

# Brexit, planning and the environment: key questions

The noise of Brexit is in danger of drowning out its immediate practical implications for the planning system, writes Simon Ricketts

Secretary of state Michael Gove committed in the Department for Environment, Food and Rural Affairs' 25 Year Environment Plan (published on 11 January 2018) to consulting "early in 2018" on "establishing a new, world-leading, independent, statutory body to give the environment a voice, championing and upholding environmental standards as we leave the European Union."

The European Union (Withdrawal) Act 2018 was enacted on 26 June 2018. Due to amendments introduced in the House of Lords, section 16 commits parliament to secure that, once we leave the EU and we no longer have the monitoring and enforcement functions currently being carried out by the European Commission and European Court of Justice (CJEU), "environmental principles" are maintained (see box) and a new independent body is created to enforce those principles.

Section 16 provides that the draft Environmental Principles and Governance Bill to secure all of this must be published by 26 December 2018.

It will not be easy.

## Key challenges

What approach will be taken, for example, to air quality standards? Will the opportunity be taken to adopt an approach that sidesteps in any way the country's current breaches of the Air Quality Directive?

Nor will it be straightforward to draft the principles in a way that enables divergence with EU case law. Recent rulings in relation to habitats conservation have led to headaches for scheme promoters and local authorities alike (see [www.egi.co.uk/legal/new-rulings-on-habitat-regulation-assessments](http://www.egi.co.uk/legal/new-rulings-on-habitat-regulation-assessments)). But inevitably any moves away

## Environmental principles

Section 16 of the European Union (Withdrawal) Act 2018 provides that the principles to be maintained and enforced must include:

- (a) The precautionary principle so far as relating to the environment
- (b) The principle of preventative action to avert environmental damage
- (c) The principle that environmental damage should as a priority be rectified at source
- (d) The 'polluter pays' principle
- (e) The principle of sustainable development
- (f) The principle that environmental protection requirements must be integrated into the definition and implementation of policies and activities
- (g) Public access to environmental information
- (h) Public participation in environmental decision-making
- (i) Access to justice in relation to environmental matters

from this approach will be seen as a weakening of current environmental protections.

Further complications arise given that England and the devolved administrations of Scotland, Wales and Northern Ireland will not necessarily take a common approach – and the interregnum of government in Northern Ireland also creates its own specific problem.

## Defra's proposals

In England, Defra started a consultation process on 10 May 2018, which closed on 2 August 2018. The consultation paper set out, in paragraph 26, the following basic position:

"Where environmental principles are contained in specific pieces of EU legislation, these will be maintained as part of our domestic legal framework through the retention of EU law under the EU (Withdrawal) Bill. Any question as to the interpretation of retained EU law will be determined by UK courts in accordance with relevant pre-exit CJEU case law and general principles, subject to the other exceptions and restrictions within the Bill. For example, CJEU case

law on chemicals, waste and habitats includes judgments on the application of the precautionary principle to those areas. This will therefore be preserved by the Bill."

The consultation paper invited views as to whether the environmental principles (without giving any detail as to what these principles will look like) should be articulated in the Bill itself or should be left for a subsequent statutory policy statement.

The paper proposes that the proposed independent body should:

- Act as a strong, objective, impartial and well-evidenced voice for environmental protection and enhancement.
- Be independent of government and capable of holding it to account.
- Be established on a durable, statutory basis.
- Have a clear remit, avoiding overlap with other bodies.
- Have the powers, functions and resources required to deliver that remit.
- Operate in a clear, proportionate and transparent way in the public interest, recognising that it is necessary to balance environmental

protection against other priorities.

The consultation paper refers to the relevance of the body to the operation of the planning system. In summary: "The body would have no role in individual planning policy decisions. The focus of the new body would therefore be on ensuring the correct application of relevant environmental law within the planning system."

It adds that, in relation to wider planning policy, the body could have two roles. First, it could be a key consultee, when certain planning policy is being considered, for example when the National Planning Policy



planning outcomes in other ways, for instance through expressing views on types of development?

■ To what extent will there be coordination and consistency as between England and the devolved nations?

■ What about the gap between the cessation of the European Commission and CJEU's jurisdiction and the establishment of new regimes within England, Wales, Scotland and Northern Ireland? 26 December 2018 is only the deadline for the draft Bill. How long before the Bill itself is introduced, enacted and brought into force, with this new body operational? If we have a "deal" and a transition period, time will be tight but there may not be a gap. If there is "no deal", there will be a period before the promised structure is in place; indeed there will be no environmental principles in place, nor an independent body to ensure compliance.

## When will we have answers?

The Commons Environmental Audit Committee has been conducting an inquiry seeking answers to a number of questions along these lines. It had hoped to conclude the inquiry by August but we still await its report. I hope its conclusions will be available before Defra publishes its draft Bill, although I suspect we have a long way to go before an actual set of principles starts to emerge, alongside a clearer idea as to the nature of the authority that is to hold the ring on all of this.

In the meantime of course, existing legislation will need to be expunged, via statutory instruments, of any references to EU law, to be replaced by references to the relevant EU legislation frozen at time of exit or relevant domestic legislation, but that will not be where the substantive effects are likely to be felt. Instead, watch out for the draft Bill and surrounding announcements – and let's be alert for any unintended implications for our town and country planning system.

Simon Ricketts is a partner at Town Legal LLP

Framework (NPPF) is updated. Secondly, it could provide advice on the implementation of the environmental aspects of existing planning policy and suggest future potential changes. It says: "The government would not be bound to agree to such suggestions, but should consider them alongside wider policy aims."

## What's the problem?

I have some questions: ■ How detailed will the environmental principles be? Will the principles contain targets in the manner of Defra's 25 Year Environment Plan or just a generic summary of the principles currently underlying

EU environmental legislation – and, if so, how useful will they be?

■ To the extent that the principles overlap with those in, for instance, the NPPF, will they be relevant to decision making in relation to applications, appeals and plan-making?

■ Will parliament relegate the principles to a statutory policy statement? What and when will be the consultation process? What parliamentary voting process will be required? And what will be the mechanism for subsequent amendments?

■ Surely it is for the courts to ensure "the correct application of relevant environmental law within the planning system"?

Non-legally binding views from this new authority (beyond views already formally expressed by ministers or government bodies such as the Environment Agency (EA), Natural England or Historic England) may just add confusion.

■ How can a body be created which does not overlap with existing bodies such as the EA, has a "baked in" constitutional status, and is not susceptible to lobbying and repeated judicial reviews?

■ While the proposed body is not intended to be embroiled in individual planning decisions, what safeguards will there be as to its potential influence on

MOOD BOARD/REXUS/ISTOCK