

# The implications of the Environment Bill for High Court Legal Challenges



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## The Environment Bill

- 139 clauses
- 20 Schedules
- 8 Parts including:
  - Environmental Governance (ss1-48) (separate part for Northern Ireland)
  - Waste and Resource Efficiency (ss49-70)
  - Air Quality and Environmental Recall (ss71-76)
  - Water (ss77-91)
  - Nature and Biodiversity (ss92-107) (NB biodiversity gain in planning)
  - Conservation Covenants (ss108-130)
- Part 1 has three chapters: I: Improving the natural environment, II: The Office for Environmental Protection, III: Interpretation of Part 1

## Part 1, Chapters 1 and 2

### **Improving the Natural Environment**

- Environmental Targets
- Environmental improvement plans
- Environmental monitoring
- Policy statement on environmental principles
- Environmental protection: statements and reports

### **The Office for Environmental Protection**

- The OEP
- OEP's Scrutiny and Advice functions
- OEP's Enforcement functions
- Information- disclosures and confidentiality of proceedings

## The OEP's enforcement functions

- ss30-40
- Failure of public authorities to comply with environmental law- complaints- investigations- information notices- decision notices
- Environmental Review
- Judicial Review

## Environmental review: cl 37

*What is it and when would it happen?*

- Where the OEP has given a decision notice to a public authority it may apply to the court for an environmental review
- But only if- (a) satisfied, on the balance of probabilities, that the authority has failed to comply with environmental law, and (b) it considers that the failure is serious.
- Environmental review- a review of alleged conduct of the authority that is described in the decision notice as constituting a failure to comply with environmental law.
- An application for an environmental review may not be made-
  - (a) before the earlier of-
    - (i) the end of the period within which the authority must respond to the decision notice in accordance with section 35(3), and
    - (ii) the date on which the OEP receives the authority's response to that notice, or
  - (b) before the expiry of any time limit which applies to the commencement of judicial review or other similar legal proceedings for questioning the alleged conduct.
- Any restriction imposed by or under any other enactment on questioning the conduct of a public authority in legal proceedings does not apply to an environmental review.

## Environmental review: continued

### *What does the court do?*

- On an environmental review the court must determine whether the authority has failed to comply with environmental law, applying the principles applicable on an application for judicial review.
- If the court finds that the authority has failed to comply with environmental law, it must make a statement to that effect (a “statement of non-compliance”).
- A statement of non-compliance does not affect the validity of the conduct in respect of which it is given.
- Where the court makes a statement of non-compliance it may grant any remedy that could be granted by it on a judicial review other than damages, but only if satisfied that granting the remedy would not- (a) be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority, or (b) be detrimental to good administration.
- In deciding whether to grant a remedy the court must (subject to the above) apply the principles applicable on an application for judicial review.

## Environmental review: continued

*Then what happens?*

- If, on an environmental review, the court has made a statement of noncompliance in respect of a public authority, and the statement has not been overturned on appeal, the authority must publish a statement that sets out the steps it intends to take in light of the review.
- The authority’s statement must be published before the end of the 2 month period beginning with the day the review (including any appeal) concludes.
- Also note:
  - “the court” means- (a) in relation to an environmental review arising under the law of England and Wales or Northern Ireland, the High Court, or (b) in relation to an environmental review arising under the law of Scotland, the Court of Session;
  - “the principles applicable on an application for judicial review” means, in relation to an environmental review, the principles that would apply on an application for judicial review in the jurisdiction under which the environmental review arises;
  - “remedy” includes any relief or order.

## Judicial review: cl 38

‘Judicial review: powers to apply in urgent cases and to intervene’

- The OEP may apply for judicial review, or a statutory review, in relation to conduct of a public authority (whether or not it has given an information notice or a decision notice to the authority in respect of that conduct) if-
  - (a) the OEP considers that the conduct constitutes a serious failure to comply with environmental law, and
  - (b) the urgency condition is met.
- The urgency condition is that making an application under subsection (rather than proceeding by way of information, notices, decision notices or environmental review) is necessary to prevent, or mitigate, serious damage to the natural environment or to human health.
- Section 31(2A), (3C) and (3D) of the Senior Courts Act 1981 (High Court to refuse to grant leave or relief where the outcome for the applicant not substantially different) does not apply to an application for judicial review made in England and Wales.

## Judicial review: continued

- If, on an application for judicial review or a statutory review, there is a finding that a public authority has failed to comply with environmental law, and the finding has not been overturned on appeal, the authority must publish a statement that sets out the steps it intends to take in light of the finding.
- That statement must be published before the end of the 2 month period beginning with the day the proceedings relating to the application for judicial review or the statutory review (including any appeal) conclude.
- In relation to proceedings (including any appeal) that are:
  - (a) in respect of an application for judicial review or a statutory review, and
  - (b) relate to an alleged failure by a public authority to comply with environmental law (however the allegation is framed in those proceedings)
  - If the OEP considers that the alleged failure, if it occurred, would be serious, it may apply to *intervene* in the proceedings (whether it considers that the public authority has, or has not, failed to comply with environmental law).

## Also

- The reference to an application for judicial review includes an application for the *permission* of the High Court/Court of Session to apply for judicial review
- “statutory review” means a claim for statutory review under-
  - (i) section 287 or 288 of the Town and Country Planning Act 1990,
  - (ii) section 63 of the Planning (Listed Buildings and Conservation Areas) Act 1990,
  - (iii) section 22 of the Planning (Hazardous Substances) Act 1990, or
  - (iv) section 113 of the Planning and Compulsory Purchase Act 2004.

Thank you for listening

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