

THE OFFICE FOR ENVIRONMENTAL PROTECTION AND JUDICIAL REVIEW

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THE OEP AND JUDICIAL REVIEW



- Ways in which the OEP may become involved in judicial review proceedings:
 - Claimant in statutory judicial review under clause 25 of the Bill.
 - Claimant in ordinary judicial review proceedings
 - Intervener in judicial review proceedings brought by others
 - Interested Party
 - Defendant
 - Funder

1. COMPLAINTS AND CLAUSE 25 JRs



- New statutory judicial review follows on from complaints
- Complaints procedure under clause 18. Followed by investigation under clause 19, can lead eventually to information notice under clause 22 and ultimately decision notices under clause 23.
- Decision notice may lead to “recommendation” under clause 23(2).

1. COMPLAINTS AND CLAUSE 25 JRs (2)



- Recommendation may relate to **remedy and / or mitigation** of the breach of environmental law or **a**.
- **NB Gives no power to (let alone obligation on) public body to do anything it could not previously have done.** So e.g. Env Agency cannot be told to revoke Environmental Permit on which it is *functus officio*
- Recommendation not binding *per se*. Government Consultation response says that mirrors position of Commission, which can only *enforce* via infraction proceedings in CJEU.
- No power to issue penalty.
- Query whether recommendation can include some form of compensation or consolation to third parties. Much less focus on this compared with e.g. Ombudsmen recommendations.

1. COMPLAINTS AND CLAUSE 25 JRs (3): The Clause 25 JR

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- Under clause 25(1), OEP may make a “review” (i.e. JR) application:
“in relation to conduct described in a decision notice given to a public authority as a failure to comply with environmental law”
- **SO** the subject of the judicial review is the *original conduct* of the public authority which gave rise to the complaint, **NOT** its response to the Decision Notice (e.g. failure to comply with recommendation etc).
- Time for Clause 25 JR is three months from time for response to Decision Notice.
- JR permission rules apply in the normal way, but no requirement that court refuse permission or relief if outcome would be “highly likely” to be the same. Seems to facilitate JRs where primary remedy sought is a declaration. Consultation response envisages that declaration of law will be the most likely remedy.

1. COMPLAINTS AND CLAUSE 25 JRs (4): The Clause 25 JR Remedies

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- Major questions on remedy:
 - If JR is of underlying decision, for which statutory time limit is extended (3 months from response to decision notice rather than 3 months from original decision) then can court grant same remedies as in ordinary JR of original decision? EG Quash the original decision. If so major extension of JR powers. Consultation response says that OEP can “apply for the usual suite of remedies ... including ... injunctions, and mandatory / prohibiting / quashing orders”. So at least in principle, appears to be possible to quash a decision years after it was made.
 - If that is right, remedy on Clause 25 JR seems to go much further than what OEP can recommend under clause 23. Consultation response suggests that clause 25 JR would be used where public body does not comply with recommendations. But no limit of that kind in clause 25.

1. COMPLAINTS AND CLAUSE 25 JRs (5):

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The Clause 25 JR Remedies (cont)

- What approach should court take to exercise of discretion to refuse relief? Cannot say that the JR is out of time *per se*, but should it be less willing to quash a decision if the JR is brought under clause 25 than if brought under normal JR?
- What about approach to prejudice to third parties e.g. beneficiary of environmental permit or planning permission?
- How do you challenge a refusal to follow a recommendation under clause 23? Not under clause 25. But nothing to stop ordinary JR, either by the OEP or by the original complainant.


2. Ordinary JR by OEP?

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- OEP given no express power to bring other forms of judicial review, Government Consultation Response says:
The draft Bill does not make explicit provision for the OEP to intervene in third party judicial review proceedings, however it could apply to intervene in the normal way, and it is not considered necessary in any case given that the OEP has powers to bring its own judicial reviews.
- This is unclear whether it envisages OEP bringing “ordinary” JRs or only clause 25 JRs. Cannot be assumed it has that power absent express power to litigate.
- May have reason to do so:
 - To challenge refusal to follow recommendations
 - To challenge underlying breach of environmental law promptly given previous discussion on remedy.
 - To challenge government decisions not amenable to the complaints procedure.


3. Interventions

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- Consultation response just quoted envisages OEP may intervene in judicial review proceedings.
 - But no express power to do so. Query whether express provision required for this.
 - Subject to that, it is possible to envisage the OEP playing an important role in environmental judicial review as intener akin to that played by EHRC. But EHRC has express powers of intervention etc.
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4. Interested Party

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- OEP could (and in some cases should) be named as an interested party to judicial review challenges brought by others on issues of law where it has expressed a view or played a role as a consultee of some kind.
 - Slightly different implications for costs as compared with interveners.
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5. Defendant



- Plainly, the OEP is a public body which will itself be amenable to judicial review, by:
 - Complainants who are dissatisfied with its handling of their complaints
 - Commercial interests who are dissatisfied with its approach to environmental law
 - Other public bodies including central government.



6. FUNDING ENVIRONMENTAL JR



- No express discussion of this in consultation paper that I can see. Not clear whether general financial competence would extend to funding or indemnifying other parties to environmental JR.
- Compare EHRC, which has express powers in this regard and a well-developed strategy for funding public interest challenges in the equality and human rights field.



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