



## BRIEFING PAPER

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# Environmental Principles and Governance: the draft Bill

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# Summary

## Environmental principles and governance after Brexit

Following the UK's June 2016 referendum result to leave the EU, concerns were raised both in Parliament and by stakeholders that environmental standards in the UK could be weakened. These included concerns that: a.) the enforcement mechanisms provided for by European Union institutions (and predominantly used in relation to EU environmental law) would be lost following EU exit; and b.) there would no longer be the same legal requirement to ensure environmental policy was based on environmental principles. The Government published a consultation on [Environmental Principles and Governance](#) in May 2018 with initial proposals to allay these concerns.

## Legal requirement to publish draft legislation

Section 16 of the *European Union (Withdrawal) Act 2018* was introduced by the Government following debate in Parliament on the above concerns and the Government's initial proposals. The Act required the Government to publish a draft Bill by December 2018 containing particular provisions on environmental principles and governance, including a specific list of environmental principles; and to set up a new body with powers to take proportionate enforcement action (including legal proceedings if necessary) where a Minister of the Crown was not complying with environmental law.

## Aim of the draft Bill

The Government published the [draft Environment \(Principles and Governance\) Bill](#) and a number of [related documents](#) on 19 December 2018. This draft Bill fulfilled the statutory requirements of section 16 of the *EU (Withdrawal) Act 2018*. On publication, the [Government summarised](#) the purpose and main features of the draft Bill as follows:

The draft Environment (Principles and Governance) Bill sets out how the government will maintain environmental standards as we leave the EU. It also details how we will build on the vision of the 25 Year Environment Plan.

This includes creating an independent body - the Office for Environmental Protection (OEP) – which will:

- scrutinise environmental law and the government's environmental improvement plan (EIP)
- investigate complaints on environmental law
- take enforcement action on environmental law

The draft Bill commits the government to publishing a policy statement which will set out how ministers should interpret and apply environmental principles. It also commits government to have a plan for environmental improvement.

## The wider Environment Bill

The draft clauses will form part of a wider Environment Bill, which has not yet been published. The Government has set out broadly the "wider ambition of the Bill" in "four other key areas: air, wildlife, water and waste", which are likely to be included in the full Bill. The wider Environment Bill is expected to be introduced in the second Parliamentary session in 2019.

## Reaction to the draft Bill

The ambition and aims of the draft Bill were broadly welcomed as a step in the right direction, but specific concerns have been raised on particular provisions, focusing on:

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- the independence of the new body (the OEP), specifically that it will be funded by Defra and that the non-executive members of the board (including the Chair) are to be appointed by the Secretary of State;
- the lack of provision in the draft Bill to give the OEP the power to issue fines for a breach of environmental law;
- the strength of the duty on Ministers of the Crown to “have regard to” the policy statement on environmental principles and whether this achieves equivalence with the existing EU situation;
- the scope of a number of delegated powers given to the Secretary of State, including in relation to amending the definition of “environmental law” and to set out additional exemptions relating to “any other matter” from the scope of the policy statement;
- the exclusion of climate change mitigation (greenhouse gas emissions) from the scope of the definition of environmental law, and thus the scope of the OEP’s powers.

##### **Pre-legislative scrutiny of the draft Bill**

The draft Bill will undergo select Committee pre-legislative scrutiny. The House of Commons Environment, Food and Rural Affairs Committee and the Environmental Audit Committee launched a [joint call for written evidence for pre-legislative scrutiny of the draft Environment \(Principles and Governance\) Bill](#) on 20 December 2018.

# 1. Environmental principles and governance: background

## 1.1 Environmental principles

### Box 1: Environmental principles: selected briefings

- House of Commons Library Briefing Paper on [Brexit and the Environment](#) 8 August 2018
- POSTnote, [EU Environmental Principles](#), 28 November 2018
- Client Earth [What are environmental principles?](#) 27 June 2018

### What are environmental principles?

There is no single agreed definition of environmental principles, nor is there an agreed list or set of principles.<sup>1</sup> Environmental principles in the UK stem from a number of different sources, including international agreements, EU Treaties, or both.

The [Treaty on the Functioning of the EU](#) (TFEU) states that policy on the environment shall be based on the “precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay”.<sup>2</sup> See Box 2 for further explanation of the “precautionary principle”. Further examples of environmental principles are set out in Annex A of the Government consultation on [Environmental Principles and Governance after EU Exit](#).

As to the status and legal effect of these principles in EU law, a legal journal article explains as follows:

These principles have, therefore, been given legal effect in EU law, but it is equally clear that they are not free-standing principles which can be invoked independently, but are expressed as the basis of any Community policy, including legislation, that is taken on the environment. But even with that limitation, they have provided significant leverage for the Court of Justice of the European Union in how it interprets EU environmental legislation.<sup>3</sup>

Client Earth’s page on [What are environmental principles?](#) explains the breadth of their application:

They act as guidance for judges and decision-makers, giving laws shape and meaning. They are used in a whole host of government and public authority decisions, including planning applications, management of marine protected areas and dealing with contaminated land.<sup>4</sup>

<sup>1</sup> HM Government, [Environmental Principles and Governance after the United Kingdom leaves the European Union Consultation on environmental principles and accountability for the environment](#), May 2018, para 149

<sup>2</sup> EU, [Treaty on the Functioning of the European Union](#), 2012/C 326/01, article 191

<sup>3</sup> Journal of Planning & Environment Law, Environmental Principles: Will They Have a Legal Role After Brexit, Richard Macrory, Justine Thornton QC [2017] Issue 9

<sup>4</sup> Client Earth, [What are environmental principles?](#) 27 June 2018 [accessed 7 August 2018]

### Box 2: The 'precautionary principle'

The Precautionary Principle is one of the key elements for policy decisions concerning environmental protection and management. It aims at ensuring a higher level of environmental protection through preventative decision-taking in the case of risk. The precautionary principle is detailed in Article 191 of the Treaty on the Functioning of the EU. The EC Treaty however does not define it.

In 2000, the European Commission adopted a [Communication on the use of the Precautionary Principle](#).<sup>5</sup> This explained that the precautionary principle may only be invoked when the three preliminary conditions are met:

- identification of potentially negative effects;
- evaluation of the scientific data available relevant to the risks;
- the extent of scientific uncertainty.

### **European Union (Withdrawal) Act 2018: maintenance of environmental principles**

The [European Union \(Withdrawal\) Act 2018](#) was designed to provide legal continuity after the UK leaves the EU by providing the framework to copy over the entire body of EU law onto the UK's post-exit statute book. In broad terms, this means that all EU environmental law will be converted into domestic law. This would include any specific environmental principles which are contained in specific pieces of EU legislation e.g. the precautionary principle as set out in the EU REACH chemicals regulation.<sup>6</sup>

However, the *EU (Withdrawal) Act 2018* does not roll over the overarching EU environmental principles into national law. Schedule 1 of the Act rules out any general principles of EU law as a basis for challenge in UK courts following exit day. The potential loss of these principles was identified during the passage of the 2018 Act through Parliament as significant for the future of environmental decision-making in the UK.

Following lobbying from stakeholders and amendments laid during the passage of the *EU (Withdrawal) Bill* by both MPs and Peers (see more below), a late stage amendment was made which provided for the maintenance of environment principles in a subsequent draft Bill.

Section 16 of the *EU (Withdrawal) Act 2018* (Maintenance of environmental principles etc) required the Secretary of State to publish a draft Bill by 26 December 2018 consisting of a set of environmental principles (as specified by section 16(2)) and the following duties on the Secretary of State and Ministers of the Crown:

[...]

(b) a duty on the Secretary of State to publish a statement of policy in relation to the application and interpretation of those

<sup>5</sup> EUR-Lex, [Communication \(COM\(2000\) 1final\) on the precautionary principle](#), 2 February 2000

<sup>6</sup> HM Government, [Environmental Principles and Governance after the United Kingdom leaves the European Union Consultation on environmental principles and accountability for the environment](#), May 2018, paras 24 and 26. Further information on REACH is available in the [Library Briefing Paper on Brexit and chemicals regulation \(REACH\)](#).

principles in connection with the making and development of policies by Ministers of the Crown,

(c) a duty which ensures that Ministers of the Crown must have regard, in circumstances provided for by or under the Bill, to the statement mentioned in paragraph (b),

[...]

(e) such other provisions as the Secretary of State considers appropriate.

Section 16(2) lists the following set of environmental principles which must be included as a minimum:

(2) The set of environmental principles mentioned in subsection (1)(a) must (however worded) consist of—

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

### Previous debate on environmental principles

During the passage of the *EU (Withdrawal) Act 2018* through Parliament, a number of MPs, Peers and stakeholders (including ClientEarth and Greener UK) called for the Act to convert *all* EU environmental law including environmental principles into UK law.<sup>7</sup> Client Earth explained the importance of retaining environmental principles in UK law as follows:

The potential loss of these principles from UK law is significant. EU environmental principles have been used in the European courts and in the UK as interpretive aids for statutes and policies, have provided a basis for scrutiny and challenge of Government actions in court, and have guided administrative decision-making and policy. They have therefore operated in a number of ways to shape the UK environment and environmental decision-making [...]

Ensuring that these principles continue to operate in the UK after Brexit is important so that they carry on shaping the UK's

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<sup>7</sup> Greener UK, [Great Repeal Bill Briefing](#), June 2017 [accessed 31 October 2017]; Client Earth, [Withdrawal Bill Report: Destination and Journey](#), September 2017 [accessed 31 October 2017]

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approach both domestically and internationally to environmental issues and challenges.<sup>8</sup>

Before this, in evidence to House of Commons Environmental Audit Committee (EAC) on 1 November 2017, the Secretary of State for Environment, Food and Rural Affairs (Michael Gove) stated that environmental principles would not be transferred into UK law, but would instead be embodied in policy guidance. He explained that they are “interpretative principles...to govern how policy is designed and devised” and should not be put on a statutory basis.<sup>9</sup>

Following this, on 10 May 2018, the Government published a consultation on [Environmental Principles and Governance after EU Exit](#) which explored “the scope and content of a new policy statement to ensure environmental principles underpin policy making”.<sup>10</sup> The consultation set out the Government’s commitment to creating a new, “comprehensive policy statement” to provide the environmental principles which will “guide our environmental policy-making and legislation, in a similar way to existing EU principles.”<sup>11</sup> However, environmental groups such as the Green Alliance continued to express concern over the possibility that post-Brexit environmental principles could be set out in a policy statement rather than enshrined in legislation, calling for the principles to be binding on the Government.<sup>12</sup>

Client Earth published [a Report: Environmental principles in UK law after Brexit](#) (26 June 2018) which provided detailed discussion of the principles and recommended ways that environmental principles should be incorporated into UK law post-Brexit. It argued for a hybrid approach between primary legislation and a policy statement with corresponding legal duties attached to public bodies:

There are several possible ways that the principles could be enshrined. They could be incorporated into primary legislation (either as a bare list or with added detail) with corresponding duties attaching to public authorities. They could also be contained within a policy statement. This report recommends a hybrid approach whereby the principles are listed in statute and then elaborated in a policy statement, with two corresponding legal duties attached to public bodies.<sup>13</sup>

More detailed background on this is included in the [Library Briefing Paper on Brexit and the environment](#). Further discussion of the consultation responses and Government position is included in Section 3 below.

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<sup>8</sup> ClientEarth, [Environmental principles in UK law after Brexit](#), 26 June 2018 [accessed 7 August 2018]

<sup>9</sup> Environmental Audit Committee Oral evidence: The Government’s Environmental Policy, [HC 544](#), 1 November 2017, Q15 [accessed 7 November 2017]

<sup>10</sup> Gov.uk, [New environmental protections to deliver a Green Brexit](#), 12 November 2017

<sup>11</sup> Defra, [Environmental Principles and Governance after the United Kingdom leaves the European Union: Consultation on environmental principles and accountability for the environment](#), 10 May 2018, para 28

<sup>12</sup> “Concerns mount over future status of green principles” [ENDS Report](#), 31 May 2018 [subscription required]

<sup>13</sup> ClientEarth, [Environmental principles in UK law after Brexit](#), 26 June 2018 [accessed 7 August 2018]

## 1.2 Environmental governance

### Box 3: Environmental governance: selected briefings

- House of Commons Library Briefing Paper on [Brexit and the Environment](#) 8 August 2018
- UKELA, [Brexit and Environmental Law: Enforcement and Political Accountability Issues](#), July 2017
- Society for the Environment, [Environmental Governance Post-Brexit](#)

### EU environmental governance

EU law is monitored and enforced by the European Commission under Article 258 TFEU, as the “Guardian of the Treaties”. It is overseen by the Court of Justice of the European Union (CJEU), which can levy fines on Member States that are found to be in breach of EU law. A briefing from the UK Environmental Law Association (UKELA) explains that these powers are available in all areas of EU law, “but the majority of infringement proceedings have been brought in the environmental field”<sup>14</sup> (see Box 5).

The European Commission uses information from a variety of sources to carry out its enforcement role, including reports from Member States, reports from the European Environment Agency and a free-of-charge citizen’s complaint procedure (see Box 5). An example of the Commission taking the UK to court is set out in Box 4. However, the vast majority of EU infringement proceedings are settled in discussion and negotiation without leading to court action.

### Box 4: Air Quality: an example of EU Commission enforcement

The Commission stated in 2013 that it would like to “to achieve full compliance with [its] existing air quality standards by 2020 at the latest”.<sup>15</sup> In February 2014 the EU Commission began [infraction proceedings](#) against the UK for its failure to meet Air Quality Directive targets for NO<sub>2</sub> in 16 of its air quality zones.<sup>16</sup> On 17 May 2018 the EU Commission referred the UK (along with France, Germany, Hungary, Italy and Romania) to the Court of Justice of the EU (CJEU) for “for failure to respect limit values for nitrogen dioxide (NO<sub>2</sub>), and for failing to take appropriate measures to keep exceedance periods as short as possible.”<sup>17</sup> Further information is available from the EU Commission press release, “[Air quality: Commission takes action to protect citizens from air pollution](#)” 17 May 2018.

If a Member State is found to be at fault, it must put things right in accordance with the decision of the CJEU, or risk a second case being brought, which may result in a fine. There are two types of fines: lump sums and periodic penalty payments. This process can take a number of years to complete.<sup>18</sup>

<sup>14</sup> UK Environmental Law Association, [Brexit and Environmental Law Enforcement and Political Accountability Issues](#), July 2017, p3

<sup>15</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Clean Air Programme for Europe /\*, [COM/2013/0918 final \\*/](#)

<sup>16</sup> European Commission, Press release, [Environment: Commission takes action against UK for persistent air pollution problems](#), Brussels, 20 February 2014

<sup>17</sup> European Commission press release, “[Air quality: Commission takes action to protect citizens from air pollution](#)” 17 May 2018

<sup>18</sup> Defra, [Environmental Principles and Governance after the United Kingdom leaves the European Union: Consultation on environmental principles and accountability for the environment](#), 10 May 2018, p42

### Box 5: Citizen action to enforce environmental law

#### European Commission

In addition to domestic rights of action for citizens to enforce their rights, the European Commission has a [standard complaints form](#) which any EU citizen can use free of charge (either online or by post) to submit a complaint against a breach of EU law by a Member State. No explicit time limits for making a complaint are included on the form. The Commission assesses all complaints and, where appropriate, transfers it to a suitable problem-solving mechanism. This often involves discussion and negotiation rather than a formal infringement procedure.

This option is available for all EU law, but the majority of infringement proceedings have been brought in the environmental field. This is explained by UKELA as being due to the often “unowned” and “diffusively spread” nature of the environment and environmental harms compared to other areas of EU law (such as employment rights) where specific individuals or bodies have clear interests to protect.<sup>19</sup>

#### European Parliament

EU citizens and organisations can petition the EU Parliament over concerns about the application of EU law which affect them directly. There is a [European Parliament website](#) where petitions can be submitted free of charge.

### ***European Union (Withdrawal) Act 2018:*** **establishing a new governance body**

Section 16 of the *EU (Withdrawal Act) 2018* requires that the Government must publish a draft Bill which provides for the establishment of a public authority with functions for taking “proportionate enforcement action (including legal proceedings if necessary)”:

(1) The Secretary of State must, within the period of six months beginning with the day on which this Act is passed, publish a draft Bill consisting of—

[...]

(d) provisions for the establishment of a public authority with functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law (as it is defined in the Bill), and

(e) such other provisions as the Secretary of State considers appropriate.

### **Previous debate on environmental governance**

Following the EU referendum, several concerns and proposals were raised in relation to accountability of the Government for upholding environmental standards in the UK following Brexit. There were several calls for a new watchdog to be established to address what was identified as a potential governance gap. For example, [Greener UK](#) called on the Government to create “a powerful independent statutory committee to monitor progress” and “establish an effective new approach to environmental regulation.”<sup>20</sup>

<sup>19</sup> UKELA, [Brexit and Environmental Law, Enforcement and political accountability issues July 2017](#) [accessed 14 August 2017]

<sup>20</sup> Greener UK, [Securing a healthier environment and nature’s recovery: A briefing for policy makers following the EU referendum](#), February 2017 [accessed February 2017]

Initially, in response to concerns, the Government pointed to existing domestic provisions for regulators to enforce environmental laws, the judicial review process and the role of Parliament as ways of maintaining enforcement and accountability:

**How will the government be held responsible for making sure it complies with its own environmental regulations?**

The UK has always had a strong legal framework for enforcing environmental protections and this will continue. This includes provisions for regulators to enforce our existing environmental regulations, and our system of judicial review and its body of public law that enables decisions and actions of public authorities to be challenged through the UK courts.

It is, and it will remain, the role of Parliament (and where appropriate, the devolved legislatures) to hold the executive to account, and Parliament (and the relevant devolved legislature) is ultimately accountable to the electorate. That will not change on our departure from the EU.<sup>21</sup>

In response to Government assurances, stakeholders such as UKELA argued that judicial review alone was “ill-suited” to replacing the supervisory role of the Commission, pointing to the costs involved as well as the loss of the less formal mechanisms such as discussion and negotiation (see Box 5 above).<sup>22</sup>

Subsequently, in November 2017, the Secretary of State for Defra made reference to a “commission-like body” which could oversee all environmental law and said he thought a consultation on what type of body would be appropriate to replace the role of the European Commission and the ECJ was needed.<sup>23</sup> He stated that one of the reasons for needing a new body was that, although the judicial review process is a good thing “on its own I suspect will probably not be enough”.<sup>24</sup> The resulting Government consultation, published in May 2018, stated that “[t]his consultation explores the functions of a new, independent, statutory environmental body to hold government to account on the environment and support our longer term objective for this, to be the first generation to leave the environment in a better state than that in which we inherited it.”<sup>25</sup>

More detailed background on this included in the [Library Briefing Paper on Brexit and the environment](#). Further discussion of the consultation responses and Government position is included in Section 3 below.

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<sup>21</sup> Department for Exiting the European Union, [The Repeal Bill: Factsheet 8 Environmental Protections](#), 8 September 2017

<sup>22</sup> UKELA, [Report on Brexit and Environmental Law: Enforcement and Political Accountability Issues](#), July 2017 [accessed October 2017]

<sup>23</sup> Environmental Audit Committee Oral evidence: The Government’s Environmental Policy, [HC 544](#), 1 November 2017, Q1 and Q4 [accessed 7 November 2017]

<sup>24</sup> Environmental Audit Committee Oral evidence: The Government’s Environmental Policy, [HC 544](#), 1 November 2017, Q3 [accessed 7 November 2017]

<sup>25</sup> Defra, [Environmental Principles and Governance after the United Kingdom leaves the European Union: Consultation on environmental principles and accountability for the environment](#), 10 May 2018, p2

## 2. Devolved nations

### UK Government approach

The Government's Environmental principles and governance consultation set out its starting point that (as many environmental matters are devolved) the statement of principles and the new environmental body would apply to England only and matters that are not devolved, but noted that "a joined up approach would be beneficial":

12. Our starting point is that the statutory statement of environmental principles and the environmental body should cover England and environmental matters that are not devolved. This consultation therefore relates only to areas for which the UK government is responsible.

13. The statutory statement of environmental principles and the new body could, subject to the ongoing framework discussions with the devolved administrations, apply more widely across the UK. The environment does not respect boundaries, and we believe a joined up approach would be beneficial. If the devolved administrations would like to address the issues in this consultation jointly, we would welcome the opportunity to co-design the proposals for the new environmental body and principles with them to ensure they work more widely across the UK, taking account of the different government and legal systems in the home nations.<sup>26</sup>

The Policy paper accompanying the publication of the draft *Environment (Principles and Governance) Bill* reiterated this position:

Environment is a devolved matter, subject to a small number of areas that are reserved. In consequence, this Bill applies to England and to the UK for reserved matters. Overall, we recognise that protecting the environment is inherently an issue that cuts across boundaries, and we continue to welcome the opportunity to co-design with the Devolved Administrations, should they wish to join any proposals, to safeguard our shared natural environment.<sup>27</sup>

For further information about the territorial extent of the draft *Environment (Principles and Governance) Bill* see section 3.3 of this paper.

### Devolved Administrations' approach

For background information about the devolved Administrations' stances on environmental principles and governance in general, see section 5 of the Library briefing paper [Brexit and the Environment \(8 August 2018\)](#).

A [blog](#) by Professor of Environmental Law at Dundee University (Colin Reed)<sup>28</sup> provides a useful discussion on devolution in the draft

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<sup>26</sup> Defra, [Environmental Principles and Governance after the United Kingdom leaves the European Union: Consultation on environmental principles and accountability for the environment](#), 10 May 2018, paras 12-13

<sup>27</sup> HM Government, [Environment Bill: policy paper](#), 19 December 2018

<sup>28</sup> Brexit & Environment, [All in it together – but not yet? Devolution in the Environment Bill](#), 20 January 2019 [accessed 30 January 2019]

Environment Bill and the situations in Scotland, Wales and Northern Ireland.

The National Assembly for Wales Research Service has published a [blog on Environmental principles and governance post-Brexit: the draft UK Bill and Wales](#) (10 January 2019) which includes the following summary of the Welsh Government's approach:

The Welsh Government has previously committed to 'take the first proper legislative opportunity to enshrine the environmental principles into law and close the governance gap'.

The Minister for Environment, Energy and Rural Affairs, Lesley Griffiths, has since been considering whether to create a Wales-only environmental governance body and Welsh principles or join the UK Government in establishing a UK-level approach. In correspondence to the Assembly's Climate Change, Energy and Rural Affairs (CCERA) Committee (October 2018) she said the Welsh Government was considering the differences in the governance gap between England and Wales, and that a Welsh consultation would be launched in autumn 2018.

However, a Welsh consultation is yet to be published.

The Welsh Climate Change, Environment and Rural Affairs Committee wrote to the Welsh Minister on 10 January with a number of questions on the draft Bill and its application to Wales, as well as an update on the Welsh Government's proposals for environmental principles and governance arrangements.<sup>29</sup> Any response from the Minister is likely to be published on the [Committee's website](#).

The Committee had previously published a report on [Environmental governance arrangements and environmental principles post-Brexit](#), June 2018, which is accompanied by a [Welsh Government Response](#). The Committee's report was also the subject of a blog piece written by the National Assembly for Wales Research Service, [Environmental governance post-Brexit: closing the 'governance gap'](#), 27 June 2018.

The following resources were published in October 2018 by [The UK in a Changing Europe](#):

- [Wales: challenges and opportunities for post Brexit environmental governance](#)
- [Scotland: challenges and opportunities for post Brexit environmental governance](#)
- [Northern Ireland: challenges and opportunities for post Brexit environmental Governance](#)

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<sup>29</sup> National Assembly for Wales, Climate Change, Environment and Rural Affairs Committee, [Correspondence from the Chair: UK Government's Draft Environment \(Principles and Governance\) Bill](#), 10 January 2019

## 3. The draft Environment (Principles and Governance) Bill

In accordance with section 16 of the *European Union (Withdrawal) Act 2018*, the Government was required to publish a draft Bill by 26 December 2018.

The Government published the [draft Environment \(Principles and Governance\) Bill and draft Explanatory Notes](#) on 19 December 2018, along with a number of accompanying documents as follows:

- [Environment Bill: policy paper](#);
- [Statement of Impacts](#);
- [Environment \(Principles and Governance\) Bill: Memorandum from Defra to the Delegated Powers and Regulatory Reform Committee](#);
- [Information paper on the policy statement on Environmental Principles](#); and
- [Environmental Principles and Governance after the United Kingdom leaves the European Union: Summary of responses and government response](#).

### 3.1 Wider Environment Bill later in 2019

The draft clauses will form part of a wider Environment Bill which was announced by the Prime Minister in July 2018.<sup>30</sup> The wider Environment Bill is expected to be introduced in the next Parliamentary session and the Government press release commits to the broader Bill including legislative measures to address: air quality, protection and enhancement of landscapes, wildlife and habitats; more efficient handling of resources and waste; and better management of water.<sup>31</sup>

Further information about the “wider ambition of the Bill” is set out in the [Environment Bill: Policy Paper](#) which was published alongside the draft Bill.

Furthermore, on air quality, the Government’s January 2019 [Clean Air Strategy](#) gave some detail of the provisions to tackle air pollution that would be in the wider Bill:

Through the new Environment Bill we will make changes to make smoke control legislation easier to enforce. In addition, we will explore powers for Local Authorities to go further in areas of high pollution, for example, we will continue to explore how we can give Local Authorities powers to increase the rate of upgrades of inefficient and polluting heating appliances. We will also consider what additional, stronger local powers would be effective to further reduce pollution from domestic burning where there is a

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<sup>30</sup> House of Commons Liaison Committee, Oral evidence: The Prime Minister, [HC 1393](#), 18 July 2018

<sup>31</sup> Defra press release, [New environment protections set out in flagship bill](#), 19 December 2018 [accessed 14 January 2019]

clear case that action needs to be taken to protect human health. We will improve and develop new guidance on when existing local and national powers should be used in times of high air pollution.<sup>32</sup>

More detailed information about these proposals is provided in pages 81-82 of the [Clean Air Strategy](#).

## 3.2 Overview of draft Bill

The draft Bill as it stands is broadly split into three key areas covering: environmental principles; establishing a new environmental governance body named the Office for Environmental Protection; and introducing a new legal requirement for the Government to publish Environmental Improvement Plans which it will monitor and report on annually. The first of these plans would be the existing 25-year environment plan which was published in January 2018.<sup>33</sup> Each of these key areas is explained further below.

## 3.3 Territorial extent and application

The territorial extent of the draft clauses is set out in draft clause 34. Annex A of the [draft Explanatory Notes](#) includes a table summarising the territorial extent and application in the UK.

All of the draft clauses apply to England. Subject to the below bulletpoints, the draft clauses also apply to Wales, Scotland and Northern Ireland in respect of environmental matters that are not devolved:

- Draft clauses 1-4 (environmental principles) apply to the whole of the UK in respect of UK Ministers and their functions only.
- Draft clauses 5-10 and 14 (environmental improvement plans) apply to England only.

This means that the provisions on the new Office for Environmental Protection (OEP) will apply to the whole of the UK in respect of matters that are not devolved.<sup>34</sup> Furthermore, the draft Explanatory Notes state that the OEP could exercise functions more widely across the UK “subject to the ongoing framework discussions with the devolved administrations”.<sup>35</sup>

## 3.4 Environmental principles

Draft clauses 1-4 relate to environmental principles and fulfil the obligations set out in section 16(1) (a) (b) and (c) and (2) of the *European Union (Withdrawal) Act 2018*. The Government published an [Information paper on the policy statement on Environmental Principles](#) alongside the draft clauses.

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<sup>32</sup> HM Government, [Clean Air Strategy](#), January 2019, p59

<sup>33</sup> See [Library Briefing Paper on the 25-year environment plan](#), 17 January 2018 for background information.

<sup>34</sup> For example, the offshore pollution prevention regime.

<sup>35</sup> Draft Explanatory Notes, para 42

## Policy statement

Draft clause 1 puts a duty on the Secretary of State to prepare a policy statement on environmental principles which sets out how Ministers of the Crown should interpret and proportionately apply environmental principles when making, developing and revising policies. This is a delegated power and the accompanying [delegated powers memorandum](#) explains that the policy statement “will provide a level of detail that would be inappropriate to set out on the face of the Bill”. It goes on to explain that as the power relates to a new statutory duty, it may require updating to fully incorporate emerging best practice or case law.<sup>36</sup>

The detailed guidance and interpretation on the environmental principles will be included in the policy statement and is not set out in the draft clauses. A draft version of the policy statement has not been published alongside the draft Bill, but the Government published an [Information Paper on the Policy Statement](#) which provides more detailed information and includes a number of case studies and example.

Draft clause 3 sets out a specific process that the Secretary of State must follow each time the policy statement is updated. It requires the Government to prepare a draft and consult with “such persons as the Secretary of State considers appropriate”. The [Information paper on the policy statement](#) confirms that the policy statement will be a statutory document and the expectation is that it should be read alongside other government documents such as National Policy Statements. A lawyer at Friends of the Earth set out their concerns in a blog that this does not replicate the current position under EU law:

[...] we will be moving from the current position where (under Article 191 of the Lisbon Treaty) environmental policy must be “based on” the environmental principles to one where the interpretation and application of the environmental principles (and the decision as to which policies the principles apply to) will be entirely controlled by the Government (because the Government will write the policy statement).<sup>37</sup>

## Exemptions

There are some areas excluded from the scope of the policy statement including: policies relating to armed forces, defence or national security; and taxation, spending or the allocation of resources within government. The Secretary of State may also set out further exemptions relating to “any other matter”. This delegated power is justified by Defra in the accompanying delegated powers memorandum in order to “retain flexibility” for any new or emerging policy area that should not be covered. The memorandum confirms that the proposal is that any such exemptions would be added by way of a statutory instrument

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<sup>36</sup> Defra, [Memorandum from Defra to the Delegated Powers and Regulatory Reform Committee](#), 19 December 2018, para 14

<sup>37</sup> WCL, [Government publishes \(half\) a draft Environment Bill](#), David Abrahams, December 2018 [accessed 10 January 2019]

under the affirmative resolution procedure, and thus be subject to Parliamentary scrutiny.<sup>38</sup>

Some commentators, such as the executive director of the Aldersgate Group (Nick Molho), have called for the policy statement to *include* (rather than specifically exclude) the Government's fiscal and spending decisions.<sup>39</sup> Others have called for the Secretary of State's delegated power to set out further exemptions to be removed, with Green Party MP Caroline Lucas describing the relevant provision as a "truly absurd caveat to vital rules protecting our oceans, wildlife and animals. This Get Out of Jail Free card must go."<sup>40</sup> An environmental lawyer at Prospect Law commented that the exemptions from the Policy Statement were wide and appeared "unjustified":

These exemptions appear unjustified, inconsistent with EU environmental law which the government has promised to transpose into national law, and inconsistent with the express ambition of the Secretary of State to have a "world-leading, independent watchdog to hold government to account on our environmental ambitions once we have left the EU". There is a long way to go in amending these Draft clauses before they can be said to deliver anything equivalent to the force and enforcement of EU environmental laws.<sup>41</sup>

### **Duty on Ministers of the Crown to have regard to the policy statement**

Draft clause 4 places a duty on Ministers of the Crown to "have regard" to the policy statement, except in circumstances where the action would have "no significant environmental benefit" or would be "in any other way disproportionate to the environmental benefit". Examples of such circumstances given in the accompanying Information Note include literacy policy, provision of welfare or media policy.<sup>42</sup> Subject to the exceptions, the draft Explanatory Notes explain that this clause means that "policy-makers must consider the Policy Statement and follow the approach which is set out in the statement".<sup>43</sup>

The requirement to "have regard to" the policy statement mirrors the language of section 16 of the *EU (Withdrawal) Act 2018*. This standard was subject to much debate at the time of the 2018 Act, with reaction to these draft clauses echoing previous concerns and calling for the duty to be elevated to "act in accordance with" or similar.<sup>44</sup> Concerns that the requirement was not strong enough was also a key theme of the

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<sup>38</sup> Defra, [Memorandum from Defra to the Delegated Powers and Regulatory Reform Committee](#), 19 December 2018, paras 17-19

<sup>39</sup> Environment Analyst, [Gove unveils draft environment bill and waste strategy](#), 8 January 2019 [accessed 9 January 2019]

<sup>40</sup> ENDS Report, [Environment bill: ministers would not be bound by environmental principles](#), 20 December 2018 [subscription only] [accessed 10 January 2019] and [Caroline Lucas twitter thread](#) [19 December 2018]

<sup>41</sup> Prospect Law blog, [The Environment \(Principles and Governance\) Bill: Environmental Standards after Brexit](#), 2 January 2019, William Wilson [accessed 14 January 2019]

<sup>42</sup> Defra, [Information paper on the policy statement on Environmental Principles](#), 19 December 2018, p.5 [accessed 20 December 2018]

<sup>43</sup> Draft Explanatory Notes, para 65

<sup>44</sup> See, for example, Environment Analyst, [Gove unveils draft environment bill and waste strategy](#), 8 January 2019 [accessed 9 January 2019]

responses to the Government consultation.<sup>45</sup> For example, the Environment Agency Chair (Emma Howard Boyd) welcomed the Bill in general, but expressed concerns in a speech in January 2019 that the wording “have regard to” means the “policy decisions risk being narrowly defined” and stated that “we would like to be certain all Ministers will respect the principles”.<sup>46</sup>

The Government’s aim is for the draft Bill to be broadly equivalent to the existing situation under the TFEU, which it argues is achieved by the “have regard to” obligation:

The government seeks the draft Bill to be broadly equivalent to the corresponding provisions in the Treaty on the Functioning of the European Union – particularly Article 191 which sets out that Union Policy ‘shall be based on’ the environmental principles; the proposed ‘have regard to’ obligation is broadly equivalent to this requirement.<sup>47</sup>

The Government’s explanation is contested by some, including academics at University College London, who argued that this duty is:

[...] much more limited than current EU law, where the environmental principles are *binding* on *all* public authorities when they are applying EU law that falls within the scope of EU environmental competence, in all relevant cases, including individual administrative decisions. The Explanatory Memorandum dramatically understate the current role of environmental principles in EU law.<sup>48</sup>

Some legal commentators have also highlighted that the draft Bill’s provisions on principles and its governance arrangements are not explicitly linked<sup>49</sup> i.e. that the scope of the OEP’s powers do not explicitly include the policy statement on environmental principles. However, the Government’s response to the consultation clarifies that the duties upon Ministers set out in the draft Bill will fall within the scope of the OEP and that:

[...] it is therefore possible that the OEP could scrutinise government’s application of the principles and take enforcement action in cases where it considered that a duty had not been discharged; this should address concerns raised that oversight and enforcement of the environmental principles is needed.<sup>50</sup>

For further discussion of the scope of the OEP’s powers, see section 3.7 below.

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<sup>45</sup> HM Government, [Environmental Principles and Governance after the United Kingdom leaves the European Union: Summary of responses and government response](#), 19 December 2018, p8

<sup>46</sup> Environment Agency, [Speech: the Natural Laws of Brexit](#), 17 January 2019

<sup>47</sup> HM Government, [Environmental Principles and Governance after the United Kingdom leaves the European Union: Summary of responses and government response](#), 19 December 2018, p14

<sup>48</sup> Maria Lee and Eloise A.K. Scotford, [Environmental Principles After Brexit: The draft Environment \(Principles and Governance\) Bill](#), 25 January 2019

<sup>49</sup> See, for example, [Brexit & Environment expert roundtable: the Environment \(Principles and Governance\) Bill](#), 14 January 2019 [accessed 21 January 2019]

<sup>50</sup> HM Government, [Environmental Principles and Governance after the United Kingdom leaves the European Union: Summary of responses and government response](#), 19 December 2018, p14

## List of environmental principles

Draft clause 2 lists the environmental principles exactly as set out in the *European Union (Withdrawal) Act 2018*. Additional principles for inclusion were suggested by some submissions to the Government's consultation (including proportionality and net environmental gain)<sup>51</sup> however, none were included in the draft Bill. The Government's response to the consultation stated that "further work and evidence is being gathered to establish what the circumstances, evidence and/or criteria might be for the Secretary of State to add further principles within the statutory policy statement".<sup>52</sup>

As explained in section 1.1 above, there is no universal or single definition of environmental principles. Further explanation of the Government's intended meaning of each of the principles set out in the draft Bill is set out in the accompanying draft Explanatory Notes, including a statement that the "principles cannot be changed without primary legislation". More detailed Government explanation is provided in the [Information Note](#).<sup>53</sup>

## 3.5 Definition of "natural environment" and "environmental law"

The definitions set out in the draft Bill are important for understanding the scope and nature of the new domestic governance and principles arrangements. For example, many of the OEP's functions are described by reference to "environmental law".<sup>54</sup>

### Natural environment

"Natural environment" is defined in draft clause 30 as: wild animals, plants and other living organisms; their habitats, land, water and air (except building or other structures and water or air inside them), and the natural systems, cycles and processes through which they interact.

The draft Explanatory Notes confirm that this would include the offshore environment such as the marine environment, as well as the atmosphere and the soil. The exclusions from the definition mean that the indoor air environment and any indoor water environments (e.g. aquariums) would not fall within this.

### Environmental law

There is not an existing or generally accepted definition of the "environment" or "environmental law". For the purposes of the draft Bill, the meaning of "environmental law" is set out in draft clause 31 as:

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<sup>51</sup> HM Government, [Environmental Principles and Governance after the United Kingdom leaves the European Union: Summary of responses and government response](#), 19 December 2018, p8

<sup>52</sup> HM Government, [Environmental Principles and Governance after the United Kingdom leaves the European Union: Summary of responses and government response](#), 19 December 2018, p13

<sup>53</sup> Draft Explanatory Notes, para 57 and Defra, [Information paper on the policy statement on Environmental Principles](#), 19 December 2018, Pp. 12-15 [accessed 20 December 2018]

<sup>54</sup> These include: monitoring the implementation of environmental law; advising Minister about changes to environmental law; responding to complaints about failure to comply with environmental law; and other enforcement functions.

the Bill itself and any regulations made under it, and any legislative provision (other than devolved legislative provision) that is mainly concerned with an “environmental matter” and is not concerned with an “excluded matter”.

**Environmental matters** are:

- (a) protecting the natural environment from the effects of human activity;
- (b) protecting people from the effects of human activity on the natural environment;
- (c) maintaining, restoring or enhancing the natural environment;
- (d) monitoring, assessing, considering, advising or reporting on anything in paragraphs (a) to (c).

The draft Explanatory Note provides examples of what would normally be considered to fall within this definition, including: air quality; water resources and quality; marine, coastal or nature conservation; waste management; pollution; and contaminated land. The following would normally be outside of the scope (according to the draft Explanatory Note): forestry; flooding; navigation; planning; cultural heritage; animal welfare or sentience; animal or plant health; health and safety at work; and people’s enjoyment of or access to the natural environment.<sup>55</sup>

Explicitly **excluded matters** are set out in draft clause 31(3) as: most climate change mitigation legislation (see section 3.8 below); disclosure or access to information legislation (to avoid overlap with the Information Commissioner’s Office); and legislation relating to the armed forces, defence, national security, taxation, spending or the allocation of resources within government.

Draft clause 31(5) provides a delegated power to the Secretary of State to amend the definition of “environmental law” by regulations. This could be by way of additional inclusion or further exclusions from the meaning. The Secretary of State must consult the OEP and any other persons he/she considers appropriate before making any such regulations. The delegated powers memorandum provides the following justification for this power, explaining that there may be cases where there are questions over whether certain legislative provisions are or are not environmental law:

It is expected that the new body and the government will discuss any such uncertainties at the margins of the definition, and come to a resolution between them. Should that not be possible, clarity can be provided through judgments of the court in the event that the OEP applies for judicial review (clause 25). However, it is also considered desirable to provide a legislative mechanism to clarify any such uncertainties if necessary. Otherwise, it may not be clear to the OEP if it has a locus to act, or to a public authority whether its implementation of a particular legislative provision is subject to oversight and investigation by the OEP.<sup>56</sup>

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<sup>55</sup> Draft Explanatory Notes, para 211-212

<sup>56</sup> Delegated Powers Memorandum, para 27

## 3.6 Environmental Improvement Plans

Draft clauses 5-10 relate to environmental improvement plans.

Draft clause 6 places a duty on the Secretary of State to prepare an environmental improvement plan (EIP) for improving the “natural environment” (see section 3.5 above). The plan must relate to a period of at least 15 years and must set out the steps that the Government intends to take to improve the natural environment in that period. It may also set out steps for improving people’s enjoyment of the natural environment. Clause 6(6) specifies that the Secretary of State’s duties relating to EIPs relate to England only. Draft clause 6(7) confirms that the Government’s 25-year environment plan published on 11 January 2018<sup>57</sup> is to be treated as an EIP.

A lawyer at Friends of the Earth commented on the lack of legally binding targets in the draft Bill and called for more ambition from the Government:

Although the draft Bill puts the Government’s 25 Year Plan on a statutory footing, it is entirely silent on the setting of legally binding targets.

[...]

This is an area where the Government needs to be far more ambitious. Without legally-binding targets we will be left with mere aspirations and the risk that environmental issues will be pushed well down the political agenda, and made subordinate to other political priorities (such as the pursuit of deregulation and economic growth at all costs).<sup>58</sup>

### Environmental monitoring and reports

Draft clause 7 puts a duty on the Secretary of State to ensure that appropriate monitoring data is obtained to assess whether the natural environment is improving in accordance with the current EIP. It also requires the Secretary of State to specify the kinds of data to be obtained in a statement laid before Parliament.

Alongside the Bill documents, the Government published a [consultation on the 25 year environment plan: measuring progress](#) on 19 December 2018, seeking views on the indicators and measures that should be used to show environment change and how the government will measure progress against the 10 goals of the plan. The consultation included a draft indicator framework and closed on 25 January 2019.<sup>59</sup>

In response to a request from the Environmental Audit Committee to update a 2015 briefing on environmental and sustainability metrics, the National Audit Office (NAO) published a report on [Environmental metrics: government’s approach to monitoring the state of the natural environment](#) on 16 January 2019 which sets out the NAO’s expectations of good practice for an effective system of performance metrics based

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<sup>57</sup> See [Library Briefing Paper on the 25-year environment plan](#), 17 January 2018 for background information.

<sup>58</sup> WCL, [Government publishes \(half\) a draft Environment Bill](#), David Abrahams, December 2018 [accessed 10 January 2019]

<sup>59</sup> Gov.uk, [Consultation on the 25 year environment plan: measuring progress](#), 19 December 2018

on its experience of reviewing government approaches to managing performance. It also examines the government's current environmental metrics and its plans for developing new metrics in this context.

There does not appear to be an explicit requirement for the Secretary of State to publish the actual data collected pursuant to clause 7, but draft clause 8 requires the Secretary of State to prepare annual reports on the implementation of the current environmental improvement plan including a description of actions taken and consideration of whether the environment is improving, which is to be laid before Parliament "as soon as reasonably practicable" after the end of the relevant annual period. The Government's draft indicators framework for the 25 year environment plan sets out data that is currently publicly available (e.g. [water quality tests](#) published every three years).<sup>60</sup>

The Secretary of State must also review the current EIP every five years (or, in the case of the first review, by 31 January 2023), following which they must either lay a revised EIP and the reasons for the revision before Parliament, or (if the Secretary of State does not consider it appropriate to revise the plan) lay a statement before Parliament explaining that and the reasons for it.<sup>61</sup>

The OEP will play a scrutiny role in relation to the annual reports by reporting on the implementation of the EIPs (as explained further in section 3.7 below). The Secretary of State is then required to respond to the OEP's report, publish the response and lay it before Parliament (draft clause 14).

At a UKELA conference, professor of environmental law at the University of Oxford (Liz Fisher), was reported to question how "constitutionally desirable" this situation would be. She observed that the Bill is "vesting considerable power in the hands of the executive and the ministers to define the baselines which we are working from".<sup>62</sup>

### 3.7 A new Office for Environmental Protection (OEP)

Draft clauses 11-29 and the Schedule relate to the establishment of the Office for Environmental Protection (OEP) and its functions. These draft clauses fulfil the obligations set out in section 16(1)(d) of the *EU (Withdrawal) Act 2018*.

The Government has stated that the aim of the OEP is to:

...provide independent assurance of government's delivery of environmental law and the 25 Year Environment Plan, and impartial advice to support the development of improved measures for future application. This will bolster and complement our domestic governance framework to ensure that the U.K. has the ability to implement environmental legislation in an improved and more complete manner, so enabling the law to deliver its

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<sup>60</sup> Gov.uk, [Consultation on the 25 year environment plan: measuring progress](#), 19 December 2018

<sup>61</sup> Draft clause 9

<sup>62</sup> ENDS Report, [What do legal experts think of the draft Environment Bill?](#) Simon Pickstone, 18 January 2019 [subscription only]

intended benefits. This will ensure that the current level of accountability and environmental protection is not weakened after the U.K. leaves the EU, while providing for a wide range of additional social, environmental and economic benefits through improved policy design due to the scrutiny and advice functions.”<sup>63</sup>

## Membership and funding

### Membership

Draft clause 11, along with the Schedule, establishes the new OEP as a Non-Departmental Public Body (NDPB). The OEP board is to consist of:

- (a) a Chair (who is to be a non-executive member),
- (b) at least two, but not more than five, other non-executive members,
- (c) a chief executive (who is to be the accounting officer), and
- (d) at least one, but not more than three, other executive members.

The non-executive members (including the Chair) are to be appointed by the Secretary of State. According to the draft Explanatory Notes, this is “customary for NDPBs and reflects the need for adequate ministerial oversight.”<sup>64</sup> A non-executive member of the OEP can be appointed for a fixed term of no more than 5 years.

The appointments process will be in accordance with the Government’s [Governance Code for Public Appointments](#).<sup>65</sup> The Secretary of State must consult the Chair before appointing any other non-executive member. The other executive members are to be appointed by the OEP. The draft Explanatory Notes state that these provisions “aim to ensure a balance between ministerial accountability and independence in making appointments to the body, and between non-executive and executive involvement in the governance of the body.”<sup>66</sup> Draft paragraph 1(10) of the Schedule provides that, as far as practicable, the number of non-executive members “is at all times greater than the number of executive members.”

### Funding

Paragraph 9 of the Schedule provides that the Secretary of State must pay the OEP “such sums as the Secretary of State considers are reasonably sufficient to enable to OEP to carry out its functions.” The draft Explanatory Notes state that funding will be provided by grant-in-aid, which will be set out in a separate line in Defra’s financial estimate, to “...ensure adequate transparency.”<sup>67</sup>

The draft Explanatory Notes sets out the heading of various costs that will be associated with the creation of the OEP:

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<sup>63</sup> HM Government, [Draft Environment \(Principles and Governance\) Bill: Statement of Impacts](#), December 2018, p2-3

<sup>64</sup> Draft Explanatory Notes, para 230

<sup>65</sup> Draft Explanatory Notes, para 229

<sup>66</sup> Draft Explanatory Notes, para 228

<sup>67</sup> Draft Explanatory Notes, para 244

One-off setup costs, including for public appointments, staff recruitment, and enabling IT systems

Governance costs, including remuneration and expenses for non-executive members

Direct staffing and other operating costs for its enforcement, complaints and scrutiny functions

Corporate and 'back office' costs including finance, premises, communications, HR and IT.<sup>68</sup>

Under Paragraph 11 of the Schedule the OEP must produce an annual statement of accounts to be laid before Parliament. This must include an assessment of whether it has been provided with sufficient sums to carry out its functions for each financial year.

### Commentary

Defra's control over funding and board membership has been criticised by a number of environmental groups for lacking true independence from Government. For example, a WWF-UK briefing stated:

The Bill as drafted gives ministers control over the OEP's funding and board members, with the Secretary of State providing a budget. This means the OEP will essentially be within the control of the Government – the same Government it is meant to be holding to account. This does not bode well for the long-term effectiveness and sustainability of the OEP - particularly if we look at how official wildlife agency Natural England has during the past several years been starved of cash and sidelined in decision making.<sup>69</sup>

The perception of the OEP's independence was also a concern raised by the National Audit Office (NAO) in its January 2019 report on Environmental Metrics:

The watchdog will be funded through Defra, with a chair appointed by the Secretary of State for Defra. While in principle this is not incompatible with it being functionally independent, it could bring risks for its independence in practice or for its perceived independence.<sup>70</sup>

An ENDS Report article on a UKELA conference reported the opinion that establishing the OEP by royal charter could go further to assure its independence:

Others went further. David Wolfe, a QC at Matrix Chambers, said that the OEP could function as a truly independent body, but only if it were established by royal charter.

As chair of the Press Recognition Panel, one such body enjoying the protection of a royal charter, Wolfe said he was virtually "untouchable" by government because a decision on removing

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<sup>68</sup> Draft Explanatory Notes, para 254

<sup>69</sup> WWF-UK, "[Much to do in strengthening new environmental laws](#)" 21 December 2018

<sup>70</sup> National Audit Office, [Environmental metrics: government's approach to monitoring the state of the natural environment](#) HC 1866 Session 2017–2019, 16 JANUARY 2019, p11

him would require a two thirds majority in parliament. "Don't let anybody tell you that [independence] can't be done," he urged.<sup>71</sup>

The issue of the OEP's independence from Government was also raised by respondents to the consultation process. This included calls, including from the Environmental Audit Committee, for the OEP to be established as a Parliamentary Body and for the Chair of the OEP to be subject to a pre-appointment hearing. The Government responded to these points as follows setting out why it did not consider a Parliamentary Body to be appropriate:

Establishing the OEP as a Parliamentary Body was considered, however this would prevent it from taking legal proceedings against the government if it were to remain within the well-established constitutional boundaries by which Parliament currently operates. However we recognise the need for Parliament to have a clear role, and that Mary Creagh, the Chair of the Environmental Audit Committee has requested for the Chair of the OEP to be subject to a pre-appointment hearing. This will be considered as part of the follow up to government's response to the Public Administration and Constitutional Affairs Committee Report on Pre-Appointment Hearings which is looking at the overarching principles around the hearings.<sup>72</sup>

Not all commentators have been critical. The Country Land and Business Association (CLA) stated it was "pleased" with the OEP's ability to scrutinise Government without "extra cost and complexity":

In our consultation response we called for the proposed new body to ensure the Government is scrutinised and penalised sufficiently so that environmental targets are met but without adding extra cost and complexity. We are pleased the Government has listened to us and believe existing green powers will be strengthened so that the farmers and land managers who deliver this important environmental work are supported in their role.<sup>73</sup>

## Operational powers

The draft Schedule provides the OEP with a number of powers in respect of the operation of its functions. These include:

- Paragraph 5: the power to "do anything it thinks appropriate for carrying out its functions without interference or approval from ministers", (except those activities outlined in sub-paragraph (2), such as forming a company or accepting gifts, which it may not do at all.)<sup>74</sup>
- Paragraph 6: the power to establish committees to "...allow the body to gain access to additional specialised expertise".<sup>75</sup>

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<sup>71</sup> ENDSReport, "[What do legal experts think of the draft Environment Bill?](#)" 18 January 2019 [subscription only]

<sup>72</sup> HM Government, [Environmental Principles and Governance after the United Kingdom leaves the European Union: Summary of responses and government response](#), 19 December 2018, p19

<sup>73</sup> CLA, [Green Watchdog will support farmers to care for the environment](#), says CLA, 20 December 2018

<sup>74</sup> Draft Explanatory Notes, para 240

<sup>75</sup> Draft Explanatory Notes, para 241

- Paragraph 7: the power to delegate any of its functions (other than technical exceptions listed in sub-paragraph 4), to a member, employee or committee, in accordance with a delegation policy, to "...ensure decisions can be made at the most appropriate level."<sup>76</sup>
- Paragraph 8: the power to determine its own procedures, to "...ensure operational independence from Government."<sup>77</sup>

## Objectives and priorities

Draft clause 12 provides the OEP must "have regard to the need to act-objectively, impartially, proportionately, and transparently." The term "have regard to" is used because, "it is recognised that the OEP may need to use its judgement to determine when it is appropriate to apply these objectives."<sup>78</sup>

The OEP must also set out a strategy, which must be laid before Parliament and reviewed every three years, setting out: a.) how it intends to exercise the above objectives, b.) how it intends to avoid overlap in exercise of its monitoring, reporting and advising functions and the exercise by the Committee on Climate Change of its functions, and c.) its complaints and enforcement policy (which must include how the OEP will prioritise cases).

Further information about prioritising cases is given in draft clause 12(4) which states that the OEP must prioritise "...those cases that it considers have, or may have national implications." The draft Explanatory Notes state that "the definition of national implications will be for the OEP to determine."<sup>79</sup> Further instructions for prioritising cases are given in draft clause 12(4)(a)-(c):

- (a) that relate to ongoing or recurrent conduct,
- (b) that relate to conduct that the OEP considers may cause (or has caused) significant damage to the natural environment or to human health, or
- (c) that the OEP considers may raise a point of environmental law of general public importance.<sup>80</sup>

Again in regard to the complaints and enforcement policy, the draft Explanatory Notes set out how the OEP must exercise its functions in a way which "respects the integrity of other relevant statutory regimes."<sup>81</sup> The example provided is that decisions made by a Planning Authority may be subject to call-in by or appeal to the Secretary of State and that "in normal circumstances it is expected that the OEP would allow the usual regulatory process to take their course, where they could affect a matter concerning a possible failure to comply with environmental law, before taking enforcement action."<sup>82</sup>

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<sup>76</sup> Draft Explanatory Notes, para 242

<sup>77</sup> Draft Explanatory Notes, para 242

<sup>78</sup> Draft Explanatory Notes, para 110

<sup>79</sup> Draft Explanatory Notes, para 113

<sup>80</sup> Draft clause 12(4)(a)-(c), *Draft Environment (Principles and Governance) Bill*

<sup>81</sup> Draft Explanatory Notes, para 112

<sup>82</sup> Draft Explanatory Notes, para 112

## Scrutiny and advice functions

### Monitoring and reporting on environmental improvement plans

Under draft clause 14 the OEP must “monitor progress in improving the natural environment in accordance with the current environmental improvement plan.” It must prepare a progress report, to be laid before Parliament, for each annual reporting year as part of the wider monitoring and reporting process on EIPs set out in section 3.6 above.

The draft Explanatory Notes set out that under this clause “the OEP will monitor and assess and analyse environmental statistics and reports to ensure it has an effective knowledge base. This information will then be analysed alongside information published by the Government to assess progress made in improving the natural environment in accordance with the current environmental improvement plan.”<sup>83</sup>

### Monitoring and reporting on environmental law

Draft clause 15 requires the OEP to monitor the implementation of environmental law (as defined in clause 31 – see section 3.5 above). The OEP may (but is not required to) produce a report, to be laid before Parliament, on any matter concerned with the “implementation of environmental law”, for example, “any failure to fully implement environmental legislation.”<sup>84</sup> A response to this report must be laid before Parliament by the Secretary of State within three months of the OEP’s report being laid.

In a Brexit & Environment article, Dr Ole Pedersen, Newcastle Law School, questioned what monitoring implementation would actually mean in practice:

Finally, the main function of the OEP to monitor the ‘implementation of environmental law’ (Clause 15) strikes me as a peculiar choice of phrase. ‘Implementation’ makes sense when domestic law is enacted against an international or supranational background or benchmark and when there is something to compare the domestic law to (for example EU law). That won’t necessarily be the case for post-Brexit UK environmental law. In the absence of an overall statutory objective, what is the OEP supposed to compare the government’s ‘implementation’ against?<sup>85</sup>

### Advising on changes to environmental law

Under draft clause 16 the OEP must give advice to a Minister of the Crown about:

- (a) any proposed change to environmental law, or
- (b) any other matter relating to the natural environment, on which the Minister requires it to give advice.<sup>86</sup>

The OEP may also choose to give advice to a Minister of the Crown about any changes to environmental law proposed by a Minister. Under

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<sup>83</sup> Draft Explanatory Notes, para 120

<sup>84</sup> Draft Explanatory Notes, para 129

<sup>85</sup> Brexit & Environment, [Expert Roundtable: The Environment \(Principles and Governance\) Bill](#), 14 January 2019

<sup>86</sup> Draft clause 16(1) *Draft Environment (Principles and Governance) Bill*

subclause 6 the Minister may, but is not required to, lay the advice and any response to it before Parliament.

## Failure of public authorities to comply with environmental law

Under draft clause 17 a public authority's failure to comply with environmental law is defined as follows:

- (a) unlawfully failing to take proper account of environmental law when exercising its functions;
- (b) unlawfully exercising, or failing to exercise, any function it has under environmental law.<sup>87</sup>

A public authority is defined as "a person carrying out any function of a public nature that is not a devolved function." This definition goes on to specifically exclude:

- (a) the OEP;
- (b) a court or tribunal;
- (c) either House of Parliament or a person exercising functions in connection with proceedings in Parliament;
- (d) a devolved legislature, or a person exercising functions in connection with proceedings in a devolved legislature;
- (e) the Scottish Ministers, the Welsh Ministers or a Northern Ireland department.<sup>88</sup>

The Government's initial consultation proposal was that the new body will only be able to hold national government (and not all public authorities) directly to account. Section 16 of the *European Union (Withdrawal) Act 2018* specifies "Minister of the Crown" only. The consultation did seek views on whether any other authorities should be directly or indirectly in the scope of the new body. The Government's Response set out that the "majority of respondents considered that the public authorities should be directly within the scope of the OEP."<sup>89</sup> It also explains why this initial proposal has now been changed in the draft Bill, including in order to avoid a governance gap:

In response to the majority of respondents' view that public authorities should be directly within the OEP's scope, the draft Bill proposes that its complaints and enforcement functions will apply directly to any public authority failing to comply with environment law. Clause 17(3) confirms that public authorities include any person or body carrying out a function of a public nature (subject to certain exemptions) will be within the scope of the OEP.

While concerns about this approach are recognised, it would not be possible for the OEP to bring legal proceedings against central government in domestic courts for the actions of another public

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<sup>87</sup> Draft clause 17(2) *Draft Environment (Principles and Governance) Bill*

<sup>88</sup> Draft clause 17(3) *Draft Environment (Principles and Governance) Bill*

<sup>89</sup> HM Government, [Environmental Principles and Governance after the United Kingdom leaves the European Union Summary of responses and government response](#), 19 December 2018, p27

authority. Therefore all public authorities must be in scope in of the OEP order to avoid a governance gap when we leave the EU.<sup>90</sup>

An ENDS article set out concern from a law firm that under this provision a utility company could fall under the definition of “public authority”, and therefore come within the OEP’s remit:

Dean Hickey, an associate in Eversheds Sutherland’s environment, health and safety team, said the bill’s definition of a public authority would include hybrid authorities, such as utility companies, within the scope of the proposed Office for Environmental Protection (OEP).

Article 17 of the draft environment bill defines a public authority as “a person carrying out any function of a public nature that is not a devolved function”. While it excludes the OEP itself, a court or tribunal, parliament and the devolved administrations, the bill makes no mention of hybrid authorities.<sup>91</sup>

## OEP enforcement functions

Clauses 17 to 29 of the draft Bill gives the OEP a number of enforcement tools to address failings of public authorities in relation to environmental law.

The OEP is given the power to investigate a complaint. After it has concluded an investigation it must prepare a report and provide it to the public authority that was complained about. The OEP can also issue a written information notice (as a tool to request information from the public authority suspected of failing), if it has reasonable grounds to suspect that there has been a serious failure to comply with environmental law. Once an information notice has been issued, the OEP could then proceed to a “decision notice”, where it has concluded on the balance of probabilities that there has been a serious failure to comply with environmental law. If the outcome is then not satisfactory, the OEP will have the power to initiate a judicial review against the public authority. Further information about these tools is given in the sections below. The order in which these enforcement tools can be used is illustrated at Figure 4 of the Explanatory Notes.

## Complaints of breach of environmental law

Draft clause 18 allows for the OEP to receive complaints regarding alleged contraventions of environmental law by public authorities. Complaints may be made by “a person” free-of-charge, but public bodies are specifically excluded from being able to make complaints “as this would amount to one arm of government complaining about another.”<sup>92</sup>

Under draft clause 18(5) a complaint cannot be made if the public authority complained about has its own internal complaints procedure under which the complaint could be considered, and that procedure has not yet been exhausted. This is generally consistent with restrictions on

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<sup>90</sup> HM Government, [Environmental Principles and Governance after the United Kingdom leaves the European Union Summary of responses and government response](#), 19 December 2018, p28

<sup>91</sup> The ENDS Report, [“Reduce green watchdog’s scope, lawyers urge”](#) 22 January 2019

<sup>92</sup> Draft Explanatory Notes, paras 142 and 148

when other Ombudsmen, for example the Local Government and Social Care Ombudsman, can investigate complaints.

Draft clause 21 requires that a memorandum of understanding is prepared with other bodies (such as ombudsmen), who could potentially receive the same complaint, about how investigations would be coordinated.

Draft clause 18(6) provides time limits for when a complaint can be submitted as follows:

- (a) the end of the 1 year period beginning with the day on which the alleged failure that is the subject of the complaint last occurred, and
- (b) if the substance of the complaint was subject to an internal complaints procedure, the end of the 3 month period beginning with the day on which that procedure was exhausted.<sup>93</sup>

These time limits mirror existing limits for the management of complaints by ombudsman such as the [Local Government and Social Care Ombudsman](#). Subclause (7) however would allow the OEP to waive this time limit “if it considers that there are exceptional reasons for doing so.”<sup>94</sup> While not explicitly mentioned, this discretionary power may become relevant in the case of a No Deal Brexit scenario (see further information in section 3.8 below).

### **Duty to Cooperate**

Draft clause 26(1) provides a duty for public authorities to cooperate with the OEP and give it “reasonable assistance as it requests (including the provision of information”, in connection with investigations, information and decision notices. Subclause (3) aims to clarify the duty to cooperate in relation to devolved authorities; that the duty would only apply to a devolved authority’s reserved functions.<sup>95</sup>

### **Investigation of complaints**

Draft clause 19 sets out the procedure and powers relating to the investigation of complaints. The OEP is given discretion about whether to investigate complaints. After it has concluded an investigation it must prepare a report and provide it to the public authority that was complained about and copy it to the relevant Minister. Under subclause (5) the report must set out:

- (a) whether the OEP considers that the public authority has failed to comply with environmental law;
- (b) the reasons the OEP came to that conclusion;
- (c) any recommendations the OEP may have (whether generally or for the public authority) in light of those conclusions.

The OEP is given discretion, under subclause (6), over whether to publish this report. This will allow it to consider matters of significant confidentiality or sensitivity.<sup>96</sup>

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<sup>93</sup> Draft clause 18(6) *Draft Environment (Principles and Governance) Bill*

<sup>94</sup> Draft clause 18(7) *Draft Environment (Principles and Governance) Bill*

<sup>95</sup> Draft Explanatory Notes, para 189

<sup>96</sup> Draft Explanatory Notes, para 155

The question of whether the OEP would have the power to initiate its own investigations, rather than having to rely on a complaint, was raised in an academic working paper from Maria Lee, Faculty of Laws, University College London:

The provisions on investigation in the draft Bill currently seem to be dependent on first receiving a complaint (clause 19). It makes little sense for the express power to be so restricted, and presumably the conditions and protections around an investigation are not supposed to be limited. An express power for the OEP to carry out investigations into a failure to comply (or into implementation) on its own initiative would be an important addition to the Bill.<sup>97</sup>

### Information notices

Draft clause 22 provides that the OEP can take enforcement action in the form of written information notices if:

- (a) the OEP has reasonable grounds for suspecting that the public authority has failed to comply with environmental law, and
- (b) it considers that the failure is serious.<sup>98</sup>

An information notice is described in the draft Explanatory Note as a means by which the OEP can formally request information from the relevant Minister or authority concerned in relation to a suspected failure.<sup>99</sup> The allegation must be specified in the notice. The public authority in question is expected to respond to the information notice within a two month period, or later date as specified in the notice.

The draft Explanatory Notes state that this action may follow the investigation of a complaint, but it does not have to if there is another reason to suspect there has been a serious breach.<sup>100</sup>

### Decision notices

Under draft clause 24 enforcement action could be taken by the OEP issuing a written decision notice. Before a decision notice can be issued at least one information notice must have been issued previously relating to the alleged failure to comply with environmental law.<sup>101</sup> Furthermore, the OEP can only issue a decision notice to a public authority if:

- (a) the OEP is satisfied, on the balance of probabilities, that the public authority has failed to comply with environmental law, and
- (b) it considers that the failure is serious.<sup>102</sup>

According to the draft Explanatory Notes the test of the balance of probabilities means that “the OEP must consider that there is more than

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<sup>97</sup> Lee, Maria, [The New Office for Environmental Protection: Scrutinising and Enforcing Environmental Law after Brexit](#), 8 January 2019, p7

<sup>98</sup> Draft clause 22(1) *Draft Environment (Principles and Governance) Bill*

<sup>99</sup> Draft Explanatory Notes, para 166

<sup>100</sup> Draft Explanatory Notes, para 163

<sup>101</sup> Draft clause 23(5) *Draft Environment (Principles and Governance) Bill*

<sup>102</sup> Draft clause 23(1) *Draft Environment (Principles and Governance) Bill*

a 50% chance that a public authority has failed to comply with environmental law.”<sup>103</sup>

Under draft clause 23(2)(b) the decision notice must set out the steps the OEP considers the public authority should take in relation to the failure. The public authority however, is not compelled to carry out the steps set out in this notice. The public authority must respond to the decision notice, within two months unless a later date is specified in the notice, and state whether it intends to take the steps specified and if it plans to take any other steps.<sup>104</sup>

David Abrahams, a Friends of the Earth lawyer, highlighted that the steps in decision notices were not legally enforceable and called for them to be made legally binding:

Although the OEP will have the power to issue information and decision notices, there will be no legal requirement on public bodies to comply with the decisions of the OEP. Under section 23(4) of the draft Bill, a public body in receipt of a decision notice from the OEP could simply refuse to comply with the steps outlined in the decision notice. The OEP will be able to ask the courts to enforce its decision notices using a modified form of judicial review but, if the Government is serious about wanting the new watchdog to have teeth it should, as a minimum, legislate for the watchdog’s decision notices to be legally binding.<sup>105</sup>

### **Involvement of Ministers and other public authorities**

Where an information or decision notice has been issued, under draft clause 24, the OEP is also required to send a copy of the notice to the relevant Minister, as well as any correspondence between the OEP and the public authority concerned. The aim of this is to “ensure that the Government remains informed about the matter and is able to contribute if appropriate.”<sup>106</sup>

Draft clause 24 also covers the situation where a notice should be issued to more than one public authority concerning the same or similar breach of environmental law. In this situation the notice(s) would be issued in parallel to both, or all, parties. The draft Explanatory Memorandum provides air quality as an example of the circumstances in which this might be the case:

If a serious breach of air pollution limit values occurred in a Local Air Quality Management Area, the OEP may wish to commence enforcement proceedings (via notices) against both the Local Authority in question, which has obligations under Part IV of the Environment Act 1995 to put in place an action plan to deliver pollution reduction measures, and the Secretary of State for Environment, Food and Rural Affairs, who has a duty under the Air Quality (Standards) Regulations 2010 to ensure compliance with limit values.<sup>107</sup>

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<sup>103</sup> Draft Explanatory Notes, para 169

<sup>104</sup> Draft clause 23(3) and (4) *Draft Environment (Principles and Governance) Bill*

<sup>105</sup> Wildlife and Countryside Link, [Government publishes \(half\) a draft Environment Bill](#), 19 December 2018

<sup>106</sup> Draft Explanatory Notes, para 174

<sup>107</sup> Draft Explanatory Notes, para 176

### Concerns about lack of ability to issue fines

In the Government's response to the Environmental Governance and Principles consultation it set out its reasons for not giving the OEP the power to issue fines against the Government:

We do not propose that the OEP should have the power to issue fines against the government on the basis that public authorities have a duty to comply with court judgments under the Rule of Law. This forms part of the UK constitution and is made explicit in the Ministerial Code. Failure to comply with a court order can also lead to the responsible person being held to be in contempt of court, as noted by UKELA: 'Failure to comply with a court order following action by the OEP would be contempt of court (as would a failure to comply with an order or undertaking in a judicial review) and the court would have inherent powers to fine, sequester or imprison if need be.'

Fines could be counterproductive if they were to significantly reduce a department's / authority's budget and resources, and so further limited their capacity to fully implement environmental law due to resource limitations. Fines collected in domestic courts are also typically directed to the consolidated fund, which would amount to a recycling of public funds. It is also worth noting that although the power to impose fines is available to the CJEU, it is very rarely used in practice and has never been used in relation to the UK.<sup>108</sup>

A number of stakeholders have called for the OEP to have the power to issue fines. For example, the academic group Brexit & Environment has highlighted how the OEP's enforcement process is similar to the EU infringement procedure, but has lamented the lack of ability for the OEP to issue fines:

This process is similar to its EU equivalent, the infringement procedure, where the European Commission (playing a similar role to the OEP) enforces environmental law against EU member states and can take cases to the Court of Justice of the European Union (playing a similar role to the UK courts). However, there are important differences: EU member states must comply with the procedure under the EU Treaties, and in later stages of the process the Commission can recommend significant fines. As noted by the ENDS Report, Defra says that fines 'could be counterproductive' if used by the OEP because they would reduce departmental budgets.

We have described fines as the new watchdog's sharpest teeth. Although fines are by no means straightforward to apply in a domestic political setting, there is merit in giving their role more thought before they are removed from the toolbox of environmental policy.<sup>109</sup>

The lack of ability to issue fines was also a concern raised by the Wildlife Trusts:

The proposed green watchdog is too weak. Much more is needed if it is to bear any comparison to the environmental

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<sup>108</sup> Defra, [Environmental Principles and Governance after the UK leaves the EU. Summary of responses and government response](#), 19 December 2018, p27

<sup>109</sup> Brexit & Environment, "[The Environment \(Principles and Governance\) Bill: An overview and four unanswered questions](#)" 20 December 2018

enforcement powers currently held by the European Commission and Court. To do this the watchdog would need to be more independent and able to hold the whole Government to account, including through having powers to issue fines if the Government fails to implement environmental legislation properly.<sup>110</sup>

The OEP's lack of equivalent enforcement capacity to the EU Institutions was also highlighted as a concern in the NAO's January 2019 report on Environmental Metrics:

The new environmental body will be crucial in replacing the enforcement capacity of the European Commission. The threat of legal action from the Commission has, for example, been an incentive for the government to take action on air quality, having failed to meet EU concentration limits for nitrogen dioxide concentrations (Figure 12). If the new environmental body is unable to provide an equivalent incentive, there is a risk that areas of poor performance will not receive adequate funding or attention.<sup>111</sup>

Not all commenters have called for an ability to issue fines. For example, a briefing from law firm Burges Salmon highlighted some complications fines could cause:

The absence of an ability to raise financial penalties has also been raised a concern, however our view is that political pressure is often a more powerful tool to force change. In addition to this, there are all sorts of complications about where any money raised in fines would go and questions over the most productive use of that money, when of course, it all ultimately comes from the UK taxpayer.<sup>112</sup>

### Legal proceedings

Draft clause 25 gives the OEP powers to bring legal proceedings against a public authority, regarding a breach of environmental law. In order to do this, the OEP must first have issued a decision notice to the public authority in question.<sup>113</sup>

The legal proceedings that could be initiated are described in the draft clause as a "review application" which would be an application for judicial review in England, Wales or Northern Ireland; or an application to the supervisory jurisdiction of the Court of Session in Scotland.<sup>114</sup>

Once any legal proceedings under this clause had been concluded, the public authority which had been the subject of the review application must publish a statement setting out any steps it intends to take in light of the outcome of those proceedings.<sup>115</sup>

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<sup>110</sup> Wildlife Trusts, "[Draft Environment Bill published today](#)", 19 December 2018

<sup>111</sup> National Audit Office, [Environmental metrics: government's approach to monitoring the state of the natural environment](#) HC 1866 Session 2017–2019, 16 JANUARY 2019, para 3.15

<sup>112</sup> Burges Salmon, "[Environment Principles and Governance: A new era for UK environmental law](#)" 17 January 2019

<sup>113</sup> Draft clause 25(1) *Draft Environment (Principles and Governance) Bill*

<sup>114</sup> Draft clause 25(3) *Draft Environment (Principles and Governance) Bill*

<sup>115</sup> Draft clause 25(9) *Draft Environment (Principles and Governance) Bill*

Law professor, Maria Lee, speculated on the possible remedies available to the court and, in particular, about whether the courts would be able to require compliance with the steps set out in a decision notice:

As the final step, following a decision notice, the OEP can make a 'review application' to court; in England, this is an application for judicial review. The draft Bill is rather spare on quite what this involves. It cannot be a review of failure to take the steps set out in a decision notice, as there is currently no reviewable legal obligation to take those steps.

(...)

The courts have discretion on remedies, and could in principle require a public authority to take steps set out in a decision notice. However, remedies tend to be more limited, and the EU law obligation on national courts to take 'any necessary measure' to ensure compliance with EU law has in the past been helpful in ensuring significant remedies. A legislative requirement on the court to take account of the decision notice in setting remedies would be a small step.<sup>116</sup>

For background reading on judicial review processes see The Judiciary for England and Wales' guide, [The Administrative Court Judicial Review Guide 2018](#), July 2018. For Scotland see Scottish Parliament Information Centre briefing, [Judicial Review](#), 8 July 2016.

### Time limits

Draft clause 25(7) clarifies the time limits for the OEP's ability to initiate judicial review in England and Wales. The general time limit for starting a claim for judicial review requires that the claim form be filed no later than 3 months after the grounds for making the claim first arose.<sup>117</sup> There are however, specified exceptions to this general rule; for example, where a claim relates to a decision made under planning legislation the claim must be started not later than six weeks after the grounds to make the claim first arose.<sup>118</sup> Draft clause 25(7) provides that the OEP's application for review must be made within 3 months of the day that was specified for the public authority to respond to the OEP's decision notice; and that this time limit would overrule any other time limit which would otherwise apply.

## 3.8 Other key points

### Climate change

The definition of "environmental law" in draft clause 31 specifically excludes greenhouse gas emissions (other than specific fluorinated gases):

Emissions of greenhouse gases (within the meaning of the Climate Change Act 2008), but not the subject matter of the Fluorinated Greenhouse Gases Regulations 2015 (S.I. 2015/310)

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<sup>116</sup> Lee, Maria, The New Office for Environmental Protection: Scrutinising and Enforcing Environmental Law after Brexit, 8 January 2019, p7

<sup>117</sup> The Judiciary for England and Wales' guide, [The Administrative Court Judicial Review Guide 2018](#), July 2018, para 5.4.1

<sup>118</sup> The Judiciary for England and Wales' guide, [The Administrative Court Judicial Review Guide 2018](#), July 2018, para 5.4.3.1

The draft Explanatory Notes explain that the practical effect of this is that “most legislation concerning the mitigation of climate change, including that under the *Climate Change Act 2008*, will fall outside the remit of the OEP’s complaints and enforcement functions and its monitoring of environmental law, with the exception of the regulation of specific fluorinated greenhouse gases”.<sup>119</sup> This exclusion has been included with the intention of avoiding overlap with the remit of the Committee on Climate Change (CCC).

In response to the Government’s consultation on governance and principles, a “significant majority” called for the scope of the OEP to include climate change. Common arguments in support of this were that climate change and environmental issues are inextricably linked; and that a potential governance gap would be created by climate change being left out of scope, particularly in relation to the enforcement of climate change legislation. The Government response stated that it “will ensure that the vital role” of the existing CCC is “protected and it is able to operate as it does currently” and that it is continuing to explore potential solutions to this issue.<sup>120</sup> In relation to how the OEP and CCC would work together, the Government said that it expected that the OEP and CCC would both “operate under a Memorandum of Understanding, which would require them to coordinate the exercise of their functions in a mutually beneficial and complementary way”.<sup>121</sup>

Commentators including academic group Brexit & Environment and the CCC itself<sup>122</sup> had previously recommended that the enforcement of climate policy be overseen by the OEP, given that the CCC plays an advisory role and does not have enforcement powers.<sup>123</sup> On the implications of this exclusion from the definition of environmental law, Brexit & Environment state that:

It is therefore unclear how climate policy will be enforced after Brexit (e.g. via increased enforcement powers for the CCC).<sup>124</sup>

It goes on to highlight the division created by the F-gases exception as risking “regulatory dis-alignment and overlap”:

The exception for fluorinated greenhouse gases splits oversight of climate mitigation efforts: the OEP is responsible for F-gases and the CCC is responsible for other gases. This division risks regulatory dis-alignment and overlap, which sits uncomfortably with Defra’s stated justification (‘to avoid overlap’ with the CCC)

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<sup>119</sup> Draft Explanatory Notes, para 214

<sup>120</sup> Defra, [Environmental Principles and Governance after the UK leaves the EU. Summary of responses and government response](#), 19 December 2018, Q12, p31

<sup>121</sup> Defra, [Environmental Principles and Governance after the UK leaves the EU. Summary of responses and government response](#), 19 December 2018, Q12, p.32

<sup>122</sup> CCC, [Letter to Michael Gove re environmental watchdog](#), 30 May 2018 [accessed 14 January 2019]

<sup>123</sup> See: Committee on Climate Change website, [About Us](#) [accessed 14 January 2019]

<sup>124</sup> Brexit & Environment, [The Environment \(Principles and Governance\) Bill: An overview and four unanswered questions](#), 20 December 2018 [accessed 14 January 2019]

for not including climate policy in the OEP's remit in the first place.<sup>125</sup>

## No deal scenario

A number of commentators have expressed concerns about a potential environmental governance gap in the case of a no deal scenario. In a blog on the topic, the RSPB's global conservation Director (Martin Harper) explains the common concern that in the case of no deal there is insufficient parliamentary time to put in place new arrangements for enforcement of environmental law or to put in place new environmental laws to address concerns about environmental standards (including environmental principles).<sup>126</sup>

While not explicitly addressed in the draft clauses, paragraph 139 of draft Explanatory Notes explain that a no deal scenario has been contemplated in the drafting of clause 17 for the creation of the OEP as follows:

No restrictions regarding the date of a failing are included in the definition in subsection (2). This means that, in the event the UK leaves the jurisdiction of the EU institutions before the OEP is fully established (for instance in a 'no deal' scenario), it would still be able to take action against failings which occurred after the UK's date of exit but before it was fully established.<sup>127</sup>

This is further explained in the [Government's policy paper](#) as follows:

We will work to make sure that the OEP is in place as soon as possible in a no deal scenario, with the necessary powers to review, and if necessary take enforcement action, in respect of breaches of environmental law from when the jurisdiction of the Court of Justice of the European Union has ended.

Alongside this, under a no deal scenario we will put in place a holding arrangement during the interim period between 30 March 2019 and the launch of the OEP. This will provide a mechanism for the OEP to receive a report of any perceived or claimed breaches of environmental law made during this interim period. This means that the OEP can consider any early action it may need to take upon its establishment.<sup>128</sup>

The Government's [No Deal Technical Notice: Upholding environmental standards if there's no Brexit deal](#) (updated 19 December 2018) stated that the Government is considering interim measures that may be necessary:

We are considering what interim measures may be necessary in a no deal scenario after 29 March 2019 and before the Environment Act is passed and comes into effect.<sup>129</sup>

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<sup>125</sup> Brexit & Environment, [The Environment \(Principles and Governance\) Bill: An overview and four unanswered questions](#), 20 December 2018 [accessed 14 January 2019]

<sup>126</sup> RSPB, Martin Harper's blog, [Why a 'no deal' Brexit increases risks to the environment](#), 16 January 2019 [accessed 21 January 2019]

<sup>127</sup> Draft Explanatory Notes, para 139

<sup>128</sup> Defra, [Policy Paper](#), 19 December 2018

<sup>129</sup> Defra guidance, [Upholding environmental standards if there's no Brexit deal](#), 19 December 2018 [accessed 21 January 2019]

## 4. Political and stakeholder reaction

### 4.1 Political reaction

Labour's shadow environment Secretary (Sue Hayman) responded to the publication of draft Bill as follows:

[...]

Labour's 2017 manifesto proposed establishing an Environmental Tribunal which could hold government fully to account rather than the government's proposed Office for Environmental Protection which would be accountable to Defra and not to Parliament.

This draft bill is a step in the right direction, but these proposals will require a clear commitment to a level of funding that this Government consistently refuses to provide public services. Labour will scrutinise the proposals line by line to ensure that this bill becomes more than just a fig leaf.<sup>130</sup>

Labour Chair of the Commons' Environmental Audit Committee (Mary Creagh) provided the following comment:

Making the OEP accountable to and funded by DEFRA is "Not a good start".<sup>131</sup>

Wera Hobhouse (Liberal Democrat) made the following comment on the OEP's powers during a House of Commons debate on the *EU (Withdrawal) Act*.

The European Court of Justice, so hated by Brexit fanatics, has been an outstanding protector of environmental laws and regulations. The Government's recent draft environment Bill does not include a watchdog with anything like the power of the ECJ, and climate action will lose out.<sup>132</sup>

Green Party MP Caroline Lucas wrote a blog for the Huffington Post in which she made the following comments on the draft Bill:

It's certainly positive that ministers have published a draft Environment Bill. With the world's top scientists warning we have 12 years to avoid climate catastrophe, and research showing a 60% drop in global wildlife populations over the last 40 years, we stand on the precipice of an unimaginable crisis.

The Government's draft does acknowledge that – but its plans for action are built on sand. Without a firm foundation of laws and enforcement to keep ministers to their word, even the most ambitious plans are meaningless

[...]

The Bill is littered with vague language – with the Government only needing to 'have regard to' core environmental values like the polluter pays and the precautionary principle. There's also a giant get out of jail free card when ministers decide how those

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<sup>130</sup> Labour, [Sue Hayman responds to draft environment bill](#), 20 December 2018

<sup>131</sup> ENDS Report, [Environment Bill reaction: 'A green Brexit will remain an elusive dream'](#), 20 December 2018 [subscription only]

<sup>132</sup> HC Deb Vol 652 [Col 962](#) 14 January 2019

principles will be applied. Any activity related to public spending, national security or 'any other matter' specified by the Government will be excluded.

[...]

So instead of the independent defender of nature we need – in essence, a green version of the National Audit Office, with budgets set and key staff appointed by Parliament – we've been given a toothless lapdog whose independence and budget are at the whim of Ministers.<sup>133</sup>

## 4.2 Stakeholder reaction

The ambition and aims of the draft Bill were broadly welcomed by stakeholders. However, many noted that there is still work to be done and put forward concerns on specific provisions, in particular relating to the OEP. Some examples of initial reactions are included below.

Business Green summarised the initial reaction as follows:

[...] while the new powers for the OEP were welcomed by green groups, many warned the Bill still does not give the watchdog enough 'teeth' to ensure standards don't slip. Experts this evening expressed disappointment the body won't, for example, be able to levy fines, or wield more "creative" enforcement measures such as compelling senior staff members to attend hearings, or putting non-compliant bodies into Ofsted-style 'special measures'.<sup>134</sup>

The article went on to highlight the "frustration" that the draft Bill does not include any detail on climate change.<sup>135</sup>

ClientEarth UK environment law and policy advisor Tom West said:

This bill is a step in the right direction and we are pleased that the government has listened to some of our concerns. But there is still a long way to go before the new watchdog has the strong legal teeth needed to protect our environment.<sup>136</sup>

IEMA's Chief Policy Adviser (Martin Baxter) commented on the independence of the OEP:

[...] It's a step in the right direction but right now it doesn't meet our independence tests, as it will very clearly be resourced by and its appointments made by the Secretary of State. To us that sounds like the watchdog will be constrained from holding Government to account.<sup>137</sup>

Angus Evers, Co-Chair of UKELA's Brexit Task Force, stated that:

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<sup>133</sup> Huffington Post blog, [Behind the Government's green spin lies a record of environmental destruction](#), Caroline Lucas MP, 20 December 2018 [accessed 21 January 2019]

<sup>134</sup> Business Green, ['Not world leading yet': Government publishes draft Environment Bill, in part](#), Madeleine Cuff, 19 December 2018 [accessed 10 January 2019]

<sup>135</sup> Ibid.

<sup>136</sup> Client Earth, [UK Government announces Environment Bill: ClientEarth reaction](#), 19 December 2018 [accessed 21 January 2019]

<sup>137</sup> IEMA, [Concerns Over Independence of Gove's New Watchdog](#), 19 December 2018 [accessed 21 January 2019]

The draft Bill is a bold attempt at ensuring that the UK's environmental standards do not slip, but are maintained and even enhanced.<sup>138</sup>

UKELA have committed to publishing a report scrutinising the effectiveness of the draft Bill in "due course".<sup>139</sup>

Greener UK's Amy Mount noted the ambition, but warned that environmental protection will be weaker without further work:

There is a real sense of ambition in this announcement, with ministers acknowledging the need to put the environment at the heart of government.

"Yet without further work environmental protection will be weaker. If the government decides its budget, and appoints its officials, how can the new watchdog challenge ministers effectively? And without establishing strong legally binding targets for things such as water quality, how can we properly hold the government to account on leaving our environment in a healthier state?

"If we get it right, this bill could provide the turning point to reversing environmental decline."<sup>140</sup>

The WWF's Executive Director for Advocacy and Campaigns (Tony Juniper) commented as follows:

The draft Bill marks a significant victory for Michael Gove in his battle for a greener Brexit, against others in government who are looking to slash and burn environmental ambition after the UK leaves the EU.

Areas to be welcomed include the proposed legal underpinning of the 25 Year Environmental Plan, a commitment to reverse the loss of nature and the aim of putting environmental ambition and accountability at the very heart of government.

We must, however, be in no doubt that the Bill still has a long way to go if the Government is to uphold the promise to leave nature in a better state for the next generation. This is why WWF will be campaigning for serious improvements in certain areas as the Bill passes through Parliament. This includes legally binding targets for the restoration of nature, a truly independent environmental watchdog and a duty to reduce our country's global footprint.<sup>141</sup>

Further commentary and press coverage is available in the following articles:

- BBC News, [New environmental watchdog to get legal teeth after Brexit](#), Roger Harrabin, 20 December 2018
- Maria Lee, [The New Office for Environmental Protection: Scrutinising and Enforcing Environmental Law after Brexit](#), 8 January 2019

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<sup>138</sup> UKELA press release, [UKELA welcomes opportunity to develop environmental law and policy](#), 20 December 2018 [accessed 21 January 2019]

<sup>139</sup> UKELA press release, [UKELA welcomes opportunity to develop environmental law and policy](#), 20 December 2018 [accessed 21 January 2019]

<sup>140</sup> Greener UK, [Greener UK reacts to draft environment bill](#) [accessed 10 January 2019]

<sup>141</sup> WWF, [Much to do in strengthening new environment laws](#), 21 December 2018 [accessed 10 January 2019]

- Brexit & Environment, [The Environment \(Principles and Governance\) Bill: An overview and four unanswered questions](#) 20 December 2018
- Brexit & Environment, [Expert Roundtable: The Environment \(Principles and Governance\) Bill](#), 14 January 2019
- Friends of the Earth, [Draft Environment Bill not a blueprint for greener post-Brexit Britain](#), 19 December 2018
- Edie.net, [Draft Environment Bill outline vision for UK's post-Brexit green watchdog](#), 20 December 2018
- CIWM Journal, [Office for environmental protection outlined in draft environment bill](#), 20 December 2018
- Burges Salmon, [Environment Principles and Governance: A new era for UK environmental law](#), 17 January 2019
- RSPB Blog by Martin Harper, [Why a 'no deal' Brexit increases risks to the environment](#), 16 January 2019
- The Bar Council, [Bar Council latest Brexit Paper asks: Will the new watchdog have enough power?](#), 18 January 2019
- Brexit & Environment, [All in it together – but not yet? Devolution in the Environment Bill](#), 20 January 2019
- Maria Lee and Eloise A.K. Scotford, [Environmental Principles After Brexit: The draft Environment \(Principles and Governance\) Bill](#), 25 January 2019

## 5. Parliamentary scrutiny

### 5.1 Pre-legislative scrutiny

The Environment, Food and Rural Affairs Select Committee (EFRA) and the Environmental Audit Committee (EAC) launched a [joint call for evidence on the draft clauses](#) on 20 December 2018, with the following Terms of Reference:

Does the proposed constitution of the oversight body provide it with enough independence to scrutinise the Government?

Does the proposed oversight body have the appropriate powers to take 'proportionate enforcement action'?

Are there any conflicts of interest or overlap with existing government bodies?

As drafted are the principles legally enforceable? What will need to be included in the National Policy Statement to interpret the application of the principles?

Are there any conflicts with other legislators or legislation, for example the Scottish Continuity Bill?

Does the Bill meet the government's commitment to non-regression from EU environmental standards?

Is there anything else missing that should be included to meet the enforcement, governance and other gaps in environmental protection left by leaving the European Union?

The inquiries are currently open and accepting written evidence. More information is available on the Committees' webpages.<sup>142</sup>

### 5.2 EAC Report on principles and governance (July 2018)

On 24 July 2018, the House of Commons Environmental Audit Committee published its report, [The Government's 25 Year Plan for the Environment](#), which examined the Government's Principles and Governance consultation proposals.

The Committee recommended the establishment of an Environmental Enforcement and Audit Office, reporting to Parliament, with the power to fine the Government and its agencies for failure to comply and that "As a minimum, the proposed watchdog must replicate or build on the role the EU institutions play in protecting our environment. The Government's proposals as yet do not do that."<sup>143</sup>

The [Government's response](#) to the Committee's report was published on 6 November 2018.<sup>144</sup> In relation to the Committee's governance proposals the Government stated that it believed the "most appropriate

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<sup>142</sup> See: [EFRA inquiry page](#)

<sup>143</sup> House of Commons Environmental Audit Committee, [The Government's 25 Year Plan for the Environment](#), 24 July 2018, paras 69-74

<sup>144</sup> House of Commons Environmental Audit Committee, [The Government's 25 Year Plan for the Environment: Government Response to the Committee's Eighth Report Twelfth Special Report of Session 2017–19](#), 6 November 2018

approach would create an independent body that will be accountable to Parliament.”<sup>145</sup> The Government also set out that many issues were still subject to the consultation on which it was considering views. This included the issue of whether any bodies other than national Government should be directly or indirectly in the scope of the new body.<sup>146</sup>

On environmental principles the Committee argued that the wording from the Consultation and the EU Withdrawal Act that Government should ‘have regard to’ the principles and that their application was limited to central Government, rather than including all public bodies, was “too weak”.<sup>147</sup> It also expressed concern that the interpretation of the principles “may be fiercely contested”. The Committee recommended that the forthcoming Environmental Principles and Governance Bill must include provisions for “all public bodies to act in accordance with the principles” and should “consider micro-duties aimed at specific public bodies that reflect their individual remits.”<sup>148</sup>

In relation to the Committee’s recommendation on environmental principles, the Government stated:

The government is committed to ensuring that the environmental principles will have an equivalent effect in the UK after we leave the EU. The draft legislation and forthcoming policy statement will provide further details of how these environmental principles will be interpreted and how they will apply in the making and development of policies. In most cases, it is central government which is responsible for policy making. In instances relating to other public bodies, there is Governmental oversight, and through central government’s scrutiny, the environmental principles will be considered. We will also consider how to engage with public authorities during the development of the policy statement.<sup>149</sup>

## 5.3 House of Lords EU Energy and Environment Sub-Committee

On 30 January 2019 the House of Lords EU Energy and Environment Sub-Committee announced a forthcoming roundtable discussion with the title [Who will uphold environmental law after Brexit?](#) The session will be held on 6 February 2019.

According to the Committee’s website, Members will use this session to explore whether the proposals in the Government’s draft *Environment*

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<sup>145</sup> House of Commons Environmental Audit Committee, The Government’s 25 Year Plan for the Environment: [Government Response to the Committee’s Eighth Report](#) Twelfth Special Report of Session 2017–19, 6 November 2018, p8

<sup>146</sup> House of Commons Environmental Audit Committee, The Government’s 25 Year Plan for the Environment: [Government Response to the Committee’s Eighth Report](#) Twelfth Special Report of Session 2017–19, 6 November 2018, p9

<sup>147</sup> House of Commons Environmental Audit Committee, [The Government’s 25 Year Plan for the Environment](#), 24 July 2018, paras 109

<sup>148</sup> House of Commons Environmental Audit Committee, [The Government’s 25 Year Plan for the Environment](#), 24 July 2018, paras 109-111

<sup>149</sup> House of Commons Environmental Audit Committee, The Government’s 25 Year Plan for the Environment: [Government Response to the Committee’s Eighth Report](#) Twelfth Special Report of Session 2017–19, 6 November 2018, p12-13

*(Principles and Governance) Bill*, to establish an Office for Environmental Protection, are “sufficient to ensure that Brexit does not result in a reduction in environmental protection.”<sup>150</sup> Specific issues that may be raised include:

Whether the proposed Office of Environmental Protection (OEP) is sufficiently independent.

Whether it has the powers it will need to hold the Government to account.

Whether it should have a UK-wide remit?

Whether its proposed remit should be extended to include legislation aimed at reducing greenhouse gas emissions.

What changes would need to enable the OEP to enforce any ‘non-regression’ clause that might be agreed as part of a Withdrawal Agreement. specific issues that may be raised include:

Whether the proposed Office of Environmental Protection (OEP) is sufficiently independent.

Whether it has the powers it will need to hold the Government to account.

Whether it should have a UK-wide remit?

Whether its proposed remit should be extended to include legislation aimed at reducing greenhouse gas emissions.

What changes would need to enable the OEP to enforce any ‘non-regression’ clause that might be agreed as part of a Withdrawal Agreement.<sup>151</sup>

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<sup>150</sup> House of Lords EU Energy and Environment Sub-Committee website, [Who will uphold environmental law after Brexit?](#), 30 January 2019

<sup>151</sup> House of Lords EU Energy and Environment Sub-Committee website, [Who will uphold environmental law after Brexit?](#), 30 January 2019

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