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The Rt Hon Michael Gove MP
Secretary of State for Environment, Food and Rural Affairs
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28 February 2019

Dear Michael,

Draft Environment (Principles and Governance) Bill

In February 2017, our Committee published a report on *Brexit: environment and climate change*. Amongst our findings, we drew attention to the fact that the European Commission and the Court of Justice of the European Union (CJEU) have had a strong impact in ensuring UK compliance with EU legislation that affects environmental protection. We highlighted the effectiveness of EU institutions' ability to hold Member States to account, to levy fines and, ultimately, take infraction proceedings for non-compliance. And we concluded that an independent domestic enforcement mechanism would be necessary to fill the vacuum caused by the UK leaving the EU, and that mechanism would need to have both regular oversight of the Government's progress towards its environmental objectives and the ability to sanction non-compliance through the courts.

The Government's response to our report was muted, noting only that any interested party would be free to challenge Government through a judicial review process and that Parliament is ultimately responsible for holding the Government to account.

We welcome, therefore, the publication of the draft Environment (Principles and Governance) Bill and the proposal within it to establish an Office of Environmental Protection (OEP) with the power to take enforcement action on environmental law.

On 6 February, we convened a roundtable of environmental experts to discuss this aspect of the draft Bill. Like us, they welcomed the intention to establish the OEP. They also raised a number of concerns about the body, as currently envisaged, which we would urge you to consider as you develop your proposals. Please find below a summary of our findings, along with our recommendations, to which we would welcome your response.

1) Independence

The draft Bill would give the Secretary of State the power to appoint the Chair, and other non-executive members, of the OEP and requires that he or she is consulted on the

appointment of the chief executive. The OEP's funding would also come from the Secretary of State, who is only required to provide "such sums as ... [they consider] are reasonably sufficient to enable the OEP to carry out its functions."

Given that one of the OEP's functions is to hold the Government to account (and, potentially, seek judicial review of their actions) the witnesses we heard from did not believe that the current provisions would give the OEP the independence it would require. The National Audit Office (NAO) has also raised this concern, stating: "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."¹

The NAO recommends that the Government "strengthen safeguards for the new environmental watchdog's independence, by setting out how it intends to involve Parliament in choosing its chair and in determining its funding, and by setting out a clear framework document for the terms of the relationship".² A number of our witnesses made a similar plea. Ruth Chambers, from Green Alliance, argued the NAO might itself provide a good model for how the OEP could be designed, with a parliamentary Select Committee setting its budget, scrutinising its performance and appointing its non-executive members. Professor Charlotte Burns suggested the Committee on Climate Change might be a good model to draw on, in that it reports to all four UK parliaments meaning "one Government would find it quite difficult to undermine [it]." In relation to budget setting in particular, Tom West from ClientEarth told us: "The German equivalent of the NAO is able to prepare and propose its own budget and submit that to a parliamentary committee, alongside the Government's proposed budget. That allows a viewing of what the difference is. It allows that to be done transparently and a decision to be made with all that information available."

- **We recommend that Parliament is given a greater role in the appointment of members, and allocation of budget, to the OEP. The nature of the OEP's functions means it must be, and be seen to be, independent from Government. The National Audit Office may offer a useful model of how this could be achieved.**

2) Remit

The draft Bill defines environmental law as that concerned with "protecting the natural environment from the effects of human activity; protecting people from the effects of human activity on the natural environment; [and] maintaining, restoring or enhancing the natural environment." It excludes devolved legislative provision, and also excludes greenhouse gas emissions, access to information and taxation, spending and the allocation of resources. The Explanatory Notes that accompany the draft Bill go further, listing air quality, water resources and quality, marine, coastal and nature conservation, waste management, pollution and contaminated land as matters that would constitute environmental law, and forestry, flooding, navigation, town and country planning, people's enjoyment of/ access to the natural environment and cultural heritage as matters that would not.

¹ National Audit Office, *Environmental metrics: government's approach to monitoring the state of the natural environment* (January 2019) p 11: <https://www.nao.org.uk/wp-content/uploads/2019/01/Environmental-metrics-governments-approach-to-monitoring-the-state-of-the-natural-environment.pdf>

² *Ibid.*, p 12

A number of our witnesses raised concerns about these exclusions, particularly the exclusion of climate change. Begonia Filgueira, from the UK Environmental Law Association, explained that climate change is covered by the European Commission and so not including it in the OEP's remit would weaken environmental protection. She explained that, in the UK, "the Committee on Climate Change monitors and reports, but there is no enforcement function, so there is a clear gap there." She also highlighted the risk of resource allocation not being in scope: "We are concerned that, when the Environment Agency says, "We have not done this because we do not have the budget", the court cannot make an announcement on it."

- **To ensure that the OEP is able to offer the same safeguards in relation to environmental protection as the current EU system, climate change should be explicitly included in its remit. Care will need to be taken not to duplicate the distinct, but important, role played by the Committee on Climate Change in monitoring progress in reducing emissions and achieving carbon budgets and targets.**
- **Clarity is also needed on the exclusion of "taxation, spending or the allocation of resources within government", as it is conceivable that it will be argued that many breaches of environmental law result from insufficient funding.**

A number of witnesses highlighted that although the European Commission's enforcement relates to the UK as a whole, the OEP's remit does not include devolved legislation. Professor Burns, however, told us: "Under the Withdrawal Agreement and backstop, we are required to have UK-wide provision of a body or bodies that will be responsible for enforcement. Whether this body [the OEP] becomes UK-wide or puts in place co-operation mechanisms, that will have to happen...if the Withdrawal Agreement is adopted." Witnesses recognised that this would be challenging, as each devolved nation had its own legislative framework and it is currently unclear whether the Welsh and Scottish Governments would prefer to be part of the OEP or establish their own system; consultations are expected to be issued shortly by both Governments on this issue. Ruth Chambers raised particular concerns about Northern Ireland: "There has been no commitment to consult there. There is obviously no Executive in place at the moment to take plans forward, and this has historically been a rather weak environmental governance system. The environment is already losing out in Northern Ireland."

- **We urge the UK Government to work closely with its counterparts in Scotland and Wales to ensure that the OEP covers devolved legislation if that is what those Governments prefer. If stand-alone bodies are to be created, we urge Governments to work together to identify where cooperation may be necessary and establish mechanisms for that cooperation to take place.**
- **The absence of an Executive means that there will be a significant weakening of environmental protection in Northern Ireland, with neither the European Commission or the OEP having a remit to ensure that Northern Irish environmental law is upheld.**

3) Powers

The draft Bill sets out an enforcement process that the OEP would follow once it suspects a public authority may have been involved in a serious breach of environmental law, beginning

with 'information notices' (where the OEP can request information from the relevant authority), followed by 'decision notices' (where it would set out suggested remedial steps that the authority should take) and finally bringing legal proceedings through an application for judicial review.

Several of our witnesses raised concerns that the OEP, as currently envisaged, does not have the full set of powers it will require. Professor Burns told us: "The enforcement regime that is being suggested is much weaker than that which we have at EU level at the moment ... [the Court of Justice of the European Union] has the ability to levy fines against States that are not implementing or enforcing environmental law. That is not being replicated in any way, shape or form here."

Debbie Tripley from WWF-UK was one of several witnesses to suggest that the decision notices that the OEP would issue should have "bite", with Tom West arguing they should be "binding." Professor Richard Macrory, however, disagreed and argued that the model proposed closely matches the current European Commission process.

Witnesses also raised doubts about whether judicial review was the most appropriate replacement for the CJEU. Both Debbie Tripley and Professor Macrory highlighted that the CJEU has a broader approach, reviewing the substance of decisions made by Governments rather than just procedural illegality. Professor Macrory suggested the Environmental Tribunal could be an alternative model to consider.

Professor Macrory also made the point that when the European Commission brings infringement proceedings they are directed at Government (even if the breach was by another public body). He argued this should be replicated post-Brexit, with the OEP's enforcement powers directed solely against the Secretary of State: "the Government should be taking on responsibility where there have been major failures by public authorities."

- **To ensure environmental protection is not weakened after Brexit, the OEP must have at least the equivalent level of enforcement powers as European Commission.**

4) Timing

Unless a Withdrawal Agreement, or an extension to Article 50, is agreed, the UK will leave the EU on 29 March this year. The proposals for an OEP currently exist only in a draft Bill, with the full Environment Bill expected later this year. Ruth Chambers estimated that "if everything stays equal, the full Bill will be introduced in June and get Royal Assent sometime in spring 2020." The Institute for Government has recently suggested the OEP could not be in place until 2021 at the earliest.³ This raises questions about how environmental protection will be upheld in the interim. The Government's 'no deal' guidance on environmental standards states: "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."⁴

³ Institute for Government, *Brexit: two months to go* (January 2019):

<https://www.instituteforgovernment.org.uk/sites/default/files/publications/brexit-two-months-to-go-final-web.pdf>

⁴ Department for Environment, Food and Rural Affairs, *Upholding environmental standards if there's no Brexit deal* (December 2018): <https://www.gov.uk/government/publications/upholding-environmental-standards-if-theres-no-brexit-deal/upholding-environmental-standards-if-theres-no-brexit-deal>

- **A two year gap in environmental protection, especially at a time when a number of other safeguards and processes will be in flux, is a grave concern. While recognising that the development of the OEP deserves time for consultation and consideration, we urge the Government to swiftly implement interim measures that could go some way to taking on the roles performed by European institutions. This could involve temporarily increasing the powers and remit of existing bodies, and providing them with the additional resources and governance structures they would require to undertake these functions effectively and independently.**

Yours sincerely

Lord Teverson
Chairman of the EU Energy and Environment Sub-Committee

cc. Neil Parish (Chair of the Environment, Food and Rural Affairs Committee) and Mary Creagh (Chair of the Environmental Audit Committee)