

Environmental Plans, Principles and Governance: Public Discussion Document

Response from Nature Matters NI, February 2021



Introduction:

Nature Matters NI (NMNI) is a campaign for a nature friendly Brexit. Led by the NIEL Brexit Coalition, we are working, on behalf of approximately 190,000 members across over 100 organisations, for more sustainable land use and fisheries, funding for nature conservation, and better environmental protection for Northern Ireland (NI).

The State of Nature reports show how NI has lost more wildlife than other parts of the UK: with 11% of species are at risk of extinction, we have the lowest woodland cover in Europe and bee species have declined by half since 1980.¹ It isn't just wildlife that is suffering. A degraded environment also has an impact on our citizens' physical and mental health, with air pollution responsible for over 500 deaths a year² and rising sea levels leaving coastal areas at risk of flooding and erosion³. Nature cannot afford to wait any longer, NI needs robust legislation, policy, and governance mechanisms to protect, enhance, and restore our unique environment and wildlife.

The Environment Bill is a key piece of legislation that will lay out a framework for post-Brexit requirements and new measures for the enforcement of environmental law, and we welcome DAERA's efforts to include NI. This Bill provides NI an opportunity to set long-term ambition for environmental improvement, enshrine environmental principles, and secure a strong governance system that will help ensure environmental laws are properly implemented and complied with by government and public bodies. However, as currently drafted⁴, the Bill does not fulfil its potential. We remain concerned about: weakened legal effect of environmental principles; lack of mechanisms to ensure that environmental improvement plans (EIPs) are sufficiently ambitious and deliver demonstrable improvement to the environment (e.g. target setting framework); and matters of independence, funding, and lack of effective enforcement measures for the Office for Environmental Protection (OEP). We hope that the latest parliamentary delay is used to improve the Bill substantially in a number of ways.

NMNI welcomes the opportunity to respond to the '*Environmental Plans, Principles, and Governance for Northern Ireland: Public Discussion Document*' and outline on what we see as the main priorities that future environmental protection and governance should seek to achieve.

Furthermore, as is recognised on page 9 of the discussion document, matters of resource and waste management and water resources included within the Environment Bill extend to NI but are not subject to stakeholder engagement. Specifically, the Bill includes measures⁵ that could seriously undermine the water environment. These are of particular concern to NMNI given the departments recent Water Framework Directive report on lake quality which stated that in 2020, only one of the 21 lake water bodies in NI was classified as 'good' status, compared to five lakes at 'good' status in 2015 and 2018.⁶ The deleterious impacts of deregulation are well known⁷ and concerns regarding the capacity for future deregulation with regards to those provisions that are not subject to consideration here have also been highlighted by the

¹ State of Nature: A summary for NI (2019). Available at: <https://bit.ly/3u9r8Qo>

² Ricardo Energy and Environment. Report on Residential Solid Fuel and Air Pollution Study. Available at: <https://bit.ly/3ub6Fec>

³ Surging Seas Risk Zone Map: <https://bit.ly/3auDrPm>

⁴ Environment Bill as amended at House of Commons Committee stage.

⁵ Clause 85, Environment Bill as amended at House of Commons Committee stage.

⁶ NI WFD Lake Quality Update (2020). Available at: <https://bit.ly/3dqci28>

⁷ Unchecked UK Our better nature: why strong environmental protections matter (2020). Available at: <https://bit.ly/3dppbHNX>

eNGO sector⁸. We urge the department to engage with stakeholders on these matters and consider a commitment not to de-regulate any of the key environmental legal protections we currently have.

We support the responses made by our partner organisations which includes, amongst others, RSPB NI, Ulster Wildlife, National Trust, and NI Environment Link.

Summary:

- **Continued delays to the Environment Bill threaten environmental governance in NI:** we understand the UK Government's rationale for the latest delay – namely concern that Parliament will run out of time to complete discussions on the Bill before the end of this parliamentary session. However, in the past year the UK Government has chosen to move forward with a range of other legislation, which is indicative of the government's political priorities. DAERA should use this latest delay to work with Defra and stakeholders to strengthen the Bill.
- **Environmental principles are fundamental for interpretation and application of environmental law, but as described they are seriously curtailed in their status and application:** the principles' binding nature in EU law reaches deep into the routine administration of environmental law by all public authorities, including in individual administrative decisions⁹. The Bill provisions therefore constitute a significant weakening of their legal status and effect as first they are reduced to mere matters of policy consideration. Second, there is no duty on government ministers -notably not public authorities more broadly- to apply the principles, rather they only have "due regard" to an, as yet, unpublished policy statement. Third there are a number of exceptions to their application leading to the relegation of these vitally important legal principles to little more than creatures of some policies. This concern shared with experts⁸ and across the eNGO sector¹⁰.
- **The process for drafting, reviewing and approving the policy statement lacks sufficient Assembly scrutiny, and stakeholder engagement:** NMNI supports the requirement for DAERA to publish a statement of policy relating to the application and interpretation of environmental principles. It is important that this is shaped and informed by expert advice, in a consultative and transparent manner, and should also be scrutinised and approved by the NI Assembly. The lack of progression on the policy statement is a serious concern. The consultation should be fast tracked, with cross-Executive engagement and broader stakeholder engagement, led by DAERA, to completed within three months of receiving Assembly approval.
- **There are a number of principles that are noticeably absent, and warrant the consideration of additional legislation in NI:** these include avoiding transboundary harm, international cooperation and collaboration, net environmental gain, non-regression, and other principles such as transparency, accountability, efficiency, effectiveness and equality, role of science, and sustainable development.¹¹ In addition despite the Withdrawal Act 2018 requiring proposals to be brought forward for the "Aarhus Rights"¹² of public access to environmental information, public participation in environmental decision-making, access to justice in relation to environmental matters no such proposals have been forthcoming.
- **DAERA must provide clarity on the matter of environmental principles with regard to the NI Protocol:** we call on the DAERA Minister to engage with stakeholders and publish a statement regarding the continued application of EU principles necessitated by the continued implementation and dynamic alignment with the environmental legislation in Annex 2.

⁸ Briefings by Greener UK on: water clauses (Available at: <https://bit.ly/2OPJ42p>); and resource and waste clauses (Available at: <https://bit.ly/3awJCCl>).

⁹ Lee, Maria and Scotford, Eloise A.K. (2019) Environmental Principles After Brexit: The Draft Environment (Principles and Governance) Bill. Available at: <https://ssrn.com/abstract=3322341>

¹⁰ Briefing by Greener UK on principles: <https://bit.ly/2Zvcs02>

¹¹ Brennan, C., Dobbs, M., Gravey, V., & Uí Bhroin, U. (2018) Policy Paper: The Future of Environmental Governance in Northern Ireland. Available at: <https://bit.ly/2NhISZk>

¹² The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus 1998.

- **Environmental Improvement Plans (EIPs) must be underpinned by statutory targets:** the requirement to produce EIPs for significantly improving the natural environment, and for executive wide implementation of these plans is welcome. The lack of binding interim and long-term targets to underpin and guide EIPs in NI is, however, of great concern. Without these, government strategies such as the forthcoming Environment Strategy (the first EIP) will continue to fail to deliver demonstrable benefit to the natural environment. Binding targets are needed to guide and underpin EIPs for several critical features of the environment including air, land, water, marine, biodiversity, and waste and natural resources. There must be a clear link between EIPs and targets so as they can serve as credible delivery plans for environmental improvement.
- **The Green Growth strategy must seek to achieve environmental improvement:** recovery from the Coronavirus pandemic and transformation of society to net-zero must seek to address the joint nature and climate crisis. The landmark Dasgupta report shows that the most expensive thing we can do is return to ‘business-as-usual’.¹³ Rather than seek to achieve Green Growth - a concept heavily reliant on economic valuation and assumptions of growth – NMNI supports RSPB NI’s calls for a Green Recovery¹⁴ to boost our short-term economic recovery (through job creation), restore and maintain our natural environment both on land and at sea and help tackle climate change, whilst creating the longer-term conditions for greater prosperity and well-being in NI.
- **EIPs should provide a framework for decision-making and strategy development across government and public authorities:** in addition to being underpinned by binding interim and long-term targets, EIPs should be established as an overarching strategy from which other strategies are developed so as to ensure alignment aimed at improving the environment. It follows then that the Green Growth Strategy should provide a delivery framework for transformative climate action in a manner that tackles the joint climate and nature crisis.
- **NMNI strongly supports the implementation of the Office for Environmental Protection (OEP) in NI:** extensive regulatory dysfunction, and unacceptable levels of disregard and non-compliance of environmental law have resulted in substantial degradation of NI’s unique natural environment. With the UK’s exit from the EU, environmental law and governance in NI is set to become even weaker. The loss of advice, oversight and enforcement of the European Commission and the Court of Justice of the European Union (CJEU) - with some exceptions established within the NI Protocol– is of particular concern. We commend the work of DAERA officials in securing NI’s inclusion in the OEP during the absence of a functioning NI Executive and welcome the NI Assembly’s support of these provisions following the granting of legislative consent on 30th June 2020.
- **In addition to the OEP, NI urgently requires an independent Environmental Protection Agency (EPA):** to ensure effective environmental governance, and given their distinct but complementary remits, functions and enforcement powers, NI requires both the OEP, and an independent EPA. An independent EPA should be a regulator, an advisor and have clear conservation and enforcement roles. Restoration notices, financial penalties (including civil sanctions), and the pursuit of criminal prosecution against individuals and organisations should be among the enforcement powers of an independent EPA for Northern Ireland. DAERA must fulfil the commitment made in the New Decade New Approach Deal (pg.44) and reasserted by the Assembly¹⁵. Moreover, an independent EPA is required to ensure that NI fully complies with the NI Protocol’s EU environmental legislative requirements for a competent authority.¹⁶
- **For the OEP to operate effectively as an informed body, they must engage with a range of public bodies and stakeholders:** when functioning within NI the OEP should engage with a range of executive and advisory non-departmental public bodies. Collaboration should aim to raise awareness of the new

¹³ Dasgupta, P. (2021), The Economics of Biodiversity: The Dasgupta Review. (London: HM Treasury). [Available](https://bit.ly/3s4Za6v) at: <https://bit.ly/3s4Za6v>

¹⁴ RSPB NI: 5-Point Green Recovery Plan. Available at: <https://bit.ly/3do5fHd>

¹⁵ NI Assembly declares a Climate Emergency, 3rd February 2020.

¹⁶ See for example Article 9 and 15(2) of Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species; or Articles 7, 8, 10 and 13(3) of Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

watchdog's role, remit and function, and gather information: a robust scientific and technical basis against which informed decisions can be made especially on the unique constitutional and geographical context of NI including the NI Protocol.

- **NMNI welcomes the inclusion of NI in the Interim Environmental Governance Secretariat (IEGS):** however, since IEGS will not have investigative or enforcement role, NMNI calls on the DAERA Minister to commit to, and realise the need for, an expedited commencement process for the OEP as currently there are three concerns for NI:
 - First, existing regulatory mechanisms that will continue to operate through which to raise concerns are insufficient.
 - Second, it is not clear what contingency planning DAERA has undertaken to account for the NI Assembly's additional approval process. The latest delays to the Bill create uncertainty regarding the establishment of the OEP and such issues are compounded in NI. We would question what consideration has been given to the challenges arising from the likely time-delay between Royal Assent, the vesting date for the OEP for England¹⁷, and approval from the NI Assembly?
 - Third, what role would a shadow OEP have in NI? Progress has been made through the appointment of Dame Glenys Stacey as the OEP's Chair Designate and Natalie Prosser as interim CEO, however, a gulf remains between the limited scope of the IEGS and a fully-fledged OEP. This gap could be bridged by setting up the OEP in shadow form while the Bill is still passing through parliament. This would follow in the footsteps of esteemed regulators such as the Committee on Climate Change and the Office for Budget Responsibility, which were both set up in shadow form to enable them to perform urgent oversight ahead of passing their founding legislation. NMNI strongly supports the inclusion of NI in any such shadow OEP.
- **Representation on the board of the OEP must provide for sufficient expertise of NI's unique constitutional and biogeographical context:** the suitability of NI representation on the Board of the OEP is dependent on the appointment process, and qualification and expertise of the member.
 - **The appointment process lacks involvement and oversight from the NI Assembly:** Assembly involvement in the appointment of people to roles that require greater independence than normal non-departmental public bodies provides a public opportunity for scrutiny and airing of potential conflicts, issues and capabilities. It is also a check on ministerial power over the individuals that will be providing oversight of government activity. The restricted process established within the Bill also ignores the fact that the OEP will effectively be replacing the supra-national oversight role currently provided at the EU level and is therefore fully deserving of a more independent and bespoke appointments process. This need for additional scrutiny – parliamentary or assembly- has been supported by other stakeholders including the Institute for Government¹⁸, and Brexit and the Environment¹⁹.
 - **Qualification of the member(s) requires additional consideration:** Schedule 3 requires that the one NI representative is to have experience of environmental law, science, or regulation in NI. It is our view that these provisions will not sufficiently ensure that the OEP will have sufficient strategic expertise of matters of environmental law within NI if limited to only one member. We do not feel however that it is right that we specify a different number, rather we seek to emphasise the need for greater consideration be given to. NI's unique socio-economic, biogeographical and legislative context. Specifically, NMNI notes that the relevant provisions (Schedule 3) do not reflect the additional complexity of the NI Protocol. This may be explained by the fact that the wording of Schedule 3 pre-dates agreement of the NI Protocol and remains unchanged. NMNI call on DAERA to ensure that the Bill's schedule is strengthened to ensure that the OEP Board includes the necessary expertise to enable it to undertake strategic oversight of NI's unique constitutional and legislative framework.

¹⁷ Secretary of State George Eustice response to Q9, intending the OEP to be established by July 2020 . Available at: <https://bit.ly/3qwEcwY>

¹⁸ EAC Committee. Scrutiny of Draft Environmental (Principles and Governance) Bill. Report paragraphs 71, 84 and 85. Available at: <https://bit.ly/3psVlpX>

¹⁹ Brexit and the Environment. Evidence to AEAR Committee on the UK Environment Bill. Paragraph 37. Available at: <https://bit.ly/3k0Ju1c>

- **Independent and sufficient funding will be central to enabling the OEP to function effectively:** whilst the UK government has agreed to provide the OEP with a five-year indicative budget, formally ring-fenced by HM Treasury within any given spending review-period²⁰, there remains no formal or legal obligation to this commitment meaning that future governments could choose not to renew this for the OEP. The source of the OEP's funding will inevitably affect the work it pursues. It is not clear how the resourcing to allow the OEP to function effectively in NI will be provided. Multi-annual funding from an independent source will help to preserve the OEP's independence, enabling it to set its own strategic direction.
- **Governance mechanisms struggle to be effective when underfunded:** the sustained budgetary cuts and declines in staffing means that regulators are struggling to carry out their duties to protect wildlife and the environment, with enforcement action declining.²¹ This in turn has real life consequences in terms of the state of nature with protected areas, public health and safety, and undermines the efforts made by most businesses and individuals to act fairly and responsibly. When establishing an independent EPA, the security and independence of funding must also be a key priority. NI also suffers from funding cuts and the consequences of it.²² It is imperative that government funding to deliver environmental ambition is increased.
- **For the OEP to function effectively it must be appropriately resourced and staffed with experts across matters of environmental science, law, regulation, and current enforcement, across domestic, European and international scales.**
- **Capacity building with regard to the OEP's functioning is required across NI Government, public authorities and civil society:** in advance of the OEP being formally established, more and better stakeholder engagement (with departments, public authorities, politicians, civil society and other expert stakeholders) is required. Additionally, publicity of the OEPs remit and responsibilities, and how civil society can submit complaints will be key to enabling the OEP to function effectively.
- **There are many crucial roles and responsibilities currently performed by EU institutions that will be lost as a result of Brexit and are currently not provided for within the OEP:** specifically, NMNI are concerned about:
 - **Independence of the OEP:** NMNI does not support the recent Government amendment, granting power to DAERA to provide guidance to the OEP on the development and application of its enforcement policy. It is clear that the new power will have the effect of allocating ministers a central role in shaping the basic principles of the watchdog and have a severely constraining effect on the OEP's ability to act independently. This guidance power inverts the intended hierarchy (in which the OEP oversees ministers) and gives ministers the role of overseeing the OEP.²³ Moreover, we do not believe sufficient scrutiny of this power in the context of NI has been carried out.
 - **Enforcement:** the OEP should have broad scope to act where it thinks it is most needed and it must be enabled to take a wide ranging and strategic approach to environmental oversight and the enforcement of environmental law. However, the current version of the Bill does not give the OEP a sufficiently wide remit to ensure adequate oversight of environmental law or to properly fulfil its potential.
 - **Substantive Review:** the loss of the CJEU's ability to carry out substantive legality reviews needs to be replaced otherwise sole reliance on judicially reviewing decisions will not provide an effective method of ensuring failures to comply with environmental legislation are remedied.
 - **Remedies and sanctions:** the OEP will not have robust and effective enforcement mechanisms for dealing with failures to comply with environmental legislation. Unlike the CJEU, the OEP will not have the power to impose penalties such as fines in instances when public authorities continue to fail to comply with environmental law.

²⁰ Defra response to question UIN 57160 (Available at: <https://bit.ly/3drg5fw>). See also Greener UK briefing on the funding of the OEP (Available at: <https://bit.ly/3pADFZA>)

²¹ Unchecked The UK's Enforcement Gap (2020). Available at: <https://bit.ly/3pwLzn0>

²² Gravey, V., Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Jordan, A., Moore, B. and Reid, C., 2018. Northern Ireland: Challenges and opportunities for post-Brexit environmental governance.

²³ Greener UK briefing on proposed government amendments on the OEP. Available at: <https://bit.ly/3pxsn8y>

- **Reporting and Advising:** reporting on EIPs, and capacity to take action, will only be effective if EIPs are underpinned by binding interim and long-term targets. Due to the NI Protocol, and the shared nature of the environment, the OEP should be required to continue to report to EU institutions. Additionally, given the cross-cutting nature of environmental legislation, and to foster the greatest transparency and integration, any advice provided to departments should be laid in the Assembly.
- **Transboundary cooperation is essential across the UK countries, the island of Ireland, and the broader global community:** nature and the environment are global assets, benefiting us all, but impacted and managed by the laws and policies of individual jurisdictions. The response and enforcement of action on issues such as climate change, protected sites, and pollution for example require a transboundary approach, not just with those either physically or geopolitically closest to but internationally.

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