

THE ENVIRONMENT BILL

ECHR MEMORANDUM FOR THE BILL AS INTRODUCED INTO THE HOUSE OF COMMONS

1. This Memorandum has been prepared by the Department for Environment, Food and Rural Affairs (“the Department”) and addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Environment Bill (“the Bill”).
2. The Rt. Hon. Theresa Villiers MP, the Secretary of State for Environment, Food and Rural Affairs has made a statement that in her view the provisions in the Bill are compatible with the Convention rights.
3. The Bill contains a limited number of provisions which engage Convention rights, in particular Article 1 of Protocol 1 to the Convention (right to property). Several provisions in the Bill confer functions on public authorities, which are required under section 6(1) of the Human Rights Act 1998 to act in ways which are compatible with Convention rights.
4. This Memorandum deals only with those parts of the Bill which raise significant ECHR issues. The remaining provisions of the Bill are considered not to engage Convention rights, or, if they do, to do so in a way in which it is clear that there is no interference.

Summary of the Bill

5. The Bill will establish a new framework for environmental governance and accountability, and will introduce measures to improve and protect the environment.
6. **Part 1** of the Bill (Environmental Governance) includes the following measures:
 - **Environmental targets:** provisions which provide powers for the Secretary of State to set environmental targets, require the Secretary of State to achieve

long-term targets, to prepare remedial plans and to conduct a periodic review of targets.

- **Environmental improvement plans:** provisions which require the UK Government to have and maintain a plan for significant environmental improvement, to produce an annual report on its plan, and to obtain and publish a set of environmental indicators to measure progress in improving the environment;
- **Environmental Principles:** provisions which require the UK Government to publish an environmental principles policy statement, setting out how environmental principles are to be interpreted and applied by Ministers of the Crown during their policymaking process, and which require Ministers to have due regard to the statement when making policies;
- **Environmental protection - statements and reports:** provisions which require Ministers to make a statement to Parliament identifying the environmental impacts of all new environmental primary legislation and place an obligation on the Secretary of State to produce a report on significant developments in international environmental protection legislation.
- **A new environment body:** provisions which create a new, statutory and independent environment body – the Office for Environmental Protection (OEP) – to hold public authorities to account on environmental law and scrutinise and advise on policy after the UK leaves the EU.

7. **Part 2** of the Bill makes provision for Environmental Governance in Northern Ireland.

8. **Part 3** of the Bill (Waste and Resource Efficiency) includes provisions to enable the government to require producers to bear the full cost of managing their products at end of life, set resource efficient product standards, and consumer information

requirements to drive a shift in the market towards durable, repairable and recyclable products. It will allow a deposit return scheme to be established to support better recycling by households and businesses and it will enable charges to be applied to specified single-use plastic items. There are also provisions to tackle litter and fly-tipping enforcement.

9. **Part 4** of the Bill (Air Quality and Environmental Recall) includes provisions to amend the Environment Act 1995 Local Air Quality Management Framework to enable greater cooperation between different levels of local government, and with relevant public bodies, when preparing local air quality action plans to address air quality. It will also require Government to review the National Air Quality Strategy every 5 years for the purpose of that Framework. The Bill will reform the way in which Smoke Control Areas under the Clean Air Act 1993 operate to enable more effective enforcement action by Local Authorities. The provisions would provide powers enabling mandatory recall notices for vehicles and equipment which do not comply with relevant environmental standards to be issued, and for fines to be imposed when a minimum recall rate is not met.

10. **Part 5** of the Bill (Water) includes provisions to change the requirements for Water Resources Management Plans, enabling greater cooperation between different water undertakers to better manage water resources; and require the preparation of Drainage and Sewerage Management Plans by sewerage undertakers, to plan more effectively for the management of waste water. The provisions would modernise the process for modification of water and sewerage undertaker licence conditions by the Water Services Regulation Authority (“Ofwat”) to bring it in line with other utilities. This Part would also change the circumstances in which a licence to abstract water from the environment can be revoked or varied to prevent damage to the environment, without paying compensation. The provisions would allow the Secretary of State to revise the list of priority substances under the Water Framework Directive and change the regime regulating the Solway Tweed river basin. In addition, the provisions in this Part would amend the Land Drainage Act

1991 so as to provide powers enabling technical valuation calculations used by Internal Drainage Boards to be included and updated within secondary legislation.

11. **Part 6** of the Bill (Nature and Biodiversity) includes provisions to amend section 40 of the Natural Environment and Rural Communities Act 2006 to strengthen and improve the duty on public bodies to conserve and enhance biodiversity, in accordance with the proper exercise of their functions. Provisions would mandate a net gain in biodiversity through the planning system, requiring a 10% increase in biodiversity after development, compared to the level of biodiversity prior to the development taking place, as measured by a metric set out by Defra. The provisions would require the publication of Local Nature Recovery Plans, a tool to direct action for nature, and place an emphasis on supporting local leadership of nature improvement. There are also provisions that would give greater enforcement powers to the Forestry Commission to reduce illegal tree felling.

12. **Part 7** of the Bill (Conservation Covenants) includes provisions for Conservation Covenants. These will be voluntary, legally-binding, private agreements between landowners and responsible bodies, designated by the Secretary of State, which conserve the natural or heritage features of the land. They could bind subsequent owners of land, enabling long-term conservation.

13. **Part 8** of the Bill (Miscellaneous and General Provisions) gives the Secretary of State the power to amend two pieces of retained EU law relating to the regulation of chemicals, and the Devolved Administrations the power to amend one of those pieces of retained EU law. This Part also contains matters relating to the application of the Bill and regulations made under it, including powers to make consequential amendments to legislation and to commence provisions by regulations.

The Bill and Convention Rights

Article 1, Protocol 1: Right to peaceful enjoyment of possessions

Clause 78: Water and sewerage undertakers in England: modifying appointments

14. Across England and Wales there are water and sewerage undertakers appointed to supply water and sewerage services (“undertakers”). They are the water and sewerage utilities, privatised in 1989. Clause 78 of, and Schedule 13 to, the Bill amend Part 2 (appointment and regulation of undertakers) of the Water Industry Act 1991 (“WIA91”) and the current provision for modification of conditions of appointment (referred to as licence conditions) by agreement (section 13). The new power will provide for a revised process for Ofwat (referred to as “the Authority” in WIA91) in relation to the modification of water and sewerage undertaker licence conditions. The new power will only apply to undertakers whose areas are wholly or mainly in England. The current system in England needs reform because currently Ofwat may only effect modification of licence conditions in limited circumstances; where the undertaker provides consent; when there is an ownership change to a company (which is rare); or when Ofwat goes through the Competition and Markets Authority (“CMA”) referral process set out in section 14 WIA91. The process for modifying licence conditions by way of a CMA referral is slow and resource intensive for Ofwat, meaning that it constrains responsiveness to policy priorities and leads to differences between undertakers’ licences.
15. Under the proposed new power in the Bill, Ofwat may make modifications without prior consent. However under new section 12A WIA91 (inserted by clause 78), before it can make any modifications to licence conditions Ofwat must give notice to companies setting out the proposed modifications and their effect; give reasons for the modifications and consult. Under new clause 12D WIA91, Ofwat’s decisions can be appealed to the CMA by affected undertakers and licensees, their representative body, or a body representing consumers.

Interference

16. A water, or water and sewerage, licence attaches to a specific area of England or Wales (section 6 WIA91), and is required for the carrying out of a water or sewerage undertaker's business. Licences, and the economic benefit and goodwill derived from them, are likely to be considered possessions within the meaning of A1P1 (*Trent Strategic Health Authority v Jain and another* [2009] UKHL 4). These licences are granted to undertakers by Ofwat subject to conditions, which in turn are already subject to modification by Ofwat under section 13 WIA91. The licence conditions themselves are not directly affected by the Bill.

17. The Bill only amends Ofwat's existing process for making a modification. It is possible that water and sewerage undertakers could argue that the amendment to the process of modification of licence conditions is a disproportionate control of use of its property rights under Article 1 of Protocol 1.

18. Firstly it is important to note that the proposed new modification power will not deprive undertakers of their licences, and will not prevent them from continuing and profiting from the activity authorised by the licence. The licence condition modification process cannot be used to withdraw or revoke the licences. Ofwat will be constrained when making modifications to water or sewerage undertaker licences by the existing statutory framework: the powers will have to be exercised in a way which is consistent with Ofwat's duties under section 2 WIA91 and strategic priorities and objectives as set out in a statement under section 2A WIA91. Section 2(2A) WIA91 requires Ofwat to perform its functions in a way that ensures that undertakers can finance the proper carrying out of their functions, so any modification proposed would be subject to this safeguard.

19. Secondly, the Bill itself does not interfere with A1P1 rights and Ofwat as a public authority will exercise its powers to effect modifications compatibly with Convention rights in practice. The Department is confident that the provisions in the Bill are compliant with Convention rights. The powers are modelled very closely on those of

the Office of Gas and Electricity Markets (“Ofgem”) as set out in sections 11A and 11B Electricity Act 1989 and section 23B Gas Act 1986. Under those Acts, Ofgem has the same licence modification power in relation to electricity and gas suppliers, that is, a power to make modifications to the conditions of a licence, subject to a duty to give notice of any such modifications. There is a right of appeal to the CMA on the same basis. Those powers have been shown to be capable of being exercised compatibly with Convention rights.

20. Thirdly, any potential interference with A1P1 rights would be 'prescribed by law' as Ofwat would be operating under provision in primary legislation, in pursuit of a legitimate aim and proportionate. The aim of ensuring effective regulation of water and sewerage supplies provided by a market with monopolistic features is considered a legitimate one in the public interest. Effective regulation is necessary, in turn, to protect the security of water supplies, consumer interests and the environment. A more responsive model for water sector licence modification, updated to bring it in line with other economic regulators of key utilities, will enable Ofwat to take better account of ongoing and future priorities leading to better outcomes for consumers and the environment.

21. The Department considers that the likely benefit of the measure is proportionate to any potential limited A1P1 interference. Licence condition modification is already possible under existing legislation: the Bill serves to modernise that process while subjecting it to appropriate safeguards which limit the manner in which it can be exercised.

Clause 80: *Water abstraction: no compensation for certain licence modifications*

22. Clause 80 (new sections 61ZA and 61ZB of the Water Resources Act 1991 (“**WRA 1991**”)) engages A1P1.

23. A person who wishes to abstract water from the environment must obtain a licence to do so, unless the abstraction is exempt from licensing. In England, licences are issued and managed by the Environment Agency (“EA”) under a regime set out in the WRA 1991. The EA may make proposals to vary or revoke licences. If the licence holder objects to the EA’s proposals, it falls to the Secretary of State to decide if the licence should be varied or revoked. If the licence is varied or revoked following the Secretary of State’s decision, a licence holder may be entitled to claim statutory compensation from the EA for losses they suffer as a result.
24. Under new section 61ZA, the Environment Agency (“EA”) would not be liable to pay compensation for any revocation or variation of an abstraction licence made on the ground that the Secretary of State is satisfied that it is necessary to protect the water environment from damage, or necessary having regard to a relevant environmental objective. The relevant environmental objectives are defined as objectives within the meaning of the legislation that implements the Water Framework Directive.
25. The proposed new section 61ZB provides that if a licence holder’s abstraction did not exceed 75% of the quantity of water the holder was authorised to abstract for a period of 12 years, that portion of the licence that is not ‘reasonably required’ by the licence holder can be removed without the payment of compensation to the licence holder.

Engagement

26. Abstraction licences attach to specific land and are often essential for the carrying out of a business (e.g. a farm requiring irrigation). They are therefore likely to be considered ‘possessions’ under A1P1 insofar as they relate to land or business goodwill which are possessions (see *Tre Traktorer AB v Sweden* (1991) 13 EHRR 309, *Fredin v Sweden* (1991) 13 EHRR 784 and *Trent Strategic Health Authority v Jain and another* [2009] UKHL 4).

Interference

27. The primary legislation will not of itself interfere with A1P1 rights. However, a licence holder whose licence is varied or revoked without the payment of compensation pursuant to section 61ZA or 61ZB may argue that the variation or revocation is a disproportionate control of use of its property rights. The variation or revocation of a licence would be likely to be found to be a control of use rather than a deprivation (see *Tre Traktorer*); however, some variations or revocations could be so severe as to amount to a *de facto* deprivation (see *R (Mott) v Environment Agency* [2018] 1 WLR 1022). In those cases, the payment of compensation may be required or the EA may modify its proposals in such a way as to ensure that the variation or revocation did not amount to deprivation.

Justification

28. Actions taken on reliance on these provisions would be 'prescribed by law' because sections 61ZA and 61ZB would be contained in primary legislation.

29. The legitimate aim that arises under new section 61ZA WRA 1991 would be the protection of the environment. Removing water from the environment can have a detrimental impact on the ecology and resilience of rivers, wetlands and groundwater.

30. In respect of new section 61ZB, there are two potential legitimate aims that would arise: the protection of the environment; and the promotion of economic growth.

31. In some cases, unused licence volumes could be removed in order that they could be made available to another abstractor who could use that water in the course of a business or economic activity. Taking regulatory action calculated to allow new businesses to undertake a regulated activity and thereby further economic growth

has been found to be legitimate (see *R (on the application of Royden) v Metropolitan Borough of Wirral* [2002] EWHC 2484 (Admin)).

32. A provision allowing a water abstraction licence to be varied or revoked without the payment of compensation to protect the environment or promote economic growth is capable of being exercised compatibly with A1P1. Section 6 of the Human Rights Act 1998 requires the EA and the Secretary of State to act compatibly with A1P1 when exercising their functions in relation to an abstraction licence. In practice, section 6 would require the EA and/or the Secretary of State to ascertain in each case that revocation/variation would be proportionate in relation to a particular abstractor before the licence is varied or revoked. To assess proportionality in a particular case, the EA and/or the Secretary of State would likely need to consider a number of matters including the effect of the change on the licence holder, the nature of any environmental damage or potential economic benefit and the availability of less impactful interventions.
33. In addition, the legislation provides safeguards to help ensure that the measures will be applied proportionately. Sections 61ZA and 61ZB will only be available in relation to those licences which have been varied or revoked pursuant to a direction made on or after 1 January 2028. This delay to the measures taking effect will ensure that abstractors are given sufficient time to prepare for any change to their rights. In practice, the EA will conduct engagement during this period to ensure licence holders are prepared. In addition, section 61ZB only permits a licence to be varied without the payment of compensation where the licence has been underused for the preceding 12 years. Further, under section 61ZB the licence cannot be varied below a level which the abstractor 'reasonably requires', ensuring that any licence volume that the licence holder may need (for example, unused volume that may be needed in the event of a drought) would be retained.
34. The Department considers that the powers are capable of being exercised compatibly with the right to property. In practice, the EA and/or the Secretary of

State will ascertain in each case that revocation/variation of an abstraction licence would be proportionate, i.e. that the revocation or variation of the licence without the payment of compensation strikes a fair balance between the rights of the individual abstractor and the public interest pursued by the licence change.