PARLIAMENTARY DEBATES

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Public Bill Committee

ENVIRONMENT BILL

Eleventh Sitting

Thursday 5 November 2020

(Afternoon)

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Monday 9 November 2020

The Committee consisted of the following Members:

Chairs: James Gray, † Sir George Howarth

† Afolami, Bim *(Hitchin and Harpenden)* (Con)
Anderson, Fleur *(Putney)* (Lab)
† Bhatti, Saqib *(Meriden)* (Con)
† Brock, Deidre *(Edinburgh North and Leith)* (SNP)
† Browne, Anthony *(South Cambridgeshire)* (Con)
† Docherty, Leo *(Aldershot)* (Con)
† Furniss, Gill *(Sheffield, Brightside and Hillsborough)* (Lab)
† Graham, Richard *(Gloucester)* (Con)
† Jones, Fay *(Brecon and Radnorshire)* (Con)
† Jones, Ruth *(Newport West)* (Lab)
† Longhi, Marco *(Dudley North)* (Con)
Mackrory, Cherilyn *(Truro and Falmouth)* (Con)
† Moore, Robbie *(Keighley)* (Con)
Pow, Rebecca *(Parliamentary Under-Secretary of State for Environment, Food and Rural Affairs)*
Thomson, Richard *(Gordon)* (SNP)
† Whitehead, Dr Alan *(Southampton, Test)* (Lab)
† Zeichner, Daniel *(Cambridge)* (Lab)

Anwen Rees, Sarah Ioannou, *Committee Clerks*

† attended the Committee

Public Bill Committee

Thursday 5 November 2020

(Afternoon)

[Sir George Howarth *in the Chair*]

Environment Bill

Clause 24

Co-operation duties of public authorities and the OEP

2 pm

Deidre Brock (Edinburgh North and Leith) (SNP): I beg to move amendment 190, in clause 24, page 14, line 29, at end insert—

"(g) a Scottish local authority,

(h) a Scottish housing association, or

(i) a Scottish environmental regulator."

This amendment seeks to ensure clear reporting lines in Scotland and to ensure that the OEP's remit does not clash with that of the Scottish regulator.

This amendment—I touched on this on Tuesday—continues the intent of amendment 188. Its aim is to ensure that Scottish public bodies do not duplicate their chain of authority, that they report to the correct bodies and that the devolved settlement around environmental protection is protected. It would basically ensure that the devolved nature of the Administration in Scotland was respected, that the reporting lines for those duties were clear and that the remit of the Office for Environmental Protection did not clash with that of the Scottish regulator.

I hope the Minister will see that muddying the waters of authority in the present way is rather unhelpful, and I hope he and his colleagues will see fit to support what would be a very reasonable addition to the Bill.

Leo Docherty (Aldershot) (Con): I thank the hon. Member for her contribution. I would like to reassure her that the Bill respects all the devolution settlements, including the Scotland Act. Therefore, the duty to co-operate does not apply to Scottish Ministers, the Scottish Parliament or any person carrying out devolved functions, and the public authorities listed in the amendment are already excluded from the duty to co-operate to the extent that they will be carrying out devolved functions. That means that these public authorities would not be required to share any information with the OEP in relation to their devolved functions in Scotland. Therefore, it is not necessary to list them as excluded bodies for the purposes of clause 24.

I support the hon. Member's intention to avoid overlaps with the functions of the equivalent Scottish governance body. That is why we have appropriately sought to limit the OEP's remit to reserved matters, while avoiding any devolved matters that would appropriately be dealt with by that other body. I therefore ask the hon. Member to withdraw the amendment.

Deidre Brock: I am just trying to establish this from the Minister: all these bodies are included in the reference to the Scottish Government—to "the Scottish Ministers". I think that that is what the Minister is saying. If that is indeed the case, although I stick to my point that all matters of the environment should be under the aegis of the Scottish Government, I am content to withdraw my amendment at this point, but I might revisit it on Report and Third Reading. We will, of course, be speaking to other amendments relating to the same matter later on. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 24 ordered to stand part of the Bill.

Clause 25

Monitoring and reporting on environmental improvement plans and targets

Dr Alan Whitehead (Southampton, Test) (Lab): I beg to move amendment 98, in clause 25, page 15, line 26, at end insert

"including setting out what action will be taken".

This is a fairly simple and straightforward amendment, which I hope will be taken in a fairly simple and straightforward manner. In subsections (9) and (10) of clause 25, there is provision for the Secretary of State to do certain things. By the way, I cannot resist emphasising that on this occasion the Secretary of State "must" do them. Subsection (9) states:

"The Secretary of State must—

(a) respond to a report under this section, and

(b) lay before Parliament, and publish, a copy of the response."

Subsection (10) states:

"Where a report under this section contains a recommendation for how progress could be improved, the response must address that recommendation."

But the clause does not include a provision for setting out what action the Secretary of State might take in response to that report. Amendment 98 would add the words,

"including setting out what action will be taken".

It would be a prudent addition to the Bill, ensuring that when the Secretary of State is responding to an annual reporting process, he or she responds to the fact not just that there is a report, but that there is a report and that action should be taken. The Secretary of State ought to record at the same time as responding to the report what actions he or she is going to undertake.

Leo Docherty: I thank the hon. Gentleman for this amendment, as it allows me to highlight the reporting mechanisms and duties the Bill creates for the Office for Environmental Protection and the Government.

These carefully designed reporting mechanisms are central to the OEP's ability to hold the Government to account on their environmental commitments. Clause 25(10) already requires the Secretary of State to address any recommendations made by the OEP when they respond to the OEP's annual report. This requirement was added to the Bill following pre-legislative scrutiny. It is expected that Ministers will respond to the OEP's recommendations

in the Government's own progress report on the environmental improvement plan. This report must describe what has been done over the previous year to implement the EIP—that is, what actions have been taken—and consider whether the natural environment has improved. Both the OEP's report and the Government's response will be published and laid before Parliament. This gives stakeholders and Parliament the opportunity every year to scrutinise whether the Government have taken action in response to the OEP's recommendations.

As part of the triple lock in the targets clauses, the Government are required to review the EIP at least every five years. In doing so, they must consider whether further or different steps should be included in the plan specifically to achieve interim and long-term targets. This would include consideration of the OEP's recommendations since the last review. Given that the Government are already required to respond to the OEP's recommendations in this way, there is no need to include any additional requirement in the Bill to set out the actions that the Government will take. I therefore ask the hon. Gentleman to withdraw his amendment.

Dr Whitehead: I thank the Minister for that explanation. I am not entirely sure that it completely satisfies our concerns, but under the circumstances we do not wish to press the amendment to a Division this afternoon. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 25 ordered to stand part of the Bill.

Clause 26

MONITORING AND REPORTING ON ENVIRONMENTAL LAW

Dr Whitehead: I beg to move amendment 99, in clause 26, page 15, line 31, at end insert "(including international environmental law)".

Again, this it is a fairly straightforward amendment. For the sake of clarity and completeness, it would add half a line to the Bill concerning the monitoring under clause 26 by the OEP of the implementation of environmental law. Clause 26(1) states: "The OEP must"—again, "must"—

"monitor the implementation of environmental law."

As we alluded to earlier in our proceedings, we are simply suggesting adding, "(including international environmental law)", so that the OEP is required to have regard to what is happening in environmental law not only here in the UK, but elsewhere, for the greater elucidation of what is happening in environmental law in this country. The amendment would make it clear that that is a responsibility of the OEP. We think it would strengthen the position in terms of a light being shone on not just UK environmental law, but environmental law across the world.

Ruth Jones (Newport West) (Lab): I rise to support the amendment. It is all very well having environmental law, but we must take account of international law as well. As we have heard in previous debates, air quality has no boundaries as such. We must also take account of the fact that international law will impact on the way we manage recycling, waste and so on. I therefore stand in support of the amendment.

Leo Docherty: I thank the hon. Gentleman for tabling the amendment, as it gives me the opportunity to clarify the OEP's remit. The intention of the amendment is to include international environmental law within the remit of the OEP's monitoring function only where it is relevant to the UK. However, the relevant international environmental law already falls within the remit of the OEP in three ways.

First, any domestic legislation that implements an international convention and meets the definition of environmental law—for example, the conservation of habitats and species regulations implementing the Bern convention on the conservation of European wildlife and natural habitats, and the EU habitats and birds directives—would already be in the scope of the OEP. Secondly, the OEP will be able to scrutinise our international environmental commitments where they are included in the environmental improvement plan, for example our commitments to the UN convention on biological diversity. Finally, the Secretary of State may ask the OEP's advice when fulfilling the duty, under clause 20, to report on significant developments in international environmental protection legislation.

I hope that reassures the hon. Gentleman that the OEP has already been given a role in holding the Government to account for our international environmental commitments. I therefore hope that he will withdraw the amendment.

Dr Whitehead: I am not entirely sure that what the Minister has said this afternoon clarifies the matter to the extent that we wanted in our amendment. However, I draw attention to the fact that when someone says something in this Committee it goes on the record and can be used subsequently for the purpose of clarifying the intentions behind a measure in the Bill. Nevertheless, the fact that the Minister has, by way of a not quite bang-on description of exactly what is happening at the moment, gone slightly further in his clarification of what he thinks would be the responsibility of the OEP under these circumstances, is, I think, good enough for me. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Amendment made: 30, in clause 26, page 15, line 33, at end insert—

"(2A) But the OEP must not monitor the implementation of, or report on, a matter within the remit of the Committee on Climate Change.

(2B) A matter is within the remit of the Committee on Climate Change if it is a matter on which the Committee is, or may be, required to advise or report under Part 1, sections 34 to 36, or section 48 of the Climate Change Act 2008."—*(Leo Docherty.)*

This amendment modifies the OEP's duty to monitor, and power to report on, the implementation of environmental law under clause 26. It provides that the OEP must not monitor or report on matters within the remit of the Committee on Climate Change, which is defined in subsection (2B) by reference to specified provisions of the Climate Change Act 2008.

Clause 26, as amended, ordered to stand part of the Bill.

Clause 27

ADVISING ON CHANGES TO ENVIRONMENTAL LAW ETC

2.15 pm

Dr Whitehead: I beg to move amendment 4, in clause 27, page 16, line 16, leave out

"may, if the Minister sees fit,"

and insert "must".

[Dr Whitehead]

At first sight, this amendment looks as if it is just another "may" and "must" amendment. I say "just", but I think Members have got the message that this is something we are concerned about throughout the Bill. The Bill is written in such a way that Ministers may do all sorts of things, but there are very few things that they must do. It would strengthen the Bill immensely if the "mays" were converted to "musts". The hon. Member for Falmouth and—

Richard Graham (Gloucester) (Con): Gloucester.

Dr Whitehead: Sorry, Gloucester—it is in the west country, so that is okay. I hope our listeners in the west country will not be offended by that comment. As the hon. Member for Gloucester said earlier, there are a considerable number of circumstances where replacing "may" with "must" could do a very good job.

This is a particularly egregious version of that "may" or "must" dilemma. Clause 27(6) states:

"The Minister concerned may…lay before Parliament—

(a) the advice, and

(b) any response the Minister may make to the advice"—

that is, the advice on changes to environmental law and so on. I have deliberately left out a little bit of that subsection. Over and above "may", it says,

"if the Minister thinks fit".

The preceding subsection gives the OEP a responsibility to publish advice on changes to environmental law, stating:

"The OEP must publish—

(a) its advice, and

(b) if the advice is given under subsection (1), a statement of the matter on which it was required to give advice and any matters specified under subsection (2)."

The OEP has a duty to do that—it must publish the advice.

When that advice gets to the Minister's desk, the Minister may not feel like responding at all, and the Minister may justify the fact that he or she has not responded at all by simply saying, "Well, I didn't think fit to do it." That phrase is capable of any interpretation whatever. All the Minister has to do is say, "I didn't bother to publish the advice or any response to it because I didn't think fit to do so." There is no objective test of that; the Minister can just decide that they do not want to do it, and that is the end of it. That is a really bad piece of drafting, and it ought to be removed. At the least, we want to see the word "may" replaced by "must", but we also think that the additional anti-belt-and-braces device—"if the Minister thinks fit"—should be removed from the clause.

Leo Docherty: The Bill provides the OEP with statutory functions that enable it to provide advice on any proposed changes to environmental law. It can also provide advice, at the request of a Minister, on any other matter relating to the natural environment. The clause provides the Minister with a discretionary power to lay the OEP's advice and any response they wish to make to it before Parliament. In this situation, it is entirely appropriate to provide the Minister with that flexibility.

The provision of advice from the OEP to Government may not simply be a single event but could be an iterative process. Given that the OEP will become an expert body, Ministers may regularly ask it for advice, which may include specific technical questions on relatively minor matters. Requiring the OEP's advice to always be laid before Parliament may impede the interaction between the OEP and Government. The Government should be able to seek advice from and respond to their public bodies with ease. This approach is not new; the advice provided by the Committee on Climate Change under sections 33 to 35 of the Climate Change Act 2008 is not laid before Parliament. Flexible, case-by-case provision is needed here, and it would be inappropriate to convert this power into an inflexible duty. The Committee should be assured that, if the OEP's advice is significant enough for Parliament to debate it, the Minister will lay it before Parliament so that it can be discussed.

Daniel Zeichner (Cambridge) (Lab): Some of us Opposition Members do not have experience of government, so we have to trust the way others work, but I find this slightly extraordinary. It seems to me that if this is in legislation, it is not a question of just picking up the phone and having a casual chat with people; it is about seeking advice. If the Minister is seeking advice, why on earth should that not be available to Parliament? Parliament ought to be able to see what the Government are doing. That does not preclude the odd informal phone conversation.

Leo Docherty: I take the hon. Gentleman's point, but the key word here is "flexibility". It is important that flexibility be retained in the relationship so that the Government can interact with the OEP and other public bodies with ease. That is the important principle at stake here.

The OEP is required to act transparently, and any advice that it provides, either on its own initiative or at the request of a Minister, must be published. Parliamentarians will be able to use the OEP's published advice to question the Government on action they have taken in response to the OEP's advice. I hope that has eased some of the concerns of the hon. Member for Southampton, Test, and I courteously ask him to withdraw the amendment.

Dr Whitehead: I am a bit bemused by the passage that the Minister has just read out. The process here is that the Minister is laying something before Parliament. That is all the Minister is doing, or might be required to do. I really cannot think why that affects the moving nature of the relationship or the question of iterative changes, which the Minister alluded to. It seems to me that that answer has actually dug the hole a bit deeper, in terms of what concerns us about the clause.

The clause relates to advising on changes to environmental law, which it should absolutely be the province of Parliament to have a good look at. If the clause is simply about the relationship between the OEP and a Minister, and the Minister can, at his or her pleasure, decide whether something goes before Parliament, although it is true that Parliament can, in theory, quiz the OEP separately about what it is doing, that requires all sorts of other devices to be put in place. The laying before Parliament of the advice and, most crucially, any

response the Minister may make to that advice, would mean that Parliament had a reasonably automatic route to deciding what it wanted to do about those things.

Indeed, taking the clause at face value, we know that under some of the procedures in this place, it would be very difficult for MPs to find out what had gone on, particularly in terms of the Minister's response to advice that the OEP provided. That response may be in the form of an internal communication, which could be revealed to Parliament only by quite assiduous work to try to get it on the public record. This seems to me a completely unsatisfactory formulation for that reason alone.

Ruth Jones: The shadow Minister is making an important point. The wording in the clause is

"if the Minister thinks fit".

Again, the power is now vested in one person, and we are back in a situation in which, if it is a good Tuesday, the Minister may do it; if it is a bad Tuesday, he may not. This is where we need to take the subjectivity out. The objective advice that must be given by the OEP and published should then make its way naturally to Parliament, to ensure that it can be acted on.

Dr Whitehead: My hon. Friend is absolutely right. She emphasises that the proper relationship is between the OEP, the Minister and Parliament, not the OEP, the Minister and maybe Parliament. That is what this issue is about.

This is not quite the same as other issues that this Committee has considered, which were about the extent to which the Government may be trying to withdraw or reduce the powers of the OEP. Nor, indeed, is it a question of a simple "may" or "must", because it goes to the heart of the need for that three-part relationship when it comes to changes to environmental law.

I am getting a little weary of pointing out these lacunae and various other things in the Bill. On this occasion, we do not want to divide the Committee, but I hope that the Minister has heard what we say about the relationship between the Committee, Ministers and Parliament, which it would be in the Government's own interest to clarify, because opaque processes can become the cause of quite unnecessary tussles, misunderstandings and opposition. Simply making things open, transparent and clear will prevent those difficulties in most instances. If those difficulties can be compounded depending on whether the Minister has a good or a bad Tuesday, as my hon. Friend the Member for Newport West said, the chances of something happening that may not be to the advantage of the Government are also then compounded.

As I say, I am not seeking to divide the Committee, but I hope that the Minister will consider whether an amendment to the Bill at a future date might be appropriate to make matters clear. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 27 ordered to stand part of the Bill.

Clause 28

Failure of public authorities to comply with environmental law

Dr Whitehead: I beg to move amendment 117, in clause 28, page 16, line 30, after "means a" insert—

"Minister of the Crown, a government department and public body, including a local authority, or any".

This amendment clarifies that Ministers, government departments and public bodies are public authorities in respect of all their functions.

The Chair: With this, it will be convenient to discuss amendment 191, in clause 28, page 16, line 39, at end insert—

"(f) a Scottish local authority,

(g) a Scottish housing association, or

(h) a Scottish environmental regulator."

This amendment seeks to increase the definition of 'public authority' in relation to failures by public authorities to comply with environmental law.

Dr Whitehead: Amendment 117 seeks clarity about what a public authority is. Hon. Members will see from perusing the amendment paper that it is not an action amendment; it does not ask the Government to do anything differently. It amends that part of the Bill—a part found in all Bills—that defines words and terms in the Bill. Although I cannot put my finger on it exactly, I believe there is a definition of "public authority" elsewhere in the Bill, but not in this clause.

2.30 pm

Amendment 117 would put a definition of "public authority" in this part of the Bill by inserting before

"a person carrying out any function of a public nature that is not a devolved function, a parliamentary function or a function of any of the following persons"

the words

"a Minister of the Crown, a government department and public body including a local authority";

those would be public authorities carrying out that function. That would expand the definition in the Bill to match what is said elsewhere in the Bill about what a public authority consists of.

Ruth Jones: I am grateful for the opportunity to speak in support of the amendment. We are well aware that the terms "public authority" and "public body" are often used interchangeably, which can lead to a lack of clarity. We are concerned that "public authority" could be interpreted as meaning a smaller category of public bodies. Public bodies are sometimes, for the avoidance of doubt, explicitly listed in legislation as being encompassed by the term authority. For example, section 28G of the Wildlife and Countryside Act 1981 clarifies that authorities include

"any other public body of any description."

This clarification is helpful for those reading only part of the Bill; it means that they do not need to read the whole Bill to understand a clause. It is important that we clarify what we mean by the term, so we welcome the amendment.

Leo Docherty: I thank hon. Members for their contributions. I agree that it is of great importance that the OEP should be able to hold public authorities to account, and that all parties should have certainty about its remit. I assure hon. Members, however, that the provisions in the Bill are sufficient to ensure both those things.

Regarding amendment 117, we have deliberately taken a broad approach to defining a public authority as

"a person carrying out any function of a public nature",

subject to a number of specific exclusions. The same approach is used in a number of other Acts, including the Human Rights Act 1998 and, more recently, the

[Leo Docherty]

European Union (Withdrawal Agreement) Act 2020. It is, therefore, an approach with which the courts are familiar.

The existing definition already covers UK Ministers and Government Departments, local authorities, arm's length bodies such as the Environment Agency, and all other bodies that carry out public functions. It is therefore unnecessary to list specific types of public authority in the Bill, as they are already captured. Furthermore, by including the term "public body" without defining it further, this amendment would introduce a lack of clarity about who and what is covered by this particular new element of the definition.

I reassure the hon. Member for Edinburgh North and Leith that the Bill respects the devolution settlements, including the Scotland Act 1998. Scottish Ministers, the Scottish Parliament and any person carrying out devolved functions have been excluded from the remit of the OEP. The public authorities listed in amendment 191 are, therefore, already excluded from the remit of the OEP, to the extent that they are carrying out devolved functions, so it is not necessary to list them as excluded bodies for the purposes of clause 28. I support her intention of avoiding overlaps with the equivalent Scottish governance body, Environmental Standards Scotland. That is why we have appropriately sought to limit the OEP's remit to reserved matters, while avoiding any devolved matters that would appropriately be dealt with by that body.

In conclusion, I hope that Members are reassured that the definition is fit for purpose. It both avoids overlaps with bodies carrying out devolved functions, and ensures that the OEP has oversight over all relevant public authorities. As such, I politely ask the hon. Member for Southampton, Test, to withdraw the amendment.

Deidre Brock: I am somewhat reassured by the Minister's comments. He has basically given me the same assurance as he gave for amendment 190—that all the bodies covered in the amendment are already covered by references to either "(d) a devolved legislature" or "(e) the Scottish Ministers". I am happy with that assurance and will not press amendment 191.

Dr Whitehead: Likewise, although we think it would be a good idea to have the words in amendment 117 in the Bill, we are a little reassured by what the Minister has said, so I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 28 ordered to stand part of the Bill.

Clause 29

COMPLAINTS

Deidre Brock: I beg to move amendment 192, in clause 29, page 17, line 5, leave out subsection (4).

This amendment would allow public bodies to report the actions of other public bodies where they are at fault.

The amendment has come about because it seems a little strange to me that public bodies would be excluded from the reporting side of the system, particularly as public bodies might be reckoned to be rather more likely to receive knowledge about breaches. If public bodies should be held to account, why is it sensible for them to not aid in holding other public bodies to account? Reports made by those carrying out public functions are not likely to be less valid, or less based on true concern, so I do not feel they should be discounted. I am keen to hear the Minister's response, because, as I say, it seems a strange part of the Bill.

Leo Docherty: I thank the hon. Lady for tabling her amendment. It is of course important that the OEP be aware of potential breaches of environmental law, and the power to receive complaints is an important element of that. However, it would not be appropriate for one public authority to be able to submit a complaint to the OEP about another public authority; it would amount to one part of the government system complaining about another. There are more appropriate ways for public authorities to resolve such disputes.

Public authorities are expected to work together constructively to resolve any instances of alleged non-compliance. For example, the Government's code of good practice is clear that Government Departments and arm's length bodies should

"develop constructive working relationships based on trust, respect and shared values."

Furthermore, if a public authority has a specific role in regulating other public authorities, mechanisms will already be in place to enable the relevant bodies to enforce the relevant regimes. For example, when a local authority applies to the Environment Agency for an environmental permit and is subject to permit conditions, the Environment Agency already has powers to take the necessary enforcement action under existing legislation if the local authority fails to abide by the conditions.

There are also relevant precedents for our approach, which is broadly similar to that in the Local Government Act 1974 in relation to what is now called the local government and social care ombudsman. In that Act, public authorities are also excluded from submitting complaints to the ombudsman.

I note that a person who works for a public authority would still be able to submit a complaint in a personal capacity, rather than on behalf of their organisation. As such, I hope that the hon. Member is reassured that the provision in clause 29(4) is appropriate, and ask her to withdraw the amendment.

Deidre Brock: I am not entirely convinced by the Minister's response. My point about public bodies being more likely to hear of potential breaches from other public bodies still stands, but I will reflect a little more on what he has said. I will withdraw the amendment, but I might revisit it in future. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 29 ordered to stand part of the Bill.

Clause 30

INVESTIGATIONS

Dr Whitehead: I beg to move amendment 5, in clause 30, page 18, line 6, leave out "may" and insert "must"

Where the OEP carries out an investigation this amendment seeks to ensure that it is made public.

This is another "may" and "must" amendment, which draws attention to an interesting passage of "mays" and "musts" in this clause that culminates in letting the OEP off. Subsection (1) states:

"The OEP may carry out an investigation under this section if it receives a complaint"

made under the previous section. Subsection (2) states that it

"may carry out an investigation under this section without having received such a complaint if it has information that, in its view, indicates that…a public authority may have failed to comply with environmental law, and…if…the failure would be a serious failure."

So it can carry out an investigation.

However, subsection (4) states:

"The OEP must notify the public authority of the commencement of the investigation."

So there is a requirement and a duty on the OEP to tell the public authority what it is doing about the investigation. Not only must it tell the public authority, but under subsection (5) it must

"prepare a report on the investigation and provide it to the public authority."

Then, subsection (8) states that the report should set out

"whether the OEP considers that the public authority has failed to comply with environmental law…the reasons the OEP came to that conclusion, and…any recommendations the OEP may have".

So there is quite a powerful set of instructions to the OEP as to what it may do when it carries out an investigation into a public authority and how it is supposed to prepare a report. It must set out the things that I have just cited.

After all that, subsection (9) states:

"The OEP may publish the report or parts of it."

Or it may not; it may keep it to itself and put it in a cupboard. Having done all that, the OEP is not required to do anything about it. However, subsection (10) states:

"If the public authority is not a Minister of the Crown, the OEP must also…notify the…Minister of the commencement of the investigation, and…provide the relevant Minister with the report prepared under subsection (5)."

So the OEP must provide the Minister with something if the public authority is not a Minister of the Crown, but it does not have to publish the report. It is not clear whether the Minister has to do anything if the OEP does not, although the OEP, instead of leaving the report in the cupboard, might send it across the Minister's desk.

We therefore have a circularity that ends in a dead end, if it is possible to conceive of such a thing. That concerns me, because if I were the interim chair of the OEP and I was not completely au fait with everything that it ought to do or not do, I would take that passage to mean that the OEP does not actually have to do very much. I do not think that is good enough; the OEP should be bound by what it is required to do in the case of these investigations.

2.45 pm

Ruth Jones: Does my hon. Friend agree that the Bill cannot make up its mind whether the OEP is a strong body that stands for environmental rights or a puppy of the Government?

Dr Whitehead: That is an interesting point. This clause does not appear to be able to decide whether the OEP should or should not do something. Having said that it should be a strong, independent body, to the extent that the Government are thinking about how the word "independent" may be interpreted, the Bill seems to let it perform less than its best, in terms of what that independence might consist of.

Richard Graham: We have seen today a number of further insinuations that the Office for Environmental Protection will be less than satisfactorily independent. This is the first time that such an office has been created in this country—it is a unique historical moment—and all the evidence we have heard so far clearly suggests that it is up to the OEP to define a large amount of its role and that the Government are giving it the opportunity to do so. Surely we should accept that this will be a great step forward and stop undermining it.

Dr Whitehead: It is not a question of undermining the integrity of the OEP at all. As the hon. Gentleman says, it does not exist yet, although bits of it are gradually coming into existence and may materialise in corporeal form in due course. It is therefore not easy to say that anyone in this room is undermining its performance and actions. We are talking about whether the framework within which it functions will work well or not. It is incumbent on us to ensure that, as the OEP comes into existence, the framework is as good as it can be and that the lines of its relationship with Parliament and Ministers are as clear as they should be. We are not undermining what the OEP will do; we are trying to support it by clarifying, before it is under way, what the boundaries are, how they work and who is expected to do what. That is not clear in this passage of the Bill.

Anthony Browne (South Cambridgeshire) (Con): I completely support the OEP's independence, but I am confused. At the moment, the OEP can decide whether it publishes a report, but the hon. Gentleman's amendment proposes that it must publish a report, which presumably reduces rather than increases its independence of action. When it does a report, it might decide that there are certain things that it does not want to publish for certain reasons—we do not know, because we cannot pre-empt it. The hon. Gentleman is saying that it has to do something, which surely reduces its independence.

Dr Whitehead: With respect, independence has nothing to do with an authority not doing what it should do or just deciding that it cannot be bothered to do something or other. That is not independence, but sloth. We would expect the framework for an independent body to support its independence by giving it a framework within which to work that makes sure it can work as well as it should—by determining on what lines the expectations about what it does should be determined, and, indeed, how the public will see that independence in action. Our suggestions would not downgrade or undermine the independence of the OEP. On the contrary, they would help it to act in the best possible way as an independent body.

Anthony Browne: There are many reasons why an organisation such as the OEP might not want to publish a report, other than sloth. As a former journalist, I am all in favour of openness—I think everything should be

[Anthony Browne]

as open as possible—but there might be reasons for wanting a private, or non-public, investigation, and the amendment would remove the ability to decide to carry out a private investigation. It would curtail the OEP's course of action and reduce its independence. I think everything should be public, but I can certainly see that there are scenarios where the OEP might decide to do something that it did not want put in the public domain. The Opposition would remove that course of action.

Dr Whitehead: There are a number of existing laws, protocols and arrangements for all public bodies that give them, in certain circumstances, discretion not to do certain things, such as in relation to national security or the revelation of individual contracts—there are all sorts of things of that kind. Guidelines already allow that discretion.

I do not think that the idea that a Department should, under normal circumstances, publish reports to elucidate matters for the public, where those existing areas of discretion in the law do not apply, is in any way undermined. That is part of the process by which we express our confidence in that public body in the first place as a body that operates transparently and in concert with the Minister and Parliament to get the relevant matters out on the table and discussed and that can demonstrate that it is doing that. That is a perfectly appropriate way to ensure that the public and indeed this place are confident about its independent operation. I am not, therefore, sure that the point made by the hon. Member for South Cambridgeshire, well-intentioned as I think it was, has a great deal of substance in relation to the clause.

Leo Docherty: I thank the hon. Gentleman for his contribution and agree that it is extremely important that the OEP should operate as transparently as possible. However, it is also important that it should be allowed the discretion it needs to operate effectively.

Investigation reports prepared under the clause will play an important role in ensuring that the OEP's enforcement activities are transparent and in enabling public authorities to learn from its recommendations. We expect that, in the majority of cases, the OEP would choose to publish its report. However, it is important that it should have the discretion to choose whether that is appropriate. Some investigations may involve matters of significant sensitivity or confidentiality. For instance, the OEP may investigate a complaint that has been motivated by bad faith or factually incorrect information. There may be no public interest in its widely publishing a report containing entirely groundless allegations.

The OEP should be able to decide whether it is in the public interest to publish a report, and to determine whether any other restrictions on the publication of information need to be taken into account. It is of course required by clause 22(2)(b) to have regard to the need to act transparently. It will need to exercise its discretion concerning publication in line with that duty. Also, clause 38 already requires it to publish a statement at key stages in the enforcement process, to ensure that it is as transparent as possible. Furthermore, any information that the OEP does not proactively publish or report will still be subject to requests for disclosure under the relevant legislation.

The clauses therefore strike the right balance and make clear provision to ensure that the OEP acts as transparently as possible. Although I acknowledge the positive intent behind it, the amendment is unnecessary and could hinder the OEP's ability to make decisions in the public interest. It could also lead to the unnecessary publication of baseless allegations. On those grounds, I ask the right hon. Gentleman to withdraw the amendment.

Dr Whitehead: I regret to say that I have not yet been elevated to that position.

Leo Docherty: It is only a matter of time.

Dr Whitehead: Something that we have been trying to point out fairly consistently as we have gone through the Bill is the use of "may" and "must", and we will come shortly to another one of those areas in a moment. I do not intend to push for a Division. I just want to say, as I have done when debating previous clauses, that our concern about this issue has some substance. It would be a good idea to reflect on how we want the OEP to be set up and to operate. We should consider whether there are other ways to ensure that the OEP is established as a busy and transparent advocate of its area, and whether we can find other methods of doing that, other than through this part of the Bill. I am sure the Minister will want to think about that over the next period. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 30 ordered to stand part of the Bill.

Clause 31 ordered to stand part of the Bill.

Clause 32

Information notices

Dr Whitehead: I beg to move amendment 6, in clause 32, page 18, line 40, leave out "may" and insert "must".

Where the OEP has reasonable grounds for suspecting a serious break of environmental law, this amendment seeks to ensure that an information notice is given.

Earlier, I was going to stand up and say that we might have tabled an amendment that was a "must" too far, and that was because, in clause 32(1), we suggest that the OEP must, rather than may, give an information notice to a public authority. As I have pointed out previously, there are circumstances in which "may" is a perfectly appropriate term to put in a Bill, and it may well be thought at first sight that this is one such occasion.

However, we will come shortly to a debate—it probably will not be much of a debate, because we have covered the area before—about the fact that the Government are seeking to amend subsection (2)(a) by clarifying that an information notice

"explains why the OEP considers that the alleged failure, if it occurred, would be serious".

In this clause, the inclusion of the word "serious" has elevated the import of whether the OEP gives an information notice to a public authority. If the Government are including a provision that says the failure to comply has to be serious in order for an information notice to

be given, surely the word "must" ought to apply. That is what the Government have done with their amendment: they have put the seriousness of the public authority's alleged failure, as judged by the OEP, into the "must" category rather than the "may" category. Under those circumstances, it would look pretty odd if the OEP did not give an information notice. It might be a good idea, therefore, in line with the amendment—not that I particularly agree with the amendment itself, assuming we make it—to place in the Bill the requirement for the OEP to give an information notice to a public authority under those circumstances.

3 pm

Leo Docherty: I understand the hon. Gentleman's desire to ensure that all failures are addressed by the OEP. However, the amendment may in fact limit the OEP's ability to resolve failures quickly and efficiently.

The OEP's enforcement function has been designed as a framework. An escalating series of measures is available for it to use to resolve failures as quickly as possible in the interests of people and the environment. The investigation phase is an important part of that framework and we expect that, in many cases, that process will quickly resolve any issues without the need for enforcement action.

Where an issue has been resolved by a public authority at the investigation stage, there will be no need for an information notice, and a requirement to issue one would serve no purpose. It would also waste the OEP's resources by prolonging cases that it would otherwise prefer to have closed following its initial investigation.

We consider it appropriate that the OEP, as an independent body, has the discretion to target and prioritise its enforcement activities in line with its own enforcement policy. We have provided for that in clause 22. The amendment would be inconsistent with those provisions.

Finally, it is important that the OEP does not duplicate the work of any existing bodies or regulators. By removing its discretion concerning when to issue an information notice, the amendment may mean that it is required to take enforcement action where another authority may be better placed to do so, which could lead to overlapping enforcement activity. Placing it under a duty to serve information notices in all cases is inconsistent with its requirement to respect the integrity of other statutory regimes in clause 22 and is clearly not in the interests of any party or the environment.

I hope that the hon. Gentleman is reassured that the OEP's enforcement framework is designed to bring about compliance as quickly as possible, and that allowing it the discretion to target enforcement activities will be fundamental to its success. I therefore ask him to withdraw the amendment.

Dr Whitehead: I wonder whether the Minister's speaking note was written before the Government tabled the next amendment that we will debate, because his reply is one that I might well have given before that amendment was introduced. The Government amendment counters quite a lot of what he said, so I would like him to consider whether that is indeed the case, and whether he completely stands by what he said in the light of amendment 205.

We may want to discuss that when we get to amendment 205, and it might be a good idea, although I do not intend to pursue the other word of the day, "serious", with regard to that amendment. The combination of the two issues—"must" and "may", and "serious"—is interesting, and that is what we have in this clause. I do not wish to press amendment 6 to a Division, but I hope that the Minister reflects on that conjunction. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Leo Docherty: I beg to move amendment 205, in clause 32, page 19, line 2, at end insert—

"(aa) explains why the OEP considers that the alleged failure, if it occurred, would be serious, and".

Under clause 32 the OEP may give a public authority an information notice if it has reasonable grounds to suspect that the authority has failed to comply with environmental law, and it considers that the failure, if it occurred, would be serious. This amendment requires the information notice to explain why the OEP considers that the alleged failure, if it occurred, would be serious.

The Chair: With this it will be convenient to discuss Government amendment 206.

Leo Docherty: Amendment 205 is a technical amendment that serves to clarify that an information notice issued by the OEP must explain why the OEP considers that the alleged failure would be serious. Together with the corresponding change proposed in Government amendment 206 to clause 33, concerning decision notices, it will ensure that all the OEP's notices are clear and transparent, and it will provide clarity for all parties in the process.

Given the requirement that the OEP may issue an information or decision notice only if it considers that the alleged failure would be, or is, serious, it is entirely right and in the interests of good administration that notices should explain the OEP's reasons for considering that to be the case. The OEP's enforcement framework is designed to ensure that the OEP prioritises action in the most serious cases, adopting a strategic approach to enforcement action, and these amendments reinforce that.

Dr Whitehead: Yet again, we may be defending the Bill from its detractors, who happen, on this occasion, to be in the Government. The traffic is not always one way. The substantial problem of the inclusion of the word "serious" continues in the two amendments. We do not want to go over the full discussion of the word "serious" and what it does and does not do, because we have already had quite a good go at it. The hon. Member for Gloucester is not in his place, so we might be able to skip over that reasonably rapidly.

The amendments continue the problem of defining what is serious, how the OEP works on that basis, and the extent to which someone from outside the OEP is required to tell it what is or is not serious. I ask the Minister to reflect on what the addition of the amendments would say, as far as the OEP is concerned. I was interested in his statement a little earlier that the OEP "must" decide whether something is serious in order to take action—in this instance, to give an information notice. If the OEP must decide whether something is serious, it must also be enjoined to provide an information notice when it has decided that something is serious.

[Dr Whitehead]

Therefore, as we have said, the two go together. The Minister sort of underlined that case in his statement on what the OEP must do in respect of the Government amendments. Again, we do not intend to press the matter to a vote, but I underline what we have said about the question of seriousness and the conjoining of the two. It is a bit like putting two fireworks in a box, with all the consequences that that might entail. I hope the Minister will reflect on that, and on whether he has any thought of making drafting amendments to the Bill, perhaps on Report, to make its purpose a little clearer.

Amendment 205 agreed to.

Clause 32, as amended, ordered to stand part of the Bill.

Clause 33

DECISION NOTICES

Amendment made: 206, in clause 33, page 19, line 36, at end insert—

"(aa) explains why the OEP considers that the failure is serious, and" *—(Leo Docherty.)*

Under clause 33 the OEP may give a public authority a decision notice if it is satisfied, on the balance of probabilities, that the authority has failed to comply with environmental law, and it considers that the failure is serious. This amendment requires the decision notice to explain why the OEP considers that the failure is serious.

Dr Whitehead: I beg to move amendment 118, in clause 33, page 19, line 39, at end insert—

"(2A) A decision notice may also direct the public authority to rectify the failure to comply with environmental law.

(2B) A public authority must comply with a direction under subsection (2A)."

This amendment allows the OEP to require a public authority to remedy a failure to comply with environmental law.

I am sure the Committee will be delighted that this provision does not involve the words "serious", "must" or "may", or anything like them. What it does involve is a suggestion by the Opposition that the OEP should be given additional powers on decision notices to direct a public authority about which a decision notice has been made. When discussing the previous clause, we have seen that the OEP must consider seriousness in the information notices. When it comes decision notices, the same applies. A decision notice "may" follow from an information notice, and the definition of the decision notice in 33(2) states that it

"describes a failure of a public authority to comply with environmental law, and

(b) sets out the steps the OEP considers the authority should take in relation to the failure".

However, it does not say anything about what the public authority ought to do to rectify that failure and comply with environmental law. The OEP has a pretty strong requirement to go through information notices and decision notices, but it steps back at that point; it has issued its decision notice, and that is the end of it.

Our amendment takes that process a stage further by suggesting that the OEP should also have the power of direction: a power to require the public authority to rectify its failure to comply with environmental law, which the OEP has identified through the information notice and the decision notice. The amendment also states, in order to make it clear, that the public authority "must comply" with the direction that the OEP has made. The amendment would therefore give the OEP a substantial new power—one that is absolutely consistent with the strength of action it is required to take in the route between information notices and decision notices. That would be a wholly good thing as far as good governance by the OEP is concerned. It would be a clear note of understanding that if a public authority does come by a decision notice from the OEP, it should expect that there will be consequences. The OEP would be empowered to provide those consequences and ensure that compliance with the subject of a decision notice could be followed up.

3.15 pm

Ruth Jones: I rise in speak in favour of the amendment. My hon. Friend has made an eloquent point about the steps so far. We seem to be teetering on a cliff edge. We have got as far as accepting that there is an issue, the problem has been highlighted and solutions have even been suggested, but the wording of the clause does not give us an actual solution. The public authority must rectify the failure, but that is not enshrined in law. We all know that if we want something to be done, it must be enshrined in law. "Put it in the Bill," is our usual cry.

Some of us—those who have worked in health, for instance—well remember that Crown immunity used to be given to NHS buildings. Problems and solutions were identified, but there was never any enforcement because of Crown immunity. I am sure that the Government do not want that to happen with such an important Bill, and that is why we have tabled the amendment.

Leo Docherty: It is, of course, important that the OEP's enforcement framework is robust. However, we do not consider that binding notices would be an effective or appropriate means of achieving that. Decision notices are an important part of the OEP's enforcement framework. They allow the OEP to set out the nature of a failure and recommend the remedial steps that a public authority should take in response. If the public authority chooses not to follow the recommended remedial steps—for example, because it believes that it is correctly applying the law for which it is responsible—the OEP can refer the matter for an environmental review. We would expect the OEP's decision notice to form part of its evidence submission in an environmental review, and for this evidence to be given appropriate consideration as the view of an independent body. This will be the most effective way for the OEP to address cases of non-compliance.

Furthermore, the provision for binding notices through this amendment would be inappropriate for three key reasons. First, if the amendment were accepted, the OEP would effectively be able to superimpose its own decisions in place of those made by the relevant authorities appointed or elected for this purpose. Secondly, current protections for third party rights in the environmental review process would be lost. That could be damaging for businesses and cause extremely unhelpful uncertainty. Thirdly, without provision for an appeals mechanism, the public authority would have no right to challenge the OEP's judgments, other than making an application

for judicial review. The enforcement framework set out in the Bill will ensure that cases are resolved as quickly as possible, with powers to overturn decisions resting with the courts, as is appropriate. I therefore ask the shadow Minister to withdraw the amendment.

Dr Whitehead: I thank the Minister for that response. Our suggestion that the OEP ought to have a more serious power has to some extent been answered with reassurance by the Minister. However, I am unsure whether the Minister ought not to consider, for future reference, not necessarily the exact wording of this amendment, but the merit of giving the OEP what might be described as shots in the locker. Perhaps that could be done entirely as the Minister has described, or perhaps other provisions need to be added, although not necessarily this one. The process needs some thought, and I hope that the Minister will give it some thought as we move towards the introduction of the OEP. I will therefore not pursue the amendment, in the confident thought that the Minister will give the matter some consideration for the future. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 33, as amended, ordered to stand part of the Bill.

Clause 34 ordered to stand part of the Bill.

Clause 35

Environmental review

Leo Docherty: I beg to move amendment 207, in clause 35, page 20, line 40, leave out "Upper Tribunal" and insert "court".

This amendment replaces a reference to the Upper Tribunal with a reference to the court, which means either the High Court or the Court of Session. Similar changes are made by Amendments 210, 211, 212, 214 and 216.

The Chair: With this it will be convenient to discuss Government amendments 210 to 216.

Leo Docherty: This group of amendments will move the environmental review process from the upper tribunal to the High Court. Having reflected further on how that process will fit within the wider landscape of environmental mitigation, we have identified a risk that hearing environmental reviews in the upper tribunal could introduce unnecessary complexity and, potentially, inconsistency. This change is therefore intended to create greater coherence, clarity and consistency and is in the interests of good administration. First, the change will ensure that all the OEP's legal proceedings are heard in a single forum, the High Court, regardless of whether they are brought as an environmental review following normal enforcement procedure or as an urgent judicial review.

Secondly, the change will ensure that all alleged breaches of environmental law are heard in the same forum, regardless of who has brought claims. For example, wider environmental judicial reviews brought by non-governmental organisations are heard in the High Court and environmental reviews brought by the OEP will now come to the same forum. That should help to promote a consistent approach towards the interpretation and application of environmental law. It is important to note that this change of legal forum does not in any way affect the legal test or principles that will be applied in an environmental review, and nor does it affect the OEP's access to legal remedies as such.

Dr Whitehead: This is a substantial group of amendments that all have the same effect—to transfer proceedings in a variety of different areas from the upper tribunal to the High Court.

I am—mercifully, it might be said—not a member of the legal profession, and one of the few Members of Parliament who is not, but I am somewhat puzzled about how this provision happened as an amendment in earlier proceedings of the Bill. When the Bill went off for pre-legislative scrutiny by the Select Committee on Environment, Food and Rural Affairs, that Committee gave some recommendations and thoughts on the question of the upper tribunal and, indeed, of the High Court, judicial review and environmental review.

At that point, the Government's response to the EFRA Committee and its pre-legislative scrutiny report was as follows. Noting the Committee's recommendation, the Government stated that

"we have made provision for a new environmental review mechanism in the Upper Tribunal for the OEP to bring legal challenges"—

that is, the Government made such provision. I emphasise this next sentence:

"The approach will have a number of benefits compared to that of a traditional judicial review in the High Court. In particular, taking cases to the Upper Tribunal is expected to facilitate greater use of specialist environmental expertise."

At the point of pre-legislative scrutiny—this is how the Bill stood, before we all disappeared for a while—the Government appeared to be not only in favour of taking cases to the upper tribunal, but advocating that because they expected it would

"facilitate greater use of specialist environmental expertise."

Although the Bill was not in front of us for a time, nothing has happened in the legal world, as far as I know, to cause that judgment to be reversed. No new legislation or proceedings are in place; all is as it was.

The Government had judged that the upper tribunal approach was perfectly okay, so it is unclear why fairly strong support for continuation of the clearer upper tribunal route with an environmental review has been so comprehensively replaced with reference, under the judicial review mechanism, to the High Court. Perhaps during lockdown some people had too much time on their hands—they were not getting out enough or whatever—and thought they would tinker around with the provision.

People who understand these matters better than I do have suggested that that could undermine the holistic approach we might expect the OEP to take, which could have been supported in the upper tribunal. That is due, among other things, to how a tribunal has a less adversarial approach than the High Court, and the lowering of procedural requirements between the similar but different-in-name processes of environment review and judicial review could create confusion for court users and practitioners. There are a number of cons to the change—that may be what the Government thought when they responded to the EFRA Committee with a robust view that the upper tribunal would give

"greater use of specialist environmental expertise"

in determining, in a non-adversarial way, how such matters should progress.

Ruth Jones: My hon. Friend is making an excellent point. Does he agree that, as various NGOs have also said, without an upper tribunal, the lack of expertise in the High Court could be a problem when determining such scientific, delicate and detailed matters?

Dr Whitehead: Indeed, my hon. Friend makes the point about specialist environmental expertise in a far better way than the Government did to the EFRA Committee. Among other things, the upper tribunal is not adversarial; it is, in effect, inquisitorial, allowing such expertise to come to grips with an issue in an atmosphere conducive to shining light on it, rather than the knock-down, drag-out fight between two sides of the High Court. The Government would be well advised to listen to her point carefully.

3.30 pm

Again, this is not an issue on which we wish to divide the Committee, but we put a big question mark over why this decision has been made, which appears to go completely against the Government's previous position, and whether the advantages that the Government think this change in procedure will have are not outweighed by the disadvantages that a number of people have raised, including my hon. Friend the Member for Newport West.

I suggest again that it would be good if the Government consulted further before deciding that this is how the Bill will be shaped. They need to reflect on whether there are a greater number of considerations against the change than for it and whether they are happy that, after passing through all stages in this House and the other place, the Bill will emerge in its final state with this provision intact.

Amendment 207 agreed to.

Amendment made: 208, in clause 35, page 20, line 40, at end insert

', but only if—

(a) it is satisfied, on the balance of probabilities, that the authority has failed to comply with environmental law, and

(b) it considers that the failure is serious.'—*(Leo Docherty.)*

This amendment provides that the OEP may only bring an environmental review against a public authority if it is satisfied on the balance of probabilities that the authority has failed to comply with environmental law, and it considers the failure is serious. This aligns the conditions for bringing an environmental review with the conditions for giving a decision notice.

Dr Whitehead: I beg to move amendment 123, in clause 35, page 20, line 40, at end insert—

'(1A) Where the OEP has given a decision notice to a public authority but has not applied for an environmental review, any person with sufficient interest may apply for an environmental review.'

This amendment allows any person to apply for an environmental review where the OEP decides not to.

The Chair: With this it will be convenient to discuss amendment 124, in clause 35, page 21, line 14, at end insert—

'(4A) A person who has made a complaint under section 29 may intervene in an environmental review which relates to that complaint or an issue which the Upper Tribunal considers is related to the issue in that complaint.

(4B) Any person with sufficient interest may make an application to the Upper Tribunal to intervene in an environmental review.

(4C) The Upper Tribunal may not order an intervener to pay the costs of any relevant party to the proceedings in connection with the proceedings.

(4D) The Upper Tribunal may not order a relevant party to the proceedings to pay the intervener's costs in connection with the proceedings.'

This amendment allows relevant people to intervene in environmental reviews and any other person to apply to intervene in environmental reviews. It also makes provision about payment of costs of proceedings.

Dr Whitehead: These two amendments are really important for completing the process of environmental review and the way in which an environmental review may come about and be discharged through the OEP and beyond. As we have seen, there are circumstances in which the OEP may decide that something has occurred that causes it to take action through notices and various other things but not to pursue an environmental review in its entirety.

These amendments attempt to enable the public—individuals with a sufficient interest in a particular decision notice or environmental review—to act in instances where the OEP decides that it is not going to. It is not an ability for every member of the public to take vexatious legal action on an environmental review. The amendments specifically state that this pertains to

"any person with sufficient interest"

in the proceedings. We envisage that to be people who have been reasonably closely involved in proceedings and are concerned that action has not been taken on a decision notice or environmental review. They would then be able to take that up by applying for an environmental review outside the mechanism of the OEP.

At the moment, if the OEP decides that it does not want to take any action, there is very little recourse for those people who have been involved in a particular process to do anything further. The amendment seeks to enable a person with sufficient interest to make an application, in this instance, to the upper tribunal to intervene, and to protect that person from paying the costs of any relevant proceedings, where they are a party with sufficient interest that feels that the processes through the OEP have not sufficiently enabled their rights and their considerations to be properly looked at.

Amendment 123 establishes:

"Where the OEP has given a decision notice to a public authority but has not applied for an environmental review, any person with sufficient interest may apply for an environmental review."

Amendment 124 sets out the way in which that person may intervene and the protection that that person may have in terms of costs when they seek to intervene. That does not mean that they automatically get their way; it is a method by which the general public can be rather more assured that their views are not completely buried in these sorts of processes and that there is a route to redress outside the official structures, if they consider that the official structures have not undertaken what they might reasonably have expected to happen in the environmental review.

Leo Docherty: I thank the hon. Member for the amendments. The Government agree that it is important for the general public and interested parties to be able to challenge alleged breaches of environmental law, which is why we are ensuring that anybody can make a complaint to the OEP, free of charge, about a public authority's alleged failure to comply with environmental law, which is in addition to existing rights to bring judicial review.

The environmental review is an innovative, bespoke litigation procedure and the final stage in the OEP's enforcement process. The OEP will only bring environmental review in serious cases, having first conducted a number of thorough pre-litigation steps with the aim of resolving the breach. We do not consider it appropriate for another party to be able to take over at this point, as proposed in amendment 123. The OEP's decision not to apply for an environmental review will be a considered one and could be taken for a number of reasons.

First, following the decision notice, the public authority may have acknowledged the breach and be taking remedial measures to rectify it, or the response to the decision notice could demonstrate to the OEP's satisfaction that there is in fact no breach. Secondly, any decision not to bring legal action will be informed by the OEP's specialist expertise and the information it has gathered in its investigation. Furthermore, the OEP's enforcement framework has been designed in order to motivate public authorities to engage in constructive dialogue and problem solving. If there is a threat of legal action by a third party, regardless of actions taken to resolve issues during the investigation stage, that undermines much of the incentive for public authorities to work with the OEP.

On amendment 124, we recognise that people will have an interest in cases brought to environmental review by the OEP and may wish to intervene in such cases. However, we also recognise that that might not always be appropriate. There is a well-established procedure for determining who may intervene in legal proceedings. As such, it would be inappropriate to override that procedure by specifying such matters in the Bill. Nevertheless, I assure the hon. Member that we have already started to examine the existing procedural rules to see where changes may be necessary. I therefore ask him to withdraw amendments 123 and 124.

Dr Whitehead: We do not intend to press this to a Division if we are satisfied that the public are fully protected in terms of how this works overall. The Minister has to some extent, by pointing out the mechanism for judicial review, started to build ground for the possibility that there are other mechanisms for public intervention. I welcome the fact that he indicated that there should be public involvement, if necessary, beyond the involvement of public bodies where appropriate, but I do not think he has made the case—in terms of a specifically environmental review, which, as he said, is a relatively new process—that the public's ability under judicial review to intervene can be wholly applied to environmental review in the way that the Bill might intend.

Our amendments try to tie the public—a "person with sufficient interest"—to that environmental review specifically. I am afraid, therefore, that we need to put on record that this is an important right that the public should have and that it is not fully recognised in the Bill. We would like to see it recognised, and therefore I think we ought to apply for a Division on amendment 123 this afternoon.

Question put, That the amendment be made.

The Committee divided: Ayes 3, Noes 6.

Division No. 14]

AYES

Furniss, Gill	Whitehead, Dr Alan
Jones, Ruth	

NOES

Afolami, Bim	Jones, Fay
Bhatti, Saqib	Longhi, Marco
Docherty, Leo	Moore, Robbie

Question accordingly negatived.

Amendment proposed: 209, in clause 35, page 21, line 1, leave out paragraph (b). —*(Leo Docherty.)*

The OEP may only bring an environmental review after it has given a decision notice. This amendment removes the OEP's power to bring an environmental review in relation to conduct occurring after a decision notice is given, which is similar or related to the conduct described in the decision notice.

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 3.

Division No. 15]

AYES

Afolami, Bim	Jones, Fay
Bhatti, Saqib	Longhi, Marco
Browne, Anthony	Moore, Robbie
Docherty, Leo	

NOES

Furniss, Gill	Whitehead, Dr Alan
Jones, Ruth	

Question accordingly agreed to.

Amendment 209 agreed to.

3.45 pm

Dr Whitehead: I beg to move amendment 119, in clause 35, page 21, line 2, at end insert—

"(2A) The purpose of an environmental review is to promote the integrity of environmental law and the achievement of environmental improvement in accordance with the law.

(2B) When considering an environmental review, the Tribunal may review any finding of fact on which the decision in question was based and, where relevant, whether the achievement of environmental improvement required, had been achieved.".

This amendment clarifies the purpose of environmental review and provides that the Tribunal may review findings of fact during a review.

The Chair: With this it will be convenient to discuss amendment 120, in clause 35, page 21, line 14, at end insert—

"(4A) In the case of an environmental review, the Upper Tribunal shall treat notices issued by the OEP as authoritative in respect of any relevant issues.".

The amendment ensures that OEP notices will be treated as authoritative in any related environmental review, helping to ensure that the notices play a meaningful role in any subsequent enforcement action.

Dr Whitehead: Amendments 119 and 120 are connected. They seek to provide in the Bill a definition of the purpose of an environmental review. We think that will strengthen environmental reviews as set out in the Bill. Amendment 119 sets out that their purpose is to

"promote the integrity of environmental law and the achievement of environmental improvement in accordance with the law."

That is a fairly clear definition. It would allow a tribunal—in this case, the High Court—to review any findings of fact on which the decision in question is based, and indeed whether environmental improvement, as defined in the first part of the amendment, has actually been achieved. This would give powerful additional clarity about the environmental review, and we offer the amendment to the Government as a good addition to the Bill.

If the definition in amendment 119 is put in place, amendment 120 would enable the upper tribunal to treat notices issued by the OEP as authoritative in respect of any relevant issues. The link between the definition of environmental law, what the tribunal may do so far as facts are concerned and how those notices should be treated by the OEP would be a substantial addition to the Bill, ensuring that environmental reviews are as strong as they can be. I anticipate that the Minister might not think that such a great idea, but I offer it, for what it is worth, and hope that even if the Minister does not decide on this occasion that it should go straight into the Bill, he may go away and reflect on it and consider whether, during the passage of the Bill, something like this may be an appropriate strengthening of it, making it more robust as it makes its way out into the world following our deliberations.

Leo Docherty: I thank the hon. Member for his contribution on this matter. First, I reassure him that the court may already review relevant facts or evidence in coming to its judgments. I fully expect that the court will give the OEP's decision notices appropriate weight as part of any environmental review, and that its judgments will contribute to the integrity of environmental law.

While I support the hon. Member's desire to see environmental improvements delivered by the Bill, I am concerned that amendment 119 would potentially blur the well established separation of powers between Government and the courts. We all support the objective of achieving environmental improvement, but that is a policy objective for the Government to deliver. It would be highly unusual and inappropriate to give the courts responsibility for delivering a policy objective other than the service of justice. Moreover, this could also lead to secondary legal challenges examining whether the environmental review had achieved its supposed purpose.

Both amendments also risk tilting the balance of the court's judgments in such a way as to favour the OEP's case in environmental reviews. It would be unheard of to impinge on the impartial role of the court in carefully balancing all the evidence before it and reaching a fair and reasonable judgment. That could be prejudicial to the public authority concerned. Clearly, therefore, it is better to allow the court to continue to operate in a fair and balanced way, giving all parties confidence that they will be given a fair hearing, which is necessary to ensure that judgments are objective, impartial and can widely and positively influence environmental case law. I respectfully ask the hon. Gentleman to withdraw the amendments.

Dr Whitehead: I did not expect the Government to be over-enthusiastic about this idea, and indeed, they have demonstrated that they are not. They have indicated that they have concerns about the difficulties that this particular formulation might cause, but, as I have said on previous occasions, I think that the principle is probably about right, and it would be helpful for the Bill if the Government thought on it. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Amendments made: 210, in clause 35, page 21, line 15, leave out "Upper Tribunal" and insert "court".

211, in clause 35, page 21, line 18, leave out "Upper Tribunal" and insert "court".

212, in clause 35, page 21, line 23, leave out "Upper Tribunal" and insert "court".

213, in clause 35, page 21, line 24, leave out "the court" and insert "it".—*(Leo Docherty.)*

Dr Whitehead: I beg to move amendment 121, in clause 35, page 21, line 24, leave out from "review" to end of line 28.

This amendment allows the Upper Tribunal to grant any remedy it thinks fit.

The Chair: With this it will be convenient to discuss the following:

Amendment 180, in clause 35, page 21, line 28, at end insert—

"(8A) Where the Upper Tribunal makes a statement of non-compliance, it may issue ongoing financial penalties where it deems these to be necessary."

The amendment would clarify that the Tribunal has the power to issues fines in instances of non-compliance.

Amendment 184, in clause 35, page 21, line 28, at end insert—

"(8A) Where the Upper Tribunal makes a statement of non-compliance it may impose a remediation requirement to take such steps as it may specify, within such period as it may specify, to secure that the net environmental position is restored to what it would have been if the offence had not been committed."

The amendment would give the Tribunal the power to require a public authority to make amends for environmental harm resulting from a breach of the law.

Dr Whitehead: I hope that, after that plethora of votes, everyone knows where we have got to. I think and hope that I know, but we shall see whether I am speaking to the right amendment.

Amendment 121 would give the OEP's relationship with the upper tribunal—in this case, the court—a greater amount of leeway over a remedy that could be granted by the court on judicial review. Clause 35(8) states that the upper tribunal—here it is the High Court—

"may grant any remedy that could be granted by the court on a judicial review other than

damages, but only if satisfied that granting the remedy would not—

(a) be likely to cause substantial hardship",

and so on. The amendment would delete the second part of subsection (8), thereby enabling a remedy to be granted without that caveat on its operation. We think that would strengthen the proceedings. Similarly, amendment 80 would allow the upper tribunal to issue financial penalties where it thinks fit.

Amendment 184—this is important; I am particularly concerned about it—would allow remediation requirements, so that the net environmental position would be returned to where it was before the action took place. One important principle regarding environmental damage and various other activities is that such damage should not go unnoticed or be left by the wayside, and those who cause it should be required to put things back to their original state. If bodies undertake planning activity that causes environmental disturbance, they should be required to put something else in place or remedy the damage. The amendment would allow remediation requirements to be introduced, so that the offending body would be required to put the issue right. That important principle ought to be in the Bill.

Ruth Jones: Does my hon. Friend agree that although financial penalties are important, remediation is even more important? For instance, where trees with tree preservation orders have been cut down, contractors have decided to take the fine on the chin, while not doing anything about the trees. The remediation aspect is so important.

Dr Whitehead: Once again my hon. Friend hits the nail on the head. In many cases a contractor, or someone who has decided to undertake an action, may make a cold calculation about what they can achieve by cutting down a row of trees, or sawing branches off a tree, or whatever. Although they might face financial consequences, the net result could be to their advantage, so they will take that on the chin. However, the tree is gone, and the other things have not been remedied. The idea of having a remediation clause that a person who is thinking of doing something must take into account before they do it is an important step forward. As my hon. Friend says, that remediation requirement should be in the Bill and a power of the upper tribunal or the court.

4 pm

Leo Docherty: I thank the hon. Gentleman for his contribution. We support his intention of ensuring that the court has powers to grant appropriate remedies in environmental reviews.

With regard to amendment 121, it is also important to recognise that in some cases the granting of remedies by the court could substantially affect the rights of innocent third parties who have acted in good faith in reliance on public authority decisions. We have therefore sought to protect the rights of such third parties from the most significant implications of unlawful decision making. To be clear, that does not prevent the court from granting remedies in any circumstances where a third party is even slightly affected. In order to be able to grant a remedy, the court would need to be satisfied that this would not be likely to cause substantial hardship or prejudice.

It is entirely necessary to protect third parties from the increased risk of granting remedies long after a decision has been taken. It is not novel to protect such rights in legislation, but the current drafting is a reasonable and proportionate approach to that issue. Subject to those safeguards, through environmental review, the court will have access to judicial review remedies, including mandatory and quashing orders that can ensure that compliance with environmental law is achieved.

In the highly unlikely event that a public authority failed to comply with a court order, the OEP would be able to bring contempt of court proceedings, which could lead to a range of sanctions being imposed by the court, potentially including fines or even imprisonment. The availability of those remedies and the strict requirement for compliance with court orders entirely dispense with the need for an inferior system of fines in a domestic context, as proposed in amendment 180. Fines form part of the EU infraction framework, but only because the Court of Justice of the European Union is unable to compel the member state into a specific course of action through a court order. The provision for remedies through the OEP's environmental review enforcement procedure clearly outlines how this Government are committed to enhancing environmental protections now that we have left the EU.

Turning to amendment 184, I reassure the hon. Gentleman again that the court has the appropriate powers to make court orders where a public authority has breached environmental law. Amendment 184 would go further by giving the court powers to specify the steps necessary to make amends for any environmental harm resulting from their failure to comply with the law. Given the separation of powers, it is for the courts to determine legal proceedings and for the Government and public authorities to implement law and policy. That is why we have provided that, where the court has determined that a public authority has failed to comply with environmental law, that authority must publish a statement setting out the steps that it intends to take. I therefore ask the hon. Member not to press amendments 121, 180 and 184.

Dr Whitehead: I take the Minister's points on amendments 121 and 180, and we do not intend to proceed further with those. However, on amendment 184 the Minister has essentially repeated the limitations that are already on the courts with respect to public authorities and remediation—that is, that an authority would be expected to say what it is going to do, but that does not mean the authority has to do it. We think the inclusion of this particular arrangement on remediation, although it would be an extension of the court's responsibilities, would nevertheless be a substantial environmental gain by ensuring that the process was fully followed through.

I am sorry that the Government have been unable to accept either the spirit or the actuality of amendment 184. Although it is not the lead amendment in this group, it does relate to this clause, so a Division would be appropriate within the purview of this particular clause. That is what we would like to do, Sir George, if that is the order that we can follow. I beg to ask leave to withdraw amendment 121.

Amendment, by leave, withdrawn.

Amendment proposed: 184, in clause 35, page 21, line 28, at end insert—

'(8A) Where the Upper Tribunal makes a statement of non-compliance it may impose a remediation requirement to take such steps as it may specify, within such period as it may specify, to secure that the net environmental position is restored to what it would have been if the offence had not been committed.'—*(Dr Whitehead.)*

The amendment would give the Tribunal the power to require a public authority to make amends for environmental harm resulting from a breach of the law.

The Committee divided: Ayes 3, Noes 7.

Division No. 16]

AYES

Furniss, Gill	Whitehead, Dr Alan
Jones, Ruth	

NOES

Afolami, Bim	Jones, Fay
Bhatti, Saqib	Longhi, Marco
Browne, Anthony	
Docherty, Leo	Moore, Robbie

Question accordingly negatived.

Amendments made: 214, in clause 35, page 21, line 29, leave out "Upper Tribunal" and insert "court".

See Amendment 207.

Amendment 215, in clause 35, page 21, line 31, leave out from "review" to end of line 32.

This amendment is consequential on Amendment 214. It omits words that are no longer required relating to remedies granted by the court.

Amendment 216, in clause 35, page 21, line 33, leave out "Upper Tribunal" and insert "court".—*(Leo Docherty.)*

See Amendment 207.

Clause 35, as amended, ordered to stand part of the Bill.

Clause 36

JUDICIAL REVIEW: POWERS TO APPLY TO PREVENT SERIOUS DAMAGE AND TO INTERVENE

Leo Docherty: I beg to move amendment 217, in clause 36, page 22, line 11, at end insert ", and

(b) the urgency condition is met."

This amendment provides that the OEP may only bring a judicial review under clause 36, rather than proceeding by way of information notice, decision notice and environmental review, in urgent cases. Amendments 218 and 219 define what is meant by urgent.

The Chair: With this it will be convenient to discuss Government amendments 218 and 219.

Leo Docherty: We have created the OEP's bespoke core enforcement mechanism of notices and environmental review to identify and resolve breaches of environmental law while only resorting to litigation in court as a last resort. Clause 36 ensures that the OEP can apply directly for judicial review, but that power has always been intended to supplement the OEP's core enforcement mechanism. It is expected that judicial review should be used by the OEP in limited and exceptional circumstances where it is necessary to do so to prevent or mitigate serious damage to the natural environment or human health where the OEP cannot do so through its core enforcement mechanism.

Government amendments 217, 218 and 219 clarify the policy intention as to how and when the OEP should apply directly for a judicial review. Amendment 217 simply clarifies that the OEP should apply for judicial review only in limited circumstances, now referred to as the urgency condition. Amendments 218 and 219 go on to define when and how the urgency condition may be met.

The urgency condition is framed in terms of necessity. To meet the condition, it must be necessary for the OEP to proceed according to this route—rather than its normal enforcement procedures—to prevent or mitigate serious damage to the natural environment or human health. The clause is also restructured so that this condition is an objective, rather than subjective, test that must be passed in order for the OEP to bring such proceedings. This is intended to bring greater clarity to the test. Amendments 217 to 219 will therefore improve clause 36 by clarifying the process for the OEP to apply for judicial review as intended.

Dr Whitehead: The Opposition's opinion is that these amendments, which are connected, as the Minister has explained, constitute a serious undermining of the powers of the OEP and its ability to judge for itself what it wants to do, particularly with regard to judicial review. Clause 36(1) states:

"The OEP may apply for judicial review, or a statutory review, in relation to conduct of a public authority (whether or not it has given an information notice or a decision notice to the authority in respect of that conduct) if the OEP considers that the conduct constitutes a serious failure to comply with environmental law."

Therefore, there is already the question of "serious failure" in the clause. Now, the Government are adding to that by putting this urgency requirement on the end, so there has to be not just a serious failure, but an urgent and serious failure. This clearly puts obstacles in the way of the ability of the OEP to work for itself, in relation to how judicial review is undertaken. It puts in place a number of outside obstacles to that process.

Without going over the case at great length, we think that this is part of that suite of amendments that seek to put a corset around the OEP in terms of what it may or may not do, and in effect hug it closer to Government as a result. We do not think that is conducive to what we have always considered to be the imperative of the independence of the OEP, and therefore we will seek once again to defend the Bill as it stands—against the Government's wish to dilute further what is in it—particularly in relation to the powers of the OEP that were set out when the Bill was first introduced.

We do not want to support amendment 217, but we appreciate that the other amendments are consequential to it and that therefore if amendment 217 does go through, the others follow. Not wishing to extend proceedings greatly this afternoon, I will just say that is where our position stands.

4.15 pm

Question put, That the amendment be made.

The Committee divided: Ayes 7, Noes 3.

Division No. 17]

AYES

Afolami, Bim	Jones, Fay
Bhatti, Saqib	Longhi, Marco
Browne, Anthony	
Docherty, Leo	Moore, Robbie

NOES

Furniss, Gill	Whitehead, Dr Alan
Jones, Ruth	

Question accordingly agreed to.

Amendment 217 agreed to.

Amendments made: 218, in clause 36, page 22, line 12, leave out from beginning to "(rather" in line 13 and insert

"The urgency condition is that making an application under subsection (1)".

This amendment, together with Amendment 219, provides that a case is urgent only if it is necessary to bring a judicial review, rather than proceeding by way of information notice, decision notice and environmental review, to prevent or mitigate serious damage to the natural environment or to human health.

Amendment 219, in clause 36, page 22, line 14, after "35)" insert "is necessary".

See Amendment 218.

Amendment 220, in clause 36, page 22, line 29, leave out subsection (6) and insert—

"(6) Subsection (6A) applies to proceedings (including any appeal) that—

(a) are in respect of an application for judicial review or a statutory review, and

(b) relate to an alleged failure by a public authority to comply with environmental law (however the allegation is framed in those proceedings).

(6A) If the OEP considers that the alleged failure, if it occurred, would be serious, it may apply to intervene in the proceedings (whether it considers that the public authority has, or has not, failed to comply with environmental law)."—*(Leo Docherty.)*

This amendment provides that the OEP may apply to intervene in a judicial or statutory review relating to an alleged failure by a public authority to comply with environmental law only if it considers that the failure, if it occurred, would be serious. If that test is satisfied, it may apply to intervene whether or not it considers that the authority has in fact failed to comply with environmental law.

Clause 36, as amended, ordered to stand part of the Bill.

The Chair: In consideration of the vast amount of material that the Minister has agreed to reflect on, and out of concern for his time and welfare, the Committee will now adjourn.

Ordered, That further consideration be now adjourned. —*(Fay Jones.)*

4.16 pm

Adjourned till Tuesday 10 November at twenty-five minutes past Nine o'clock.

Written evidence reported to the House

EB74 Royal Society of Chemistry (briefing on the Environment Bill's provisions relating to plastic and electronic waste)

EB75 Royal Society of Chemistry (briefing on the Environment Bill's provisions relating to REACH legislation)