By email and post

FAO: Secretary of State for Environment, Food and Rural Affairs,
Nobel House, 17 Smith Square,
Westminster,
London SW1P 3JR

secretary.state@defra.gov.uk /
correspondence.section@defra.gov.uk

Dear Sirs,

JUDICIAL REVIEW PRE-ACTION PROTOCOL LETTER – URGENT RESPONSE NEEDED WITHIN 14 DAYS

We write on behalf of our client CHEM Trust regarding:

(i) The REACH etc. (Amendment etc.) (EU Exit) Regulations 2019 made on 29 March 2019 with amendment regulations made on 11 April 2019; and


Our client considers that, in making the above regulations, the Secretary of State for the Environment, Food and Rural Affairs has both acted contrary to the legitimate expectation of our client, and of the public at large, that current environmental protections will not be weakened as a result of the UK leaving the EU, and acted ultra vires his powers under section 8(1) of, and paragraph 1 of Schedule 4 and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018.

Please accept this letter as a formal letter before action as required by the CPR pre-action protocol governing claims for judicial review and as a response to the Secretary of State’s letter to CHEM Trust dated 16 May 2019. This matter may give rise to judicial review proceedings. As a consequence, we are writing this letter to give you the chance to respond to the relevant issues (including explaining any disagreement you have with the factual or legal situation as we explain it here) in the hope of avoiding litigation.
I. The Proposed Claimant:

CHEM Trust, Impact Hub Kings Cross, 34b York Way, London N1 9AB. CHEM Trust is a UK registered charity. The objectives of the charity are, for the benefit of the public, to promote the protection of human health and the environment from the effects of noxious chemicals and to promote research into the effects of chemicals on health and the environment.

The Proposed Claimant clearly has standing to challenge the decision.

II. The Proposed Defendant:

Secretary of State for Environment, Food and Rural Affairs, Nobel House, 17 Smith Square, Westminster, London SW1P 3JR.

III. The details of the Claimants' legal advisers:

Tom Short and Carol Day, Solicitors, Leigh Day, Priory House, 25 St John Street, London, EC1M 4LB

IV. The Legislative framework

The EU REACH Regulations

1. The aim of Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (the "EU REACH Regulations") is to improve the protection of human health and the environment from the risks that can be posed by chemicals, while enhancing the competitiveness of the EU chemicals industry. It also promotes alternative methods for the hazard assessment of substances in order to reduce the number of tests on animals.

2. Title X (Article 75 onwards) of the EU REACH Regulations concerns the establishment of the European Chemicals Agency ("ECHA") for the purposes of managing and, in some cases, carrying out the technical, scientific and administrative aspects of the Regulations and to ensure consistency at Community level in relation to those aspects. The
operation of ECHA is governed by numerous safeguards in the EU REACH Regulations ensuring a robust and evidential basis and appropriate public participation in the decision-making process. In particular:

- **Article 76** establishes that ECHA is comprised of numerous bodies including a Management Board, an Executive Director and Committees on, *inter alia*, Risk Assessment and Socio-economic Analysis, a Member State Committee and a Forum for Exchange of Information on Enforcement;

- **Article 77** requires ECHA to provide Member States and Community institutions with the best possible scientific and technical advice on questions relating to chemicals falling within its remit;

- **Article 78** sets out the responsibilities of the Management Board including, *inter alia*, the power to adopt: (i) the general report of the Agency for the previous year; (ii) the work programme of the Agency for the coming year; (iii) the final budget of the Agency; and (iv) a multiannual work programme. The Management Board also adopts, and makes public, the internal rules and procedures of the Agency;

- **Article 79** concerns the composition of the Management Board; and

- **Article 82** concerns the voting rights of the Management Board.

The Plant Protection Regulation

3. Regulation (EC) No 1107/2009 regulates the placing of plant protection products (PPPs or pesticides) on the EU market. PPPs are products in the form in which they are supplied to the user, consisting of, or containing active substances, safeners or synergists, and intended for a number of uses.

The European Union (Withdrawal) Act 2018

4. The purpose of the European Union (Withdrawal) Act 2018 (the “Withdrawal Act”) is to provide certainty and continuity, ensuring the same rules and laws apply immediately after Brexit wherever possible and supporting a smooth transition. The Withdrawal Act received Royal Assent on 26 June 2018.

5. Section 8(1) of the Withdrawal Act empowers Ministers of the Crown to make provision to “prevent, remedy or mitigate - (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU”. Sections 8(2) and 8(3) of the Withdrawal Act exhaustively explain the circumstances in which there is a “deficiency in EU law” such that Ministers can make provisions of the kind contemplated if, but only if, and also only to the extent that, they fall within section 8(2) or 8(3).

6. Section 8(2) identifies the following “deficiencies” (which, we assume, are those relied
on as the basis for the changes considered in this letter, but please tell us if you think otherwise):

“(b) confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to the United Kingdom or any part of it,

(c) makes provision for, or in connection with, reciprocal arrangements between—
   (i) the United Kingdom or any part of it or a public authority in the United Kingdom, and
   (ii) the EU, an EU entity, a member State or a public authority in a member State,
which no longer exist or are no longer appropriate,

(d) makes provision for, or in connection with, other arrangements which—
   (i) involve the EU, an EU entity, a member State or a public authority in a member State, or
   (ii) are otherwise dependent upon the United Kingdom’s membership of the EU, and which no longer exist or are no longer appropriate,”

The 2019 Amending Regulations

7. The purpose of the REACH etc. (Amendment etc.) (EU Exit) Regulations 2019 (2019 N.758) (the “REACH SI”) is to amend the following instruments (so far as they relate to the UK) so that they are operable upon the UK’s exit from the EU:


- Commission Implementing Regulation (EU) 2016/9 on joint submission of data and data sharing in accordance with Regulation (EC) No 1907/2006;


- The REACH (Enforcement) Regulations 2008.

so that they are operable upon the UK’s exit from the EU.

9. Chapter 2 of the Plant Protection Products SI confirms that it also amends eight other EU Regulations.

V. The failure of the 2019 Regulations to protect the environment and prevent deficiencies in retained EU law

The REACH SI

10. The REACH SI appears to substantially alter the way in which chemicals will be regulated in the event that the UK leaves the EU and no provision is in place for the UK to continue to participate in the current regulatory regime overseen by ECHA.

(a) Removal of experience, expertise and participation

11. The REACH SI effects a significant reduction in the level of experience, expertise and participation that will apply in the UK’s chemicals regulatory regime following the UK’s exit from the EU compared with that which is enjoyed under the EU REACH Regulations. That reduction is, it appears to us, not to be justified with reference to the Secretary of State’s power under s8 of the Withdrawal Act to correct deficiencies, and, moreover, contravenes statements and promises by the Government that environmental standards in the UK will not fall in the event of the UK’s exit from the EU.

12. Regulations 63 and 65 of the REACH SI omit Articles 78-82 and 84-87 of the EU REACH Regulations. The effect of these omissions is to transfer functions and powers from the Management Board and voting mechanisms of ECHA to the Secretary of State. The significance of these changes which consolidate power in the Secretary of State alone is made clear by reference to Article 79(1) of the EU REACH Regulations, which concerns the composition of the Management Board:

"1. The Management Board shall be composed of one representative from each Member State and a maximum of six representatives appointed by the Commission, including three individuals from interested parties without voting rights and in addition two independent persons appointed by the European Parliament.

Each Member State shall nominate a member to the Management Board. The members thus nominated shall be appointed by the Council."

13. The Secretary of State has made no provision for the devolved agencies and interested/independent persons to participate in the exercise of equivalent responsibilities under the REACH SI. The Secretary of State has, instead, consolidate all roles in himself.
14. Further, Article 79(2) of the EU REACH Regulations provides:

"Members [of the Management Board] shall be appointed on the basis of their relevance and expertise in the field of chemical safety or the regulation of chemicals whilst ensuring there is relevant expertise amongst the board members in the fields of general, financial and legal matters".

15. The REACH SI fails to require the Secretary of State either to possess relevant experience and expertise himself or to take relevant experience and expertise into account in the appropriate exercise of his powers.

16. Similarly, Article 82 of the EU REACH Regulations provides:

"The Management Board shall adopt rules of procedure for voting, including the conditions for a member to vote on behalf of another member. The Management Board shall act by a two-thirds majority of all members with the right to vote".

17. This requirement appears to be replaced, through the REACH SI, by a decision on the part of the Secretary of State alone, who may exercise his powers absent any measures or controls to ensure that decisions are taken on a majority basis and underpinned by relevant experience and expertise.

(b) Removal of due regard for societal needs in decision-making

18. Our client's concerns regarding these, apparently unjustified, dilutions in standards of experience, expertise and participation are compounded by the failure in the REACH SI to reference the Preambles to the EU REACH Regulations that seek to ensure the framework for decision-making serves the public interest.

19. For example, Preamble 78 requires ECHA to provide advice on the prioritisation of substances for authorisation to "ensure that decisions reflect the needs of society as well as scientific knowledge and developments".

20. Similarly, Preamble 95 recognises that the role of ECHA is "central to ensuring that chemicals legislation and the decision-making processes and scientific basis underlying it have credibility with all stakeholders and the public". It is presently unclear how the Secretary of State will exercise an equivalent replacement supervisory function to ensure that societal needs and knowledge are properly taken into account in authorisation decisions.

(c) ECHA Committees and stakeholder engagement

21. Article 77(3)(b) of the EU REACH Regulations requires the ECHA Committees to, at the Executive Director's request, provide:
"technical and scientific support for steps to improve cooperation between the Community, its Member States, international organisations and third countries on scientific and technical issues relating to the safety of substances, as well as active participation in technical assistance and capacity building activities on sound management of chemicals in developing countries”.

22. Article 85 of the EU REACH Regulations allows each Member State to nominate candidates to membership of the ECHA Committees. Members are appointed for their role and experience in performing the tasks specified in Article 77(3) of the EU REACH Regulations. Article 85(4) requires the Committees to have a broad range of relevant expertise among their members. To this end, each Committee may co-opt a maximum of five additional members chosen on the basis of their specific competence. The members of each Committee may be accompanied by advisers on scientific, technical or regulatory matters and stakeholders may also be invited to attend meetings as observers, as appropriate, at the request of the Committee members, or the Management Board.

23. The Preambles to the EU REACH Regulations provide the framework and context for Articles concerning the importance and role of third party involvement in the authorization process. For example, Preamble B1 obliges ECHA to issue opinions on risks arising from the uses of particular substances, including “on any socio-economic analysis submitted to it by third parties”.

24. ECHA currently works with a range of accredited stakeholders representing a variety of interests including industry, human health, animal welfare, environmental protection, scientific research and development, and consumer protection (see the detailed policy document from ECHA on its approach to engagement with accredited stakeholders1).

25. The important practical effect of these safeguards is that where a substance is being evaluated under the EU regime, the Committees can determine what information is relevant to the decision on the basis of the expertise and experience available to them and stakeholders present at the meeting can actively engage in the process.

26. The REACH SI transfers the functions of the ECHA Committees to the Health and Safety Executive (“HSE”) (see Schedule 1, Part 1, Chapter 2 or Title 1, Article 2A(1) of the REACH SI). However, the evidential, transparency and participatory safeguards built into the composition and operation of the ECHA Committees are not replicated in the HSE. For example:

- Regulation 64 of the REACH SI omits the Committee for Risk Assessment and the Committee for Socio-economic Analysis. Both of these Committees currently play an extremely important role in the authorisation process, the former in respect of risks to the environment and human health, the latter in respect of consideration of socio-

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1 See: https://echa.europa.eu/documents/10162/13559/echas_approach_to_engagement_with_accredited_stakeholder_organisations_en.pdf/b54c589e-d615-42e4-ba09-ac4ecc2fefa1

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economic impacts;

- **Regulation 65** of the REACH SI omits Article 85 of the EU REACH Regulations in its entirety;

- **Article 88(1)** of the EU REACH Regulations requires the membership of the Committees and the Forum to be made public (unless privacy is request on the basis that there is a risk to an individual by making their name public). The Executive Director shall decide whether to agree to such requests. When each appointment is published, the professional qualifications of each member shall be specified. Regulation 66 of the REACH SI requires that the details of suitably qualified or experienced persons providing advice to the HSE must be made public. Individuals may request that their names not be made public if they believe that such publication could place them at risk. The HSE must decide whether to agree to such requests. When details are published, the professional qualifications of each suitably qualified or experienced person must be specified;

- There would appear to be no policy within the HSE or Government governing stakeholder engagement in comparable processes undertaken by the HSE. In this respect, we refer to the evidence session of the Environment, Climate Change and Land Reform Committee of the Scottish Parliament on 23 April 2019\(^2\) during which concerns about the loss of stakeholder engagement were raised by Dr Michael Warhurst, Executive Director of CHEM Trust and Libby Peake of Greener UK\(^3\); and

- The REACH SI fails to replicate the Preambles to the EU REACH Regulations. This includes Preamble 81, which concerns analysis submitted by third parties “on any socio-economic analysis submitted to it by third parties”.

27. The failure to replicate the above features of the ECHA Committees has the capacity to seriously undermine the opportunities for public participation in the domestic authorisation regime.

(b) **Scientific knowledge**

28. Appropriate reliance on sound independent scientific knowledge is a cornerstone of the EU chemicals regime under the EU REACH Regulations. Preamble 95 to the EU REACH Regulations states:

> “The Agency should be central to ensuring that chemicals legislation and the decision-making processes and scientific basis underlying it have credibility with all stakeholders and the public. The Agency should also play a pivotal role in coordinating communication around this Regulation and in its implementation. The confidence in the Agency of the Community institutions, the Member States, the general public and interested parties is therefore essential. For this reason, it is


\(^3\) See ibid pages 30, 36 and 44
vital to ensure its independence, high scientific, technical and regulatory capacities, as well as transparency and efficiency.”

30. This objective is reflected in Article 77(1) of the EU REACH Regulations, which requires ECHA to provide the Member States and the institutions of the Community with “the best possible scientific and technical advice on questions relating to chemicals which fall within its remit and which are referred to it in accordance with the provisions of this Regulation”.

31. Regulation 62 of the REACH SI amends Article 77 to restrict the information the HSE may take into account when forming an opinion. The HSE may only take into account knowledge or advice where:

“(a) the knowledge or advice has been commissioned by the Agency, from one or more suitably qualified or experienced persons who are independent of the Agency, for the purposes of forming the opinion concerned, or

(b) the knowledge or advice—

(i) is already in existence (whether within the Agency or externally),

(ii) is produced within the Agency for the purposes of forming the opinion concerned, or

(iii) is, in accordance with Article 28, produced by the Environment Agency or one of the other environmental regulators in connection with the Agency forming the opinion concerned and then passed on to the Agency,

and the Agency considers that it is appropriate to take it into account, rather than to commission knowledge or advice in compliance with point (a).

The knowledge or advice that the Agency may take into account in compliance with point (b)(i) includes knowledge or advice which has previously been commissioned by the Agency from one or more suitably qualified or experienced persons who are independent of the Agency for the purposes of forming a previous opinion on any matter.

A.3 The Agency must comply with this paragraph if —

(a) it is forming—

(i) an opinion in connection with deciding whether to grant an authorisation under Article 60,

(ii) an opinion under Article 70 as to whether suggested restrictions are
appropriate in reducing the risk to human health or the environment, or

(iii) an opinion under Article 71 on suggested restrictions and on the related socio-economic impact, and

(b) it only takes into account knowledge or advice that is not commissioned in compliance with paragraph A2(a) for the purposes of forming that opinion.”

31. This amendment obliges the HSE to exclude information that may be directly relevant to the authorisation process (and indeed to the exercise of other functions). Restricting the HSE to relying purely on ‘knowledge’ that it has commissioned for its own purposes is in direct contrast to the EU regime and carries significant public risk (not least in a context where there is real risk that reduced regulatory oversight and standards could be used in order to attract chemicals-related business to the UK).

(c) Data-sharing and decision-making

32. Our client is concerned that, despite public assurances from the Government that suitable solutions would be in place by 31 March 2019, practical arrangements for the secure sharing and processing of data necessary for the HSE and Secretary of State to properly regulate chemicals post-Brexit will not be possible (regardless of the date of the UK’s exit from the EU).

33. We note in this regard that even under the current regime, it appears that there are widespread failures by UK companies to adhere the required standards. For example, a recent ENDS report states that at least 80 UK companies have failed to meet data safety standards for chemicals under the EU REACH Regulations. The report also states that 940 dossiers did not comply with the regulation and whilst it was not possible to verify current compliance status of around three-quarters of those dossiers, 41 of them had not been changed between 2014 and 13 April 2019. We consider that, in circumstances where there is a clear lack of both capacity and expertise, the HSE will be ill-equipped to better regulate dossiers.

34. In any event, irrespective of the HSE’s capabilities in this regard, restrictions on data use present so fundamental an obstacle that it is unclear how, or indeed whether, the HSE will be able to process registrations and authorisations under the new UK regime. That fact would seem to undermine the Preamble of the EU REACH Regulations and the aspirations of the statements such as on registrations:

“In addition, it is necessary to instill confidence in the general quality of registrations and to ensure that the public at large as well as all stakeholders in the chemicals industry have confidence that natural or legal persons are meeting the obligations placed upon them.”

35. The REACH SI inserts a new Article 127A into the EU REACH Regulations providing that existing EU registrations with a connection to the UK will be transferred to UK REACH on exit day. There will be a window of 2 years for registration of non-UK registrations – in the meantime the UK will rely on the integrity of the existing EU REACH registration.

36. We understand that under the UK REACH regime, the basic principle of “no data, no market” will continue to apply. However, most data is currently subject to particular ownership rights, often belonging to numerous EU companies for any one registered substance. It is unclear how UK companies or the HSE will be to obtain that data (or equivalent new data) in circumstances where the European Commission has made it clear that it will not make available to the UK existing dossiers held by ECHA.

37. In this context, the HSE’s statements that it intends to introduce a new UK IT system similar to the existing EU system offer no assurances as to the ability of the HSE to safely regulate chemicals following the UK’s exit from the EU. Statements by Thérèse Coffey MP on this issue in committee evidence offer cold comfort:

“Dr Thérèse Coffey MP: Ministers have been meeting on this for some time and have agreed to the building of a new IT system. Yes, there is confidence. The plans have detailed delivery timelines for designing and procuring the IT systems, and there are ongoing reviews to ensure that they remain on track. Gabrielle has spent what probably feels like half her life dealing with this particular issue, so she might want to add a bit more about some of the processes that have been gone through.

Gabrielle Edwards: We are building a database or IT system that could be used if there was a no-deal scenario with the EU. By March 2019, we need a registration function in place, so that companies that need to register new chemicals have the ability to do so. Clearly, we would need to hold information on chemicals that we were grandfathering, so that their registrations remain valid in the EU system. We are trying to build a system that will replicate, as far as it can, what the ECHA system does.”

Plant Protection SI

38. Annex II of Regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market states:

“3.6.5 An active substance, safener or synergist shall only be approved if, on the basis of the assessment of Community or internationally agreed test guidelines or other available data and information, including a review of the scientific literature, reviewed by the Authority, it is not considered to have endocrine disrupting properties that may cause adverse effect in humans, unless the exposure of humans to that active substance, safener or synergist in a plant protection product, under realistic proposed conditions of use, is negligible, that is, the product is used in closed systems or in other conditions excluding contact with
humans and where residues of the active substance, safener or synergist concerned on food and feed do not exceed the default value set in accordance with point (b) of Article 18(1) of Regulation (EC) No 396/2005.” (our emphasis)

and,

“3.8.2. An active substance, safener or synergist shall only be approved if, on the basis of the assessment of Community or internationally agreed test guidelines, it is not considered to have endocrine disrupting properties that may cause adverse effects on non-target organisms unless the exposure of non-target organisms to that active substance in a plant protection product under realistic proposed conditions of use is negligible.”


40. We note the principle on “negligible exposure” also applies to carcinogens & reproductive toxins and it would appear that the deletion of 3.6.5 (above) erases this protection against endocrine disrupters. Further, and crucially, this “negligible exposure” control also applies to “non-target organisms” in the environment in 3.8.2 (above), but this is deleted in the Plant Protection Products SI, and thus removes this protection for the environment. This is a significant weakening of the EU regime with potentially far-reaching consequences.

V. Grounds

A legitimate expectation of equivalent environmental protection

41. The dilutions of regulatory standards outline above are contrary to Government assurances. The Secretary of State has made a number of public statements to the effect that environmental standards will be maintained (if not strengthened) on the UK’s departure from the EU. For example:

- When giving evidence to the Environmental Audit Committee on 11 July 2018, the Secretary of State was asked whether the proposals set out in the Brexit White Paper would enable the UK Government to diverge from existing EU regulations on air quality, water pollution and waste management at a time when the UK is failing to meet these standards. The Secretary of State told MPs that the opportunity for ministers to set different standards to those enforced by the bloc would “unquestionably” lead to tougher regulations being introduced, claiming that many “pro-leave” politicians took their stance in the 2016 referendum partly due to the
appeal of setting stricter controls than the EU. The Secretary of State re-affirmed that environmental standards will not "slip lower" than those of the European Union (EU) post-Brexit⁵;

- The Secretary of State has publicly stated that "As the prime minister has made clear, we will not weaken environmental protections when we leave the EU"⁶;

- The Parliamentary Under-Secretary of State for Environment, Food and Rural Affairs (Dr Thérèse Coffey) on considering the Eleventh Report of the Environmental Audit Committee of Session 2016-17, The Future of Chemicals Regulation after the EU Referendum, HC 912, and the Government response, HC 313:

"I also recognise that trade associations and other organisations have continued to call for the UK to stay in REACH. As I have explained elsewhere, given the principles set out by the Prime Minister in her Lancaster House speech, we will not stay in REACH per se but, through the provisions set out in the European Union (Withdrawal) Bill, we will bring into law the regulations that put REACH into effect. That is important because the continuity will provide an effective regulatory system for the management and control of chemicals to safeguard human health and the environment. It will also minimise any market access barriers for UK companies trading with the EU".⁷

"On leaving the EU, our regulatory system and laws will be identical to those of the EU. There could be opportunities to consider improving the regulatory system to maintain standards in protecting the environment and human health. That is why we have considered the regulatory approaches of other countries, including those that are largely modelled on REACH".⁸ (own emphasis added); and

- The Parliamentary Under-Secretary of State, Department for Environment, Food and Rural Affairs (Lord Gardiner of Kimble) on 26 March 2019 on a Motion to Approve the draft Regulations laid before the House on 5 February: "We will continue to ensure the highest levels of protection for human health and the environment, based on robust evidence and strong scientific analysis."⁹

42. The Secretary of State has repeated these reassurances directly to our client CHEM Trust in a letter dated 16 May 2019, in response to a letter from Dr Michael Warhurst (Executive Director of CHEM Trust) dated 4 April 2019. In his letter, Dr Warhurst raised concerns about the removal of vital mechanisms of stakeholder engagement and public participation, and the risk of reduced environmental protections post-Brexit.

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43. In his response, the Secretary of State reassured CHEM Trust that “UK chemical management will be based on strong science and analysis”. The letter also confirms the Government envisages arrangements that:

“reflect those in the EU where stakeholders can observe technical discussions at ECHA Committee meetings and read publicly available minutes of these meetings, subject to the commercially sensitive nature of some applications for authorisation. We will work with stakeholders to develop these transparency arrangements ... The transitional measures set out in the REACH SI ensure short term alignment but ... long term divergence is a possibility ... The possibility of long term divergence will not, however, allow a reduction of environmental standards after we leave the EU.” In particular, the Government confirmed that “there is no intention of weakening our current environmental protection as we leave the EU.”

44. These statements of policy are sufficiently clear, unambiguous and without qualification as to amount to promises of particular treatment. Given that they also include statements made in Parliament and in direct correspondence with CHEM Trust, our client (and indeed other environmental NGOs) are entitled to rely on the Government’s commitment to maintain environmental protections and, as a consequence, that the domestic regulatory framework will replicate the necessary procedural safeguards. Any failure to do so would have far reaching implications in terms of public safety and environmental protection.

45. In *R v Department for Education & Employment, ex parte Begbie* [2000] ELR 445, the Court of Appeal held that while there was no doubt that statements made by the Leader of the Labour party before the 1997 General Election gave rise to an expectation that children already on the Assisted Paces Scheme would continue to receive support until their education was completed, these statements did not give rise to a legitimate expectation that was protected by law, nor were they an abuse of power. In that case, the Court thought it obvious that a party in opposition would not know all the facts and ramifications of a promise until it achieved office and to hold that a pre-election promise bound a new government could be inimical to good government. However, this case is distinguishable from *Begbie* on the basis that the Secretary of State has been in office for nearly two years and is therefore fully cognizant of the facts and ramifications flowing from commitments of this nature and the reliance that CHEM Trust, other environmental charities and the public would place on them. Indeed, the promises such as those set out above were made by the very Ministers who were then to give effect to those promises.

**s.8(1) of the Withdrawal Act**

46. In making both sets of Regulations, the Secretary of State is Purporting to act under section 8(1) of the Withdrawal Act 2018:

“(1) A Minister of the Crown may by regulations make such provision as the Minister
(a) any failure of retained EU law to operate effectively, or
(b) any other deficiency in retained EU law,

arising from the withdrawal of the United Kingdom from the EU.”

47. As above, the “deficiencies” in play here so we assume (but please tell us if think there is more to it) are those arising from the loss of the EU institutions which have previously been involved in these matters, as above.

48. The powers in play allow the Secretary of State to make good the effect of the deficiency in each case. However, those powers are not available, nor are they to be used, to bring about a reduction in the protections such as those considered above.

49. We consider that by introducing these requirements in this manner the Secretary of State has acted (a) ultra vires his power under section 8(1), and paragraph 1 of Schedule 4 and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018, and/or (b) for an improper purpose, in that those powers are available (and are to be exercised) to ensure the continuity of the EU protections (including as set out in this letter) in the context of the EU institutions dropping out of the picture, not to diminish or risk those protections as has happened here.

VI. The details of any Interested Parties

50. A copy of this letter has been sent to the Treasury, as the body consenting to the making of these Regulations.

VII. Aarhus costs

51. If a claim is pursued it will plainly be an Aarhus claim to which the cost protection of CPR 45.41 will therefore apply. If you disagree, please fully explain why.

VIII. The details of the action that the Defendant is expected to take

52. The Claimants seek the following remedies:

(i) a declaration that the Secretary of State for the Environment, Food and Rural Affairs has acted both contrary to the legitimate expectation that current environmental protection will not be weakened as the UK leaves the EU and ultra vires his powers under section 8(1), and paragraph 1 of Schedule 4 and paragraph 21 of Schedule 7 to, the Withdrawal Act with respect to the REACH SI and the Plant Protection Products SI and/or for an improper purpose by reference to those provisions;

(ii) an order quashing the offending text from the REACH SI and the Plant Protection
(iii) an order for costs.

IX. ADR proposals

53. We do not currently consider that these issues are suitable for alternative dispute resolution but would be pleased to consider any proposals you have for this.

X. The address for reply and service of court documents

54. See above for the address of the Claimants’ legal advisers. Service of documents by email will not be accepted.

XI. Proposed reply date

55. The REACH SI was made on 29 March 2019 (with a set of amendment regulations addressing industry concerns made on 11 April 2019) and the Plant Protection Products SI was made on 20 March (with a correction slip published on 14 May 2019).

56. The Claimants have sought, through correspondence and the Parliamentary process, to engage with Defra in relation to the making of these Regulations. The Claimants act promptly in now writing to the Secretary of State under the Pre-action Protocol and request a response within 14 days, by **4pm 18 June 2019**.

57. In the event that we do not receive a satisfactory response to this letter on or before the above date, we will issue proceedings seeking permission from the High Court to proceed with the proposed claim for judicial review as outlined above.

Yours faithfully,

Leigh Day