

# ENVIRONMENT BILL

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3).

- These Explanatory Notes have been prepared by the Department for Environment, Food and Rural Affairs (Defra) in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

## Table of Contents

Subject	Page of these Notes
<b>Overview of the Bill</b>	<b>9</b>
<b>Policy background</b>	<b>13</b>
Exiting the European Union (EU)	13
Part 1: Environmental Governance	13
Part 2: Environmental Governance: Northern Ireland	14
Part 3: Waste and Resource Efficiency	14
Part 4: Air Quality and Environmental Recall	15
Part 5: Water	17
Part 6: Nature and Biodiversity	17
Part 7: Conservation Covenants	18
Part 8: Miscellaneous and General Provisions	19
<b>Legal background</b>	<b>19</b>
<b>Territorial extent and application</b>	<b>21</b>
<b>Commentary on provisions of Bill</b>	<b>23</b>
Part 1: Environmental Governance	23
Chapter 1: Improving the natural environment	23
Clause 1: Environmental targets	23
Clause 2: Environmental targets: particulate matter	23
Clause 3: Environmental targets: process	24
Clause 4: Environmental targets: effect	25
Clause 5: Environmental targets: reporting duties	25
Clause 6: Environmental targets: review	26
Clause 7: Environmental improvement plans	26
Clause 8: Annual reports on environmental improvement plans	27
Clause 9: Reviewing and revising environmental improvement plans	28
Clause 10: Reviewing and revising plans: interim targets	29
Clause 11: Reviewing and revising plans: other requirements	30
Clause 12: Renewing environmental improvement plans	31
Clause 13: Renewing plans: interim targets	31
Clause 14: Renewing plans: other requirements	32
Clause 15: Environmental monitoring	32
Clause 16: Policy statement on environmental principles	33
Clause 17: Policy statement on environmental principles: process	34
Clause 18: Policy statement on environmental principles: effect	35
Chapter 2: The Office for Environmental Protection	36
Clause 19: The Office for Environmental Protection	36
Clause 20: Principal objective of the OEP and exercise of its functions	36
Clause 21: The OEP's strategy: process	38

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Clause 22: Co-operation duties of public authorities and the OEP	39
Clause 23: Monitoring and reporting on environmental improvement plans and targets	39
Clause 24: Monitoring and reporting on environmental law	40
Clause 25: Advising on changes to environmental law etc.	41
Clause 26: Failure of public authorities to comply with environmental law	41
Clause 27: Complaints	42
Clause 28: Investigations	44
Clause 29: Duty to keep complainants informed	46
Clause 30: Information notices	47
Clause 31: Decision notices	48
Clause 32: Linked notices	49
Clause 33: Environmental review	50
Clause 34: Judicial review: powers to apply to prevent serious damage and to intervene	53
Clause 35: Duty of the OEP to involve the relevant Minister	54
Clause 36: Public statements	55
Clause 37: Disclosures to the OEP	55
Clause 38: Confidentiality of proceedings	55
<b>Chapter 3: Interpretation of Part 1</b>	<b>56</b>
Clause 39: Meaning of “natural environment”	57
Clause 40: Meaning of “environmental law”	57
Clause 41: Interpretation of Part 1: general	59
<b>Part 2: Environmental Governance: Northern Ireland</b>	<b>59</b>
Clause 42: Improving the natural environment: Northern Ireland	59
Clause 43: The Office for Environmental Protection: Northern Ireland	59
<b>Part 3: Waste and Resource Efficiency</b>	<b>59</b>
Clause 44: Producer responsibility obligations	59
Clause 45: Producer responsibility obligations: Northern Ireland	59
Clause 46: Producer responsibility for disposal costs	59
Clause 47: Resource efficiency information	60
Clause 48: Resource efficiency requirements	60
Clause 49: Deposit schemes	61
Clause 50: Charges for single use plastic items	61
Clause 51: Charges for carrier bags	62
Clause 52: Separation of waste: England	62
Clause 53: Separation of waste: Northern Ireland	68
Clause 54: Electronic waste tracking: Great Britain	74
Clause 55: Electronic waste tracking: Northern Ireland	76
Clause 56: Hazardous waste: England and Wales	78
Clause 57: Hazardous waste: Northern Ireland	79
Clause 58: Transfrontier shipments of waste	80
Clause 59: Powers to make charging schemes	82
Clause 60: Waste charging: Northern Ireland	83
Clause 61: Enforcement powers	84
Clause 62: Enforcement powers: Northern Ireland	84
Clause 63: Littering enforcement	84
Clause 64: Fixed penalty notices	85
Clause 65: Regulation of polluting activities	86
Clause 66: Waste regulation: amendment of Northern Ireland Order	86
<b>Part 4: Air Quality and Environmental Recall</b>	<b>87</b>
Clause 67: Local air quality management framework	87
Clause 68: Smoke control areas: amendments to the Clean Air Act 1993	87
Clause 69: Environmental recall of motor vehicles etc.	88
Clause 70: Compulsory recall notices	88
Clause 71: Further provision about regulations under section 69	88

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Clause 72: Interpretation of sections 69 to 71	89
<b>Part 5: Water</b>	<b>89</b>
Clause 73: Water resources management plans, drought plans and joint proposals	89
Clause 74: Drainage and sewerage management plans	92
Clause 75: Authority's power to require information	94
Clause 76: Water and sewerage undertakers in England: modifying appointments	95
Clause 77: Electronic service of documents [w04]	98
Clause 78: Water abstraction: no compensation for certain licence modifications	99
Clause 79: Water quality: powers of Secretary of State	101
Clause 80: Water quality: powers of Welsh Ministers	101
Clause 81: Water quality: powers of Northern Ireland Department	102
Clause 82: Solway Tweed river basin district: power to transfer functions	102
Clause 83: Water quality: interpretation	102
Clause 84: Valuation of other land in drainage district: England	102
Clause 85: Valuation of other land in drainage district: Wales	103
Clause 86: Valuation of agricultural land in drainage district: England and Wales	103
Clause 87: Disclosure of Revenue and Customs information [jlflood3]	104
<b>Part 6: Nature and Biodiversity</b>	<b>105</b>
Clause 88: Biodiversity gain as condition of planning permission	105
Clause 89: General duty to conserve and enhance biodiversity	105
Clause 90: Biodiversity reports	107
Clause 91: Local nature recovery strategies for England	108
Clause 92: Preparation of local nature recovery strategies	109
Clause 93: Content of local nature recovery strategies	110
Clause 94: Information to be provided by the Secretary of State	111
Clause 95: Interpretation	112
Clause 96: Controlling the felling of trees in England	112
Clause 97: Local highway authorities in England to consult before felling street trees	112
<b>Part 7: Conservation Covenants</b>	<b>114</b>
Clause 98: Conservation covenants	114
Clause 99: Responsible bodies	115
Clause 100: Statutory effect	115
Clause 101: Local land charge	115
Clause 102: Duration of obligation under conservation covenant	116
Clause 103: Benefit and burden of obligation of landowner	116
Clause 104: Benefit of obligation of responsible body	117
Clause 105: Breach of obligation	118
Clause 106: Enforcement of obligation	118
Clause 107: Defences to breach of obligation	118
Clause 108: Discharge of obligation of landowner by agreement	119
Clause 109: Release of obligation of responsible body by agreement	119
Clause 110: Modification of obligation by agreement	119
Clause 111: Discharge or modification of obligation by Upper Tribunal	120
Clause 112: Power of responsible body to appoint replacement	120
Clause 113: Body ceasing to be a responsible body	121
Clause 114: Effect of acquisition or disposal of affected land by responsible body	122
Clause 115: Effect of deemed surrender and re-grant of qualifying estate	122
Clause 116: Land passing as bona vacantia	122
Clause 117: Declarations about obligations under conservation covenants	122
Clause 118: Duty of responsible bodies to make annual return	123
Clause 119: Crown application	123
Clause 120: Index of defined terms in Part 7	123
Clause 121: Consequential amendments relating to Part 7	123

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Part 8: Miscellaneous and General Provisions	123
Clause 122: Amendment of REACH legislation	123
General provisions	124
Clause 123: Consequential provision	124
Clause 124: Regulations	124
Clause 125: Crown application	124
Clause 126: Financial provisions	124
Clause 127: Extent	124
Clause 128: Commencement	124
Clause 129: Transitional or saving provision	125
Clause 130: Short title	125
Schedule 1: The Office for Environmental Protection	125
Membership	125
Appointment of non-executive members	125
Appointment of executive members	126
Terms of membership	126
Remuneration of non-executive members	127
Staffing and remuneration	127
Powers	127
Committees	127
Delegation to members, committees and employees	127
Procedure	128
Funding	128
Annual report	128
Annual accounts	128
Meaning of “financial year”	128
Status	128
Independence of the OEP	129
Disqualification from membership of legislatures	129
Public records	129
Freedom of information	129
Investigation by the Parliamentary Commissioner	129
Public sector equality duty	129
Schedule 2: Improving the natural environment: Northern Ireland	129
Part 1: Environmental Improvement Plans	130
Environmental Improvement Plans	130
Annual reports on environmental improvement plans	131
Reviewing and revising environmental improvement plans	131
Renewing environmental improvement plans	132
Environmental monitoring	133
Part 2: Policy statement on environmental principles	133
Policy statement on environmental principles	133
Policy statement on environmental principles: process	134
Policy statement on environmental principles: effect	135
Part 3 – Interpretation	136
Meaning of “natural environment” and General interpretation	136
Schedule 3: The Office for Environmental Protection: Northern Ireland	136
Part 1: The OEP’s Northern Ireland functions	136
Monitoring and reporting on the Department’s environmental improvement plans	136
Monitoring and reporting on environmental law	137
Advising on changes to Northern Ireland environmental law etc	138
Failure of relevant public authorities to comply with environmental law	138

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Meaning of relevant environmental law, relevant public authority etc	138
Complaints about relevant public authorities	139
Investigations: relevant public authorities	140
Duty to keep complainants informed	141
Information notices	141
Decision notices	142
Linked notices	142
Enforcement	143
Intervention in judicial review	143
Duty of the OEP to involve the relevant department	144
Public statements	144
Disclosures to the OEP	144
Confidentiality of proceedings	145
Meaning of UK environmental law and Northern Ireland environmental law	145
Interpretation of Part 1 of this schedule: general	146
Part 2: Amendments of the OEP's general functions	146
Schedule 4: Producer Responsibility Obligations	147
Schedule 5: Producer responsibility obligations: Northern Ireland	149
Schedule 6: Producer responsibility for disposal costs	151
Part 1: Requirements	151
General power	151
"Disposal costs" and "disposal"	151
Calculation of sums payable	151
Administration	152
Registration	152
Payment of sums	152
Distribution of sums paid	152
Repayment of sums paid	152
Charges	152
Consultation requirements	152
Part 2: Enforcement	152
General power	152
Powers to confer functions and Monitoring compliance	153
Records and information	153
Powers of entry etc	153
Sanctions	153
Costs	153
Consultation requirements.	153
Schedule 7: Resource efficiency information	153
Part 1: Requirements	153
General power	153
Meaning of "information about resource efficiency"	153
Persons on whom requirements may be imposed	154
Examples of provision that may be made	154
Consultation etc requirements	154
Interpretation	155
Part 2: Enforcement	155
General power	155
Powers to confer functions	155
Monitoring compliance	155
Records and information	155
Powers of entry etc	155

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Sanctions	156
Costs	156
Consultation requirement	156
<b>Schedule 8: Resource efficiency requirements</b>	<b>156</b>
Part 1: Requirements	156
General power	156
Meaning of “resource efficiency requirements”	157
Persons on whom requirements may be imposed	157
Examples of provision that may be made	157
Consultation etc requirements	158
Interpretation	158
Part 2: Enforcement	158
<b>Schedule 9: Deposit schemes</b>	<b>158</b>
Power to establish deposit schemes	158
Scheme suppliers	159
Scheme collectors	159
Deposit scheme administrators	160
Enforcement	160
Interpretation	161
<b>Schedule 10: Charges for single use plastic items</b>	<b>161</b>
General power	161
Requirement to charge	161
Sellers of goods and services	161
Amount of charge	162
Administration	162
Registration	162
Record-keeping and publication of records	162
Enforcement	162
Civil sanctions	162
<b>Schedule 11: Enforcement powers</b>	<b>162</b>
Powers to search and seize vehicles in connection with waste offences	162
Powers of direction in relation to waste	163
Powers of entry in relation to pollution control etc	163
<b>Schedule 12: Local air quality management framework</b>	<b>165</b>
<b>Schedule 13: Smoke control in England and Wales</b>	<b>169</b>
Part 1: Principal amendments to the Clean Air Act 1993: England	169
Part 2: Principal amendments to the Clean Air Act 1993: Wales	173
Part 3: Minor and consequential amendments	173
Minor and consequential amendments to the Clean Air Act 1993	173
Minor amendments to other legislation	174
<b>Schedule 14: Modifying water and sewerage undertakers’ appointments: Procedure for appeals</b>	<b>174</b>
<b>Schedule 15: Biodiversity gain as condition for planning permission</b>	<b>179</b>
Part 1: Biodiversity gain condition	179
Part 2: Consequential amendments.	183
<b>Schedule 16: Controlling the felling of trees in England</b>	<b>183</b>
Introductory	183
Penalty for felling without licence: increase of fine	183
Restocking notices to be local land charges	183

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Enforcement notices to be local land charges	183
Further enforcement notices for new estate or interest holders	183
Power of court to order restocking after conviction for failure to comply with enforcement notice	184
Service of notices on directors of companies that have estates or interests in land	184
Requiring information from the owner of land	184
<b>Schedule 17: Discharge or modification of obligations under conservation covenants</b>	<b>184</b>
Part 1: Discharge by Upper Tribunal	185
Power to discharge on application by landowner or responsible body	185
Deciding whether to discharge	185
Supplementary powers	185
Part 2: Modification by Upper Tribunal	185
Power to modify on application by landowner or responsible body	185
Deciding whether to modify	185
Supplementary powers	186
Effect of modification	186
<b>Schedule 18: Application of Part 7 to Crown land</b>	<b>186</b>
Part 1: General	186
Part 2: Conservation covenants relating to Crown land held by a person other than the appropriate authority	186
Arrangements for the purposes of section 98	186
Modification of Part 7 in relation to obligations under certain Crown conservation covenants	186
Part 3: Other modifications of Part 7	187
Cases where estate in land to which conservation covenant relates has been acquired by the Crown and is held by person other than the appropriate authority	187
Agreements under sections 108(1), 109(1) and 110(1)	187
<b>Schedule 19: Consequential amendments relating to Part 7</b>	<b>187</b>
Acquisition of Land Act 1981 (c. 67)	187
Housing and Planning Act 2016 (c. 22)	187
Neighbourhood Planning Act 2017 (c. 20)	188
<b>Schedule 20: Amendment of REACH legislation</b>	<b>188</b>
Amendment of the REACH Regulation	188
Amendment of the REACH Enforcement Regulations 2008	188
Consent of the devolved administrations	189
Requests by devolved administrations for exercise of powers under this Schedule	189
Consultation	189
The protected provisions	189
<b>Commencement</b>	<b>189</b>
<b>Financial implications of the Bill</b>	<b>190</b>
<b>Parliamentary approval for financial costs or for charges imposed</b>	<b>190</b>
<b>Compatibility with the European Convention on Human Rights</b>	<b>191</b>
<b>Public Sector Equalities Statement</b>	<b>191</b>
<b>Related documents</b>	<b>191</b>

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*



## **Annex A - Territorial extent and application in the United Kingdom<sup>194</sup>**

Minor or consequential effects	205
Minor or consequential effects outside England	205
Minor or Consequential Effects outside England and Wales	206
Subject matter and legislative competence of devolved legislatures	207

## Overview of the Bill

- 1 The Environment Bill (“the Bill”) is comprised of two thematic halves. The first provides a legal framework for environmental governance once the UK leaves the EU. The second makes provision for specific improvement of the environment, including measures on waste and resource efficiency, air quality and environmental recall, water, nature and biodiversity, and conservation covenants.
- 2 The first part of the Bill was published in part as the draft Environment (Principles and Governance) Bill on 19 December 2018, fulfilling a legal obligation set out in section 16 of the European Union (Withdrawal) Act 2018. The measures published at that time related only to environmental principles and governance, and placing the government’s 25 Year Environment Plan on a statutory footing.
- 3 The remaining parts of the Bill make provision for a range of environmental improvements. In its 2017 Manifesto, *‘Forward Together’: Our Plan for a Stronger Britain and a Prosperous Future*, the government pledged to be ‘the first generation to leave the environment in a better state than we inherited it’. To this end the government has consulted on a broad range of measures, and published a 25 Year Environment Plan in January 2018. Measures in this Bill take legislative steps to achieve this vision.
- 4 The Environmental Governance Part of the Environment Bill (Part 1) includes provisions to:
  - allow government to set long-term targets (of at least 15 years duration) in relation to the natural environment and people’s enjoyment of the natural environment via statutory instrument;
  - require government to meet long-term targets, and to prepare remedial plans where long-term targets are not met;
  - require government to set, by October 2022, at least one long-term target in each of the priority areas of air quality, water, biodiversity, and resource efficiency and waste reduction;
  - require government to set and meet an air quality target for fine particulate matter in ambient air (PM<sub>2.5</sub>);
  - require government to periodically review all environmental targets to assess whether meeting them would significantly improve the natural environment in England;
  - establish the process by which a long-term target is set and amended, as well as an enhanced process where a long-term target is lowered or revoked;
  - require the government to have, and maintain, an Environmental Improvement Plan, a plan to significantly improve the natural environment, which sets out the steps the government intends to take to improve the natural environment, and which sets out interim targets towards meeting the long-term targets;
  - require government to produce an annual report on the Environmental Improvement Plan, to consider progress towards improving the natural environment and meeting the targets;

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

- require government to review the plan periodically, to consider progress and whether further or different steps are needed to improve the natural environment and meet the targets, and if appropriate revise the plan;
- require government to collect and publish data used to measure progress in improving the natural environment and meeting the targets;
- require the publication of a policy statement on environmental principles setting out how environmental principles specified under the Bill are to be interpreted and applied by Ministers of the Crown during the policymaking process;
- create a new, statutory and independent environmental body, the Office for Environmental Protection (OEP), to hold government to account on environmental law and its Environmental Improvement Plan once the UK leaves the EU;
- define the scrutiny, complaints and enforcement functions of the OEP and their scope;
- establish an OEP enforcement process of environmental review in the Upper Tribunal; and
- define the nature of the OEP, including considerations of membership, remuneration, staffing, powers, reporting, funding, accounts and other issues.

5 The Environmental Governance: Northern Ireland Part of the Environment Bill (Part 2) includes provisions to:

- extend the application of the OEP to Northern Ireland, and make separate provision for Environmental Improvement Plans and environmental principles in Northern Ireland.

6 The Waste and Resource Efficiency Part of the Environment Bill (Part 3) includes provisions to:

- require producers to pay the full net cost of managing their products at end of life to incentivise more sustainable use of resources;
- allow deposit return schemes to be established, whereby a deposit is included in the price of an in-scope item (such as a drink in a bottle or can) which is redeemed when the item is returned to a designated point;
- enable producer responsibility obligations to be applied at all levels of the waste hierarchy to, for example, facilitate the prevention of food waste and increase the redistribution of food surplus;
- enable charges to be applied to specified single-use plastic items;
- require local authorities in England to collect the same range of materials for recycling from households;
- ensure households have a weekly separate food waste collection;

- ensure businesses and public bodies present recyclable materials for separate collection and arrange for its separate collection;
- enable government to set resource efficient product standards and information and labelling requirements, to drive a shift in the market towards durable, repairable and recyclable products;
- improve the proportionality and fairness of litter enforcement, by issuing statutory guidance on the use of enforcement powers and extending an existing power to set out conditions to be met by all those carrying out enforcement activity;
- improve the management of waste, by enabling the Secretary of State to make regulations in relation to waste tracking digitally;
- improve the regulators' effectiveness in tackling waste crime, reducing the cost of that criminal activity on the wider economy, environment and society;
- allow the Environment Agency to be more flexible and responsive in managing exempt waste sites and ensure proportionate controls are in place to avoid environmental harm or illegal activity as waste market practices change;
- fill a gap in existing powers to ensure that waste can be collected and disposed of when normal processes fail;
- enable the Secretary of State to make regulations to amend the permitted range of penalties for existing Fixed Penalty Notices; and
- enable the Secretary of State to regulate the import, export or transit of waste and hazardous waste.

7 The Air Quality and Environmental Recall Part of the Environment Bill (Part 4) includes provisions to:

- amend Part IV of the Environment Act 1995 (which creates the Local Air Quality Management Framework) to strengthen the requirements in respect of the National Air Quality Strategy, including a requirement for it to be regularly reviewed;
- amend the Local Air Quality Management Framework to clarify duties and enable greater cooperation between different levels of local government, and other relevant public bodies, in the preparation of Local Air Quality Action Plans;
- amend Part III of the Clean Air Act 1993 to enable quicker, simpler and more proportionate enforcement of Smoke Control Areas, a key means by which local authorities can control pollution from domestic solid fuel burning; and
- provide for mandatory recall notices for vehicles and equipment that do not comply with relevant environmental standards and for fines to be issued when a minimum recall rate is not met.

8 The Water Part of the Environment Bill (Part 5) includes provisions to:

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- change the procedural requirements for Water Resources Management Plans, and enable increased collaboration between different water undertakers to better manage water resources;
- require the preparation of Drainage and Sewerage Management Plans by sewerage undertakers, to better plan for the management of waste water;
- modernise the process for modification of water and sewerage undertaker licence conditions by the Water Services Regulation Authority (“Ofwat”) to bring it in line with other utilities, and to strengthen Ofwat’s ability to improve water and sewerage undertakers’ operations;
- change the circumstances in which a licence to abstract water from the environment can be revoked or varied without paying compensation, to prevent damage to the environment;
- enable future updates to the lists of priority substances in water quality legislation, and enable the reallocation of regulatory responsibilities in the Solway Tweed river basin district; and
- enable updates to be made to the valuation calculations relevant to the apportionment of internal drainage board (IDB) charges in secondary legislation, allowing for the creation of new or expansion of existing IDBs where there is a local desire to do so.

9 The Nature and Biodiversity Part of the Environment Bill (Part 6) includes provisions to:

- amend section 40 of the Natural Environment and Rural Communities Act 2006 to strengthen and improve the duty on public bodies to conserve and enhance biodiversity, in accordance with the proper exercise of their functions;
- mandate net gain in biodiversity through the planning system, requiring a 10% increase in biodiversity after development, compared to the level of biodiversity prior to the development taking place, as measured by a metric set out by Defra;
- require the preparation and publication of Local Nature Recovery Strategies, a tool to direct action for nature, and place an emphasis on supporting local leadership of nature improvement; and
- provide greater enforcement powers to the Forestry Commission to reduce illegal tree felling, and require local authorities to consult local residents prior to the felling of street trees.

10 The Conservation Covenants Part of the Environment Bill (Part 7) includes provisions to:

- provide for Conservation Covenants: voluntary, legally binding private agreements between landowners and responsible bodies, designated by the Secretary of State, which conserve the natural or heritage features of the land, enabling long-term conservation.

11 The Miscellaneous and General Provisions Part of the Environment Bill (Part 8) includes provision to:

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- amend two pieces of retained European Union law relating to the regulation of chemicals.
- allow for consequential provision; regulations; commencement and transitional or saving provision; and
- set out the position in relation to Crown application; financial provisions; and the extent and the short title of the Bill, which may be cited as the Environment Act 2019.

## Policy background

### Exiting the European Union (EU)

- 12 On 1 January 1973, the UK joined the European Economic Community, now the European Union.
- 13 On 17 December 2015, the European Union Referendum Act 2015 received Royal Assent. The Act made provision for holding a referendum in the UK and Gibraltar on whether the UK should remain a member of the EU. The referendum was held on 23 June 2016 and a majority voted to leave the EU.
- 14 The European Union (Notification of Withdrawal) Act 2017 received Royal Assent on 16 March 2017. On 29 March 2017, the Prime Minister gave notification of withdrawal of the UK from the EU under Article 50(2) of the Treaty on European Union. The European Union (Withdrawal) Act 2018 received Royal Assent on 26 June 2018. Section 16 of the Withdrawal Act required the Secretary of State to publish a draft Bill to make provision for a new environmental governance body and a requirement for Ministers of the Crown to have regard to a new policy statement on environmental principles when making policy following the UK's withdrawal from the EU.

### Part 1: Environmental Governance

- 15 The Draft Environment (Principles and Governance) Bill 2018 was published for parliamentary pre-legislative scrutiny on 19 December 2018, fulfilling requirements for publication of a draft Bill under section 16 of the European Union (Withdrawal) Act 2018. Part 1 of this Bill updates that Draft Bill in light of the pre-legislative scrutiny reports by the Environment, Food and Rural Affairs Select Committee and Environmental Audit Committee which were published on 30 April 2019 and 24 April 2019 respectively. The government responded to these reports alongside introduction of the Bill in October 2019.
- 16 Most of the UK's environmental law and policy derives from the EU, and EU structures and processes provide for oversight and enforcement. The Bill sets out the measures needed to ensure that there is no environmental governance gap on withdrawal from the EU. It will allow the setting of long-term, legally binding and joined-up targets tailored to England, embed consideration of environmental principles in future policy making and establish the independent Office for Environmental Protection.
- 17 The Bill places a statutory requirement for government to prepare and maintain an Environmental Improvement Plan (EIP); the first being the 25 Year Environment Plan published in January 2018, and creates a new statutory cycle of monitoring, planning and reporting to ensure continuing improvement to the environment. It also establishes a new framework for setting long-term, legally binding and joined-up targets (covering at least

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air quality, resource efficiency and waste reduction, water and biodiversity). As part of the framework for setting targets, the Bill will include a specific duty to set a target for annual mean concentrations in ambient air of the air pollutant of greatest harm to human health – fine particulate matter (PM<sub>2.5</sub>).

- 18 The Bill legislates for environmental principles to protect the environment from damage by making environmental considerations central to the policy development process across government. The principles work together to legally oblige policy-makers to consider choosing policy options which cause the least environmental harm.
- 19 The Bill also creates a new public body – the Office for Environmental Protection (OEP) – as a domestic independent watchdog who will be responsible for taking action in relation to breaches of environmental law. Through its scrutiny and advice functions, the OEP will monitor progress in improving the natural environment in accordance with the government’s domestic environmental improvement plans and targets. It will be able to provide government with written advice on any proposed changes to environmental law. Through its complaints and enforcement mechanisms, the OEP will take a proportionate approach to managing compliance issues relating to environmental law.

## Part 2: Environmental Governance: Northern Ireland

- 20 Under the Northern Ireland Act 1998, the Northern Ireland Assembly has legislative competence for a number of areas of law. The Department for Agriculture, Environment and Rural Affairs has requested that the Bill include provision to allow the Office for Environmental Protection to exercise its functions in Northern Ireland, subject to the approval of a restored Northern Ireland Assembly.
- 21 The Environment Bill sets out measures that would provide the OEP with equivalent powers in England and Northern Ireland, and ensure that operationally it can function across both administrations. In some cases, this has meant providing for slightly different processes that reflect the different legal and policy frameworks. In others, it has meant ensuring appropriate Northern Ireland representation, for example on the board of the OEP.

## Part 3: Waste and Resource Efficiency

- 22 In the 25 Year Environment Plan, the government committed to using resources from nature more sustainably and efficiently, and to minimising waste. In December 2018, the government published its Resources and Waste strategy, [\*Our Waste, Our Resources: A strategy for England\*](#), to help move towards a more sustainable, circular economy. Waste management is based on a "waste hierarchy", which sets a priority order when shaping waste policy and managing waste. It gives top priority to preventing waste in the first place. When waste is created, it gives priority to preparing it for re-use, then recycling, then recovery, and last of all disposal (for example, landfill). The Bill will provide the legislative framework needed to deliver on many of the commitments in the Resources and Waste Strategy, by introducing new powers and amending existing legislation such as the Environment Act 1995 and Environmental Protection Act 1990.
- 23 The Environment Act 1995 allows for obligations to be placed on producers in relation to the re-use, recovery and recycling of products. These are already in place for four waste streams (including packaging waste), putting a level of financial responsibility on producers for their goods at end-of-life. The Bill will allow government to require producers to pay the full net cost of managing their products at end of life to incentivise them to design their products with sustainability in mind. The government consulted

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from 18 February to 13 May 2019 on reforming the UK packaging producer responsibility system and received 679 responses. [Reforming the UK packaging producer responsibility system: summary of responses and next steps](#) was published on 23 July. The Bill also clarifies that producer responsibility obligations can include prevention of waste and redistribution, making it clear that action can be taken on food waste.

- 24 Once in force, the Ecodesign for Energy-Related Products and Energy Information (Amendment) (EU Exit) Regulations 2019 will amend the Ecodesign for Energy-Related Products Regulations 2010 to allow for mandatory product standards (which may relate to energy efficiency and resource efficiency) to be set by the government for energy-related products. The Bill complements these provisions by enabling resource efficiency standards to be set for non-energy-related products. The Bill will also allow for clear labelling to enable consumers to identify products that are more durable, repairable and recyclable.
- 25 The Climate Change Act 2008 makes provision for charging for the supply of single-use carrier bags. The introduction of a 5p plastic bag charge in England in 2015 has [resulted in a 90% decrease in plastic bag sales by main supermarket retailers](#). The Bill allows for the introduction of charges for any single-use plastic item.
- 26 The Environmental Protection Act 1990 underpins local authorities' duty to collect household waste in England from domestic properties. Current arrangements ensure that every local authority collects some recyclable materials. Local authorities, however, do not all collect the same range of materials, which has caused confusion as to what can be recycled. The Bill stipulates a consistent set of materials that must generally be collected individually separated from all households and businesses, including food waste. The government consulted from 18 February to 13 May 2019 on consistency in household and business recycling collections in England and received 1713 responses. [Reforming the UK packaging producer responsibility system: summary of responses and next steps](#) was published on 23 July.
- 27 The Bill also allows for the introduction of deposit return schemes where consumers pay an up-front deposit when they buy an item (such as a drink in a bottle or can), which is then redeemed on return of the used item. These schemes can increase recycling and reuse, and reduce littering. The government consulted from 18 February to 13 May 2019 on introducing a Deposit Return Scheme for drinks containers in England, Wales and Northern Ireland and received a total of 208,269 responses. [Introducing a Deposit Return Scheme \(DRS\) in England, Wales and Northern Ireland: summary of responses](#) was published on 23 July.
- 28 The rules for transporting, storing or disposing of waste include the general requirement to have an environmental permit if disposing of or recovering waste and the requirement for carriers, brokers of or dealers in waste to register with the Environment Agency. Illegal waste activity was estimated to have cost the English economy over £600 million in 2015. The Bill will help prevent waste crime by modernising the regulatory framework; deter waste crime by ensuring regulators can take effective enforcement action; and detect waste crime by allowing for electronic waste tracking.
- 29 The Bill also contains measures to improve the proportionality and fairness of enforcement against littering, as part of the continued delivery of the [Litter Strategy for England](#).

## Part 4: Air Quality and Environmental Recall

- 30 The UK has legally-binding targets to reduce overall national emissions of five air pollutants (fine particulate matter, ammonia, nitrogen oxides, sulphur dioxide, and non-

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- methane volatile compounds) by 2020 and 2030. The government committed to delivering clean air in the 25 Year Environment Plan, and consulted on a draft Clean Air Strategy (CAS) in May 2018, which received 711 responses. The final CAS was published in January 2019. It sets out the comprehensive actions required across all parts of government to improve air quality, at both the national and local levels, including by setting new and ambitious goals, bringing forward targeted legislation, investment and policies. This Bill implements key proposals outlined in the Strategy, enabling greater local level action on air pollution, to tackle key sources of pollutants, which will help the UK achieve its overall national emission obligations.
- 31 The Environment Act 1995, the Clean Air Act 1993 and the Environmental Protection Act 1990 establish frameworks for local authorities to address air quality.
- 32 The Environment Act 1995 establishes the Local Air Quality Management Framework, under which local authorities have obligations to assess and manage the quality of the air in their areas. Where specified standards and objectives are not being met, authorities are required to declare Air Quality Management Areas and then prepare action plans. Amendments made to this Act by the Bill will strengthen these duties by giving greater clarity on the requirements of action plans enabling greater collaboration between local authorities and all tiers of local government, as well as with Relevant Public Authorities, in the creation and delivery of those plans. It will also require the Secretary of State to regularly review the National Air Quality Strategy, which specifies the standards and objectives that local authorities need to achieve.
- 33 Part III of the Clean Air Act 1993 is the UK's main legislative framework for the control of pollution from domestic solid fuel burning, the single biggest source of fine particulate matter emissions in the UK. Part III gives local authorities the power to make an order designating parts of their area as Smoke Control Areas (SCAs), in which it is an offence to emit smoke from chimneys of buildings and chimneys that serve the furnace of any fixed boiler or industrial plant. The amendments through the Bill will enable local authorities to issue civil financial penalties instead of criminal prosecutions, making enforcement quicker, simpler and more proportionate. It will strengthen the existing penalties for the sale of controlled solid fuels in SCAs and ensure consumers are aware that it is an offence to buy these fuels for use in SCAs. It will also give authorities the power to broaden the scope of their SCAs to include moored inland waterway vessels.
- 34 Part III of the Environmental Protection Act 1990 (EPA) stipulates what can constitute a statutory nuisance. This includes smoke from premises, except private dwellings in SCAs which are exempt. The amendment of this Act by the Bill will remove this exemption in England so that a local authority will be able to pursue somebody who emits smoke from private dwellings in SCAs where it is prejudicial to human health or causing a nuisance.
- 35 Measures in this Part will also enable the Secretary of State to compel manufacturers of vehicles, vehicle components and Non- Road Mobile Machinery (NRMM) to recall their products for reasons of environmental failure.
- 36 In late 2015, the government became aware that vehicles on the road in the UK were emitting more NO<sub>x</sub> (a controlled pollutant) than their emission test results would suggest. This was a result of software fitted to the vehicles. The situation highlighted the limits of the government's powers to compel a recall of vehicles or engines for NRMM for reasons of environmental non-conformity or failure. This is in contrast to the government's power to compel a recall of any product (including road vehicles and NRMM) on the basis that it is a "dangerous product" (or "not a safe product") pursuant to the General Product Safety Regulations 2005 (2005/1803).

## Part 5: Water

- 37 The water industry was privatised in 1989 pursuant to the Water Act 1989. The regulatory regime for the privatised water industry is principally set out in the Water Industry Act 1991, and amendments made to that Act (notably in 2003 and 2014). Water abstraction licensing was introduced in the 1960s; the licensing regime is principally set out in the Water Resources Act 1991 and enables regulators to act to protect the environment and the needs of water users. The legislative regime providing for flood risk management by the government and other public authorities is set out in various pieces of legislation; the principal primary legislation relating to the powers and duties of internal drainage boards is the Land Drainage Act 1991.
- 38 The government launched a consultation (*Improving our Management of Water in the Environment*), which ran between 15 January and 12 March 2019. The consultation received 298 responses. [Improving our management of water in the environment: summary of responses and government response](#) was published on 23 July.
- 39 The Bill sets out measures to provide for policy outcomes for water resources, drainage and flood management through:
- improved water resources planning, which facilitates collaborative regional planning and considers the needs of all sectors of water users, including the environment;
  - placing on a statutory footing drainage and wastewater planning to assess risks to sewerage networks and network capacity;
  - modernising water regulation by reforming elements of the abstraction licensing regime to link it more tightly to the government’s objectives for the water environment; and
  - enabling updates to be made to the valuation calculations relevant to the apportionment of internal drainage board (IDB) charges in secondary legislation, allowing for the creation of new or expansion of existing IDBs where there is a local desire to do so.
- 40 It also includes measures to protect water quality in our surface and groundwater, by enabling updates to the lists of priority substances that pose a threat to water bodies in line with the latest scientific knowledge, in the absence of powers under section 2(2) of the European Communities Act 1972.

## Part 6: Nature and Biodiversity

- 41 [Nature is in decline, much of England’s wildlife is deteriorating, and many ecosystems are degraded](#). The UK has a number of international and legislative commitments to take urgent and effective action to halt the loss of nature or biodiversity.
- 42 Since the 25 Year Environment Plan set the ambition towards embedding a broad ‘environmental net gain’ principle in the planning system, government has focussed on embedding the principle of biodiversity net gain. In July 2018, the revised National Planning Policy Framework strengthened planning policy on biodiversity net gain by making it clearer that all development in scope should deliver biodiversity net gains. From December 2018 to February 2019, government consulted on whether biodiversity net gain should be made mandatory and received 470 responses. In March 2019, in response

to strong support at consultation, [government committed to mandating biodiversity net gain in the Environment Bill](#).

- 43 Section 40 of the Natural Environment and Rural Communities (NERC) Act 2006 requires all public authorities carrying out functions in England (together with HMRC in Wales also) to have regard to conserving biodiversity when delivering their functions. The existing wording does not adequately reflect the ambition or language of the 25 Year Environment Plan. Shifting the focus of the duty to an active requirement to seek the further conservation and enhancement of nature should better align public authorities' action on biodiversity with government's ambition.
- 44 Spatial plans enable the public, private and charity sectors to direct investment in nature to where it can best benefit the natural environment, and have an important role to play in delivering the government's commitment to nature recovery. Although such plans do exist in some areas of England, they are often produced by a variety of bodies working at different spatial scales. Local Nature Recovery Strategies (LNRSs) will put spatial planning for nature on a statutory footing, and will support local action by consistently mapping important existing habitats and opportunities to create or restore habitat. For example, the biodiversity net gain consultation identified a need for local plans for nature to target biodiversity increases. Developed through a collaborative approach, LNRS will also support the delivery of a Nature Recovery Network by acting as a key tool to help local partners better direct investment and action that improves, creates and conserves wildlife-rich habitat.
- 45 This Bill also includes measures covering forestry and street trees, including amendments to the Forestry Act 1967 to tackle illegal felling, and measures requiring local highway authorities to consult the public before felling any street trees. Current regulations on tree felling include felling licences in the Forestry Act 1967, provisions in The Highways Act 1980, Tree Preservation Orders (TPOs) under the Town and Country Planning Act 1990, and the Equalities Act 2010. On 30 December 2018, the government announced a public consultation on protecting and enhancing England's trees and woodlands which received 4671 responses.

## Part 7: Conservation Covenants

- 46 This Part addresses the absence of a simple legal tool that landowners can use to secure conservation benefits when land is sold or passed on. Conservation covenants are private, voluntary agreements between a landowner and responsible body, such as a conservation charity or public body. They provide for conservation of natural environment and heritage assets for the public good. They can bind subsequent owners of the land, so have the potential to deliver long-lasting conservation benefits.
- 47 In the 25 Year Environment Plan, the government set out its ambition of recovering nature. Individual landowners can play an important role in conservation efforts, but under the current law it is difficult for any legal obligations they take on to remain once the land has been sold or passed on. As a result, conservation opportunities are missed or fail to secure long-term, sustainable outcomes. Complex, legal workarounds have sometimes been used but these can be costly and do not always appeal to landowners. Conservation covenants are used in other countries including New Zealand, USA, Canada and Scotland.
- 48 The Law Commission examined the need for conservation covenants and concluded that legislation should be introduced, preparing a draft Bill in 2014. The government consulted on the Law Commission proposals in February and March 2019. There was broad support for covenants from the 112 responses across a range of stakeholders. Government

committed to include provisions for conservation covenants in the Environment Bill in its response published on 23 July. The key change to the Law Commission Bill is to allow for-profit bodies to apply to become responsible bodies.

## Part 8: Miscellaneous and General Provisions

49 The use of chemicals in the EU is regulated by Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency (the “REACH Regulation”). The REACH Regulation will form part of retained EU law by virtue of the European Union (Withdrawal) Act 2018 (“the Withdrawal Act”). The REACH Enforcement Regulations 2008 provide for the contravention of various provisions of the REACH Regulation to be a criminal offence, and set out which domestic bodies enforce those offences. Part 8 and Schedule 20 give the Secretary of State the power to amend the REACH Regulation and the REACH Enforcement Regulations 2008 as they apply in the UK after exit day, in order to keep them up to date and respond to emerging needs or ambitions for the effective management of chemicals.

## Legal background

- 50 A large proportion of UK environmental law derives from the EU and its implementation is currently monitored and enforced by EU mechanisms and institutions, mainly the European Commission. This Bill will provide for a new policy statement setting out the environmental principles that will guide environmental policy-making and legislation, in a similar way to existing EU principles. The Bill will also provide for a domestic replacement for the scrutiny and enforcement function of the European Commission.
- 51 The European Union (Withdrawal) Act 2018 provides for legislation derived from the EU to form part of retained EU law when the UK leaves the EU. The Bill provides powers to amend retained EU law in relation to several areas, including the regulation of chemicals and water quality.
- 52 The Bill also makes provision for new domestic policy to improve air quality, conserve and enhance nature, improve the management of resources and waste and modernise water regulation. The following significant domestic legislation is referenced or amended by this Bill:
- Forestry Act 1967
  - Highways Act 1980
  - Environmental Protection Act 1990
  - Town and Country Planning Act 1990
  - Land Drainage Act 1991
  - Water Industry Act 1991
  - Clean Air Act 1993
  - Environment Act 1995
  - Pollution Prevention and Control Act 1999

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- Water Act 2003
- Natural Environment and Rural Communities Act 2006
- Climate Change Act 2008
- Water Act 2014

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

## Territorial extent and application

- 53 Clause 127 sets out the territorial extent of the clauses in the Bill. The extent of a Bill is the legal jurisdiction where it forms part of the law. The extent of a Bill can be different from its application. Application refers to where it has practical effect.
- 54 Subject to a small number of exceptions, the Bill forms part of the law of England and Wales and applies to England. Around half of the Bill's provisions extend and apply to Wales with a significant number of provisions having Great Britain, UK or England, Wales and Northern Ireland extent. Clauses 42, 45, 53, 55, 57, 60, 62, 66, 81 and Schedule 2 and 5 form part of the law of Northern Ireland and apply to Northern Ireland only. Clauses 80 and 85 apply to Wales only.
- 55 There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly without the consent of the legislature concerned. The following clauses touch on matters that are devolved to Scotland or Wales or transferred to Northern Ireland and a legislative consent motion is being sought in relation to them: clause 42 (improving the natural environment: Northern Ireland); clause 43 (the Office for Environmental Protection: Northern Ireland); clause 44 (producer responsibility obligations); clause 45 (producer responsibility obligations: Northern Ireland); clause 46 (producer responsibility for disposal costs); clause 47 (resource efficiency information); clause 48 (resource efficiency requirements); clause 49 (deposit schemes); clause 50 (charges for single use plastic items); clause 51 (charges for carrier bags); clause 53 (separation of Waste: Northern Ireland); clause 54 (electronic waste tracking: Great Britain); clause 55 (electronic waste tracking: Northern Ireland); clause 56 (hazardous waste: England and Wales); clause 57 (hazardous waste: Northern Ireland); clause 59 (powers to make charging schemes); clause 60 (waste charging: Northern Ireland); clause 61 (enforcement powers); clause 62 (enforcement powers: Northern Ireland); clause 63 (littering enforcement); clause 64 (fixed penalty notices); clause 65 (regulation of polluting activities); clause 66 (waste regulation: amendment of Northern Ireland Order); clause 67 (local air quality management framework); clause 68 (smoke control areas: amendments to the Clean Air Act 1993); clause 73 (water resources management plans, drought plans and joint proposals); clause 74 (drainage and sewerage management plans); clause 75 (authority's power to require information); clause 77 (electronic service of documents); clause 79 (water quality: powers of Secretary of State); clause 80 (water quality: powers of Welsh Ministers); clause 81 (water quality: powers of Northern Ireland Department); clause 82 (Solway Tweed river basin district: power to transfer functions); clause 83 (water quality: interpretation); clause 85 (valuation of other land in drainage district: Wales); clause 86 (valuation of agricultural land in drainage district: England and Wales); clause 87 (disclosure of Revenue and Customs information); clause 122 (amendment of REACH legislation); Schedule 2 (Improving the natural environment: Northern Ireland); Schedule 3 (The Office for Environmental Protection: Northern Ireland); Schedule 4 (Producer responsibility obligations); Schedule 5 (Producer responsibility obligations: Northern Ireland); Schedule 6 (Producer responsibility for disposal costs); Schedule 7 (Resource efficiency information); Schedule 8 (Resource efficiency requirements); Schedule 9 (Deposit schemes); Schedule 10 (Charges for single use plastic items); Schedule 11 (Enforcement powers); Schedule 12 (Local air quality management framework); Schedule 13 (Smoke control in England and Wales); and Schedule 20 (amendment of REACH legislation).
- 56 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding

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legislative consent motions and matters relevant to Standing Orders Nos. 83J to 83X of the Standing Orders of the House of Commons relating to Public Business.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

# Commentary on provisions of Bill

## Part 1: Environmental Governance

### Chapter 1: Improving the natural environment

#### Clause 1: Environmental targets

- 57 Clause 1 provides a power for the Secretary of State to set long-term targets by regulation.
- 58 Subsection (1) provides the Secretary of State with a power to set long-term targets in relation to the natural environment or people's enjoyment of it. The natural environment is defined in clause 39 (meaning of "natural environment"). This definition includes living and non-living elements of the environment, such as plants, wildlife, their habitats, air, water and land. Targets relating to people's enjoyment of the natural environment may relate to its use, access to natural areas or a measure of public views about the environment. Among other initiatives, enjoyment may be increased through education and public awareness of the natural environment both past and present, natural systems and processes through which organisms interact with their surroundings.
- 59 Subsection (2) requires the Secretary of State to set at least one long-term target in each of four priority areas. More than one long-term target could be set within a given priority area; however, one is the minimum. Subsection (3) defines those priority areas as air quality, water, biodiversity, and resource efficiency and waste reduction. Clause 3(9) requires that a draft statutory instrument (or instruments) satisfying the requirement in subsection (2) must be laid before Parliament by 31 October 2022.
- 60 Subsection (4) requires all long-term targets set under this clause to specify an objectively measurable standard to be achieved and a date by which this standard must be achieved.
- 61 A specified standard might be the exposure of a certain area to damaging levels of ammonia in the atmosphere, for example. The method for objective measurement should be clear and repeatable, with results reproducible within reason. The process of setting targets will necessarily involve some choices as to how a target will be measured. Subsection (5) provides that regulations made under this clause may make provision specifying how a target will be measured.
- 62 Subsection (6) provides that long-term targets must have a minimum duration of 15 years.
- 63 Subsection (7) clarifies that a target is initially set once the regulations setting it come into force. This is relevant to calculating the specified date (that is, the duration) of long-term targets under this clause. Subsection (8) provides that, in Part 1, the terms "specified standard" and "specified date" mean the standard and date specified in subsection (4).
- 64 By virtue of clause 2(6), subsections (4) to (9) also apply to the PM<sub>2.5</sub> air quality target set under clause 2.
- 65 This clause, and clauses 2 to 6, extend to England and Wales. Subsection (9) prevents the Secretary of State from making provision in regulations made under this clause that could be made in an Act of the Welsh Assembly. The regulations made under this clause can therefore make provision relating to the natural environment in England (including the English inshore area), as well as in the offshore area (to the extent that Her Majesty's Government has functions).

#### Clause 2: Environmental targets: particulate matter

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*



- 66 Subsection (1) introduces a requirement for the Secretary of State to set a target for an annual mean concentration level of fine particulate matter (PM<sub>2.5</sub>) in ambient air, in secondary legislation by regulations. These regulations will be made having obtained expert advice as to the date that the target can be achieved and having considered the full economic analysis in line with clause 3(1).
- 67 Subsection (2) provides clarification that the fine particulate matter target is not required to be set for 15 years in the future, and therefore may not be a long-term target as defined in clause 1. This could be the case if the independent expert advice is that the target could be achieved more quickly.
- 68 Subsection (3) defines fine particulate matter (PM<sub>2.5</sub>).
- 69 Subsection (4) specifies that regulations setting the target can also define “ambient air”.
- 70 Subsection (5) clarifies the duty to set a target for fine particulate matter in this clause does not discharge the duty on the Secretary of State to set a further long-term target for air quality under clause 1.
- 71 Subsection (6) clarifies the elements of the environmental targets framework set in clause 1 that apply to the fine particulate matter target. These elements include the provisions that specify that the target will be set by secondary legislation that will specify the standard to be achieved and the date by which it will be achieved, as well as the details regarding how the target will be measured.
- 72 Subsection (7) defines the “PM<sub>2.5</sub> air quality target” as being the target set under subsection (1).

### Clause 3: Environmental targets: process

- 73 Clause 3 sets out the process that must be followed by the Secretary of State before setting and amending any target.
- 74 Subsection (1) requires the Secretary of State to seek advice from independent experts before making any regulations under clauses 1 and 2. This could involve consulting expert individuals or bodies, with the purpose of advising the Secretary of State on setting appropriate targets.
- 75 Subsection (2) specifies that, when setting or amending a target, the Secretary of State must be satisfied that the target, or the amended target, can be met.
- 76 Subsections (3) to (6) set out the process for amending a target so as to lower or revoke it. Lowering a target is defined in subsection (5) as a lowering of the standard to be achieved or an extension of the specified date for achieving the target. For example, where a target requires an increase in standard based on a numerical value, a reduction in that numerical value would constitute a lowering of the target.
- 77 Subsection (3) provides that a target may only be lowered or revoked where the Secretary of State is satisfied that meeting the target would have no significant benefit as compared to not meeting it or meeting a lower target, or that because of a change in circumstances, the costs of meeting the target would be disproportionate to the benefits. Those costs might be of an environmental, social, economic, or other nature.
- 78 Meeting a target may have no significant benefit – for example, if meeting it was anticipated to generate a health benefit, and new scientific evidence has now demonstrated that the same health benefit is achievable through meeting a revised or entirely new target.

- 79 A change in circumstances may, for example, occur as a result of an event, such as a significant wild fire or major flood, taking place after the target is set. The financial costs, for example, of meeting the target may, following this change of circumstance, then be disproportionate to the benefits gained by meeting the target.
- 80 Subsection (4) requires that, before lowering or revoking a target, the Secretary of State must publish and lay before Parliament a statement that explains why the Secretary of State is satisfied that one of the grounds in subsection (3) has been met.
- 81 Subsection (6) prevents the Secretary of State from using the processes set out in this clause to revoke the PM<sub>2.5</sub> air quality target; however, the target may otherwise be amended in line with this clause.
- 82 Subsection (7) provides that, for the purposes of Part 1, a target is met where the specified standard is met by the specified date.
- 83 Subsection (8) specifies that the regulations made under clauses 1 and 2 are subject to the affirmative procedure.
- 84 Subsection (9) requires that a draft statutory instrument (or instruments) containing regulations setting the long-term targets for the priority areas required under clause 1(2) and the PM<sub>2.5</sub> air quality target set under clause 2 must be laid before Parliament by 31 October 2022.

#### Clause 4: Environmental targets: effect

- 85 Clause 4 provides that the Secretary of State has a duty to ensure that the long-term targets set under clause 1 and the PM<sub>2.5</sub> air quality target set under clause 2 are met.
- 86 The environmental improvement plan (EIP) provisions under clauses 8, 11 and 14 set requirements for consideration of the progress made towards meeting targets, and for consideration of the need to introduce new measures to meet targets, when reviewing and renewing EIPs.

#### Clause 5: Environmental targets: reporting duties

- 87 Clause 5 sets out the reporting duties that must be fulfilled when a long-term target set under clause 1 or the PM<sub>2.5</sub> air quality target set under clause 2 ends.
- 88 Subsection (1) requires that all regulations setting targets under clauses 1 and 2 contain a reporting date. This is the date used to determine the timescales for producing the statements under clause 5.
- 89 Subsections (2) and (3) require the Secretary of State to prepare a statement confirming whether or not each target has been met. Alternatively, the statement may provide that the Secretary of State is currently unable to make that confirmation. The statement must be published, and laid before Parliament, by the relevant reporting date set under subsection (1).
- 90 Subsections (4) and (5) set out the process the Secretary of State must follow in the event that the statement made under subsection (2) confirms that the target has not been met. The Secretary of State must prepare a report explaining why the target has not been met and setting out the steps taken, or intended to be taken, to achieve the required standard as soon as reasonably practicable. That report must be published, and laid before Parliament, within twelve months of the statement being laid.
- 91 Subsection (3)(c) provides that, where the Secretary of State is unable to confirm whether or not a target has been met, the statement made under subsection (2) must explain why

and set out the steps the Secretary of State intends to take in order to be able to make that determination. In these cases, subsection (6) provides that the Secretary of State must prepare a further subsection (2) statement within six months of the initial statement being laid. There may be cases when the data needed to assess whether a target has been met is not yet available, and the Secretary of State is therefore unable to confirm target achievement on the reporting date. Subsection (7) provides that, where further statements are needed pursuant to subsection (6), the requirements of subsections (3) to (6) apply equally to those statements.

### Clause 6: Environmental targets: review

- 92 Clause 6 sets out the procedure for the Secretary of State to conduct a periodic review of all targets set under clauses 1 and 2.
- 93 Subsection (1) sets out the requirement for the Secretary of State to conduct the review. Subsection (2) clarifies that the purpose of the review is to consider whether the significant improvement test is met.
- 94 Subsection (3) explains that the significant improvement test is met where meeting the targets set under clauses 1 and 2, and any other environmental targets that the Secretary of State considers appropriate to consider, will bring about a significant improvement in the natural environment in England. Subsection (8) sets out certain requirements that those other environmental targets must meet to be capable of consideration.
- 95 Subsection (4) provides that, following the conclusion of the review, the Secretary of State must publish, and lay before Parliament, a report confirming whether the Secretary of State considers that the significant improvement test has been met. Where the Secretary of State considers that the test has not been met, the report must set out the steps the Secretary of State proposes to take, using the powers in clauses 1 and 2, to ensure that it is met. In addition to identifying potential new targets, the report might also acknowledge, for example, the need for more research in a particular policy area in order to examine the possibility of developing a target in future.
- 96 Subsection (5) sets out that the Secretary of State must complete the first significant improvement test review by 31 January 2023.
- 97 Subsection (6) provides that, following the first review, future reviews must be conducted at intervals of no more than five years. Subsection (7) confirms that a review is completed when the Secretary of State publishes, and lays before Parliament, a report under subsection (4).
- 98 Subsection (8) sets out the conditions that a target set otherwise than under clauses 1 and 2 must meet in order to be capable of consideration by the Secretary of State under subsection (3)(b). In broad terms, those targets must meet the same standards as targets set under clauses 1 and 2. These conditions include the need for a target to have an objectively measurable standard to be achieved by a specific date.
- 99 The National Emission Ceilings Regulations 2018 targets are examples of those that may be taken into consideration under the conditions set out in sub-section (8). These targets relate to reductions in total anthropogenic emissions of five key air pollutants in the UK by 2030.

### Clause 7: Environmental improvement plans

- 100 Clause 7 introduces a duty on the Secretary of State to prepare a plan for significantly improving the natural environment (an “EIP”). It sets requirements for what an EIP must contain. The 25 Year Environment Plan, as published on 11 January 2018, will become the

first EIP.

- 101 Subsection (1) introduces the requirement for the Secretary of State to prepare an EIP. Subsection (2) clarifies that an EIP is a plan for significantly improving the natural environment in the period it covers. The natural environment is defined in clause 39 (meaning of “natural environment”). This definition includes living and non-living elements of the environment, such as plants, wildlife, their habitats, air, water and land.
- 102 Subsection (3) specifies that the period of each EIP must be at least 15 years. Long-term EIPs are needed because some aspects of the natural environment change slowly and require continuity in how they are managed. The current 25 Year Environment Plan covers a period of 25 years but a future government may prefer to set an EIP for a different period. Clause 9 requires the government to review and revise EIPs at least every 5 years. A period of 15 years allows for an EIP to be introduced, reviewed and revised twice before its end. This will allow its effectiveness to be assessed, and meaningful corrective action taken if necessary.
- 103 Subsection (4) specifies that the EIP must set out the steps the government will take to improve the natural environment during the lifetime of the EIP.
- 104 Subsection (5) allows EIPs to contain steps the Government will take to improve people’s enjoyment of the natural environment. Steps relating to people’s enjoyment of the natural environment may relate to its use, access to natural areas or a measure of public views about the environment. Amongst other initiatives, enjoyment may be increased through education and public awareness of the natural environment both past and present, natural systems and processes through which organisms interact with their surroundings. For example, the current 25 Year Environment Plan includes the ambition to make it easier for schools and pupil referral units to take pupils to natural spaces on a regular basis. This policy aims to increase enjoyment of the natural environment through learning, improved wellbeing and raised public awareness.
- 105 This clause and clauses 8 to 14, 15, and 23 extend to England and Wales. Subsection (6) provides that the Secretary of State’s functions in relation to EIPs are not exercisable in relation to the natural environment in Wales. The policy areas covered by EIPs therefore could cover the natural environment in England (including the English inshore area), as well as in the offshore area (to the extent that Her Majesty’s Government has functions) and to Her Majesty’s Government’s international policy (including to the Overseas Territories where Her Majesty’s Government has functions: Gibraltar and the British Virgin Islands, for example).
- 106 Subsection (7) confirms that the current 25 Year Environment Plan must be treated as an EIP. Furthermore, subsection (8) specifies that references to the first EIP are to that document, and that references to the current plan refer to the plan that is in effect at the time.

### Clause 8: Annual reports on environmental improvement plans

- 107 Clause 8 establishes a duty on the Secretary of State to produce annual reports on the implementation of the environmental improvement plan (EIP) and on whether the natural environment is improving. It explains when and how these reports should be published. Given clause 7(6), this clause applies only in relation to England.
- 108 Subsection (1) requires the Secretary of State prepare annual reports on the implementation of EIPs. These reports must be published (subsection (8)) and laid before Parliament (subsection (7)).

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

- 109 Subsection (2) requires that annual reports must describe what has been done to implement the EIP, and consider whether the natural environment (or particular aspects of it) has improved, during the period to which the report relates. Consideration of whether the environment has improved must have regard to information gathered under clause 15.
- 110 Subsection (3) provides that, when considering whether the natural environment (or aspects of it) has improved, the Secretary of State must consider the progress that has been made towards achieving the targets (or any relevant targets) set under clauses 1 and 2, and the interim targets (or any relevant interim targets) set under clauses 10 and 13.
- 111 Subsection (4) explains that the first annual report on the current EIP may cover any 12 month period that includes the day on which clause 8 comes into force. Government has already committed to producing annual reports on the implementation of the 25 Year Environment Plan. The first report was published on 16 May 2019, and covers the period from the EIP being launched until March 2019. The intention of this subsection is to allow the timing of the first statutory report to be aligned with the preceding non-statutory reports.
- 112 Subsection (5) states that, following the replacement of the current EIP, the first annual report should relate to the first 12 months of that EIP.
- 113 Subsection (6) states that all other annual reports should relate to the 12 month period immediately following the previous reporting period. This ensures that there is a continuous timeline of annual reports relating to consecutive 12 month periods for the duration of each EIP.
- 114 Subsection (7) requires the Secretary of State to lay each annual report before Parliament within four months of the end of the 12 month period on which it reports. For example, an annual report assessing the period 1st April 2020 to 31st March 2021 must be laid before Parliament by 31st July 2021. Subsection (8) requires the Secretary of State to publish all annual reports laid before Parliament under this clause.

## Clause 9: Reviewing and revising environmental improvement plans

- 115 Clause 9 provides for the review and revision of EIPs. It establishes a duty on the Secretary of State to review the EIP, and timeline in which to complete a review and, if appropriate, revise the plan. Given clause 7(6), this clause applies only in relation to England.
- 116 Subsection (1) establishes the duty on the Secretary of State to review the EIP and, if the Secretary of State is required to revise the plan under clause 10, or considers it appropriate to revise the plan as a result of the review, to produce a revised plan. It is expected that revisions will be appropriate when each EIP is reviewed, but this clause does allow the Secretary of State to decide that no revision is appropriate following a review of the EIP.
- 117 Subsection (2) specifies that a revised plan will cover the remaining time period of the existing plan. The current EIP runs until 2043; any revisions to this plan will also be required to cover the period up to 2043. Furthermore, when an EIP for a future time period is produced in line with clause 12, the time period will be specified in that EIP and any revisions to it must retain the same end date.
- 118 Subsection (3) specifies that the first EIP (the 25 Year Environment Plan) must be reviewed by the end of January 2023. This is just over five years from its publication. This is considered to be sufficient time for some progress to be made against the EIP, for the monitoring of the environment to assess improvement established, and for early results to

be obtained. This time also allows for weaknesses and gaps in the EIP and policy changes to be identified that may require a revision to the EIP.

- 119 Subsection (4) applies to future EIPs, and ensures that they too are first reviewed within five years of taking effect.
- 120 Subsection (5) provides that, following the first review of an EIP, further reviews must be undertaken within every five year period for the duration of the EIP. In accordance with this, the 25 Year Environment Plan must be reviewed for a second time before 31st January 2028.
- 121 Subsection (6) requires that when the Secretary of State has completed a review and determined it appropriate to revise the plan, then this revised plan must be laid before Parliament along with a statement explaining what revisions have been made and why. This statement may be part of the same document as the revised plan or a separate document.
- 122 Subsection (7) requires that, if the Secretary of State completes a review but does not consider it appropriate to revise the EIP, then the Secretary of State must lay before Parliament a statement to this effect and the reasons for this. Whilst the Secretary of State is required to complete a review within the five year timeline there is no duty to revise the EIP if a revision is not appropriate. (However, the Secretary of State must revise the EIP if so required under clause 10.) This allows for a revision to the EIP to be delayed if the Secretary of State considers it appropriate, but such a decision must be justified to Parliament.
- 123 Subsection (8) requires the Secretary of State to publish any documents laid before Parliament following a review of an EIP. These will be the revised plan and reasoning as in subsection (6), or the statement as to why no revision is considered appropriate as in subsection (7).
- 124 Subsection (9) specifies that a review is to be considered completed when documents have both been laid before Parliament and published. This is the completion date for the purpose of meeting the requirement to complete a review within five years of an EIP being published or previous review. It also becomes the start date for the next five-year time period for completing the subsequent review.
- 125 Subsection (10) clarifies that, when the EIP is revised in accordance with this clause, the references to an EIP in this Bill refer to the now revised EIP.

#### Clause 10: Reviewing and revising plans: interim targets

- 126 Clause 10 provides for interim targets to be included in environmental improvement plans (EIPs), and sets out the requirements for those interim targets. Given clause 7(6), this clause applies only in relation to England.
- 127 Subsection (1) requires the Secretary of State, during the first review of the first EIP, to revise the plan so as to include at least one interim target in relation to the targets set under clauses 1 and 2 (for a “relevant matter”, see subsection (3)), and to ensure that from the date that the first review is completed (for the “relevant date”, see subsection (9)) there is an interim target for each such target for the next five years.
- 128 Subsection (2) contains an equivalent provision for subsequent reviews of the EIP. It requires the Secretary of State, during each review of the EIP, to make any revisions necessary to include at least one interim target in relation to any targets set under clauses 1 and 2 since the previous review, and to ensure that from the date that the relevant review is completed there is an interim target for each target for the next five years.

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- 129 Subsections (1) and (2) give the Secretary of State the flexibility to set just one interim target for the five year period between EIP reviews, or multiple, shorter interim targets for this same period.
- 130 Subsection (3) provides that the term “relevant matter” means any matter where there is a target under clauses 1 or 2.
- 131 Subsection (4) ensures that the requirement in subsection (2)(b) to maintain an interim target does not apply where the specified end date of the relevant target under clauses 1 or 2 falls within the relevant five year period. For example, if a long-term target expires four months after the date on which an EIP review is completed, there is no requirement for the Secretary of State to set an interim target because the long-term target expires so quickly.
- 132 Subsection (5) clarifies that the Secretary of State may revise or replace interim targets during any EIP review, regardless of whether revisions are needed pursuant to subsections (1) and (2).
- 133 Subsection (6) provides that interim targets must consist of an objectively measurable standard to be achieved across a specified time period. Subsection (7) provides that this time period must be no longer than five years. For the first interim targets, that period starts on the date on which the relevant EIP review is completed. For subsequent interim targets, that period starts on that date or the date on which the previous interim target expired.
- 134 Subsection (8) provides that, when setting or revising any interim target, the Secretary of State must be satisfied that meeting it will make an appropriate contribution towards meeting the relevant target under clauses 1 or 2. This will ensure that the Secretary of State takes account of the overall trajectory of environmental improvement required in order to meet those targets.
- 135 Subsection (9) provides that the term “relevant date” means the date on which a review is completed.

### Clause 11: Reviewing and revising plans: other requirements

- 136 Clause 11 sets out what the Secretary of State must consider when reviewing an environmental improvement plan (EIP). Given clause 7(6), this clause applies only in relation to England.
- 137 Subsection (1) sets out that the Secretary of State must take the following into consideration when reviewing an EIP:
- what steps the government has taken to implement the EIP since it was published, or (if it has been reviewed before) since it was last reviewed;
  - whether the natural environment (or particular aspects of it) has improved during that period; and
  - whether the government should take further or different steps compared to those in the plan to improve the natural environment in the remaining period of the EIP.
- 138 When considering whether the natural environment has improved, the Secretary of State must have regard to data obtained under clause 15 and reports made by the Office of Environmental Protection under clause 23.

139 In addition, subsection (2) requires the Secretary of State, when considering whether the natural environment (or particular aspects of it) has improved, to consider the progress made towards meeting the targets (or any relevant targets) set under clauses 1 and 2, and the interim targets (or any relevant interim targets) set under clauses 10 or 13.

140 Subsection (3) requires the Secretary of State, when considering whether further or different steps should be taken to improve the natural environment, to consider whether further or different steps should be taken to meet those targets.

### Clause 12: Renewing environmental improvement plans

141 Clause 12 provides for the Secretary of State to replace the environmental improvement plan (EIP) with a renewed version, and what the Secretary of State must consider as part of this process. Given clause 7(6), this clause applies only in relation to England.

142 Subsection (1) requires the Secretary of State to prepare a new EIP before the end date of the existing EIP.

143 Subsection (2) requires the new EIP to cover a period that starts no later than immediately after the end of an existing EIP, ensuring there is no gap between EIPs.

144 Subsection (3) requires the Secretary of State to publish and lay before Parliament the new EIP on or in advance of the end date of the existing EIP.

145 Subsection (4) specifies when the new EIP begins. At its earliest, this will be when the EIP has been laid before Parliament and published, but it can be later if the period to which the EIP relates begins after this date.

146 The provisions in clauses 12 to 14 allow for plans to be completely replaced (as distinct to clauses 9 to 11, which allow for the amendment of existing plans). It is anticipated that future governments may choose to renew EIPs before they reach the end of their lifetime to enable them to include longer term actions.

### Clause 13: Renewing plans: interim targets

147 Clause 13 provides for interim targets to be included in new environmental improvement plans (EIPs), and sets out the requirements for those interim targets. Given clause 7(6), this clause applies only in relation to England.

148 Subsection (1) requires that a new EIP include at least one interim target in relation to the targets set under clauses 1 and 2 (for a “relevant matter”, see subsection (2)), and to ensure that from the date that the new EIP commences for the “relevant date”, see subsection (7)) there is an interim target for each such target for the next five years.

149 Subsection (2) provides that the term “relevant matter” means any matter where there is a target under clauses 1 or 2.

150 Subsection (3) ensures that the requirement in subsection (1) to maintain an interim target does not apply where the specified end date of the relevant target under clause 1 or 2 falls within five years of the start of the new plan. For example, if a long-term target expires four months after the date on which a new EIP period commences, there is no requirement for the Secretary of State to set an interim target because the long-term target will expire so quickly.

151 Subsection (4) provides that interim targets must consist of an objectively measurable standard to be achieved across a specified time period. Subsection (5) provides that this time period must be no longer than 5 years. For the first interim targets, that period starts on the date on which the new EIP period commences. For subsequent interim targets, that



period starts on the date the previous interim target expired.

152 Subsection (6) provides that, when setting any interim target, the Secretary of State must be satisfied that meeting it will make an appropriate contribution towards meeting the relevant target under clause 1 or 2. This will ensure that the Secretary of State takes account of the overall trajectory of environmental improvement required in order to meet those targets.

153 Subsection (7) provides that the term “relevant date” means the date on which the new EIP period commences.

154 Subsection (8) clarifies that references to a “new plan” are to be read in accordance with the definitions in clause 12(1).

#### Clause 14: Renewing plans: other requirements

155 Clause 14 sets out what the Secretary of State must consider when renewing an environmental improvement plan (EIP). Given clause 7(6), this clause applies only in relation to England.

156 Subsection (1) sets out that the Secretary of State must take the following into consideration when renewing an EIP:

- what steps the government has taken to implement the old EIP during the period to which it related;
- whether the natural environment has improved since the beginning of the period to which the old plan related; and
- whether the government should take further or different steps (compared to those in the old plan) to improve the natural environment in the period to which the new EIP relates.

157 When considering whether the natural environment has improved, the Secretary of State must have regard to data obtained under clause 15 and reports made by the Office of Environmental Protection under clause 23).

158 In addition, subsection (2) requires the Secretary of State, when considering whether the natural environment has improved, to consider the progress made towards meeting the targets set under clauses 1 and 2, and the interim targets set under clauses 10 or 13.

159 Subsection (3) requires the Secretary of State, when considering whether further or different steps should be taken to improve the natural environment in the new EIP, to consider whether further or different steps should be taken to meet those targets.

160 Subsection (4) clarifies that references to “old plan” and “new plan” are to be read in accordance with the definitions in clause 12.

#### Clause 15: Environmental monitoring

161 Clause 15 establishes a duty on the Secretary of State to obtain and publish metrics for the purpose of seeking environmental improvement. The metrics will measure outcomes achieved through the implementation of the actions set out in the environmental improvement plan (EIP) and inform updates to it. The data will also allow the progress being made towards meeting targets to be monitored. Given clause 7(6), this clause applies only in relation to England.

162 A suite of indicators and metrics has most recently been published by government, in

May 2019, as [Measuring environmental change: outcome indicator framework for the 25 Year Environment Plan](#).

- 163 Subsection (1) requires the Secretary of State to obtain data about the natural environment appropriate for monitoring whether the natural environment (or particular aspects of it) is improving in accordance with the EIP, and for monitoring progress towards meeting any targets set under clauses 1 and 2 and any interim targets set under clauses 10 and 13.
- 164 Subsection (2) requires the Secretary of State to specify in a statement what kinds of data will be obtained, and to lay this statement before Parliament and publish it. This statement will provide the details of how the environment is to be monitored to determine whether there has been an improvement in the environment in accordance with the EIP and progress towards meeting targets.
- 165 Subsection (3) specifies that the first statement on monitoring data must be laid before Parliament within four months of this clause coming into force.
- 166 Subsection (4) allows for the Secretary of State to revise the statement on monitoring data at any time. This may be necessary if it becomes clear that additional data is needed, or that current measures do not adequately assess environmental improvement or target progress. Such a revised statement must also be laid before Parliament and published (subsection (2)).
- 167 Subsection (5) requires that data collected under the clause must be published.

#### Clause 16: Policy statement on environmental principles

- 168 Clause 16(1) requires the Secretary of State to prepare a policy statement on the environmental principles set out in subsection (5).
- 169 Subsection (2) provides specific information on what the environmental principles policy statement must include. The policy statement will explain how Ministers of the Crown should interpret and proportionately apply the environmental principles when developing policies. Proportionate application means ensuring that action taken on the basis of the principles balances the potential for environmental benefit against other benefits and costs associated with the action. This means that a policy where there is the potential for high environmental damage would require more stringent action than a policy where the potential environmental damage is low.
- 170 Subsection (3) sets out that the Secretary of State may explain in the statement how other considerations should be taken into account by Ministers of the Crown when they are interpreting and applying environmental principles. For example, it may be necessary to balance the application of a specific environmental principle against other considerations, such as economic and social benefits, whilst taking care to ensure that these do not supersede environmental benefit but are considered alongside.
- 171 Subsection (4) details two aims that the Secretary of State must be satisfied that the statement will contribute to. These are:
- The improvement of environmental protection. This means being satisfied that the policy statement will be used to shape policies in a way that protects the environment. It underpins the interpretation and application of the environmental principles. This consideration is to be taken in line with other necessary considerations in these clauses, such as in subsection (3).
  - Sustainable development. Sustainable development can be summarised as

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development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It involves trying to achieve environmental benefit alongside economic growth and social progress.

Therefore, the Secretary of State must be satisfied that, when using the policy statement, policy makers will consider the needs of future generations. This means that policy makers should consider the environmental impact of their policies together with the economic and social factors and, as much as possible, ensure policy achieves all three aims.

172 Subsection (5) sets out the list of environmental principles the policy statement will cover. These principles are drawn from a number of sources, including, for example, the [Rio Declaration on Environment and Development](#) (1992).

173 There is no single agreed definition of the environmental principles. The policy statement will explain in more detail how these are to be interpreted, and provide information as to how they should be applied.

174 The meaning of the individual environmental principles is as follows:

- The principle that environmental protection must be integrated into the making of policy: environmental protection must be embedded in the making of policies.
- The principle of preventative action to avert environmental damage: preventive action should be taken to avert environmental damage.
- The precautionary principle so far as relating to the environment: where there are threats of serious irreversible environmental damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
- The principle that environmental damage should as a priority be rectified at source: environmental damage should as a priority be rectified by targeting its original cause and taking preventive action at source.
- The 'polluter pays' principle: the costs of pollution control and remediation should be borne by those who cause pollution rather than the community at large.

175 Further direction on these environmental principles will be set out in the policy statement. These principles cannot be changed without primary legislation.

### Clause 17: Policy statement on environmental principles: process

176 Clause 17 establishes the process by which the Secretary of State will develop and publish the environmental principles policy statement.

177 Subsection (1) sets out the duty for the Secretary of State to prepare a draft policy statement. This will be an initial version of the statement before public and parliamentary scrutiny.

178 Subsection (2) requires the Secretary of State to conduct a public consultation.

179 Subsection (3) requires that a draft must be produced and laid before Parliament for its consideration. This must take place before the policy statement is finalised.

180 Subsection (4) includes provisions for cases where Parliament chooses to respond to the

draft policy statement, either by passing a resolution in respect of the draft policy statement, or recommending changes to the statement, within the period of 21 sitting days after the draft statement has been laid. The Secretary of State is required to lay a response to any resolution passed or recommendations made by Parliament.

181 Subsection (5) requires the final policy statement to be presented to Parliament before being published. The Secretary of State must not publish the final statement before laying a response if required under subsection (4) or, otherwise, before a period of 21 sitting days has passed since the draft statement is laid. This is intended to allow Parliament sufficient time to scrutinise the draft policy statement.

182 Subsection (6) provides that the final policy statement comes into force when laid before Parliament, at which point the Secretary of State is required to publish it (subsection (7)).

183 Subsection (9) sets out that the policy statement may be revised at any time the Secretary of State sees fit, and that if this is done then the process set out in this clause must be followed.

### Clause 18: Policy statement on environmental principles: effect

184 Clause 18 sets out the legal duty on Ministers of the Crown in using the environmental principles policy statement. It also details the relevant exemptions to the duty to have due regard to the policy statement.

185 Subsection (1) requires Ministers to have due regard to the environmental principles policy statement when making policies included in the scope of the duty (in other words, policy that is not excluded). This means that, when making policy, Ministers of the Crown must have the correct level of regard to the content of the environmental principles policy statement.

186 Subsection (2) sets out that the policy statement does not require Ministers to take, or refrain from taking, any action that would have no significant environmental benefit, or if the environmental benefit would be disproportionate when compared to other factors.

187 In this context:

- “Significant” is to be understood as meaning ‘not negligible’. This means that the policy statement does not need to be used to change a policy direction, if the environmental impact would be negligible.
- “Disproportionate” indicates situations in which action would not be reflective of the benefit or costs, environmental or otherwise. Action taken must reflect the potential for environmental benefit, as well as other costs and benefits. For example, there is no need for a Minister to change a policy in light of the principles policy statement if the cost of this change would be very high and the benefit to the environment would be very low. Equally, if the potential environmental benefit is high, then it is proportionate to take a more significant action based on the policy statement.

188 Subsection (3) sets out which policies are excluded from the duty to have due regard to the policy statement. The three areas covered are set out in paragraphs (a) to (c).

189 The exclusion in subsection (3)(a) refers to armed forces, defence and national security policy. For example, policies that would be excluded include:

- Armed Forces policies relating to the Royal Navy, the Royal Marines, the Army,

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and the Royal Air Force; and

- national security policies, such as the Strategy and Strategic Defence and Security Review.

190 In subsection (3)(b), ‘taxation’ refers to taxes in a legal sense, and therefore does not include other regulatory schemes which involve fees and charges for purposes other than taxation, such as the plastic bag charge or the imposition of fees to cover the cost of a regulatory regime. ‘Spending or the allocation of resources within government’ refers to decisions about how money and resources are allocated to or between government departments or agencies, including at fiscal events such as Budgets and Spending Reviews. It does not refer to individual policies on which government funds could be spent. For example, in decisions on which departments should receive funds and how much, the policy statement will not apply. However, it would apply to policies which relate to spending this allocated funding which are decided by a Minister of the Crown, such as when setting up a new innovation scheme.

191 Subsection (3)(c) sets out that the duty in subsection (1) does not apply to policy relating to or applying in Wales.

## **Chapter 2: The Office for Environmental Protection**

### **Clause 19: The Office for Environmental Protection**

192 Clause 19 provides for the establishment of a new body called the Office for Environmental Protection (OEP), and introduces Schedule 1 which makes further provision about this independent Non-Departmental Public Body.

### **Clause 20: Principal objective of the OEP and exercise of its functions**

193 Clause 20 sets out the strategic framework for the OEP, making provision for how it will carry out its functions and establish its independence from government and other bodies. The clause requires the OEP to take an objective and impartial approach to the delivery of its functions, and requires it to set out how it will exercise its functions in a strategy that takes into account where extensive governance already exists, for example in the planning system.

194 Subsection (1) establishes that, when exercising its functions, the OEP’s principal objective is to contribute to two aims. These are:

- The protection of the natural environment.
- The improvement of the natural environment.

195 The term “principal objective” is used to emphasise that it is a key objective for the OEP, but not the only one it has to consider when exercising its functions. The principal objective should also guide the OEP when exercising its discretionary powers.

196 Subsection (2)(a) requires the OEP to act objectively and impartially, thereby ensuring it is capable of holding government to account. Subsection (2)(b) provides that the OEP must have regard to the need to act proportionately and transparently, helping to ensure balance and accountability in the body’s exercise of its statutory functions. The term “have regard to” is used here because an absolute legal duty would not allow for the OEP to exercise its judgment in individual circumstances. For example, in the interest of transparency, the OEP would normally make information about its work publicly available; however, there may be certain situations where it is inappropriate for it to do so at an early stage, such as during the investigation of a complaint. The OEP will consider

proportionality when balancing the need to improve and protect the natural environment against other considerations, such as the protection of the historic environment.

- 197 Under subsection (3), the OEP is required to prepare a strategy setting out its approach towards exercising its functions; the process for revising and reviewing this strategy is set out in clause 21. Paragraphs (a) to (c) of subsection (4) require the OEP to set out in its strategy how it will further its principal objective, how it will act objectively and impartially, and how it will have regard to the need to act proportionately and in a transparent manner.
- 198 Subsection (5) provides that the OEP must set out how it intends to avoid any overlap with the Committee on Climate Change in exercising its functions. This is intended to ensure that the OEP does not seek to replicate the role of the Committee on Climate Change under section 57 of the Climate Change Act 2008, or the reporting role of the Committee under section 59 of the Act. This could be through the use of memoranda of understanding.
- 199 Subsection (6) provides that the OEP's strategy must contain an enforcement policy. Paragraphs (a) to (e) describe what this policy must set out.
- 200 Paragraph (a) requires the OEP to set out in its policy how it will reach decisions about whether a failure to comply with environmental law is "serious", as required in clauses 28(1)(b) and (2)(b), 30(1)(b), 31(1)(b) and 34(1).
- 201 Paragraph (b) also requires the OEP to set out in its policy how it intends to judge whether damage to the natural environment or to human health is 'serious', as required in section 34(2) in order to make an application for judicial review.
- 202 Paragraph (c) provides that the policy must set out how the OEP intends to exercise its enforcement functions in a way that respects the integrity of other relevant statutory regimes (including appeals processes), meaning where a decision is itself subject to the possibility of intervention by, or appeal to, another body. Statutory regimes could include decision-making functions, complaints, investigation, enforcement or appeals functions, and legal challenges. For example, some decisions made by the Environment Agency, or by a Planning Authority, may be subject to call-in by, or appeal to, the Secretary of State or the Planning Inspectorate. In normal circumstances, it is expected that the OEP would allow the usual regulatory processes to take their course, where they could affect a matter concerning a possible failure to comply with environmental law, before taking enforcement action. This provision therefore requires that the OEP's strategy should set out how it intends to operate with a view to effective alignment, and avoidance of conflict or duplication, with such procedures.
- 203 Paragraph (d) requires the OEP to specify in its policy how it intends to avoid any overlap between its activities in relation to its complaints function and the work of a relevant ombudsman. Subsection (9) sets out that for the purposes of these provisions, the Commission for Local Administration in England (the official body that runs the Local Government and Social Care Ombudsman service) and the Parliamentary Commissioner for Administration (otherwise known as the Parliamentary and Health Service Ombudsman) shall each be considered a relevant ombudsman.
- 204 Paragraph (e) also requires that the OEP's enforcement policy set out how it will prioritise cases. Further requirements on this point are set out in subsection (7).
- 205 Subsection (7) sets out certain types of case which the OEP should seek to prioritise when developing and reviewing its enforcement policy. In particular, the OEP must have regard

to the particular importance of prioritising cases that it considers have, or may have, national implications. This provision is intended to steer the OEP to act in cases with broader, or more widespread significance, rather than those of narrow local concern; for example, some individual local planning or environmental permitting decision may not have implications beyond the local area.

206 Other types of cases which the OEP must have regard to the need to prioritise are set out under paragraphs (a) to (c):

- those which concern persistent issues; that is, currently ongoing or recurring problems, or systemic failures;
- those concerning decisions that the OEP considers have caused, or could cause, serious damage in terms of their environmental impacts or effects on human health; and
- cases that deal with points of law of general public importance, such as addressing those that could otherwise set a potentially damaging precedent, or where there is potential for the OEP's intervention to clarify a point of widespread uncertainty.

207 Subsection (8) defines the OEP's enforcement functions as those provided for under clauses 27 to 36.

208 Subsection (9) sets out what is meant by "a relevant ombudsman" for the purposes of subsection (6)(d) above, and other provisions in this Part.

### Clause 21: The OEP's strategy: process

209 Clause 21 sets out the process for publishing and revising the OEP's strategy, which it must prepare under clause 20. The strategy sets out how the OEP will carry out its functions. A number of other public bodies, such as the Equality and Human Rights Commission, have a similar statutory duty to prepare a strategic plan.

210 Subsection (1) requires the strategy (and each subsequent revised strategy) to be laid before Parliament and published. This is intended to provide transparency and clarity to government, Parliament, and other stakeholders on the operational framework and strategic direction of the OEP, which it itself determines.

211 Subsection (2) allows the OEP to revise its strategy at any time. For example, it may need to reprioritise its work programme based on the types of complaint received during a particular period, or to address a newly emerging substantive issue that falls within its remit.

212 Subsection (3) ensures that the strategy remains a live document, which is kept up to date and relevant to the OEP's statutory remit, by requiring a review of the strategy at least once in every "review period". Subsection (4) specifies the review period as three years for the first strategy and for each subsequent strategy. The three-year review period is designed to be an appropriate amount of time to ensure that the production of the plan is not overly burdensome, yet to also ensure that it stays up to date.

213 Subsection (5) provides that before producing, revising or reviewing the strategy, the OEP must consult relevant stakeholders as it considers appropriate. This could include government, although ministers or other parties will not have powers to veto any part of the strategy.

## Clause 22: Co-operation duties of public authorities and the OEP

- 214 This clause establishes a duty on public authorities to co-operate with the OEP, and provide the OEP such reasonable assistance as it requests, in connection with the exercise of its statutory functions. This includes the provision of information in relation to investigations under clause 28, information notices under clause 30 and decision notices under clause 31, as well as activities that form its scrutiny and advice functions under clauses 23 to 25. The intention of the duty to co-operate is to help the OEP and public authorities resolve issues constructively, and to share relevant information. It applies only to reasonable requests and would not replace the need for the OEP to commission work from public authorities, for which a fee might be payable: for example, if the OEP commissioned the Environment Agency (EA) to analyse data and that analysis was outside the EA's planned work programme.
- 215 The obligation under subsection (1) is for any person whose functions include functions of a public nature to co-operate with the OEP, and to give the OEP such reasonable assistance (including the provision of information) as the OEP requests. This reflects the definition of a "public authority" in clause 26(3).
- 216 Subsection (2) sets out the persons to whom, and circumstances where, the duty to co-operate does not apply. The duty excludes courts and tribunals, Parliament, devolved legislatures, Scottish and Welsh Ministers and Northern Ireland departments, persons exercising parliamentary functions, and persons who exercise only devolved functions. The duty does not apply to any person whose functions are wholly devolved; however, if only some of their functions are devolved, they need only comply with the duty in relation to their non-devolved functions, as set out in subsection (3).
- 217 Subsection (4) provides that the OEP should consult a devolved environmental governance body if the work it is undertaking would be of relevance to such a body. This could include the OEP consulting the relevant body during an investigation if it became aware of a transboundary environmental issue that may have involved a breach of devolved legislation outside of the OEP's own remit, but would be within the remit of the devolved environmental governance body. "Devolved environmental governance body" is defined in clause 41.

## Clause 23: Monitoring and reporting on environmental improvement plans and targets

- 218 Clause 23 describes the monitoring and reporting functions of the OEP in relation to the environmental improvement plans and targets. Under this clause, the OEP will monitor and assess environmental statistics and reports on an ongoing basis to ensure that it has an effective knowledge base. This information will then be analysed alongside information published by the government to provide an independent assessment of progress made in improving the natural environment in accordance with the current environmental improvement plan and targets.
- 219 Subsection (1) provides that the OEP must monitor progress:
- in improving the natural environment in accordance with the government's current environmental improvement plan (the first such plan is known as the 25 Year Environment Plan), as set out in clause 7;
  - towards meeting any long-term targets as set under clause 1, and the particulate matter target as set under clause 2; and
  - towards meeting any interim targets as set out in the environmental

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improvement plan.

- 220 This monitoring and reporting function will hold government to account on its environmental improvement commitments.
- 221 Subsection (2) requires the OEP to produce a progress report for each annual reporting period. As set out in subsection (3), the reports will inform on progress made related to improving the natural environment that has occurred within the annual reporting period. This will be measured against the current environmental improvement plan and targets. An annual reporting period is the period for which the Secretary of State must produce a report under clause 9, as set out in subsection (4).
- 222 When making a progress report, subsection (5) requires the OEP to take into account the annual report made by the Secretary of State on progress against the implementation of the environmental improvement plan and targets for that period, as set out in clause 9. The OEP will also consider the data published under clause 15 for that period, as well as any other documents or information that the OEP believes are relevant. In reporting on progress made in an annual reporting period, the OEP will undertake any analysis and interpretation it believes is necessary.
- 223 Subsection (6) specifies that a progress report may advise how the OEP believes progress could be improved – for example, through comparison with other countries, including the devolved administrations. It may also consider the adequacy of data published under clause 15, enabling the OEP to independently determine whether the right information is being collected to evaluate progress in improving the natural environment, and whether it is accurate and sufficiently comprehensive.
- 224 Subsections (7) and (8) require that the OEP's reports must be laid before Parliament and published. This is intended to provide the OEP with sufficient independence from government when carrying out its reporting functions. The OEP's report must be laid before Parliament within six months of the relevant report under clause 8 being laid. This gives the OEP sufficient time to carry out its scrutiny of the clause 8 report whilst tying it to a fixed reporting deadline.
- 225 Subsection (9) requires the Secretary of State to respond to the OEP's report, publishing their response and laying it before Parliament. Subsection (10) requires that the Secretary of State's response must specifically address any recommendations made by the OEP as to how progress with the environmental improvement plan and targets could be improved. This requires the Secretary of State to evidence and justify any decisions whereby the OEP's recommendations will not be taken forward. Subsection (11) specifies that the Secretary of State must lay their response within 12 months of the OEP's report being laid, and may include this response in the Secretary of State's subsequent report made under clause 9. This allows the Secretary of State to include the response to the OEP's progress report as part of the following year's annual report on the environmental improvement plan and targets.

#### Clause 24: Monitoring and reporting on environmental law

- 226 Clause 24 requires the OEP to monitor the implementation of environmental law and provides a power to issue reports on any matter to do with the implementation of environmental law.
- 227 Subsection (1) requires the OEP to monitor the implementation of environmental law. Environmental law is defined in clause 40 of this Bill. An example of environmental law caught by this duty would be the Habitats Regulations.

228 Subsection (2) allows the OEP, as it deems appropriate, to produce a report on any matter concerned with the implementation of environmental law. This provision would, for example, allow the OEP to produce a report considering the operation of existing environmental legislation, highlighting particular strengths and weaknesses. For example, if the OEP identified a significant issue in the implementation of part of the Marine and Coastal Access Act 2009 relevant to its remit, it may choose to report on this.

229 Subsection (3) requires the OEP's reports to be laid before Parliament and published. This reflects the OEP's independence from government when carrying out its reporting functions.

230 Subsection (4) requires the Secretary of State to lay before Parliament and publish a response to a report issued by the OEP under this clause within three months of that report being laid.

### Clause 25: Advising on changes to environmental law etc.

231 Clause 25 sets out the circumstances in which the OEP can give advice to Ministers of the Crown, and how this advice must be published and may be laid before Parliament.

232 Subsections (1), (2) and (4) enable a Minister to require the OEP to provide written advice on proposed changes to environmental law, or on any other matter relating to the natural environment. The OEP must take into consideration any specific matters the Minister outlined in their request when providing this advice, as per subsection (2). The natural environment is defined in this Bill in clause 39. For example, the OEP could be asked by the government to give recommendations on proposals to make amendments to the Natural Environment and Rural Communities Act 2006, or about a proposal to include additional goals in the environmental improvement plan. Subsection (3) provides a power for the OEP to give written advice to a Minister concerning any proposed changes to environmental law.

233 Subsection (5) requires the OEP to publish its advice, along with details of the specific request and any matters it was required to take into account, if it was asked to provide advice by a Minister. The publication of this information ensures transparency in the relationship between the OEP and any Minister asking it for advice.

234 Subsection (6) provides that the relevant Minister may lay the advice and any response before Parliament. This is a discretionary power to reduce burden on Parliament. For example, where advice has been sought by a Minister regarding a specific technical detail that is apolitical, the Minister can decide not to lay this advice before Parliament.

### Clause 26: Failure of public authorities to comply with environmental law

235 This clause sets out definitions for certain terms that are referred to throughout Chapter 2, which concerns the functions of the OEP. Subsection (1) states that clauses 27 to 36 provide for the functions of the OEP relating to failures by public authorities to comply with environmental law. (The term "environmental law" is defined in clause 40.)

236 "Failing to comply with environmental law" is defined in subsection (2) as meaning where an authority is:

- Not taking proper lawful account of environmental law when exercising its functions. For example, as set out in clause 18, a Minister of the Crown must have due regard to the policy statement on environmental principles in making, developing and revising policies. Failure to have due regard to the policy statement where required would therefore constitute a failure to take proper

account of environmental law; or

- Unlawfully exercising or failing to exercise functions it may have under environmental law. For example, various authorities are charged with establishing and implementing permitting or other types of regulatory control regimes for different activities that can affect the environment. Failing to meet such requirements, or implementing them in a deficient way (for instance, by omitting certain prescribed activities or applying standards that are less rigorous than the law demands), would also constitute a failure to comply with environmental law. A failure to meet a statutory environmental quality standard for which a public authority was responsible for ensuring compliance would also be captured by this provision.

237 No restrictions regarding the date of a failing are included in the definition in subsection (2). This means that the OEP will still be able to take action against failings that occurred after the UK's date of exit from the EU but before it was fully established.

238 In subsection (3), a "public authority" is defined as a person carrying out a function of a public nature, that is not a devolved function, a parliamentary function, or a function of one of the bodies specified in paragraphs (a) to (e). This follows a similar approach to section 6(3) of the Human Rights Act 1998. The term "public function" is not defined in the Bill (or in the Human Rights Act 1998), so it will ultimately be for the courts to determine what constitutes a public function. The courts have previously recognised that a body can act in more than one capacity. As such, bodies that undertake some public and some private functions, such as statutory undertakers, will be within scope of the OEP only with regard to the exercise of their public functions. The term "person" means any legal or natural person. For example, a Minister of the Crown, a government department, non-departmental public body, or local authority would be considered a public authority.

239 Where a person is undertaking a devolved or parliamentary function, they will not fall within this definition. This means that any public authorities implementing devolved functions under environmental law in Scotland, Wales and Northern Ireland will not be covered by the remit of the OEP in respect of devolved matters. Bodies exercising such functions would typically include devolved public bodies such as Scottish Natural Heritage, the Scottish Environment Protection Agency, Natural Resources Wales and the Northern Ireland Environment Agency. "Devolved function" is defined in clause 42.

240 Paragraphs (a) to (e) of subsection (3) also set out certain bodies that are excluded from this definition, including, for the purposes of this Bill, the OEP itself. This exclusion is to avoid the OEP having to consider whether to exercise its statutory complaint and enforcement powers in relation to a complaint made against it; the OEP could still consider complaints about its conduct outside of its statutory functions, or complaints could be made to the parliamentary ombudsman, as provided for in paragraph 22 of Schedule 1. Among the other excluded bodies are courts and tribunals and both Houses of Parliament. The devolved legislatures, and the Scottish and Welsh Ministers and Northern Ireland departments are also excluded. Any person carrying out a devolved function on behalf of the devolved ministers, such as a devolved public body, is also excluded from the OEP's remit.

## Clause 27: Complaints

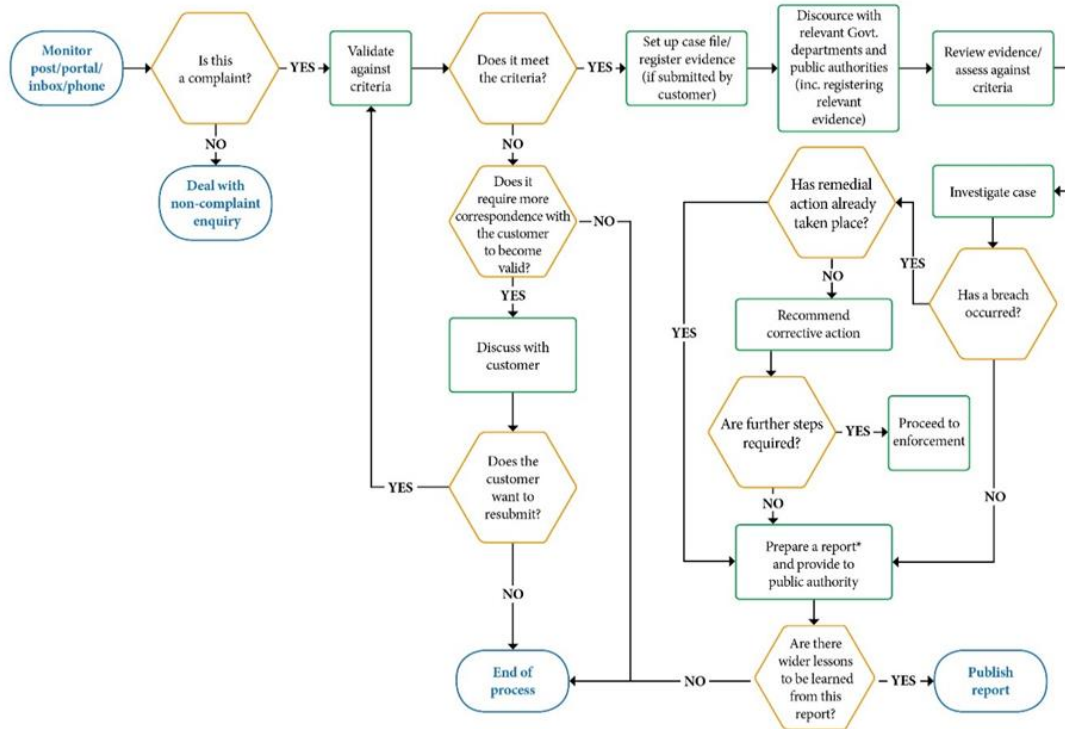
241 This clause provides that a person may make complaints to the OEP regarding alleged contraventions of environmental law by public authorities. It sets out who may make such complaints, what form they must take, and the time limits within which they should be

made. The contraventions and public authorities about which complaints may be considered by the OEP are set out in clause 26, while “environmental law” is defined in clause 40. Figure 1 illustrates the process by which the OEP’s management of complaints is expected to operate, as set out in this clause and in clause 28 (investigations).

- 242 Subsection (1) allows for any legal or natural person to make a complaint to the OEP if they believe that a public authority has failed to comply with environmental law, subject to the exclusions set out in subsection (4).
- 243 Subsection (2) sets out that the OEP must prepare and publish a document that sets out the procedure by which complaints can be made, and subsection (3) provides that complaints must be submitted in accordance with the most recently published version of that procedure. This is to allow the OEP to specify the means by which it will accept complaints. The OEP may or may not allow, for example, complaints in writing, by telephone or through an online complaints portal. Complaints that are not submitted in accordance with the procedure do not have to be considered by the OEP.
- 244 Under subsection (4), public authorities themselves are excluded from complaining to the OEP, as this would amount to one arm of government or the public sector complaining about another.
- 245 Subsection (5) requires that the complainant must have exhausted all internal complaints procedures of the allegedly offending body before they submit the complaint to the OEP. A wide range of bodies including the Environment Agency, Natural England and the Planning Inspectorate, for instance, operate complaints procedures that will apply to their functions, which are concerned with the implementation of environmental law. This provision is intended to give the public authority in question the opportunity to consider and seek to resolve the matter through its own procedures before it is considered by the OEP.
- 246 Subsection (6) makes provision regarding the timing of making a complaint to the OEP. The complaint must be submitted no later than one year after the last occurrence of the alleged breach of environmental law (paragraph (a)), or three months after the conclusion of any internal complaints procedures (paragraph (b)), whichever is later. This is intended to encourage complainants to bring their complaints in a timely manner, whilst also allowing a reasonable time period for people to bring complaints. An open-ended ability to complain long after the event in question could lead to uncertainty over certain decisions, particularly given that it could lead to enforcement action.
- 247 The provision in subsection (7) means that the OEP will not be entirely precluded from investigating serious matters on the basis of a complaint being late. Subsection (7) allows the OEP to waive the time limit in subsection (6) if there are exceptional reasons for doing so. This judgement will be a matter for the OEP’s discretion, and as such it could cover a number of circumstances, although it can be used only where there is an exceptional reason to disapply the normal time limit. It is possible that the OEP may wish to use this provision in a case where, for example, environmental harm resulting from a failure to comply with the law has taken some time to materialise and therefore for that failure to be identified, or where details of a decision only came to light long after it was taken.
- 248 The time limits specified in subsection (6) set out the periods after which complaints will not normally be accepted by the OEP, but do not affect its wider ability to investigate or take enforcement action (which may be prompted by triggers other than a complaint) under subsequent clauses.
- 249 It should be noted that no provision is made to grant the OEP the power to impose

charges in relation to its receipt and handling of complaints. As such, the complaints system will be free of charge to all complainants.

250 A summary of the procedure for handling complaints is provided in figure 1.



\*Note, the OEP is not required to prepare a report if it makes an application for environmental review.

## Figure 1: Summary of complaints handling procedures

### Clause 28: Investigations

251 This clause deals with the investigation of complaints, and potential breaches of environmental law coming to the OEP's attention by other means.

252 Subsection (1) provides that the OEP may undertake an investigation on the basis of a complaint received under clause 27 if it considers that the complaint indicates that a public authority may be responsible for a serious failure to comply with environmental law.

253 Subsection (2) provides that the OEP may also undertake an investigation under this clause without having received a complaint, if it has information obtained by other means that in its view indicates a public authority may have committed a serious failure to comply with environmental law.

254 The OEP's enforcement policy will set out how the OEP intends to determine seriousness for the purpose of subsection (2)(b). The OEP is not obliged to investigate all complaints, and provisions in subsections (1) and (2) allow the OEP to exercise discretion regarding the potential breaches that it investigates. The OEP's approach to prioritising cases will also be set out in its enforcement policy, in which it must have regard to the considerations set out in clause 20(7). If the OEP chooses not to investigate a complaint, the complainant must be informed under the requirements of clause 29.

255 Subsection (3) sets out the purpose of the investigation, which should focus on

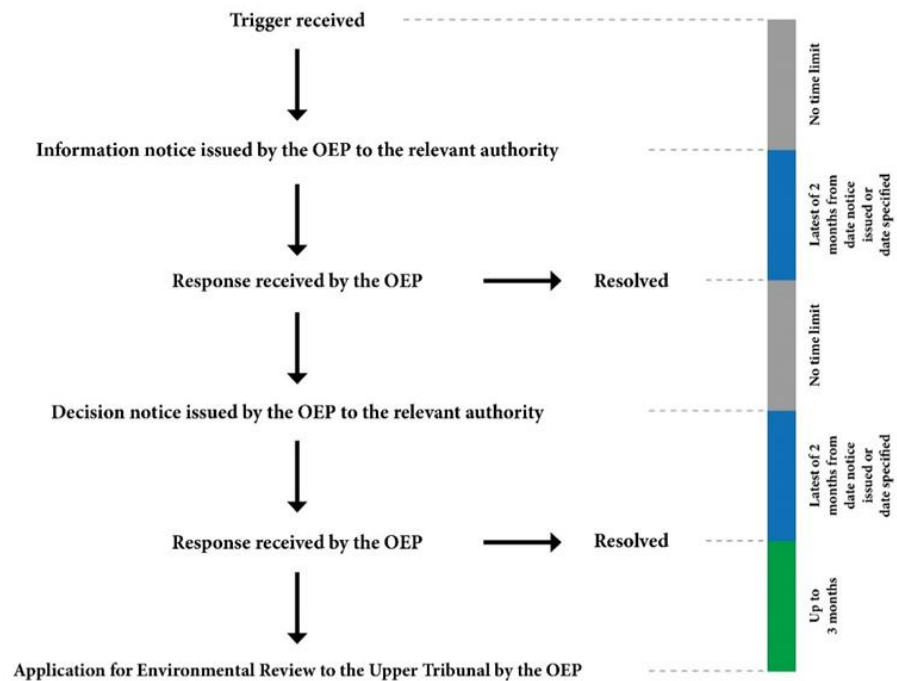
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establishing whether a public authority has failed to comply with environmental law. Under subsection (4), at the start of an investigation the OEP is required to notify the public authority being investigated, although in practice it also has discretion to contact the public authority informally in advance of commencing an investigation. Subsection (10) also provides that, if the authority is not a Minister, the OEP must additionally notify the “relevant Minister”. Subsection (11) provides that the relevant Minister should be the Minister of the Crown that the OEP considers appropriate, having regard to the nature of the public authority and the nature of the failure (that is, the Minister whose department is responsible for the policy area). For example, in the case of an investigation into a potential infringement relating to environmental permitting, a Minister for the Department of Environment, Food and Rural Affairs should likely be informed where the Environment Agency had issued the permit in question. If an investigation relates to environmental impact assessment, which is a policy area predominantly owned by the Ministry for Housing, Communities and local government, a Minister from this department should likely be informed, where a local authority was responsible for the alleged failure. The intention of these subsections is to ensure that central government departments remain informed of investigations related to their subject areas, and are therefore able to contribute, even if an alleged infringement does not involve a lack of compliance on the part of the department or Ministers themselves. This definition of the “relevant Minister” also applies to other clauses in this Part.

- 256 Similarly, when an investigation is concluded, subsection (5) requires that the OEP provide a report to the relevant public authority, copied to the relevant Minister if necessary under subsection (10). The OEP may publish the report in full or part under subsection (9).
- 257 Subsection (6) allows the OEP the flexibility to delay the preparation of this report if it considers that it may take further enforcement action (for instance, the service of an information or decision notice, or application for environmental review under clause 33) in relation to the alleged failure. This is intended to ensure that the OEP is not required to prepare and release reports concerning an investigation while it is still considering or intending to take further enforcement action. However, should the OEP publish a report and further information subsequently comes to light, it will not be precluded from taking further enforcement steps in relation to the failure as a result of having already published a report.
- 258 Under subsection (7), if the OEP has applied for an environmental review, judicial review, or statutory review it is not required to prepare a report.
- 259 The required contents of this report are set out in subsection (8). A report must state whether the OEP considers that a public authority has failed to comply with environmental law, the reasons the OEP came to these conclusions, and any recommendations the OEP may have for the relevant Minister, the public authority in question and any other authorities.
- 260 The OEP has discretion over whether to publish the report (in whole, in part or at all), in view of the possibility that some investigations may conclude that there is nothing of value to put in the public domain, while other investigations may involve matters of significant confidentiality or sensitivity. The OEP will exercise this discretion consistently with its duty to have regard to the need to act transparently (see clause 20(2)(b)). Information that the OEP chooses not to proactively report and publish will still be open to requests for disclosure and will need to be considered under the applicable legislation dealing with such requests.

## Clause 29: Duty to keep complainants informed

- 261 This clause deals with the procedure for the OEP to inform complainants about whether an investigation following a complaint will be carried out and the progress of the investigation.
- 262 The OEP must inform the complainant if the complaint will not be considered for further investigation on the basis that it is not a valid complaint. For example, the complaint may not be concerned with a valid matter (a breach of environmental law by a public authority), it may not have been submitted in accordance with the specified procedure, or it may have been submitted after the time limit without any exceptional basis for the OEP to reasonably accept it. This is covered in subsection (2)(a) of this clause.
- 263 Where a complaint has been made in accordance with clause 27, the OEP must inform the complainant about whether or not an investigation into that complaint will be carried out; this is covered in subsections (2)(b) and (c). This reflects the fact that the OEP has discretion in choosing which cases to investigate, prioritising cases in line with its enforcement policy.
- 264 When a report on an investigation under clause 28(5) has been provided to the public authority in question, paragraph (d)(i) requires that the OEP must inform the complainant of this, although it is not obliged to disclose that report to the complainant at that stage unless it has been published under clause 28(9).
- 265 Where the OEP applies for an environmental review, or for permission to apply for a judicial review, or statutory review in relation to the failure that was the subject of the complaint, paragraph (d)(ii) requires the OEP to inform the complainant.
- 266 Where the OEP publishes a report following the investigation of a complaint, it must provide the complainant with a copy of that report as published in full or in part, as required by paragraph (e). This could be done by electronic means, or by referring the complainant to a published report that is available online, rather than necessarily requiring a hard copy of the report to be provided in every case.



**Figure 2: Summary of investigation and enforcement**

**Clause 30: Information notices**

267 This clause provides that the OEP can take enforcement action in the form of “information notices” in cases where it reasonably suspects a public authority may be responsible for a serious breach of environmental law. This action may follow the investigation of a complaint, but the OEP can also take enforcement action if it has other grounds for suspecting there has been a serious breach (for example, based on information presented in a report on the implementation of a law, or arising from a parliamentary inquiry or other source), whether arising from an investigation under clause 28 or not.

268 This clause, and those that follow it, reflects the intended enforcement function and process of the OEP. Figure 2 illustrates the process that is expected to operate in the OEP’s management of enforcement activities under these clauses.

269 Under subsection (1), the OEP may issue an information notice if it has reasonable grounds (whether or not this information arises from an investigation under clause 28) for suspecting that a public authority has failed to comply with environmental law, and it considers that the failure is serious. The seriousness of a failure will be determined by the OEP in accordance with its own, published enforcement policy (see clause 20). The OEP therefore may not serve an information notice in relation to trivial matters, or serve a speculative information notice if it does not have any reasonable basis to believe an authority is failing to comply with environmental law.

270 Information notices are a means by which the OEP can formally request information from the public authority concerned in relation to a suspected failure. Subsection (2) states that an information notice is to describe the alleged failure, and the information that the OEP requests in relation to it. Subsection (3) requires the relevant public authority to respond

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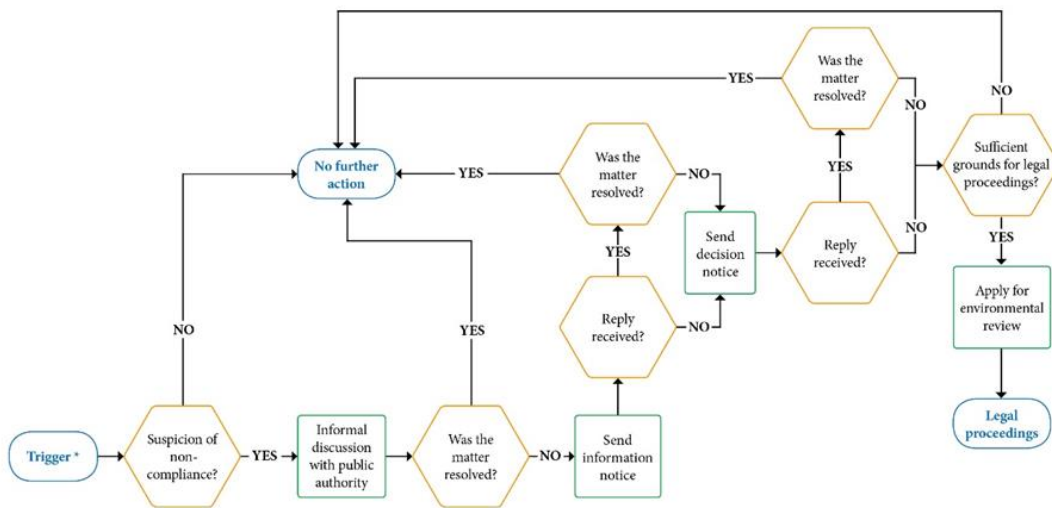


in writing to an information notice within a fixed time period as specified in subsection (4), and subsection (5) sets out what information should be included in such responses.

271 Subsection (4) specifies that responses must be provided within two months from the date on which the notice was issued, or such later date as specified by the OEP. This means that, although the OEP can specify a response date that gives a public authority longer than the standard period of two months to respond if it sees fit (for example, if it accepts that the matter is exceptionally complex, or if the ability of the public authority to respond is constrained by an election period), it must allow notice recipients at least this amount of time.

272 Under subsection (6), the OEP may withdraw an information notice or issue multiple information notices in relation to the same suspected infringement.

273 Under subsection (7), where the OEP plans to issue an information notice in relation to an alleged failure to comply with environmental law relating to greenhouse gas emissions, the OEP must first notify the Committee on Climate Change and provide it with appropriate information. “Emissions of greenhouse gases” is defined in the Climate Change Act 2008.



\* e.g. A complaint to the OEP, a whistle-blower, an implementation report on environmental legislation from a public authority, etc.

**Figure 3: Summary of enforcement process**

**Clause 31: Decision notices**

274 This clause provides for the OEP to take further enforcement action in the form of a “decision notice”.

275 The OEP may issue a decision notice under subsection (1) if it is satisfied, on the balance of probabilities, that the public authority has failed to comply with environmental law, and it considers that the failure is serious. As with an information notice, the question of

seriousness will be one for the OEP to consider on the basis of its own, published complaints and enforcement policy (see clause 20). The “balance of probabilities” test means that the OEP must consider it more likely than not that a public authority has failed to comply with environmental law. Note that this test only relates to the question of when the OEP is permitted to serve a decision notice, and does not create a requirement to issue such a notice in any particular case where the test is satisfied.

276 As defined in subsection (2), decision notices are a means by which the OEP can take action against the public authority failing to comply with environmental law, by setting out the failure and the suggested steps for the public authority to take in relation to the failure. The potential actions that the OEP can request will be specific to each case. For instance, the OEP could recommend that the public authority prepare a new, or updated strategy, or undertake remedial action in the event that environmental harm has been done. Other possible steps could include asking an authority to cancel, amend or re-take a decision (for example to designate a certain area as a protected site), or take steps to pursue a particular environmental quality standard or other environmental outcome as required. Subsection (2) does not constrain the types of steps that the OEP can specify, and provides expressly that they may include steps designed to remedy, mitigate or prevent reoccurrence of the failure.

277 The public authority that receives a decision notice is not under a legal duty to carry out the steps detailed in the notice. Under subsection (3), the public authority is required to respond to a decision notice either two months after the notice was given, or by a date specified in the notice, whichever is later. The written response from the public authority must state whether the public authority agrees that there has been a failure to comply with the law, and whether the steps set out in the notice will be followed, as specified in subsection (4). This subsection also requires the public authority to specify any other alternative steps that will be taken in relation to the alleged failure described in the notice. This reflects the possibility that the public authority might accept that it had failed to comply with environmental law, but might wish to propose alternative or additional steps to remedy, mitigate or prevent reoccurrence of the failure, compared to those specified in the OEP’s decision notice.

278 Subsection (5) provides that the OEP may withdraw a decision notice after it has been issued (paragraph (b)), and also requires that the OEP must have previously issued at least one information notice relating to the alleged failure of the public authority to comply with environmental law before a decision notice is issued (paragraph (a)). The OEP may withdraw a decision notice if, for example, it has served such a notice where it considers there has been a failure to comply with the law but later considers that there had been no such failure. In this case, it would be desirable to withdraw the notice rather than require a public authority to respond to a notice that the OEP no longer considers is relevant or necessary.

### Clause 32: Linked notices

279 This clause deals with the scenario in which the OEP considers that a notice should be issued to more than one public authority concerning the same or similar breaches of environmental law. In such a scenario, the OEP could issue information or decision notices in parallel to both (or all) parties, and determine that these are “linked notices” under subsection (1). Public authorities may make joint or separate responses to linked notices.

280 The OEP may wish to issue linked notices in various circumstances, including for example:

- If a serious breach occurred for which a local authority was immediately responsible in the local area, but in relation to which a Secretary of State also had national duties, it might be appropriate for the OEP to commence enforcement proceedings (via notices) against both the local authority in question and the Secretary of State.
- If a cross-boundary incident occurred where two or more local authorities failed to properly carry out their obligations under environmental law, the OEP might wish to issue linked notices to both or all of the authorities in question. For instance, if during the course of a major, cross-boundary development project it was found that two or more local authorities had neglected their responsibilities under Part IIA of the Environmental Protection Act 1990 to identify contaminated land and serve remediation notices where appropriate, leading to improper development of the site with potential implications for human health and the environment, it may be appropriate for the OEP to take action against both/all authorities in parallel using linked notices.

281 Subsection (2) provides that the relevant Minister may also request that the OEP designates information or decision notices as linked, and that the OEP must have regard to such a request. This does not mean that the OEP is obliged to comply with the Minister's request, but it must be able to demonstrate it has appropriately considered it. The meaning of "the relevant minister" is as defined in clause 28(11).

282 Subsection (3) sets out that copies of any linked notices and any relevant correspondence between the OEP and the recipient of such notices, or the relevant Minister notified in the case, must be provided to notice recipients. Subsection (4) sets out what will be considered as "relevant" correspondence in such cases. To be relevant, correspondence must relate to a linked notice, but not be connected with an environmental review, or other legal proceedings such as a judicial review, or sent to fulfil the requirements of clause 35(1)(a) or 35(1)(b).

283 Subsection (5) provides that the obligations set out under subsection (3) to provide copies of notices or correspondence will not apply where the OEP considers that to do so would not be in the public interest. For instance, where correspondence regarding a notice contained information pertaining to matters of national security, it may not be in the public interest to share this with other parties.

### Clause 33: Environmental review

284 This clause provides for the OEP to bring legal proceedings against a public authority regarding an alleged breach of environmental law. These proceedings are through a mechanism in the Upper Tribunal called "environmental review".

285 Subsection (1) sets out that the OEP may apply to the Upper Tribunal for an environmental review regarding an alleged breach where it has given a decision notice to a public authority. The OEP therefore cannot bring such a review unless it has gone through this earlier notice stage, which in turn must be preceded by the service of an information notice (see clause 30). This process is intended to ensure that cases dealt with through this bespoke process necessarily involve substantial pre-litigation stages, with a view to resolving cases without legal proceedings where possible.

286 Subsection (2) defines an environmental review as a review of the conduct described in a decision notice as a failure to comply with environmental law (paragraph (a)) or further alleged misconduct of the public authority that takes place after the OEP has issued its

decision notice but is similar to the conduct described in that notice (paragraph (b)). Subsection (2)(b) addresses a scenario in which a public authority could respond to a decision notice by accepting it has failed to comply with environmental law in the manner described in the notice and committing to remedial action, but then does not take the steps needed to address the failing. In this scenario, subsection (2)(b) provides that the OEP may apply to the courts for a review that covers similar conduct that occurred after the giving of the decision notice, without having to serve another decision notice.

287 Subsection (3) sets restrictions for when an application for an environmental review may be made. Subsection (3)(a) sets out that the OEP may not make an application for environmental review before the end of a period of two months, or such longer period as specified in the notice, in which the public authority in question is required to respond to a decision notice under clause 31(3). The OEP may only make an application before this time if the public authority has already responded to the decision notice. This is to ensure that the OEP is able to consider the authority's response to the decision notice before deciding whether to proceed to applying for an environmental review.

288 Subsection (3)(b) provides that the OEP may not apply for an environmental review before the expiry of any time limit in which legal proceedings (judicial review or other similar legal proceedings) in relation to the same conduct could be initiated. This is to ensure that environmental review does not pre-empt other legal proceedings. The timescales for the OEP's enforcement process mean that the period within which judicial review or similar legal proceedings can be brought will normally have passed before the OEP can apply for an environmental review. For example, where a decision is challenged through judicial review, the application for review must be made promptly and within six weeks for planning cases and three months in other cases. The applicable legislation provides a margin of discretion for the courts to accept judicial review applications outside these time limits in exceptional circumstances. However, the provision in subsection (3)(b) necessarily only captures any specific time limit expressed in law, rather than any time limits that have been extended by the discretion of the court in an individual case.

289 Subsection (4) provides that any restriction in other legislation on questioning the conduct of a public authority in legal proceedings does not apply to an environmental review. This provision is made to ensure that the OEP's route of challenge can exist alongside other pre-existing routes of challenge. In some cases, the relevant legislation may provide that the courts can only entertain challenges against those decisions in the form of a judicial review – for example, section 13 of the Planning Act 2008. Furthermore some existing statutory routes of challenge specifically exclude any other route of challenge – for example, section 284(1)(b) of the Town and Country Planning Act 1990. However, the intention is that these restrictions should not preclude the OEP bringing a challenge.

290 Subsection (5) establishes what the Upper Tribunal must determine in an environmental review, namely whether the public authority in question has failed to comply with environmental law. The subsection provides that the Upper Tribunal must determine whether there has been a failure applying judicial review principles. The Upper Tribunal will consider whether the decision maker has made an error in law, whether the decision was reasonable, and whether the process was fair.

291 Subsection (6) provides that, if the Upper Tribunal finds on an environmental review that a public authority has failed to comply with environmental law, it must make a statement confirming this, referred to as a "statement of non-compliance".

- 292 Subsection (7) sets out that, whilst the statement of non-compliance confirms that the Upper Tribunal has found that the public authority in question has failed to comply with environmental law, it does not in itself invalidate the decision of the public authority in question. For example, if the grant of a planning permission is challenged through environmental review and the Upper Tribunal finds it to be unlawful and makes a statement of non-compliance, the planning permission granted would nevertheless remain valid. This is the case unless the Tribunal decides that it is appropriate to impose further remedies such as a quashing order, and the conditions for doing so were met.
- 293 Where the Tribunal issues a statement of non-compliance, this would not prevent or oblige the Secretary of State, or other relevant decision-maker, from using existing discretionary powers in relation to that decision (that is, to modify or revoke their original decision).
- 294 Subsection (8) provides that, if the Upper Tribunal makes a statement of non-compliance, it will have the full suite of remedies, other than damages, available to it as on a judicial review, but only if it is satisfied that granting such a remedy would have neither of the effects described in paragraphs (a) and (b). These remedies include a declaration, quashing, prohibiting and mandatory orders, and injunctions. Damages are not available in environmental reviews because the OEP, as the only applicant, would have no cause to seek compensation for damages personally suffered where the claimant in a traditional judicial review might. As such, this remedy is unnecessary.
- 295 The provision that the Upper Tribunal may only grant a remedy if it is satisfied that neither of the effects described in paragraphs (a) or (b) would occur as a result, recognises the fact that the environmental review will take place after the expiry of judicial review time limits and that prejudice may result from quashing the decision at this later date. This provision allows third parties reliant on decisions involving the application of environmental law to have confidence that those decisions will not be quashed or other judicial review relief granted outside the normal judicial review time limits, if substantial prejudice, substantial hardship or detriment to good administration would be likely to result. If these effects are likely to result from the granting of the proposed remedy, the Tribunal may not grant the remedy.
- 296 Paragraph (a) of subsection (8) requires the Upper Tribunal to be satisfied that a remedy would not be likely to substantially prejudice or cause substantial hardship to a third party (a person other than the OEP or the defendant) before granting it. Expenditure already spent in reliance of the decision in question may be relevant to the question of substantial prejudice or hardship, along with potentially the recoverability of the sums and the financial means of the third party.
- 297 Paragraph (b) of subsection (8) requires that the Upper Tribunal also be satisfied that a remedy it grants would not be detrimental to good administration. This provision recognises the need to protect the orderly implementation of properly-reached decisions, and recognises that finality in decision-making is important for both public authorities and the public.
- 298 Subsection (9) sets out that the Upper Tribunal, subject to the conditions set out in subsection (8), must apply the usual principles applied in a judicial review when considering whether to grant a remedy in an environmental review. Subsection (9) also provides that any remedies the Tribunal does grant will have effect, and be enforceable, in the same manner as remedies granted by, for instance, the High Court. This means that if the Tribunal finds that a public authority has failed to comply with environmental law and imposes a remedy to address the failing, should the authority fail to comply with any

resulting court order it could be subject to contempt of court proceedings brought by the OEP.

299 Subsection (10) requires a public authority that has been the subject of an environmental review in which a statement of non-compliance has been issued by the Upper Tribunal (and not overturned on appeal) to publish a statement. This statement should describe any steps the authority intends to take based on the outcome of these proceedings. For example, if the Tribunal were to agree with the conclusions outlined by the OEP in its decision notice, and make an order granting a statement of non-compliance and specified remedies, the public authority's statement could include details of how it intends to ensure the remedies are given effect, and/or details of how it will ensure future breaches are avoided. Where a statement of non-compliance is not issued, the public authority is not required to publish a statement, but would not be prevented from doing so if it so wished.

300 Subsection (11) sets out that a statement under subsection (10) must be published within two months of the conclusion of the review proceedings. This means that the statement should be published after the final disposal of proceedings, meaning after judgment has been delivered on the final issue in the case, including any subsequent appeal proceedings.

301 Subsection (12) defines several terms used in this clause.

#### Clause 34: Judicial review: powers to apply to prevent serious damage and to intervene

302 This clause makes provision for the OEP to intervene in third party judicial reviews and statutory reviews where appropriate.

303 Subsection (1) provides that the OEP may apply for judicial review, or a statutory review (a legal challenge procedure similar to judicial review, but under specific legislation – for instance, the Town and Country Planning Act 1990 procedure by which an applicant may challenge a decision of the Secretary of State), of a public authority's conduct, whether or not it has issued an information or decision notice, if it considers that the public authority in question has committed a serious breach of environmental law, and, under subsection (2), if it considers it is necessary to do so to prevent or mitigate serious damage to the natural environment or human health. The effect of these provisions is that the OEP could only make an application for judicial review (or statutory review), rather than proceeding according to its normal enforcement procedure (information notice; decision notice; environmental review) if doing so was "necessary". This could be the case if for example the serious damage would have already happened by the time that the normal enforcement procedure reached the Upper Tribunal and a more urgent court judgment was needed. To give all parties certainty, the OEP will be required to set how it intends to determine whether damage is serious for the purpose of this clause in its enforcement policy, as part of its strategy (see clause 20(6)(b)). Subsection (3) disapplies section 31(2A), (3C) and (3D) of the Senior Courts Act 1981 in relation to judicial review applications under subsection (1) of this clause in England and Wales, which limit the granting of permission for judicial review, or relief "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". This is because it is highly likely that the outcome for the OEP itself would not have been different if the public authority had behaved differently.

304 Subsection (4) provides that a public authority which was the subject of a judicial review, or statutory review, commenced by the OEP under this clause must publish a statement

within two months of the conclusion of proceedings (including any appeal). This statement must set out any steps the public authority intends to take as a result of the proceedings.

- 305 Subsection (5) provides that the OEP may apply to participate in third party judicial review or statutory review proceedings (including appeal proceedings) against a public authority concerning an alleged failure to comply with environmental law, as defined under section 40. This could include scenarios where the OEP agrees that the public authority has failed to comply with environmental law, but also where it may disagree that this is the case; the OEP may have useful expertise to contribute in each case.
- 306 Subsection (6)(a) provides that in this clause reference to “an application for judicial review” includes an application to the High Court, or the Court of Session in Scotland.
- 307 Subsection (6)(b) provides that in this clause a “statutory review” means a claim for such a review under the provisions set out in sub-paragraphs (i) to (iv).

### Clause 35: Duty of the OEP to involve the relevant Minister

- 308 This clause deals with how the OEP should operate in situations where the subject of an information or decision notice under clauses 30 and 31 respectively, or of an application for environmental review under clause 33, is not a Minister of the Crown.
- 309 Where the recipient of an information or decision notice is not a Minister of the Crown, subsection (1)(a) requires the OEP to provide a copy of the notice to the relevant Minister, as well as a copy of any correspondence between the OEP and the public authority concerned that relates to the notice. This is to ensure that the government remains informed about the matter and is able to contribute if appropriate. Paragraph (b) of this subsection also requires that the OEP must provide the recipient of a notice with a copy of any correspondence it has with the relevant Minister regarding the notice. In each case, the OEP is not required to share correspondence which is sent as part of these requirements. (In other words, it would not be required to share copies of copies of notices, or of correspondence which relates to notices by virtue of this clause.)
- 310 Subsection (2) provides that obligations to provide copies of notices or correspondence under subsection (1) will not apply where the OEP considers that to do so would not be in the public interest.
- 311 Where the OEP makes an application for environmental review, judicial review, or statutory review against a public authority which is not a Minister of the Crown, subsection (3)(a) provides that the OEP must provide the relevant Minister with a copy of the application. Subsection 3(b) additionally requires the OEP to provide the Minister with a statement which sets out whether the OEP considers the Minister should participate in the review proceedings, for example as an interested party. The OEP may consider such Ministerial involvement appropriate in particular cases, even where the Minister is not the defendant (that is, the party responsible for compliance with the environmental law in question), for various reasons. For instance, delivery bodies may adopt an approach to implementation influenced by factors or messaging emanating from central government. To this extent, it may be helpful for Ministers to provide input to the proceedings.
- 312 Ministerial involvement in proceedings where appropriate would have similarities to EU infraction cases, where the action is brought against the UK or other Member State government regardless of which particular public authority is at fault. Subsection 3(b) essentially therefore provides for the OEP to offer a formal statement of its view as to the desirability of the Minister’s participation, for the Minister’s consideration. The OEP

cannot require the Minister's participation under this clause. Further details concerning the addition of parties to legal proceedings in environmental reviews brought by the OEP will be a matter for the rules of the Upper Tribunal.

313 Throughout this clause, "the relevant Minister" has the meaning given in clause 28(11).

### Clause 36: Public statements

314 This clause deals with requirements on the OEP to publish statements when it takes certain enforcement actions.

315 Subsection (1) provides that the OEP must publish a statement, for example in the form of a press release, whenever it serves an information or decision notice, applies for environmental review, judicial review, or statutory review, or applies to intervene in judicial review. This subsection also sets out the information that this statement must contain.

316 Subsection (2) provides that the OEP does not need to publish a statement if it considers that it would not be in the public interest to do so. For example, the OEP might judge it to be not in the public interest to publish a statement about its enforcement activities that would prejudice the protection of personal or confidential data.

317 The provisions of this clause are intended to provide an appropriate degree of transparency as regards the enforcement action that the OEP is taking and against whom. The European Commission also publishes press statements at key stages of the infraction process. The clause only requires the OEP to make a statement that it has issued an information or a decision notice, describing the failure or alleged failure and other appropriate information rather than requiring publication of the actual notices.

### Clause 37: Disclosures to the OEP

318 To assist the OEP in carrying out its investigatory functions, subsection (1) of this clause enables persons whose functions include functions of a public nature to provide information to the OEP notwithstanding any obligation of secrecy, either statutory or otherwise, when that information is in connection with an investigation under clause 28, an information notice or a decision notice.

319 Subsection (2) provides for particular circumstances in which a person is not required to provide the OEP with information.

320 This disapplication of obligations of secrecy is limited: it applies only to the provision of information to the OEP, and not to anyone else, and it applies only under the conditions set out in subsection (1).

321 Subsection (3) makes similar provision for a relevant ombudsman. The meaning of a "relevant ombudsman" is set out in clause 20(9).

322 Subsection (4) excludes data protection legislation from the provisions in this Part of the Bill.

### Clause 38: Confidentiality of proceedings

323 This clause deals with the circumstances in which the OEP and public authorities may or may not disclose information regarding an investigation whilst the OEP is carrying out enforcement proceedings. The provisions have been designed to provide adequate protection of confidential information during those enforcement proceedings, whilst ensuring compliance with the pillar of the Aarhus Convention that is concerned with access to environmental information, and with Council Directive 2003/4/EC on public access to environmental information. The Directive is implemented in England, Wales and



Northern Ireland by the Environmental Information Regulations 2004 (EIR) and in Scotland by the Environmental Information (Scotland) Regulations 2004. The only way in which the provisions affect the application of the EIR is in the manner set out in subsection (7): that is, that information mentioned in subsections (1) and (3) is capable of attracting the exception relating to the confidentiality of proceedings of a public authority where such confidentiality is provided for by law.

- 324 Subsection (1)(a) sets out that the OEP must not disclose information which has been provided by a public authority as a response to a request for information from the OEP in an information notice (as provided for in clause 30(3)(b)), or otherwise obtained by the OEP on the basis of the duty on public authorities to cooperate, provided for in clause 22(1)). Under paragraph (b) of this subsection, the OEP cannot disclose any correspondence between the OEP and the recipients of information or decision notices that relates to those particular notices, including the information and decision notices themselves. Circumstances where this does not apply, and the OEP is able to disclose the information, are covered under subsection (2).
- 325 Under subsection (3), a public authority in receipt of an information or a decision notice may not disclose the notice or any correspondence between the OEP and that, or any other, public authority relating to that notice. Subsection (4) sets out the circumstances where the restriction in subsection (3) does not apply to a disclosure. This relates to cases such as where consent has been obtained, where the disclosure is required for the purposes of an investigation under clause 28, where disclosure is required to be able to respond to an information or decision notice, or where it is connected to an environmental review or judicial review proceedings.
- 326 Subsection (5) sets out that the OEP can only give its consent for disclosure of an information or a decision notice when it has concluded it intends to take no further steps under this Chapter.
- 327 Subsection (6) ensures that, if consent has been requested by a public authority, the OEP cannot withhold that consent for disclosure of correspondence if it has concluded it intends to take no further steps under this Chapter.
- 328 Subsection (7) provides that information referred to in subsection (1) and held by the OEP, or subsection (3) and held by a public authority, is to be regarded as “environmental information” in accordance with the EIR and held, for the purposes of these regulations, in connection with confidential proceedings. Whilst enforcement proceedings by the OEP are ongoing, the information referred to in subsection (1) will fall within an exception in the EIR that provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law.

### **Chapter 3: Interpretation of Part 1**

- 329 There is no universal definition of “the environment”. Although a diverse array of definitions exists, each has been designed to describe the environment in a particular context, or from a specific perspective. A clear definition, therefore, is needed to determine the scope of the OEP. Clauses 39 and 40 define the “natural environment” and “environmental law” for the primary purpose of determining the range of legislation that falls within the remit of the OEP, and with respect to which the OEP can exercise its scrutiny, advice, complaints and enforcement functions. The definitions in clauses 39 and 40 are not intended to have any application beyond the interpretation of this Bill.
- 330 The definition of the “natural environment” is also relevant to the minimum scope of the

environmental improvement plans.

#### Clause 39: Meaning of “natural environment”

- 331 In setting out the matters that are primarily the subject of environmental law, clause 39 uses the term “natural environment”. The definition provided in the clause includes living elements of the environment, namely plants, wild animals, other living organisms (paragraph (a)), and their habitats (paragraph (b)). However, it is not intended to include domesticated animals such as livestock and pets. The definition also includes non-living elements, namely air, water and land (paragraph (c)). Buildings and other structures are excluded from the meaning of “land”.
- 332 The clause also sets out that systems, cycles and processes through which the elements listed above interact are also included within this definition of the natural environment. This therefore includes ecosystems, and hydrological and geomorphological processes.
- 333 This definition covers the marine as well as the terrestrial environment. Moreover, the expression “water” will include seawater, freshwater and other forms of water, while “air” will include the atmosphere (including, for example, the ozone layer) and “land” will include soil, geological strata and other features.

#### Clause 40: Meaning of “environmental law”

- 334 This clause deals specifically with the definition of “environmental law”, and therefore the scope of the OEP’s functions that depend upon this definition.
- 335 Subsection (1) defines “environmental law”, for the purposes of this Part, as any legislative provision other than a devolved legislative provision (defined in subsection (4)), to the extent that the provision is mainly concerned with one of the matters described in subsection (2) and is not explicitly excluded under subsection (3).
- 336 Subsection (1) uses the term “legislative provision”, which is a reference to UK legislation, and can cover specific sections or subsections of an Act, regulations or other forms of legislation. As such, the effect of this subsection is that the OEP will not have a statutory function to assess compliance with, or otherwise involve itself in matters concerning purely international environmental law. Rather, its remit will be limited to UK legislation that falls under the definition of environmental law, including legislation that implements international commitments.
- 337 The definition of environmental law applies at the level of legislative provisions (that is, the whole or any element of an Act or regulations). This means that, even if most of an Act or set of regulations does not meet these conditions, to the extent that any specific provisions in the Act or regulations do meet the conditions they should be considered as “environmental law”.
- 338 When reading the matters set out under subsection (2), reference should be made to the definition of the “natural environment” in clause 39. These matters are: protecting the natural environment from the effects of human activity; protecting people from these effects; maintaining, restoring or enhancing the environment; and monitoring, advising or reporting on the above points.
- 339 The only matters explicitly and expressly excluded from the definition of environmental law are those which are concerned with an excluded matter listed under subsection (3), and devolved legislative provisions as defined in subsection (4). Unless so expressly excluded, any other law can be considered to determine whether individual legislative provisions are “mainly concerned” with an environmental matter. This does mean that within broadly environmental policy areas, whilst many provisions may meet these

criteria, there may be certain provisions that will not be mainly concerned with an environmental matter, and therefore not constitute environmental law.

340 For example, the Forestry Act 1967 contains examples of provisions that would be considered to be mainly concerned with an environmental matter, and therefore constitute environmental law, as well as provisions which would not. Section 1(3A) of the Forestry Act 1967, for instance, places a duty on the appropriate authority to endeavour to achieve a balance between its functions in relation to afforestation and timber supply and production, and “the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest”. As this places a duty on a public authority concerning the conservation of the natural environment, this provision would fall within scope. However, some other provisions within this Act would not, such as section 1(2), which charges the appropriate forestry authority “with the general duty of promoting the interests of forestry, the development of afforestation and the production and supply of timber and other forest products”. This provision is mainly concerned with the promotion of the forestry sector and the production and supply of timber, rather than an environmental matter as listed in subsection (2), and as such would not be considered to fall within the definition of environmental law.

341 Another example is planning legislation. Whilst provisions concerning environmental impact assessment and strategic environmental assessment are clearly concerned with an environmental matter as set out in subsection (2), and therefore will fall within the definition of environmental law, most other areas of planning legislation are not mainly concerned with an environmental matter, and therefore will not fall within the definition.

342 It will be for the OEP to assess whether or not it considers a legislative provision to fall under the definition on a case by case basis when determining whether or not it has legal powers to act in that area. In most cases, it is expected that the answer to this question will be clear, and agreed by all parties. However, there may be cases of uncertainty or disagreement, and in these instances it may ultimately be for the courts to decide whether a specific provision falls within the definition or not.

343 Subsection (3) sets out matters that are explicitly excluded from the definition of environmental law:

- Disclosure of or access to information. These matters are excluded under paragraph (a) in order to avoid overlap between the remit of the OEP and that of the Information Commissioner’s Office, which oversees and where necessary takes action to enforce public authorities’ compliance with the Environmental Information Regulations.
- The armed forces or national security (paragraph (b)).
- Legal provisions concerning taxation (paragraph (c)). The term “taxation” in this context refers to taxes in a legal sense, and therefore does not include other regulatory schemes that involve fees and charges for purposes other than taxation, such as the plastic bag charge or the imposition of fees to cover the cost of a regulatory regime. Such schemes are not automatically excluded from the Bill’s definition of “environmental law”.
- Paragraph (c) also excludes provisions concerning spending or the allocation of resources within government from the definition of “environmental law”. As

such, all finance acts are excluded.

344 Subsection (4) defines what is meant by “devolved legislative provision” as any provision which is contained in or created by legislation of the three devolved Assemblies and Parliaments, or which otherwise falls within their legislative competence.

345 Subsection (5) provides that the Secretary of State may use secondary legislation to clarify legislative provisions which are or are not environmental law. Provision in this way may be necessary in the light of experience, and could be made either by describing types of legislation in a similar way to the definitions in this clause, or by identifying specific provisions. Subsection (6) requires that the Secretary of State must consult the OEP, and any other persons the Secretary of State considers appropriate, before using this power to specify provisions.

346 Subsection (7) provides that any such provision made under subsection (5) would be made through a statutory instrument subject to the affirmative resolution procedure. This means it must be laid before and approved by a resolution of each House of Parliament.

#### **Clause 41: Interpretation of Part 1: general**

347 This clause defines various terms used throughout Part 1.

## **Part 2: Environmental Governance: Northern Ireland**

#### **Clause 42: Improving the natural environment: Northern Ireland**

348 Clause 42 introduces Schedule 2, which includes provision for environmental improvement plans and policy statements on environmental principles in Northern Ireland.

#### **Clause 43: The Office for Environmental Protection: Northern Ireland**

349 Clause 43 introduces Schedule 3, which makes provision for the functions of the OEP in terms of its activities in Northern Ireland, as well as amendments to this Bill to reflect those functions.

## **Part 3: Waste and Resource Efficiency**

#### **Clause 44: Producer responsibility obligations**

350 Clause 44 introduces Schedule 4, which amends sections 93 and 94 of the Environment Act 1995. Section 93 confers a power to make regulations to impose producer responsibility obligations on specified persons and in relation to specified products or materials. Section 94 makes further provision in relation to such regulations.

#### **Clause 45: Producer responsibility obligations: Northern Ireland**

351 Clause 46 introduces Schedule 5, which amends provisions in the Producer Responsibility Obligations (Northern Ireland) Order 1998. Schedule 5 amends Articles 2, 3, 4, 6 and 7, which allows regulations to be made imposing producer responsibility obligations on specified persons and in relation to specified products or materials in Northern Ireland. The amendments to the 1998 Order mirror the amendments made to sections 93 to 95 of the Environment Act 1995 by Schedule 4.

#### **Clause 46: Producer responsibility for disposal costs**

352 Clause 46 introduces Schedule 6, which allows the relevant national authority to make regulations that require those involved in manufacturing, processing, distributing or supplying products or materials to meet, or contribute to, the disposal costs of those products.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

353 Subsections (2) and (3) sets out who the “relevant national authority” is. This is the Secretary of State in relation to England, the Scottish Ministers in relation to Scotland, the Welsh Ministers in relation to Wales, and the Department of Agriculture, Environment and Rural Affairs in relation to Northern Ireland. The Secretary of State may make regulations on behalf of Wales, Scotland, or Northern Ireland, but only with the relevant Minister’s or Department’s consent.

354 Subsection (4) makes provision for regulations made under Schedule 6 to be subject to the affirmative resolution procedure.

#### Clause 47: Resource efficiency information

355 This clause gives effect to Schedule 7, which gives the relevant national authority the power to make regulations that set requirements for manufacturers and producers to provide information about the resource efficiency of their products. The purpose of the power is to enable the regulation of products that have a significant impact on natural resources at any stage of their lifecycle, with the object of reducing that impact primarily through ensuring consumers are supplied with information about the resource efficiency of those products in order to drive more sustainable consumption. Regulations may impose requirements on any person connected with a product’s supply chain, and in relation to any type of product other than some specified exceptions.

356 Subsection (1) sets out that the Schedule is divided into two parts. Part 1 gives power to the relevant national authority to make regulations about requiring resource efficiency information. Part 2 gives the relevant national authority power to make regulations about the enforcement of these information requirements.

357 Subsection (2) defines the “relevant national authority” in each territory.

358 Subsection (3) makes clear that regulations made under Schedule 7 by either Welsh Ministers, Scottish Ministers or Department of Agriculture, Environment and Rural Affairs can only contain provisions that are within their legislative competence.

359 Subsection (4) makes clear that the Secretary of State must obtain the consent of the appropriate national authority before making provisions in regulations that fall under the legislative competence of another national authority.

360 Subsection (5) states that regulations under Schedule 7 are subject to affirmative procedure.

361 This clause and Schedule 7 extend and apply to England and Wales, Scotland and Northern Ireland.

#### Clause 48: Resource efficiency requirements

362 This clause gives effect to Schedule 8, which gives the relevant national authority the power to make regulations that set resource efficiency requirements that products are required to meet. The purpose of the power is to enable the regulation of products that have a significant impact on natural resources at any stage of their lifecycle, with the object of reducing that impact primarily through setting requirements relating to durability, reparability and recyclability, and the recycled content of products and materials. Regulations may impose requirements on any person connected with a product’s supply chain, and in relation to any type of product other than some specified exceptions.

363 Subsection (1) sets out that the Schedule is divided into two Parts. Part 1 gives power to the relevant national authority to make regulations about resource efficiency standards. Part 2 will give the relevant national authority power to make regulations about the

enforcement of these standards.

364 Subsection (2) defines the “relevant national authority” in the same way as in clause 47.

365 Subsection (3) makes clear that regulations made under this Schedule by either Welsh Ministers, Scottish Ministers or the Department of Agriculture, Environment and Rural Affairs can only contain provisions that are within their legislative competence.

366 Subsection (4) makes clear that the Secretary of State must obtain the consent of the appropriate national authority before making provisions in regulations that fall under the legislative competence of another national authority.

367 Subsection (5) states that regulations made under this Schedule are subject to the affirmative procedure.

368 This clause and Schedule 8 extend and apply to England and Wales, Scotland and Northern Ireland.

### Clause 49: Deposit schemes

369 Clause 49 and Schedule 9 enable the relevant national authority – namely, the Secretary of State, in relation to England, Welsh Ministers, in relation to Wales, and the Department of Agriculture, Environment and Rural Affairs in Northern Ireland, in relation to Northern Ireland – to make regulations establishing deposit schemes. Subsections (3) and (4) allow the Secretary of State to make regulations on behalf of Wales and Northern Ireland, subject to their consent. Subsections (5) and (6) outline the parliamentary procedure for regulations establishing a deposit scheme. Regulations are subject to the negative resolution procedure, except in the below cases when they are subject to the affirmative resolution procedure:

- the regulations establish a deposit scheme for the first time;
- the regulations are the first to provide for enforcement of a deposit scheme;
- the regulations create a criminal offence;
- the regulations provide for new civil sanctions; or
- the regulations increase the amount or the maximum amount of a fine or monetary penalty, or change the basis on which an amount of maximum amount of a fine or monetary penalty is to be determined.

370 Subsection (7) and paragraph 1(2) of the Schedule set out what a deposit scheme is. This is a scheme under which a person supplied with a deposit item by a scheme supplier (this might be a producer, retailer or distributor) by way of sale or in connection with the supply of goods or services pays the supplier an amount (the deposit) and a person who gives a deposit item to a scheme collector (this might be a retailer or other return point) is entitled to be paid a refund in respect of that item.

### Clause 50: Charges for single use plastic items

371 This clause introduces Schedule 10 and allows for the making of regulations about charges for single use plastic items.

372 Subsection (2) defines who the relevant national authority is for the purposes of making regulations under the Schedule; this is the Secretary of State, in relation to England, Welsh Ministers, in relation to Wales and the Department of Agriculture, Environment and Rural Affairs in Northern Ireland, in relation to Northern Ireland.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

373 Subsection (3) sets out the circumstances in which the affirmative procedure applies to the making of regulations (namely, where the first set of regulations is made by the relevant national authority under the Schedule, where the regulations contain provision about charging for a new item, where the regulations contain provisions imposing or providing for the imposition of new civil sanctions, or where the regulations increase the maximum amount of a monetary penalty or change the basis on which it is to be determined.) Otherwise, regulations under the Schedule are subject to the negative resolution procedure.

#### Clause 51: Charges for carrier bags

374 This clause amends Schedule 6 of the Climate Change Act 2008 (“the 2008 Act”) by inserting a new paragraph 6A. New paragraph 6A makes provision for regulations made under Schedule 6 by the Secretary of State in relation to England, and the Department of Agriculture, Environment and Rural Affairs in Northern Ireland in relation to Northern Ireland, to require sellers of single use carrier bags to register with an administrator. The regulations may also make provision about applications for registration, the period of registration, the cancellation of registration, and the payment of registration fees, including the amount.

375 Schedule 6 of the 2008 Act contains enabling powers conferred on the relevant national authority to make regulations about charges for single use carrier bags. Section 77(3) of the 2008 Act defines the “relevant national authority” as the Secretary of State in relation to England, the Welsh Ministers in relation to Wales, and the Department of the Environment in Northern Ireland in relation to Northern Ireland. However, new paragraph 6A does not apply to regulations made by Welsh Ministers in relation to Wales.

#### Clause 52: Separation of waste: England

376 Clause 52 concerns the separation of waste for recycling. It amends the Environmental Protection Act 1990, in particular replacing the current section 45A and inserting new sections 45AZA to 45AZG, and the Environment Act 1995.

377 Subsection (2) inserts additional definitions into section 30 of the Environmental Protection Act. These define “English waste disposal authority” and “English waste collection authority” as those whose area is in England. A waste collection authority is a term applied to those collecting waste on behalf of local authorities (and is defined in section 30(3) of the Environmental Protection Act). Given that section 45A duties apply to arrangements made by English waste collection authorities only, this has the effect of limiting the changes in new section 45A of the Environmental Protection Act to waste collection authorities within England only.

378 Subsection (3) amends section 33ZA of the Environmental Protection Act, which relates to fixed penalty notices, to omit the definition of “English waste collection authority”. This is because the definition is now provided in the amended section 30 of the Environmental Protection Act.

379 Subsection (4) amends the Environment Protection Act to provide for separate collection of waste in England. It replaces section 45A with new sections 45A to 45AZG.

#### **New section 45A England: separate collection of household waste**

380 New section 45A concerns separate collection arrangements for household waste for English waste collection authorities. It only applies where a waste collection authority is required to collect household waste in its area under section 45(1)(a) of the Environmental Protection Act. It does not apply if new section 45AZA applies, which relates to the collection of household waste from non-domestic properties.

381 Subsection (2) states that arrangements for the collection of household waste must meet the conditions in subsections (3) to (8), unless there is a relevant exemption in regulations made under new section 45AZC. These first two conditions (set out in subsections (3) and (4)) require that recyclable household waste must be collected separately from other household waste for recycling or composting. In other words, recyclable waste must be separated from waste that it is destined for incineration or landfill so that the separately collected waste can be recycled or composted. The third condition (set out in subsection (5)) requires that the different recyclable waste streams are collected separately from each other unless subsection (6) applies.

382 Subsection (6) explains that two or more recyclable waste streams may be collected together if it is not technically or economically practicable to collect them separately from each other, or if collecting the waste separately has no significant environmental benefit. In other words, there are circumstances where different recyclable waste streams may be collected together. These circumstances will be set out in statutory guidance, which will be subject to consultation.

383 Subsection (7) makes clear that under no circumstances may the dry recyclable waste streams (glass, metal, plastic, paper and card) be mixed with the other recyclable waste streams (food and garden waste). This is to minimise or prevent contamination of dry recyclable materials by food or garden waste.

384 Subsection (8) stipulates that food waste must be collected from households at least once a week by waste collection authorities.

385 Subsection (9) inserts a new definition of “recyclable household waste”. This is defined as household waste (for which see section 75(5) of the Environmental Protection Act) that falls within any of the recyclable waste streams stated in subsection (10), which is of a description specified in regulations. The regulations will provide detail about what materials within a recyclable waste stream are suitable for recycling. Some materials may on the face of it fall within a subsection (10) waste stream, but will not in fact be suitable for recycling or composting.

386 Subsection (10) states that the recyclable waste streams to be collected separately from other household waste are glass, metal, plastic, paper and card, food waste and garden waste.

### **New section 45AZA England: separate collection of household waste from relevant non-domestic premises**

387 Subsection (1) applies to arrangements to collect household waste from non-domestic premises either by persons acting in the course of business, such as a commercial waste collector, or by persons exercising a public function, such as a waste collection authority acting under section 45(1)(a) of the Environmental Protection Act. Non-domestic premises are defined in subsection (11) as residential homes, universities, schools, nursing homes and hospitals. The Secretary of State can specify additional types of relevant non-domestic premises in regulations. However, subsection (12) states that such regulations must not define domestic properties as relevant non-domestic premises.

388 Subsection (2) sets out that the arrangements must meet the conditions in subsections (3) to (7) unless there is a relevant exemption in regulations made under new section 45AZC. The first two conditions (set out in subsections (3) and (4)) require that recyclable household waste must be collected separately from other household waste for recycling or composting. In other words, recyclable waste must be separated from waste that it is destined for incineration or landfill with the intention of it being recycled or composted.



The third condition in subsection (5) requires that the different recyclable waste streams are collected separately unless subsection (6) applies.

389 Subsection (6) sets out that two or more recyclable waste streams may be collected together if it is not technically or economically practicable to collect them separately from each other, or if collecting the waste separately has no significant environmental benefit. In other words, there are circumstances where it is possible for different recyclable waste streams to be collected together. These circumstances will be set out in statutory guidance, which will be subject to consultation.

390 Subsection (7) makes clear that under no circumstances may certain dry waste streams (glass, metal, plastic, paper and card) be collected mixed with the other recyclable waste streams (food waste). This is to minimise or prevent contamination of dry recyclable materials by food waste.

391 Subsection (8) clarifies that persons who present waste for collection must present it in accordance with this section. This means that there is a duty on the persons presenting the waste for collection as well as the persons collecting the waste.

392 Subsection (9) inserts a definition of “recyclable household waste”. This is defined as household waste (for which see section 75(5) of the Environmental Protection Act) that falls within one of the recyclable waste streams set out in subsection (10), which is of a description specified in regulations. The regulations will provide detail about what materials within a recyclable waste stream are suitable for recycling. Some materials may on the face of it fall within a subsection (10) waste stream, but in fact not be suitable for recycling or composting.

393 Subsection (10) states that the recyclable waste streams to be collected separately from other household waste are glass, metal, plastic, paper and card, and food waste.

394 For subsections (11) and (12), see the explanation for subsection (1) above.

#### **New section 45AZB England: separate collection of industrial or commercial waste**

395 Subsection (1) sets arrangements for collecting industrial or commercial waste from premises in England, either by persons acting in the course of business, such as a commercial waste collector, or by persons exercising a public function, such as a waste collection authority.

396 Subsection (2) defines “relevant waste” as waste that is similar in nature and composition to household waste. Where waste is relevant waste, the collection arrangements must meet the conditions in subsections (3) to (7) unless there is a relevant exemption in regulations made under this section. The first two conditions (set out in subsections (3) and (4)) require that recyclable relevant waste is collected separately from other waste for the purpose of recycling or composting. In other words, recyclable relevant waste must be separated from waste that it is destined for incineration or landfill with the intention of it being recycled or composted. The third condition (set out in subsection (5)) requires that the different recyclable waste streams are collected separately, unless subsection (6) applies or unless an exemption applies in regulations made under this section.

397 Subsection (6) explains that two or more recyclable waste streams may be collected together if it is not technically or economically practicable to collect them separately from each other, or if collecting the waste separately has no significant environmental benefit. In other words, there are circumstances where it is possible for different recyclable waste streams to be collected together. These circumstances will be set out in detail in statutory guidance, which will be subject to consultation.

- 398 Subsection (7) makes clear that under no circumstances may certain dry waste streams (glass, metal, plastic, paper and card) be collected mixed with other recyclable waste streams (food waste). This is to minimise or prevent contamination of dry recyclable materials by food waste.
- 399 Subsection (8) states that the persons who present waste for collection must present it in accordance with the arrangements and conditions set out in this section. This means that there is a duty on the persons presenting the waste for collection as well as the persons collecting the waste.
- 400 Subsection (9) inserts a definition of “recyclable relevant waste”. This is defined as relevant waste that falls within one of the recyclable waste streams set out in subsection (10) and is also of a description specified in regulations. The regulations will provide detail about what materials within a recyclable waste stream are suitable for recycling.
- 401 Subsection (10) defines “recyclable waste streams” as glass, metal, plastic, paper and card and food waste.

**New section 45AZC Sections 45A to 45AZB: powers to exempt and extend**

- 402 New section 45AZC concerns powers for the Secretary of State to make regulations exempting duty holders from certain separate collection duties. It also allows the Secretary of State, if certain conditions are met, to extend the duties to additional recyclable waste streams.
- 403 Subsection (1)(a) allows the Secretary of State to make regulations to create exemptions from the requirement to collect all recyclable waste streams separately from each other under new sections 45A to 45AZB. In other words, the Secretary of State can make regulations so that specific recyclable waste streams (such as plastics and metal) can always be collected together, without the requirement to consider the specific technical, economic or environmental benefit in subsection (6) of the relevant section.
- 404 Subsection (1)(b) allows the Secretary of State to make regulations to create exemptions from the application of the whole of new section 45AZA (separate collection of recyclable household waste from non-domestic premises) or 45AZB (separate collection of recyclable relevant waste). This is to enable the Secretary of State to exempt certain categories of persons from having to comply with these conditions, either at all or for a set period of time.
- 405 Subsection (1)(c) also allows the Secretary of State to make regulations to create exemptions from the application of new section 45AZA or new section 45AZB in relation to specific recyclable waste streams. This is to enable the Secretary of State to exempt certain categories of persons from having to comply with the conditions set out in new section 45AZA or new section 45AZB in respect of a particular recyclable waste streams such as food waste.
- 406 Subsection (2) sets a condition that the Secretary of State may exercise powers under subsection (1)(a) only if satisfied that collecting two or more materials together would not significantly reduce the potential for the recyclable household waste or relevant recyclable waste to be recycled. This is to ensure mixed collections are only used where there is no impact on the ability to recycle the materials concerned. For example, collecting glass together with paper can impact on the recycling of paper, as very fine glass shards cannot be readily separated from the paper fibres and can lead to damage of paper recycling machinery.
- 407 Subsection (3)(a) allows the Secretary of State to amend new sections 45A to 45AZB by

regulations, in order to add further recyclable waste streams to subsection (10) of those sections. This is so that, as recycling technology improves, it will be possible to recycle items that are not widely recycled now. There are further conditions that must be satisfied so that the Secretary of State can exercise this power. These are set out in subsection (4) below.

408 Subsection (3)(b) allows the Secretary of State to set out in regulations the extent to which these additional recyclable waste streams need to be collected separately or are able to be collected together with other recyclable waste streams. This is because it may be appropriate to collect an additional recyclable waste together with some of the existing recyclable waste streams or, alternatively, entirely separately. The regulations would be able to specify this.

409 Subsection (4) sets out that the Secretary of State may only exercise the power to add further recyclable waste streams to new sections 45A(10), 45AZA(10) or 45AZB(10) if they are satisfied that there will be an environmental benefit, that all English waste collection authorities are able to make arrangements to collect that new recyclable waste stream, and that it will be possible for the new recyclable waste stream to be sold on for recycling.

410 Subsection (5) contains statutory consultation requirements. Before making regulations under this section to add further recyclable waste streams, the Secretary of State must consult the organisations named. These are the Environment Agency, local authorities, and anyone else the Secretary of State considers appropriate. This is a non-exhaustive list.

#### **New section 45AZD Sections 45A to 45AZB: duties of waste collectors**

411 New section 45AZD introduces additional duties on persons who collect household waste, or commercial and industrial waste that is like household waste in nature and composition.

412 Under subsection (1), where any person collects or proposes to collect waste under arrangements in new sections 45A to 45AZB, and they will be collecting two or more of the recyclable waste streams co-mingled rather than individually separated, on the basis that it would not be technically or economically practicable to collect individually separated or that there would be no significant environmental benefit in collecting it individually separated, then they will need to carry out a written assessment under subsection (2) of why they have relied on new section 45A(6), 45AZA(6) or 45AZB(6).

#### **New section 45AZE Sections 45 to 45AZD: guidance**

413 Subsection (1) allows the Secretary of State to issue guidance about the duties imposed by sections 45 to new section 45AZD.

414 Subsection (2) is a non-exhaustive list of what the Secretary of State's guidance may contain. This includes guidance on when it would be reasonable to conclude it is not technically or economically practicable to collect recyclable household waste or recyclable relevant waste streams separately, or that separate collection has no significant environmental benefit; how often household waste other than food waste should be collected; the kinds of waste which are relevant waste for the purposes of new section 45AZB; and assessments made under new section 45AZD.

415 Subsection (3) states that the guidance may make different provision in relation to new sections 45A to 45AZB. This is to enable the Secretary of State to take account of the fact that there might be different circumstances depending on whether it is household waste, household waste from non-domestic premises, or industrial and commercial waste being collected.

416 Subsection (4) contains statutory consultation requirements. Before issuing guidance, the Secretary of State must consult the organisations listed. The list includes the Environment Agency, English waste collection authorities (local authorities), and others that the Secretary of State considers appropriate. It is a non-exhaustive list.

417 Subsection (5) requires that waste collection authorities, and any party to arrangements regarding the collection of recyclable waste under these sections, must have regard to the guidance.

#### **New section 45AZF Sections 45AZA and 45AZB: compliance notices**

418 New section 45AZF concerns compliance notices that the Environment Agency may issue in relation to the duties in new sections 45AZA and 45AZB.

419 Subsection (1) concerns the Environment Agency issuing compliance notices to persons, other than waste collection authorities, who are parties to the arrangements to collect household waste from non-domestic premises (new section 45AZA duties). This will include hospitals, schools, universities and nursing homes. Compliance notices can also be issued to persons, other than waste collection authorities, who are parties to arrangements to collect industrial and commercial waste that is similar in nature and composition to household waste (new section 45AZB duties). The Environment Agency may issue a compliance notice where a person is failing to comply with their duties in relation to the collection of waste under new sections 45AZA or 45AZB.

420 Subsection (2) allows the Environment Agency to issue a compliance notice requiring specified steps to rectify the failure within a specified time. This is so that the person in receipt of the notice can take the action detailed in the notice, so that the failure does not carry on.

421 Subsection (3) sets out what the compliance notice must include in order to be valid. This includes the specific failures to comply with new section 45AZA (household waste from non-domestic premises) or new section 45AZB (industrial and commercial waste), the specific steps to be taken to sort out the failure, the time period within which these steps must be taken, and information on the rights of appeal.

422 Subsection (4) sets out that if a person fails to comply with a compliance notice, they are committing an offence. Under subsection (5), a person who commits such an offence will have to pay a fine if convicted.

#### **New section 45AZG Sections 45AZA and 45AZB: appeals against compliance notices**

423 New section 45AZG concerns appeals against compliance notices (for which see above).

424 Subsection (1) sets out that a person who is given a compliance notice may appeal to the First-tier Tribunal against the notice, or any requirement in the notice.

425 Subsection (2) clarifies that the notice will take effect unless a tribunal decides otherwise. This means that the compliance notice will still have effect, even if the person appeals, until the tribunal quashes or varies the notice or otherwise decides that the notice should not have effect.

426 Subsection (3) lists the steps that the tribunal may take in relation to a compliance notice that has been appealed. The tribunal may quash, confirm or vary the notice or requirement. The tribunal may take any steps the Environment Agency could take in relation to the failure giving rise to the notice or requirement. The tribunal may also send any matter relating to the notice or requirement to the Environment Agency.

- 427 Subsection (5) of clause 52 amends section 46(2) of the Environmental Protection Act, which relates to receptacles for household waste. This allows Welsh collection authorities to require persons to use separate bins (or compartments) for waste that will be recycled and for waste that will not be recycled. It also allows English waste collection authorities to require persons to use separate bins (or compartments) to help that authority to comply with its duties under new sections 45A or 45AZA.
- 428 Subsection (6) of clause 52 amends section 161 (regulations etc) of the Environmental Protection Act to clarify which parliamentary procedure should be used for regulations under new section 45AZC. The amendment means that any regulations made under new section 45AZC must be made using the affirmative statutory instrument procedure as opposed to the negative statutory instrument procedure.
- 429 Subsection (7) of clause 52 inserts some additional wording into section 41(1) of the Environment Act. The effect is that the Environment Agency can make charges to recover its costs in performing duties relating to new sections 45A to 45AZB of the Environmental Protection Act. It can make such charges through a charging scheme, as detailed in section 41 of the Environment Act.
- 430 Subsection (8) of clause 52 amends section 108(15) of the Environment Act to clarify that the new duties under new sections 45A to 45AZB of the Environmental Protection Act are not included in the definition of pollution control functions for the purposes of section 108 Environment Act 1995 powers of entry.
- 431 Clause 52 forms part of the law of England and Wales although it applies to England only.

### **Clause 53: Separation of waste: Northern Ireland**

- 432 Clause 53 concerns the separation of waste for recycling. It amends the Waste and Contaminated Land (Northern Ireland) Order 1997 to provide for the separation of recyclable waste, and to prohibit co-mingling of that waste.
- 433 Subsection (2) replaces Article 20A with new Articles 20A to 20H.

### **New article 20A Separate collection of household waste**

- 434 New Article 20A concerns separate collection arrangements for household waste in Northern Ireland by waste collection authorities. It only applies where a waste collection authority is required to collect household waste in its area under Article 20(1)(a) of the Waste and Contaminated Land (Northern Ireland) Order 1997. It does not apply if new Article 20B applies, which relates to the collection of household waste from non-household properties.
- 435 Paragraph (2) sets out that arrangements for the collection of household waste must meet the conditions in paragraphs (3) to (7) unless there is a relevant exemption in regulations made under new Article 20D. These first two conditions (set out in paragraphs (3) and (4)) require that recyclable household waste must be collected separately from other household waste for recycling or composting. In other words, recyclable waste must be separated from waste that it is destined for incineration or landfill so that the separately collected waste can be recycled or composted. The third condition (set out in paragraph (5)) requires that the different recyclable waste streams are collected separately from each other unless paragraph (6) applies.
- 436 Paragraph (6) sets out that two or more recyclable waste streams may be collected together if it is not technically or economically practicable to collect them separately from each other or if collecting the waste separately has no significant environmental benefit. In

other words, there are circumstances where different recyclable waste streams may be collected together. These circumstances will be set out in statutory guidance, which will be subject to consultation.

437 Paragraph (7) makes clear that under no circumstances may the dry recyclable waste streams (glass, metal, plastic, paper and card) be mixed with the other recyclable waste streams (food and garden waste). This is to minimise or prevent contamination of dry recyclable materials by food or garden waste.

438 Paragraph (8) inserts a new definition of “recyclable household waste”. This is defined as household waste (for which see Article 2(2)(a) of the Waste and Contaminated Land (Northern Ireland) Order 1997) that falls within any of the recyclable waste streams stated in paragraph (9), which is of a description specified in regulations. The regulations will provide detail about what materials within a recyclable waste stream are suitable for recycling. Some materials may on the face of it fall within a paragraph (9) waste stream, but in fact not be suitable for recycling or composting.

439 Paragraph (9) states that the recyclable waste streams to be collected separately from other household waste are glass, metal, plastic, paper and card, food waste and garden waste.

#### **New article 20B Separate collection of household waste from relevant non-domestic premises**

440 New Article 20B concerns arrangements for the separate collection of household waste from relevant non-domestic premises.

441 Paragraph (1) applies to arrangements to collect household waste from non-domestic premises either by persons acting in the course of business, such as a commercial waste collector, or by persons exercising a public function, such as a waste collection authority acting under Article 20(1)(a). Non-domestic premises are defined in paragraph (11) as residential homes, universities, schools, nursing homes, and hospitals. The Department can specify additional types of relevant non-domestic premises in regulations. However, paragraph (12) states that such regulations must not define domestic properties as relevant non-domestic premises.

442 Paragraph (2) sets out that the arrangements must meet the conditions in paragraph (3) to (7) unless there is a relevant exemption in regulations made under new Article 20D. The first two conditions (set out in paragraphs (3) and (4)) require that recyclable household waste must be collected separately from other household waste for recycling or composting. In other words, recyclable waste must be separated from waste that it is destined for incineration or landfill with the intention of it being recycled or composted. The third condition (set out in paragraph (5)) requires that the different recyclable waste streams are collected separately unless paragraph (6) applies.

443 Paragraph (6) explains that two or more recyclable waste streams may be collected together if it is not technically or economically practicable to collect them separately from each other, or if collecting the waste separately has no significant environmental benefit. In other words, there are circumstances where it is possible for different recyclable waste streams to be collected together. These circumstances will be set out in statutory guidance, which will be subject to consultation.

444 Paragraph (7) makes clear that under no circumstances may certain dry waste streams (glass, metal, plastic, paper and card) be collected mixed with other recyclable waste streams (food waste). This is to minimise or prevent contamination of dry recyclable

materials by food waste.

445 Paragraph (8) clarifies that persons who present waste for collection must present it in accordance with this Article. This means that there is a duty on the persons presenting the waste for collection as well as the persons collecting the waste.

446 Paragraph (9) inserts a definition of “recyclable household waste”. This is defined as household waste (for which see Article 2(2)(a) of the Waste and Contaminated Land (Northern Ireland) Order 1997) that falls within one of the recyclable waste streams set out in paragraph (10), which is of a description specified in regulations. The regulations will provide detail about what materials within a recyclable waste stream are suitable for recycling. Some materials may on the face of it fall within a paragraph (10) waste stream, but in fact not be suitable for recycling or composting.

447 Paragraph (10) states that the recyclable waste streams to be collected separately from other household waste are glass, metal, plastic, paper and card, and food waste.

448 For paragraphs (11) and (12), see the explanation for paragraph (1) above.

### **New article 20C Separate collection of industrial or commercial waste**

449 Paragraph (1) sets arrangements for collecting industrial or commercial waste from premises in Northern Ireland, either by persons acting in the course of business, such as a commercial waste collector, or persons exercising a public function, such as a waste collection authority.

450 Paragraph (2) defines “relevant waste” as waste that is similar in nature and composition to household waste. Where waste is relevant waste, the collection arrangements must meet the conditions set out in paragraphs (3) to (7) unless there is a relevant exemption in regulations made under new Article 20D. The first two conditions (set out in paragraphs (3) and (4)) require that recyclable relevant waste is collected separately from other waste for the purpose of recycling or composting. In other words, recyclable relevant waste must be separated from waste that it is destined for incineration or landfill with the intention of it being recycled or composted. The third condition (set out in paragraph (5)) requires that the different recyclable waste streams are collected separately unless paragraph (6) applies, or unless an exemption applies in regulations made under new Article 20D.

451 Paragraph (6) explains that two or more recyclable waste streams may be collected together if it is not technically or economically practicable to collect them separately from each other or if collecting the waste separately has no significant environmental benefit. In other words, there are circumstances where it is possible for different recyclable waste streams to be collected together. These circumstances will be set out in detail in statutory guidance, which will be subject to consultation.

452 Paragraph (7) makes clear that under no circumstances may certain dry waste streams (glass, metal, plastic, paper and card) be collected mixed with other recyclable waste streams (food waste). This is to minimise or prevent contamination of dry recyclable materials by food waste.

453 Paragraph (8) states that persons who present waste for collection must present it in accordance with the arrangements and conditions set out in this Article. This means that there is a duty on the persons presenting the waste for collection as well as the persons collecting the waste.

454 Paragraph (9) inserts a definition of “recyclable relevant waste”. This is defined as

relevant waste that falls within one of the recyclable waste streams set out in paragraph (10) and is also of a description specified in regulations. The regulations will provide detail about what materials within a recyclable waste stream are suitable for recycling.

455 Paragraph (10) defines “recyclable waste streams” as glass, metal, plastic, paper and card and food waste.

#### **New article 20D Articles 20A to 20C: powers to exempt and extend**

456 New Article 20D concerns powers for the Department to make regulations exempting duty holders from certain separate collection duties. It also allows the Department, if certain conditions are met, to extend the duties to additional recyclable waste streams.

457 Paragraph (1)(a) allows the Department to make regulations to create exemptions from the requirement to collect all recyclable waste streams separately from each other under new Articles 20A to 20C. In other words, the Department can make regulations so that specific recyclable waste streams (such as plastics and metal) can always be collected together, without the requirement to consider the specific technical, economic or environmental benefit in paragraph (6) of the relevant Article.

458 Paragraph (1)(b) allows the Department to make regulations to create exemptions from the application of the whole of new Article 20B (separate collection of recyclable household waste from non-domestic premises) or new Article 20C (separate collection of recyclable commercial and industrial waste). This is to enable the Department to exempt certain categories of persons from having to comply with these conditions, either at all or for a set period of time.

459 Paragraph (1)(c) also allows the Department to make regulations to create exemptions from the application of new Article 20B or 20C in relation to specific recyclable waste streams. This is to enable the Department to exempt certain categories of persons from having to comply with the conditions set out in new Article 20B or 20C in respect of specific recyclable waste streams such as food waste.

460 Paragraph (2) sets a condition that the Department may exercise powers under paragraph (1)(a) only if satisfied that collecting two or more materials together would not significantly reduce the potential for the recyclable household waste or relevant recyclable waste to be recycled. This is to ensure mixed collections are only used where there is no impact on the ability to recycle the materials concerned. For example, collecting glass together with paper can impact on the recycling of paper, as very fine glass shards cannot be readily separated from the paper fibres and can lead to damage of paper recycling machinery.

461 Paragraph (3)(a) allows the Department to amend new Articles 20A to 20C by regulations in order to add further recyclable waste streams to paragraphs (9) and (10) of those Articles. This is so that, as recycling technology improves, it will be possible to recycle items that are not widely recycled now. There are further conditions that must be satisfied so that the Department can exercise this power. These are described in paragraph (3) below.

462 Paragraph (3)(b) allows the Department to set out in regulations the extent to which these additional recyclable waste streams need to be collected separately or are able to be collected together with other recyclable waste streams. This is because it may be appropriate to collect that additional recyclable waste together with some of the existing recyclable waste streams or alternatively entirely separately. The regulations would be able to specify this.



463 Paragraph (4) sets out that the Department may only exercise the power to add further recyclable waste streams to Articles 20A(9), 20B(10) or 20C(10) if they are satisfied that there will be an environmental benefit, that all Northern Irish waste collection authorities are able to make arrangements to collect that new recyclable waste stream, and that it will be possible for the new recyclable waste stream to be sold on for recycling.

464 Paragraph (5) contains statutory consultation requirements. Before making regulations under this Article, the Department must consult the organisations named before making regulations to add further recyclable waste streams. These are district councils, and anyone else the Department considers appropriate. This is a non-exhaustive list.

#### **New Article 20E Articles 20A to 20C: duties of waste collectors**

465 New Article 20E introduces additional duties on persons who collect household waste or commercial and industrial waste, which is household like in nature and composition.

466 Under paragraph (1), where any person collects (or proposes to collect) waste under arrangements in new Article 20A concerning household waste collection from domestic premises, the condition in paragraph (2) applies.

467 Paragraph (2) sets out a condition that where two or more recyclable waste streams are to be collected together, on the basis of the exception that it is not technically or economically practicable or there is no significant environmental benefit, the person must prepare a written explanation or assessment of why that exception applies and, if required, provide a copy to the Department.

#### **New Article 20F Articles 20 to 20E: guidance**

468 Paragraph (1) allows the Department to issue guidance about the duties imposed by Articles 20 to new Article 20E.

469 Paragraph (2) is a non-exhaustive list of what the Department's guidance may contain. This includes guidance on when it would be reasonable to conclude it is not technically or economically practicable to collect recyclable household waste or recyclable relevant waste streams separately, or that separate collection has no significant environmental benefit; how often household waste other than food waste should be collected; the kinds of waste that are relevant waste for the purposes of new Article 20C; and assessments made under new Article 20E.

470 Paragraph (3) states that the guidance may make different provision in relation to new Article 20A, new Article 20B and new Article 20C. This is to enable the Department to take account of the fact that there might be different circumstances depending on whether it is household waste, household waste from non-domestic premises, or industrial and commercial waste being collected.

471 Paragraph (4) contains statutory consultation requirements. Before issuing guidance, the Department must consult the organisations listed. The list includes district councils, and others that the Department considers appropriate. It is a non-exhaustive list.

472 Paragraph (5) requires that a district council and any party to arrangements regarding the collection of recyclable waste under these Articles must have regard to the guidance.

#### **New Article 20G Articles 20B and 20C: compliance notices**

473 New Article 20G concerns compliance notices that the Department may issue in relation to the duties in Articles 20 to new Article 20E.

474 Paragraph (1) concerns the Department issuing compliance notices to persons, other than

district councils, that are party to the arrangements to collect household waste from non-domestic premises (new Article 20B duties). This will include hospitals, schools, universities, and nursing homes. Compliance notices can also be issued to persons, other than district councils, that are party to arrangements to collect industrial and commercial waste that is similar in nature and composition to household waste (new Article 20C duties). The Department may issue a compliance notice where that person is failing to comply with their duties in relation to the collection of waste under new Articles 20B(8) and 20C(8).

475 Paragraph (2) allows the Department to issue a compliance notice requiring specified steps to rectify the failure within a specified time. This is so that the person in receipt of the notice can take the action detailed in the notice, so that the failure does not carry on.

476 Paragraph (3) sets out what the compliance notice must include in order to be valid. This includes the specific failures to comply with new Article 20B (non-domestic premises) or new Article 20C (industrial and commercial waste), the specific steps to be taken to sort out the failure, the time period within which these steps must be taken, and information on the rights of appeal.

477 Paragraph (4) sets out that if a person fails to comply with a compliance notice, they are committing an offence. Under paragraph (5), a person who commits such an offence is liable on conviction to pay a fine.

#### **New Article 20H Articles 20B and 20C: appeals against compliance notices**

478 New Article 20H concerns appeals against compliance notices (for which see above).

479 Paragraph (1) sets out that a person who is given a compliance notice may appeal to the Planning Appeals Commission against the notice, or any requirement in the notice.

480 Paragraph (2) clarifies that the notice will take effect unless the Planning Appeals Commission decides otherwise. This means that the compliance notice will still have effect, even if the person appeals, until the Planning Appeals Commission quashes or varies the notice or otherwise decides that the notice should not have effect.

481 Paragraph (3) lists the steps that the Commission may take in relation to the compliance notice that has been appealed. The Planning Appeals Commission may quash, confirm or vary the notice or requirement. The Planning Appeals Commission may take any steps the Department could take in relation to the failure giving rise to the notice or requirement. The Planning Appeals Commission may also send any matter relating to the notice or requirement to the Department.

482 Paragraphs (4) and (5) relate to how any further details in relation to appeals will be specified in regulations made by the Department – specifically, in relation to grounds for appeals, timing of appeals, fees to be paid, and any notice to be given to the Department by the Planning Appeals Commission when an appeal is received or withdrawn.

483 Subsection (3) of clause 53 amends Article 21 of the Waste and Contaminated Land (Northern Ireland) Order 1997 relating to receptacles for household waste. Subsection (3)(a) allows district councils in Northern Ireland to require persons to use separate bins (or compartments) for waste that will be recycled and for waste that will not be recycled, in order to help that authority to comply with its duties under new Article 20A or new Article 20B. Subsection 3(b) sets out a requirement for a district council to make sure that every occupier of a domestic property has a food waste bin to enable separate collection of food waste. Subsection 3(c) inserts a definition of “domestic property” at paragraph (10) of Article 21.

484 Subsection (4) of clause 53 inserts a substitution at Article 5(2E)(b), to replace a reference to Article 20A(3) with a reference to Article 21(9A).

485 Subsection (5) of clause 53 amends Article 82 of the Waste and Contaminated Land (Northern Ireland) Order 1997 to clarify which parliamentary procedure should be used for regulations under new Article 20D. The amendments mean that any regulations made under new Article 20D must be made using the affirmative statutory instrument procedure as opposed to the negative statutory instrument procedure.

#### **Clause 54: Electronic waste tracking: Great Britain**

486 Clause 54 amends the Environmental Protection Act 1990 to create powers to introduce electronic (digital) waste tracking in England, Wales and Scotland, and to create associated criminal offences (punishable by a fine) and civil penalties.

487 Subsection (2) inserts new sections 34CA and 34CB into the Environmental Protection Act 1990 after section 34C. The effect of these two new sections is detailed below.

#### **New section 34CA Electronic waste tracking**

488 Subsection (1) introduces a power to make regulations, exercisable by the relevant national authority (as defined in subsection (12)), in order to track certain types of waste, including establishing an electronic waste tracking system.

489 Subsection (2) allows the regulations to impose requirements on relevant waste controllers (as defined in subsection (12)) in relation to waste tracking. The regulations may also impose requirements on the Environment Agency, Natural Resources Wales or the Scottish Environment Protection Agency. The requirements include ensuring that specified information about the tracking or regulation of waste is entered onto the electronic system established under the regulations.

490 Subsection (3) contains non-exhaustive examples of the information that the regulations can require people to enter onto the electronic system. Those examples include information about how waste is processed or treated, where waste has moved to and to whom waste has transferred. It also includes the same information in relation to material that has been produced as a result of the processing or treatment of waste (“relevant waste products”) and information about relevant waste controllers.

491 Subsection (4) allows the relevant regulations to require persons in control or in possession of waste to ensure waste that is on or is going to be on the system can be physically identified – for example, by tracking waste tyres using radio-frequency identification.

492 Subsection (5) allows the regulations to make provision for third parties, rather than those in possession or control of the waste, to carry out their duties under the regulations. The regulations may impose requirements on such third parties.

493 Subsection (6) contains a duty on the Secretary of State that regulations made in relation to electronic waste tracking must include exemptions from the duties under the regulations for digitally excluded persons, as defined in subsection (12). These are persons who, either for religious or practical reasons – for example, age, disability or location – cannot use the electronic system. The regulations may impose alternative requirements on such persons.

494 Subsection (7) allows the regulations to appoint someone else to set up, administer, or maintain the electronic system. The regulations may also give functions to that person.

495 Subsection (8) allows the regulations to determine how information about the relevant

waste on the system is used, who may access it and what limits should be placed on how that information is used by those who have been given access to it.

- 496 Subsection (9) allows for the introduction of fees or charges on anyone subject to the regulations. The regulations may state to whom the fee should be paid.
- 497 Subsection (10) allows for those fees or charges to reflect the costs of establishing, operating or maintaining the waste tracking system, or any other cost associated with tracking relevant waste incurred by the person designated to establish, operate or maintain the system.
- 498 Subsection (11) allows the relevant national authority to provide a grant or loan to the person chosen to set up, maintain or run the waste tracking system.
- 499 Subsection (12) provides definitions of “digitally excluded person”, “extractive waste”, “relevant national authority”, “relevant waste”, “relevant waste controller”, “relevant waste product” and “specified”.

### **New section 34CB Further provision about regulations under section 34CA**

- 500 Subsection (1) allows the regulations to create criminal offences punishable with a fine in order to enforce the regulations and any failures to comply with the regulations.
- 501 Subsection (2) allows regulations to enable an enforcing authority to impose financial penalties, to determine the amount of these penalties, to set out what factors should be taken into account when determining the amount, and to include any appeals process.
- 502 Subsection (3) allows the regulations to make different provisions for different purposes, which might include exempting certain categories of waste controllers or placing different duties on certain categories of waste controllers depending on their circumstances.
- 503 Subsection (4) provides the power to make consequential, transitional and similar amendments to legislation, including a power to make such amendments to primary legislation and retained Direct EU legislation, by regulations.
- 504 Subsection (5) defines “enforcement authority” and “relevant legislation” for the purposes of new section 34CB.
- 505 Subsection (3)(a) of clause 54 inserts new subsection (2ZAA) after subsection (2ZA) in section 161 of the Environmental Protection Act 1990. New subsection (2ZAA) sets out when the affirmative resolution procedure should be used in relation to a statutory instrument containing regulations made by the Secretary of State under new section 34CA. These affirmative triggers are when the first set of regulations are made, the creation of a criminal offence, increasing the maximum penalty for a criminal offence, the creation of a new financial (civil) penalty, and amending primary legislation or retained direct principal EU legislation.
- 506 Subsection (3)(b) of clause 54 inserts a reference to the new subsection (2ZAA) into subsection (2ZC). The effect of this amendment is that regulations that include the provision in new subsection (2ZAA) should be made by affirmative parliamentary procedure.
- 507 Subsection (3)(c) of clause 54 inserts a new subsection (2AZA) after subsection (2A) in section 161 of the Environmental Protection Act 1990. New subsection (2AZA) sets out when the affirmative resolution procedure should be used in relation to a statutory instrument made by Welsh Ministers under new section 34CA. These affirmative triggers are when the first set of regulations are made, the creation of a criminal offence, increasing

the maximum penalty for a criminal offence, the creation of a new financial (civil) penalty, and amending primary legislation or retained direct principal EU legislation.

508 Subsection (3)(d) of clause 54 inserts new subsections (2AC) and (2AD) before subsection (2B) in section 161 of the Environmental Protection Act 1990. New subsections (2AC) and (2AD) set out when the affirmative resolution procedure should be used in relation to a statutory instrument made by Scottish Ministers under new section 34CA. These affirmative triggers are when the first set of regulations are made, the creation of a criminal offence, increasing the maximum penalty for a criminal offence, the creation of a new financial (civil penalty), and amending primary legislation or retained direct principal EU legislation.

509 Subsection (4) of clause 54 makes an amendment to section 41(1) of the Environment Act 1995 in relation to the powers of the Environment Agency, Natural Resources Wales and the Scottish Environment Protection Agency to make charging schemes. The amendment inserts paragraph (da) into section 41(1) of the 1995 Act. The effect of that amendment is that the Environment Agency, Natural Resources Wales and the Scottish Environment Protection Agency can make a charging scheme to recover costs incurred when performing their functions in relation to functions given to them by the electronic waste tracking regulations.

510 Clause 54 extends and applies to Great Britain.

#### **Clause 55: Electronic waste tracking: Northern Ireland**

511 Clause 55 amends the Waste and Contaminated Land (Northern Ireland) Order 1997 to create powers to introduce electronic (digital) waste tracking in Northern Ireland, and to create associated criminal offences (punishable by a fine) and civil penalties.

512 Subsection (2) inserts new Articles 5G and 5H into the Waste and Contaminated Land (Northern Ireland) Order 1997 after Article 5F. The effect of these two new Articles is detailed below.

#### **New article 5G Electronic waste tracking**

513 Paragraph (1) introduces a power to make regulations, exercisable by the Department of Agriculture, Environment and Rural Affairs (“the Department”), in order to track certain types of waste, including establishing an electronic waste tracking system.

514 Paragraph (2) allows the regulations to impose requirements on relevant waste controllers (as defined in paragraph (12)) in relation to waste tracking. The regulations may also impose requirements on the Department or the Northern Ireland Environment Agency. The requirements include ensuring that specified information about the tracking or regulation of waste is entered onto the electronic system established under the regulations.

515 Paragraph (3) contains non-exhaustive examples of the information that the regulations can require people to enter onto the electronic system. Those examples include information about how waste is processed or treated, where waste has moved to and to whom waste has transferred. It also includes the same information in relation to material that has been produced as a result of the processing or treatment of waste (“relevant waste products”) and information about relevant waste controllers.

516 Paragraph (4) allows the relevant regulations to require persons in control or in possession of waste to ensure waste that is on or is going to be on the system can be physically identified –for example, tracking waste tyres through radio-frequency identification.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

- 517 Paragraph (5) allows the regulations to make provision for third parties, rather than those in possession or control of the waste, to carry out their duties under the regulations. The regulations may impose requirements on such third parties.
- 518 Paragraph (6) contains a duty on the Department that regulations made in relation to electronic waste tracking must include exemptions from the duties under the regulations for digitally excluded persons, as defined in paragraph (12). These are persons who, either for religious or practical reasons – for example, age, disability or location – cannot use the electronic system. The regulations may impose alternative requirements on such persons.
- 519 Paragraph (7) allows the regulations to appoint someone else to set up, administer or maintain the electronic system. The regulations may also give functions to that person.
- 520 Paragraph (8) allows the regulations to determine how information about the relevant waste on the system is used, who may access it, and what limits should be placed on how that information is used by those who have been given access to it.
- 521 Paragraph (9) allows for the introduction of fees or charges on anyone subject to the regulations. The regulations may state to whom the fee should be paid.
- 522 Paragraph (10) allows for those fees or charges to reflect the costs of establishing, operating or maintaining the waste tracking system, or any other cost associated with tracking relevant waste incurred by the person designated to establish, operate or maintain the system.
- 523 Paragraph (11) allows the Department to provide a grant or loan to the person chosen to set up, run or maintain the waste tracking system.
- 524 Paragraph (12) provides definitions of “digitally excluded person”, “extractive waste”, “relevant waste”, “relevant waste controller”, “specified”, and “waste processing product”.

#### **New article 5H Further provision about regulations under Article 5G**

- 525 Paragraph (1) allows the regulations to create criminal offences punishable with a fine, in order to enforce the regulations and any failures to comply with the regulations.
- 526 Paragraph (2) allows the regulations to enable the Department to impose financial penalties, to determine the amount of these penalties, to set out what factors should be taken into account when determining the amount, and to include any appeals process.
- 527 Paragraph (3) provides the power to make consequential and similar amendments to a number of regulations and consequential amendments to primary legislation by regulations.
- 528 Subsection (3) of clause 55 amends Article 82 of the Waste and Contaminated Land (Northern Ireland) Order 1997. This inserts paragraphs (1C) and (1D) after paragraph (1B) into Article 82. These paragraphs clarify the Assembly procedure to be used in relation to the new powers contained in new Article 5G. Paragraph (1C) clarifies that paragraph (1) does not apply to regulations mentioned in paragraph (1D). The effect of this is that the regulations mentioned in paragraph (1D) are subject to the affirmative Assembly procedure. Paragraph (1D) states the types of regulations that are subject to affirmative Assembly procedure. These affirmative triggers are the first set of regulations made under new Article 5G, the creation of a criminal offence, increasing the maximum penalty for a criminal offence, the creation of a new financial (civil penalty), and amending primary legislation or retained direct principal legislation.

529 Clause 55 extends and applies to Northern Ireland.

### Clause 56: Hazardous waste: England and Wales

530 Subsection (1) inserts new section 62ZA into the Environmental Protection Act 1990.

#### **New section 62ZA Special provision with respect to hazardous waste in England and Wales**

531 Subsection (1) contains a power to make regulations to make provision about, or connected with, the regulation of hazardous waste.

532 Subsection (2) contains further details about the provision that can be made under the power in subsection (1). This includes prohibitions or restrictions on what can be done with hazardous waste, requirements on how such waste may be kept, the registration of persons in control of hazardous waste, and keeping and inspection of records related to hazardous waste. Such regulations may also impose civil sanctions or create criminal offences in relation to contraventions of the regulations.

533 Subsection (3) introduces a definition of “civil sanctions”. This is defined as the type of sanction in Part 3 of the Regulatory Enforcement and Sanctions Act 2008.

534 Subsection (4) makes further provision about civil sanctions. It states that the conduct leading to the sanction need not be a “relevant offence” for the purposes of Part 3 of the 2008 Act. The regulations may impose civil sanctions, even if the person imposing them is not a “regulator” within the meaning of the 2008 Act.

535 Subsection (5) contains further details as to what the regulations may provide for. This includes waste regulation authorities (the Environment Agency in England and Natural Resources Wales in Wales) supervising activities authorised under the regulations. It also includes those authorities overseeing persons who carry out such activities. The regulations may also make provision about those authorities maintaining records (including registers), recovering certain expenses or charges, and appeals to the Secretary of State or Welsh Ministers against the decisions of the Environment Agency and Natural Resources Wales respectively.

536 Subsection (6) clarifies that this section is subject to section 114 of the Environment Act 1995. This means that the Secretary of State or Welsh Ministers can appoint another person to determine appeals on certain matters listed in section 114.

537 Subsection (7) allows the regulations to confer functions on the Secretary of State, Welsh Ministers, the Environment Agency or Natural Resources Wales in relation to hazardous waste.

538 Subsection (8) is a power to make incidental, consequential and transitional provision, and to allow different provision for different purposes.

539 Subsection (9) inserts a definition of “mixing.” This is to ensure that any hazardous waste that is mixed or diluted (perhaps to the extent that it is no longer hazardous waste) can still be regulated under regulations made under this section.

540 Subsection (10) introduces definitions of “activity”, “hazardous waste controller”, “relevant national authority”, and “specified.” Activity is defined in relation to hazardous waste. The effect of the definition is that anything defined as an activity can be regulated under the new power in relation to hazardous waste. “Activity” is defined to ensure that activities currently regulated under the Hazardous Waste (England and Wales) Regulations 2005 and the Hazardous Waste (Wales) Regulations 2005 can continue to be

so regulated. "Activity" includes producing, keeping, treating, disposing, classifying, and directing and supervising others carrying out such an activity. "Hazardous waste controller" is defined as any person who carries out an activity (as defined above) in relation to hazardous waste. "Relevant national authority" is defined as the Secretary of State in England and Welsh Ministers in Wales. The "hazardous waste regulations" are defined as the Hazardous Waste (England and Wales) Regulations 2005 and the Hazardous Waste (Wales) Regulations 2005. "Specified" is defined as specified in the regulations made under this section.

- 541 Subsection (2) of clause 56 amends section 75 of the Environmental Protection Act 1990 to insert a new definition of "hazardous waste" and "waste list". A new hazardous waste definition is necessary as the existing definition of hazardous waste in that section relies on the definition of hazardous waste in the Hazardous Waste (England and Wales) Regulations and the Hazardous Waste (Wales) Regulations 2005. The new hazardous waste definition is in section 75(8A) of the Environmental Protection Act 1990. It includes any waste listed in the waste list as hazardous, in regulations made under section 62A(2) of the Environmental Protection Act 1990, and waste treated as hazardous for the purposes of regulations made under section 62ZA of that Act or the Hazardous Waste (England and Wales) Regulations 2005 or the Hazardous Waste (Wales) Regulations 2005. The new waste list definition is in section 75(8B) of the Environmental Protection Act 1990. It is defined as EU Decision 2000/532 as it has effect in England and Wales.
- 542 Subsection (3) of clause 56 inserts subsections (2ZF), (2ZG) and (2AAB) into section 161 of the Environmental Protection Act 1990, as amended by other clauses in this Bill. The changes require the affirmative parliamentary procedure to be used where the regulations made under new section 62ZA create criminal offences, increase the maximum penalty for a criminal offence, or create civil sanctions.
- 543 Subsection (4) of clause 56 amends section 41 of the Environment Act 1995. The effect of this amendment is to enable the Environment Agency and Natural Resources Wales to make charging schemes as a means of recovering costs incurred in performing their functions under any regulations made under new section 62ZA of the Environmental Protection Act.
- 544 Subsection (5) of clause 56 amends section 114 of the Environment Act 1995, so that the Secretary of State can appoint an appropriate person to determine appeals under new section 62ZA of the Environmental Protection Act.

#### Clause 57: Hazardous waste: Northern Ireland

- 545 Clause 57 amends Article 30 of the Waste and Contaminated Land (Northern Ireland) Order 1997, which provides for the making of regulations to control the management of special waste (referred to as "hazardous waste" in Article 30(1) of that Order) in Northern Ireland.
- 546 Subsection (2) amends Article 30(2) of that Order.
- 547 Subsection (2)(a) adds new sub-paragraph (h) after sub-paragraph (g). New sub-paragraph (h) expands the power in Article 30(1) to make regulations for the treatment, keeping or disposal of hazardous waste. It allows the regulations to impose civil sanctions.
- 548 Subsection (2)(b) inserts new paragraphs (2A) and (2B) into Article 30 of that Order. New paragraph (2A) introduces a definition of civil sanctions for the purposes of Article 30. "Civil sanctions" are defined as a type of sanction for which provision may be made under Part 3 of the Regulatory Enforcement and Sanctions Act 2008. New paragraph (2B)



makes further provision about civil sanctions. New paragraph (2B) states that the regulations under Article 30 may include civil sanctions even if the conduct leading to the sanction is not a “relevant offence” or the person imposing them is not a “regulator” within the meaning of Part 3 of the 2008 Act. New paragraph (2B) allows the Department of Agriculture, Environment and Rural Affairs to make regulations that impose civil sanctions even if the Department cannot make provision for the imposition of civil sanctions under Part 3 of the Regulatory Enforcement and Sanctions Act 2008.

549 Subsection (2)(c) inserts new paragraph (3A) into Article 30 of that Order after paragraph (3) to enable any regulations made under the power in Article 30 to make consequential, supplementary, incidental, transitional, transitory or saving provision.

550 Subsection (3) amends Article 82 of that Order. This inserts new paragraphs (1E) and (1F) after paragraph (1D) (as inserted by this Bill). These new paragraphs clarify the Assembly procedure to be used in relation to the new powers contained in Article 30. New paragraph (1E) clarifies that Article 82(1) does not apply to regulations made under Article 30 that create a new civil sanction. This means that the creation of a new civil sanction under Article 30 is subject to affirmative Assembly procedure. New paragraph (1F) states that where Article 82(1) does not apply given Article 82(1E), the affirmative Assembly procedure must be used.

#### Clause 58: Transfrontier shipments of waste

551 Clause 58 amends section 141 of the Environmental Protection Act 1990. Section 141 of that Act contains a power to make regulations to prohibit or restrict waste imports and exports. That section is amended to allow regulations to be made to regulate waste imports or exports or the transit of waste for export.

552 Subsection (1) states that section 141 is amended as per subsections (2) to (7).

553 Subsection (2) amends the heading of section 141. Paragraph (a) replaces the words “prohibit or restrict” with “regulate”. Paragraph (b) adds “the transit of waste for export” to the heading of the section.

554 Subsection (3) replaces the current subsection (1) of section 141. It also adds new subsections (1A) and (1B) to section 141. New subsection (1) allows the Secretary of State to make provision about, or in connection with, the regulation of waste imports and exports and the transit of waste for export by regulations. New subsection (1A) gives further detail on the provision that can be made by those regulations. This includes banning or restricting waste imports and exports, the landing and loading of waste in the UK, loading waste for export, or the transit of waste for export. New subsection (1B) clarifies that regulations made can include those relating to the intended final destination of the waste or the places the waste will pass through.

555 Subsection (4) substitutes subsection (3) of section 141 with new subsection (3). This allows the regulations made under the section to confer functions on the Secretary of State, the Environment Agency, Natural Resources Wales or the Scottish Environment Protection Agency.

556 Subsection (5) amends subsection (5) of section 141.

557 Subsection (5)(a) omits paragraph (a) of section 141(5). Section 141(3) allows the regulations to confer functions on the Environment Agency, Natural Resources Wales and the Scottish Environment Protection Agency, so section 141(5)(a) is obsolete.

558 Subsection (5)(b) inserts new paragraph (aa) after omitted paragraph (a) of section 141(5). New paragraph (aa) allows the regulations made under this section to issue directions

regarding how the Environment Agency, Natural Resources Wales and the Scottish Environment Protection Agency exercise their functions when regulating waste imports and exports and the transit of waste for exports.

- 559 Subsection (5)(c) inserts new paragraphs (ba) and (bb) after paragraph (b) of section 141(5). New paragraph (ba) allows the regulations to include provisions about fees or charges to the Environment Agency, Natural Resources Wales or the Scottish Environment Protection Agency. Such fees and charges are to be paid by persons involved in the import or export waste, or the transit of waste for export. New paragraph (bb) contains further provision in relation to those fees and charges. This states that the regulations may provide for the Environment Agency, Natural Resources Wales or the Scottish Environment Protection Agency to use those fees or charges to meet the costs they have incurred when regulating waste imports and exports and the transit of waste for export.
- 560 Subsection (5)(d) amends paragraph (d) of section 141(5). Paragraph (d)(i) inserts the words “with or without modifications” into that paragraph. Paragraph (d)(ii) substitutes the reference to section 69(3) of the Environmental Protection Act with a reference to section 108(4) of the Environment Act 1995. This is because section 108(4) of the 1995 Act is a similar provision (conferring similar powers) to section 69(3) of the 1990 Act, and section 69 of the 1990 Act has been repealed. This follows the approach taken in the equivalent provision in section 140.
- 561 Subsection (5)(e) amends paragraph (e) of section 141(5). This is to make clear that the reference to “authorities” is to waste regulation authorities.
- 562 Subsection (5)(f) inserts new paragraphs (fa) and (fb) into section 141(5). New paragraph (fa) allows the regulations to make provision allowing officers of Revenue and Customs to disclose information to the Environment Agency, Natural Resources Wales or the Scottish Environment Protection Agency. New paragraph (fb) allows the regulations to confer functions in relation to seizing or detaining waste that has arrived in the UK or entered the UK or will go out of the UK. Such functions can be given to persons who are designated as general customs officials under the Borders, Citizenship and Immigration act 2009.
- 563 Subsection (5)(g) inserts new paragraphs (h) and (i) into section 141(5). New paragraph (h) allows the regulations to make provision about how a person may discharge criminal liability for an offence by paying a financial penalty. New paragraph (i) provides further information about the amount of that financial penalty. The regulations may allow for a person designated as per the regulations to decide the amount of penalty.
- 564 Subsection (6) inserts new subsections (5B) and (5C) into section 141. New subsection (5B) states that regulations under section 141 can make provision about where the regulations will apply. This can include the regulations applying to the sea or seabed within the areas designated under the Continental Shelf Act 1964 and the Marine and Coastal Access Act 2009.
- 565 Subsection (7) inserts various definitions into subsection (6) of section 141. Definitions are inserted for “importation”, “exportation”, “primary legislation” and “transit of waste for export”.
- 566 Subsection (8) makes amendments to section 161 of the Environmental Protection Act 1990. These changes clarify which parliamentary procedure is to be used when regulations under section 141 are made. Subsection (8) adds new subsection (2ZH) to section 161. This subsection states that section 161(2) does not apply to regulations made

under section 141 if those regulations contain certain provisions. In those cases, the affirmative parliamentary procedure must be used. Affirmative parliamentary procedure must be used where regulations under section 141 confer new powers of entry, seizure or detention, provide for new fees or charges to be paid, create a new criminal offence, or increase the maximum penalty for a criminal offence. The affirmative procedure must also be used where section 141 regulations amend primary legislation or retained direct principal EU legislation.

567 Subsection (9) amends section 41 of the Environment Act 1995. Under section 41, the Environment Agency, Natural Resources Wales and the Scottish Environment Protection Agency can make charging schemes in relation to particular matters. Paragraph (a) substitutes paragraph (d) of section 41 of the 1995 Act with a new paragraph (d). This will allow the Environment Agency, Natural Resources Wales and the Scottish Environment Protection Agency to create a charging scheme to recover their costs in performing their functions in relation to the import or export of waste, or the transit of waste for export. Paragraph (b) inserts a new subsection after subsection (1) of section 41 of the Environment Act 1995. This inserts new definitions of “importation”, “exportation”, “transit of waste for export” and “waste” for the purposes of section 41(1)(d) of the 1995 Act. Those terms have the same definitions as in section 141 of the Environmental Protection Act 1990.

568 Subsection (10) amends the Transfrontier Shipment of Waste Regulations 2007. It omits paragraph (1) of regulation 46. This is because regulation 46(1) relates to fees, and is no longer needed given the amendment made by subsection (9) above in relation to charging schemes.

#### Clause 59: Powers to make charging schemes

569 Clause 59 makes amendments to sections 41 and 56 of the Environment Act 1995 to supplement existing charging powers available to the Environment Agency, Natural Resources Wales, and the Scottish Environment Protection Agency (“the Agencies”). These amendments relate to charging schemes and environmental licences for producer responsibility schemes.

570 Subsection (2) inserts five new paragraphs into section 41(1) of the Environment Act 1995, which creates powers to make charging schemes. Each of these powers is conferred on some or all of the Agencies. New paragraph (n) creates a charging scheme relating to producer responsibility schemes established under section 93 of the Environment Act 1995. It allows the Agencies to require payment of charges to them as a means of recovering costs they have incurred in performing the functions conferred on them. New paragraphs (o) and (p) create the same powers as new paragraph (n) but in relation to the End of Life Vehicles (Producer Responsibility) Regulations 2005 and the Waste Electrical and Electronic Equipment Regulations 2013, respectively. New paragraphs (q) and (r) create charging schemes to recover costs incurred by the Environment Agency and Natural Resources Wales when performing functions in relation to section 33(1) of the Environmental Protection Act 1990 (preventing the unauthorised or harmful deposit, treatment or disposal etc. of waste) or functions relating to a regulated waste operation under regulation 12(1) of the Environmental Permitting (England and Wales) Regulations 2016. This would allow fees to be charged to site operators for interventions at unpermitted waste sites or those in breach of a permit.

571 Subsection (3)(a)(i) extends the interpretation of the definition of “environmental licence” in section 56(1)(j) in relation to England and Wales from just relating to a Waste Electrical and Electronic Equipment (WEEE) operation with a registered exemption from permitting under Schedule 2 to the Environmental Permitting (England and Wales) Regulations 2007 to any waste operation with a registered exemption under the same regulations. Defining

registered waste exemptions as environmental licences allows for charges to be prescribed for them under section 41(2) of the Environment Act 1995.

572 Subsection (3)(a)(ii) deletes section 56(1)(l) to (o) as it makes reference to WEEE. This is because the definition of “environmental licence” in paragraphs (l) to (o) was used as a way of creating a charging scheme, which is now done by new section 41(1)(p). The same deletions are made in relation to Scotland by subsection 3(b).

### Clause 60: Waste charging: Northern Ireland

573 Clause 60 amends the Waste and Contaminated Land (Northern Ireland) Order 1997 and the Waste Management Licensing Regulations (Northern Ireland) 2003 to supplement existing charging powers available to the Department of Agriculture, Environment and Rural Affairs.

574 Subsection (2) adds new Article 76A to the Waste and Contaminated Land (Northern Ireland) Order 1997 to provide the Department of Agriculture, Environment and Rural Affairs with a power to prescribe charges to be paid to it in relation to costs incurred by it in performing the functions referred to in paragraph (2) of that Article. These functions are functions set out in a number of pieces of subordinate legislation, including Article 4(1) of that Order (Prohibition on unauthorised or harmful deposit, treatment or disposal etc., of waste) and regulation 18(1) of the Waste Management Licensing Regulations (Northern Ireland) 2003. This would allow for fees to be charged for interventions at unlicensed waste sites or those in breach of a licence.

575 Other functions referred to in Article 76A(2) relate to extended producer responsibility. These are functions conferred by regulations made under Article 3 of the Producer Responsibility Obligations (Northern Ireland) Order 1998, the End-of-Life Vehicles Regulations 2003, the End-of-Life Vehicles (Producer Responsibility) Regulations 2005, the Waste Batteries and Accumulators Regulations 2009, and the Waste Electrical and Electronic Equipment Regulations 2013. These functions allow the Department to levy fees in relation to its prescribed requirements in existing and future producer responsibility regimes.

576 Any charging scheme made under the powers that Article 76A will provide must describe who is liable to pay specified charges, and the Department of Agriculture, Environment and Rural Affairs must consult such persons as it considers to be appropriate before making any charging scheme under the Article.

577 Subsection (4) amends regulation 17 (exemptions from waste management licensing) of the Waste Management Licensing Regulations (Northern Ireland) 2003 to require that the fee required under new regulation 20B (which is being inserted by subsection (6) of this clause) for an application for an exemption from waste management licensing requirements has to be paid in order for an exemption to apply.

578 Subsection (5) amends regulation 18 (registration in connection with exempt activities) of the Waste Management Licensing Regulations (Northern Ireland) 2003 to ensure that any notice provided by an establishment or undertaking in respect of the registration of an exemption is to be accompanied by payment of the appropriate fee as may be required under regulation 20B. Subsection (5) further amends regulation 18, adding to the list of exemptions which apply for only one year in paragraph (9), omitting paragraph (12) which lists the current charges payable for exempt activities, and updating the reference in paragraph (11)(b) so that it refers to new regulation 20B (which is being inserted by subsection (6) of this clause) instead of paragraph (12).

579 Subsection (6) creates new regulation 20B in the Waste Management Licensing

Regulations (Northern Ireland) 2003, which provides the Department of Agriculture, Environment and Rural Affairs with power to make a charging scheme in respect of fees and charges for registration in connection with exempt activities. New regulation 20B requires that fees and charges, which may be provided for by the scheme, for applications for registering and renewing an exemption and in respect of the subsistence of registrations, are paid to the Department. New regulation 20B further allows for the scheme to provide for different fees depending on the nature of the activities, to set out the times and manners in which payments of fees and charges are to be made, and to provide for reductions in fees where an applicant is applying for multiple exemptions and specified conditions are met. The charging scheme may also specify charges in respect of the subsistence of registrations.

### Clause 61: Enforcement powers

580 Clause 61 introduces Schedule 11 to amend legislation relating to enforcement powers for waste and other environmental matters.

### Clause 62: Enforcement powers: Northern Ireland

581 Subsection (1) amends Article 27 of the Waste and Contaminated Land (Northern Ireland) Order 1997.

582 Subsection (2) amends paragraph (2) of Article 27 to account for circumstances in which waste might be taken to an appropriate storage site in the first instance, or otherwise not directly treated or disposed of.

583 Subsection (3) inserts new paragraph (2A) after paragraph (2) of Article 27. Sub-paragraph (a) allows the Department to direct a registered carrier of controlled waste to collect specified waste and deliver it to a specified site. Sub-paragraph (b) allows the Department to direct a keeper of controlled waste, or the owner or occupier of the land on which the waste is being kept, to facilitate the collection of the waste by the specified waste carrier.

584 Subsection (5) amends paragraph (4) of Article 27 to reflect the amendment to paragraph (2) of that Article.

585 Subsection (6) inserts new paragraph (4A) after paragraph (4) of Article 27. Sub-paragraph (a) allows the Department to direct the keeper of the controlled waste or the owner or occupier of the land on which the waste is being kept to pay the waste carrier's reasonable costs. Sub-paragraph (b) allows the Department to direct the keeper of the controlled waste or the owner or occupier of the land on which the waste is being kept to pay the reasonable costs of the person the waste is delivered to.

586 Subsections (4), (7) and (8) amend paragraphs (3), (5) and (6) of Article 27 respectively, to make these provisions relevant to all of Article 27.

587 Subsection (9) amends paragraph (7) of Article 27 to clarify that the Department may choose to pay the reasonable costs incurred by the registered carrier of controlled waste or the specified person to whom the waste is delivered under paragraph (4) or new paragraph (4A).

588 Subsection (10) amends paragraph (8) of Article 27 so as to make the definition of "specified" relevant to all of Article 27.

### Clause 63: Littering enforcement

589 Clause 63 amends Part 4 of the Environmental Protection Act 1990 ("the 1990 Act") in relation to enforcement against litter, and other offences of littering from a vehicle and the

unauthorised distribution of free printed material.

590 Under section 88 of the 1990 Act, litter authorities (as defined under section 88(9) of the 1990 Act) may authorise members of their staff, or contractors operating on their behalf, to issue fixed penalty notices in lieu of prosecution for these offences. The income from fixed penalty notices is (in most cases) retained by the litter authority, and must be used for functions under Part 4 of the 1990 Act. Section 88(11) of the 1990 Act allows the appropriate person to make regulations which “prescribe conditions to be satisfied by a person before a parish or community council may authorise him in writing for the purpose of giving [fixed penalty notices for littering]”. The “appropriate person” is the Secretary of State in relation to England, and the Welsh Ministers in relation to Wales.

591 Subsection (2) replaces existing subsection (11) of section 88 of the 1990 Act with new subsections (11) to (13). New subsection (11) confers a power for the appropriate person to prescribe conditions by regulations that must be met by an authorised officer operating on behalf of a litter authority, and to make provision requiring a litter authority to revoke an officer’s authorisation if that officer fails to meet the prescribed conditions. Regulations under new subsection (11) will be subject to the negative resolution procedure. New subsection (12) clarifies that different provision can be made for different cases – for example, to enable transitional arrangements for existing authorised officers to be made when new conditions are prescribed. New subsection (13) requires the appropriate person to consult such persons as the appropriate person considers appropriate before making regulations under new subsection (11).

592 Subsection (3) inserts new section 88B into the 1990 Act. This new section contains a power for the appropriate person to issue statutory guidance to litter authorities on the exercise of “littering enforcement functions” by them and their authorised officers. New section 88B(2) requires litter authorities to have regard to any such guidance when exercising those functions (including when exercising control over the way in which their authorised officers carry out those functions on the authority’s behalf). New section 88B(4) requires the appropriate person to consult such persons as the appropriate person considers appropriate before issuing guidance. This is likely to mean litter authorities, authorised officers, and the public. New section 88B(5) contains definitions of “littering enforcement function”, making clear that the scope of the guidance may cover enforcement functions related to any of the three offences in Part 4 of the 1990 Act, as well as connected purposes. These functions include:

- setting fixed penalty levels;
- authorising enforcement officers;
- issuing penalty notices;
- collecting and processing payments;
- initiating and pursuing prosecutions; and
- designating land (for the purposes of Schedule 3A to the 1990 Act).

593 Subsection (4) amends section 98(1A)(b) of the 1990 Act. Section 98(1A) defines “appropriate person” for the purposes of Part 4 of the 1990 Act, and the amendment updates this section by replacing “National Assembly for Wales” with “Welsh Ministers”.

#### Clause 64: Fixed penalty notices

594 Clause 64 amends sections 33ZA, 33ZB, 34ZA and 34ZB of the Environmental Protection

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Act 1990 to allow the level of fixed penalty notices (FPNs) under those sections, and the time period under which a less amount may be treated as payment of the fixed penalty, to be varied in the future. This could, for example, be to reflect inflation, changes to the cost of waste disposal, or changing waste management practices. The exact level of fixed penalty notices are set by local authorities to reflect local needs, within a range prescribed in legislation. The Environment Agency and Natural Resource Wales can also set levels for penalties issued by them under sections 34ZA and 34ZB, within a range prescribed in legislation. A FPN is a financial penalty that gives an offender the chance to pay a fixed amount of money by a set date. If the penalty is paid by the set time, the offender is no longer liable for that offence and no further action will be taken.

595 Subsections (2) and (3) amend sections 33ZA (fixed penalty notices relating to depositing, treatment of disposal of waste: England) and 33ZB (fixed penalty notices relating to depositing, treatment of disposal of waste: Wales) respectively. Subsections (2)(a) and 3(a) remove the specified ten-day early payment period in which an English or Welsh waste collection authority may choose to offer a discounted penalty, and allows that period to be specified by the authority instead. Subsections (2)(b) and 3(b) allow for the Secretary of State and Welsh Ministers to amend by regulations any of the penalty amounts currently specified in subsections (9) and (10) of sections 33ZA and 33ZB.

596 Subsections (4) and (5) amend sections 34ZA (FPNs relating to transfer of household waste: England) and 34ZB (FPNs relating to transfer of household waste: Wales) respectively. Subsections (4)(a) and (5)(a) remove the specified ten-day period an enforcement authority in England or Wales may choose to allow a lesser payment for, and allow that period to be specified by the authority. Subsections (4)(b) and (5)(b) allow for the Secretary of State and Welsh Ministers to amend by regulations any of the penalty amounts currently specified in subsections (7), (8) and (9) of section 34ZA, and the standard and lesser penalty amounts currently specified in subsections (7) and (8) of section 34ZB.

597 Clause 64 forms part of the law of England and Wales and extends to England and Wales.

### Clause 65: Regulation of polluting activities

598 Clause 65 amends Schedule 1 to the Pollution Prevention and Control Act 1999, which sets out the purposes for which the Secretary of State can make regulations under Section 2 of that Act. The current purpose set out in paragraph 4 of Schedule 1 relates to the prohibition of operating an installation or plant of a specified description without a permit. In other words, under paragraph 4 of Schedule 1, the Secretary of State is able to make regulations relating to permits and also exemptions from permits.

599 Subsection (2) inserts a new sub-paragraph into paragraph 4 of Schedule 1, setting out a new purpose for which regulations can be made. This allows the Secretary of State to prohibit an activity unless it meets conditions determined by the Environment Agency and/or Natural Resources Wales in accordance with the regulations. This enables the Environment Agency and/or Natural Resources Wales to set conditions for exempt activities, which do not require a permit, but only relating to activities specified by the Secretary of State in regulations and only within the confines specified by the Secretary of State in regulations. This new purpose sits in addition to the existing purpose in paragraph 4 set out above.

600 Clause 65 forms part of the law of England and Wales.

### Clause 66: Waste regulation: amendment of Northern Ireland Order

601 Subsection (1) amends Article 2(2) of the Waste and Contaminated Land (Northern

Ireland) Order 1997 to reflect departmental changes in the Northern Ireland Executive. The Department of Agriculture, Environment and Rural Affairs has taken over the relevant responsibilities under the 1997 Order from the previous Department of the Environment.

602 Subsection (2) makes the necessary transitional provision.

## **Part 4: Air Quality and Environmental Recall**

### **Clause 67: Local air quality management framework**

603 This clause enacts Schedule 12, which amends Part IV of the Environment Act 1995. Part IV creates the Local Air Quality Management Framework. The amendments will require the Secretary of State to review the Air Quality Strategy, which sets out policies for the assessment or management of the quality of air, at least every five years; and to report annually to Parliament on progress to deliver air quality objectives and standards (set out in the Strategy) in relation to England, and the steps the Secretary of State has taken in that year to support the meeting of those objectives and standards.

604 Amendments will also strengthen the requirements for local authorities under the Framework. When an Air Quality Management Area is declared by local authorities because they have assessed local air and determined that it exceeds, or is likely to exceed, air quality objectives and standards (as set by the Secretary of State in the National Strategy and enacted in secondary legislation), local authorities will be required to prepare actions plans that will need to set out how the local authority will exercise its functions to ensure that air quality standards are achieved and maintained. All tiers of local government, and neighbouring local authorities where relevant, will be required to co-operate in the development of those action plans. The Secretary of State will have power to designate, following consultation, relevant public authorities as air quality partners who would also be required to co-operate with the development of action plans, and to take proportionate action to improve air quality where necessary. These amendments will ensure responsibility for tackling air pollution is shared across relevant parties.

### **Clause 68: Smoke control areas: amendments to the Clean Air Act 1993**

605 This clause enacts Schedule 13, which amends the Clean Air Act 1993. The amendments will give local authorities the power to impose financial penalties for the emission of smoke in smoke control areas (SCAs) in England. This means that the emission of smoke from a chimney of a building or a chimney (not being a chimney of a building) that serves the furnace of any fixed boiler or industrial plant in an SCA in England will change from being a criminal offence to instead being subject to a civil penalty notice (a fine). The change will remove the current statutory defences that are making enforcement by local authorities very challenging, and reduce the burden and cost associated with enforcing SCAs. Additionally, the amendments remove the exemption in the Environmental Protection Act 1990 so that smoke emitted from a private dwelling in a Smoke Control Area can be enforced by local authorities in England as a statutory nuisance.

606 The amendments will also remove the limit on the fine for the offence of selling controlled solid fuels for delivery (leaving it to the discretion of the Magistrate's Court), and create a new duty on retailers to notify customers of the law regarding the acquisition of controlled solid fuels in England. This is intended to help raise consumer awareness and improve compliance.

607 They will also enable a local authority to extend the scope of an SCA in England to cover

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*



moored vessels, subject to local consultation. This means that if a local authority amends its smoke control order to include vessels, smoke emissions from the chimney of such vessels could be liable to a financial penalty.

608 Schedule 13 also amends, for Wales, the procedure for declaring a fuel to be authorised or fireplace to be exempt for the purposes of Part III of the Clean Air Act 1993, by enabling Welsh Ministers to publish a list of these fuels and fireplaces and to update this list as needed.

#### Clause 69: Environmental recall of motor vehicles etc.

609 Subsection (1) provides for the Secretary of State to make regulations making provision for the recall of relevant products that do not meet relevant environmental standards.

610 Subsections (2) and (3) clarify that the specification or description of a “relevant product” will be set out in secondary legislation, but set constraints on the types of product that may be specified or described.

611 Subsections (4), (5) and (6) provide definitions for “relevant environmental standard”, “enactment” and “environmental impact”.

#### Clause 70: Compulsory recall notices

612 Subsection (1) provides that regulations made under clause 69(1) can confer a power on the Secretary of State to issue a “compulsory recall notice” if they have reasonable grounds for believing a product does not meet a relevant environmental standard.

613 Subsection (2) provides a definition for “compulsory recall notice”.

614 Subsection (3) specifies that where a relevant product forms part of another product, a notice may require the return of the entire product.

615 Subsections (4) and (5) provide that a notice, or a supplementary notice, may impose supplementary requirements on a recipient.

616 Subsection (6) provides a non-exhaustive list of supplementary requirements that may be imposed pursuant to subsections (4) and (5), including requirements to publicise the recall, to achieve a minimum recall rate, to pay compensation, or to prevent any relevant products being sold while subject to a notice.

617 Subsection (7) provides a definition for “specified”.

618 Subsection (8) provides that the Secretary of State may in the regulations provide for an appeal mechanism or for a means of withdrawing a notice or supplementary notice.

#### Clause 71: Further provision about regulations under section 69

619 Subsection (1) provides that regulations made under clause 69(1) may impose a duty on both manufacturers and distributors to notify the Secretary of State if they consider that a relevant product does not meet an environmental standard.

620 Subsection (2) provides that the Secretary of State may in the regulations confer investigative and information gathering powers on themselves or a designated person for the purposes of deciding whether to issue a compulsory recall notice.

621 Subsection (3), (4) and (5) provide that the Secretary of State may in the regulations make provision about enforcement of the regulations, including the imposition of financial penalties, powers of entry to take documents and samples where there are reasonable grounds for suspecting a manufacturer or distributor has failed to comply with a requirement imposed by or under the regulations, and for appeals against the imposition

of a financial penalty.

#### Clause 72: Interpretation of sections 69 to 71

622 This clause defines terms used in this Part of the Bill.

### Part 5: Water

#### Clause 73: Water resources management plans, drought plans and joint proposals

623 Subsection (1) provides that the following subsections will amend Chapter 1 of Part 3 of the Water Industry Act 1991.

624 Subsection (2) makes a number of changes to section 37A of the Act. Subsection (2)(a) amends the heading of section 37A to remove the words “preparation and review”. The procedure for the preparation and review of water resources management plans will now be set out in regulations and directions made under new sections 39F and 39G of the Act. Subsection (2)(b) removes from primary legislation the reference to water undertakers taking account of water introduced into their area of appointment by water supply licensees. This requirement will instead be addressed in secondary legislation. Subsections (2)(c) to (f) make some amendments in light of the fact that the procedure for preparing and publishing water resources management plans will be set out in secondary legislation. Cross-references to section 37B are also removed, as this section will be replaced by the new powers to make secondary legislation as to procedure.

625 Subsection (3) omits section 37B of the Act, which contains the current requirements for the publication of a draft and final water resources management plan and the handling of consultation responses on the draft plan, and section 37C, which contains the current requirements for water supply licensees to provide information to water undertakers. These provisions will be replaced by the provisions in regulations and directions made under new sections 39F and 39G.

626 Subsection (4) makes amendments to section 37D to remove references to section 37B and section 37C, since those sections have been omitted by subsection (3).

627 Subsection (5) makes amendments to section 39B, which relates to the procedure for preparing and revising drought plans, to change those provisions that rely on and refer to the water resources management plan provisions amended in the previous subsections.

628 Subsection (6) omits section 39C, which relates to information sharing in the context of drought plan preparation, since regulations made under new section 39F will provide for the process of information sharing in relation to drought plans.

629 Subsection (7) inserts new sections 39E, 39F and 39G in to the Water Industry Act 1991.

#### **New section 39E Joint proposals**

630 Subsection (1) introduces a new power for the Secretary of State or Welsh Ministers to direct water undertakers to prepare and publish joint proposals.

631 Subsection (2) provides that a joint proposal is a proposal identifying measures that may be taken jointly by the undertakers for the purpose of improving the management and development of water resources. Such proposals are currently being developed on a voluntary basis by water undertakers working together in regional groups. Such directions can require those joint proposals to include measures to support the achievement of relevant environmental objectives.

632 Subsection (3) clarifies that a water undertaker must not prepare a joint proposal that

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

includes measures that prevent water undertakers meeting their obligations under Part 3 of the Water Industry Act 1991. Part 3 includes, in particular, water undertakers' water supply duties.

- 633 Subsection (4) provides that the Minister may specify the form that the joint proposals must take, any specified matter they must address, a particular area they should cover, any specific criteria they should address, and any planning assumptions they must be based upon. The directions are likely to require matters that change over time and location are addressed, for example, population, climate change or drought projections.
- 634 Subsection (5) provides that any directions must be set out in writing. This is consistent with the approach to other powers in the Water Industry Act 1991 under which the relevant Minister may direct water undertakers as to certain matters.
- 635 Subsection (6) provides that each undertaker to whom a direction applies must comply with the direction.
- 636 Subsection (7) provides that a direction under this subsection would be enforceable by the Minister under Section 18 of the Water Industry Act 1991. This is consistent with the current approach to water resources management plan and drought plan directions.
- 637 Subsection (8) provides that the power to make directions under new section 39E is conferred on the Secretary of State for water undertakers whose areas are wholly or mainly in England and Welsh Ministers in relation to water undertakers whose areas are wholly or mainly in Wales.
- 638 Subsection (9) provides that, where new section 39E refers to matters "specified", this means specified in a direction under that section.

#### **New section 39F Plans and joint proposals: regulations about procedure**

- 639 Subsection (1) provides powers under which the Secretary of State or Welsh Ministers may make regulations setting the procedure for preparing and publishing joint proposals, water resources management plans and drought plans. It is likely that the regulations will largely cover similar requirements as the existing regulations for water resources planning (The Water Resources Management Plan Regulations 2007) and drought planning (The Drought Plan Regulations 2005). The existing regulations set out publication requirements and how responses to the consultations should be considered, as well as procedural requirements for inquiries or hearings. It is also likely that the new regulations may also include provisions that permit the use of modern consultation platforms and improve the existing requirements for the sharing of information and the handling of confidential information.
- 640 Subsection (2) provides that the regulations may include requirements for the sharing information, including requirements that water supply licensees must share with water undertakers such information as the water undertaker may reasonably request.
- 641 Subsection (3) provides that the regulations may include requirements on how water undertakers should consult with other bodies, who they should consult, the timing of any consultation and the publication of statements relating to any consultation.
- 642 Subsection (4) provides that the regulations may include the procedures for preparing and circulating drafts, including provision for the Minister to require changes to a draft plan or proposal.
- 643 Subsection (5) provides that the regulations may include requirements to ensure that people likely to be affected by the plan or proposal have a reasonable opportunity to make

representations to the Minister.

644 Subsection (6) provides that the regulations may include requirements about how water undertakers should handle the responses they receive and that the Secretary of State or Welsh Ministers may cause a public local inquiry or other hearing to be held in connection with a water resources management plan or drought plan.

645 Subsection (7) provides that the regulations may include requirements about how water undertakers should handle commercially confidential information.

646 Subsection (8) provides that references to the Minister in that section, including the power to make regulations, is conferred on the Secretary of State for water undertakers whose areas are wholly or mainly in England and Welsh Ministers in relation to water undertakers whose areas are wholly or mainly in Wales.

#### **New section 39G Regulations under section 39F: directions**

647 Subsection (1) provides that regulations made under new section 39F may also confer on the Secretary of State or Welsh Ministers a power to make directions. This power is required because some administrative requirements – for example, around the timetables for preparation, revision and publication – are likely to change from planning round to planning round. The Secretary of State or Welsh Ministers may also need to be able to direct specific water undertakers on when and how water resources management plans, drought plans and joint proposals should be prepared and revised. Under the existing legislation relating to water resources management plans and drought plans, the Secretary of State can give such directions to water undertakers and those directions are not subject to parliamentary procedure.

648 Subsection (2) provides that the directions must be set out in writing.

649 Subsection (3) provides that a direction could apply generally to all water undertakers or to one or more undertakers.

650 Subsection (4) provides that each water undertaker must comply with a direction.

651 Subsection (5) provides that the directions would be enforceable by the Secretary of State or Welsh Ministers under the section 18 of the Water Industry Act 1991.

652 Subsection (6) provides that “Minister” has the same meaning as in new section 39F, with the effect that the power to make directions under new section 39G is conferred on the Secretary of State for water undertakers whose areas are wholly or mainly in England, and Welsh Ministers in relation to water undertakers whose areas are wholly or mainly in Wales.

#### **New section 39H Regulations under section 39F: supplementary**

653 Subsection (1) provides that regulations under new section 39F are to be made by statutory instrument.

654 Subsection (2) provides that regulations are subject to the a negative resolution procedure subject to annulment by either House of Parliament, in relation to regulations made by the Secretary of State, or the Assembly, in the case of regulations made by the Welsh Ministers.

655 Subsections (3) and (4) provide that, where regulations are made by both the Secretary of State and Welsh Ministers and either legislature votes to annul those regulations, the regulations will have no further effect.

656 Subsection (5) provides that section 213(2) to (2B) of the Water Industry Act 1991 applies to regulations made by Welsh Ministers under new section 39F as they would apply the Secretary of State under new section 39F. This means that regulations made by Welsh Ministers may, for example, include provision for the determination of questions of fact and law which may arise in giving effect to the regulations or provision as to awarding costs or expenses of proceedings in any determination, among other things.

#### Clause 74: Drainage and sewerage management plans

657 Clause 74 inserts five new sections into the Water Industry Act 1991.

#### **New section 94A Drainage and sewerage management plans: preparation and review**

658 New section 94A introduces a new duty on sewerage undertakers in England and Wales regarding drainage and sewerage management plans.

659 Subsection (1) sets out the requirement for each sewerage undertaker to prepare, publish and maintain a plan.

660 Subsection (2) defines the plan with reference to Part 4 of the Water Industry Act 1991. This Part includes section 94 of the Water Industry Act 1991, which is the duty on the sewerage undertakers to provide, maintain and extend a system of public sewers to ensure that their area of operation is and continues to be “effectually drained”. The production of the plan will demonstrate how a sewerage company will meet its duties under Part 4 of the Water Industry Act 1991 including section 94.

661 Subsection (3) sets out the specific matters the plan must address, namely an assessment of the sewerage undertaker’s drainage and sewerage system capacity, current and future demand, and resilience. The sewerage undertaker is required to set out in the plan what it intends to do to maintain an effective system of sewerage and drainage, and when those actions are likely to be taken. Any relevant risks to the environment and mitigation measures should be recorded in the plan. Should other factors become relevant, the Minister (defined in subsection (10) as the Secretary of State or Welsh Ministers) may make directions specifying additional matters that must be addressed by the plan.

662 Subsection (4) points to section 94C, which makes provision for the preparation and publication of a plan.

663 Subsection (5) sets out that the sewerage undertaker must review its plan on an annual basis and share the conclusions of that review with the Minister.

664 Subsection (6) specifies the circumstances in which a sewerage undertaker must produce a revised plan. This must occur within 5 years of publication of the last plan, or earlier if an annual review indicated a material change of circumstances or if the Minister gives directions that a revised plan is needed.

665 Subsection (7) sets out that the Minister can give directions to sewerage companies regarding the form of, or the time period covered by, the plan. The intention is that the planning period is long-term, in the region of around 25 years.

666 Subsection (8) refers to enforcement powers at section 18 of the Water Industry Act 1991.

667 Subsection (9) defines “drainage system” and “sewerage system” as used in the preceding subsections. Section 114A of the Water Industry Act 1991 defines a “drainage system” as a structure designed to receive rainwater and other surface water, other than a natural watercourse. Section 17BA of the Water Industry Act 1991 defines the “sewerage system” of a sewerage undertaker as the system comprising (a) the system of public sewers, the facilities for emptying public sewers and the sewage disposal works and other

facilities for dealing effectually with the contents of public sewers that the undertaker is required to provide by section 94 of the Water Industry Act 1991, and (b) the lateral drains that the undertaker is required to maintain by section 94 of the Water Industry Act 1991.

668 Subsection (10) defines “Minister”, as used in the preceding subsections, as meaning the Secretary of State or Welsh Ministers in relation to English and Welsh sewerage undertakers respectively.

#### **New section 94B Drainage and sewerage management plans: power to amend period**

669 New section 94B sets out the powers available to the Minister to amend the five-year time period specified at new section 94A(6)(c).

670 Subsection (1) sets out that the time period must be amended by statutory instrument.

671 Subsection (2) defines “Minister” as used in this section with the same meaning as new section 94A(10).

672 Subsection (3) sets out that statutory instruments made under this section are subject to negative resolution procedure.

673 Subsection (4) sets out that subsection (5) applies to orders made by both the Secretary of State and Welsh Ministers.

674 Subsection (5) describes how the negative resolution procedure can lead to revocation of the statutory instrument.

#### **New section 94C Drainage and sewerage management plans: regulations about procedure**

675 Subsection (1) allows the Minister to make regulations that set out how a plan should be prepared and published.

676 Subsection (2) sets out that the regulations made under this section can describe how information should be shared in the development of a plan, including requiring sewerage licensees to provide information to sewerage undertakers.

677 Subsection (3) sets out that the regulations made under this section can set out how a sewerage undertaker should consult on their plans, including who should be consulted, the frequency and timing of consultation and the publication of consultation results.

678 Subsection (4) sets out that the regulations made under this section can make provision for how plans are prepared and circulated.

679 Subsection (5) sets out that the regulation made under this section can be used to make sure that appropriate representations are made in the preparation of the plan.

680 Subsection (6) sets out how representations made under subsection (5) are dealt with.

681 Subsection (7) sets out that the regulation made under this section can provide details on handling of commercially confidential information.

682 Subsection (8) sets out that the regulation made under this section can be used to give the Secretary of State/Welsh Ministers direction making powers.

683 Subsection (9) defines “Minister” as used in this section with the same meaning as new section 94A(10).

#### **New section 94D Regulations under section 94C: supplementary**

684 Subsection (1) sets out that regulations made under new section 94C are made by statutory instrument.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

- 685 Subsection (2) sets out that regulations made under new section 94C are subject to negative resolution procedure.
- 686 Subsection (3) sets out that subsection (4) applies to regulations made under new section 94C by both the Secretary of State and Welsh Ministers.
- 687 Subsection (4) describes how the negative resolution procedure can lead to revocation of regulations made under new section 94C.
- 688 Subsection (5) defines how other sections apply to regulations made under new section 94C by the Secretary of State and Welsh Ministers.

#### **New section 94E Drainage and sewerage management plans: direction**

- 689 New section 94E defines directions with reference to preceding sections.
- 690 Subsection (1) defines directions as those given in new section 94A or regulations under new section 94C.
- 691 Subsection (2) specifies that directions must be given in writing.
- 692 Subsection (3) specifies that directions may be given to all sewerage undertakers or can be specific to one or more sewerage undertaker.
- 693 Subsection (4) confirms that sewerage undertakers have a duty to comply with directions.
- 694 Subsection (5) sets out that the duties under this section are enforceable under section 18 of the Water Industry Act 1991.
- 695 This clause forms part of the law of England and Wales and applies to England and Wales.

#### **Clause 75: Authority's power to require information**

- 696 Clause 75 inserts new section 27ZA into the Water Industry Act 1991.

#### **New Section 27ZA: Power to require information for purpose of monitoring**

- 697 This new section provides the Water Services Regulation Authority (“Ofwat”) with a strengthened information gathering power when performing its duties under section 27(1) (reviewing water and sewerage company and water supply and sewerage licensees performance of duties) and section 27(2) (collecting information on company and licensees activities under their licences to operate) of that Act.
- 698 Subsection (1) enables Ofwat to issue a notice to a water or sewerage undertaker or licensee requesting information in relation to its functions under section 27(1) and section 27(2). Ofwat has duties under the Water Industry Act 1991 to (a) keep under review the manner in which water and sewerage undertakers and licensees carry out their functions and activities (under section 27(1)); and (a) collect information with respect to the manner in which water and sewerage undertakers and licensees carry out their functions and activities, so as to enable Ofwat to become aware of matters relating to its statutory powers or duties (under section 27(2)).
- 699 Subsection (2) defines the notice as a notice which requires a person to produce specified documents by a particular time, to a particular location, or to provide specified information in a specific manner and form at a particular time and place.
- 700 Subsection (3) provides that the duties in this section are enforceable by Ofwat using the procedure set out under section 18 of the Water Industry Act 1991.
- 701 Subsection (4) defines the “appropriate Minister” responsible for enforcement under

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

section 18 of the Water Industry Act 1991 with reference to the water/ sewerage undertaker or water supply/ sewerage licensee in question.

- 702 Subsection (5) provides the definitions for “the supply system for a water undertaker” and “the sewerage system of a sewerage undertaker” in subsection (4) as those, respectively, provided in section 17B and section 17BA(7) of the Water Industry Act 1991.
- 703 Subsection (6) provides clarification that nothing in this section requires a contravention of the data protection legislation.
- 704 Subsection (7) imports the “data protection legislation” definition in section 3(9) of the Data Protection Act 2018. That section currently defines the “data protection legislation” as the General Data Protection (GDPR); the “applied GDPR”, the Data Protection Act 2018 and regulations made under it, and regulations made under section 2(2) of the European Communities Act 1972 that relate to the GDPR or the Law Enforcement Directive.
- 705 This clause forms part of the law of England and Wales and applies to England and Wales.

#### **Clause 76: Water and sewerage undertakers in England: modifying appointments**

- 706 Subsection (1) amends Part 2 (appointment and regulation of undertakers) of the Water Industry Act 1991, where the current provision for modification of appointment conditions of water and sewerage undertakers by agreement (section 13) is located.
- 707 Subsection (2) inserts nine new sections into the Water Industry Act 1991, setting out the new process for modification of appointment conditions.

#### **New section 12A Modification by the Authority**

- 708 Subsection (1) explains that sections 12B to 12I apply to water and sewerage undertakers whose areas are wholly or mainly in England. The process for the modification of licence conditions of undertakers whose areas are wholly or mainly in Wales will remain unchanged by this Bill.
- 709 Subsection (2) of new section 12A contains a power for the Water Services Regulation Authority (“Ofwat”) to make modifications to appointment conditions.
- 710 Subsection (3) requires Ofwat to consult on any proposed modifications to appointment conditions. The consultation should set out that Ofwat proposes to make changes to a licence, set out the proposed changes, the effect of the changes, why the changes are being proposed, and when the consultation will close.
- 711 Subsection (4) requires that the consultation period under subsection (3) must be at least 42 days in length, starting from the date the notice is published.
- 712 Subsection (5) sets out who must be given notice of the consultation. Paragraph (a) requires Ofwat to publish notice in a way that ensures those affected by the modifications will be able to see it; paragraph (b) requires Ofwat to send a copy of the notice to each water or sewerage undertaker whose conditions Ofwat proposes to change, any undertaker or will be affected by the modifications, to the Secretary of State, and to the Consumer Council for Water.
- 713 Subsection (6) requires Ofwat to consider any responses received to the consultation within the time limit.
- 714 Subsection (7) enables the Secretary of State to direct Ofwat not to make the change or changes, during the period of the consultation.



- 715 Subsection (8) explains that subsections (9) to (11) will apply where Ofwat has undertaken the process under subsections (3) to (6) and decides to proceed with the change to the licence following consultation.
- 716 Subsection (9) requires Ofwat to publish its decision and proposed changes following consultation, including explaining the effect of the changes, how it considered consultation responses, and how the final decision differs (if at all) from the original proposal.
- 717 Subsections (10) and (11) require Ofwat to state the date on which each change will take effect, which must be at least 56 days after publication of the decision to make the change in question.

#### **New section 12B Modification of conditions of appointment: early effective date**

- 718 This new section allows for proposed modifications to licence conditions to be made sooner than 56 days if Ofwat considers an earlier date is necessary and has undertaken a consultation explaining its intention to do this. Ofwat's consultation must have explained the proposed earlier effective date, the reasons for the earlier date, and why an earlier date would not have a material negative impact on undertakers.

#### **New section 12C Modification of conditions under section 12A: supplementary**

- 719 This new section enables Ofwat to make consequential amendments to other conditions where it is necessary or expedient as a consequence of the original modification. Paragraph 2 of new Schedule 2ZA allows the CMA to direct that, where the modification is appealed, the modification can be suspended from coming into effect, in full or in part, pending the outcome of the appeal, and will not come into effect until the appeal has been determined.

#### **New section 12D Appeal to the CMA**

- 720 Subsection (1) allows an appeal to be made to the CMA against a decision to modify a condition of an appointment.
- 721 Subsection (2) sets out the bodies that can bring an appeal: the affected undertaker; any other undertaker or licensee also affected by the change; the representative body of undertakers and licensees (currently a position held by Water UK); or the Consumer Council for Water.
- 722 Subsection (3) provides that the CMA must agree to an appeal being brought.
- 723 Subsection (4) enables the CMA to refuse permission to appeal on three specific grounds: where the appeal is brought by an undertaker or licensee whose interests are not materially affected by the decision being appealed; where the interests of undertakers or licensees that are represented (by the industry or consumer body) are not materially affected; or where the appeal is vexatious, is trivial or does not have a reasonable prospect of success.

#### **New section 12E Procedure on appeal to CMA**

- 724 This new section provides for the legal effect of new Schedule 2ZA. That Schedule sets out the process for appeals to CMA.

#### **New section 12F Determination by CMA of appeal**

- 725 Subsection (1) sets out that the process in this section applies to all appeals brought under section 12D.

- 726 Subsection (2) requires CMA to have regard to Ofwat's duties as set out in section 2 of the Water Industry Act 1991 and the strategic priorities set out in any Strategic Policy Statement issued to Ofwat by Defra Secretary of State under section 2A of that Act. Ofwat's duties under section 2 include duties to further the consumer objective; secure that the functions of water and sewerage undertakers are properly carried out across Wales and England; secure that undertakers are able to finance the proper carrying out of their functions; secure that the activities authorised by the licence of a licensed water supplier and any statutory functions imposed on it in consequence of the licence are properly carried out; and to further the resilience objective.
- 727 Subsection (3) allows the CMA to consider any matter that Ofwat did not consider, provided Ofwat would have been entitled to do so, such as more recent company data. The CMA must not consider any matter Ofwat would not have been entitled to consider.
- 728 Subsection (4) sets out the grounds on which the CMA can allow an appeal: that Ofwat did not take proper account of its duties under the Water Industry Act 1991 or its strategic priorities; that Ofwat's decision was based on a factual error; that the modifications do not achieve what Ofwat contended they achieve; that Ofwat did not follow the statutory procedure for making modifications; or that the decision was legally wrong.
- 729 Subsection (5) sets out that, where the appeal is not allowed, the CMA must confirm Ofwat's original decision.

#### **New section 12G CMA's powers on allowing an appeal**

- 730 Subsection (1) allows for the CMA, where it allows an appeal (in full or in part), to quash Ofwat's licence modification decision and/or send the proposed modification back to Ofwat to reconsider and make a new decision based on any CMA direction.
- 731 Subsection (2) allows CMA only to direct Ofwat to do something that it has the power to do.
- 732 Subsection (3) requires Ofwat to comply with a direction.

#### **New section 12H Time limits for CMA to determine an appeal**

- 733 This new section sets the time limits for the CMA to determine appeals.
- 734 Subsection (1) sets out that there will be a four-month time limit for the CMA to determine an appeal, running from the date on which it gave permission for the appeal to proceed, unless certain conditions apply.
- 735 Subsections (2), (3) and (4) allow the CMA to extend the time limit to five months, if a party to an appeal asks them to and the CMA is satisfied that there are good reasons why the appeal cannot be determined within four months. If the CMA extends time, it must inform the parties to the appeal, and publish the revised time limit so that it is brought to the attention of any persons that it considers will be affected by the determination.
- 736 Subsection (5) provides that the permission date is the date the CMA gave permission to bring the appeal under new section 12D(3).
- 737 Subsection (6) explains that the definition for "a party" to an appeal in new sections 12H and 12I is that set out in new Schedule 2ZA: that is, "a party" to an appeal means either the appellants or Ofwat.

#### **New section 12I Determination of appeal by CMA: supplementary**

- 738 Subsection (1) sets out how the CMA must set out the determination of an appeal (in an

order), what should be included in it, when and how it should be published, and whom the CMA must notify.

- 739 Subsection (2) allows the CMA not to publish any commercial information that could harm the business interests of an undertaking to which the determination relates, or any information that relates to an individual and could harm their interests.
- 740 Subsection (3) requires Ofwat to take any steps needed to comply with an order issued by the CMA.
- 741 Subsection (4) provides that Ofwat must comply with any order issued by the CMA by the time specified in the order or, if no time is specified, within a reasonable time.
- 742 Subsection (5) provides that new section 12C, under which a consequential change to other conditions linked with the original change could be made, applies as it applies where a condition of a licence is modified under new section 12A. Under new section 12G, Ofwat may be required to reconsider and redetermine a licence modification decision if an appeal is allowed by the CMA.
- 743 Subsection (3) of clause 76 inserts a new heading before section 13 of the Water Industry Act 1991 to read “Modification of appointment conditions: Wales”. This clarifies that, following the amendments made by this Bill, sections 13 to 16B of the Water Industry Act 1991 will apply solely to undertakers whose appointments areas are wholly or mainly in Wales. The current process for modification of licence conditions by agreement will effectively continue for Wales only.
- 744 Subsection (4) of clause 76 inserts a new subsection (A1) into section 13 of the Water Industry Act 1991, clarifying that that sections 13 to 16B apply only to undertakers whose areas of appointment are wholly or mainly in Wales.
- 745 Subsection (5) of clause 76 inserts a new heading before section 17 of the Water Industry Act 1991 to clarify that section 17 applies to the modification of conditions in both England and Wales.
- 746 Subsection (6) of clause 76 inserts a new Schedule 2ZA into the Water Industry Act 1991, which details the procedure for appeals made under section 12D of the Water Industry Act 1991.
- 747 Members of the CMA Panel will consider appeals made to the CMA in respect of water and sewerage undertaker licence modification decisions. Subsection (7) makes a consequential amendment to the CMA Panels provision in Schedule 4 to the Enterprise and Regulatory Reform Act 2013 (paragraph 35(3)), to ensure that appeals to the CMA under new section 12D of the Water Industry Act 1991 will meet the definition of a “specialist utility function” in the Enterprise and Regulatory Reform Act 2013. This will ensure that CMA panel experts are able to carry out new section 12D functions.

#### **Clause 77: Electronic service of documents [w04]**

- 748 Clause 77 inserts new subsections into section 216 (service of documents) of the Water Industry Act 1991, enabling the electronic service of documents served under that Act.
- 749 Subsection (4A) allows any document required or permitted to be served under the Water Industry Act 1991 to be served by electronic means.
- 750 Subsection (4B) provides that where the document is to be served on a consumer, it can only be served electronically where (a) a person has consented in writing to receiving documents electronically and has not withdrawn that consent, and (b) the document is sent electronically to the electronic address that the consumer has most recently provided

to the sender.

751 Subsection (4C) defines the meaning of “consumer”, as a person liable to pay charges in respect of (a) the supply of water any premises, or (b) the provision of sewerage services in respect of any premises.

752 This clause forms part of the law of England and Wales and applies to England and Wales.

#### **Clause 78: Water abstraction: no compensation for certain licence modifications**

753 Clause 81 inserts new sections 61ZA and 61ZB into the Water Resources Act 1991, and makes consequential modifications to section 27 of the Water Act 2003 and Schedule 8 to the Water Act 2014. The purpose of the two new sections is to allow permanent licences in England to be varied or revoked on or after 1 January 2028 where the change is necessary to protect the environment or to remove excess headroom.

754 Subsection (1) inserts two new sections 61ZA and 61ZB after section 61 of the Water Resources Act 1991.

#### **New section 61ZA No compensation where modification to protect environment: England**

755 New section 61ZA provides that permanent abstraction licences in England only can be varied or revoked on or after 1 January 2028 without the payment of compensation if the Secretary of State is satisfied that the revocation or variation is necessary having regard to a relevant environmental objective; or to otherwise protect the water environment from damage. This section extends the circumstances in which a permanent abstraction licence can be varied or revoked without the payment of compensation to protect the environment beyond the current law. Currently, section 27 of the Water Act 2003 permits the revocation or variation of a licence in order to protect from “serious damage” to the water environment.

756 Subsection (1) sets out the circumstances where the section applies. Paragraph (a) sets out that the section applies to licences that are revoked or varied on or after 1 January 2028 pursuant to a direction made by the Secretary of State following a licence change proposal by the Environment Agency (section 54) or the owner of a fishing right affected by the licence (section 56). This date will allow time for the catchment-based approach to water resources to embed and produce solutions. (Defra proposed a stronger catchment focus following the catchment based approach in its [Water Abstraction Plan](#), which involves working with abstractors and other local stakeholders to develop solutions to abstraction issues at a catchment level.) Paragraph (b) sets out the environmental reasons why a licence may be varied or revoked without paying compensation. These are that the Secretary of State is satisfied the change is needed in relation to “a relevant environmental objective” or “to otherwise protect the water environment from damage”. (Subsections (2), (4) and (5) define the terms “relevant licence”, “water environment” and “relevant environmental objective” respectively.)

757 Subsection (2) defines the term “relevant licence” used in subsection (1)(a). A relevant licence is a licence (a) that allows abstraction in England only, and (b) that does not have a time-limit – that is, one that would remain in force indefinitely unless revoked, commonly known as a permanent licence. As a result, licences that allow abstraction in Wales and licences with a time-limit are not affected by the provisions.

758 Subsection (3) provides that, where a licence is changed under this section, no compensation is payable under section 61 to the licence holder.

759 Subsection (4) defines the term “water environment” used in subsection (1)(b)(ii). The

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

water environment is any inland waters (including lakes, ponds, rivers or other watercourses with dry bottoms, channels or beds); any water contained in rocks underground (commonly known as groundwater); and the underground rocks themselves (commonly known as aquifers). It includes both natural and man-made features. It also refers to the plants and animals that are dependent on any of this water or these physical features.

760 Subsection (5) defines the term “relevant environmental objective” used in subsection (1)(b)(i). A relevant environmental objective is an environmental objective as defined in the regulations that implement the Water Framework Directive in England. In England, environmental objectives are set in relation to each water body in a river basin district by the Environment Agency, after public consultation, and approved by the Secretary of State. Environmental objectives include achieving compliance with protected area objectives, preventing any deterioration in the status of water bodies; and protecting, enhancing or restoring water bodies with the aim of achieving “good status”. There are three pieces of secondary legislation that implement the Water Framework Directive in England. There are separate regulations for the Solway Tweed River Basin District and the Northumbria River Basin District, which both span England and Scotland, and a further statutory instrument for all other River Basin Districts in England and Wales.

#### **New section 61ZB No compensation where variation to remove excess headroom: England**

761 New section 61ZB provides that permanent abstraction licences in England can be varied on or after 1 January 2028 without the payment of compensation where at least 25% of the licence volume remains unused for at least 12 years before the date the Environment Agency makes a proposal to vary or revoke the licence, as long as the Secretary of State is satisfied that the variation or revocation does not reduce the quantity of water the licence holder is authorised to abstract to a level below that which the holder reasonably requires.

762 Subsection (1) sets out that the section only applies to relevant licences that are varied or revoked on or after 1 January 2028 pursuant to a direction made by the Secretary of State under section 54, following a licence change proposal by the Environment Agency.

763 Subsection (2) defines the term “relevant licence” used in subsection (1). A relevant licence is a licence (a) that allows abstraction in England only, and (b) that does not have a time-limit – that is, one that would remain in force indefinitely unless revoked, commonly known as a permanent licence. As a result, licences that allow abstraction in Wales and licences with a time-limit are not affected by the provisions.

764 Subsection (3) provides that no compensation is payable under section 61 to the licence holder, if (a) the licence holder has abstracted less than 75% of the annual licensed volume in each of the 12 years preceding the relevant date, and (b) the Secretary of State is satisfied that the variation would not reduce the quantity of water that the licence holder reasonably needs.

765 Subsection (4) defines the term “relevant date” used in subsection (3). The relevant date is the date when the Environment Agency serves notice on the licence holder that it proposes to change the licence. It is the end of the 12-year period used to calculate under-use.

766 Subsection (2) of clause 78 amends section 27 of the Water Act 2003 so that on or after 1 January 2028 it will only apply to licences that fall within the definition of a relevant licence as defined in new section 61ZA(2) of the Water Resources Act 1991 – that is, permanent licences that authorise abstraction in England. Section 27 will not apply to relevant licences on or after 1 January 2028, but will continue to apply to relevant licences

up to and including 31 December 2027.

767 Subsection (3) of clause 78 omits paragraph 30(4) of Schedule 8 to the Water Act 2014, so that the legislative changes introduced in this Bill can be incorporated into the new Environmental Permitting Regulations regime. In future, it is intended that the water abstraction licensing regime will be moved into to the Environmental Permitting Regulations regime under the Environmental Permitting (England and Wales) Regulations 2016. Making this change should ensure that the abstraction licensing regime is consistent with the regulation of other activities affecting the environment. The powers under which the regulations will be made include Schedule 8 to the Water Act 2014.

### Clause 79: Water quality: powers of Secretary of State

768 Subsection (1) provides a regulation-making power for the Secretary of State to make provision about the substances to be taken into account in assessing the chemical status of surface water or groundwater, and to specify standards for those substances, or in relation to the chemical status of water bodies. This will enable updates to the substances and standards currently used in that process, for example those set out in the list of priority substances and priority hazardous substances for surface waters in the domestic legislation which implements the Environmental Quality Standards Directive. The power can only be used to amend or modify the existing water quality legislation relevant to chemical status, listed in subsection (2).

769 Subsection (1)(a) would allow an entirely new substance to be included in the legislation, or the removal of an existing substance. Subsection (1)(b) allows the environmental quality standard (EQS) to be set for a substance, or for an existing EQS to be modified.

770 Subsection (3) enables additional provision that may need to be introduced as a result of exercising the powers under subsection (1). This may include, for example, specifying a date by which a standard for a specific substance must be achieved, changes to monitoring regimes to cover newly specified substances, or new measures to be introduced into river basin management plans in respect of such substances.

771 Subsection (4) establishes that the Secretary of State can only exercise the powers in this section to make provision that could be made by the Welsh Ministers or Northern Ireland Department of Agriculture, Environment and Rural Affairs under their own powers in clauses 80 and 81 respectively with their consent.

772 Subsection (5) establishes that the Secretary of State cannot exercise the powers in this section to make provisions which would fall within the Scottish Parliament's devolved competency, given effect by powers under an Act of that Parliament, with the exception of parts of the cross border river basin districts lying in Scotland, where the Secretary of State could exercise the powers to make provisions but only with Scottish Ministers' consent.

773 Subsection (6) establishes the consultation requirements attached to the exercise of the powers. Subsection (6)(b) requires the Secretary of State to consult with Welsh Ministers when making regulations applying to an England and Wales cross-border River Basin District (RBD) that lies in England, and when the Welsh Ministers' consent is not required under subsection (4). This would mean consultation is only required if the provision being made is only for the English part and does not apply to the part in Wales. Subsection (5)(c) places the same consultation requirements on the Secretary of State in relation to the cross-border RBDs shared with Scotland.

### Clause 80: Water quality: powers of Welsh Ministers

774 Clause 80 confers a regulation, broadly comparable to that in clause 79, on the Welsh Ministers in relation to Wales. Subsection (4) requires consultation with the Natural

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Resources Body for Wales, other interested persons or bodies, and with the Secretary of State when exercising the power in relation to the Welsh part of a cross-border RBD.

#### Clause 81: Water quality: powers of Northern Ireland Department

775 Clause 81 confers the same power on the Department of Agriculture, Environment and Rural Affairs in relation to Northern Ireland.

#### Clause 82: Solway Tweed river basin district: power to transfer functions

776 Clause 82 confers a power to be exercised by the Secretary of State to amend the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004 (“the Solway Tweed Regulations”) to allow future changes to the exercise of functions in the Solway Tweed River Basin District.

777 Subsection (3) enables regulations to be made that provide for functions under the Solway Tweed Regulations to be exercised in a different manner. For example, it would enable changes to functions that are currently joint between the Secretary of State and Scottish Ministers for the whole of the river basin district.

778 Subsection (4) would allow amendments to the functions of the Environment Agency and Scottish Environment Protection Agency. These could be split to enable, for example, monitoring of English water bodies by the Environment Agency alone.

779 Subsection (5) allows for changes to the geographical area in which the functions can be exercised. For example, the functions could be amended so that in future they are exercised by the Secretary of State alone in relation to the English part, and the Scottish Ministers alone in the Scottish part.

780 Subsection (6) would enable requirements to be imposed on such functions so that they are exercisable with the consent of the Secretary of State or the Scottish Ministers, or after consultation.

781 Subsection (7) requires the consent of the Scottish Ministers for any regulations under this clause.

782 Subsection (8) states that regulations made under this clause are subject to the negative procedure.

783 Subsection (9) provides a definition.

784 This clause forms part of the law of England and Wales and Scotland, and applies to the area of the Solway Tweed river basin district which is partly in England and partly in Scotland.

#### Clause 83: Water quality: interpretation

785 This clause contains definitions used in the clauses on water quality.

#### Clause 84: Valuation of other land in drainage district: England

786 Clause 87 amends section 37 of the Land Drainage Act 1991 (“the LDA”), enabling the Secretary of State to make regulations, by the affirmative procedure, that establish the valuation calculation for the value of other land in an internal drainage district in England. Subsection (3) makes the main changes by inserting new subsections (5ZA) to (5ZH) into the LDA.

787 Setting out the valuation calculation in regulations is appropriate and proportionate, because these provisions deal with details of a subsidiary and technical matter and, accordingly, it is anticipated that these details will need to be updated again in future. By enabling the technical implementation of this policy to be set out in secondary legislation,

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

future governments will be better able to make any future necessary updates in a timely manner.

- 788 New subsection (5ZA) provides the power for the Secretary of State to make such regulations.
- 789 New subsection (5ZB) sets out the provisions that the regulations may include when setting out the new valuation calculation. Paragraphs (a) to (g) detail the different components of calculations for the different types of land that comprise other land under the LDA, ensuring that the Secretary of State has the necessary powers to stipulate a comprehensive valuation calculation in secondary legislation.
- 790 New subsection (5ZC) sets out which internal drainage boards (IDBs) the Secretary of State can decide to apply the regulations to. Linked to this, new subsection (5ZD) enables the regulations to allow for an IDB to elect that the regulations apply to them, and for the regulations to specify a procedure for that election. These provisions mean that, where an issue associated with the existing valuation calculation only affects certain IDBs in England, the Secretary of State may provide an alternative calculation that other IDBs may elect to make use of, if they so choose. This is currently necessary because certain data referred to within existing subsection (5) is either missing or incomplete in some areas. However, the provisions also reflect the fact that, in future, the calculation may need to be updated for all IDBs (were an issue within the calculation to affect all IDBs). New subsection (5ZC) therefore enables a calculation stipulated in secondary legislation to be applied to all English IDBs in such cases.
- 791 Subsection (5ZE)(b) enables the Secretary of State to make changes, as a consequence of these new provisions being added to the LDA. This includes amending, repealing or revoking provisions in primary legislation (pursuant to new subsection (5ZF)).
- 792 New subsection (5ZG) places a duty on the Secretary of State to consult such persons (if any) as are considered appropriate, taking into account the extent to which the regulations are likely to affect the valuation of other land.

#### **Clause 85: Valuation of other land in drainage district: Wales**

- 793 Section 83 of the Environment (Wales) Act 2016 conferred powers on Welsh Ministers to make regulations which establish a valuation calculation for other land in respect of internal drainage districts in Wales. These powers are similar to those conferred on the Secretary of State in England under clause 84 above.
- 794 Clause 85 makes minor amendments to section 83 of that Act, with one key substantive amendment set out below.
- 795 Subsection (2)(b)(iii) inserts new subsection (5D) into section 37 of the Land Drainage Act 1991 (“the LDA”), which places a new duty on Welsh Ministers to consult such persons (if any) as are considered appropriate, taking into account the extent to which the regulations are likely to affect the valuation of other land. The existing subsection (5D) is renumbered as new subsection (5E).

#### **Clause 86: Valuation of agricultural land in drainage district: England and Wales**

- 796 Clause 86 inserts new section 41A into the LDA, which enables the appropriate national authorities (the Secretary of State in respect of internal drainage districts in England, and Welsh Ministers in respect of internal drainage districts in Wales) to make regulations that establish the valuation calculation for the value of chargeable property (agricultural land and buildings) in an internal drainage district.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*



### **New section 41A Alternative method of calculating annual value of agricultural land and buildings**

- 797 Subsection (1) provides the power for the appropriate national authorities to make such regulations.
- 798 Subsections (3) and (4) set out the provisions the regulations may include when setting out the new valuation calculation. These provisions detail the different components of the calculation to assess the value of “chargeable property” under the LDA. This ensures that the Secretary of State has the necessary powers to stipulate a comprehensive valuation calculation in secondary legislation.
- 799 Subsections (7) and (8) set out which IDBs the Secretary of State or Welsh Ministers can decide to apply the regulations to. Linked to this, subsection (9) enables the regulations to allow for an IDB to elect that the regulations apply to them, and for the regulations to specify a procedure for that election. These provisions mean that, where an issue associated with the existing valuation calculation only affects certain IDBs in England, the Secretary of State may provide an alternative calculation which other IDBs may elect to make use of, if they so choose. However, the provisions also reflect the fact that, in the future, the calculation may need to be updated for all IDBs (were an issue within the calculation to affect all IDBs). Subsections (7) and (8) therefore enable a calculation stipulated in secondary legislation to be applied to all English IDBs in such cases.
- 800 Subsection (10)(b) enables the Secretary of State to make changes, as a consequence of these new provisions being added to the LDA. This includes amending, repealing or revoking provisions in primary legislation (pursuant to subsection (11)).
- 801 Subsection (12) places a duty on the appropriate national authority to consult such persons (if any) as are considered appropriate, taking into account the extent to which the regulations are likely to affect the valuation of any chargeable properties.

### **Clause 87: Disclosure of Revenue and Customs information [jflood3]**

- 802 Clause 87 inserts new sections 37A to 37C into the LDA.

### **New section 37A Disclosure of Revenue and Customs information**

- 803 New section 37A deals with the disclosure of revenue and customs information.
- 804 Subsection (1) provides a power to the Valuation Office Agency (VOA) to disclose Revenue and Customs information to certain “qualifying persons” for a “qualifying purpose”. IDBs will require certain data to enable them to discharge their statutory duties and complete the valuation calculations referred to above. The data it is envisaged qualifying persons will need is the council tax valuation list and the non-domestic rating list, both of which are compiled and maintained by the VOA and not otherwise publicly available.
- 805 Subsection (3) lists the qualifying persons. These are the bodies that will need access to the certain VOA data as they are involved in completing the valuation calculations for other land or chargeable property referred to above. The list includes IDBs, the Environment Agency and the Natural Resources Body for Wales. Paragraph (h) enables the appropriate national authority, via regulations, to name any other person as a qualifying person.
- 806 Subsection (4) lists the qualifying purposes (mainly to carry out any functions under Chapter 1 or 2 of the LDA, or section 75 of the Local Government Finance Act 1988). This definition captures the key purpose of the statutory gateway, being that qualifying

persons are able to carry out the valuations calculations referred to above.

807 Subsection (5) stipulates that regulations, under subsection (3)(h), can only be made with the consent of the Commissioners for Her Majesty's Revenue and Customs.

### **New section 37B Restrictions on onward disclosure of Revenue and Customs information**

808 New section 37B deals with the restrictions on the onward disclosure of Revenue and Customs information.

809 Subsection (1) sets out when the onward disclosure of information may be permitted. This will enable one qualifying person to share the data with another qualifying person (such as those under new section 37A(30)(d) and (e)) for a qualifying purpose, to enable one person to complete the valuation calculation on behalf of another.

810 Subsection (2) requires, in certain circumstances, the consent of the Commissioners for Her Majesty's Revenue and Customs before the onward disclosure of information is allowed.

811 Subsection (4) makes it an offence to disclose Revenue and Customs information relating to a person whose identity is specified in the disclosure or can be deduced from it; subsection (5) provides a defence, in certain circumstances, if a person is charged; and subsection (6) sets out the criminal sanctions if such a person is found guilty.

### **New section 37C Further provisions about disclosure under section 37A or 37B**

812 New section 37C includes provisions stipulating how the disclosure of information permissible under new sections 37A and 37B relate to certain existing legislation. In particular, subsections (4) and (5) confirm that certain information disclosed under new sections 37A and 37B is exempt from disclosure under the Freedom of Information Act 2000.

## **Part 6: Nature and Biodiversity**

### **Clause 88: Biodiversity gain as condition of planning permission**

813 Clause 88 refers to Schedule 15, which applies a new general condition to all planning permissions granted in England, subject to exceptions. This condition requires that a biodiversity gain plan must be submitted and approved before development may lawfully commence.

### **Clause 89: General duty to conserve and enhance biodiversity**

814 Section 40 of the Natural Environment and Rural Communities Act 2006 ("the NERC Act") places a duty on public authorities to have regard for the conservation of biodiversity when delivering their functions. This clause makes textual amendments to section 40 of that Act, to avoid repeating definitions. The revisions make more explicit the requirement for public authorities to assess how they can take action to conserve and enhance biodiversity, and then take these actions. This clause also sets out how public authorities should abide by the revised duty.

815 Subsection (2) adds to the heading of the biodiversity duty in the NERC Act, setting out that this duty is changing from "conserving" to "conserving and enhancing" biodiversity.

816 Subsection (3) replaces existing subsections (A1) and (1) of the NERC Act with new subsections (A1) to (1F).

817 New subsection (A1) defines the term "general biodiversity objective", which is used in section 40 to direct the activity taken by public authorities under this duty. This extends

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

the duty of public authorities beyond the original NERC Act, which referred only to conservation, so that it includes the enhancement of biodiversity in England. The aim is to provide for the enhancement or improvement of biodiversity, not just its maintenance in its current state.

818 New subsection (1) sets out that, in order to comply with the revised biodiversity duty, a public authority must periodically consider the opportunities available to improve biodiversity, across the full range of its functions. This represents a proactive, strategic assessment of a public authority's functions, rather than considering each function in isolation as required by the original section 40 duty.

819 New subsection (1A) sets out the process that the public authority must undertake following the strategic assessment. It may decide there is no action it can reasonably take that is consistent with the proper exercise of its functions. For example, it may decide a particular action is not possible within existing budget constraints, not good value for money or conflicts with other priorities. If there is action it can take, however, then paragraph (a) sets out that it must decide how that action can be put into effect, through appropriate policies and objectives. Paragraph (b) then requires the public authority to take the action.

820 New subsection (1B) provides further detail on those activities considered to be contributing to the general biodiversity objective. It establishes that the duty can be satisfied by adjusting existing policies and objectives, rather than requiring public authorities to introduce new policies or undertake new projects.

821 New subsections (1C) to (1E) establish the frequency with which the public authority should consider how it can improve biodiversity and then take action. New subsection (1C) provides that the initial assessment must be completed within one year of the amended duty coming into force. New subsection (1D) sets out that subsequent assessments to determine whether there is action it can reasonably take, and what that action should be, must take place at least every five years. New subsection (1E) requires that the decisions around which policies and objectives can be used to further the biodiversity objective, as required by subsection (1A)(a), should then follow as soon as is practically possible.

822 New subsection (1F) explains that, although the requirement is to evaluate opportunities to fulfil the general biodiversity objectives "from time to time", a public authority is free both to carry out a strategic assessment of its policies and specific objectives and to take action for biodiversity at any interval, as long as this consideration takes place frequently enough to satisfy new subsections (1C) and (1D).

823 Subsection (4) of clause 89 amends an existing reference in section 40(2) of the NERC Act to ensure it refers to new subsections (1) and (1A) of the same section.

824 Subsection (5) of clause 89 requires that public authorities consider any relevant Local Nature Recovery Strategies (LNRSs) as part of their strategic assessment of their functions, establishing the relationship between the two measures. LNRSs map existing important areas for nature and show the opportunities that exist in an area to recover and enhance nature. LNRSs will support public authorities in deciding the most appropriate and effective action to take to further the biodiversity objective under new section 40(1A) of the NERC Act, and in turn subsection (5) will support the implementation of LNRSs.

825 Subsection (6) updates the existing explanation of "conserving biodiversity" by directing public authorities to give particular focus to the conservation, restoration and enhancement of species and habitats when deciding the actions to take under the

biodiversity objective. This particular emphasis on species and habitats reflects their significance within biodiversity overall, and the wider benefits for nature and society that can be accrued through actions for species and habitats.

826 Subsection (7) provides that in the case of HMRC, the duty does not apply to its functions in England alone, but also extends to its functions in Wales. This is to maintain the amendment made to section 40 by the Environment (Wales) Act 2016. This subsection also clarifies the spatial extent of the general biodiversity duty, establishing that the territorial sea adjacent to England falls under the duty.

827 Subsection (8) amends section 41 of the NERC Act so that its references to section 40 correctly reflect the amendments made by this Bill.

## Clause 90: Biodiversity reports

828 This clause adds new section 40A to the NERC Act, which creates a power for the Secretary of State to designate public authorities who are required to report on the action they have taken under the biodiversity objective set out in clause 89. It also defines, at a high level, the content of the biodiversity reports and their frequency. These reports will capture how public authorities with significant landholdings have sought to conserve and enhance biodiversity, and will contribute to the improvement of information on protected sites, priority habitats and priority species.

### **New section 40A Biodiversity reports**

829 Subsection (1) sets out the public authorities to which new section 40A applies. The scope of this reporting requirement is limited in comparison to the general biodiversity duty, as the latter applies to all public authorities. All local authorities and local planning authorities, excluding parish councils, will be required to produce biodiversity reports. It would not be reasonable to require other public authorities with few or no landholdings to produce reports, and so additional public bodies that must report will be designated by the Secretary of State in subsequent regulations as stipulated in subsection (8)(a).

830 Subsection (2) requires the public authorities identified in subsection (1) to produce biodiversity reports.

831 Subsections (3) and (4) specify the required content of a biodiversity report. In subsection (3), paragraphs (a) and (b) set out that this report will both reflect on the action the public authority has taken under the duty over the reporting period, and look forward to the actions it will take in the subsequent five-year reporting period. This qualitative information will be accompanied by quantitative data, as provided by paragraph (c). The specific data required will be stipulated in regulations issued by the Secretary of State; it could, for example, include the proportion of local wildlife sites in favourable condition. In addition to the required qualitative and quantitative information, paragraph (d) sets out that the public authority is free to include any other information it considers relevant. Subsection (4) specifies additional reporting requirements for local planning authorities – namely, the provision of information on biodiversity net gain. Local planning authorities must give a qualitative summary of the action they have taken to comply with mandatory biodiversity net gain, and any gains within their jurisdiction.

832 Subsections (5) to (7) set out the timing and frequency of reporting. Under subsection (5), the report must be published within 12 weeks after the end of the period that it covers, in order to ensure that the information shared is up-to-date and relevant upon publication. Subsection (6) sets out that a public authority must publish its first biodiversity report within three years of being designated as required to report, although it is at liberty to decide when to publish within this window. This applies both in cases when the public

authority is designated on the introduction of clause 90 and when the public authority is brought into scope at a later point. After the first report, subsection (7) establishes that the public authority must publish subsequent reports at least every five years, though again it can choose when to publish within this window.

- 833 Subsection (8) creates a power for the Secretary of State to issue regulations that designate public authorities as required to report, and to further define what data must be included in the biodiversity report. This will ensure key quantitative data is reported in a consistent fashion across all reports, thereby making comparisons across the reports easier. Having such data defined in regulations will also allow for it to be updated in the future as required.
- 834 Subsection (9) clarifies that the reporting requirement will not apply to public authorities that do not exercise functions in England.
- 835 Subsections (10) and (11) establish that the regulations should be issued through a statutory instrument subject to the negative resolution procedure in Parliament.
- 836 Subsection (12) clarifies that the definitions within this section are the same as used in the wider section 40 duty and in clause 89.

### Clause 91: Local nature recovery strategies for England

- 837 This clause provides for the creation of Local Nature Recovery Strategies (LNRSs) in England, for how the geographical coverage of each LNRS will be determined, and for the relationship between LNRSs and the biodiversity duty under the NERC Act.
- 838 Subsections (1) and (2) set out that the requirement for LNRSs applies to England and that, taken together, all areas of England will be covered by an LNRS.
- 839 Subsection (3) sets out that the area covered by each LNRS will be determined by the Secretary of State. This approach allows flexibility to make sure that the area covered by each LNRS balances the potentially competing needs to be ecologically meaningful (that is, based on the common geographic, geological, topographical or other physical features that help define the ecology of an area, and of sufficient scale to include a range of habitats and land uses) and align with existing administrative boundaries. It will also allow alignment of boundaries between neighbouring LNRS areas to avoid gaps or overlap. It is anticipated that the area covered by each LNRS will be approximately county-scale, but with the potential to vary to best accommodate differing local circumstances.
- 840 Establishment of the area covered by an LNRS is closely linked to agreement on the identity of the responsible authority, which will lead on the production of the LNRS. The process for doing this is set out in clause 92.
- 841 Subsection (4) states that the area of a local authority, other than a county council, may not be split between different LNRSs. This requirement reflects the importance of local authorities in producing and implementing the LNRS, and is intended to make it easier for individual local authorities to do so by making each LNRS area an aggregate of local authority areas. This requirement will also facilitate the agreement of individual LNRS boundaries, and make sure they operate at scales most relevant to local authorities.
- 842 The bodies included within the definition of “local authority” are listed in subsection (2). County councils are exempted from the general prohibition in splitting local authorities between LNRSs because of their larger size, and the potential that not doing so would result in a *de facto* requirement that LNRSs conform to county boundaries, irrespective of ecological or other practical considerations. Whilst in many cases there may be good reason for LNRS and county council boundaries to align, it is reasonable to anticipate

situations where this would not be the case.

843 Subsection (5) highlights the relationship between LNRSs and the duty to conserve biodiversity under section 40 of the NERC Act. The existing duty is modified by this clause to require that all public authorities must have regard to any relevant LNRS in the proper exercise of their functions.

#### Clause 92: Preparation of local nature recovery strategies

844 This clause sets out the process by which LNRSs are to be prepared, published, reviewed and republished. It also provides a power for the Secretary of State to make regulations regarding this process.

845 Subsection (1) sets out that each LNRS will be prepared and published by a “responsible authority”. The requirement to publish the LNRS is to ensure that the LNRS is a publicly available document.

846 Subsection (2) states that the Secretary of State will appoint the responsible authority for each LNRS, and lists the authorities who may potentially be appointed. In addition to those local authorities listed at clause 95(2), the Secretary of State may appoint a mayoral authority, national park (including the Broads Authority) or Natural England.

847 It is intended that the appointment of the responsible authority will be by mutual agreement between the Secretary of State and the authority. Where the LNRS area corresponds with county or mayoral boundaries, it may be that the county council or mayoral authority would be well-placed to act as responsible authority. Where this is not the case, it would be preferable for the responsible authority to be another local authority, mayoral authority or national park to foster strong links between the LNRS and the land-use planning system and to benefit from existing local democratic mechanisms. Alternatively, Natural England would act as responsible authority.

848 Subsection (3) requires that the LNRS is reviewed and republished from time to time to ensure it remains current, relevant and forward-looking. Updates may be periodic or triggered by the Secretary of State publishing an updated national habitat map under clause 94(3). Regulations made under subsection (5) may introduce specific requirements regarding the timings for reviewing and republishing of LNRSs. Information collected and published under the NERC reporting duty is expected to provide an important resource when reviewing and republishing the LNRS.

849 Subsection (4) provides that the Secretary of State can make regulations to introduce further requirements regarding how LNRSs must be prepared and published; both in the first instance and in later versions. Subsection (5) provides a non-exhaustive list of some specific aspects of this process that regulations may provide for. These are:

- provision of information by a local authority that is not the responsible authority;
- agreement of the LNRS by all local authorities within the LNRS area;
- the procedure for reaching agreement and resolving disagreements;
- consultation requirements; and
- timings for reviewing and re-publishing of the LNRS.

850 These regulations provide a mechanism for creating consistency and maintaining standards between LNRSs and for encouraging a broad, collaborative approach to producing LNRSs, involving a wide range of stakeholders from public, private and

voluntary sectors. Regulations allow for a greater level of detail than would be appropriate in primary legislation, and can be updated more easily to reflect experience of good practice.

851 Subsections (6) and (7) set out that regulations made under subsection (4) will be by statutory instrument subject to the negative resolution process.

### Clause 93: Content of local nature recovery strategies

852 This clause defines the required content of an LNRS, setting out the general nature of the documents that each LNRS must comprise and the information that these documents must contain. It also provides for the Secretary of State to issue statutory guidance to provide further detail.

853 Subsection (1) provides that each LNRS must include (a) a statement of biodiversity priorities for the plan area and (b) a local habitat map for the full extent of the area under the plan, either through one or multiple maps.

854 Subsection (2) specifies what the statement of biodiversity priorities referred to under subsection (1)(a) must include. The required elements are:

- a description of the plan area and its biodiversity;
- a description of the opportunities for recovering or enhancing biodiversity;
- the priorities for recovering or enhancing biodiversity; and
- proposals of potential measures relating to those priorities.

855 In combination these elements are intended to provide a comprehensive vision of the current and future potential biodiversity value of the plan area, and some proposed practical steps that different bodies may choose to support to help make improvements.

856 Subsection (3) specifies what the local habitat map referred to under subsection (1)(b) must include. The required elements are:

- national conservation sites;
- local nature reserves (as designated under section 21 of the National Parks and Access to the Countryside Act 1949); and
- other areas that, in the opinion of the responsible authority, are or could become of particular importance for biodiversity, or where the recovery or enhancement of biodiversity could make a particular contribution to other environmental benefits.

857 The term “national conservation sites” is defined in clause 95(3). National conservation sites and local nature reserves are treated separately because information on them will be made available to the responsible authority via different mechanisms. Clause 94 creates a duty on the Secretary of State to provide responsible authorities with mapped information on national conservation sites, whilst information on local nature reserves is held by local authorities. Where a local authority is not the responsible authority, a requirement for them to provide information on local nature reserves to the responsible authority could be introduced via regulations made under clause 92(4) to make sure that this forms part of the LNRS.

858 Subsection (3)(c)(i) is what is sometimes referred to as “biodiversity opportunity

mapping”. Government is aware of more than a dozen different examples of biodiversity opportunity maps that have been produced by local authorities or on their behalf – such as Surrey Nature Partnership’s [Biodiversity Opportunity Areas: the basis for realising Surrey’s ecological network](#). It is intended that LNRSs will build on and seek to accommodate existing best practice.

859 Subsection (3)(c)(ii) allows for the opportunities included in the local habitat map to consider other environmental benefits alongside recovering and enhancing biodiversity. For example, planting a new area of woodland for biodiversity would also sequester carbon, and potentially reduce the likelihood of flooding downstream. Intentionally targeting such multiple benefits may prove more cost-efficient and, in turn, such proposals may be more likely to be acted upon. Statutory guidance made under subsection (5) provides a mechanism by which approaches to including multiple environmental objectives could be applied consistently across all LNRSs.

860 Subsection (4) establishes that a local habitat map that only partially covers the area within the plan must correlate to the area of at least one of the local authorities within the plan area. This is intended to avoid an individual local authority, other than potentially a county council, from having to contribute to and consider more than one local habitat map.

861 Subsection (5) allows the Secretary of State to issue guidance on the information that an LNRS must include, in relation to the biodiversity priorities, the local habitat map or any other matter. Guidance is intended to assist responsible authorities in preparing an LNRS and to promote consistency between LNRSs.

862 Subsection (6) sets out that when the responsible authority is preparing an LNRS, it must have regard to any guidance that has been issued by the Secretary of State under subsection (5). This gives the guidance issued under subsection (5) greater standing and effect in achieving its purpose. The issuing of new or revised guidance would not require a responsible authority to revisit an LNRS that has already been published.

#### Clause 94: Information to be provided by the Secretary of State

863 This clause introduces a new duty on the Secretary of State to make available certain information to the responsible authority to assist with the production of the LNRS.

864 Subsection (1) requires the Secretary of State to prepare and publish a national habitat map for England.

865 Subsection (2) specifies that the national habitat map must contain:

- national conservation sites; and
- other areas that the Secretary of State considers to be of particular importance for biodiversity.

866 The term “national conservation sites” is defined in clause 95(3). Information on these sites is held by central government. Other areas of particular importance for biodiversity might include locations of scarce habitats or habitats upon which scarce species depend outside of existing protected sites.

867 Subsection (3) allows for the Secretary of State to review and republish the national habitat map from time to time. The distribution of different habitat types can be expected to change over time, and it is anticipated that technology, such as satellite imaging, may present new options for habitat mapping. Publication of an updated national habitat map may potentially trigger a responsible authority to review and republish its LNRS, as



provided for in clause 92(3).

868 Subsection (4) requires the Secretary of State to provide the responsible authority with information not captured by the national habitat map that they consider would assist in the production of the LNRS relating to areas that could either:

- become of particular importance for biodiversity; or
- where the recovery or enhancement of biodiversity could make a particular contribution to other environmental benefits

869 This provision closely mirrors that in clause 93(3)(c), which specifies that such areas are a required component of a local habitat maps. Whilst the intention is that the very large majority of such “biodiversity opportunities” are identified locally by the responsible authority through an open collaborative approach, subsection (4) is intended to also allow the Secretary of State to propose national priorities for an area. This might theoretically include future landscape scale biodiversity projects.

870 Similarly to clause 93(3)(c)(ii), subsection (4)(b) allows for the opportunities identified to consider other environmental benefits alongside recovering and enhancing biodiversity. Thus, areas might include those identified for other environmental reasons that could also have a biodiversity benefit, such as forestry creation.

871 Subsection (5) extends the duty on the Secretary of State to provide the responsible authority with information to anything else that the Secretary of State holds that the Secretary of State considers would assist in the preparation of an LNRS. Examples of such information might include other mapped information, like climate change assessments, soils, geology or topography that the Secretary of State considers might help the responsible authority assess the potential of a location for recovering biodiversity.

### Clause 95: Interpretation

872 This clause offers clarification on the definition of the terms used in the preceding clauses on LNRSs.

873 Subsection (1) sets out that these interpretations apply to the entirety of this section on LNRSs.

874 Subsection (2) defines the term “local authority”, setting out the different classifications of local government to which these clauses apply.

875 Subsection (3) defines the term “national conservation site”, setting out the types of sites that must be included. This definition applies at both the local level for the responsible authority in developing the local habitat map that makes up the LNRS, and also at the national level for the Secretary of State in providing information to the responsible authority through the national habitat baseline map.

876 Subsection (4) provides that this Part will commence through regulations.

877 Subsection (5) provides that the territorial extent of these clauses is limited to England and Wales.

### Clause 96: Controlling the felling of trees in England

878 Clause 96 introduces Schedule 16, which enables the Commission to create a local land charge where illegal felling has taken place or a licence has not been complied with – a local land charge is a public record and the buyer will take the land subject to the charge.

### Clause 97: Local highway authorities in England to consult before felling street trees

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

879 Clause 97 inserts new section 96A into the Highways Act 1980.

**New section 96A Duty of local highway authorities in England to consult before felling street trees**

880 Subsection (1) requires local highway authorities to consult the public before felling any street trees. Defra has used the definition of highway authority as set out in the Highways Act 1980 Section 1. This includes the council of a county or metropolitan district, Transport for London as the highway authority for major roads in London, and the council of a London borough for other London roads. Roads managed by other highway authorities that are not local highway authorities – such as trunk roads managed by the Secretary of State through Highways England – are out of scope. Only trees on land legally adopted as a highway, and therefore in scope of local highway authorities powers/duties, are in scope.

881 Local highway authorities must consult on all street trees they are considering felling, unless the tree is exempt. If appropriate, several street trees can be consulted on at once.

882 Subsection (2) lays out the requirement for local highway authorities to consider any guidance released by the Secretary of State. Government intends to publish guidance to cover how this duty should be applied and the process that should be used.

883 Subsection (3) sets out trees that are exempt from the consultation required in this duty. This means that any tree meeting the criteria as laid out in this subsection would not require a consultation before being felled. Further explanation of some of the exemptions have been provided below:

- The tree size exemption used in paragraph (a) is consistent with the standard tree size definitions used by the British Tree Nursery sector.
- The tree is required to be felled under the Plant Health Act 1967. Under this Act, statutory plant health notices can be issued that require the owner or manager to eradicate or contain notifiable pests and diseases. This can include felling a tree and failure to comply can result in enforcement action and prosecution.
- The tree is required to be felled under any enactment on the basis that the tree is dangerous. This covers trees that need to be felled urgently because they present an immediate danger to life or property.
- The tree is required to be felled in order to comply with section 20 or 29 of the Equality Act 2010 because the tree is causing an obstruction. This means that a tree can be felled where it is blocking, or otherwise making the pavement a danger for disabled people to use. This would result in the footway being unusable for people with a disability.
- The tree is required to be felled as part of development authorised either by a granted planning permission or by an outlining planning permission as defined by the Town and Country Planning Act 1990. Specific sections of this are specified in the clauses.

884 “Street trees” are those situated on urban roads as defined under subsection (4).

- Subsection (1)(a) references section 81 of the Road Traffic Regulation Act 1984, which specifies a general speed limit for restricted roads. It states that a restricted

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road is one where a speed limit of 30 miles per hour is in place.

- Subsection (1)(b) references roads that would otherwise have a 30 miles per hour speed limit but have their speed limit increased to 40 miles per hour. These roads will also be in scope of the duty to consult.
- Subsection (1)(c) brings into scope urban streets excluded by the above definitions, for example because the road, although urban, has a higher speed limit.

## Part 7: Conservation Covenants

### Clause 98: Conservation covenants

885 Subsection (1) states that a conservation covenant is so much of an agreement to which clause 98 applies as is given statutory effect by clause 100.

886 Subsection (2) describes the conditions that an agreement must meet for this clause to apply. It must be an agreement between a landowner and a “responsible body” (as set out in clause 99), be in writing signed by the parties, and meet specified conditions. Those conditions are that the agreement contains provision which is of “a qualifying kind”, has a “conservation purpose”, and is intended by the parties to be for the public good. The meaning of “qualifying kind” is covered in subsection (3). Subsection (4) defines “conservation purpose” and the meaning of “conserving” is dealt with in subsection (5).

887 Subsection (2) also states that for the agreement to be a conservation covenant it must be apparent from the agreement that the parties intend to create a conservation covenant. No particular wording is specified for that purpose. The intention of that requirement is to ensure that agreements do not take effect as conservation covenants contrary to the wishes of the parties.

888 Subsection (3) states that a provision of “a qualifying kind” is of one of two kinds. First, it may require the landowner to do, or not to do, something on specified land in England, or require the landowner to allow the responsible body to do something on such land. Second, it may require the responsible body to do something on such land.

889 Subsection (3) also provides that the landowner must hold a “qualifying estate” in the land to which the provision in question relates and this must be specified in the agreement. A “qualifying estate” is a freehold, or a leasehold estate of more than seven years (as set out in subsection (5)). Subsection (5)(b) provides that a conservation covenant can only be created by a lessee during the fixed term of the lease, and not during any subsequent period of statutory continuation of the lease (for example, under section 24(1) of the Landlord and Tenant Act 1954).

890 Subsection (4) sets out what qualifies as a conservation purpose. It extends to the natural environment of the land, such as plants and animals and their habitats; the land’s natural resources, such as water on the land; the land as a place of archaeological, architectural, artistic, cultural or historic interest; and the setting of the land. The reference to setting provides for the protection of land around a conservation site, which may affect its conservation status. For example, the architectural or artistic value of a country house could derive in part from the landscape in which it is set.

891 Provision of an agreement to which clause 98 applies is given statutory effect if it meets the conditions in subsection (2)(a), or is ancillary to provision meeting those conditions. Obligations of the landowner or responsible body given statutory effect in that way

become obligations under a conservation covenant (clause 100(4)(a)).

### Clause 99: Responsible bodies

- 892 As above, a conservation covenant is an agreement between a landowner and a responsible body. The responsible body is able to enforce compliance with the landowner's obligations under the conservation covenant. It may or may not also be made subject to obligations under the conservation covenant.
- 893 Clause 99 defines "responsible bodies" as, on the one hand, the Secretary of State and, on the other hand, bodies which are designated by the Secretary of State. Bodies will need to apply to be designated. An application from a local authority in England will need to satisfy the Secretary of State that it is suitable to be a responsible body, and other bodies will, additionally, have to satisfy the Secretary of State that at least some of its main purposes, functions or activities relate to conservation (subsections (3) and (4)).
- 894 Subsection (6) allows the Secretary of State to revoke a designation by notice in certain circumstances, including if the relevant body no longer meets the conditions for designation.
- 895 The Secretary of State must publish and keep up to date a document setting out the criteria which will be applied to determine if an applicant body is suitable to be or to remain a responsible body, which may stipulate that applicants should have a connection with the United Kingdom. The Secretary of State must also publish and keep up to date a list of designated responsible bodies.
- 896 Subsection (9) defines "charity", "conservation" and "local authority" for the purposes of clause 99.

### Clause 100: Statutory effect

- 897 This clause gives statutory effect as a conservation covenant to any provision contained in an agreement to which clause 98 applies, which is of a qualifying kind, has a conservation purpose, and is intended by the parties to be for the public good – the qualifying conditions set out in clause 98(2)(a).
- 898 This clause also gives statutory effect to a provision in an agreement to which clause 98 applies that are ancillary to a provision that meets the qualifying conditions. An "ancillary provision" is a provision that does not itself meet the qualifying conditions, but is related to the performance of a provision that does – for example, provision for payment for work done on the land, or provision relating to the way in which work is to be performed. Ancillary provisions may not themselves have a conservation purpose or be, taken in isolation, intended to be for the public good; they are nevertheless closely linked with provision of the agreement that does meet the qualifying conditions, and so are given statutory effect along with them. Both provisions that meet the qualifying conditions, and terms that are ancillary to such provisions, are given statutory effect by clause 100 and are referred to in the rest of Part 7 as obligations under a conservation covenant (clause 100(4)(a)).
- 899 This clause also provides that provision for public access to land that is the subject of a conservation covenant is to be treated as ancillary to provision given statutory effect by the clause. Provision for public access to land may not itself meet the qualifying conditions because it may not itself have a conservation purpose. By treating such provision as ancillary provision, subsection (2) makes sure that the public access provision is given statutory effect.

### Clause 101: Local land charge

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

- 900 Subsection (1) provides that a conservation covenant is a local land charge.
- 901 As a result, section 5(2) of the Local Land Charges Act 1975 applies. This imposes a duty upon the responsible body to apply for registration of the conservation covenant as a local land charge.
- 902 Subsection (3) amends the application of section 2 of the Local Land Charges Act 1975 so as to ensure that a conservation covenant between a lessor and a lessee is not excluded from being a local land charge.
- 903 Subsection (4) modifies section 10(1) of the Local Land Charges Act 1975 in its application to conservation covenants. The modifications reflect the fact that a conservation covenant is effective against subsequent owners of the land only once it has been registered as a local land charge (see clause 103(5)(b)). This differs from the general position where the enforceability of a local land charge is unaffected by whether or not it is registered. Accordingly, the registering authority cannot incur liability for non-registration. However, liability for a defective search result remains in the usual way.

### Clause 102: Duration of obligation under conservation covenant

- 904 This clause provides that each obligation in a conservation covenant has a specified duration, either as a result of this clause or as a result of an explicit provision in the agreement.
- 905 Unless the conservation covenant provides for a shorter period, an obligation under a conservation covenant has effect for the “default period” which is:
- a period of indefinite duration where the relevant qualifying estate is a freehold estate; or
  - the remainder of the term where the relevant qualifying estate is a leasehold estate.
- 906 Accordingly, a conservation covenant created by a freeholder will be of indefinite duration unless it provides for a shorter duration. The duration of a conservation covenant created by a leaseholder cannot exceed the remainder of the term of the lease but, again, the conservation covenant may specify a shorter term.

### Clause 103: Benefit and burden of obligation of landowner

- 907 This clause sets out who is responsible for complying with an obligation under a conservation covenant entered into by a landowner and, therefore, the person against whom any enforcement action can be taken in the event of breach. It also spells out who may take such action.
- 908 Subsection (1) provides that an obligation under a conservation covenant is owed by a landowner to the responsible body under the conservation covenant.
- 909 Subsection (2) has the effect that a conservation covenant will bind the landowner who created it (referred to in these notes as “the original covenantor”), and burden the estate in land which enabled the landowner to create it (“the qualifying estate”). A conservation covenant will bind any successors of the original covenantor – that is, anyone who acquires the original covenantor’s estate in the land (or part of that land) or who holds an estate derived from that estate (for example, a lease of the whole or part of the land) – unless one of the exceptions in subsection (5) applies.
- 910 A conservation covenant will not bind anyone whose interest in the land predates the conservation covenant. If a freeholder grants a lease, and then enters into a conservation

covenant relating to the land which is the subject of the lease, and the lessee is not a party to the conservation covenant, the lessee will not be bound by any obligation of the landowner under the conservation covenant. On the other hand, where a freeholder enters into a conservation covenant of indefinite duration and then grants a lease of the land then, unless one of the exceptions in subsection (5) applies, the leaseholder will be bound by the conservation covenant throughout the term of the lease.

911 Subsection (4) provides that a landowner's liability in respect of an obligation under a conservation covenant comes to an end on parting with the whole of the estate by virtue of which he or she is bound by the obligation, or if the land is no longer bound by the conservation covenant. If the landowner ceases to own only part of the land, he or she will continue to be bound by the obligation but only in relation to the retained land. If an obligation is partially discharged, the application of subsection (2)(b) is correspondingly reduced because the land to which the obligation relates diminishes. In the case of modification, the obligation continues, but needs to be read as modified as respects the land to which the modification relates.

912 Subsection (5) provides for three situations in which a successor will not be bound by the conservation covenant:

913 Subsection (5)(a) provides that a lessee under a lease granted for seven years or less is not bound by positive obligations under a conservation covenant. Accordingly, where a freeholder creates a conservation covenant which is registered as a local land charge (as set out in subsection (5)(b)), and then grants a periodic tenancy, the lessee will be bound by negative obligations in the conservation covenant but not by positive ones. The same result follows where a lessee under a lease for more than seven years, granted after the creation of a conservation covenant, holds over on a periodic tenancy after expiry of the lease. Corresponding results follow where a conservation covenant is created by a lessee of a term of seven years or more (see clause 98(5) and the definition of "qualifying estate") who then sub-lets the land.

914 Subsection (5)(b) provides that a successor will only be bound by a conservation covenant if it was registered as a local land charge at the time they acquired the land. An estate in land is "acquired" for these purposes at the time of the disposition (for example, a sale, a gift, a grant of a lease) even if that disposition is required to be completed by registration at the Land Registry (subsection (6)).

915 Subsection (5)(c) provides that a successor will not be bound by a conservation covenant if their immediate predecessor was not bound. This could arise in the context of the discharge of a conservation covenant in respect of part of the land to which it related or where a conservation covenant is registered late. For example, a landowner, A, and a responsible body enter into an agreement for a conservation covenant. Before the responsible body registers the conservation covenant as a local land charge, A transfers part of the land to B, who later transfers it to C. Even if the conservation covenant is subsequently registered as a local land charge, C will not be bound by it because B was not bound by it at the time B transferred it to C. "Immediate predecessor" is defined by subsections (8) and (9).

#### **Clause 104: Benefit of obligation of responsible body**

916 This clause sets out who has the benefit of an obligation on the part of the responsible body under a conservation covenant and who can, therefore, enforce it.

917 It provides that such an obligation is owed to the landowner with whom the responsible body entered into the conservation covenant (referred to in these notes as "the original

covenantor”) and anyone who later holds either the relevant qualifying estate or an estate in land derived from this. For example, a transferee of the land, or a lessee, can enforce the responsible body’s obligations. However, the original covenantor or a successor can only do so while he or she holds the relevant estate (subsections (3)(b) and (3)(c)).

918 Subsection (4) ensures that if a successor to the original covenantor is not bound by certain obligations – in particular, by positive obligations because he or she holds a lease for less than seven years – then that successor will not take the benefit of any of the responsible body’s obligations that are ancillary to those obligations.

### Clause 105: Breach of obligation

919 Subsections (1) and (2) set out what amounts to a breach of negative and positive obligations, respectively. Where a landowner undertakes a negative obligation, they must not breach or allow others to breach it. Where they take on a positive obligation there is a responsibility to ensure that it is performed. These will be relevant considerations where the landowner grants a lease of the land after the creation of the covenant.

### Clause 106: Enforcement of obligation

920 Clause 106 sets out the remedies that are available in proceedings for the enforcement of an obligation under a conservation covenant. It also provides that when considering, in the context of an application for equitable relief, what remedy is appropriate, the court must take into account any public interest in the performance of the obligation concerned.

921 Contract principles apply to awards of damages (subsection (3)), and in particular the rules that determine remoteness of damage. Contractual damages compensate the claimant for loss; and, in most cases, the direct loss to the responsible body as a result of breach of an obligation in a conservation covenant may be insignificant. For that reason, it is expected that in most cases the remedy sought will be an injunction, or an order for specific performance of the obligation. In considering claims for an injunction, the court has discretion to award damages instead, and in that context it is expected that a consideration of the public interest will be particularly significant.

922 Subsection (4) enables the court to award exemplary damages where a landowner has breached obligations. This is to ensure that a landowner is not able to profit from a breach of an obligation in a conservation covenant – for example, by developing the land in contravention of the covenant in circumstances where compensatory damages may be very small. In such circumstances, the court can make an award of damages that will strip the landowner of any profit from the breach of covenant.

923 Subsection (5) provides that the limitation period in respect of an action for breach of an obligation under a conservation covenant is the same as the limitation period under section 5 of the Limitation Act 1980 for an action founded on simple contract. This means that any proceedings in respect of a conservation covenant cannot generally be brought after the expiration of six years from the date on which the cause of action accrued.

### Clause 107: Defences to breach of obligation

924 Clause 107 sets out defences to proceedings for breach of an obligation under a conservation covenant. These are: where the breach occurred because of something beyond the defendant’s control (subsection (1)(a)), as a result of something done in an emergency to prevent loss of life or injury (for example, to control flood water)(subsection (1)(b)), or in circumstances where it is not possible to comply with an obligation under a conservation covenant without breaching a statutory control applying as a result of the designation of the land for a public purpose (subsection (1)(c)).

925 The last defence will only be available if the land was designated for a public purpose

after the conservation covenant was created (subsection (3)) and, in the event that the defence is relied on only because of a failure to obtain authorisation that would have enabled compliance with the obligation, the defendant can show that he or she took all reasonable steps to obtain such an authorisation (subsection (2)).

926 For example, land may be subject to a conservation covenant which requires the landowner to carry out specified works, and the land, or part of it, may be subsequently designated as a Site of Special Scientific Interest (SSSI). The works specified in the conservation covenant are likely to damage the special interest features for the site and cannot be done without the consent of Natural England. Natural England refuses consent. If the landowner carries out the works required by the conservation covenant he or she will commit an offence under section 28P of the Wildlife and Countryside Act 1981. In these circumstances the landowner could rely on this latter defence.

927 Subsection (4) provides that the defence of statutory authority applies to conservation covenants. The intention is that when a public body such as a local authority acquires, and uses, land in accordance with its statutory powers it can override a conservation covenant that binds the land, in the same way that it can override an easement affecting the land.

### Clause 108: Discharge of obligation of landowner by agreement

928 This clause provides that the responsible body under a conservation covenant and a landowner bound by (or having the benefit of) a conservation covenant can by agreement discharge any of the relevant land from the obligation (insofar as it relates to the landowner's estate). An agreement to do this must be in writing signed by the parties and identify the relevant land, obligation and qualifying estate.

929 If the whole of the land to which an obligation of the landowner under the conservation covenant relates is discharged from the obligation, the effect is to modify the covenant or, if it is the only obligation under the covenant, to discharge it. Rules 8(1) and (2) of the Local Land Charges Rules 1977 require details to be given to the registering authority in relation to the Local Land Charges Register following the modification or discharge of a registered charge.

930 If an area of land is discharged from an obligation of the landowner under the conservation covenant, the effect will be that the obligation relates to a smaller area of land because some land will have been freed from the obligation. Clause 103(4)(a) ensures that a landowner is no longer bound by an obligation in respect of land which has been discharged from it.

### Clause 109: Release of obligation of responsible body by agreement

931 This clause provides that a person to whom a responsible body owes an obligation under a conservation covenant may agree with the responsible body to release it from the obligation. This can be done in respect of part or all of the relevant land.

932 If the responsible body under a conservation covenant is released from an obligation under the covenant, that is a modification of the covenant for the purposes of rules 8(1) and (2) of the Local Land Charges Rules 1977. As above, the details of the modification have to be given to the registering authority in relation to the Local Land Charges Register.

### Clause 110: Modification of obligation by agreement

Subsection (1) creates a means of modifying an obligation by agreement between the responsible body and a landowner bound by (or having the benefit of) an obligation under a conservation covenant. The power can be exercised in relation to any of the land in respect of which the landowner is bound by, or entitled to the benefit of, the obligation under the



conservation covenant.

933 Subsection (2) means that an obligation under a conservation covenant cannot be modified such that, had the relevant provision (as modified) been included in the original agreement, it would not have met the qualifying conditions for having effect as a provision of a conservation covenant (that is, the conditions in clause 98(2)(a)). For example, an obligation could not be modified so that it does not serve a conservation purpose.

934 Subsection (3) sets out the requirements for the form and content of the agreement, and subsection (4) provides that any modification will bind the parties to the agreement and their successors in respect of any of the land to which the obligation, as modified, relates.

935 For example, X enters into a conservation covenant and then transfers part of the land to Y, leases another part to Z, and retains part of the land. The original obligation may, following devolution of parts of the original landowner's interest, bind X, Y and Z. X then enters into an agreement with the responsible body to modify the obligation. This particular modification will only bind X. It will not bind Y and Z as they are not parties to the modification agreement. In the case of X (and his or her successors), the obligation under the conservation covenant is then read with the modification. In the case of Y and Z (and their successors), the obligation under the covenant has effect without modification.

936 Rules 8(1) and (2) of the Local Land Charges Rules 1977 require details to be given to the registering authority in relation to the Local Land Charges Register following the modification of a registered charge.

#### Clause 111: Discharge or modification of obligation by Upper Tribunal

937 Clause 111 gives effect to Schedule 17, which makes provision about the discharge or modification of an obligation under a conservation covenant on application to the Upper Tribunal.

938 An application for discharge or modification may, in some circumstances, be found useful as a response to proceedings brought to enforce an obligation under a conservation covenant. Subsection (2) gives a person who is the subject of enforcement proceedings the right to apply to the High Court or the county court for an order giving permission to apply to the Upper Tribunal and suspending the enforcement proceedings in the meantime.

939 Subsection (3) provides that an application cannot be made under section 84(1) of the Law of Property Act 1925 to discharge or modify an obligation under a conservation covenant. This ensures that obligations under a conservation covenant are modified or discharged by the Lands Chamber of the Upper Tribunal only on the basis designed for conservation covenants.

#### Clause 112: Power of responsible body to appoint replacement

940 Subsection (1) enables the responsible body under a conservation covenant ("the appointor") to transfer both the benefit and the burden of its obligations to another responsible body ("the appointee") by appointing it the responsible body under the covenant by agreement in writing signed by the appointor and appointee (subsection (2)). A conservation covenant can exclude the power to do this.

941 Subsection (3) provides that where the conservation covenant has been registered as a local land charge, the transfer to the appointee only has effect if the appointor gives to the Chief Land Registrar (or, in the case of land in an area in relation to which section 3 of the Local Land Charges Act 1975 has not yet taken effect, the authority responsible for the

appropriate local land charges register) sufficient information to enable the Registrar (or appropriate authority) to amend the register, as it is required to do by rule 8(2) of the Local Land Charges Rules 1977. In the case of land in an area in relation to which section 3 of the Local Land Charges Act has not yet taken effect, subsection (3) does not apply where the appointor is itself the registering authority (which may be the case where the responsible body is a local authority (subsection (4)).

942 Subsection (5) describes the effect of the appointment. It transfers to the appointee the benefit of every obligation of the landowner under the conservation covenant and the burden of every obligation of the responsible body. This is subject to the qualification in subsection (6) that the transfer of a conservation covenant does not transfer to the appointee any rights or liabilities in respect of an existing breach of an obligation under the conservation covenant. It only has effect in relation to future performance. The appointee cannot take, or continue, enforcement action in respect of a breach which pre-dates the transfer. If the breach is a continuing one the appointee may be able to take enforcement action in respect of the continuing breach after the transfer.

943 Subsection (7) requires the appointee to give notice of its appointment to every person who is bound by an obligation of the landowner under a conservation covenant.

### Clause 113: Body ceasing to be a responsible body

944 This clause deals with the situation where the responsible body under a conservation covenant ceases to be a qualifying body or ceases to be designated as a responsible body under clause 99(1)(b) (clause 99(6) sets out the grounds on which the Secretary of State may revoke a designation). There is no specific provision for the situation where a responsible body has itself ceased to exist because in these circumstances it will cease to be a qualifying body and, therefore, automatically be captured by this provision.

945 Subsection (2) provides that in such circumstances the body will cease to be the responsible body under the covenant.

946 Subsection (3) describes what happens in these circumstances. The benefit of every obligation of the landowner under the covenant and the burden of every obligation of the responsible body under the covenant will transfer to the Secretary of State. The transfer does not have effect as regards any rights or liabilities in respect of an existing breach of obligation. It only has effect in relation to future performance (subsection (4)).

947 Subsection (5) provides that, when the transfer described in subsection (3) takes place, the Secretary of State becomes the custodian of the conservation covenant until either they appoint another responsible body and transfer the conservation covenant to it, or decide to take on the role of responsible body.

948 Subsection (6) provides that as custodian the Secretary of State may elect to become the responsible body under the conservation covenant by giving written notice to every person who is bound by an obligation of the landowner under the covenant.

949 Subsection (7) gives the Secretary of State the power as custodian of a conservation covenant to enforce any obligation of the landowner under the covenant in respect of land, and to exercise any power that was conferred on the responsible body in respect of such land.

950 Subsection (8) states that no enforcement action can be taken against the Secretary of State during the period for which they are the custodian of a conservation covenant or subsequently in respect of the period of custodianship. The Secretary of State will only become liable to perform the obligations of the responsible body under the conservation

covenant if they make an election under subsection (6).

#### Clause 114: Effect of acquisition or disposal of affected land by responsible body

951 Generally when land that is burdened by an obligation or interest (for example, a restrictive covenant or an easement), and the land that benefits from that interest, come into the same ownership, the interest comes to an end. If the land subsequently returns to separate ownership, the interest does not revive. This is known as the doctrine of unity of seisin, or unity of ownership.

952 By contrast, clause 114 provides that where the responsible body under a conservation covenant acquires an estate in land to which an obligation under the covenant relates, this does not extinguish the obligation. The responsible body is bound by the obligation. When the responsible body disposes of land, the obligation remains in force.

#### Clause 115: Effect of deemed surrender and re-grant of qualifying estate

953 Clause 115 requires that a conservation covenant be created by a landowner who holds a “qualifying estate” in the land to which the agreement relates. The qualifying estate must be a freehold, or a lease granted for a term of more than seven years.

954 Clause 115 sets out what is to happen where the qualifying estate is a lease which is surrendered and re-granted by operation of law. This takes place in circumstances where a radical amendment to its terms is agreed between the lessor and lessee. In particular, where the lessor and lessee agree an extension of the term of the lease, there is a deemed surrender and re-grant. Special provision is needed owing to the role in this Part of the qualifying estate. The position of successors under clauses 103 and 104 depends upon those successors holding the qualifying estate. But the qualifying estate ceases to exist on a surrender and re-grant.

955 Clause 115 provides that in these, circumstances, clauses 103, 104 and 108 are to be read as if the “qualifying estate” is a reference to the term of years deemed to be granted by the operation of law. Accordingly, the tenant of the extended lease, and successors, remains liable under the conservation covenant.

956 However, clause 102 is not affected. The duration of the conservation covenant therefore remains unchanged: it will either be the length of the original lease (that is, the default period under clause 102(2)(b)) or such shorter period as the parties originally agreed (under clause 102(1)).

#### Clause 116: Land passing as bona vacantia

957 Due to the feudal origins of land law, land can revert back to the Crown as bona vacantia, that is, as ownerless property. This occurs in particular where a person dies intestate and no one is entitled to his or her estate under the intestacy rules (contained in the Administration of Estates Act 1925), or where a company is dissolved. In these circumstances property becomes vested in the Crown.

958 Clause 116 provides for what happens if an estate in land to which an obligation under a conservation covenant relates passes as bona vacantia. It replicates the general rule of land law in relation to property that vests in the Crown by operation of law, by providing that the Crown is not liable under an obligation in a conservation covenant until it takes possession or control of the land or enters into occupation of it. If the Crown subsequently transfers the interest to another, that person will be the new landowner for the purposes of clauses 103(3)(b) and 104(1)(b).

#### Clause 117: Declarations about obligations under conservation covenants

959 Subsection (1) gives the High Court, the county court or the Upper Tribunal, on

application of any person interested, the power to make a declaration as to the validity of a conservation covenant, whether land is subject to an obligation under a conservation covenant, who is bound by or has the benefit of such an obligation, and the true construction (that is, meaning) of such an obligation. It will be for the court or the Upper Tribunal to decide whether an applicant has sufficient interest to make an application. The power to make a declaration extends to any agreement or order that modifies a conservation covenant. A person might seek a declaration under subsection (1) in circumstances where they needed to know the status of a conservation covenant – for example, in order to resist an action enforcing a breach or because the land was wanted for a different use.

960 Subsection (2) provides that an application cannot be made under section 84(2) of the Law of Property Act 1925 in respect of an obligation under a conservation covenant.

#### **Clause 118: Duty of responsible bodies to make annual return**

961 Clause 118 requires a responsible body to make an annual return to the Secretary of State, specifies certain information that the return should contain, and provides the Secretary of State with a power to specify by regulations other information that must be provided as part of the annual return.

962 Subsection (4) gives the Secretary of State the power to specify by regulations the information to be included in an annual return, the twelve month period to which the return is to relate, and the date by which the return is to be made.

963 Subsection (5) clarifies that the information so specified by the Secretary of State must relate to the responsible body, its activities, its conservation covenants, or the land covered by its covenants.

#### **Clause 119: Crown application**

964 This clause gives effect to Schedule 18, which provides that the provisions on conservation covenants in the Bill apply to Crown land, and modifies those provisions insofar as they apply to Crown land.

#### **Clause 120: Index of defined terms in Part 7**

965 Clause 120 sets out an index of definitions of terms used in this Part.

#### **Clause 121: Consequential amendments relating to Part 7**

966 Clause 121 gives effect to Schedule 19 which makes consequential amendments.

## **Part 8: Miscellaneous and General Provisions**

#### **Clause 122: Amendment of REACH legislation**

967 Clause 122 introduces Schedule 20, paragraph 1 of which gives the Secretary of State the power to amend the Articles of the [REACH Regulation](#), as amended by the [REACH Exit Statutory Instrument](#). The provision excludes certain Articles, including those which set out the fundamental aims and principles of the REACH Regulation.

968 The [REACH Enforcement Regulations 2008](#) (the “REACH Enforcement Regulations”) were made under section 2(2) of the European Communities Act 1972. Section 1 of the European Union (Withdrawal) Act 2018 repeals the European Communities Act 1972. This means that after exit day there will not be any power to amend the REACH Enforcement Regulations. Clause 122 and paragraph 2 of Schedule 20 give the Secretary of State the power to amend the REACH Enforcement Regulations.

969 Clause 122 extends, and applies, to the whole of the United Kingdom.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

## General provisions

### Clause 123: Consequential provision

970 Clause 123 confers on the Secretary of State a regulation-making power to make further consequential amendments which arise from this Bill or regulations made under it. Regulations that make consequential provision may amend, repeal or revoke an enactment. Any regulations that amend or repeal primary legislation are subject to the affirmative procedure. Any other regulations under this clause are subject to the negative procedure. Equivalent powers are provided for Scottish and Welsh Ministers and for DAERA, subject to respective legislative competence.

### Clause 124: Regulations

971 Subsection (1) provides that, where regulations are made under this Bill (apart from Commencement regulations), those regulations may make supplementary, incidental, transitional or saving provision. Subsection (1)(b) also allows regulations to make different provision for different purposes or places.

972 This clause also provides that regulations made under this Bill are to be made by statutory instrument or statutory rule (Northern Ireland only). Where regulations made by the Secretary of State are subject to the negative resolution procedure, they are subject to annulment in pursuance of a resolution of either House of Parliament. Where such regulations are subject to the affirmative resolution procedure, a draft of the regulations must be laid before Parliament and approved by a resolution of each House of Parliament. The clause contains equivalent provision for regulations made by Welsh Ministers, Scottish Ministers and DAERA.

### Clause 125: Crown application

973 This Bill does not contain any provision to exempt the Crown from its requirements. Subsection (2) of this clause sets out that, where this Bill amends or repeals other legislation, the Crown is bound by that provision to the same extent as in the amended or repealed legislation.

### Clause 126: Financial provisions

974 Costs from the Environment Bill will include, but are not limited to:

- The establishment and running of the Office for Environmental Protection.
- Additional activities for public bodies, such as local authorities; arms-length bodies (for example, Environment Agency and Natural England); other government departments (for example, additional costs for the justice system and additional responsibilities for policymakers across government); and Defra.
- Additional resources to support the delivery of activities, such as enforcement officers and policymakers.
- Infrastructure and other assets, such as estates costs for the Office for Environmental Protection, and enhanced IT systems to deliver certain measures.

### Clause 127: Extent

975 Clause 127 sets out the extent of the Bill. Annex A provides further information.

### Clause 128: Commencement

976 Part 8 of the Bill (Miscellaneous and General Provisions) will come into force on the day this Bill is passed. Subsection (2) sets out those provisions in the Bill which will come into

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force two months after the day this Bill is passed.

977 Subsection (3) sets out those provisions which will come into force on such day as the Secretary of State may by regulations appoint. Corresponding provision is made in respect of Welsh Ministers and Scottish Ministers respectively in subsections (4) and (5).

978 DAERA also has a corresponding commencement power, the details of which are provided for in subsection (6). Exercise of that power is subject to the consent of the Secretary of State in the cases described in subsection (7). Subsections (8) and (9) provide that exercise of the power is through statutory rule subject to the affirmative procedure.

979 Subsection (10) allows for commencement regulations or orders to appoint different days for different purposes or places.

#### Clause 129: Transitional or saving provision

980 This clause provides that Commencement regulations made under this Bill may also make transitional or saving provision. Subsection (8) allows those regulations to make different provision for different purposes or places. Equivalent powers are provided for Scottish and Welsh Ministers and for DAERA, subject to respective legislative competence.

#### Clause 130: Short title

981 This clause confirms the short title of the Bill.

## Schedule 1: The Office for Environmental Protection

982 This Schedule sets out further information on the composition of the OEP, established as a statutory corporation and due to be classified as a Non-Departmental Public Body (NDPB), and prescribes how it is to operate. The provisions in this schedule relate to ministerial oversight; the body's operational independence from government; and the need for transparency and accountability in the body's exercise of its statutory powers and functions.

### Membership

983 Paragraph 1 covers the membership of the Board that governs the OEP. The provisions in this paragraph aim to ensure a balance between ministerial accountability and independence in making appointments to the body, and between non-executive and executive involvement in the governance of the body.

984 Sub-paragraph (1) provides that the new body will consist of a non-executive Chair and between two and five other non-executive members, and a Chief Executive (who is to be the Accounting Officer of the body and therefore responsible for accounting for the body's use of public funds) and between one and three other executive members. The make-up of the Board will ensure a balance of non-executive and executive members. Setting the maximum size of the Board at ten members enables the body to have a strategic focus while ensuring that the required expertise can be fully represented across the Board.

985 Sub-paragraph (3) requires the Secretary of State and the OEP to ensure, so far as practicable, that the number of non-executive members is at all times greater than the number of executive members, in order to ensure effective strategic oversight and ministerial accountability.

### Appointment of non-executive members

986 Paragraph 2 provides for the appointment process of the non-executive members of the board. Provisions in this paragraph aim to ensure a balance between ministerial

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accountability and having regard to the OEP's independence in making appointments to the body.

987 Sub-paragraph (1) provides for the non-executive members (including the Chair) to be appointed by the Secretary of State. This is usual practice for appointments to NDPBs, including other bodies which hold government to account such as the Equality and Human Rights Commission. The appointments process will be in accordance with the [Governance Code for Public Appointments](#). The Code will ensure that members are appointed through a fair and open process. The regulation of appointments against the requirements of this Code is carried out by the Commissioner for Public Appointments.

988 Sub-paragraph (2) places a duty on the Secretary of State to consult the Chair before appointing the other non-executive members. This ensures that the Chair is involved in the decision. Sub-paragraph (3) places a duty on the Secretary of State to have regard to the desirability of specific expertise being met across all non-executive members of the OEP (including the Chair), when nominating and appointing the non-executive members. This is intended to ensure that the OEP's non-executive members collectively have the expertise required for effective strategic oversight of its statutory functions. Non-executive directors will need to meet a range of essential criteria as part of the public appointments process.

989 Sub-paragraph (4) clarifies that non-executive members may not also be employees of the OEP, by virtue of their non-executive status. This enables them to hold the executive members to account.

### Appointment of executive members

990 Paragraph 3 provides for the appointment of the executive members of the board.

991 Sub-paragraph (1) sets out that the chief executive will be appointed by the non-executive members of the OEP, other than the first chief executive who will be appointed by the Chair. This provision is to ensure that the first CEO appointment can be made ahead of other non-executives being appointed, in order to assist with the set up activities of the OEP.

992 Sub-paragraph (2) provides for the other executive members to be appointed by the OEP.

993 Sub-paragraph (3) requires that the Secretary of State be consulted on the appointment of the Chief Executive, since the Chief Executive is to be the Accounting Officer of the OEP.

994 Sub-paragraph (4) clarifies that executive members are employees of the OEP. The body will be expected to follow the guidance for good practice for corporate governance for public bodies.

### Terms of membership

995 Paragraph 4 sets out the basis on which members (both non-executive and executive) can be appointed to, and removed from, the OEP. Appointments will be made in accordance with the Governance Code for Public Appointments.

996 Sub-paragraph (2) specifies that civil servants may not be appointed as members of the OEP, as a non-Crown entity.

997 Sub-paragraph (3) requires that non-executive members be appointed for a fixed term of no more than five years.

998 Sub-paragraph (4) requires the Secretary of State to have regard to the desirability of securing that the appointments of non-executive members expire at different times in

order to ensure strategic continuity and to spread the administrative workload of appointing and inducting new board members.

999 Sub-paragraph (5) provides that non-executive members may be re-appointed once they reach the end of their term of office.

1000 Sub-paragraph (6) explains the terms for termination of a non-executive member's appointment. Sub-paragraph (c) explains the conditions under which the Secretary of State may remove a non-executive member from office.

### Remuneration of non-executive members

1001 Paragraph 5 places a duty on the OEP to pay its non-executive members any remuneration, allowances and compensation (for example, in the event of being removed from office) as determined by the Secretary of State in consultation with the Chair.

1002 This will be in accordance with the [Corporate Governance Code for Central Departments 2017](#), which requires non-executive members of public bodies to comply with the [guidance for approval of senior pay issued by HM Treasury](#). This reflects the fact that non-executive members are public appointments by the Secretary of State (paragraph 1(2)), and helps to maintain the relative independence of the non-executive members within the OEP, as the OEP does not make decisions on their remuneration arrangements.

### Staffing and remuneration

1003 Paragraph 6 gives the OEP the power to appoint and make other arrangements for staff as it determines; and to pay its staff any remuneration and allowances as it determines. This will also be done in accordance with the [public sector pay and terms guidance](#). This arrangement gives the OEP independence in how it recruits and pays its staff, without approval from ministers. Sub-paragraph (2) provides for the Chair to determine the terms of the CEO when making the first appointment.

1004 Sub-paragraph (4) places a duty on the OEP to make pensions arrangements for its members and staff with the approval of the Secretary of State.

1005 Sub paragraphs (5) and (6) ensure that the OEP is able to take part in the Civil Service Pension Scheme for its employees.

### Powers

1006 Paragraph 7 gives the OEP the power to do anything it thinks appropriate for carrying out its functions without interference or approval from ministers, except for accepting gifts of money, land or other property, or forming, participating in forming, or investing in, a company, partnership, joint venture or other similar form of organisation. This provides the OEP with sufficient independence from government when carrying out its functions.

### Committees

1007 Paragraph 8 gives the OEP the power to establish committees to, for example, provide advice or carry out an OEP function. These may include people who are neither board members nor employees. Such committee members may be paid but may not have a vote on the committee. This will allow the body to gain access to additional specialised expertise to support any of the functions or strategic direction of the body.

### Delegation to members, committees and employees

1008 Paragraph 9 gives the OEP the power to delegate any of its functions other than the approval of key documents, reports and advice to Ministers, and key decisions related to

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the enforcement function. Functions other than these may be delegated to a member, employee or committee, in accordance with a delegation policy that it will determine. This provides the body with adequate independence to delegate functions without interference from ministers and ensures that decisions can be taken at the most appropriate level.

## Procedure

1009 Paragraph 10 gives the OEP the power to determine its own procedures, such as arrangements for decision making (other than the meeting quorum set out in sub-paragraph (2)), as part of ensuring its operational independence from government. Sub-paragraph (3) provides that proceedings will not be made invalid by a vacancy in the membership or the incorrect appointment of any member for example due to conflicts of interest. This ensures that processes and decision-making are not disrupted by situations that may not be within the OEP's control.

## Funding

1010 Paragraph 11 places a duty on the Secretary of State to fund the OEP sufficiently to perform its functions, and gives the Secretary of State the power to provide further financial assistance to the body, for example by way of grants to be used for a specific purpose related to operational delivery or achievement of functions. Funding will be provided to the OEP in the form of grant in aid, which will be set out as a separate line in the overall estimate of the Department for Environment, Food and Rural Affairs to ensure adequate transparency.

## Annual report

1011 Paragraph 12 places a duty on the OEP to prepare an annual report as soon as possible at the end of each financial year; to arrange for the report to be laid before Parliament; and to publish it. This provides transparency on the performance of the body against its key statutory functions and its strategic plan, helping to ensure accountability for the exercise of its powers and its use of public funds.

## Annual accounts

1012 Paragraph 13 is intended to ensure independent oversight, transparency and ministerial accountability for use of public funds.

1013 Sub-paragraphs (1) to (3) place a duty on the OEP (and the Chief Executive as Accounting Officer) to keep proper accounting records and prepare an annual statement of accounts. The latter includes an assessment of whether the OEP received sufficient funds to carry out its statutory functions in the relevant financial year. This provision is intended to provide further transparency around the funding of the OEP and ensure it is funded sufficiently to carry out its functions.

1014 Sub-paragraph (4) places a duty on the body to send these accounts as soon as reasonably practicable after the end of the relevant financial year to the Secretary of State and the Comptroller and Auditor General. Sub-paragraph (5) requires The Comptroller and Auditor General to certify and report on the accounts, and send the certified statement and report to the Secretary of State and the OEP. Sub-paragraph (6) mandates that the OEP must then arrange to lay these documents before Parliament.

## Meaning of "financial year"

1015 Paragraph 14 defines "financial year" as the year ending 31 March.

## Status

1016 Paragraph 15 clarifies that the OEP is not part of the Crown, unlike government

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

departments. This is customary for NDPBs, and is intended to ensure that the body can act independently of government and is capable of properly enforcing against government. The body will be staffed by public servants rather than civil servants.

### Independence of the OEP

1017 Paragraph 16 places a duty on ministers to have regard to the need to protect the OEP's independence when carrying out functions in relation to the OEP.

### Disqualification from membership of legislatures

1018 Paragraph 17 subjects OEP members to the House of Commons Disqualification Act 1975, which restricts membership of the House of Commons to certain categories of people. Consequently, people who are members of the OEP board will be disqualified from becoming members of the House of Commons until they cease to be members of the OEP. This is customary for members of certain bodies, including NDPBs. Paragraph 18 subjects OEP members to the equivalent legal obligation in Northern Ireland, the Northern Ireland Assembly Disqualification Act 1975.

### Public records

1019 Paragraph 19 subjects the OEP to the Public Records Act 1958, which governs public records in the UK.

### Freedom of information

1020 Paragraph 20 subjects the OEP to the Freedom of Information Act 2000, which governs the public's access to information held by public authorities.

### Investigation by the Parliamentary Commissioner

1021 Paragraph 21 requires the OEP to comply with the Parliamentary Commissioner Act 1967, under which the Parliamentary Ombudsman can investigate public authorities' administrative actions.

### Public sector equality duty

1022 Paragraph 22 provides for the OEP to be subject to the Equality Act 2010. The OEP will be subject to the public sector equality duty, which requires public bodies and others carrying out public functions to have due regard to the need to eliminate discrimination, to advance equality of opportunity and foster good relations between people who share a protected characteristic and those who do not.

## Schedule 2: Improving the natural environment: Northern Ireland

1023 While significant progress has been made in improving aspects of Northern Ireland's environment in recent times, there remain substantial environmental challenges which must be addressed if the Northern Ireland Executive's draft Programme for Government Outcomes are to be realised – in particular Outcome 2: "We live and work sustainably – protecting the environment".

1024 These challenges include waste management and the development of a circular economy; waste crime; air quality; local environmental quality (for example, litter and dilapidated buildings); biodiversity loss; soil quality; greenhouse gas emissions/ climate change; water quality (including the impact of nitrogen and phosphorus run-off); single use plastic waste; and ammonia emissions.

1025 In order to provide a strategic framework to tackle these challenges and to reaffirm its

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commitment to protect and improve the environment after the United Kingdom's withdrawal from the European Union, the Department for Agriculture, Food and Rural Affairs (referred to as "the Department") commenced preparatory work on a draft 'Environment Strategy for Northern Ireland' in March 2018.

1026 The Department launched a public discussion on a future Environment Strategy for Northern Ireland in September 2019, with a view to producing its first Environment Strategy in 2020. Subject to the approval of the Northern Ireland Executive, it is intended that this future strategy will be Northern Ireland's first environmental improvement plan.

## Part 1: Environmental Improvement Plans

1027 The duties included in Schedule 2 provide a statutory basis for future environmental improvement plans relating to Northern Ireland. These duties are intended to work together for the purpose of seeking to significantly improve the natural environment. Specifically, Schedule 2 requires the Department, in consultation with other relevant departments, to: produce and maintain an environmental improvement plan which is reviewed and, if appropriate, updated at least every five years; publish a statement on the data it will obtain to determine whether the natural environment (or elements of it) are improving; and report progress towards environmental improvement to the Northern Ireland Assembly on an annual basis.

### Environmental Improvement Plans

1028 Paragraph 1 introduces a duty on the Department to prepare a plan for significantly improving the natural environment. It states: what the plan must do; what the plan must contain; who must be consulted; and enables the plan to relate to a specified time period or to be of no specified duration.

1029 Sub-paragraphs (1) and (2) introduce the requirement to have an environmental improvement plan for significantly improving the natural environment.

1030 Sub-paragraph (3) enables the environmental improvement plan to relate to a specified time period or to be of no specified duration.

1031 Sub-paragraph (4) specifies that the environmental improvement plan must set out the steps that the Department and other Northern Ireland departments intend to take to improve the natural environment.

1032 Sub-paragraph (5) allows the environmental improvement plan to include measures that any Northern Ireland department intends to take in order to improve people's enjoyment of the natural environment. Enjoyment may be increased through education and public awareness of the natural environment both past and present, natural systems and processes through which organisms interact with their surroundings.

1033 Sub-paragraph (6) requires the Department to consult with such other Northern Ireland departments as it considers appropriate as part of the process of preparing an environmental improvement plan. These may be departments who are taking steps to improve the environment or those whose policy remits might be impinged upon by those taking steps.

1034 Sub-paragraph (7) requires the Department to publish an environmental improvement plan and lay this in the Northern Ireland Assembly within 12 months of paragraph 1 coming into force.

1035 Sub-paragraph (8) states that all references in Schedule 2 to the current environmental improvement plan are to the environmental improvement plan that is in effect at the time.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

## Annual reports on environmental improvement plans

- 1036 Paragraph 2 establishes a duty on the Department to produce annual reports on the implementation of the environmental improvement plan and on whether the environment is improving. It explains when and how these reports should be published.
- 1037 Sub-paragraph (1) requires the Department to prepare annual reports on the implementation of the current environmental improvement plan.
- 1038 Sub-paragraph (2) requires that these reports must describe what has been done to implement the plan and consider whether the natural environment (or aspects of it) is improving during the period to which the report relates. Consideration as to whether the environment (or aspects of it) has improved must have regard to information gathered under paragraph 5.
- 1039 Sub-paragraph (3) specifies the period of time annual reports on an environmental improvement plan must relate to, which is 12 months.
- 1040 Sub-paragraph (4) requires the Department to lay each annual report in the Northern Ireland Assembly within four months of the end of the period to which it relates.
- 1041 Sub-paragraph (5) requires the Department to publish annual reports laid before the Northern Ireland Assembly under Paragraph 2.

## Reviewing and revising environmental improvement plans

- 1042 Paragraph 3 provides for the review and revision of environmental improvement plans. It establishes a duty on the Department and a timeline to complete a review (and, if appropriate, to revise the plan), in consultation with other relevant departments. It also specifies what must be considered in undertaking this review.
- 1043 Sub-paragraph (1) establishes a duty on the Department to review the plan and if it considers it appropriate then to revise the plan.
- 1044 Sub-paragraph (2) specifies that the first review of an environmental improvement plan must be completed within 5 years of its publication (in respect of the first plan) or its start date (in respect of any other plans). This is considered to be sufficient time for: progress to be made against the plan; the monitoring of the environment to assess improvement; and early results to be obtained. This time should also allow for any weaknesses and gaps in the plan and required policy changes to be identified which may require a revision to the plan.
- 1045 Sub-paragraph (3) provides that further reviews of an environmental improvement plan must be undertaken within every five-year period.
- 1046 Sub-paragraph (4) specifies what the Department must consider when reviewing an environmental improvement plan. These are: the steps that have been taken to deliver the plan; improvements in the natural environment (or aspects of it); and what else should be done to improve the environment. The Department must have regard to the data obtained under paragraph 5 and reports from the Office for Environmental Protection when considering whether the environment (or aspects of it) has improved. The Department will be at liberty to consider other relevant information, reports or commentary in completing its review.
- 1047 Sub-paragraph (5) requires the Department to consult with such other Northern Ireland departments as it considers appropriate as part of the process of reviewing or revising an environmental improvement plan. These departments may be those who are taking steps to improve the environment or those whose policy remits might be impinged upon by

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

those taking steps.

- 1048 Sub-paragraph (6) requires that when the Department has completed a review and determined it appropriate to revise the plan, then this revised plan must be laid in the Northern Ireland Assembly along with a statement explaining what revisions have been made and why.
- 1049 Sub-paragraph (7) requires that if the Department completes a review but does not consider it appropriate to revise the plan then it must lay in the Northern Ireland Assembly a statement to this effect and the reasons for this. Whilst the Department is required to complete a review within the 5 year timeline there is no duty to revise the plan if a revision is not considered appropriate. This allows for a revision to the plan to be delayed if the Department considers it appropriate, but such a decision must be justified to the Northern Ireland Assembly.
- 1050 Sub-paragraph (8) requires the Department to publish any documents laid in the Northern Ireland Assembly under sub-paragraphs (6) and (7) following a review of an environmental improvement plan.
- 1051 Sub-paragraph (9) specifies that a review is to be considered completed when the documents prepared under subsections (6) and (7) have been laid in the Northern Ireland Assembly and published. This is the completion date for the purpose of meeting the requirement to complete a review within five years of a plan being published or previous review. It also becomes the start date for the next five-year time period for completing the subsequent review.
- 1052 Sub-paragraph (10) clarifies that when the environmental improvement plan is revised in accordance with this paragraph, then references to an environmental improvement plan in this Schedule include the now revised environmental improvement plan.

### Renewing environmental improvement plans

- 1053 Paragraph 4 provides for the Department to, in consultation with other relevant departments, replace the environmental improvement plan with a renewed version in such circumstances where the environmental improvement plan relates to a specified period as stated in the plan itself.
- 1054 Sub-paragraph (1) specifies that paragraph 4 applies where an environmental improvement plan relates to a period specified in the plan itself.
- 1055 Sub-paragraph (2) requires the Department to prepare a new environmental improvement plan before the point at which the current plan comes to an end.
- 1056 Sub-paragraph (3) requires the new plan to start no later than the end of a previous plan, ensuring there is no gap between plans.
- 1057 Sub-paragraph (4) sets out what the Department must consider before the current environmental improvement plan can be renewed. These are the steps that have been taken to deliver the current plan; improvements in the natural environment since the beginning of the period to which the old plan relates; and what else should be done to improve the environment after the end of the period to which the previous plan related. The Department must also consult such other Northern Ireland departments as it considers appropriate as part of the renewal process. The Department must have regard to the data obtained under paragraph 5 and reports from the Office for Environmental Protection when considering whether the environment has improved and is at liberty to consider other relevant information, reports or commentary.

1058 Sub-paragraph (5) requires the Department to publish and lay all new environmental improvement plans in the Northern Ireland Assembly at or before the end of the period to which the previous plan relates.

1059 Sub-paragraph (6) refers to the replacement of the plan and specifies when the previous plan ends and the new plan begins. At its earliest, this will be when the plan has been laid in the Northern Ireland Assembly and published, but if the period to which the new plan relates is specified in the new plan it will be the start of that period. Sub-paragraph (3) requires that the new plan begins no later than the end of the previous plan.

### Environmental monitoring

1060 Paragraph 5 establishes a duty on the Department to obtain and publish data for the purpose of environmental improvement. The metrics will measure outcomes achieved through the implementation of the environmental improvement plan and inform updates to the plan.

1061 Sub-paragraph (1) establishes a duty on the Department to ensure that appropriate monitoring data is obtained to assess whether the natural environment (or elements of it) is improving in line with the current environmental improvement plan.

1062 Sub-paragraph (2) requires the Department to publish and lay a statement in the Northern Ireland Assembly explaining the types of data to be collected for the purposes identified in sub-paragraph (1).

1063 Sub-paragraph (3) requires the first statement under sub-paragraph (2) to be laid within four months of this Paragraph coming into force.

1064 Sub-paragraph (4) allows for changes to be made to the statement at any time. This may be necessary if it becomes clear to the Department that additional data is needed or that current measures do not adequately assess environmental improvement. Such a revised statement must also be published and laid in the Northern Ireland Assembly.

1065 Sub-paragraph (5) requires the Department to publish any data that it obtains under sub-paragraph (1).

## Part 2: Policy statement on environmental principles

1066 Part 2 of Schedule 2 makes similar provision for Northern Ireland as clauses 16 to 18 do for England.

### Policy statement on environmental principles

1067 Paragraph 6(1) requires the Department of Agriculture, Environment and Rural Affairs (“the Department”) to prepare a policy statement on the environmental principles. This means that the Department must draft the policy statement in line with requirements in paragraphs 6 and 7.

1068 Sub-paragraph (2) provides specific information on what the environmental principles policy statement must include. The policy statement will provide information for Northern Ireland departments on the interpretation and proportionate application of the environmental principles when developing policies. Proportionate application of the principles means that action taken should be comparable to the potential benefit or risk applying in a specific case.

1069 Sub-paragraph (3) sets out that the Department may explain in the statement how other considerations should be taken into account by Northern Ireland departments when they are interpreting and applying the environmental principles. For example, it may be

necessary to balance the application of a specific environmental principle with other considerations, such as economic and social benefits.

1070 Sub-paragraph (4) details two aims that the Department must be satisfied that the statement will contribute to. These are:

- The improvement of environmental protection. In this context, this means ensuring that the policy statement can be used to shape policies in a way that contributes to protection of the environment.
- Sustainable development. Sustainable development can be summarised as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It involves trying to achieve environmental benefit alongside economic growth and social progress. Therefore, the policy statement will require Northern Ireland departments to consider needs of future generations when developing policies. This means that a Department should consider the environmental impact of their policies together with economic and social factors and, as much as possible, ensure each policy achieves all three aims.

1071 Sub-paragraph (5) sets out the list of environmental principles the policy statement will cover. These principles are drawn from a number of sources, including, for example, the [Rio Declaration on Environment and Development](#) (1992). There is no single agreed definition of the environmental principles. The policy statement will explain in more detail how these are to be interpreted and provide information as to how they should be applied.

1072 The meaning of the individual environmental principles are as follows:

- The principle that environmental protection should be integrated into the making of policy: Environmental protection must be embedded in the making of policies.
- The principle of preventative action to avert environmental damage: Preventive action should be taken to avert environmental damage.
- The precautionary principle, so far as relating to the environment: Where there are threats of serious irreversible environmental damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.
- The principle that environmental damage should as a priority be rectified at source: Environmental damage should as a priority be rectified by targeting its original cause and taking preventive action at source.
- The polluter pays principle: The costs of pollution control and remediation should be borne by those who cause pollution rather than the community at large.

1073 Further direction on these environmental principles will be set out in the policy statement. These principles cannot be changed without further primary legislation.

### Policy statement on environmental principles: process

1074 Paragraph 7 establishes the process by which the Department will develop and publish

the environmental principles policy statement.

1075 Sub-paragraph (1) requires the Department to prepare a draft environmental policy statement. This will be an initial version of the statement before public and Northern Ireland Assembly (“the Assembly”) scrutiny.

1076 Sub-paragraph (2) requires the Department to undertake a public consultation on the draft policy statement.

1077 Sub-paragraph (3) requires the draft to be laid before the Assembly for its consideration. This must take place before the policy statement is finalised.

1078 Sub-paragraph (4) sets out provisions for cases where the Assembly chooses to respond to the draft policy statement by passing a resolution in respect of the draft. The Assembly has a period of 21 sitting days after the draft statement has been laid to pass a resolution if it deems this necessary. The Department is required to lay a response to any resolution passed by the Assembly.

1079 Sub-paragraphs (5) to (7) require the final environmental policy statement to be laid before the Assembly and published. If a response is required under sub-paragraph (4), the Department must not lay and publish the final statement before laying this response. Otherwise, the Department must not lay and publish the final statement before a period of 21 sitting days has passed since the draft statement was laid. This is intended to allow the Assembly sufficient time to scrutinise the draft policy statement. The final statement comes into effect when it is laid before the Assembly.

1080 Sub-paragraph (8) provides a definition for the term “21 day period”.

1081 Sub-paragraph (9) allows the Department to revise the policy statement at any time and requires the process set out in paragraph 7 to be followed each time that the policy statement is revised.

1082 Sub-paragraph (10) details what a sitting day is in this context.

### Policy statement on environmental principles: effect

1083 Paragraph 8 sets out the legal duty on Northern Ireland departments and Ministers of the Crown in respect of the environmental principles policy statement, where the duty applies. It also details the relevant exemptions to the duty to have due regard to the policy statement.

1084 Sub-paragraph (1) requires the Northern Ireland departments to have due regard to the environmental principles policy statement when making policies included in the scope of the duty (i.e. policy that is not excluded). This means that when making policy, departments must have the correct level of regard to the content of the environmental principles policy statement.

1085 Sub-paragraph (2) places the same duty on Ministers of the Crown when they are making policies relating to Northern Ireland.

1086 Sub-paragraph (3) sets out that the policy statement does not require departments or Ministers of the Crown to do, or refrain from doing, anything if doing something (or not doing it) has no significant environmental benefit or would be in any other way disproportionate to the environmental benefit. In this context:

- No significant environmental benefit means that the policy statement does not need to be used to change a policy direction if the environmental impact would



be negligible.

- Disproportionate indicates situations in which action would not be reflective of the benefit or costs, environmental or otherwise. Action taken must reflect the potential for environmental benefit as well as other costs and benefits. For example, there is no need for a Department to change a policy in light of the principles policy statement if the cost of this change would be very high and the benefit to the environment would be very low. Equally, if the potential environmental benefit is high, then it is proportionate to take a more significant action based on the policy statement.

1087 Sub-paragraph (4) sets out which policies are excluded from the requirement to have due regard to the policy statement during the policy-making process. In the equivalent provision for England – clause 18(3) - the armed forces, defence, and national security, taxation, spending and the allocation of resources within government are excluded. These matters are similarly excluded for Ministers of the Crown when making policy in relation to Northern Ireland. However, armed forces, defence, and national security do not need to be specifically excluded for Northern Ireland departments as they are excepted matters and, on that basis, Northern Ireland departments have no powers to make policies relating to these subjects.

### **Part 3 – Interpretation**

1088 Part 3 of Schedule 2 makes similar provision for Northern Ireland as clauses 39 and 41 do for England.

#### **Meaning of “natural environment” and General interpretation**

1089 Paragraphs 9 and 10 define the terms used in the Schedule and cover the application of the Interpretation Act (Northern Ireland) 1954.

### **Schedule 3: The Office for Environmental Protection: Northern Ireland**

1090 The Office for Environmental Protection’s (OEP’s) functions in Northern Ireland are essentially the same as its functions in England. This is dealt with in the Bill in two ways:

- Substantive Northern Ireland functions of the OEP are provided for in Part 1 of Schedule 3. To a large extent these provisions mirror those in Part 1 of the Bill.
- Provision about the OEP itself and its general functions are contained in clauses 19 to 38 of Part 1 of the Bill. These apply to Northern Ireland subject to the amendments made by Part 2 of Schedule 3.

1091 Throughout this Schedule, “the Department” means the Department of Agriculture, Environment and Rural Affairs (DAERA).

### **Part 1: The OEP’s Northern Ireland functions**

#### **Monitoring and reporting on the Department’s environmental improvement plans**

1092 Paragraph 1 describes the monitoring and reporting functions of the OEP in relation to the environmental improvement plans prepared by the Department. Under this paragraph, the OEP will monitor and assess environmental statistics and reports on an ongoing basis to ensure that it has an effective knowledge base. This information will then

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

be analysed alongside information published by the Department to assess progress made in improving the natural environment in accordance with the current environmental improvement plan.

- 1093 Sub-paragraph (1) provides that the OEP must monitor progress in improving the natural environment in accordance with the Department's environmental improvement plan (the first of which is intended to be the 'Environment Strategy for Northern Ireland'), as set out in Schedule 2. This is intended to hold the Department to account on its environmental commitments.
- 1094 Sub-paragraph (2) requires the OEP to produce a progress report for each annual reporting period. As set out in sub-paragraph (3), the reports will inform on progress made related to improving the natural environment that has occurred within the annual reporting period. This will be measured against the current environmental improvement plan. An annual reporting period is the period for which the Department must produce a report under paragraph 2 of Schedule 2 (a "Schedule 2 report"), as set out in sub-paragraph (4).
- 1095 When making a progress report, sub-paragraph (5) requires the OEP to take into account the report made by the Department on progress against environmental objectives for that period, as set out in paragraph 2 of Schedule 2. The OEP will also consider the data for that period, as required by paragraph 5(1) of Schedule 2, as well as any other documents or information which the OEP believes is relevant.
- 1096 Sub-paragraph (6) specifies that a progress report may advise how the OEP believes progress could be improved. It may also consider the adequacy of data obtained under paragraph 5(1) of Schedule 2, enabling the OEP to independently determine whether the right information is being collected to evaluate progress in improving the natural environment.
- 1097 Sub-paragraphs (7) and (8) require that the OEP's reports must be laid before the Northern Ireland Assembly and published. This is intended to provide the OEP with sufficient independence when carrying out its reporting functions. The OEP's reports must be laid before the Northern Ireland Assembly within six months of the relevant Schedule 2 report being laid. This gives the OEP sufficient time to carry out its scrutiny of the Schedule 2 report whilst tying it to a fixed reporting deadline.
- 1098 Sub-paragraph (9) requires the Department to respond to the OEP's report, publishing its response and laying it before the Northern Ireland Assembly. Sub-paragraph (10) requires that the Department's response must specifically address any recommendations made by the OEP as to how progress with the environmental improvement plan could be improved. Sub-paragraph (11) specifies that the Department must lay its response within 12 months of the OEP's report being laid; and may include this response in the Department's subsequent report made under paragraph 2 of Schedule 2. This allows the Department to include the response to the OEP's progress report as part of the following year's annual report on the environmental improvement plan.

### Monitoring and reporting on environmental law

- 1099 Paragraph 2 describes how the OEP is to monitor and report on the implementation of Northern Ireland environmental law. This term is defined in paragraph 18(2) of Schedule 3.
- 1100 Sub-paragraph (1) requires the OEP to monitor the implementation of Northern Ireland environmental law.

- 1101 Sub-paragraph (2) permits the OEP, as it deems appropriate, to produce a report on any matter concerned with the implementation of Northern Ireland environmental law.
- 1102 Sub-paragraph (3) requires that any report the OEP produces in line with sub-paragraph (2) must be laid before the Northern Ireland Assembly and published. This ensures the reports are in the public domain and are subject to scrutiny by elected representatives.
- 1103 Sub-paragraph (4) requires the Department to produce a response to any report issued by the OEP under sub-paragraph (2). The Department must lay the response before the Northern Ireland Assembly and publish it.
- 1104 Sub-paragraph (5) requires the Department to lay its response before the Assembly within three months of the OEP's report being laid.

### Advising on changes to Northern Ireland environmental law etc

- 1105 Paragraph 3 sets out the circumstances in which the OEP can give advice to a Northern Ireland department. It also makes provision for how this advice must be published and may be laid before the Northern Ireland Assembly.
- 1106 Sub-paragraphs (1) and (2) enable a Northern Ireland department to require the OEP to provide it with advice on any proposed change to Northern Ireland environmental law, or on any other matter relating to the natural environment. The department in question can, if it wishes, set out specific matters it requires the OEP to take into consideration when providing this advice. "Natural environment" is defined in this Bill in clause 39 and paragraph 19 of this Schedule.
- 1107 Sub-paragraph (3) enables the OEP, acting on its own initiative, to give advice to a Northern Ireland department concerning any changes to environmental law being proposed by the department in question.
- 1108 Sub-paragraph (4) requires any advice given by the OEP to a Northern Ireland department to be given in writing. This applies whether the advice has been requested by the department or whether it has been provided at the OEP's initiative.
- 1109 Sub-paragraph (5) requires the OEP to publish its advice. If it was asked to provide the advice by a Northern Ireland department under sub-paragraph (1), it must also publish details of the request and any matters it was required to take into account in line with sub-paragraph (2). The publication of this information ensures transparency in the relationship between the OEP and any Northern Ireland department asking it for advice.
- 1110 Sub-paragraph (6) permits (but does not require) the relevant Northern Ireland department to lay the advice it has received from the OEP before the Northern Ireland Assembly. It may also lay any response it has made to that advice.

### Failure of relevant public authorities to comply with environmental law

- 1111 Paragraph 4 defines what is meant by a relevant public authority failing to comply with relevant environmental law.
- 1112 Sub-paragraph (1) sets out that paragraphs 6 to 15 provide for the functions of the OEP relating to failures by "relevant public authorities" to comply with "relevant environmental law". Both of these terms are defined in paragraph 5.
- 1113 Sub-paragraph (2) defines what is meant by a relevant public authority failing to comply with relevant environmental law.

### Meaning of relevant environmental law, relevant public authority etc

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

1114 Paragraph 5 defines certain terms referred to in this Part of this Schedule.

1115 Sub-paragraph (2) defines the term “relevant environmental law”. This definition is in two parts:

- Sub-paragraph (2)(a) sets out that for Northern Ireland public authorities (defined in sub-paragraph (4)) “relevant environmental law” means “UK environmental law”, as defined in paragraph 18(1) – which references clause 40 – or “Northern Ireland environmental law”, as defined in paragraph 18(2).
- Sub-paragraph (2)(b) sets out that for any other relevant public authority (meaning those captured under sub-paragraph (3)(b)), “relevant environment law” means “Northern Ireland environmental law”.

1116 The definition is structured in this manner to enable the OEP to carry out enforcement action against Northern Ireland devolved public authorities who are believed to have breached either devolved or reserved environmental legislation, as well as against other public authorities who are believed to have breached devolved legislation when exercising any function in or as regards to Northern Ireland.

1117 Sub-paragraph (3) defines the term “relevant public authority”. This means a Northern Ireland public authority (as defined in sub-paragraph (4)), or any other legal or natural person carrying out a function of a public nature in or as regards Northern Ireland that is not a parliamentary function, or a function of a body listed under sub-paragraphs (3)(b)(i) to (3)(b)(iv).

1118 Sub-paragraph (4) defines the term “Northern Ireland public authority”. This means a legal or natural person carrying out a Northern Ireland devolved function (as defined in sub-paragraph (5)) that is not a function connected with proceedings in the NI Assembly, or a function of any of the bodies listed under sub-paragraphs (5)(b)(i) to (5)(b)(iii).

1119 Sub-paragraph (4) makes it clear that the definition of Northern Ireland public authority includes the implementation bodies as defined in section 55 of the Northern Ireland Act 1998 but only insofar as their functions relate to Northern Ireland.

1120 Sub-paragraph (5) defines the term “Northern Ireland devolved function”. This means a function that could be conferred by an Act made by the Northern Ireland Assembly under sections 6 to 8 of the Northern Ireland Act 1998.

## Complaints about relevant public authorities

1121 Paragraph 6 allows complaints to be made to the OEP regarding alleged contraventions of relevant environmental law by relevant public authorities. It sets out who may make such complaints, what form they must take, and the time limits within which they should be made. Complaints that are not submitted in accordance with the procedures set out in this paragraph do not have to be considered by the OEP (see paragraph 8(2)(a)). The contraventions and relevant public authorities about which complaints may be considered by the OEP are set out in paragraphs 4 and 5 respectively. Paragraph 5 also defines relevant environmental law.

1122 Sub-paragraph (1) allows for any legal or natural person - other than a person described in sub-paragraph (4) - to make a complaint to the OEP if they believe that a relevant public authority has failed to comply with relevant environmental law.

1123 Sub-paragraph (2) requires the OEP to draw up and publish a complaints procedure and sub-paragraph (3) requires all complaints to the OEP to be submitted in accordance with

the most recently published version of that procedure.

- 1124 Sub-paragraph (4) does not permit public authorities to make complaints to the OEP. This is to prevent one arm of government or the public sector complaining about another.
- 1125 Sub-paragraph (5) requires a complainant to have exhausted any internal complaints procedures of the body it wishes to complain about before submitting a complaint to the OEP. This should allow matters to be resolved without formal action being taken where possible.
- 1126 Sub-paragraph (6) requires a complaint to be submitted to the OEP within a year of the alleged breach of relevant environmental law (sub-paragraph (a)), or within three months of the conclusion of any internal complaints procedures (sub-paragraph (b)), whichever is later. However sub-paragraph (7) allows the OEP to consider complaints submitted after the expiration of these time limits if it believes that there are exceptional grounds for doing so e.g. if the full impact of environmental harm allegedly caused by a relevant public authority has not become apparent for some time.

### Investigations: relevant public authorities

- 1127 Paragraph 7 deals with the investigation of complaints about relevant public authorities as well as the investigation of potential breaches of relevant environmental law coming to the OEP's attention by other means.
- 1128 Sub-paragraph (1) gives the OEP powers to undertake an investigation on the basis of a complaint received under paragraph 6 if it considers that the complaint indicates that a relevant public authority may have committed a serious failure to comply with relevant environmental law.
- 1129 Sub-paragraph (2) gives the OEP powers to undertake an investigation without having received a complaint if it has information obtained by other means, which in its view indicates a relevant public authority may have committed a serious failure to comply with relevant environmental law.
- 1130 Sub-paragraph (3) sets out the purpose of the investigation i.e. establishing whether a relevant public authority has failed to comply with relevant environmental law.
- 1131 Under sub-paragraph (4), at the start of an investigation the OEP is required to notify the relevant public authority that it is being investigated. Under sub-paragraph (10), if that public authority is not a Northern Ireland department, the OEP must also notify the "relevant department". Sub-paragraph (11) defines the relevant department as the Northern Ireland department that the OEP considers the most appropriate, taking account of the nature of the public authority being investigated and the nature of the failure/alleged failure. In most cases this will mean that the OEP will notify the department responsible for the policy area in question.
- 1132 Similarly, when an investigation is concluded, sub-paragraph (5) requires the OEP to provide a report to the relevant public authority, copied to the relevant department if necessary under sub-paragraph (10). The OEP may publish the report in full or part under sub-paragraph (9).
- 1133 Sub-paragraph (6) allows the OEP the flexibility to delay the preparation of its report if it considers that it may take further enforcement action.
- 1134 Under sub-paragraph (7), if the OEP has made a review application in relation to the alleged failure to comply with relevant environmental law it is not required to prepare a report. The process for review application" is set out in paragraph 12.

1135 The required contents of the OEP's report are set out in sub-paragraph (8). The report must include information on whether the OEP considers that a relevant public authority has failed to comply with relevant environmental law, the reasons the OEP came to these conclusions, and any recommendations the OEP may have for the relevant public authority in question and any other authorities.

### Duty to keep complainants informed

1136 Paragraph 8 sets out the OEP's duty to inform a complainant about whether an investigation will be carried out following their complaint and, if so, about the progress of the investigation. Under this paragraph:

- The OEP must inform the complainant if their complaint will not be considered for further investigation on the basis that it was not made in accordance with paragraph 6 - see sub-paragraph (2)(a).
- Where a complaint has been made in accordance with paragraph 6, the OEP must advise the complainant whether or not an investigation into that complaint will be carried out – see sub-paragraphs (2)(b) and (2)(c).
- When a report on an investigation under paragraph 7(5) has been provided to the relevant public authority, sub-paragraph (2)(d)(i) requires the OEP to inform the complainant of this, although it is not obliged to disclose the report to the complainant.
- Where the OEP makes a review application in relation to the failure that was the subject of the complaint, sub-paragraph (2)(d)(ii) requires the OEP to inform the complainant of this.
- Where the OEP publishes a report following the investigation of a complaint, it must provide the complainant with a copy of that report as published in full or in part, as required by sub-paragraph (2)(e).

### Information notices

1137 Paragraph enables the OEP to take enforcement action in the form of an "information notice".

1138 Under sub-paragraph (1), the OEP may issue an information notice to a relevant public authority if it has reasonable grounds for suspecting that the authority has failed to comply with relevant environmental law, and it considers that the failure is serious.

1139 Sub-paragraph (2) requires an information notice to describe the alleged failure to comply with relevant environmental law and detail the information that the OEP requires from the relevant public authority in relation to the alleged failure.

1140 Sub-paragraph (3) requires the relevant public authority to respond in writing to an information notice, providing, as far as is reasonably practicable, the information requested.

1141 Sub-paragraph (4) specifies that the relevant public authority must respond within two months from the date on which the notice was given, or by any later date as specified by the OEP in the notice.

1142 Sub-paragraph (5) sets out the information that must be included in a response to the OEP including, if applicable, the steps the relevant public authority now intends to take.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

1143 Under sub-paragraph (6), the OEP may withdraw an information notice or issue multiple information notices in relation to the same alleged compliance failure.

### Decision notices

1144 Paragraph 10 enables the OEP to take further enforcement action in the form of a “decision notice”.

1145 The OEP may issue a decision notice under sub-paragraph (1) if it is satisfied, on the balance of probabilities, that the relevant public authority has failed to comply with relevant environmental law, and it considers that the failure is serious.

1146 Sub-paragraph (2) requires a decision notice to describe the failure to comply with relevant environmental law and the steps the relevant public authority should take in relation to the failure.

1147 Under sub-paragraph (3) the relevant public authority is required to respond in writing to a decision notice within two months from the date the notice was given, or by any later date as specified by the OEP in the notice.

1148 Sub-paragraph (4) requires the written response from the relevant public authority to state whether the authority agrees that there has been a failure to comply with the law and, whether it will take the steps set out in the notice. The response must also specify what other steps (if any) the relevant public authority intends to take in relation to the failure described in the notice.

1149 Sub-paragraph (5) requires the OEP to have issued at least one information notice relating to the compliance failure before it can issue a decision notice (sub-paragraph (5)(a)). It also allows the OEP to withdraw a decision notice (sub-paragraph (5)(b)).

### Linked notices

1150 Paragraph 11 deals with the possible scenario in which the OEP considers that a notice should be issued to more than one public authority concerning the same or similar breaches of relevant environmental law.

1151 Sub-paragraph (1) gives the OEP the power to issue information or decision notices to more than one relevant public authority and determine that these are ‘linked notices’.

1152 Sub-paragraph(2) allows the relevant department (i.e. the department responsible for the policy area in question) to ask the OEP to designate information or decision notices as linked notices and requires the OEP to have regard to such a request.

1153 Sub-paragraph (3) allows the OEP to designate information notices and decision notices to be linked notices where these also relate to conduct that is the same or similar to the subject of a UK information notice or decision notice.

1154 Sub-paragraph (4) requires the OEP to provide the recipient of an information notice or a decision notice with copies of any linked notices, copies of relevant correspondence between the OEP and the recipient of such linked notices, and, where applicable, copies of relevant correspondence between the OEP and the relevant department. Sub-paragraph (5) sets out what will be considered as “relevant” correspondence in such cases.

1155 Sub-paragraph (6) provides that the obligations set out under sub-paragraph (4) (to provide copies of notices or correspondence) will not apply where the OEP considers that to provide this information would not be in the public interest.

1156 Sub-paragraph (7) provides the meaning of a UK decision notice and a UK information notice.

## Enforcement

- 1157 Paragraph 12 enables the OEP to bring legal proceedings against a relevant public authority in specified circumstances.
- 1158 Sub-paragraph (1) gives the OEP powers to make a review application in relation to the conduct of a relevant public authority, as long as the conduct in question has been described in a decision notice previously issued to the authority in question as a failure to comply with relevant environmental law.
- 1159 Sub-paragraph (2) gives the OEP the power to make a review application regarding the conduct of the relevant public authority which takes place after the OEP has issued its decision notice if it considers that the conduct in question is similar or related to the conduct which gave rise to the notice.
- 1160 Sub-paragraph (3) provides that the OEP may make a review application in relation to conduct of a relevant public authority outside of the circumstances provided for in sub-paragraphs (1) and (2) if certain conditions apply. These are that (a) the conduct constitutes a serious failure to comply with environmental law; and (b) although a decision notice has not been issued in relation to the conduct, it is necessary to make the application to prevent or mitigate serious damage to the natural environment or to human health. The effect of this provision is that the OEP could only make an application for judicial review, without proceeding according to its normal enforcement processes, i.e. without the need to issue an information notice and a decision notice, if it believed that doing so was necessary. This could be the case if, for example, it was of the view that serious environmental damage would have already happened by the time that its normal enforcement procedure reached litigation and a more urgent court judgment was needed.
- 1161 Sub-paragraph (4) defines a “review application” in this Part of the Schedule as an application for judicial review in the High Court in Northern Ireland. This means that the usual judicial review remedies are available to the court e.g. quashing orders and declarations.
- 1162 Sub-paragraph (5) makes it clear that the OEP must obtain permission from the court before making a review application.
- 1163 Sub-paragraph (6) disapplies the usual time limit for bringing a judicial review application.
- 1164 Sub-paragraph (7) applies to review applications made in line with sub-paragraph (1). Sub-paragraph (7)(a) requires the High Court to be satisfied that a remedy would not substantially prejudice or cause substantial hardship to a third party (a person other than the OEP) before granting it. Sub-paragraph (7)(b) requires that the High Court must also be satisfied that a remedy it granted would not be detrimental to good administration.
- 1165 Sub-paragraph (8) requires a relevant public authority which has been the subject of a review application to publish a statement upon conclusion of the review proceedings where the High Court makes a finding that the public authority has failed to comply with relevant environmental law – and this finding has not been overturned on appeal. This must set out the future action it plans to take.
- 1166 Sub-paragraph (9) requires a public authority to publish the statement as provided for in sub-paragraph (8) within two months of the day that proceedings, including any appeal, conclude.

## Intervention in judicial review

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*



1167 Paragraph 13 permits the OEP to intervene in an application for a relevant judicial review brought by another person or body. It enables the OEP to apply to intervene in a third party judicial review (including appeal proceedings) against a relevant public authority concerning an alleged failure to comply with relevant environmental law.

### Duty of the OEP to involve the relevant department

1168 Paragraph 14 ensures that the relevant department i.e. the Northern Ireland department with policy responsibility for the area in question (see definition in paragraph 7(11)) is made aware of a relevant information or decision notice or of a review application.

1169 Where the recipient of an information or decision notice is not a Northern Ireland department, sub-paragraph (1)(a) requires the OEP to provide a copy of the notice to the relevant department, as well as a copy of any correspondence between the OEP and the recipient of the notice that relates to the notice. Sub-paragraph (1)(b) requires the OEP to also provide the recipient of a notice with a copy of any correspondence it has with the relevant department regarding the notice.

1170 Sub-paragraph (2) provides that the OEP is not obliged to provide copies of notices or correspondence set out in sub-paragraph (1) if it considers that to do so would not be in the public interest.

1171 Where the OEP makes a review application against a relevant public authority which is not a Northern Ireland department, sub-paragraph (3) requires the OEP to provide the relevant department with a copy of the application and a statement which sets out the OEP's opinion on whether the relevant department should participate in the review proceedings.

### Public statements

1172 Paragraph 15 sets out the OEP's duties with respect to public statements such as press releases.

1173 Sub-paragraph (1) requires the OEP to publish a public statement whenever it serves an information or decision notice, makes a review application, or applies to intervene in a judicial review. This sub-paragraph also sets out the information that this statement must contain.

1174 Sub-paragraph (2) provides that the OEP is not required to publish a statement if it considers that it would not be in the public interest to do so.

### Disclosures to the OEP

1175 Paragraph 16 deals with the circumstances in which a person must – and when they are not obliged - to provide information to the OEP.

1176 Sub-paragraph (1) of this paragraph sets out that no obligation of secrecy, whether set out in legislation or not, prevents someone from providing the OEP with information. This sub-paragraph applies if the information is in connection with an investigation (under the powers set out in paragraph 7), an information notice or decision notice or when complying with a request for information in response to an information notice (in accordance with paragraph 9(3)(b)).

1177 Sub-paragraph (2) qualifies sub-paragraph (1), by providing a public authority with an exemption from the requirement to provide information if it would be entitled or required to withhold that information in legal proceedings on the grounds of either legal professional privilege or public interest immunity.

1178 Sub-paragraph (3) provides that no obligation of secrecy, statutory or otherwise, restricts the Northern Ireland Public Services Ombudsman from providing information to the OEP, if this is done for purposes connected with the exercise of the OEP's functions under paragraph 7.

1179 Sub-paragraph (4) confirms that nothing in this Part of the Schedule requires or authorises any disclosure of information which would contravene the data protection legislation, even if the disclosure would be in accordance with the provisions in this Part of the Schedule.

1180 Sub-paragraph (5) defines the meaning of the phrase "the data protection legislation" for the purposes of this paragraph and is self-explanatory.

### Confidentiality of proceedings

1181 Paragraph 17 deals with the circumstances in which the OEP and relevant public authorities must not disclose information obtained during enforcement proceedings by the OEP.

1182 Sub-paragraph (1)(a) sets out that the OEP cannot disclose information where it has been provided by a relevant public authority as a response to information requested by the OEP in an information notice (as provided for in paragraph 9(3)(b)). Sub-paragraph (1)(b) provides that the OEP also cannot disclose correspondence between the OEP and the relevant public authority in respect of information or decision notices. This includes the notices themselves.

1183 Circumstances where the prohibition on disclosure does not apply and the OEP is therefore able to disclose the information, are covered under sub-paragraph (2).

1184 Sub-paragraph (3) prohibits a relevant public authority that is in receipt of an information notice or decision notice from disclosing correspondence between it and the OEP in relation to the notice – including the notice itself. This prohibition also applies to correspondence between the OEP and any other relevant public authority in relation to the relevant notice.

1185 Sub-paragraph (4) sets out the circumstances where the prohibition in sub-paragraph (3) does not apply.

1186 Sub-paragraph (5) sets out that that the OEP can only give its consent for disclosure of an information or a decision notice when it has concluded it intends to take no further steps under this Part of this Schedule or under Chapter 2 of Part 1 of this Bill. Sub-paragraph (6) ensures that, if consent has been requested by a relevant public authority, the OEP cannot withhold that consent for disclosure of correspondence if it has concluded it intends to take no further steps under this Part of this Schedule or Chapter 2 of Part 1 of this Bill.

1187 Sub-paragraph (7) provides that any information which is non-disclosable under this paragraph and which is held by the OEP or relevant public authorities is to be regarded as "environmental information" in accordance with the Environmental Information Regulations 2004 and the Environmental Information (Scotland) Regulations 2004 and held, for the purposes of those regulations, in connection with confidential proceedings.

### Meaning of UK environmental law and Northern Ireland environmental law

1188 Paragraph 18 defines "environmental law" for the purpose of determining the range of legislation which falls within the remit of the OEP and with respect to which the OEP can exercise its scrutiny, advice, complaints and enforcement functions in Northern Ireland.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

- 1189 Sub-paragraph (1) defines “UK environmental law” for the purpose of this Part of this Schedule, as meaning anything which is environmental law for the purposes of Part 1 of this Act (see clause 40).
- 1190 Sub-paragraph (2) defines “Northern Ireland environmental law” for the purpose of this Part of this Schedule as meaning any Northern Ireland legislative provision that meets the dual requirement of being mainly concerned with one of the matters described in sub-paragraph (3) and not being explicitly excluded under sub-paragraph (4). It is important to note that the definition of Northern Ireland environmental law applies to legislative provisions on an individual basis (ie specific sections or sub-sections of an Act or regulations) rather than entire legal instruments. This means that even if most of an Act or set of regulations does not meet these conditions, any specific provisions in the Act or regulations which do meet the conditions should be considered as Northern Ireland environmental law. For further guidance see the Explanatory Notes on clause 40.
- 1191 Sub-paragraph (3) defines environmental matters as: (a) protecting the natural environment from the effects of human activity; (b) protecting people from those effects; (c) maintaining, restoring or enhancing the natural environment; and (d) functions such as monitoring and advising on (a) – (c).
- 1192 Sub-paragraph (4) sets out matters which are explicitly excluded from the definition of Northern Ireland environmental law:
- Disclosure of or access to information. These matters are excluded in order to avoid overlap between the remit of the OEP and that of the Information Commissioner’s Office, which oversees and, where necessary, takes action to enforce public authorities’ compliance with the Environmental Information Regulations 2004.
  - Taxation, spending or the allocation of resources within government.
- 1193 Sub-paragraph (5) defines “Northern Ireland legislative provision” as any legislative provision contained in, or an instrument made under, Northern Ireland legislation, and any legislative provision not covered by sub-paragraph (5)(a) which would be within the legislative competence of the Northern Ireland Assembly, if contained in an Act of that Assembly made without the Secretary of State’s consent.
- 1194 Sub-paragraph (6) provides that the Department may make new regulations specifying Northern Ireland legislative provisions which are, or are not, Northern Ireland environmental law. Before making these regulations, the Department must carry out a consultation process which must include consulting the OEP (sub-paragraph (7)). Sub-paragraph (8) sets out that any regulations made under sub-paragraph (6) will be subject to the affirmative procedure in the Northern Ireland Assembly.

### Interpretation of Part 1 of this schedule: general

- 1195 Paragraph defines terms used in Part 1 of this Schedule and is self-explanatory.

## Part 2: Amendments of the OEP’s general functions

- 1196 Part 1 of this Schedule sets out the Northern Ireland-specific provisions with respect to the OEP.
- 1197 Paragraph 20 clarifies that Part 2 of this Schedule (paragraphs 21 to 28) amends the general OEP provisions in Part 1 of the Bill to reflect the extension of the OEP’s geographical coverage to Northern Ireland.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

- 1198 Paragraph 21 amends clause 20 of the Bill, which sets out the principal objective of the OEP and other provisions about its functions. Specifically, sub-paragraphs (2) to (6) make the changes necessary to reflect the application of the OEP's statutory functions in Northern Ireland. For example, sub-paragraph (4) specifies that the OEP, when prioritising its enforcement cases, should consider whether a case raises a point of environmental law or Northern Ireland environmental law of general public importance.
- 1199 Paragraph 22 amends clause 21 to require the laying of the OEP's strategy before the Northern Ireland Assembly as well as before Parliament.
- 1200 Paragraph 23 extends the duty to cooperate with the OEP as set out in clause 22 of the Act to Northern Ireland public authorities and other public authorities exercising Northern Ireland devolved functions. Specifically, the amendment made by sub-paragraph (2)(a) indicates that Northern Ireland departments are not exempt from the statutory duty on public authorities to cooperate with the OEP. The amendment made by sub-paragraph (2)(b) excludes any person whose only public functions are devolved functions in Northern Ireland from the exemption to cooperate with the OEP. The amendment made by sub-paragraph (4) makes explicit mention of the implementation bodies as defined in section 55 of the Northern Ireland Act 1998 clarifying that they are only required to cooperate in relation to their functions in Northern Ireland.
- 1201 Paragraph 24 amends clause 32 of the Bill to enable the OEP to designate notices issued to UK public authorities and relevant public authorities as "linked notices".
- 1202 Paragraph 25 amends clause 38 of the Bill (confidentiality of proceedings) to include appropriate provision for Northern Ireland. Specifically, sub-paragraph (2)(b) extends the provision to facilitate the coordination of an investigation between the OEP and the Northern Ireland Public Services Ombudsman.
- 1203 Paragraph 26 sets out the amendments required to clause 41 of the Bill (interpretation of Part 1 of the Bill) to ensure appropriate provision for Northern Ireland and redefines what is meant by "devolved" to no longer include Northern Ireland.
- 1204 Paragraph 27 makes various amendments to Schedule 1 (the Office for Environmental Protection) to provide for the inclusion of Northern Ireland in the OEP. This includes making provision for the Department to be jointly responsible for the appointment of the chair and to be consulted on the appointments of the non-executive members and the chief executive. The amendments provide for a non-executive "Northern Ireland Member" to be appointed to the board by the Department – setting out the experience that member must have – and provides for any resignations or removals from office of non-executive and Northern Ireland members. Paragraph 27 also makes provisions in relation to funding of the OEP and reporting requirements.
- 1205 Paragraph 28 makes amendments to Schedule 2 (improving the natural environment: Northern Ireland) to reflect the extension of the OEP's geographical coverage to Northern Ireland.

## **Schedule 4: Producer Responsibility Obligations**

- 1206 Schedule 4 amends sections 93 and 94 of the Environment Act 1995. The amendments to section 93 are set out in paragraph 2 of the Schedule. Amendments to section 94 are set out in paragraph 3 of the Schedule. These amendments complement provisions made elsewhere in the Act for extended producer responsibility. They also allow for producer responsibility obligations to be introduced for the purpose of preventing products and materials becoming waste and the redistribution of surplus products or materials.

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- 1207 Sub-paragraphs (2), (4)(a), (5) and (9) of paragraph 2 substitute “Secretary of State” with “relevant national authority”. The relevant authority is the Secretary of State in relation to England, Welsh Ministers in relation to Wales, and Scottish Ministers in relation to Scotland. The Secretary of State may make regulations on behalf of Welsh and Scottish Ministers but only with their consent. These changes are also made where relevant in section 94.
- 1208 Sub-paragraph (3) of paragraph 2 inserts into section 93 new subsection (1A). This restates the purpose for which regulations under section 93 may be made, including the added purpose of preventing a product or material becoming waste and for the redistribution of products or materials.
- 1209 Sub-paragraphs (6) and (7) of paragraph 2 delete sections 93(4) and 93(5). Subsection (4) is restated in subsection (1A)(b). Subsection (5) is deleted, and the matters that the relevant national authority must take into account when making regulations restated in the amended section 93(6) (for which see below). This amendment removes the requirement to set producer responsibility obligations as a target, but does not preclude targets being set.
- 1210 Sub-paragraph (8) of paragraph 2 amends section 93(6), which requires the relevant national authority to be satisfied the regulations being made will produce an economic or environmental benefit and achieve the purposes set out in subsection (1A); and burdens imposed by regulations are imposed on persons most able to make a contribution to securing the benefits set out in subsection (1A). The amendment to section 93(6)(e) makes clear that obligations imposed by the regulations need not be directly contributing towards any targets, but may still be contributing to the environmental or economic benefits of the system and the purposes set out in subsection (1A).
- 1211 Sub-paragraph (10) of paragraph 2 inserts new sections 93(7A) and 93(7B). New section 93(7A) defines the term “relevant national authority”. The relevant authority is the Secretary of State in relation to England, Scottish Ministers in relation to Scotland and Welsh Ministers in relation to Wales. The Secretary of State may make regulations on behalf of Wales and Scotland but only with Welsh or Scottish Ministers consent (see new section 93(7B)).
- 1212 Sub-paragraph (11) of paragraph 2 amends the definition of producer responsibility obligations in section 93(8) to remove reference to targets. This amendment means regulations will not need to specify or describe a target to be achieved by the producer but does not prevent targets being set.
- 1213 Sub-paragraphs (12) to (14) of paragraph 2 amend sections 93(9) to 93(12), and insert new section 93(13). This is to reflect the differing Parliamentary procedure applicable to regulations made in England, in Scotland and in Wales.
- 1214 Sub-paragraph (1) of paragraph 3 introduces amendments to section 94, which sets out what supplementary provision regulations made under section 93 may contain.
- 1215 Sub-paragraph (2)(a)(ii) of paragraph 3 amends section 94(1)(c) to add a reference to redistribution. This makes section 94 consistent with the amended section 93, which now also refers to redistribution. This allows any targets set as a producer responsibility obligation to be achieved through redistribution as well as recovery, recycling, or re-use.
- 1216 Sub-paragraph (2)(b) of paragraph 3 inserts new sections 94(1)(da) and 94(1)(db). New section 94(1)(da) allows for a producer responsibility obligation to be met in whole or in part by the payment of a sum of money. Such a provision tends to be referred to as a

“compliance fee”.

1217 New subsection 94(1)(db) and the amendment to subsection 94(1)(e) made by paragraph 3(2)(c) allow for persons subject to a producer responsibility obligation to be mandated to join a compliance scheme, and for the registration of persons subject to a producer responsibility obligation, whether they are members of a compliance scheme or not.

1218 Sub-paragraph (2)(d) of paragraph 3 substitutes “exemption scheme” with “compliance scheme”. (Sub-paragraphs (8)(c) and (8)(g) of paragraph 3 insert definitions for “compliance schemes” and “registered compliance schemes” in subsection 94(6). Sub-paragraphs (8)(d) and (8)(h) of paragraph 3 remove the definitions of “exemption scheme” and “registered exemption scheme from subsection 94(6).) A compliance scheme is a scheme under which the producer responsibility obligations of members of the scheme are discharged by the compliance scheme on the members’ behalf.

1219 Sub-paragraph (2)(e) of paragraph 3 inserts new section 94(1)(fa). Amendments to section 94(1)(f) and new section 94(1)(fa) concern the approval of compliance schemes and allow the establishment of a compliance scheme by a person appointed by the relevant national authority.

1220 Sub-paragraph (3) of paragraph 3 inserts new section 94(1A). This allows for the regulator to be specified in regulations, and for a different regulator to be appointed for different producer responsibility schemes or different functions or areas. “Appropriate Agency” and “new agency” are substituted by “regulator” throughout section 94 to accommodate new section 94(1A). (Sub-paragraphs (8)(a) and (e) of paragraph 3 delete the definitions of “appropriate Agency” and “new Agency” in section 94(6).) These changes allow for the regulator to be someone other than the Environment Agency or devolved equivalents.

1221 Sub-paragraph (5) of paragraph 3 deletes section 94(3), and sub-paragraph (7) of paragraph 3 deletes section 94(5). These are part of the changes required in relation to the regulator. Sub-paragraph (2)(l) of paragraph 3 substitutes subsection 94(1)(p) to make provision for charges to be paid to the regulator as a means of recovering costs incurred by the regulator in relation to its producer responsibility functions.

1222 Sub-paragraph (8) of paragraph 3 amends definitions in section 94(6) to reflect changes made elsewhere in section 94.

## **Schedule 5: Producer Responsibility Obligations: Northern Ireland**

1223 Schedule 5 amends relevant articles of the Producer Responsibility Obligations (Northern Ireland) Order 1998. These amendments complement provisions made elsewhere in the Act for extended producer responsibility and changes made to the equivalent GB-wide powers in the Environment Act 1995. They also allow for producer responsibility obligations to be introduced for the purpose of preventing products and materials becoming waste and the redistribution of surplus products or materials.

1224 Paragraph 2 amends Article 2, which sets out the definitions of terms used in the Order. Paragraph 2 sets out definitions for new terms used in the Order, amends existing terms to mirror amendments made elsewhere and deletes the definition of terms no longer used. Paragraph 2(c) updates the Department’s name and a new reference to the Department is added to Article 7 by paragraph 7.

1225 Sub-paragraph (3) inserts new Article 2(2A). This allows for the regulator to be specified

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

- in regulations, and for a different regulator to be appointed for different producer responsibility schemes or different functions. All references to “Department” in relation to enforcement functions in Articles 2 and 4 are substituted by “regulator” to accommodate new Article 2(2A). These changes allow for the regulator to be someone other than the Department.
- 1226 Paragraph 3 amends Article 3, which provides for regulations to be made that impose producer responsibility obligations on specified persons and in relation to specified products or materials. Amendments are made to Article 7 by paragraph 6, so that regulations can be made either by the Department or, if the Department consents, by the Secretary of State. This is so that producer responsibility regulations can be made on a UK-wide basis. Article 3 is amended by sub-paragraphs (2), (4), (5) and (9) of paragraph 3, and paragraph 4 amends Article 4 to reflect this change where relevant. Amendments made by paragraph 6 to Article 7 (regulations and directions) also set out the Parliamentary procedure applicable to regulations made by the Secretary of State on behalf of Northern Ireland. These are subject to the affirmative Parliamentary procedure, unless they relate to the varying of targets, in which case they are subject to the negative procedure.
- 1227 Sub-paragraph (3) inserts new Article 3(1A). This, together with other amendments, enables producer responsibility obligations to be imposed for the purpose of preventing a product or material becoming waste and for the redistribution of products or materials.
- 1228 Sub-paragraphs (6) and (7) delete paragraphs (4) and (5) of Article 3. Article 3(4) is restated in Article 3(1A)(b). The matters the Department or the Secretary of State must be satisfied of when making regulations are now restated in amended Article 3(6) (for which see below). The effect of this amendment is that producer responsibility obligations no longer have to be set only as a target, but this does not preclude targets being set. As a consequence, amendments are made to the definition of “producer responsibility obligation” in Article 2(2) by sub-paragraph (2)(f) and the definition of “relevant targets” is deleted.
- 1229 Sub-paragraph (8) amends Article 3(6), which requires the Department or the Secretary of State, before exercising the power to make regulations, to be satisfied those regulations will produce an economic or environmental benefit and achieve the purposes set out in Article 3(1A); and that burdens imposed by regulations are imposed on persons most able to make a contribution to securing the benefits set out in Article 3(1A). The amendment to Article 3(6)(e) makes clear that obligations imposed by the regulations need not be directly contributing towards any targets, but may still be contributing to the environmental or economic benefits of the system and the purposes set out in Article 3(1A).
- 1230 Paragraph 4 amends Article 4, which sets out what supplementary provision regulations made under Article 3 may contain.
- 1231 Sub-paragraph (2) amends Article 4(1).
- 1232 Sub-paragraph (2)(a)(ii) amends Article 4(1)(c) to add a reference to redistribution. This makes Article 4 consistent with the amended Article 3, which now also refers to redistribution.
- 1233 Sub-paragraph (2)(b) inserts new sub-paragraphs (da) and (db) into Article 4(1). New sub-paragraph (da) allows for a producer responsibility obligation to be met in whole or in part by the payment of a sum of money. Such a provision tends to be referred to as a ‘compliance fee’.

- 1234 New sub-paragraph (db) and the amendment to Article 4(1)(e) made by sub-paragraph (2)(c) allow for persons subject to a producer responsibility obligation to be mandated to join a compliance scheme. Also, to require registration of persons subject to a producer responsibility obligation, whether they are members of a compliance scheme or not.
- 1235 Sub-paragraph (2)(d) substitutes “exemption scheme” with “compliance scheme”. Sub-paragraphs (2)(b) and (2)(g) insert definitions for “compliance schemes” and “registered compliance schemes”. Sub-paragraphs 2(d) and (2)(h) remove the definitions of “exemption scheme” and “registered exemption scheme”. Sub-paragraph (2)(e) amends the definition of “operator” in line with the change from exemption to compliance scheme. A compliance scheme is a scheme under which the producer responsibility obligations of members of the scheme are discharged by the compliance scheme on the members’ behalf.
- 1236 Sub-paragraph (2)(e) inserts new Article 4(1)(fa). Amendments to Article 4(1)(f) and new Article 4(1)(fa) concern the approval of compliance schemes and allow the establishment of a compliance scheme by a person appointed by the Department or the Secretary of State.
- 1237 Sub-paragraph (5) deletes Article 4(4). This is part of the changes required in relation to the regulator. Sub-paragraph (2)(m) substitutes Article 4(1)(o) to make provision for charges to be paid to the regulator as a means of recovering costs incurred by the regulator in relation to its producer responsibility functions.

## Schedule 6: Producer responsibility for disposal costs

- 1238 Schedule 6 makes provision for regulations under which those involved in the manufacture, processing, distribution or supply of products or materials may be required to pay for or contribute to the costs of disposing of those items. Part 1 of the Schedule covers disposal costs, and the appointment of one or more administrators and Part 2 covers enforcement and the appointment of one or more regulators.

### Part 1: Requirements

#### General power

- 1239 Paragraph 1 sets out the power for the relevant national authority to make regulations to require the payment of sums by specified persons relating to the disposal of specified products or materials. Sub-paragraph (2) sets out that only those involved in manufacturing, processing, distributing or supplying the specified products or materials can be required to meet or contribute to such costs.

#### “Disposal costs” and “disposal”

- 1240 Paragraph 2 makes provision for determining what disposal costs are. These costs may include the costs of collecting, transporting, sorting, and treating products or materials for disposal. They may also include the costs of providing the public with information about the disposal of products, for example through communication campaigns. Costs in relation to products or materials that have been disposed of unlawfully may also be included (for example, the costs of clearing up products or materials that have been littered or fly-tipped). Sub-paragraph (2) clarifies that “disposal” includes the re-use, redistribution, recovery, and recycling of products or materials. Sub-paragraph (4) allows for disposal costs to be calculated in accordance with provision made in the regulations.

#### Calculation of sums payable

- 1241 Paragraph 3 allows for the amount to be paid to be calculated in accordance with the

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regulations and for this amount to vary according to the design or composition of a product or materials, or the methods by which they were made. For example, a producer of easily recycled products might pay less, and producers of unrecyclable products might pay more.

### Administration

1242 Paragraph 4 provides for the appointment of one or more administrators. An administrator's role is to manage provision made in relation to disposal costs in the regulations.

### Registration

1243 Paragraph 5 makes provision for those who are required to pay disposal costs to register with an administrator and the payment of a registration fee. The administrator may also be required to register with an enforcement authority appointed by regulations made under this Schedule. Provision is also made for the regulations to establish the process for registering with an administrator. The regulations may require any registers that are made to be published or made available for inspection.

### Payment of sums

1244 Paragraph 6 outlines the provisions that regulations may make regarding payments of sums to an administrator. This includes how the sums paid are to be held by the administrator. This might be, for example, into a bank account.

### Distribution of sums paid

1245 Paragraph 7 makes provision for sums paid to an administrator to be distributed to persons who have incurred disposal costs in relation to the products or materials covered by the regulations. These sums can be distributed directly by the administrator to whom they have been paid, or to another administrator who then distributes among such persons. For example, an administrator may distribute sums to local authorities who have incurred costs in collecting and disposing of the products to which the regulations apply.

### Repayment of sums paid

1246 Paragraph 8 allows for sums paid to an administrator to be paid back, in whole or in part, to the person who paid them. It allows for regulations to set out how the amount to be re-paid is calculated and the conditions under which any repayment may be made. For example, a repayment might be made if a material has been recycled into a high value application.

### Charges

1247 Paragraph 9 makes provision for the payment of a charge to administrators to cover the administrator's costs incurred in relation to its functions.

### Consultation requirements

1248 Paragraph 10 sets out that the relevant national authority must first consult the relevant stakeholders before making regulations under this Schedule.

## Part 2: Enforcement

### General power

1249 Paragraph 11 makes provision for the relevant national authority to make regulations for the enforcement of regulations made under Part 1 of this Schedule.

## Powers to confer functions and Monitoring compliance

1250 Paragraphs 12 and 13 allow for functions to be conferred on one or more enforcement authority. These functions may include the exercise of discretion, to monitor compliance with regulations, and to provide guidance about the exercise of its functions available. Regulations may also provide for a person to be authorised to exercise functions on behalf of an enforcement authority.

## Records and information

1251 Paragraph 14 makes provision for the keeping of records and to whom records or information is to be provided to.

## Powers of entry etc

1252 Paragraph 15 allows for regulations to confer on an enforcement authority powers of entry, inspection, examination, search and seizure.

## Sanctions

1253 Paragraph 16 makes provision for penalties for a breach of a requirement in regulations. These can be criminal or civil sanctions. A criminal offence (punishable with a fine) can only be imposed for breach of a civil sanction or for the obstruction of or failure to assist an enforcement authority.

## Costs

1254 Paragraph 17 makes:

- provision for the payment of a charge to cover enforcement costs incurred by an enforcement authority in performing its functions under the regulations; and
- provision for a court order to include an enforcement authority's costs incurred in relation to the matter the court or tribunal has dealt with

## Consultation requirements.

1255 Paragraph 18 sets out that the relevant national authority must first consult the relevant stakeholders before making regulations under this Schedule.

# Schedule 7: Resource efficiency information

## Part 1: Requirements

### General power

1256 Paragraph 1(1) is a power which enables the relevant national authority, as defined in section 48, to make product-specific regulations setting requirements to provide information about a product's resource efficiency.

1257 Sub-paragraph (2) exempts food products, medicinal products and veterinary medicinal products from being subject to regulations made under this measure. These types of products are already extensively regulated and it is not considered appropriate to impose further regulation relating to provision of information about their resource efficiency.

1258 Sub-paragraph (3) allows regulations to be made in relation to the packaging of those products listed in sub-paragraph (2).

### Meaning of "information about resource efficiency"

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

1259 Paragraph 2(1) defines “information about resource efficiency” as any information which is relevant to the product’s impact on the natural environment and which falls within sub-paragraph (2) or (3). “Natural environment” has the same meaning as in section 39.

1260 Sub-paragraphs (2) and (3) together provide an exhaustive list of the types of information about a product which can be required to be provided under these powers. Sub-paragraph (2) includes information relating to the product’s expected life, durability, reparability and upgradeability and the ways in which it can be disposed of at the end of its life. For example, regulations might require information to be given about whether spare parts are available to accommodate repair, the potential to remanufacture the product or whether the materials used in the product are recyclable. Sub-paragraph (3) includes types of information relating to the impact of the product on the natural environment; these include the materials and techniques used in its manufacture, the resources consumed during its production or use, and the pollutants (such as greenhouse gases) released or emitted during production, which includes both the extraction of raw materials and the manufacturing process, as well as use or disposal.

### Persons on whom requirements may be imposed

1261 Paragraph 3 sets out the persons who may be subject to requirements under regulations made under this measure. This is limited to persons who are involved in the manufacture, import, distribution, sale or supply of the product. This may include someone who supplies a product by way of hire or lease.

### Examples of provision that may be made

1262 Paragraph 4 gives examples of provision that may be made. These include provisions around:

- How information about the product is to be provided. This may, for example, be through affixing a label or through providing information in a manual accompanying the product or on the manufacturer’s website.
- Giving certain bodies the authority to determine whether the product has the characteristics which it is described to have on the label or in other information accompanying the product. For example, if a label is required to be affixed to packaging in order to state whether or not it is a recyclable, regulations may contain a provision giving someone the function of determining whether the packaging is indeed recyclable or not. This body will also publish the results of their determinations.
- Specifying a scheme for classifying products, such as a ‘rating label’ scheme assessing how well products meet criteria relating to resource efficiency.
- Requiring information about a product to be determined according to specified criteria. This criteria could be based on the results of the determinations or classification schemes set out above.

### Consultation etc requirements

1263 Paragraph 5 contains the steps the relevant national authority must follow, and the matters to which the authority must have regard, before making product specific regulations under Part 1 of this Schedule.

1264 Sub-paragraph (1) sets out that they must consult any persons they consider appropriate, as well as having regard to the matters set out in sub-paragraph (2). These are that the product has a significant impact on natural resources at any stage of its production, use or disposal; that the benefits of the regulations outweigh the costs associated with complying with them; and whether any exemptions or special provisions should be made for smaller businesses.

## Interpretation

1265 Paragraph 6 contains definitions for the purposes of Part 1 of this Schedule. In particular, it defines “product” as including a product which is a component part of, or packaging of another product. This could for example include food or drinks packaging, which could be labelled with a ‘recyclable/ non-recyclable’ marking.

## Part 2: Enforcement

### General power

1266 Paragraph 7 gives the relevant national authority power to make regulations containing provision for the enforcement of resource efficiency information requirements.

### Powers to confer functions

1267 Paragraph 8(1) sets out that regulations may confer enforcement functions on one or more bodies. Those bodies will be specified in the regulations.

1268 Sub-paragraph (2) sets out that these functions may involve the enforcement body exercising discretion in relation to the exercise of their enforcement functions. It also outlines that the enforcement body may authorise another body to carry out one or more of its functions on its behalf.

1269 Sub-paragraph (3) sets out that regulations may also include a provision requiring the enforcement authority to develop guidance relating to its enforcement activities.

### Monitoring compliance

1270 Paragraph 9 sets out that regulations may include provisions on compliance with the regulations. This includes provisions which confer the function of monitoring compliance with resource efficiency information requirements onto an enforcement authority.

### Records and information

1271 Paragraph 10 sets out that regulations may include provision on records and information relevant to monitoring the enforcement of these measures. These may require persons who have obligations to keep records and provide them to an enforcement authority if needed. The regulations may also provide that the enforcement authority makes reports or provides information about their enforcement activity to the relevant national authority.

### Powers of entry etc

1272 Paragraph 11 sets out that regulations may confer on enforcement authorities powers of entry, inspection, examination, search and seizure. Regulations may make provision that such powers are only exercisable under the authority of a warrant, issued by a justice of the peace, sheriff, summary sheriff or lay magistrate. Regulations may also make provision about how applications for and the execution of warrants may be made. Regulations must provide that where powers are conferred to either enter premises by force, enter a private dwelling without the consent of the occupier; or search and seize material, the authority of a warrant must be obtained.

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## Sanctions

1273 Paragraph 12 enables regulations to include provision for the imposition of civil sanctions or creating criminal offences.

1274 Sub-paragraph (1)(a) sets out that regulations may provide for the imposition of civil sanctions in the following circumstances:

- for failure to comply with any of the requirements under Parts 1 and 2 of these regulations; or
- where there has been an obstruction of or failure to assist a person carrying out enforcement functions.

1275 Sub-paragraph (1)(b) sets out that regulations may also include provision on appeals against such sanctions.

1276 Sub-paragraph (2) sets out that regulations may include provision on creating criminal offences punishable with a fine under the following circumstances:

- in respect of failures to comply with civil sanctions imposed under Part 2 of this schedule; or
- where there has been the obstruction of, or failure to assist, an enforcement authority when they are carrying out their functions.

1277 Sub-paragraph (3) defines “civil sanction” as a sanction of a kind referred to in Part 3 of the Regulatory Enforcement and Sanctions Act 2008 (“the 2008 Act”) – that is, a fixed monetary penalty, discretionary requirement, stop notice or enforcement undertaking.

1278 Sub-paragraph (4) outlines that regulations may include provision for the imposition of sanctions of that kind, whether or not the enforcement authority is a regulator or the conduct in respect of which the sanction is imposed is a relevant offence for the purposes of Part 3 of the 2008 Act, or the relevant national authority may make provision for the imposition of sanctions under that Part.

## Costs

1279 Paragraph 13(a) sets out that regulations may include provision requiring persons subject to resource efficiency requirements to pay costs incurred by an enforcement authority in administering and enforcing those requirements. This power could be used, for example, to enable an enforcement authority to charge a manufacturer or supplier its costs of testing a product which fails to comply with resource efficiency requirements.

1280 Sub-paragraph (b) provides that regulations may authorise a court or tribunal to award costs incurred by the enforcement authority.

## Consultation requirement

1281 Paragraph 14 requires the relevant national authority to consult before making enforcement regulations.

# Schedule 8: Resource efficiency requirements

## Part 1: Requirements

### General power

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

1282 Paragraph 1(1) is a power which enables the relevant national authority, as defined in section 49, to make product-specific regulations setting requirements relating to a product's resource efficiency.

1283 Sub-paragraph (2) exempts energy-related products as defined in the Ecodesign for Energy-Related Products Regulations 2010 (S.I. 2010/2617)), food products, medicinal products and veterinary medicinal products from being subject to regulations made under this measure. The resource efficiency of energy-related products may be regulated under separate powers. Food and medicines are already extensively regulated so it is not considered appropriate to impose further regulation relating to resource efficiency of those products.

1284 Sub-paragraph (3) allows regulations to be made in relation to the packaging of those products listed in sub-paragraph (2).

### Meaning of "resource efficiency requirements"

1285 Paragraph 2(1) defines "resource efficiency requirements" as any requirement which is relevant to the product's impact on the natural environment and which falls within sub-paragraphs (2) or (3). "Natural environment" has the same meaning as in section 39.

1286 Sub-paragraphs (2) and (3) together provide an exhaustive list of types of resource efficiency requirements which may be made about a product. Sub-paragraph (2) includes requirements relating to aspects of the product's design which affect its expected life, the product's durability, repairability, and upgradeability, including potential for being remanufactured and the ways in which it can be disposed of at the end of its life. This would enable, for example, a requirement that the product is designed so it can be disassembled, and that spare parts are to be made available in order to facilitate repair. It would also enable a requirement for materials used in the product to be recyclable.

1287 Sub-paragraph (3) includes other requirements relating to the impact of the product on the natural environment: these include the materials and techniques used in its manufacture, the resources consumed during its production or use (for example, water or fuel), and the pollutants (such as greenhouse gases) released or emitted during its production, which includes extraction of raw materials, as well as use or disposal. This would enable, for example, a requirement that timber used in a product must be sustainably sourced.

1288 Sub-paragraph (4) provides for resource efficiency standards to be specified either in the regulations or by reference to standards prepared by a third person, which may be pre-existing standards such as an ISO standard.

### Persons on whom requirements may be imposed

1289 Paragraph 3 sets out the persons who may be subject to requirements under regulations made pursuant to this measure. These are limited to those who are involved in the manufacture, import, distribution, sale or supply of the product. This may include someone who supplies a product by way of hire or lease.

### Examples of provision that may be made

1290 Paragraph 4 gives examples of provisions that may be made. These include, in sub-paragraph (1), provisions which prohibit a product from being distributed, sold or supplied if it fails to meet the requirements in the regulation, and provisions requiring persons involved in a product's supply chain to keep records or information about the product and provide this to other such persons where appropriate.

1291 Sub-paragraph (2)(a) sets out that regulations may also include provision about how and by whom determinations about a product's compliance with resource efficiency regulations may be made. Sub-paragraph (2)(b) enables regulations to provide for appeals against such determinations. Sub-paragraph (2)(c) enables provision to be made about evidencing a product's compliance with resource efficiency requirements, for example requirements to affix a label or apply a marking to a product.

### Consultation etc requirements

1292 Paragraph 5 sets out the steps the relevant national authority must follow, and matters of which the authority must be satisfied, before making product-specific regulations under Part 1 of this Schedule.

1293 Sub-paragraph (1) requires the relevant national authority to consult such persons as the authority considers appropriate, and to publish for the purposes of the consultation an assessment of the matters of which it is required to be satisfied before making regulations, and a draft of the regulations.

1294 Under sub-paragraphs (2) to (4), those matters are:

- that the product has a significant impact on the natural environment (if there are no existing regulations under Part 1 of this Schedule applying to the product);
- that the regulations would be likely to reduce that impact (in all cases);
- that the benefits would be significant as against the likely costs of the regulations; and
- that a reduction in the product's environmental impact could not be achieved as effectively by other means.

1295 Sub-paragraph (5) sets out that the relevant national authority must also consider whether exemptions should be given or other special provision made for smaller businesses. "Smaller businesses" is not defined in the Schedule, so that there is flexibility for regulations relating to different products to apply exemptions or special provisions to different descriptions of smaller businesses. The need for exemptions or special provisions, and the businesses to which they should apply, will be considered as part of the impact analysis.

### Interpretation

1296 Paragraph 6 contains definitions for the purposes of Part 1 of this Schedule. In particular, it defines "product" as including a product which is a component part of, or packaging for, another product. A component part could, for example, be the engine of a vehicle.

## Part 2: Enforcement

1297 This Part gives the relevant national authority powers to make regulations containing provision for the enforcement of resource efficiency requirements. The powers are identical to those in Part 2 of Schedule 7 (resource efficiency information).

## Schedule 9: Deposit schemes

### Power to establish deposit schemes

1298 Paragraph 1 provides a general power for the "relevant national authority" (as defined

in clause 50(2)) to make regulations establishing deposit schemes.

1299 Sub-paragraph (1) provides that regulations can be made for the purposes of sustaining, promoting or securing an increase in recycling, reuse, or to reduce the incidence of littering or fly-tipping.

1300 Sub-paragraph (2) sets out what a deposit scheme is. This is a scheme under which a person supplied with a deposit item by a scheme supplier (this might be a producer, retailer or distributor) pays the supplier an amount (the deposit) and a person who gives a deposit item to a scheme collector (this might be a retailer or to another return point) is then entitled to be paid a refund in respect of that item.

1301 Sub-paragraph (3) sets out what a deposit item is. This is an item specified in regulations that is supplied by way of sale or in connection with the supply of goods or services. By way of example, this might be a drinks container or disposable cutlery).

1302 Sub-paragraph (4) sets out that a deposit scheme may specify the circumstances in which a deposit or refund is to be paid.

1303 Sub-paragraph (5) provides that “scheme suppliers” and “scheme collectors” are to be defined in the regulations, it provides that a scheme supplier and a scheme collector is someone who is a supplier or producer of a deposit item. A scheme collector may also be a scheme administrator. By way of example, a scheme supplier might be a producer, distributor or retailer of a drinks container. Scheme collectors host return points, refund deposits and handle the material that has been collected (this might be a retailer or the scheme administrator).

1304 Sub-paragraph (6) provides that the deposit scheme may set a deposit amount specified in regulations, or an amount determined by the scheme administrator or an amount determined (and published) by the relevant national authority.

1305 Sub-paragraph (7) gives a definition of the word “specified”.

### Scheme suppliers

1306 Paragraph 2 provides that regulations may impose requirements on scheme suppliers, including:

- taking steps to ensure deposits are paid for the deposit item;
- how items are marked to identify them as deposit items;
- the retention of deposits; paying deposits to other scheme suppliers, scheme collectors or to a scheme administrator;
- ensuring a proportion of deposit items are returned to scheme collectors; keeping records in connection with the scheme; and
- providing those records or other information in connection with the scheme to a scheme administrator.

1307 The requirements may be different for different scheme suppliers.

### Scheme collectors

1308 Paragraph 3 provides that regulations may impose requirements on scheme collectors, including:



- paying those who return a deposited item a refund;
- arranging for the recycling of any items returned or disposing of those items in accordance with the scheme; and
- ensuring a proportion of deposit items are returned to scheme collectors, keeping records in connection with the scheme and providing those records or other information in connection with the scheme to a scheme administrator.

1309 The requirements may be different for different scheme collectors.

### Deposit scheme administrators

1310 Paragraph 4(1) provides that regulations may appoint or make provision for the appointment of a deposit scheme administrator.

1311 Sub-paragraph (2) sets out the functions that regulations may confer on the scheme administrator. This includes:

- the registration of scheme suppliers and scheme collectors;
- charging registration fees;
- giving directions to the scheme suppliers and scheme collectors in relation to the requirements placed on them under the deposit scheme;
- ensuring a proportion of deposit items are returned to scheme collectors;
- making payments to scheme collectors to reimburse them for any refunded deposits they have paid out;
- the retention of amounts that they have received under the deposit scheme, including determining how these amounts should be utilised;
- payments to other scheme administrators; and
- keeping records and providing these records to the relevant national authority.

1312 Sub-paragraph (3) specifies that, where there is more than one scheme administrator, different functions may be conferred on different scheme administrators by a deposit scheme.

1313 Sub-paragraph (4) provides that regulations may confer a power on the relevant national authority to give directions to a scheme administrator as to how the scheme administrator should exercise their functions under the scheme.

1314 Sub-paragraph (5) defines the word “specified” for this paragraph.

### Enforcement

1315 Paragraph 5 makes provision for the enforcement of a “relevant requirement” (defined in sub-paragraph (5) as a requirement imposed by regulations or under a deposit scheme) and for offences and penalties.

1316 Sub-paragraph (2) provides that regulations may make provision for the appointment of an enforcement authority, the provision of records and information to persons specified in the regulations, a failure to comply with a relevant requirement to constitute an offence, about such offences, and the imposition of civil sanctions in respect of failures to comply

with relevant requirements.

1317 Sub-paragraph (3) defines “civil sanction” as a sanction of a kind referred to in Part 3 of the Regulatory Enforcement and Sanctions Act 2008 (“the 2008 Act”) – that is, a fixed monetary penalty, discretionary requirement, stop notice or enforcement undertaking.

1318 Sub-paragraph (4) outlines that regulations may include provision for the imposition of sanctions of that kind, whether or not the enforcement authority is a regulator or the conduct in respect of which the sanction is imposed is a relevant offence for the purposes of Part 3 of the 2008 Act, or the relevant national authority may make provision for the imposition of sanctions under that Part.

1319 Sub-paragraph (5) provides definitions as described above.

## Interpretation

1320 Paragraph 6 defines words used in the Schedule.

## Schedule 10: Charges for single use plastic items

### General power

1321 Paragraph 1 provides a general power for the “relevant national authority” (as defined in section 50(2)) to make regulations about charging by sellers of goods or services for single use plastic items. Powers to define what is meant by “sellers” are set out in paragraph 3.

1322 Sub-paragraphs (2) and (3) define what a “single use plastic item” is. This is a manufactured item made wholly or partly of plastic that is likely to be used only once (or for a short period of time) before being disposed of, and which is supplied in connection with good or services.

1323 Sub-paragraphs (4) and (5) state that an item is supplied in connection with goods and services if it is supplied at the place the goods or services are sold so that the goods can be taken away, used consumed or delivered. This might be a plastic food container or other plastic packaging into which the goods are placed or plastic cutlery.

### Requirement to charge

1324 Paragraph 2 provides that the regulations may require sellers of goods or services to charge for single use plastic items specified in those regulations.

### Sellers of goods and services

1325 Paragraph 3 provides that “sellers” in relation to goods or services are to be defined in the regulations, including by reference to one or more of the following:

- a person’s involvement in selling goods services;
- a person’s interest in the goods or services or;
- a person’s interest in the premises at or from which the goods or services are sold.

1326 It provides that the regulations may apply to a range of different sellers, including all sellers of goods and services and sellers identified by reference to factors specified in the regulations. The factors that may be specified in the regulations may include the place from which the goods or services are sold, the type and value of goods or services supplied and the seller’s turnover.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

## Amount of charge

1327 Paragraph 4 provides that the regulations may specify the minimum amount that sellers must charge for each single use plastic item or provide for that amount to be determined in accordance with the regulations.

## Administration

1328 Paragraph 5 contains powers to appoint an administrator to administer the provisions made by the regulations and clarify references in the Schedule to “an administrator”.

## Registration

1329 Paragraph 6 provides that the regulations may require sellers to register with an administrator and make provision about applications for registration, the period of registration and the cancellation of registration. The regulations may also provide for sellers to pay registration fees, and specify the amount.

## Record-keeping and publication of records

1330 Paragraph 7 provides that the regulations may require records to be kept in relation to charges made for single use plastic items, including records relating to the amounts received by the seller by way of charges and the uses to which the proceeds of the charge are put. The regulations may also require that this information is published and is made available to the relevant national authority, an administrator or members of the public upon request.

1331 Sub-paragraph (4) defines “gross proceeds of the charge” and “net proceeds of the charge” for the purposes of this paragraph.

## Enforcement

1332 Paragraph 8 provides that the regulations may confer powers and duties on an administrator in order to enforce the regulations and in particular, to enable the administrator to obtain relevant documents and information or question a seller (or their officers or employees) where the administrator reasonably believes that there has been a breach of the regulations.

## Civil sanctions

1333 Paragraph 9 provides that the regulations may include civil sanctions to deal with breaches of requirements in the regulations.

1334 Sub-paragraph (2) provides that the regulations may make provision for appeals.

1335 Sub-paragraph (3) state that or the purposes of this paragraph, a “civil sanction” is a sanction of a kind for which provision may be made under Part 3 of the Regulatory Enforcement and Sanctions Act 2008 (“the 2008 Act”) – that is, fixed monetary penalties, discretionary requirements, stop notices and enforcement undertakings.

1336 Sub-paragraph (4) outlines that regulations may include provision for the imposition of sanctions of that kind, whether or not the enforcement authority is a regulator or the conduct in respect of which the sanction is imposed is a relevant offence for the purposes of Part 3 of the 2008 Act, or the relevant national authority may make provision for the imposition of sanctions under that Part.

# Schedule 11: Enforcement powers

## Powers to search and seize vehicles in connection with waste offences

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

1337 Paragraphs 1 and 2 amend section 5(6) of the Control of Pollution (Amendment) Act 1989 and section 34B(6) of the Environmental Protection Act 1990 respectively. Sub-paragraphs 1(a) and 2(a) make amendments to allow a vehicle seized by the police without an Environment Agency or Natural Resources Wales officer present to be seized on behalf of the respective authority if the authority has requested for the police to do this. This is instead of it being considered to be done on behalf of the waste collection authority in whose area the seizure takes place, which adds an unnecessary step for the Environment Agency or Natural Resources Wales as they then have to re-seize it from the waste collection authority.

1338 Sub-paragraphs 1(b) and 2(b) make amendments to clarify that, where no request has been made by the Environment Agency or Natural Resources Wales, or in any other case, a vehicle will still be considered to be seized on behalf of the waste collection authority in whose area the seizure takes place.

### Powers of direction in relation to waste

1339 Paragraph 3 amends section 57 of the Environmental Protection Act 1990.

1340 Sub-paragraph (2) amends subsection (2) to account for circumstances in which waste might be taken to an appropriate storage site in the first instance, or otherwise not directly treated or disposed of.

1341 Sub-paragraph (3) inserts new subsection (2A) after subsection (2) to allow the Secretary of State to direct a registered waste carrier to collect waste and deliver it to a specific site. It also allows the Secretary of State to direct a person keeping waste, or the owner or occupier of the land on which the waste is being kept, to enable the collection of the waste by the waste carrier.

1342 Sub-paragraph (4) amends subsection (4) so that the requirement to pay costs is not limited to treating and disposing of waste and covers circumstances in which waste might be taken to an appropriate storage site in the first instance, or otherwise not directly treated or disposed of.

1343 Sub-paragraph (5) inserts new subsection (4A) after subsection (4) to allow the Secretary of State to direct the waste keeper or the owner or occupier of the land where the waste is being kept to pay the waste carrier's reasonable costs and/or to pay the reasonable costs of the person to whom the waste is delivered. The reasonable costs would be part of the discussion and analysis in advance of issuing a direction.

1344 Sub-paragraph (6) amends subsection (7) to clarify that the Secretary of State may choose to pay the reasonable costs under subsection (4) instead.

1345 Sub-paragraph (7) inserts new subsection (7A) after subsection (7) to allow the appropriate Minister to directly reimburse the registered waste carrier or the person to whom the waste is delivered, in line with new subsection (4A), instead of the waste keeper or the owner or occupier of the land where the waste is being kept.

1346 Sub-paragraph (8) amends subsection (8) insert a definition of "appropriate Minister", defined to mean either the Secretary of State or the Welsh Ministers depending on the location of the land where waste is being kept. It also inserts a definition of "registered waste carrier".

### Powers of entry in relation to pollution control etc

1347 Paragraphs 4-6 of Schedule 11 relate to section 108 of the Environment Act 1995.

1348 Paragraph 5 makes amendments to section 108 of that Act.

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- 1349 Sub-paragraph (2) inserts new paragraph (ka) in subsection (4) after paragraph (k), giving an authorised person with a power to enter a premises under subsection (4)(a) the power to (i) search the premises, (ii) seize and remove documentary or other evidence, (iii) require electronic information to be produced in a form that enables it to be removed or produced as documentary evidence, and (iv) to operate equipment found on the premises in order to produce information from it. These powers can only be used for the purposes of an examination or investigation made using the power in subsection (4)(c).
- 1350 Sub-paragraph (3) amends subsection (6) by removing paragraph (a). This removes the requirement to provide at least seven days' notice of a proposed entry where it is proposed to enter any premises used for residential purposes, or to take heavy equipment on to any premises. The requirement for consent of the occupier or a warrant remains. This allows the power of entry to be used where giving notice would undermine the purpose for which the warrant is issued, or without a delay where consent has been given by the occupier.
- 1351 Sub-paragraph (4) inserts new subsections (7A) to (7F) after subsection (7). Subsection (7A) prevents the use of the power unless with the authority of a warrant issued under Schedule 18 of the Environment Act 1995, or unless the conditions in subsection (7B) apply. These conditions are that the authorised person has reasonable grounds for believing there is evidence of non-compliance of pollution control or flood risk enactments, and it is necessary to use the powers without first obtaining a warrant in order to prevent the evidence being concealed, lost, altered or destroyed.
- 1352 New subsection (7C) clarifies that if something can be done using the existing power under subsection (4)(k) or the new power under new subsection (4)(ka), the requirement for a warrant for exercising the power under new subsection (4)(ka) does not apply.
- 1353 New subsection (7D) requires that protected material seized or removed under new subsection (4)(ka) cannot be used for an examination or investigation under subsection (4)(c) and must be returned to the premises it was removed from, or the person who last had possession or control of it, as soon as reasonably practicable after it is identified. New subsection (7F) defines protected material as material subject to legal professional privilege or is excluded or journalistic material within the meaning of sections 11 and 13 respectively of the Police and Criminal Evidence Act 1984.
- 1354 New subsection (7E) clarifies that if something contains both protected and non-protected material, the requirements under new subsection (7D) do not prevent the non-protected material from being used for the purposes of an examination or investigation, retained or copied.
- 1355 Sub-paragraph (5) inserts new subsection (12A) after subsection (12), clarifying that evidence removed or taken away under new subsection (4)(ka) can only be retained so long as is necessary taking into account all the circumstances.
- 1356 Sub-paragraph (6) amends subsection (15) to insert a definition of "document" after the definition of "authorised person", and to insert a definition of "English or Welsh authorised person" after a definition of "enforcing authority". It also clarifies that, as the powers in section 108 cannot be used in relation to section 46 of the Environmental Protection Act 1990 (receptacles for household waste) in England, they also cannot be used for sections 46A to 46D, which relate to enforcement of section 46.
- 1357 Paragraph 6 makes amendments to Schedule 18 of the Environment Act 1995.
- 1358 Sub-paragraph (2) inserts new sub-paragraphs (2A) and (2B) after sub-paragraph (2).

New sub-paragraph (2A) allows a justice of the peace to issue a warrant authorising use of the powers in new section 108(4)(ka), provided they are satisfied that the conditions in new sub-paragraph (2B) are met. The conditions in new sub-paragraph (2B) are that there are reasonable grounds for believing there is material on the premises in question that is likely to be of substantial value to an examination or investigation under section 108(4)(c) and that it is either impracticable to communicate with a person in order to gain access to the material or that access to the material is unlikely to be granted without a warrant.

1359 Sub-paragraph (2) also removes sub-paragraph (3) from Schedule 18, which requires the justice of the peace issuing a warrant to be satisfied that the notice period in subsection (6) of section 108 of the Act has been given, as that notice period requirement has been removed by paragraph 5(3) as detailed above.

1360 Sub-paragraph (3) amends paragraph 3 of Schedule 18 to remove the need to produce authorisation unless requested to do so, making it more straightforward to enter an abandoned or predominantly unoccupied site or premises.

## **Schedule 12: Local air quality management framework**

1361 The Schedule makes amendments to the cited sections of the Environment Act 1995.

1362 Paragraph 2 amends section 80 (national air quality strategy) of the Environment Act 1995. Sub-paragraph (2) omits subsection (3); sub-paragraph (3) inserts new subsections (4A) and (4B). New subsection (4A) requires that the National Air Quality Strategy be reviewed, and, following that review, amended if that is considered necessary. New subsection (4B) sets out the minimum review periods, requiring a review initially within 12 months of the schedule coming into force, and then subsequent reviews to happen at least once every five years after that.

1363 Paragraph 3 inserts new section 80A into the Environment Act 1995.

### **New section 80A Duty to report on air quality in England**

1364 New section 80A requires the Secretary of State to lay a statement annually before Parliament which sets out an assessment of progress made towards meeting air quality objectives and standards in England, as well as the steps the Secretary of State has taken in support of meeting those standards and objectives. These are the standards and objectives for local air quality that the Secretary of State must include in the National Air Quality Strategy and enact in secondary legislation, which are then the levels that local authorities must assess against under the Local Air Quality Management Framework.

1365 Paragraph 4 inserts new section 81A into the Environment Act 1995.

### **New section 81A: Functions of relevant public authorities**

1366 New section 81A applies a legislative requirement to certain relevant public authorities to co-operate with local authority air quality action planning, once the relevant public authority has been designated under subsection (3) below by the Secretary of State.

1367 Subsection (1) applies the duty to have regard to the National Air Quality Strategy when carrying out functions and services which might affect air quality to additional bodies who may be relevant to meeting air quality standards and objectives.

1368 Subsection (2) defines a “relevant public authority” as a body or person prescribed by the Secretary of State in regulations.

1369 Subsection (3) gives Secretary of State the power to designate a relevant public authority in England if it is determined that the person carries out functions of a public nature that

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are relevant to air quality in local authority areas.

- 1370 Subsection (4) ensures that the Secretary of State consults with both the person who is proposed to be designated as a relevant public authority and anyone else considered appropriate, ahead of making regulations that designate the relevant public body or bodies.
- 1371 Subsection (5) clarifies that references to England include the territorial sea adjacent to England, but not the territorial sea adjacent to Wales or Scotland.
- 1372 Paragraph 5 amends section 82 (local authority reviews) of the Environment Act 1995. Sub-paragraph (2) provides drafting to allow for the insertion of further subsections into that Act. Sub-paragraph (3) inserts new subsections (4), (5) and (6).
- 1373 New subsection (4) of section 82 replicates the former duty on local authorities to identify where air quality standards or objectives are not likely to be achieved within the “relevant period” (a period to be prescribed by regulations).
- 1374 New subsection (5) of section 82 provides that local authorities in England must also identify which sources of emissions they believe are responsible for failure to achieve air quality standards or objectives; identify neighbouring authorities who may be responsible for emissions; and identify other relevant public authorities or the Environment Agency who may be responsible for emissions.
- 1375 New subsection (6) of section 82 defines a source of pollution as relevant if it is: within the local authority; within a neighbouring local authority in England; or within an area where a relevant public authority has functions of a public nature and the local authority considers these functions as relevant to the source of the emissions.
- 1376 Paragraph 6 inserts new section 83A into the Environment Act 1995.

### **New section 83A Duties of English local authorities in relation to designated areas**

- 1377 Subsection (1) sets out the application of this section.
- 1378 Subsection (2) applies a duty on local authorities to prepare an action plan to ensure air quality standards and objectives are achieved in the Air Quality Management Area it has designated in accordance with section 83. This tightens the requirement to ensure that action plans should secure the required standards and objectives.
- 1379 Subsection (3) sets out that an action plan’s purpose is to set out how the local authority will *secure* air quality standards and objectives in the air quality management area.
- 1380 Subsection (4) sets out that the action plan must also *maintain* air quality standards and objectives in the Air Quality Management Area, once achieved.
- 1381 Subsection (5) provides that action plans must set out measures the local authority will take to secure and maintain air quality standards and objectives within the Air Quality Management Area, and requires a date by which these measures must be carried out to be set out in the plan.
- 1382 Subsection (6) provides that local authorities *may* revise the action plan, and *must* revise the action plan if new or different measures are required. This will be applicable if the existing plan is not securing compliance, or if there are new circumstances which need to be taken into account.
- 1383 Subsection (7) sets out that the following two subsections apply where a district council preparing a plan is in a two-tier authority.

- 1384 Subsection (8) provides that, in the case of disagreement between a county and district council on the contents of the plan, either the county council or the district council preparing the plan can refer the matter to the Secretary of State.
- 1385 Subsection (9) gives Secretary of State the power to confirm or reject the proposed action plan and the actions to be taken, where there is disagreement between the district and county council. This would apply where the Secretary of State considers the plan to be inadequate and not likely to secure compliance with air quality objectives.
- 1386 Subsection (10) requires that, if an action plan has been referred to the Secretary of State under subsection (8), the district council must abide by the Secretary of State's decision.
- 1387 Paragraph 7 amends section 84 of the Environment Act 1995 to clarify that this section now applies only to Scottish and Welsh local authorities.
- 1388 Paragraph 8 inserts new sections 85A and 85B into the Environment Act 1995. These new sections define the new duties of air quality partners. These could be neighbouring authorities, relevant public authorities or the Environment Agency, where relevant to a local pollution exceedance or likely future exceedance.

#### **New section 85A Duty of air quality partners to co-operate**

- 1389 Subsection (1) defines an "air quality partner" as a body responsible for emissions contributing to exceedance of local air quality objectives.
- 1390 Subsection (2) requires an air quality partner to assist a local authority upon request in connection with meeting air quality standards and objectives in the context of action planning where there is an exceedance. Such requests may include provision of information needed to accurately assess a pollution source's contribution to a local exceedance.
- 1391 Subsection (3) clarifies that an air quality partner may refuse a request for assistance it deems to be unreasonable. It is for the air quality partner to determine whether a request is reasonable – for example, a request may be considered unreasonable on grounds of disproportionate cost, feasibility, relevance, or incompatibility with their wider legal obligations.

#### **New section 85B Role of air quality partners in relation to action plans**

- 1392 Subsection (1) places a duty on local authorities in England to notify all of their identified air quality partners if they intend to prepare an action plan.
- 1393 Subsection (2) places a duty on air quality partners to propose measures for inclusion in the plan they will take to contribute to achievement or maintenance of air quality standards. It is for the air quality partner to propose measures they deem reasonable taking into account their wider legal responsibilities, disproportionate cost and feasibility.
- 1394 Subsection (3) provides that an air quality partner should specify a date by when they will carry out the measures they have proposed and, as far as possible, meet those commitments.
- 1395 Subsection (4) requires action plans to include the proposals and dates provided by air quality partners.
- 1396 Subsection (5) provides for the Secretary of State to direct air quality partners to make further proposals for action by a date specified by the Secretary of State where existing proposals are considered insufficient. This is a last resort measure, and is limited to directing that an air quality partner propose further actions; it does not give the Secretary



of State the power to determine the measures the air quality partner will take. This power of direction would not be utilised unilaterally by the Secretary of State where a relevant public body falls under the governance of another government department – agreement with the relevant government department would be sought. If agreement was reached that ministerial direction was necessary, the lead department could legitimately opt to use existing governance structures instead.

1397 Subsection (6) sets out that directions given under subsection 5 may specify the extent to which further proposals are designed to augment or replace existing actions proposed by air quality partners. So a direction could require the partner to go further in respect of a particular action it intends to take, such as extending its scope, or it could ask the partner to come up with new measures.

1398 Subsection (7) requires air quality partners to comply with directions as above.

1399 Paragraph 9 amends section 86 of the Environment Act 1995.

1400 Paragraph 9(2) omits subsection (1) relating to the role of district and county councils, which is now covered in new section 83A.

1401 Paragraph 9(3) sets out that county councils may make recommendations to district councils in respect of meeting air quality objectives.

1402 Paragraph 9(4) inserts new subsection (2A) into section 86, providing that district councils in areas of England where there is a county council must inform county councils if they intend to prepare an action plan.

1403 Paragraph 9(5) substitutes subsections (3) to (5) of section 86. New subsection (3) provides that if, as above, a county council has been informed of a district council's intention to prepare an action plan, the county council should propose measures that they will take to help secure the achievement and maintenance of air quality standards and objectives in the local authority's area. New subsection (4) sets out proposals should have a date specified for the carrying out of the measures and, as far as possible, those dates should be met. New subsection (5) sets out district councils should incorporate county council proposals and dates in their action plans.

1404 Paragraph 9(6) applies the definition of a district council to England.

1405 Paragraph 9(7) makes consequential amendments.

1406 Paragraph 10 substitutes section 86A in the Environment Act 1995 with new sections 86A and 86B.

### **New section 86A Role of the Mayor of London in relation to action plans**

1407 Subsection (1) provides that local authorities in London must inform the Mayor of London if they intend to prepare an action plan

1408 Subsection (2) has the effect that if, as above, the Mayor of London has been informed of a local authority's intention to prepare an action plan, the Mayor must propose measures that the Mayor will take to help contribute to the achievement and maintenance of air quality standards and objectives. This replicates the duty that now applies to county councils in areas outside of London

1409 Subsection (3) sets out that proposals should have a date specified for carrying out of proposed measures and, as far as possible, those dates should be met.

1410 Subsection (4) requires local authorities to incorporate the Mayor of London's proposals

and dates in their action plans.

### **New section 86B Role of combined authorities in relation to action plans**

- 1411 Subsection (1) requires that a local authority in a combined authority area must notify the combined authority of its intention to produce a plan.
- 1412 Subsection (2) requires that if, as above, the combined authority has been informed of a local authority's intention to prepare an action plan, they should propose measures that they will take to help contribute to the achievement and maintenance of air quality standards.
- 1413 Subsection (3) requires that proposals should have a date specified for carrying out of proposed measures and that, as far as possible, those dates should be met.
- 1414 Subsection (4) requires that local authorities should incorporate combined authority proposals and dates in their action plans.
- 1415 Subsection (5) defines "combined authority".
- 1416 Paragraph 11 amends section 87 (regulations) of the Environment Act 1995. These amendments broaden the range of bodies the Secretary of State can confer powers on, impose duties on, prescribe measures to be adopted by, require provision of relevant information or enable cost recovery in the realm of measures to improve air quality, to include relevant county councils, relevant public authorities and the Environment Agency.
- 1417 Paragraph 12 amends section 88 of the Environment Act 1995. These amendments widen the number of bodies the Secretary of State may issue guidance to relating to local air quality, and to which they must have regard, to include relevant public authorities and the Environment Agency.
- 1418 Paragraph 13 amends section 91 (interpretation) of the Environment Act 1995, providing additional definitions.
- 1419 Paragraph 14 makes amendments to Schedule 11 (air quality: supplementary provisions) to the Environment Act 1995, simplifying wording.

## **Schedule 13: Smoke control in England and Wales**

### **Part 1: Principal amendments to the Clean Air Act 1993: England**

- 1420 Paragraphs 1 to 8 make amendments to the Clean Air Act 1993.
- 1421 Paragraph 2 inserts new section 19A, which introduces new Schedule 1A.
- 1422 Paragraph 3 inserts new Schedule 1A after Schedule 1. Schedule 1A makes provisions for imposing financial penalties for emissions of smoke from a chimney of a building, a chimney (not being a chimney of a building) which serves the furnace of any fixed boiler or industrial plant and, if applicable, a chimney of a vessel in smoke control areas in England. The amendments to this Act enable a local authority to extend the scope of a smoke control area to cover moored inland waterway vessels (as set out in paragraph 7 below), subject to local consultation. They would need to amend their smoke control order to include vessels and then once it comes into operation smoke emissions from the chimney of such vessels could be liable to a financial penalty.

### **New Schedule 1A Penalty for emission of smoke in smoke control area in England**

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- 1423 Paragraph 1 of new Schedule 1A defines “relevant chimney” and “person liable” (in relation to a relevant chimney).
- 1424 Paragraph 2 of new Schedule 1A defines “notice of intent”, setting out when a notice of intent applies and what it must do. Where a local authority is satisfied that smoke has been emitted from a relevant chimney, they can give a notice to the liable person. The notice must include the information specified in sub-paragraph (3).
- 1425 Paragraph 3 of new Schedule 1A provides the minimum and maximum levels of penalty that can be given in respect of a financial penalty issued under the Schedule. Sub-paragraphs (3) and (4) allow the Secretary of State to amend these amounts under regulations, subject to the affirmative resolution procedure. This means that draft regulations must be laid before and approved by a resolution of both Houses of Parliament.
- 1426 Paragraph 4 of new Schedule 1A gives the recipient of the notice of intent a period of 28 days from the day after the notice of intent was given to object in writing on a ground specified in sub-paragraph (2) and provide evidence to support the objection. For example, they could object on the grounds that there was no emission of smoke on the occasion specified or that they were not the person liable on the occasion specified in the notice of intent. Sub-paragraph (3) stipulates that if the objection is on the grounds of the person not being liable, the name and address of the liable person must be included if known. Sub-paragraph (4) allows the Secretary of State to amend the grounds of objection under regulations, subject to consultation with anyone who may have an interest in the proposed regulations (sub-paragraph (5)) as well as the affirmative resolution procedure (sub-paragraph (6)). This means that draft regulations must be laid before and approved by a resolution of both Houses of Parliament.
- 1427 Paragraph 5 of new Schedule 1A gives the local authority the power to impose a financial penalty, following the issuing of a notice of intent, and specifies the period within which they must do so. Sub-paragraph (2) stipulates that a local authority must notify a person of their decision not to impose a financial penalty, if applicable. For example, if the local authority receives an objection following the issuing of a notice of intent and is satisfied that the penalty should not apply, they must inform the person of their decision.
- 1428 Paragraph 6 of new Schedule 1A provides for the application of this paragraph where a local authority decides to impose a financial penalty. It sets out how a local authority can use a final notice to impose a financial penalty and defines a “final notice”. It also sets out what a final notice must specify (sub-paragraph (3)) and sets out the period within which the financial penalty must be paid (sub-paragraph (4)).
- 1429 Paragraph 7 of new Schedule 1A gives local authorities the power to withdraw a notice of intent or final notice, or reduce the amount specified in a final notice, and explains how to use said power.
- 1430 Paragraph 8 of new Schedule 1A gives the recipient of a financial penalty a period within which they can appeal to the First-tier Tribunal. It also sets out the grounds of appeal to the First-tier Tribunal a person may take. Sub-paragraph (3) stipulates that until the appeal has been determined or withdrawn, the final notice is suspended (that is, the local authority cannot pursue any debt until such time). Sub-paragraph (4) gives the First-tier Tribunal the power to respond to the appeal.
- 1431 Paragraph 9 of new Schedule 1A states that a financial penalty is recoverable as a civil debt due to the relevant local authority.

- 1432 Paragraph 10 of new Schedule 1A allows a local authority to delegate their functions under this Schedule. It requires that delegation must be made by giving notice to the delegate.
- 1433 Paragraph 11 of new Schedule 1A requires that a notice under this Schedule must be in writing, and instructs how a notice may be given to a person
- 1434 Paragraph 12 of new Schedule 1A applies to a vessel moored in a smoke control area in England and is subject to the operation of new Schedule 1A. It sets out that when a local authority has included vessels within the scope of its smoke control area, these provisions apply in respect of emissions of smoke from those vessels. If the notice of intent cannot be given to the occupier of the vessel, it may instead be given to the registered owner of the vessel, in which case one of the grounds for objecting listed in paragraph 4(2) – that they were not the person liable on the occasion specified in the notice of intent – does not apply. A person who receives a notice of intent relating to a vessel may object under paragraph 4 on the further ground that the smoke emitted on the occasion specified was solely due to engine-powered propulsion or to provide electric power to the vessel.
- 1435 Paragraph 4 inserts new sections 19B to 19D after new section 19A. These sections set out the offences relating to the acquisition and sale of controlled solid fuel in England, the exemption relating to particular areas in England, and the interpretation of new sections 19A to 19C.

#### **New section 19B Acquisition and sale of controlled solid fuel in England**

- 1436 Most of the provisions set out in new sections 19B and 19C mirror those in existing sections 22 and 23 of the Clean Air Act, but have been amended to provide a distinction between how Part III of the Act applies in England and in Wales. For example, subsection (1) of new section 19B provides for an offence of acquiring controlled solid fuel for use in a building, fireplace, fixed boiler or industrial plant to which a smoke control order applies. This offence already exists in existing section 23 of the Act.
- 1437 New subsection (2) clarifies that the acquisition of controlled solid fuel for use in the propulsion of a vessel or to provide electric power to the vessel will not form an offence.
- 1438 New subsection (3) clarifies that acquiring controlled fuel for use in an approved fireplace will not form an offence, mirroring the existing defence under section 23. For example, wood is a controlled solid fuel but it is not an offence to acquire wood for use in a smoke control area if it will be used in a fireplace of a type specified in a list published by the Secretary of State and used in compliance with any conditions specified in the list.
- 1439 New subsection (4) sets out a new offence where a retailer must notify potential buyers that it is an offence to acquire controlled solid fuel for certain purposes (for example, if it will be burned in a fireplace not specified in the Secretary of State's list of approved fireplaces, such as an open fireplace, in a smoke control area in England). This also applies to online retailers. Reasonable steps to notify potential purchasers could include, for example, putting an informative sign next to the fuels and at the cash register, or including a notification during online checkout.
- 1440 New subsection (5) provides for an offence of selling controlled fuels for delivery to a building, or premises with a fixed boiler or industrial plant to which a smoke control order in England applies. This offence already exists in the current Act.
- 1441 New subsection (6) provides defences for the offence under subsection (5), mirroring the existing defences in the current Act.

1442 New subsection (7) provides that a person guilty of the offences under subsection (1) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

1443 New subsection (8) provides that a person guilty of the offence under subsections (4) and (5) is liable on summary conviction to a fine. The level of fine will be determined by the Court.

#### **New section 19C Exemptions relating to particular areas in England**

1444 The provisions set out in new section 19C (exemptions relating to particular areas in England) allow the Secretary of State to order the suspension of financial penalties for emission of smoke and/or offences relating to the acquisition and sale of controlled solid fuel in England. Subsection (2) sets out that the Secretary of State must consult the relevant local authority prior to using their power under subsection (1), and subsection (3) sets out what the local authority must do following the making of such an order.

#### **New Section 19D Interpretation: “approved fireplace” and “controlled solid fuel”**

1445 New section 19D applies to new sections 19A to 19C. Subsection (2) defines “approved fireplace”, and subsection (3) sets out the requirements a fireplace must meet in order for the Secretary of State to include it on the list of approved fireplaces. Subsections (4) and (5) define “controlled solid fuel” and “approved fuel”.

1446 Paragraph 5 inserts new section 26A after section 26.

#### **New section 26A Duty of local authority to reimburse for adaptations of vessels in England**

1447 This section sets out the criteria by which local authorities in England are required to reimburse owners or occupiers of vessels that are subject to a smoke control order, for works carried out to avoid incurring a financial penalty under new Schedule 1A to the Clean Air Act 1993.

1448 Subsection (1) sets out the criteria an owner or occupier of a vessel must meet in order to be eligible for reimbursement under these provisions. For example, the vessel must have the right to moor at a single mooring place for the qualifying period, the owner or occupier must complete the adaptations prior to the coming into operation of the order, and the owner or occupier must not have access to mains gas or electricity.

1449 Subsection (2) provides further conditions for when reimbursement will be required, and requires local authorities to reimburse the owner or occupier of a vessel 70% of the expenditure incurred in carrying out the adaptations if the adaptations are completed prior to the coming into operation of the order, the local authority approves the expenditure, and the adaptations are completed to the satisfaction of the local authority.

1450 Subsection (3) stipulates that reimbursement must be paid in equal monthly instalments for a period of six months.

1451 Subsection (4) removes the duty on local authorities to reimburse the owner or occupier of a vessel, should the owner or occupier cease to have the right to moor at the single mooring place or the vessel be absent from the smoke control area for one or more periods totalling three months.

1452 Paragraph 6 inserts new section 28A after section 28.

#### **New section 28A Guidance for local authorities in England**

1453 New section 28A requires local authorities in England to have regard to any guidance

published by the Secretary of State related to their functions under Part 3 of the Act.

1454 Paragraph 7 inserts new subsections (2A) to (2C) after section 44(2).

1455 New subsection (2A) allows local authorities in England to include moored vessels in scope of their smoke control areas, which would be subject to the operation of new Schedule 1A. The amendments in this Act enable a local authority to extend the scope of a smoke control area to cover moored vessels, subject to local consultation. They would need to amend their smoke control order to include vessels, and then, once it comes into operation, smoke emissions from the chimney of such vessels could be liable to a financial penalty. New subsection (2B) extends references to a building in Part 3 and in section 54 of the Act to vessels, except for references in section 24 and 25 to dwellings. New subsection (2C) defines “moored vessels”.

1456 Paragraph 8 clarifies that rights of entry under section 56 only apply in relation to a private dwelling where adaptations are required under section 24(1), or to a vessel where there is a duty to make reimbursements to the occupier or owner for works carried out under section 26A(3).

## **Part 2: Principal amendments to the Clean Air Act 1993: Wales**

1457 Paragraphs 9 to 11 make amendments to the Clean Air Act 1993.

1458 Paragraph 10 amends section 20 (prohibition on emission of smoke in smoke control area), which only applies in Wales following the minor and consequential amendments made in Part 3. Sub-paragraph (2) amends, for Wales, the procedure for declaring a fuel to be authorised for the purposes of Part 3 of the Act. It enables Welsh Ministers to authorise fuels by publishing a list of authorised fuels and to update this list as needed. Sub-paragraph (3) omits subsection (6), which gives meaning to “authorised fuel”.

1459 Paragraph 11 amends section 21 (power by order to exempt certain fireplaces) as it applies to Wales. Welsh Ministers currently have the power to exempt any class of fireplace by order upon such conditions as may be specified in the order, if they are satisfied that such fireplaces can be used for burning fuel other than authorised fuels without producing any smoke or a substantial quantity of smoke. The amendment enables Welsh Ministers to exempt such fireplaces by publishing a list of exempted fireplaces and any relevant conditions and to update this list as needed.

1460 The amendments made by these paragraphs will enable Welsh Ministers to authorise fuels and exempt fireplaces as and when they are manufactured and tested, rather than waiting for common commencement dates as is currently the case for Wales.

## **Part 3: Minor and consequential amendments**

### **Minor and consequential amendments to the Clean Air Act 1993**

1461 Paragraph 13 amends section 18 (declaration of smoke control area by local authority) to achieve a distinction between how Part 3 applies in England and in Wales, and extends the section to include new Schedule 1A.

1462 Paragraph 14 amends section 20 (prohibition on emission of smoke in smoke control area) to provide that the section applies only in Wales.

1463 Paragraph 15 amends section 21 (power to exempt certain fireplaces) to achieve a distinction between how Part 3 applies in England and in Wales.

1464 Paragraph 16 amends section 22 (exemptions relating to particular areas) to achieve a distinction between how Part 3 applies in England and in Wales.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

- 1465 Paragraph 17 amends section 23 (acquisition and sale of unauthorised fuel in a smoke control area) to achieve a distinction between how Part 3 applies in England and in Wales.
- 1466 Paragraph 18 amends section 24 (power to require adaptations of fireplaces) to achieve a distinction between how Part 3 applies in England and in Wales, and extends the section to include new Schedule 1A.
- 1467 Paragraph 19 amends section 26 (power to make grants for fireplaces in churches etc) to achieve a distinction between how Part 3 applies in England and in Wales and, extends references made to premises to include vessels.
- 1468 Paragraph 20 amends section 27 (references to adaptations) to achieve a distinction between how Part 3 applies in England and in Wales, and extends references made to a dwelling to include vessels.
- 1469 Paragraph 21 amends section 28 (expenditure on execution of works) to extend references made to a dwelling to include vessels.
- 1470 Paragraph 22 inserts the definition of “smoke control order in England” into section 29 (interpretation).
- 1471 Paragraph 23 amends section 63 (regulations and orders) to clarify that the delegated powers set out in paragraph 3(3) and 4(5) of new Schedule 1A are not subject to annulment in pursuance of a resolution of either House of Parliament.
- 1472 Paragraph 24 amends Schedule 1 to achieve a distinction between how Part 3 applies in England and in Wales, and extends paragraph 5 of that Schedule 1 to new Schedule 1A. Sub-paragraph (3) inserts new paragraph 6A into Schedule 1, which provides a duty on local authorities in England to inform the Secretary of State of any new smoke control orders and the date on which they will come into operation.

### Minor amendments to other legislation

- 1473 Paragraph 25 inserts “in Wales” into subsection (3)(i) of section 79 of the Environmental Protection Act 1990 (statutory nuisances). This achieves a distinction between how the section applies in England and in Wales. It means that private dwellings in smoke control areas in England are no longer exempt from nuisance legislation, but retains the exemption for Wales. This means that smoke from private dwellings in smoke control areas in England can constitute a statutory nuisance, provided that it is prejudicial to health or a nuisance, as is currently the case for private dwellings outside of smoke control areas in England.

## Schedule 14: Modifying water and sewerage undertakers’ appointments: Procedure for appeals

- 1474 Schedule 14 inserts new Schedule 2ZA into the Water Industry Act 1991.

### New Schedule 2ZA Procedure for appeals under section 12D

- 1475 New Schedule 2ZA sets out the details of the Competition and Markets Authority (CMA) process for appeals against licence condition modifications under section 12D of the Water Industry Act 1991.
- 1476 Paragraph 1 of new Schedule 2ZA sets out the procedure to make an application for permission to appeal under section 12D. Sub-paragraph (1) sets out the procedure that must be followed to bring an appeal. An appeal must be made by sending a notice to the CMA requesting for permission to appeal.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

- 1477 Sub-paragraph (2) refers to the persons set out in section 12D as being the only persons that can apply for permission to appeal.
- 1478 Sub-paragraph (3) requires an application for permission to be made within 20 working days after the working day on which Ofwat's decision on the modification is published.
- 1479 Sub-paragraph (4) requires specific information to be provided with the application for permission to appeal which will be detailed in rules.
- 1480 Sub-paragraph (5) enables provision to be made in the rules requiring the applicant to confirm through a statement of truth that the evidence contained in an application is true.
- 1481 Sub-paragraph (6) defines a person applying for permission to bring an appeal as an "appellant".
- 1482 Sub-paragraph (7) requires the appellant to send a copy of the application for permission to appeal to Ofwat at the same time as the application is sent to the CMA, along with any other information that may be required by the appeal rules.
- 1483 Sub-paragraph (8) requires that the decision about whether to grant permission to appeal be made by a member of the CMA who is duly authorised.
- 1484 Sub-paragraph (9) provides that Ofwat must be afforded an opportunity to comment on the application before CMA decides whether to give permission.
- 1485 Sub-paragraph (10)(a) requires the CMA to respond to the application for permission to appeal by the end of the 10th working day after the day on which the CMA received any comments from Ofwat.
- 1486 Sub-paragraph (10)(b) requires the CMA to respond to the application for permission to appeal by the end of the 14th working day after the day it received the application where there are no comments from Ofwat.
- 1487 Sub-paragraph (11) sets out the conditions subject to which permission to appeal can be granted, including provision for joint appeals.
- 1488 Sub-paragraph (12) requires notification to the appellant and Ofwat where an appeal is granted or refused, and of the reasons for it.
- 1489 Sub-paragraph (13) requires CMA to publish its decision on the application for permission to appeal as soon as reasonably practicable.
- 1490 Sub-paragraph (14) provides for section 12I(2), which allows the CMA not to publish any commercial information that could harm the business interests of an undertaking to which it relates or any information that relates to an individual and could harm their interests, to apply to any information to be published under subparagraph (13) relating to the CMA decision on an application to bring an appeal against a proposed licence modification decision.
- 1491 New paragraph 2 of new Schedule 2ZA sets out the procedure for suspending an Ofwat decision on licence modification.
- 1492 Sub-paragraph (1) enables the CMA to prevent the modification from taking effect or limit the extent to which the modification takes effect until after it has taken its decision on the appeal.
- 1493 Sub-paragraph (2) provides that, where an appeal is made against a licence condition change that came into effect earlier than 56 working days following publication of the decision, the CMA can suspend the change or limit its effect as it considers necessary



pending the determination of the appeal.

- 1494 Sub-paragraph (3) provides that the CMA can only suspend the effect of the change where the appellant requested that it be suspended when they made their application for permission to appeal within the specified time limit; where Ofwat has been able to comment on the application; where the change would create significant costs for the appellant or the persons the appellant represents; and where the change is not needed, from the perspective of the balance of convenience, to come into effect until the decision on the appeal is made.
- 1495 Sub-paragraph (4) provides that the CMA must make a decision about suspending the early effective date by the end of the 10th working day after the day they received any comments from Ofwat, or by the end of the 14th working day after the day they received the application where there are no comments from Ofwat.
- 1496 Sub-paragraph (5) requires the appellant to send an application to suspend the early effective date to Ofwat at the same time as it is sent to the CMA.
- 1497 Sub-paragraph (6) provides that the person making the decision on the application for the CMA must be licensed to do so, and that the CMA must publish the decision as soon as it is reasonably practical to do so.
- 1498 Sub-paragraph (7) provides for section 12I(2), which allows the CMA not to publish any commercial information that could harm the business interests of an undertaking to which it relates or any information that relates to an individual and could harm their interests, to apply to any information to be published as a result of a direction on an application to bring an appeal against a proposed licence modification decision.
- 1499 Paragraph 3 of new Schedule 2ZA sets out the time limit for representations and observations by Ofwat. Under sub-paragraph (1), where Ofwat wishes to comment on an application for permission to bring an appeal or a CMA direction, it must do so within the time limit imposed by sub-paragraph (2). The time limit provided by sub-paragraph (2) is ten working days beginning with the first working day on which Ofwat received a copy of the application for permission to appeal or the application for a direction. Under sub-paragraphs (3) and (4), where the CMA has granted permission to bring an appeal, and Ofwat wishes to make representations on the reasons that it reached the decision that is under appeal or on any grounds on which the appeal has been brought, Ofwat must make any written representations within a specified time limit. That time limit, which is set out in sub-paragraph (4), is by the end of the 15th working day from the date that the permission to appeal was granted.
- 1500 Sub-paragraph (5) requires Ofwat to send a copy of its representations made under paragraph 3 to the person bringing the appeal.
- 1501 Paragraph 4 of new Schedule 2ZA sets out how the CMA group that considers and determines an appeal must be constituted. Sub-paragraph (2) provides that the decision made by the group is only valid if all members of the group are present at the meeting making the decision and at least 2 members of the group support the decision.
- 1502 Paragraph 5 of new Schedule 2ZA sets out the matters that can be considered as part of an appeal. Subparagraph (1) enables the CMA, in order to reach a determination on the appeal, to disregard any issues that the person making the appeal has raised that were not included in their application to make an appeal, and to disregard any issues that Ofwat raises after the period in which it had the opportunity to comment on the appeal application or on any CMA direction.

- 1503 Paragraph 6 of new Schedule 2ZA enables the CMA, to request, via a notice, the production of documents, estimates, forecasts, returns or other specified information relevant to an appeal.
- 1504 Sub-paragraph (2) enables the CMA to set out a time for the documents or information requested under subparagraph (1) to be produced, where they need to be sent, and the format in which they are required.
- 1505 Sub-paragraph (3) limits the information the CMA is able to request to that which could be required in High Court civil cases.
- 1506 Sub-paragraph (4) allows anyone authorised on behalf of the CMA to copy any documents, estimates, forecasts, returns or other information requested by and provided to the CMA.
- 1507 Sub-paragraph (5) requires that a notice issued under sub-paragraph (1) must be issued by someone who is authorised on behalf of the CMA to do so, and must include details about possible consequences of the person to whom it is directed not complying with the notice.
- 1508 Paragraph 7 of new Schedule 2ZA sets out when an oral hearings may be held and specifies who can be required to present evidence.
- 1509 Sub-paragraph (1) allows for evidence to be taken under oath by the person considering an application for permission to bring an appeal, a person considering an application for a direction or by the CMA group determining the appeal.
- 1510 Sub-paragraph (2) provides that the CMA may issue a notice to require a person to attend the hearing and give evidence. The CMA must request a person to attend by notice setting out the time and place where the person must attend to give evidence.
- 1511 Sub-paragraph (3) allows for the person or group conducting the hearing to require the appellant or Ofwat to give evidence, or someone representing the appellant or Ofwat to make representations or observations.
- 1512 Sub-paragraph (4) allows for a person giving evidence at the hearing to be questioned by any party to the appeal. Sub-paragraph (5) provides that if the appellant, Ofwat, or a representative of either of these is not at the hearing the CMA does not have to consider the evidence that would have been provided and can determine the application for permission to appeal or the appeal without the evidence.
- 1513 Sub-paragraph (6) limits the type of evidence that a person can be required to give to that which could be required within a High Court civil case.
- 1514 Sub-paragraph (7) allows the person providing evidence to claim expenses for their attendance from the CMA if they have to travel more than 10 miles from their home to the hearing.
- 1515 Sub-paragraph (8) allows authorised members of the CMA to issue the notice to a person requiring that they give evidence at an oral hearing.
- 1516 Paragraph 8 of new Schedule 2ZA provides the CMA with the power to require a person to produce written evidence.
- 1517 Sub-paragraph (1) sets out that the CMA can request by notice written evidence from a person requesting a direction from the CMA or from the CMA group determining an appeal.

- 1518 Sub-paragraph (2) allows the CMA to specify by when and where the evidence must be provided, and that it must be verified by a statement of truth. If verification is required and not provided, the CMA must disregard the evidence.
- 1519 Sub-paragraph (3) limits the type of written evidence that a person can be required to give to that which could be required within a High Court civil case.
- 1520 Sub-paragraph (4) allows an authorised member of the CMA to issue the notice to a person requiring that person to provide written evidence.
- 1521 Paragraph 9 of new Schedule 2ZA enables the CMA to commission and use evidence from an expert in an appeal. The expert can be asked to provide evidence on any aspect of the appeal.
- 1522 Paragraph 10 of new Schedule 2ZA sets out the process that takes effect when a person fails to comply with a CMA notice requesting the production of documents under paragraph 6, or fails to attend oral hearings under paragraph 7, or fails to provide written evidence as required under paragraph 8.
- 1523 Sub-paragraph (2) enables the CMA to refer the failure, or the making of false statement or providing of false information, to the High Court.
- 1524 Sub-paragraph (3) sets out the process that the High Court can undertake which can ultimately, may enable the person to be punished as if they had been found in contempt of court.
- 1525 Sub-paragraph (4) enables the High Court, where the person is a business, to find both the business and any director or senior official of the business in contempt of court.
- 1526 Sub-paragraph (5) makes it a criminal offence for anyone to alter, suppress or destroy a document that the CMA requests under paragraph 6. The offence is punishable by a fine on summary conviction or a fine and or imprisonment on indictment.
- 1527 Paragraph 11 of new Schedule 2ZA sets out the procedure for making rules about the process for considering appeals under section 12D.
- 1528 Under sub-paragraph (2), rules made under sub-paragraph (1) can supplement the provisions of new Schedule 2ZA, and may include rules concerning evidence given at an oral hearing or other representations at a hearing.
- 1529 Under sub-paragraph (3), the CMA Board must publicise rules made under paragraph 11 to bring them to the attention of those affected by them.
- 1530 Under sub-paragraph (4), the CMA Board must consult those persons affected by the rules before setting them.
- 1531 Under sub-paragraph (5), rules made under sub-paragraph (1) may vary in relation to different cases.
- 1532 Paragraph 12 of new Schedule 2ZA deals with the position in relation to costs under the appeal procedure.
- 1533 Sub-paragraph (1) sets out how the CMA's costs for dealing with the appeal will be payable.
- 1534 Sub-paragraph (2) sets out who is liable to pay the CMA's costs, depending on the outcome of the appeal.
- 1535 Under sub-paragraph (3), the CMA can also order one party to pay the reasonable costs

of the other party, depending on the appeal outcome.

1536 Under sub-paragraph (4), any party required to pay costs to another party must do so within 28 days from the day after the date of the CMA order.

1537 Under sub-paragraph (5), where the costs are not paid to the other party within the time period, they will accrue interest as set out in the order.

1538 Under sub-paragraph (6), any unpaid costs may be recovered as a civil debt by the person entitled to the costs.

1539 Paragraph 13 of new Schedule 2ZA sets out the definitions of terms used.

## **Schedule 15: Biodiversity gain as condition for planning permission**

### **Part 1: Biodiversity gain condition**

1540 Paragraph 1 inserts new section 90A into the Town and Country Planning Act 1990, which gives effect to new schedule 7A.

1541 Paragraph 2 inserts new schedule 7A.

#### **New Schedule 7A Biodiversity gain in England**

##### **Part 1: Condition of planning permission relating to biodiversity gain**

1542 Part 1 of new Schedule 7A applies a new general condition to all planning permissions granted in England, subject to exceptions. The condition requires a biodiversity gain plan to be submitted and approved by the planning authority before development can lawfully commence. The biodiversity gain plan should contain an assessment of the value of natural habitats before development and after development, and ensure that at least a 10% net gain is achieved between the earlier and later values. The Town and Country Planning Act 1990 already allows for planning permission to be granted subject to condition(s). This “general condition” for biodiversity gain, which is mandatory for all planning permissions, is novel. Because the condition is deemed to have been granted, it exists in statute prior to the grant of planning permission. It may therefore be met at the time of granting planning permission where the planning authority also approve a biodiversity gain plan. This could be used for straightforward planning applications where the relevant information is available upfront. The general condition will not apply to all development in all scenarios. Part 1 includes a power to detail these exceptions in secondary legislation.

1543 Paragraph 1 sets out and applies the general condition to all planning permissions granted for development in England, subject to exceptions in paragraphs 6 and 7 and further application beyond the standard definition of planning permission in paragraph 8. Planning permission includes deemed planning permission, which is granted by government departments to certain development. This includes development approved under the Electricity Act 1989 and the Transport and Works Act 1989.

1544 Sub-paragraph (2) contains the wording of the general condition itself, which requires that a developer wishing to commence a development approved by planning permission will first need to submit a biodiversity gain plan to the planning authority, as defined in sub-paragraph 1(3), and obtain the planning authority’s approval of this plan.

1545 Sub-paragraph (3) defines the terms “developer”, “onsite habitat” and “planning authority” as they are applied in new Schedule 7A.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

- 1546 Paragraph 2 establishes what information a biodiversity gain plan must include to satisfy the general condition. A biodiversity gain plan must specify all the information necessary for a planning authority to be able to approve the plan under paragraph 3. This includes information about the biodiversity value of habitats before and after development and steps taken to minimise harm to habitats during development.
- 1547 The Secretary of State may specify other matters to be included in the plan under sub-paragraph (2)(f). Sub-paragraph (3) provides for the Secretary of State to specify the procedure which must be followed when submitting a gain plan.
- 1548 Paragraph 3 requires planning authorities to approve a biodiversity gain plan if, and only if, key information in the biodiversity gain plan is accurate and the biodiversity gain objective is met. Authorities need to be satisfied with the information provided, including the value of onsite and offsite habitat gains and losses associated with the development. If the authority decides they are not satisfied, development would not be able to proceed lawfully unless the developer successfully appeals this decision.
- 1549 Paragraph 4 sets out the biodiversity gain objective and how it must be met. The objective is that the biodiversity value, expressed in biodiversity units, attributable to the development exceeds that which existed before development by at least 10%. Sub-paragraph (4) gives the Secretary of State a power to vary the percentage gain required.
- 1550 Paragraph 5 gives the Secretary of State the power to specify procedures to follow and factors to be taken into account when approving a biodiversity gain plan, and in relation to appeals against decisions.
- 1551 Paragraph 6 exempts all development granted planning permission by the Secretary of States using a development order, or under provisions for urgent Crown development, from the application of the general condition. This includes development granted permission by the General Permitted Development Order, which allows various types of development to proceed without requiring a planning application. Paragraph 6 also gives the Secretary of State the power to exempt development from the requirement to apply the general condition.
- 1552 In recognition of the fact that some habitat is irreplaceable, and therefore impossible to achieve a net gain on, paragraph 7 allows the Secretary of State to make regulations that modify or exclude the application of the general condition to irreplaceable habitat. Sub-paragraph (2) specifies that, where development does impact irreplaceable habitats, regulations must require measures to be taken to minimise the negative impacts of this development on those habitats, and that those measures should be agreed with the planning authority where they are not made by the planning authority in the first place. Sub-paragraph (3) allows regulations to confer powers and duties on Natural England in relation to giving guidance on the treatment of irreplaceable habitat in development.
- 1553 Whilst it is generally agreed in practice that development should not claim biodiversity net gain in cases when development results in land take from statutory protected sites (such as Sites of Special Scientific Interest), development on such sites is not specifically exempted from the net gain requirement. The biodiversity metric does not address impacts on species, recognise the significance of site designations or take account of indirect impacts, and so the biodiversity net gain requirement for development on such sites is separate to, and will work alongside, any existing legal or policy requirements for protected areas, including restoration and conservation of designated features and the achievement of favourable condition.
- 1554 Paragraph 8 allows the Secretary of State to modify the application of this Part to

permissions for phased development or developments where subsequent approval has the effect of phasing development. Sub-paragraph (2) sets out that regulations may include provisions for biodiversity gain conditions to be included in the grant of planning permissions for these types of permission.

1555 Paragraph 9 gives the Secretary of State powers to modify or exclude the application of this Part to planning permissions for development already carried out, or planning permissions granted for the alteration or removal of buildings or works by any order requiring discontinuance of any use of land.

1556 Paragraph 10 makes provision for the Secretary of State to make provision as to the application of this Part of the Schedule to planning permission granted in relation to a purchase notice and the successful appeal of a planning enforcement notice.

## **Part 2: Interpretation of terms relating to biodiversity value**

1557 Paragraph 11 is self-explanatory.

1558 Paragraph 12 identifies the biodiversity metric as the approach which will be used to calculate the relative biodiversity value of any habitat. The metric uses habitats as a proxy for biodiversity value, which it measures and expresses in terms of 'biodiversity units'.

1559 Paragraph 13 makes provision for the Secretary of State to publish the biodiversity metric, the tool which is used to measure the relative biodiversity value of habitats as relevant to this schedule. Sub-paragraphs (3) and (5) give the Secretary of State the power to update the biodiversity metric, and set out any arrangements for transition when the metric is updated so that developers and planning authorities are clear what is required where, for example, a planning application is under consideration on the date the updated version of the metric comes into effect. Updates to the metric will allow technical improvements, reflecting improved ecological understanding and further evaluation of the metric's application in practice, to the metric to be incorporated into the approach. Updates will be infrequent to avoid creating unnecessary uncertainty for the planning for the planning system. The intention is to publish a timeline of planned updates. The provision also enables the secretary of state to make transitional provision where the metric is revised and republished.

1560 Paragraph 14 defines the date on which the pre-development biodiversity value of land should be taken to be measured. Sub-paragraph (3) enables a developer and a local planning authority to agree another date where more appropriate than the default set out in sub-paragraph (2). Sub-paragraph (4) makes provision for circumstances in which the planning authority is aware that there has been degradation of habitats in advance of development.

1561 Paragraph 15 states that the pre-development biodiversity value of onsite habitats is to be taken as the value before certain activities took place. These activities must have been carried out without planning permission, or without an alternative permission specified by the Secretary of State in regulations, on or after 15 October 2019. The activities must also have reduced the biodiversity value of habitats on the site below what it would otherwise have been at the time of planning application or planning permission.

1562 Paragraph 16 defines the post-development biodiversity value of habitat on the development site as the projected value of habitats on the development site. The value needs to be projected because a planning authority will need to use this figure before development starts to determine whether the development will achieve the net gain objective. In practice, the post-development biodiversity value of habitats on the development site will be determined by applying the metric to the developer's plan for

the development site as detailed in the biodiversity gain plan.

1563 Paragraph 17 stipulates that significant increases in onsite biodiversity value can only be considered part of the post-development biodiversity value if they are secured through a suitable mechanism and will be maintained for at least 30 years after the completion of development.

1564 Paragraph 18 defines what can be counted towards “registered offsite biodiversity gain” in relation to a development. This relates to gain achieved on land other than the development site. Where a developer makes an agreement with a third party to do so, or enters into an agreement to do so themselves, this gain can be allocated to the development to be counted towards meeting the biodiversity objective. The biodiversity gain and its allocation to a development must be recorded on the biodiversity gains site register.

1565 Paragraph 19 is self-explanatory.

### **Part 3: Registration of biodiversity gain sites**

1566 Paragraphs 20 and 21 make provisions for a public biodiversity gains sites register. They define some of the eligibility criteria for land to be included on the register, including that it must be maintained for at least 30 years after the completion of enhancement works, and sets out how the benefits of habitat on the register might be allocated to a development. The register is intended to provide transparency in offsite enhancements for developers, planning authorities and others, and help parties to confirm that any offsite biodiversity gains are only allocated to a single development and that the necessary agreements to deliver biodiversity gains are in place. The intention is that the register will also facilitate monitoring of biodiversity gain delivery and its outcomes by indicating what outcomes are expected where. Paragraph 21 sets out what regulations under paragraph 20 are likely to provide for, including details of the procedure for registering land in the biodiversity gains site register.

### **Part 4: Biodiversity credits**

1567 Paragraph 22 makes provision for the Secretary of State to set up a system to sell a supply of statutory biodiversity credits to the habitat compensation market. The provision of statutory credits will be provided in England only. The sold credits will be equivalent to a specified gain in biodiversity value, which will be eligible for inclusion in a biodiversity gain plan. Sub-paragraph (3) sets out the arrangements that may be made for the scheme and the operation of the scheme. Sub-paragraph (4) requires the Secretary of State, in considering the price of a biodiversity credit, to set this at a level which does not discourage the development of local market schemes and non-credit habitat creation projects. The government intends to conduct a further review of the price of units following engagement with stakeholders before setting a price. The intention is that the price of biodiversity credits will be higher than prices for equivalent biodiversity gain on the market. Sub-paragraph (5) will require the Secretary of State to make information on the price of the units and their operation publically available.

1568 Paragraph 23 sets the framework that the Secretary of State must consider when handling the proceeds of the credits. Proceeds from the sale of credits will contribute to strategic ecological networks and provide long term environmental benefits and would be additional to existing requirements. This framework includes a provision that funds collected via this mechanism must be used for the purpose of securing biodiversity gain. Sub-paragraph (2) makes provision to exclude works to enhance habitat from the system where there is an existing requirement for the Secretary of State to act. For example, where

land is subject to alternative legislative requirements such as where a public body manages a Site of Special Scientific Interest. Through the Wildlife and Countryside Act 1981 (as amended), public bodies have a duty to take reasonable steps to further the conservation and enhancement of the special features of Sites of Special Scientific Interest.

1569 Paragraph 24 requires the Secretary of State to report on the operation of the biodiversity credit system on an annual basis. This includes setting out the total funding received and how this has been spent in securing habitat enhancement.

## **Part 2: Consequential amendments.**

1570 Paragraph 3 details the consequential amendments to the Town and Country Planning Act 1990.

## **Schedule 16: Controlling the felling of trees in England**

### **Introductory**

1571 This Schedule amends Part 2 of the Forestry Act 1967 (“the 1967 Act”).

### **Penalty for felling without licence: increase of fine**

1572 Paragraph 2 amends section 17 to preserve in Wales the current level of fine that the Courts are able to impose (level 4 (£2,500) or twice the value of the tree, whichever is the higher) following conviction for a section 17 offence (felling without a licence where one was required), whilst amending the fine available in respect of such a conviction in England to an unlimited level 5 fine.

### **Restocking notices to be local land charges**

1573 Paragraph 3 amends section 17A by inserting new subsection (1B), which provides that a restocking notice is a local land charge and, for the purposes of the Local Land Charges Act 1975, the Commissioners who serve the notice are defined as the “originating authority.”

### **Enforcement notices to be local land charges**

1574 Paragraph 4 inserts new subsection (6) at the end of section 24. This, as in paragraph 3, provides that a notice under this section is a local land charge and, for the purposes of the Local Land Charges Act 1975, the Commissioners who serve the notice are defined as the “originating authority.”

1575 Local land charges will give notice to any buyer, and anyone who inspects the land register, that any buyer will acquire the land subject to the local land charge unless and until it is removed.

### **Further enforcement notices for new estate or interest holders**

1576 Paragraph 5 inserts new section 24A after section 24.

1577 Sub-paragraph (1) inserts a cross-reference to new section 24A in section 17C.

1578 Sub-paragraph (2) provides the text for new section 24A. It has the effect of allowing the Forestry Commission to serve the new owner of land that is still subject to an enforcement notice with a subsequent enforcement notice. This will compel the new owner of the land to comply with the restocking of the land, as the previous owner can no longer be reasonably expected to comply with the original Enforcement Notice. This is in line with the ‘buyer beware’ principle of the English housing market.

1579 It also follows the principle already established in the 1967 Act that the new owner of

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land inherits the responsibility to restock that land. This is established at present by the Act providing for enforcement notices to be served on the new owner of the land if that land is sold during the life of a restocking notice (and that restocking notice is not complied with).

### Power of court to order restocking after conviction for failure to comply with enforcement notice

1580 Paragraph 6 inserts new section 24B into the 1967 Act. It has the effect of giving the court the power, following a conviction under section 24 of the Act (failure to comply with an Enforcement Notice), to make a restocking order that compels the person convicted to restock the land. This power is in addition to the existing fine.

1581 Sub-section (3) of new section 24B explains that a restocking order will require a person to take specified steps within a specified time to stock or restock an area of land with trees – either the land under which the restocking notice was given or other land that the court considers appropriate – and to maintain those trees for the period specified in the order (which will not exceed 10 years).

1582 Sub-section (4) of new section 24B provides that in deciding whether to make a restocking order a court must have regard to the interests of good forestry and agriculture and the desirability of promoting the growing and maintenance of trees in England.

1583 Sub-section (5) of new section 24B provides for the application of section 63(3) of the Magistrates' Courts Act 1980 for breaches in relation to a restocking order.

### Service of notices on directors of companies that have estates or interests in land

1584 Paragraph 7 amends section 30. Section 30 sets out the precise manner in which documents, such as restocking notices and enforcement notices, should be served. Where a company is to be served with such a notice, section 30 currently stipulates that this must be upon the company "clerk" or "secretary". This paragraph amends section 30 to allow notices to be served upon a company "director" as well.

### Requiring information from the owner of land

1585 Paragraph 8 also amends section 30. Section 30, for the purposes of serving documents, gives the Forestry Commission the power to request information regarding the ownership of the land from the "occupier" or "any person who, either directly or indirectly, receives rent" from the land in question. Failure to comply with the request is an offence carrying a fine. This clause amends the 1967 Act to allow that request to be made of an "owner" of any land in England, compelling them to disclose, for instance, details of any leaseholders or tenants of the land.

## Schedule 17: Discharge or modification of obligations under conservation covenants

1586 Schedule 17 enables the Upper Tribunal to discharge land from an obligation under a conservation covenant, or to modify such an obligation, on application. Any landowner bound by, or entitled to the benefit of, such an obligation, or the responsible body under the covenant, can apply. In practice, application will be made to the Lands Chamber, and procedure will be governed by the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010.

1587 Separate provision is made for discharge and modification, in Parts 1 and 2 of the Schedule respectively. Applications may be made for either, but in some circumstances

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will be made for both.

## Part 1: Discharge by Upper Tribunal

### Power to discharge on application by landowner or responsible body

1588 Paragraphs 1 and 2 make provision for application for discharge, and provide that the Tribunal must add as parties as necessary, depending upon who has made the application: the responsible body and everyone who is currently bound by or entitled to the benefit of the obligation concerned.

### Deciding whether to discharge

1589 Paragraph 3(1) provides that the Upper Tribunal may make an order discharging an obligation when it considers it reasonable to do so in all the circumstances of the case. Sub-paragraph (2) sets out the matters that the Upper Tribunal must have regard to when considering whether or not to exercise its discretion. When considering the extent to which the performance of an obligation is, or is likely in the future to be, affordable or practicable (sub-paragraph (2)(a)(iii) and (iv)), sub-paragraph (4) requires the Upper Tribunal to disregard the personal circumstances of the person bound by the obligation.

1590 Paragraph 3(3) requires the Tribunal to consider whether the purpose for which the obligation in question was created could equally well be served by the creation of another conservation covenant on other land held by the landowner. In other words, the Tribunal is to consider whether any form of like for like substitution is possible. If it is, paragraph 5 comes into play.

### Supplementary powers

1591 Paragraph 4 gives the Upper Tribunal the power to include in an order a requirement that the applicant pay compensation in respect of any resulting loss of benefit.

1592 Paragraph 5 enables the Upper Tribunal, with the consent of the landowner and the responsible body, to make an order discharging an obligation conditional on entry into a new conservation covenant. This may be an option where an obligation under a new conservation covenant will be able to fulfil the same purpose as the obligation to be discharged. If this is the position, then the landowner and responsible body can enter into an agreement for the purposes of clause 101 in relation to the replacement land.

## Part 2: Modification by Upper Tribunal

### Power to modify on application by landowner or responsible body

1593 Paragraphs 6 and 7 make provision for application for modification, and provide that the Tribunal must add as parties as necessary, depending upon who has made the application: the responsible body and everyone who is currently bound by or entitled to the benefit of the obligation concerned.

1594 Paragraph 8 has the effect that the Upper Tribunal's powers to modify an obligation under a conservation covenant cannot be exercised so as to produce a result which could not have been achieved by the original agreement (because inconsistent with the requirements of clause 98(2)(a)). For example, it would not be possible to modify an obligation in such a way that it was no longer for the public good.

### Deciding whether to modify

1595 Paragraph 9(1) provides that the Upper Tribunal may make an order modifying an obligation when it considers it reasonable to do so in all the circumstances of the case.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Sub-paragraph (2) sets out the matters that the Upper Tribunal must have regard to when considering whether or not to exercise its discretion. When considering the extent to which the performance of an obligation is, or is likely in the future to be, affordable or practicable (paragraph 9(2)(iii) and (iv)), paragraph 9(3) requires the Upper Tribunal to disregard the personal circumstances of the person bound by the obligation.

### Supplementary powers

1596 Paragraph 10 gives the Upper Tribunal the power to include in an order a requirement that the applicant pay compensation in respect of any resulting loss of benefit.

1597 Paragraph 11 enables the Upper Tribunal, with the consent of the landowner and the responsible body, to make an order modifying an obligation conditional on the applicant and the responsible body entering into an agreement for a new conservation covenant containing such provision as the order may specify.

### Effect of modification

1598 Paragraph 12 describes the effect of a modification to a conservation covenant, which must for the future be read as modified by the Upper Tribunal's order as respects the land to which the modification relates. The parties to the proceedings will be bound by the order of the Upper Tribunal, as will their successors (as respects any of the land to which the modification relates).

## Schedule 18: Application of Part 7 to Crown land

### Part 1: General

1599 Schedule 18 makes provision for Part 7 to have effect with modifications in certain cases where an interest in Crown land is held by or on behalf of the Crown.

1600 Paragraph 2 defines "Crown land" and who is the appropriate authority in relation to each of the categories of Crown land. In cases where it is the appropriate authority that holds an interest in Crown land held by or on behalf of the Crown, Part 7 can be left to operate in the normal way. The appropriate authority is the landowner and can create a conservation covenant. Any obligation of the authority under the covenant will be an obligation of the landowner in the ordinary way. Where that is not the case, the intention is that any obligation under a conservation covenant created by the Crown, or under a conservation covenant affecting land acquired by the Crown, should be an obligation of the appropriate authority, rather than of the Crown entity that holds the relevant estate in land.

### Part 2: Conservation covenants relating to Crown land held by a person other than the appropriate authority

#### Arrangements for the purposes of section 98

1601 To that end, paragraph 3 enables a conservation covenant to be created, not by the Crown entity that holds the relevant estate in land, but by the appropriate authority acting in its place. An obligation of the appropriate authority under such a conservation covenant is then treated for the purposes of Part 7 as an obligation of the landowner.

#### Modification of Part 7 in relation to obligations under certain Crown conservation covenants

1602 Paragraphs 5 to 9 accordingly modify various provisions in Part 7 to deal with the fact

that, in this special case, the appropriate authority will act in place of the Crown entity holding the relevant estate in land (for example, an obligation of the landowner needs to bind the appropriate authority), but the provisions about successors still have to operate by reference to the actual landowner.

### **Part 3: Other modifications of Part 7**

#### **Cases where estate in land to which conservation covenant relates has been acquired by the Crown and is held by person other than the appropriate authority**

1603 Paragraphs 10 to 14 deal with the case where an interest in land to which an obligation under a conservation covenant relates is acquired by the Crown and the relevant estate in land is not held by the appropriate authority. In this case, the intention is that it should be the appropriate authority that is subject to any obligation of the landowner under the covenant, or entitled to the benefit of any obligation of the responsible body under the covenant, instead of the Crown entity that holds the relevant estate in land. To that end, paragraphs 11 to 14 provide for various provisions in Part 7 to have effect, in this special case, with appropriate modifications.

#### **Agreements under sections 108(1), 109(1) and 110(1)**

1604 Paragraphs 15 to 18 provide for clauses 108 to 110 to have effect with modifications to deal with the fact that Parts 2 and 3 of the Schedule may produce the result, exceptionally, that the appropriate authority may be bound by an obligation of the landowner under a conservation covenant, or entitled to the benefit of an obligation of the responsible body under a conservation covenant, without being the holder of the relevant estate in land.

### **Schedule 19: Consequential amendments relating to Part 7**

1605 Schedule 19 makes consequential amendments relating to two main issues. Firstly, it ensures that holders of conservation covenants will be notified if a public authority seeks compulsorily to acquire the burdened land. Secondly, it enables public authorities to develop land that has been acquired for planning purposes in accordance with planning permission, even if it requires overriding conservation covenants (except conservation covenants held by the National Trust).

#### **Acquisition of Land Act 1981 (c. 67)**

1606 Paragraphs 2 and 3 amend section 12 of and paragraph 3 of Schedule 1 to the Acquisition of Land Act 1981 to ensure that a person entitled to the benefit of an obligation under a conservation covenant will be notified if a compulsory purchase order is made or proposed with respect to land to which the obligation relates. Any objection made in response to such a notice will be treated as a “relevant objection” for the purposes of that Act.

#### **Housing and Planning Act 2016 (c. 22)**

1607 Paragraphs 4 to 7 amend the Housing and Planning Act 2016 to cover a number of points in respect of developing land acquired for planning purposes which is subject to a conservation covenant.

1608 Paragraph 5(2) amends sections 203(1)(b) and 203(4)(b) of that Act so that local authorities and other public and quasi-public bodies, in carrying out their normal functions for the public benefit, can rely on section 203 of the Act to override the covenant’s obligations in land that has been acquired for planning purposes and is developed or used in accordance with that section.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

1609 Paragraph 5(3) amends section 203(10) of that Act to ensure that obligations under a conservation covenant owed to the National Trust cannot be overridden under section 203 of that Act.

1610 Paragraph 6 amends section 204 of that Act so that compensation is not available to the beneficiary of an obligation under a conservation covenant under this section of the Act by virtue of the conservation covenant having been overridden under section 203. This reflects the nature of conservation covenants as distinct from an interest in property and as agreements entered into for the public good.

### Neighbourhood Planning Act 2017 (c. 20)

1611 Paragraphs 8 to 12 amend the Neighbourhood Planning Act 2017 in connection with the use, in accordance with section 27 of that Act, of land which an acquiring authority has temporarily possessed. Paragraph 9 amends section 20 of that Act so that a person entitled to the benefit of an obligation under a conservation covenant is to be notified before an authority takes temporary possession of the land to which the obligation relates. Paragraphs 10 and 11 amend section 23 and 27 of that Act so as: (i) to make clear that the acquiring authority is not bound by obligations under a conservation covenant relating to the land by virtue of acquiring a right to use land under section 27 of that Act and that in using land under that section it may cause a person to be in breach of an obligation under a conservation covenant relating to the land; (ii) to provide that a person entitled to the benefit of an obligation under a conservation covenant is not eligible for compensation under section 23 of that Act; and (iii) to provide that in using land under section 27 of that Act, the acquiring authority may not cause a person to be in breach of an obligation owed to the National Trust under conservation covenants (or use land in such a way that, if a person permitted or suffered such use, that person would be in breach of such an obligation). The relevant provisions of the Neighbourhood Planning Act 2017 are not currently in force.

## Schedule 20: Amendment of REACH legislation

### Amendment of the REACH Regulation

1612 Paragraph 1 of Schedule 20 give the Secretary of State the power to amend the Articles of the [REACH Regulation](#), as amended by the [REACH Exit Statutory Instrument](#). The provision excludes certain Articles, including those which set out the fundamental aims and principles of REACH.

1613 Any regulations made under this power must be consistent with Article 1 of the REACH Regulation which sets out its aim and scope. The Secretary of State must publish a statement to explain how this condition is met. Certain protected provisions are excluded from the power to amend the REACH Regulation, except where this is consequential etc. to another amendment. These protected provisions are listed in paragraph 6 of this Schedule. Regulations made under this power are subject to the affirmative procedure.

### Amendment of the REACH Enforcement Regulations 2008

1614 Paragraph 2 of Schedule 20 give the Secretary of State the power to amend the [REACH Enforcement Regulations 2008](#) (the “REACH Enforcement Regulations”).

1615 Any regulations made under this power must be necessary or appropriate for, or in connection with, the enforcement of the REACH Regulation. Regulations may create new criminal offences or extend the scope of existing ones connected to the enforcement of the REACH Regulation. Penalties are restricted to the maximum levels that could be provided for under section 2(2) of the European Communities Act 1972 by virtue of paragraph 1(d)

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

of Schedule 2 to that Act as it applies in the different nations of the UK. Regulations made under this power are subject to the affirmative procedure.

1616 The REACH Regulation and the REACH Enforcement Regulations relate to a mixture of devolved and reserved matters. Under paragraph 3 the Secretary of State can only make regulations under this Schedule with the consent of the Devolved Administrations to the extent that the function is within devolved competence. Paragraph 4 provides for the Devolved Administrations to be able to request that the Secretary of State makes regulations.

1617 Paragraph 5 of the Schedule requires the Secretary of State to consult the UK REACH Agency (the Health and Safety Executive) and other people she considers appropriate, or who are nominated by a Devolved Administration, before exercising these powers.

1618 Paragraph 6 lists the protected provisions in the REACH Regulation that cannot be amended under this Schedule (see paragraph 1 of the Schedule). These protected provisions relate to the fundamental principles of UK REACH, the role of the Devolved Administrations, transparency, and collaboration between the Agency and other bodies. The Annexes to the REACH Regulation are also excluded because the REACH Regulation itself contains the necessary powers to amend them.

1619 Schedule 20 extends, and applies, to the whole of the United Kingdom.

### Consent of the devolved administrations

1620 The REACH Regulation and the REACH Enforcement Regulations relate to a mixture of devolved and reserved matters. Paragraph 3 states that the Secretary of State can only make regulations under this Schedule with the consent of the Devolved Administrations to the extent that the function is within devolved competence.

### Requests by devolved administrations for exercise of powers under this Schedule

1621 Paragraph 4 provides for the Devolved Administrations to be able to request that the Secretary of State makes regulations.

### Consultation

1622 Paragraph 5 of the Schedule requires the Secretary of State to consult the UK REACH Agency (the Health and Safety Executive) and other people she considers appropriate, or who are nominated by a Devolved Administration, before exercising these powers.

### The protected provisions

1623 Paragraph 6 lists the protected provisions in the REACH Regulation that cannot be amended under this Schedule (see paragraph 1). These protected provisions relate to the fundamental principles of UK REACH, the role of the Devolved Administrations, transparency, and collaboration between the Agency and other bodies. The Annexes to the REACH Regulation are also excluded because the REACH Regulation itself contains the necessary powers to amend them.

1624 Schedule 20 extends, and applies, to the whole of the United Kingdom.

## Commencement

1625 Part 8 of the Bill (Miscellaneous and General Provisions) will come into force on the day this Bill is passed. Clause 128(2) sets out those provisions in the Bill which will come into force two months after the day this Bill is passed.

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

1626 Clause 128 sets out those provisions which will come into force on such day as the Secretary of State may by regulations appoint. Corresponding powers are provided for Welsh Ministers, Scottish Ministers and DAERA.

## Financial implications of the Bill

1627 Costs from the Environment Bill will include, but are not limited to:

- The establishment and running of the Office for Environmental Protection.
- Additional activities for public bodies, such as local authorities; arms-length bodies (for example, Environment Agency and Natural England); other government departments (for example, additional costs for the justice system and additional responsibilities for policymakers across government); and Defra.
- Additional resources to support the delivery of activities, such as enforcement officers and policymakers.
- Infrastructure and other assets, such as estates costs for the Office for Environmental Protection, and enhanced IT systems to deliver certain measures.

## Parliamentary approval for financial costs or for charges imposed

1628 The Bill will require a money resolution, to cover:

- expenditure by the Secretary of State, including in particular the cost of establishing and funding the Office for Environmental Protection (clause 20(1) and paragraph 11 of Schedule 1), and a power to make grants or loans to the operator of an electronic waste tracking system (clause 55(2) and 56(2), inserted section 34CA(11)); and
- increased expenditure under other Acts, arising from the costs to public authorities of functions conferred or imposed on them by virtue of the Bill (for example, local authorities' new duties in relation to separate waste collection under clauses 53 and 54).

1629 The Bill will also require a ways and means resolution, to cover:

- the provisions about producer responsibility for disposal costs, under which producers can be required to make payments in respect of the costs of disposing of products and materials (clauses 45 and 46 and Schedule 6);
- a number of provisions allowing fees and charges to be imposed in connection with the exercise of functions (for example, clause 60 extends the Environment Agency's charging powers under section 41 of the Environment Act 1995); and
- charges for biodiversity credits made by the Secretary of State under Part 4 of Schedule 7A to the Town and Country Planning Act 1990 (inserted by Schedule 15 to the Bill).

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

## Compatibility with the European Convention on Human Rights

1630 The government considers that the Environment Bill is compatible with the European Convention on Human Rights (ECHR).

1631 Accordingly, the Secretary of State for Environment, Food and Rural Affairs has made a statement under section 19(1)(a) of the Human Rights Act 1998 to this effect. The government's ECHR analysis can be found in the memorandum to the Joint Committee on Human Rights. This memorandum is available on the parliament website.

## Public Sector Equalities Statement

1632 In relation to the policy which is given effect by the Bill, the Secretary of State for Environment, Food and Rural Affairs has had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.

## Related documents

1633 The following documents are relevant to the Bill and can be read at the stated locations:

### Draft Bill and pre-legislative scrutiny

- [Draft Environment \(Governance and Principles\) Bill](#), December 2018.
- [Draft Environment \(Governance and Principles\) Bill Statement of Impacts](#), December 2018.
- [Information paper on the policy statement on Environmental Principles](#), December 2018.
- [Environment \(Principles and Governance\) Bill: Memorandum from Defra to the Delegated Powers and regulatory Reform Committee](#), 23 July 2019.
- [Draft Environment \(Principles and Governance\) Bill 2018 policy paper](#), updated 23 July 2019.

### Pre-legislative scrutiny reports

- [Environmental Audit Committee Pre-legislative scrutiny of the Draft Environment \(Principles and Governance\) Bill](#), 24 April 2019.
- [Environment, Food and Rural Affairs Committee Pre-legislative scrutiny of the Draft Environment \(Principles and Governance\) Bill](#), 30 April 2019.

### Consultations

- *Environmental Principles and Governance after EU Exit – seeking views on the development of an Environmental Principles and Governance Bill*. Duration: 10 May – 2 August 2018. No. of responses: 176,746 responses (176,006 campaign responses). Government response published: 19 December 2018. The consultation and government response can be found at the following [hyperlink](#).

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*



- *Draft Clean Air Strategy – seeking views on the draft Clean Air Strategy which outlines our ambitions relating to reducing air pollution in the round, making our air healthier to breathe, protecting nature and boosting the economy.* Duration: 22 May – 14 August 2018. No. of responses: 711 responses. Government response published: 14 January 2019. The consultation and government response can be found at the following [hyperlink](#).
- *Net Gain - seeking views on how we can improve the planning system in England to protect the environment (biodiversity net gain) and build places to live and work.* Duration: 2 December 2018 – 10 February 2019. No. of responses: 470 responses. Government response published: 23 July 2019. The consultation and government response can be found at the following [hyperlink](#).
- *Protecting and enhancing England’s trees and woodlands - the UK government’s proposals to introduce four new measures designed to increase transparency and accountability in the process of felling street trees and to strengthen the Forestry Commission’s power to tackle illegal tree felling.* Duration: 30 December 2018 – 28 February 2019. No. of responses: 4,671 responses. Government response due to be published alongside the Bill. The consultation can be found at the following [hyperlink](#).
- *Conservation covenants.* Duration: 22 February – 22 March 2019. No of responses 112 responses. Government response published: 23 July 2019. The consultation and government response can be found at the following [hyperlink](#).
- *Consultation on reforming the UK packaging producer responsibility system – seeking views on measures to reduce the amount of unnecessary and difficult to recycle packaging and increase the amount of packaging that can and is recycled, through reforms to the packaging producer responsibility regulations.* Duration: 18 February – 13 May 2019. No. of responses: 712 responses. Government response published: 23 July 2019. The consultation and government response can be found at the following [hyperlink](#).
- *Consultation on consistency in Household and business recycling collections in England.* Duration: 18 February – 13 May 2019. No. of responses: 1,758 responses. Government response published: 23 July 2019. The consultation can be found at the following [hyperlink](#).
- *Introducing a Deposit Return Scheme (DRS) in England, Wales and Northern Ireland.* Duration: 18 February – 13 May 2019. No. of responses: 1,180 responses (223,000 campaign responses). Government response published: 23 July 2019. The consultation and government response can be found at the following [hyperlink](#).
- *Improving our management of water in the environment – seeking views on proposals for better long-term planning for water resource and drainage and modernising water regulation.* Duration: 15 January– 12 March 2019. No. of responses: 298 responses. Government response published: 23 July 2019. The consultation and government response can be found at the following [hyperlink](#).

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

## **Policy paper**

- [Environment. Bill summer policy statement: July 2019](#), updated 23 July.

## Annex A - Territorial extent and application in the United Kingdom

Clause 127 sets out the territorial extent of the clauses in the Bill. The extent of a Bill is the legal jurisdiction where it forms part of the law. The extent of a Bill can be different from its application. Application refers to where it has practical effect.

Most of the Bill forms part of the law of England and Wales and applies to England. Around half of the Bill's provisions extend and apply to Wales, with a significant number of provisions having Great Britain, UK or England, Wales and Northern Ireland extent. Clauses 42, 45, 53, 55, 57, 60, 62, 66, 81 and Schedules 2 and 5 form part of the law of Northern Ireland and apply to Northern Ireland only. Clause 80 and 85 apply to Wales only.

The following provisions apply to England only, disregarding minor or consequential effects outside England, and, in the view of the UK Government, would be within the legislative competence of the National Assembly for Wales, the Scottish Parliament or the Northern Ireland Assembly for the purposes of EVEL: clauses 1 to 6 (environmental targets); clauses 7 to 14 (environmental improvement plans); clause 15 (environmental monitoring); clauses 16 to 18 (policy statement on environmental principles); clause 52 (separation of waste: England); clause 76 (water and sewerage undertakers in England: modifying appointments); clause 78 (water abstraction: no compensation for certain licence modifications); clause 84 (valuation of other land in drainage district: England); clauses 88 to 90 (biodiversity); clauses 91 to 95 (local nature recovery strategies); clauses 96 to 97 (tree felling and planting); clauses 98 to 121 (conservation covenants); Schedule 14 (Modifying water and sewerage undertakers' appointments: procedure for appeals); Schedule 15 (Biodiversity gain as condition for planning permission); Schedule 16 (Controlling the felling of trees in England); Schedule 17 (Discharge or modification of obligations under conservation covenants); Schedule 18 (Application of Part 7 to Crown land); and Schedule 19 (Consequential amendments relating to Part 7).

The following provisions apply to England and Wales only, disregarding minor or consequential effects outside England and Wales, and, in the view of the UK Government, would be within the legislative competence of the National Assembly for Wales, the Scottish Parliament or the Northern Ireland Assembly for the purposes of EVEL: clause 56 (hazardous waste: England and Wales); clause 61 (enforcement powers); clause 63 (littering enforcement); clause 64 (fixed penalty notices); clause 65 (regulation of polluting activities); clause 73 (water resources management plans, drought plans and joint proposals); clause 74 (drainage and sewerage management plans); clause 75 (authority's power to require information); clause 77 (electronic service of documents); clause 86 (valuation of agricultural land in drainage district: England and Wales); clause 87 (disclosure of Revenue and Customs information); and Schedule 11 (Enforcement powers).<sup>1</sup>

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<sup>1</sup> References in this Annex to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

Provision	Extends to England & Wales and applies to England?	Extends to England & Wales and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clauses 1-6 (environmental targets)	Yes	No	No	No	Yes	Yes	Yes	No
Clauses 7-14 (environmental improvement plans)	Yes	No	No	No	Yes	Yes	Yes	No
Clause 15 (environmental monitoring)	Yes	No	No	No	Yes	Yes	Yes	No
Clauses 16- 18 (Policy statement on environmental principles)	Yes	No	No	No	Yes	Yes	Yes	No
Clauses 19-22 (the Office for Environmental Protection)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clauses 23-25 (the OEP's scrutiny and advice functions)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clauses 26-36 (the OEP's enforcement functions)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clauses 37-38 (information)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clauses 39-41 (interpretation of Part 1)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Provision	Extends to England & Wales and applies to England?	Extends to England & Wales and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clause 42 (improving the natural environment: Northern Ireland)	No	No	No	Yes	N/A	N/A	N/A	Yes (Northern Ireland)
Clause 43 (the Office for Environmental Protection: Northern Ireland)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes (Northern Ireland)
Clause 44 (producer responsibility obligations)	Yes	Yes	Yes	No	N/A	N/A	N/A	Yes (Wales, Scotland )
Clause 45 (producer responsibility obligations: Northern Ireland)	No	No	No	Yes	N/A	N/A	N/A	Yes (Northern Ireland)
Clause 46 (producer responsibility for disposal costs)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes (Wales, Scotland and Northern Ireland)
Clauses 47-48 (resource efficiency information and requirements)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes (Wales, Scotland and Northern Ireland)
Clause 49 (deposit schemes)	Yes	Yes	No	Yes	N/A	N/A	N/A	Yes (Wales and Northern Ireland)

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Provision	Extends to England & Wales and applies to England?	Extends to England & Wales and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clause 50 (charges for single use plastic items)	Yes	Yes	No	Yes	N/A	N/A	N/A	Yes (Wales and Northern Ireland)
Clause 51 (charges for carrier bags)	Yes	No	No	Yes	N/A	N/A	N/A	Yes (Northern Ireland)
Clause 52 (separation of waste: England)	Yes	No	No	No	Yes	Yes	Yes	No
Clause 53 (separation of waste: Northern Ireland)	No	No	No	Yes	N/A	N/A	N/A	Yes (Northern Ireland)
Clause 54 (electronic waste tracking: Great Britain)	Yes	Yes	Yes	No	N/A	N/A	N/A	Yes (Wales, Scotland)
Clause 55 (electronic waste tracking: Northern Ireland)	No	No	No	Yes	N/A	N/A	N/A	Yes (Northern Ireland)
Clause 56 (hazardous waste: England and Wales)	Yes	Yes	No	No	Yes	Yes	Yes	Yes (Wales)
Clause 57 (hazardous waste: Northern Ireland)	No	No	No	Yes	N/A	N/A	N/A	Yes (Northern Ireland)
Clause 58 (transfrontier shipments of waste)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Provision	Extends to England & Wales and applies to England?	Extends to England & Wales and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clause 59 (powers to make charging schemes)	Yes	Yes	Yes	No	N/A	N/A	N/A	Yes (Wales, Scotland)
Clause 60 (waste charging: Northern Ireland)	No	No	No	Yes	N/A	N/A	N/A	Yes (Northern Ireland)
Clause 61 (enforcement powers)	Yes	Yes	No	No	Yes	Yes	Yes	Yes (Wales)
Clause 62 (enforcement powers: Northern Ireland)	No	No	No	Yes	N/A	N/A	N/A	Yes (Northern Ireland)
Clause 63 (littering enforcement)	Yes	Yes	No	No	Yes	Yes	Yes	Yes (Wales)
Clause 64 (fixed penalty notices)	Yes	Yes	No	No	Yes	Yes	Yes	Yes (Wales)
Clause 65 (regulation of polluting activities)	Yes	Yes	No	No	Yes	Yes	Yes	Yes (Wales)
Clause 66 (waste regulation: amendment of Northern Ireland Order)	No	No	No	Yes	N/A	N/A	N/A	Yes (Northern Ireland)
Clause 67 (local air quality management framework)	Yes	In part	In part	No	N/A	N/A	N/A	Yes (Wales and Scotland)
Clause 68 (smoke control areas:	Yes	In part	No	No	N/A	N/A	N/A	Yes (Wales)

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Provision	Extends to England & Wales and applies to England?	Extends to England & Wales and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
amendments to the Clean Air Act 1993)								
Clauses 69-72 (environmental recall of motor vehicles etc)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clause 73 (water resources management plans, drought plans and joint proposals)	Yes	Yes	No	No	Yes	Yes	Yes	Yes (Wales)
Clause 74 (drainage and sewerage management plans)	Yes	Yes	No	No	Yes	Yes	Yes	Yes (Wales)
Clause 75 (authority's power to require information)	Yes	Yes	No	No	Yes	Yes	Yes	Yes (Wales)
Clause 76 (water and sewerage undertakers in England: modifying appointments)	Yes	No	No	No	Yes	Yes	Yes	No
Clause 77 (electronic service of documents)	Yes	Yes	No	No	Yes	Yes	Yes	Yes (Wales)
Clause 78 (water abstraction: no compensation for	Yes	No	No	No	Yes	Yes	Yes	No

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*



Provision	Extends to England & Wales and applies to England?	Extends to England & Wales and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
certain licence conditions)								
Clause 79 (water quality: powers of Secretary of State)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes (Wales, Northern Ireland, Scotland)
Clause 80 (water quality: powers of Welsh Ministers)	No	Yes	No	No	N/A	N/A	N/A	Yes (Wales)
Clause 81 (water quality: powers of Northern Ireland Department)	No	No	No	Yes	N/A	N/A	N/A	Yes (Northern Ireland)
Clause 82 (Solway Tweed river basin district: power to transfer functions)	Yes	No	Yes	No	N/A	N/A	N/A	Yes (Scotland)
Clause 83 (water quality: interpretation)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes (Wales, Northern Ireland, Scotland)
Clause 84 (valuation of other land in drainage district: England)	Yes	No	No	No	Yes	Yes	Yes	No
Clause 85 (valuation of other land in drainage district: Wales)	No	Yes	No	No	N/A	N/A	N/A	Yes (Wales)
Clause 86 (valuation of agricultural land	Yes	Yes	No	No	Yes	Yes	Yes	Yes (Wales)

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Provision	Extends to England & Wales and applies to England?	Extends to England & Wales and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
in drainage district: England and Wales)								
Clause 87 (disclosure of Revenue and Customs information)	Yes	Yes	No	No	No	No	No	Yes (Wales)
Clause 88 (biodiversity gain as condition of planning permission)	Yes	No	No	No	Yes	Yes	Yes	No
Clauses 89-90 (general duty to conserve and enhance biodiversity and biodiversity reports)	Yes	No	No	No	Yes	Yes	Yes	No
Clauses 91-95 (local nature recovery strategies)	Yes	No	No	No	Yes	Yes	Yes	No
Clauses 96-97 (tree felling and planting)	Yes	No	No	No	Yes	Yes	Yes	No
Clauses 98-121 (conservation covenants)	Yes	No	No	No	Yes	Yes	Yes	No
Clause 122 (amendment of REACH)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes (Wales, Scotland and Northern

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Provision	Extends to England & Wales and applies to England?	Extends to England & Wales and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
legislation)								Ireland)
Clause 123 (consequential provision)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clause 124 (regulations)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clause 125 (Crown application)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clause 126 (financial provisions)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clause 127 (extent)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clause 128 (commencement)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clause 129 (transitory or saving provision)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Clause 130 (short title)	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Schedule 1 – The Office for Environmental Protection	Yes	Yes	Yes	Yes	N/A	N/A	N/A	No
Schedule 2 – Improving the natural	No	No	No	Yes	Yes	Yes	Yes	Yes (Northern

*These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3)*

Provision	Extends to England & Wales and applies to England?	Extends to England & Wales and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
environment: Northern Ireland								Ireland)
Schedule 3 – The Office for Environmental Protection: Northern Ireland	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes (Northern Ireland)
Schedule 4 – Producer responsibility obligations	Yes	Yes	Yes	No	N/A	N/A	N/A	Yes (Wales, Scotland)
Schedule 5 – Producer responsibility obligations: Northern Ireland	No	No	No	Yes	N/A	N/A	N/A	Yes (Northern Ireland)
Schedule 6 – Producer responsibility for disposal costs	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes (Wales, Scotland and Northern Ireland)
Schedule 7 – Resource efficiency information	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes (Wales, Scotland and Northern Ireland)
Schedule 8 – Resource efficiency requirements	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes (Wales, Scotland and Northern Ireland)
Schedule 9 – Deposit schemes	Yes	Yes	No	Yes	N/A	N/A	N/A	Yes (Wales, Northern

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Provision	Extends to England & Wales and applies to England?	Extends to England & Wales and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
								Ireland)
Schedule 10 – Charges for single use plastic items	Yes	Yes	No	Yes	N/A	N/A	N/A	Yes (Wales, Northern Ireland)
Schedule 11 – Enforcement powers	Yes	Yes	No	No	Yes	Yes	Yes	Yes (Wales)
Schedule 12 – Local air quality management framework	Yes	In part	In part	No	N/A	N/A	N/A	Yes (Wales and Scotland)
Schedule 13 – Smoke control in England and Wales	Yes	In part	No	No	N/A	N/A	N/A	Yes (Wales)
Schedule 14 – Modifying water and sewerage undertakers' appointments: procedure for appeals	Yes	No	No	No	Yes	Yes	Yes	No
Schedule 15 – Biodiversity gain as condition for planning permission	Yes	No	No	No	Yes	Yes	Yes	No
Schedule 16 – Controlling the felling of trees in England	Yes	No	No	No	Yes	Yes	Yes	No

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Provision	Extends to England & Wales and applies to England?	Extends to England & Wales and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Schedule 17 – Discharge or modification of obligations under conservation covenants	Yes	No	No	No	Yes	Yes	Yes	No
Schedule 18 – Application of Part 7 to Crown land	Yes	No	No	No	Yes	Yes	Yes	No
Schedule 19 – Consequential amendments relating to Part 7	Yes	No	No	No	Yes	Yes	Yes	No
Schedule 20 – Amendment of REACH legislation	Yes	Yes	Yes	Yes	N/A	N/A	N/A	Yes (Wales, Scotland and Northern Ireland)

## Minor or consequential effects<sup>2</sup>

The following provisions that apply to England have effects outside England, all of which are, in the view of the Government of the United Kingdom, minor or consequential:

### Minor or consequential effects outside England

<sup>2</sup> References in this Annex to an effect of a provision being minor or consequential are to its being minor or consequential for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

Executive and Legislative competence is devolved to Welsh Government on a wholly or mainly in Wales basis. Some water companies operate cross-English/Welsh border, so there will be some minor effects of the Ofwat licence condition modification powers in Wales (clause 76 (water undertakers and sewerage undertakers in England: modifying appointments) and Schedule 14) to the extent that they will affect how Ofwat regulates a water or sewerage undertaker wholly or mainly in England, but which may have some customers in Wales. When provisions in the Wales Act 2017 are implemented, executive and legislative competence will change to a “down the border” basis.

Executive and legislative competence in relation to water resources is devolved to the Welsh and Scottish Government. Subsection (2) of clause 78 (water abstraction: no compensation for certain licence modifications) amends section 27 of the Water Act 2003, providing that this section will not apply to licences varied or revoked on or after 1 January 2028 unless the licence applies in relation to Wales. This is because, after 1 January 2028, new section 61ZA of the Water Resources Act 1991 will effectively supersede section 27 of the Water Act 2003 in England. Section 27 of the Water Act 2003 extends and applies to England and Wales and so the amendment has the same extent and application. Subsection (3) of clause 81 amends section Schedule 8 to the Water Act 2014 in relation to the powers under which the relevant Minister may make secondary legislation to regulate the use of water resources. The amendment to Schedule 8 will permit any future regulations relating to water resources to make provision similar to the existing legislation regulating water resources as that legislation has effect when the regulations are made, where it currently provides that regulations can make provision similar to the legislation as it had effect on 14 July 2014. The amendment is intended to ensure that future regulations can make provision similar to new sections 61ZA and 61ZB. Schedule 8 extends and applies to England and Wales and parts of Scotland for specific purposes.<sup>3</sup> The amendment to Schedule 8 has the same extent and application. As there are no substantive changes being made to the water resources legislation in Wales or Scotland, this amendment has only minor effect in these nations.

Clause 89 (general duty to conserve and enhance biodiversity) amends section 40 of the Natural Environment and Rural Communities Act 2006. Section 40 (following amendments made by the Environment (Wales) Act 2016) currently extends to England and Wales, and applies to all public bodies carrying out functions in England, and also to HMRC. The amendments to section 40 have the same application as the provision currently has, and therefore apply primarily to England but also to HMRC carrying out functions in England or Wales.

### Minor or Consequential Effects outside England and Wales

Clause 76 (water undertakers and sewerage undertakers in England: modifying conditions of appointment) and Schedule 14 (Modifying water and sewerage undertakers’ appointments: procedure for appeals) extend to England and Wales, and largely apply to England. However, the definition of “specialist utility functions” in paragraph 35(3) of Schedule 4 to the Enterprise and Regulatory Reform Act 2013 (CMA Panels) is also being amended. This definition extends UK-wide, so the amendment

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<sup>3</sup> Schedule 8 to the Water Act 2014 extends to Scotland only so far as required for the purposes of regulations made pursuant to section 61(11)(b) of that Act. Such regulations may apply to so much of the River Esk, with its banks and tributary streams up to their sources, as is situated in Scotland.

will have the same extent.

## Subject matter and legislative competence of devolved legislatures

The subject matter of clauses 1 to 6 (environmental targets) and 8 to 15 (environmental improvement plans) is within the legislative competence of the Northern Ireland Assembly, the Scottish Parliament and the National Assembly for Wales. The primary purpose of the clauses relates to the environment, which is within the legislative competence of each of the three devolved legislatures, being not within Schedule 5 to the Scotland Act 1998 and not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act); not within Schedules 2 or 3 to the Northern Ireland Act 1998 and not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act); not a reserved matter listed within Schedule 7A to the Government of Wales Act 2006 and not within an exception listed therein, and not otherwise outside the legislative competence of the National Assembly for Wales (see section 108A of that Act). In Wales, the Wellbeing of Future Generations (Wales) Act 2015 imposes duties in relation to “sustainable development” and “well-being goals” which have the effect of imposing duties on Welsh public bodies with respect to the environment, together with reporting and monitoring provisions. Section 6 of the Environment (Wales) Act 2016, section 1 of the Nature Conservation (Scotland) Act 2004, and section 1 of the Wildlife and Natural Environment Act (Northern Ireland) 2011 all impose duties on public bodies in respect of the improvement of the environment and biodiversity.

The subject matter of clause 73 (water resources management plans, drought plans and joint proposals); clause 74 (drainage and sewerage management plans); clause 75 (authority’s power to require information); clause 76 (water and sewerage undertakers in England: modifying appointments) and Schedule 14 (Modifying water and sewerage undertakers’ appointments: procedure for appeals); clause 87 (electronic service of documents); and clause 81 (water abstraction: no compensation for certain licence modifications) relate to the water supply and sewerage, abstraction and impounding of water, water resources management, water quality, and the water industry including the regulation of water companies. As subject areas, these matters are within the legislative competence of the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly. In relation to Wales, these matters are not in the list of reserved matters listed within Schedule 7A to the Government of Wales Act 2006 and not within an exception listed therein, and not otherwise outside the legislative competence of the National Assembly for Wales (see section 108A of that Act). The subject matters are not within Schedule 5 to the Scotland Act 1998 and are not otherwise outside the legislative competence of the Scottish Parliament (see section 29 of that Act); the primary purpose of the subject matter of the instrument is not within Schedules 2 or 3 to the Northern Ireland Act 1998 and is not otherwise outside the legislative competence of the Northern Ireland Assembly (see section 6 of that Act).

Clauses 84 to 86 (land drainage) relate primarily to the subject matters of flooding and land drainage. These matters are within the legislative competence of the Northern Ireland Assembly, the Scottish Parliament and the National Assembly for Wales, being matters which are: (i) not excepted or reserved matters within Schedules 2 or 3 of the Northern Ireland Act 1998, (ii) not reserved matters within Schedule 5 of the Scotland Act 1998, (iii) not reserved matters within Schedule 7A to the Government of Wales Act 2006, and (iv) not otherwise outside the legislative competence of any of those three devolved legislatures.

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Clause 71 (smoke control areas; amendments to the Clean Air Act 1993) and Schedule 13 (Smoke control in England and Wales) relate to air quality. Air quality is within the legislative competence of the Northern Ireland Assembly, the Scottish Parliament and the National Assembly for Wales, being a matter which is: (i) not an excepted or reserved matter within Schedules 2 or 3 of the Northern Ireland Act 1998, (ii) not a reserved matter within Schedule 5 of the Scotland Act 1998, (iii) not a reserved matter within Schedule 7A to the Government of Wales Act 2006, and (iv) not otherwise outside the legislative competence of any of those three devolved legislatures.

Clause 88 (biodiversity gain as condition of planning permission) (and Schedule 15) relates to nature conservation and town and country planning, while clauses 91 to 95 (local nature recovery strategies), clauses 96 and 97 (tree felling and planting) and Schedule 16 (Controlling the felling of trees in England) relate to nature conservation. These are matters within the legislative competence of the Northern Ireland Assembly, the Scottish Parliament and the National Assembly for Wales, being matters which are: (i) not excepted or reserved matters within Schedules 2 or 3 of the Northern Ireland Act 1998, (ii) not reserved matters within Schedule 5 of the Scotland Act 1998, (iii) not reserved matters within Schedule 7A to the Government of Wales Act 2006, and (iv) not otherwise outside the legislative competence of any of those three devolved legislatures.

Clause 53 (separation of waste: England); clause 57 (hazardous waste: England and Wales); clause 61 (enforcement powers) and Schedule 11; clause 63 (littering enforcement); clause 64 (fixed penalty notices); and clause 65 (regulation of polluting activities) relate to waste. These are matters within the legislative competence of the Northern Ireland Assembly, the Scottish Parliament and the National Assembly for Wales, being matters which are: (i) not excepted or reserved matters within Schedules 2 or 3 of the Northern Ireland Act 1998, (ii) not reserved matters within Schedule 5 of the Scotland Act 1998, (iii) not reserved matters within Schedule 7A to the Government of Wales Act 2006, and (iv) not otherwise outside the legislative competence of any of those three devolved legislatures.

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# ENVIRONMENT BILL

## EXPLANATORY NOTES

These Explanatory Notes relate to the Environment Bill as introduced in the House of Commons on 15 October 2019 (Bill 3).

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