House of Commons

Environment, Food and Rural Affairs Committee

Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Government Response to the Committee's Fourteenth Report of Session 2017–19

First Special Report of Session 2019

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The Environment, Food and Rural Affairs Committee

The Environment, Food and Rural Affairs Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Environment, Food and Rural Affairs and associated public bodies.

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First Special Report

The Environment, Food and Rural Affairs Committee published its Fourteenth Report of Session 2017–19, *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill* (HC 1893), on 30 April 2019. The Government response was received on 15 October 2019 and is appended to this report.

Appendix: Government Response

The government thanks the Environment, Food and Rural Affairs Committee (EFRA) for their inquiry and the publication of their pre-legislative scrutiny report on the draft Environment (Principles and Governance) Bill.

It is essential that the Environment Bill creates a powerful new legal basis for the protection and recovery of our natural environment in order to help face up to the ecological and climate challenges and to deliver the government's commitment to passing on the environment in better condition for future generations. With this in mind, we are extremely grateful for the Committee's constructive report and all the engagement by stakeholders and civil society throughout the pre-legislative scrutiny process. This has been invaluable in shaping the Environment Bill.

The government published the draft Environment (Principles and Governance) Bill in December 2018. This set out how we will maintain and improve our environment as we leave the EU and realise the vision of the 25 Year Environment Plan (25 YEP).

The Bill introduced today [15 October 2019] will create a new system of domestic environmental governance as we leave the UK. The Bill commits the government to publish an environmental principles policy statement which will guide future government policy making. The Bill will require this and future governments to set out how they plan to enhance the environment in an Environmental Improvement Plan and set long term legally binding targets on key aspects of the environment (air quality, water, nature and waste and resources) to further drive environmental enhancement. The Bill will set up an independent Office for Environmental Protection (OEP) which will advise and scrutinise government's environmental policy and achievements, investigate complaints, and take enforcement action to uphold environmental law where necessary in policymaking.

The government is committed to retaining and enhancing environmental protection as we leave the EU. With this in mind, we have agreed with many of the Committee's recommendations which reinforce the environmental effectiveness of the Bill.

Recognising the Committee's concerns about the duty associated with the principles, we have strengthened the duty on Ministers of the Crown to have 'due regard' to the policy statement on environmental principles to ensure the principles are embedded across government in a balanced but robust manner.

We agree that the OEP should have sufficient independence from government. With this in mind, we have substantially strengthened the safeguards for independence and accountability of the OEP in the Environment Bill. We have introduced a new statutory duty on the Secretary of State, in exercising functions in respect of the OEP, to have regard

to the need to protect the OEP's independence. It will have bespoke enforcement powers – which will include coverage of all legislation concerned with climate change – based on decision notices and provision for reference to a new Environmental Review process in the Upper Tribunal. The Bill sets a principal objective for the OEP to contribute to both the improvement of the natural environment and the protection of the natural environment. In addition, the OEP will be provided with a five year indicative budget to be agreed with HM Treasury (HMT) and it will be able to submit an additional Estimate Memorandum to Parliament alongside the Defra Estimate Memorandum.

The Bill introduces further measures to protect and enhance the environment building on the Committee's recommendations. A flagship element of the Bill is a framework for the setting of far-reaching, legally-binding and long-term environmental targets to be achieved by the government to drive significant environmental improvement. We will put in place rigorous, transparent and authoritative arrangements to inform those targets, such as seeking independent expert advice. To provide a clear frame of reference for the duties and powers set under the new framework, we have adopted an objective in the Bill to ensure that delivering on the EIPs and meeting the targets will result in a significant improvement of the natural environment.

More broadly than this, the Bill will take direct action to address the biggest environmental priorities of our age: air quality, nature recovery, waste and resource efficiency, and water resource management. We look forward to working with the Committee during passage of the Bill.

Responses to recommendations

Cross-cutting

We recommend that the Government should leave enough time between introduction of the Bill and Second Reading to allow the Committee to conduct proper scrutiny of the remaining clauses in the Bill in order to inform the House's consideration of it. (Paragraph 10)

The timetable for the passage of the Bill will be agreed through the usual channels but the government will endeavour to support and facilitate scrutiny by Select Committees. Defra Ministers and officials involved in the drafting of the Bill will be happy to answer questions from the Committee and to engage regularly during passage.

More generally, the government is conscious that this Bill is one of great public interest and merits broad scrutiny and public input. We have carried out extensive engagement when developing the Bill, with environmental stakeholders, businesses and local authorities. We have arranged for the new Youth Steering Group to consider our progress on environmental policy.

Environmental Principles

We recommend that Clauses 1–4 of the draft Bill are redrafted to provide a stronger legal commitment to the protection of the environment. An overarching objective to

ensure a "high level of protection for the environment", as is currently outlined in the Treaty on the Functioning of the European Union, should be inserted into the draft Bill to underpin the other environmental principles.

We agree with the Committee's recommendation to include an objective on the use of environmental principles. However, since domestic legislation works in a different way than International Treaties, the approach taken is focused on the UK context. Therefore, we intend that an objective will apply to the Secretary of State in drafting the policy statement (clause 16(4) of the Bill introduced today) and will underpin the interpretation and application of the environmental principles through the policy statement approach.

The interpretation and application of the environmental principles in Clause 2 should not be left to just a policy statement but should be further outlined on the face of the Bill.

The clauses set out which principles must be included in the policy statement and set out broadly what the policy statement must include in terms of process and approach.

Developing a policy statement will offer clarity and consistency on what the principles mean in practice. If further detail were added into the clauses as opposed to the policy statement this could create additional confusion for policy-makers because it would not be possible to set out in legislation the nuances and complexity of the environmental principles.

We agree, however, that the interpretation of the principles could be aided further and it is for this reason that we have added an objective for the policy statement on the face of the Bill, as set out in answer to the recommendation above.

Given the importance it has placed on the policy statement, the government should also clarify and reinforce in the draft Bill the timescales and process for drafting, consulting on, publishing and reviewing the statement. This is essential for effective public and parliamentary scrutiny. (Paragraph 26)

The Bill sets out a careful process to be followed in preparing and publishing the policy statement including consultation, Parliamentary scrutiny and the opportunity for the House of Commons to pass a resolution in respect of the policy statement. To add further restrictions on timescales would risk preventing good practice of consultation and engagement from occurring in previous steps. We commit to ensuring that the public and Parliament are kept adequately updated with regard to the proposed timings on the policy statement throughout the process and we will undertake early and effective consultation.

The Government should amend Clause 4(1) to replace the duty to "have regard to" environmental principles with the stronger wording of "act in accordance with". Clause 4(2) should also be redrafted to reduce the level of discretion for Ministers to not act to protect the environment. (Paragraph 35)

Clause 1(6) should be redrafted to ensure that any exemptions necessary are more narrowly defined, with their implications in practice clarified in the explanatory notes. The Government should seek to substantially minimise the scope of the exemptions and to reduce their generality of application. Clause 1(6)(c) should be revised to ensure

that the Secretary of State cannot exclude further policy areas from the scope of the Policy Statement without public consultation and notifying the relevant parliamentary committees. (Paragraph 43)

We have strengthened the current duty in the Bill from 'have regard' to 'have due regard' with the aim of ensuring that the policy statement is used effectively across departments. Strengthening the duty in this way means that Ministers of the Crown will be required to give fuller consideration to the principles as the policy statement will be given greater weight. This change strengthens the duty in line with the 'Public Sector Equality Duty' in the Equality Act 2010.

We have worked to edit and reduce the number of exemptions to the need for due consideration of the environmental principles. This includes removing what was clause 1(5) in the draft Bill as we believe it to be unnecessary. However, we consider that it is necessary to ensure a degree of proportionality in the application of the environmental principles because it ensures that policy does not need to be changed based on the principles where such a change would be disproportionate.

Following the Committee's recommendation we will make the following changes to the list of exemptions:

- We have deleted what was clause 1(5) in the Draft Bill as we agree that this does not add significant value.
- We have clarified in the explanatory notes that the exemption in clause 18 (3) (b) of the Bill introduced today only applies to decisions around taxation, spending or allocation of resources within Government.
- We have removed what was clause 1(6)(c) in the Draft Bill, which gave the Secretary of State the power to add additional exclusions at a later date, as we no longer consider this to be necessary.

The Bill should be amended so that the effect of the policy statement extends to all public authorities when making any decisions. There should also be an obligation on all public authorities for written confirmation that the principles have been applied in their decisions. (Paragraph 36)

With regard to other public bodies, this would go significantly above equivalence and place a large regulatory burden on public bodies. As is the case in the EU currently, we expect that if public bodies need to use the environmental principles in decision-making, the principles should be included in the relevant legislation or guidance and will therefore be used by public bodies in the exercise of their functions.

To achieve equivalence with the EU, the duty should be based on policy-making. The environmental principles are used in decision-making where they are explicitly referenced in legislation, such as article 6(3) of the Habitats Directive. This will continue to be the case as we leave the EU.

Office for Environmental Protection (OEP)

To achieve equivalence with the existing arrangements as members of the European Union, the Bill should be redrafted to ensure greater independence for the Office for Environmental Protection. The Office for Environmental Protection must not be solely a body of Government. The Government should revisit the legal status of the Office for Environmental Protection to provide greater independence than a standard Non-Departmental Public Body allows. Lack of precedent should not be a barrier to establishing a constitutionally innovative model, especially given the Secretary of State's ambition for the watchdog to be "world leading". (Paragraph 68)

We welcome the views of the EFRA Committee in relation to the overall constitution of the OEP and agree that we should be mirroring safeguards in bodies that are deemed to have sufficient independence from government.

We are establishing the OEP in law as a non-Crown body corporate, with the intention that it will be classified as a Non Departmental Public Body (NDPB). A number of NDPBs already hold government to account, such as the Committee on Climate Change, and the Equalities and Human Rights Commission. We will give the OEP a number of additional and proven safeguards, drawing on the Committee's recommendations, which will reinforce its independence from both government and Parliament. With these safeguards, Parliament will have sufficient opportunity to oversee and scrutinise the performance of the OEP and its ongoing operational independence from the government without altering its legal status in a manner which would raise serious constitutional concerns.

The Government must revise the appointments process to ensure greater independence and transparency. We recommend that the process should be modelled on the equivalent process for the appointment of the Chair of the Budget Responsibility Council at the Office for Budgetary Responsibility. The Chair and all non-executive members of the board should be appointed by the Secretary of State only with the consent of the Environment, Food and Rural Affairs Select Committee.

The Chair should be subject to a pre-appointment hearing prior to the Committee consenting to her appointment. Similarly, a non-executive member should not be dismissed from the Board of the OEP without the consent of the Environment, Food and Rural Affairs Select Committee. (Paragraph 51)

We fully agree that Parliament should have a key role in the process of making significant public appointments to organisations which hold the government to account. However, the government's view (set out in its May 2018 written evidence to the Public Administration and Constitutional Affairs Committee's inquiry into pre-appointments hearings) is that the ultimate decision on public appointments should be made by Ministers, as they are accountable and responsible for the decisions and actions of their department and its arms-length bodies. We also consider that applying the Committee's recommendation to all board appointments could be detrimental to the government's drive to increase the diversity of skills and experience of our public appointees by not appealing to some candidates; and would also cause ongoing procedural burdens for the appointment process of the board.

The OEP's non-executive members will all therefore be appointed by the Secretary of State, as is the case for appointments to the vast majority of NDPBs, including other bodies

which hold government to account such as the Equality and Human Rights Commission. The OEP will be added to the schedule of the Public Appointments Order in Council, which offers safeguards through independent regulation by Her Majesty's Commissioner for Public Appointments. The Secretary of State will as a result be required to act in accordance with the Governance Code, including the principles of public appointments; which will ensure that members are appointed through a fair and open process. The Chair will be classed as a 'significant appointment', requiring a Senior Independent Panel member approved by the Commissioner to sit on the Advisory Assessment Panel, who can report back to the Commissioner on any breaches of process.

Parliament is involved through pre-appointment scrutiny. Current scrutiny arrangements work well in ensuring the fairness of public appointments, an adequate level of Ministerial accountability and a sufficient level of independence for the board to perform its statutory functions transparently and effectively. We will therefore invite this Committee to carry out a pre-appointment hearing with the Secretary of State's preferred candidate for OEP Chair; and the Secretary of State will duly consider the Committee's recommendations. There have been previous occasions where, in the rare event of a Select Committee not agreeing with a Minister's preferred candidate, the Minister has decided not to proceed with the appointment as a result. The Secretary of State will remain responsible for the ultimate decision over appointments and dismissals of the Chair and non-executive board members.

In addition, we have introduced a new statutory obligation on the Secretary of State, in exercising functions in respect of the OEP, to have regard to the need to protect the OEP's independence. With regards to all of the OEP's ministerial appointments, this will ensure that the Secretary of State considers the preferred candidates' ability to act objectively, impartially and independently of government.

The Government should commit to providing a multi-annual budgetary framework for the Office for Environmental Protection in the Bill. This commitment would help to ensure the Office for Environmental Protection's independence from Government and is consistent with best practice as seen with the Office for Budgetary Responsibility. Rather than grant-in-aid, the Office for Environmental Protection should also have its own estimate which should be negotiated directly with HM Treasury, and voted on by Parliament in the yearly Supply and Appropriation (Main Estimates) Bill. (Paragraph 59)

We welcome and agree with EFRA's recommendation that the Government should commit to provide the OEP with a multi-annual budgetary framework, in line with precedents that exist for some other NDPBs such as the Office for Budget Responsibility (OBR).

The Bill provides for the OEP to be established as a non-Crown body corporate funded through grant in aid, giving it flexibility as it how it expands its resources within broad parameters agreed with Defra. In order to ensure its financial independence, the OEP will be provided with a five year indicative budget which is formally ring fenced by HM Treasury within any given Spending Review period.

This safeguard provides the OEP with longer term certainty of resources and mitigates risks of Defra restricting funding due to other financial pressures because HMT approval would be required in order to redistribute any agreed funding away from the OEP. Funding

delivery will follow usual administrative practice and be made public through a separate line in Defra's Estimate, with further detail in the OEP's own annual financial report, enabling Parliamentary scrutiny.

We recognise that during the initial set-up phase additional costs are likely to be incurred, and we intend to facilitate adequate funding during this phase. We also intend to review the first five-year indicative budget during the first two years of operation in order help assess what will be a more 'steady-state' annual operational cost of the OEP.

If the OEP were to have its own Estimate separate from Defra, there would be less ministerial accountability. The OEP would become more characteristic of a Non-Ministerial Department (NMD). Since NMDs are considered part of the Crown in the same way as any other Government Department, this would greatly complicate the delivery of the OEP's enforcement functions because it would not make sense for the Crown to initiate legal action against itself. There are also additional overheads associated with the governance of NMDs and additional administrative costs which would not represent value for money of public spending for a small body such as the OEP. Having its own estimate would also remove the flexibility for Defra to provide in-year financial support to the OEP in response to changing circumstances.

To create further transparency around the resources provided to the OEP, we will give the OEP the option of providing the relevant Select Committee with an additional Estimates Memorandum alongside the Defra Estimate. The Memorandum would provide the Select Committee with a clear statement of what is in the Estimate, why funding is being sought, including explanations of what has changed and why.

Given this, and the additional financial commitments we have made, we do not agree that a separate Supply Estimate is needed in order to achieve sufficient financial independence from government.

The OEP will be able to provide government and Parliament with additional information related to any changes in funding and how the funding will be applied, enabling any perceived shortcomings to be highlighted. Parliament may then choose to scrutinise the funding of the OEP further and hold government to account accordingly.

Following common practice, we would also expect Defra to agree to review the funding of the OEP at the point of any formal request from the body which is supported by, for example, a relevant business case. Taking this further – to enshrine this commitment in a public document which is provided to Parliament – we will include in the Framework Document between Defra and the OEP a commitment for Defra to review the funding of the OEP at the OEP's request.

The definitions in Clauses 30 and 31 need to be expanded in scope and clarified in application and interpretation. We recommend that the Bill be redrafted to provide for a more holistic definition of the environment, with explicit reference made to the historic environment. Given the UK's departure from the wider framework of EU environmental law, international law should be included within the definition of environmental law, so that the OEP can factor international law into its enforcement and wider advisory functions. The Bill should also be redrafted to ensure that the OEP has the power to review all aspects of the Environmental Improvement Plans in its monitoring role. (Paragraph 123)

We agree that these definitions are of central importance. In response to the Committee's recommendation 28, we have reviewed the explanatory notes to further clarify the meaning and effect of the definitions.

We do not think it is necessary or appropriate, however, to include international law or the historic environment within the definition of environmental law for the purposes of the OEP's enforcement function.

International laws often have their own robust compliance mechanisms. Where the UK remains a party to international instruments these will remain in force. It would be duplicative and confusing, potentially producing inconsistent or contradictory outcomes, to give the OEP a role of enforcing international law. The OEP will, however, be able to take enforcement action in relation to domestic national law that gives effect to international law, as well as that which was derived entirely domestically, or from the EU. Regarding the OEP's wider advisory functions, clauses 24 and 25 of the revised Bill enable the OEP to report on the implementation of environmental law and provide advice on any proposed changes to such laws. International environmental law will therefore be covered by the OEP's scrutiny and advice functions where it has been given effect through domestic law. In addition the OEP must monitor progress in improving the natural environment in accordance with the current EIP. The government remains fully committed to implementing within the UK those international agreements to which the UK is a party. This is reflected in the 25 Year Environment Plan. The Bill also provides for the OEP to give advice on matters concerning international law relating to the natural environment if requested by Ministers under clause 25 (1) of the Bill introduced today.

Regarding the Committee's recommendation for the Bill to "be redrafted to provide for a more holistic definition of the environment, with explicit reference made to the historic environment", we believe our definition of the natural environment is broad and comprehensive and well suited to support the intended remit of the OEP.

The current 25 Year Environment Plan, while a plan to improve the natural environment, recognised that in doing so, it is important to consider both the positive impact on the natural environment that preserving the historic environment can have, as well as potential negative impacts on the historic environment that enhancing our natural environment could have. One of the ten goals of the plan was to deliver 'enhanced beauty, heritage and engagement with the natural environment'. The Bill sets out clearly that our 25 Year Environment Plan will be adopted as the first EIP, and will set the benchmark for future EIPs. We therefore expect the approach taken by our 25 Year Environment Plan, which was welcomed by heritage stakeholders when it was published, will be mirrored in future EIPs by this or future governments.

The OEP has the ability to review all aspects of the EIP in its monitoring role. Clause 23 of the Bill introduced today provides the OEP with a duty to monitor progress in improving the natural environment and this will include consideration of the current EIP. Therefore we do not believe any amendments are necessary.

There must not be a governance gap in law in relation to climate change when the UK leaves the European Union. Given the lack of enforcement provision for the Committee on Climate Change, the Office for Environmental Protection should play a role in enforcing the Government's targets and objectives relating to climate change.

However, in undertaking this function, the OEP must not unnecessarily and negatively encroach upon the well-established advisory functions of the Committee on Climate Change. (Paragraph 129).

The Government should make clear via memorandums of understanding published alongside the Bill, how the Committee on Climate Change intends to co-operate with the Office for Environmental Protection. As the Climate Change Committee has no enforcement role, Clause 31 of the Bill should be redrafted to include Climate Change within the enforcement remit of the OEP. A duty should be placed on the OEP to consult the Committee on Climate Change before conducting any enforcement action in this area. (Paragraph 130).

Climate change and the natural environment are two sides of the same coin and we therefore agree with the committee that climate change should be put on the same footing as the rest of environmental law, while respecting and maintaining the existing role of the Committee on Climate Change under the Climate Change Act. As such, we agree with the recommendations that the OEP should have climate change in the remit of its enforcement functions and have therefore removed the former exclusion at clause 31(3)(a) of the draft Bill. This will allow the OEP to bring cases against the Government in relation to the implementation of climate change legislation. This will also enable the OEP to take action if the Government misses its carbon budgets and fails to make proposals for corrective action as we progress towards our ambitious 2050 'net zero' target.

We also recognise the need to protect the role of the world leading Committee on Climate Change (CCC), ensuring that it is able to continue to provide its vital, independent role in providing advice and scrutiny on our carbon budgets, which the OEP's role will not overlap with. Our intention is therefore that both bodies will work closely together in a complementary way.

We therefore welcome the Committee's recommendation for a duty to consult the CCC when exercising its enforcement function in this area. In response, we have made a requirement for the OEP to inform the CCC prior to issuing an enforcement notice in relation to any climate change legislation. This should ensure that they are informed of each other's activities and can avoid any potential overlaps or conflicts before they arise.

We agree with the Committee's useful recommendation that a Memorandum of Understanding should be established between the OEP and the CCC to help underpin a mutually beneficial working relationship once the OEP is operational. Furthermore, the Bill requires the OEP to set out how it will avoid any overlap with the CCC when exercising its scrutiny and advice functions.

Role and Powers of the Office for Environmental Protection

To avoid unnecessary and costly duplication of technical expertise the OEP must set out in its strategy how its wider scrutiny and advisory roles will relate to and impact upon the other statutory bodies within the ambit of Defra. (Paragraph 112)

We agree with these recommendations. We note that the OEP will be working with a range of existing bodies and government departments. We expect this to require Memorandums of Understanding (MOUs) to be developed to set out the practical arrangements and

reduce any possible duplication of effort. We have not made provision for the OEP to establish MOUs with bodies such as Natural England on the face of the Bill but instead have expanded the explanatory notes to state that the OEP's strategy will outline how it will resolve any potential for duplication of effort with relevant bodies. This could be through the use of MOUs.

To avoid any tension between the OEP's two roles as an advisory body and a watchdog, Clause 16 should be redrafted so that the OEP only has to offer advice to Ministers at its own discretion. (Paragraph 111)

We note the Committee's point on this issue. It is expected that when a Minister requires advice, they will direct their request to the most appropriate body with the technical knowledge and expertise to respond. It is anticipated that there will be few occasions when the OEP believes that providing advice to a particular request could cause a conflict of interest. In these circumstances, we would expect the OEP to respond by explaining that it will not be providing a substantive response, giving reasons, and providing advice as to the course of action it believes the Minister should take. This could be directing them to a body (such as the Environment Agency) which is better placed to respond to this request. This would overcome any possible tensions between the OEP's role as an advisory body and a watchdog.

The purpose of the Office for Environmental Protection is to replace the governance functions of the European Commission and hold public authorities to account. The Government should avoid unnecessary duplication with existing domestic regulators who already enforce compliance by private companies, NGOs or landowners. The definition of "public authorities" in Clause 17(3) should be clarified, with a specific exclusion added for statutory undertakers. (Paragraph 75)

We agree with the Committee's view that the OEP should not take enforcement action against private companies, NGOs or landowners in respect of private activities that are already regulated by someone else, where these people or organisations are not undertaking a public function. That is why we have limited the OEP to acting in relation to public authorities, meaning those carrying out a function of a public nature.

We disagree, however, with the Committee's recommendation to entirely exclude statutory undertakers from the definition of "public authorities" in the Bill. Certain functions carried out as a matter of statute by statutory undertakers, such as water companies, would be considered "functions of a public nature". These would include functions which, in EU law terms, would be considered to be undertaken by bodies acting as an "emanation of the state" and in relation to which, if the undertaker failed to comply with EU environmental law, the Commission could bring infringement proceedings against the UK. We therefore believe it appropriate for statutory undertakers to be covered by the OEP's remit in relation to these functions. They would not be covered, however, in relation to any other activities which would not be considered to be functions of a public nature. For example, duties such as in section 37 of the Water Industry Act to develop and maintain an efficient and economical system of water supply would not meet the definition of environmental law and would therefore not be in scope of the OEP's functions.

However, section 28G of the Wildlife and Countryside Act 1981, for example, does give statutory undertakers, including water and sewerage companies and a range of other

bodies with public functions, the duty to take reasonable steps, consistent with the proper exercise of their functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features of sites of special scientific interest. Omitting statutory undertakers from the definition of public authorities would leave the OEP unable to act in this area. However, there is no intention to double regulate these organisations, and clause 20(6)(c) of the Bill introduced today addresses this by providing that the OEP's strategy must set out how it intends to exercise its complaints and enforcement functions "in a way that respects the integrity of other statutory regimes".

The OEP should have the power to initiate investigations into a suspected breach of environmental law and should not have to wait for a complaint to have been lodged to do so. It is important that members of the public are clear about the specific role of the OEP, and the types of complaints it is intended to deal with. ***The Bill should be redrafted to ensure the OEP has the power to proactively carry out investigations into a serious failure to comply with environmental law on its own initiative, rather than just in response to a complaint. The discretionary and strategic nature of the OEP's enforcement provisions should be made clearer in the Bill to ensure that it does not become inundated with complaints relating to local matters. The word "serious" in relation to a breach of environmental law should be clarified on the face of the Bill***. (Paragraph 79)

We agree with the majority of the Committee's recommendations in this area.

We recognise that a clarification would be useful to make explicit the OEP's power to investigate on the basis of information received other than from a complaint (for example an implementation report by a public authority) that indicates a failure to comply with environmental law. As such, we have now provided on the face of the Bill for the OEP to initiate investigations on the basis of information from other sources rather than just being able to investigate following a complaint (clause 28(2) in the Bill introduced today).

We do not consider it desirable to seek to define what is meant by "serious" on the face of the Bill. It is impractical to establish such a definition that could reasonably cover all the areas of environmental law and contexts in which the OEP will need to judge seriousness, so inevitably such a statutory definition could be arbitrary and constraining.

We agree, however, with the core of the Committee's comments around avoiding the OEP becoming inundated with complaints relating to local matters. This is not our intention. Clause 20(7) in the Bill introduced today (formerly clause 12(4)) already directs the OEP to prioritise cases with national implications. We believe this already guards to a significant extent against the Committee's concerns regarding the OEP having to take on too many complaints relating to local matters or being at too much risk of challenge over its own judgements. However, we have considered this matter further, and have now amended the Bill to provide that the OEP's enforcement policy must set out how it intends to determine whether a failure to comply with environmental law is serious for the purpose of subsequent clauses (clauses 20(6)(a) and (b) in the Bill introduced today). This should provide greater transparency in relation to the OEP's approach to the meaning of the term "serious", and guard against this further.

Given the weaknesses of the traditional judicial review process for dealing with environmental cases, an enhanced enforcement procedure should be established for the

OEP. Clause 25 should be redrafted to ensure that there is a legislative requirement on the court to take account of the issued decision notice as part of the review process. (Paragraph 95)

We note the Committee's recommendation and have made provision for a new environmental review mechanism in the Upper Tribunal for the OEP to bring legal challenges. The approach will have a number of benefits compared to that of a traditional judicial review in the High Court. In particular, taking cases to the Upper Tribunal is expected to facilitate greater use of specialist environmental expertise.

We would expect the decision notice to form a core part of the OEP's evidence in its application for review, and as such this would be considered by the court.

The OEP should be empowered to issue emergency and interim measures in urgent cases and to intervene in other legal proceedings relating to its purposes. These additional powers are essential given the potentially irreversible nature of environmental harm. (Paragraph 96)

We have added a provision for the OEP to be able to bring a judicial review at the start of the process in those rare cases where it is necessary to prevent serious damage to the environment or human health. We believe this addresses the concern flagged by the Committee in relation to providing a mechanism to act in urgent cases. We consider it is better to do this via judicial review and applications for interim relief in proceedings in order that the decision remains with the court, rather than giving the OEP its own power to issue emergency and interim measures as the Committee recommends.

In the absence of the power to fine, additional tools need to be given to the Office for Environmental Protection enforcement powers to ensure compliance with environmental law. Appropriate mechanisms to ensure greater personal accountability for failings will help to sharpen the watchdog's teeth. (Paragraph 103)

We agree with the Committee that it is unnecessary to make express provision for fines in the OEP enforcement framework. We consider that existing mechanisms are already sufficient in ensuring proper personal accountability for failings as explained below, so do not agree that the OEP needs additional tools in its enforcement powers.

Fines exist in the EU framework as an incentive for Member States to comply with CJEU judgments, without which no further legal sanction would exist. However, in a domestic context, Ministers and public bodies must comply with the law and can be found to be in contempt of court if they fail to comply with an earlier judgment. This is an established part of our legal system. Personal accountability, including financial penalties, is therefore already provided for via these contempt of court processes. Seeking to introduce further personal accountability, for example in terms of the Chief Executive or Chair of the public authority under scrutiny being required to attend and publicly account for what has gone wrong, would be a matter for a public inquiry. We do not believe it would be an appropriate extension of the OEP's powers for it to have the ability to launch or require a public inquiry. However, the OEP could recommend that the Secretary of State launch such an inquiry in its annual implementation report or in a report following an individual investigation. This does not require any additional provision in statute.

Defra should also continue to engage with legal experts on how best to incorporate the First Tier (Environmental) Tribunal into the enforcement process. An appropriate role for the Tribunal would be to confirm any decision notices issued by the OEP. The Tribunal could have a role in deciding whether there has been a breach of environmental law or whether the steps proposed to deal with the situation are adequate or reasonable. (Paragraph 97)

The Office for Environmental Protection needs to have the right balance of investigatory and enforcement powers, with sufficient legal teeth to ensure that compliance with environmental law is achieved without a majority of cases ending up in the courts. We welcome the OEP's powers to issue information and decision notices but are concerned that at present these notices will not have sufficient legal force to compel action. (Paragraph 93)

We do not agree with the Committee's concerns in paragraph 93 that the notices do not have sufficient legal force. Giving the OEP more power by allowing it to serve binding notices would undermine regulatory independence if the OEP were to over-rule an appointed regulator, such as the Environment Agency. The Commission's Reasoned Opinions, which precede references to the CJEU, are also non-binding rather than binding. Our proposal for a decision notice is therefore very similar to this element of the EU framework.

We agree, however, with a number of points raised by the Committee in this area and have made changes to the Bill, notably regarding giving the OEP recourse to a new environmental review mechanism in the Upper Tribunal (rather than the First Tier Tribunal, the Upper Tribunal being more senior). The approach will have a number of benefits compared to that of a traditional judicial review in the High Court. In particular, taking cases to the Upper Tribunal is expected to facilitate greater use of specialist environmental expertise.

We would welcome the extension of the Office for Environmental Protection to become a UK wide body but recognise that this decision sits within the power of the Devolved Administrations. The Bill should be redrafted so that, subject to the creation of separate bodies in the Devolved Administrations, the UK Government can establish the necessary mechanisms for cooperation and the sharing of data. Given the rushed timescales for the creation of the OEP, the Government should commit to a future review of the provisions for environmental governance across the UK within five years. (Paragraph 139)

We agree with the recommendation that the OEP should work collaboratively and without overlap with any potential equivalent bodies in Wales and Scotland that may be established in the future by the Devolved Administrations. The Bill therefore facilitates this collaboration. The Bill will ensure that the OEP has the power to share information with any equivalent 'devolved environmental protection body'; that is any public body exercising similar functions to the OEP in the devolved nations. Secondly, the Bill places a duty on the OEP to consult the relevant devolved environmental protection body when exercising any function that may also be relevant to such a body. We expect that this duty would be triggered in relation to transboundary issues, of relevance outside of England, allowing them to bring relevant issues to the attention of each other and share information which might support their respective investigations or scrutiny. This would also require them to highlight specific complaints / enforcement cases relating to areas of environmental law where their competences may potentially overlap or be legally ambiguous. We expect that

these powers and duties would be reciprocated by the Devolved Administrations when establishing their equivalent bodies, creating a UK-wide statutory framework upon which strong, collaborative working relationships will be developed over time.

The executive competence of certain functions can also be transferred between the administrations through transfer orders under the devolution settlements and other legislative instruments, and as such the boundaries between devolved / reserved matters may change over time. The OEP may need to make a legal judgement about whether an alleged breach is a reserved or devolved matter on a case by case basis, and we expect it would do so in collaboration with the relevant equivalent bodies in the devolved nations (as described above). Such legal judgements may often be complex and finely balanced, therefore we do not consider that setting out all reserved matters that the Government currently considers to be reserved would be particularly valuable. Indeed it could even be counter-productive as it might limit the OEPs future discretion in those areas.

More widely, there has been extensive and continued collaboration with the Scottish and Welsh Governments and the Northern Ireland Civil Service across the whole Bill. This has enabled us to bring forward a number of measures that we expect to see adopted outside of England, subject to the final decision of the devolved administrations. These joined up measures will help us deal with the environmental challenges we are facing together.