

**THE OFFICE FOR
ENVIRONMENTAL PROTECTION:**
**The proposed new enforcement body under the
Environment Bill 2019-21**

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BACKGROUND

- BREXIT is critical to the establishment of the Office for Environmental Protection and the Environment Bill 2019-2021 (“the Bill”)
- HMG “A Green Future: Our 25 Year Plan to Improve the Environment” (“the 25 Year Plan”) acknowledges concerns over loss of role of European Commission, CJEU and European Environment Agency, and commits to “setting up a new body to hold Government to account” as well as environmental principles to underpin policy making
- Two previous iterations of bill, *draft* Environment (Principles and Governance) Bill (“the Draft Bill”), December 2018, and short-lived Environment Bill 2019. Current proposals closely for OEP closely resemble model in 2018 Bill but do contain some changes
- Note wide-ranging report on the 2018 Draft Bill by the Environmental Audit Committee: Scrutiny of the Draft (Environmental (Principles and Governance) Bill, 18th Report of Session 2017-19

THE OEP

- OEP established by Chapter 2 of the Bill.
- Clause 21 establishes the OEP as a body corporate, with further provision in Schedule 1
- Clause 22 provides that the “principal objective of the OEP” is “to contribute to”:
 - “environmental protection”, and
 - “the improvement of the natural environment”
- The OEP must act “objectively”, “impartially”, “proportionately” and “transparently”. It must set out a strategy to achieve its aims, and avoid overlap with the Committee on Climate Change
- Two main sets of functions:
 - “Scrutiny and advice functions” (clauses 25-27)
 - “Enforcement Functions” (clauses 28-38)

THE OEP IS NOT THE ENVIRONMENT AGENCY

- The OEP is not a “regulator” and its role is quite different from the Environment Agency (which will continue to exist separately)
- Note different purposes of Environment Agency, whose “principal aim” is to promote “sustainable development” in accordance with guidance given by Sec of State (section 4 Environment Act 1995).
- Different functions:
 - Environment Agency *regulates* private activity with respect to the environment by granting licences, and takes direct responsibility for certain programmes and plans
 - OEP’s role is to oversee conduct by public authorities, including but not limited to the Environment Agency itself.

THE OEP IS NOT THE EU COMMISSION

- The OEP is an national body, whose focus is on the compliance with (necessarily *domestic*) environmental law by *sub-national* bodies
- The EU Commission is a *supra-national* body, whose focus is on compliance with EU and other environmental standards by UK government and UK as a whole
- NB conclusions of Environmental Audit Committee still valid (see also para 118 of report):

Under the accountability framework set out in the Bill, local authorities or arm's-length bodies, who may have limited control over their budgets, could be held to account for failings outside their control. The whole of Government should be accountable for the achievement of environmental standards and targets, rather than individual public authorities, unless the OEP deems that a specific body is at fault. This would ensure collective accountability and cross-Government working to resolve environmental failures.

...

Another departure from the Commission's approach is that the Bill makes individual public authorities responsible, rather than the Government as a whole. Professor Scotford said, since environmental problems are often collective with multiple causes and multiple agencies needed to remedy breaches, it was "strange" to make individual public authorities accountable.

OEP'S SCRUTINY AND ADVICE FUNCTIONS

- Under clauses 25-27, the OEP has three “scrutiny and advice” functions:
 - Monitoring and reporting on environmental improvement plans and targets (clause 25)
 - Monitoring and reporting on environmental law (clause 26)
 - Advising on changes to environmental law, *where requested by Minister* (clause 27)
- Reports under clauses 25-26 must be laid before Parliament, and “advice” under clause 27 may be laid before Parliament if the OEP thinks fit

OEP'S ENFORCEMENT FUNCTIONS (1): OVERVIEW

- Clauses 28-38 makes provision about functions of the OEP “in relation to failures by public authorities to comply with environmental law” (clause 28(1))
- Broadly two sets of functions and powers given to OEP to enforce against “failure of public authorities to comply with environmental law:
 - Investigation followed by environmental review (clauses 29-35)
 - Judicial review by OEP itself

OEP'S ENFORCEMENT FUNCTIONS (2): Failure to comply with environmental law

- “Failure to comply with environment law” means (clause 28(2)):
 - “unlawfully failing to take proper account of environmental law when exercising its functions” or
 - “unlawfully exercising, or failing to exercise, any functions it has under environmental law”
- Appears to be envisaged as a “*Wednesbury*” test, whether public body has acted within its powers in a public law sense. Strongly supported by e.g. Gov response to Environmental Audit Committee:

*It is our assessment, however, that it is not necessary or appropriate in this context to go beyond the *Wednesbury* test in relation to the review of discretionary decisions as the Committee has recommended*

OEP'S ENFORCEMENT FUNCTIONS (3): Public authority

- “Public authority” who the OEP can investigate and oversee includes any:
 - person carrying out any function of a public nature that is not a devolved function, a parliamentary function or a function of any of the following persons –*
 - (a) *the OEP;*
 - (b) *a court or tribunal;*
 - (c) *either House of Parliament;*
 - (d) *a devolved legislature;*
 - (e) *the Scottish Ministers, the Welsh Ministers, a Northern Ireland department or a Minister within the meaning of the Northern Ireland Act 1998.*
- So focus is on individual actions by individual public bodies, not on conduct of government as a whole

OEP'S ENFORCEMENT FUNCTIONS (4): Investigations and complaints

- Under clause 29, anyone may complain to the OEP of a failure by a public authority to comply with environmental law.
- Under clause 30, the OEP may investigate a failure to comply with environmental law on the making of a complaint or of its own motion, provided that it thinks the failure may be “serious”.
- Duties to keep complainants informed (clause 32), to require information (clause 33)
- Unclear whether OEP has a fact-finding role beyond that of administrative court.

OEP'S ENFORCEMENT FUNCTIONS (5): Investigation Remedies

- Clause 33 provides for “decision notices”, where the OEP is satisfied “on the balance of probabilities” that there has been a “serious” failure to comply with environmental law
- Decision notice should (clause 33(2)):
 - Describe the failure and
 - Set out “the steps the OEP considers the authority should take in relation to the failure (which may include steps designed to remedy, mitigate or prevent reoccurrence ...”)
- Two critical points:
 - Decision notice not *binding* on public authority, either as to breach or remedy;
 - Remedy cannot include taking steps which authority has no power to take (so cannot undo decision in respect of which it is *functus officio*)

OEP'S ENFORCEMENT FUNCTIONS (6): Environmental review under clause 35

- Where OEP has given decision notice under clause 33, it may apply to the Upper Tribunal for environmental review (NB no need for authority to have refused to comply with remedy)
- Target / Subject matter Subject matter of environmental review is “a review of”:
 - “alleged conduct ... described in the decision notice” as failure to comply with environmental law; or
 - Similar conduct occurring after the notice was given.
- **NOT** failure to accept remedy / steps in decision notice
- UT will:
 - Apply ordinary judicial review principles to consider whether alleged unlawful act is unlawful, and
 - If so, grant ordinary judicial review remedies, subject (clause 35(8)) to considering hardship / prejudice to third parties. Hardship prejudice may not be hard to show

OEP'S ENFORCEMENT FUNCTIONS (7): Mismatch of Investigation and Environmental Review

- **SCOPE**

- OEP will investigate failure to comply with environmental law. Query scope of investigation and report, whether limited to judicial review principles, but in practice and intent seems to be wider than bare judicial review
- Upper Tribunal confined to ordinary judicial review

- **REMEDIES**

- OEP cannot recommend or require authority to undo acts in respect of which it is *functus officio*, but can make wide-ranging recommendations for the future
- UT can quash decisions which are *functus officio*, but cannot make recommendations

OEP'S ENFORCEMENT FUNCTIONS (8): JUDICIAL REVIEW UNDER CLAUSE 36

- Separately, under clause 36 OEP now clearly empowered to bring its own claim for judicial review, in respect of a “serious” failure to comply with environmental law.
- Should only do so where OEP thinks it is “necessary ... to prevent, or mitigate, serious damage to the natural environment or human health”
- Proceeds as ordinary claim for judicial review in all respects, with OEP as claimant, save that the court cannot refuse relief on basis that outcome would be “highly likely” to be the same (sections 31(2A), (3C) and (3D) of Senior Courts Act 1981)
- Court can grant ordinary relief (quashing etc), but in addition, where claim succeeds, defendant public authority must within 2 months publish a statement that sets out the steps it intends to make in light of the finding. Unlike investigation / environmental review, no direct role for OEP / court in that statement or onward review

OEP'S ENFORCEMENT FUNCTIONS (9): CONCLUSIONS

- Overall scheme of OEP's enforcement functions still seems badly thought through:
 - Mismatch between scope and remedies of OEP investigation and UT environmental review noted above.
 - Fundamental problem here is that environmental review does not provide means of *enforcing* OEP's recommendations and conclusions at investigation stage.
 - Ironically, if OEP dissatisfied with response to recommendations, it looks like it should bring *judicial review* rather than environmental review under clause 35
 - Unclear relationship between investigation / environmental review on one hand and judicial review under clause 36 on the other
 - Lots of scope for unpredictable responses by court in interpreting this legislation, because it appears poorly designed.

Questions?

Thank you for listening

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