

OEP INVESTIGATIONS AND ENVIRONMENTAL REVIEW

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ENVIRONMENT BILL – LATEST VERSION

- Bill has been going through Parliamentary States. Currently in the House of Lords. Underwent significant amendment in the House of Lords over the summer.
- Most recent version, as amended on report, 15 September 2021. Available at:

[Environment Bill - Parliamentary Bills - UK Parliament](https://bills.parliament.uk/bills/2593)

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OEP – ENFORCEMENT FUNCTIONS

- OEP has enforcement functions under clauses 32-42 of the Bill. All such functions relate to (clause 32(1)):
 - ... *failures by public authorities to comply with environmental law* ...
- Three main enforcement functions:
 - (i) Consideration of complaints and carrying out of investigations (clauses 33-38);
 - (ii) Bringing proceedings for “environmental review” (clause 39);
 - (iii) Bringing and intervening in claims for judicial review (clause 40).
- The first two of these, *complaints / investigations* and *environmental review*, are linked, in that the latter can only take place upon the completion of the former. Judicial review is separate albeit some understanding of the OEP’s role in judicial review is important in understanding the other functions.

OEP – COMPLAINTS AND INVESTIGATIONS

- Members of the public may make a “complaint” to the OEP concerning an alleged failure to comply with environmental law (clause 33)
- Either pursuant to such a complaint, or of its own motion, the OEP may carry out an investigation in relation to possible failures to comply with environmental law, under clause 34. Note that OEP is not limited to investigating complaints, but may also initiate investigation of its own motion.
- Process further delineated in clauses 35-37, including duty to keep complainants informed, and power to issue information notice seeking information relating to the alleged breach.

OEP – DECISION NOTICES

- Under clause 37, OEP can issue a “decision notice” if it concludes that public authority has failed to comply with environmental law and that the failure is serious (clause 35(1)). In such a case, the decision notice:
 - A decision notice is a notice that—*
 - (a) describes a failure of a public authority to comply with environmental law,*
 - (b) explains why the OEP considers that the failure is serious, and*
 - (c) sets 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 of the failure).*
- Public authority must then indicate whether it intends to take the steps recommended (clause 37(5))
- So “remedy” is in (c). Note limitations:
 - OEP recommendation is non-binding
 - OEP does not have power to set aside, quash or undo the action in question

OEP – ENVIRONMENTAL REVIEW

- Clause 39(1) provides that OEP may apply to the court (in England and Wales, the High Court) for an environmental review where it has issued a decision notice and continues to think that the conditions for issue of that notice (serious failure to comply with environmental law) are made out.
- Clause 39(2) – subject of application is conduct in decision notice
- Role of court specified by clause 39(5):
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.
- Remedy:
 - Statement of non-compliance (“SONC”) (clause 39(6))
 - Where SONC made, may also grant any remedy available on judicial review, and subject to certain limitations relating to prejudice to third parties.
- Response
 - Public body must also publish a statement as to steps it proposes to take. But not for court to specify or recommend steps. No obvious remedy if steps are nugatory or not in the event complied with

ISSUES, CONTROVERSIES AND ANOMALIES:

(1) FAILURE TO COMPLY WITH ENVIRONMENTAL LAW

- Clause 32(2) says as follows:
 - ... a reference to a public authority failing to comply with environmental law means the following conduct by that authority—*
 - (a) unlawfully failing to take proper account of environmental law when exercising its functions;*
 - (b) unlawfully exercising, or failing to exercise, any function it has under environmental law.*

- Environmental law is defined in clause 47:
 - ... any legislative provision to the extent that it (a) is mainly concerned with environmental protection and (b) is not concerned with an excluded matter [access to information, defence or taxation]*”

- Questions / problems:
 - (i) Definition of “failure to comply” appears to *narrow* meaning of this phrase
 - (ii) What is scope of OEP’s consideration of environmental law? Is it limited to judicial review scrutiny, or can it carry out more detailed factual investigation and determine facts for itself?

ISSUES, CONTROVERSIES AND ANOMALIES:

(2) MISMATCH BETWEEN OEP AND ER REMEDIES

- Where it finds a failure to comply with environmental law, the OEP issues a decision which must explain the nature of the breach, why it is serious and:
...set[] out the steps which the OEP considers the authority should take in relation to the failure (which may include steps designed to remedy mitigate or prevent recurrence of the failure).

Limitations:

- Non-binding
- OEP can only recommend / invite authority to do something which it has power to do. But in many or most cases, the authority will be *functus officio* (see *In re Denton Road, Twickenham, Re* [1953] Ch 51) and unable to reverse the action which is the subject of complaint. This severely limits the remedies which the OEP can grant / recommend
- By contrast, court on environmental review can grant judicial review remedies such as quashing order and the like. The subject of the environmental review is, not compliance with the OEP's recommendation, but the underlying subject of complaint / investigation. But court cannot recommend, or enforce, OEP's wider recommendations.
- This mismatch is likely to undermine both procedures:
 - Complainant whose real aim is to reverse the action complained of will not be attracted to OEP process, knowing that OEP cannot grant the remedy that is sought and that it will depend on further court action at end of process.
 - OEP is left with no means of enforcing wider recommendations

ISSUES, CONTROVERSIES AND ANOMALIES:

(3) RESTRICTIONS ON ER REMEDIES

- The bill as approved by the commons contained the following restriction on the grant of remedies in ER (old clause 37(8)), that the court could only grant a remedy where satisfied that it would not:
... 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.
- As many pointed out, this would in practice prevent the grant of a remedy in most cases.
- This was removed in the House of Lords, and replaced with a new clause 39(9), requiring the court to “have regard to” such prejudice as well as to the nature and consequences of the breach of environmental law.
- This is greatly to be preferred, and leaves the court with a discretion. But it is far from clear that this amendment will be accepted by the government or survive a return to the House of Commons.

ISSUES, CONTROVERSIES AND ANOMALIES:

(4) JUDICIAL REVIEW BY OEP ONLY IN URGENT CASES

- Clause 40 gives the OEP power, *inter alia*, to seek judicial review, but only where it considers that “the conduct” in issue constitutes a serious failure to comply with environmental law and where it considers that making a claim for judicial review:
 - ... (rather than proceedings under sections 36 to 39) is necessary to prevent, or mitigate, serious damage to the natural environment or human health.
- This is called the “urgency condition”, presumably on the basis that it limits judicial review to cases which are too urgent for investigation / environmental review.
- Not quite its effect, because it would also appear to justify judicial review where investigation / environmental review could not provide an appropriate remedy i.e. in cases where a quashing order is needed.
- Cannot be used to enforce OEP recommendations in a decision notice, because refusal to comply with recommendation will not generally itself be a failure to comply with environmental law.

Thank you for listening

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