

The role of the OEP under the Environment Act 2021



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OFFICE FOR ENVIRONMENTAL PROTECTION: REGULATOR'S REGULATOR

- The Environment Act 2021 establishes the Office for Environmental Protection (“OEP”) as a body corporate. Now live: [Office for Environmental Protection | oep \(theoep.org.uk\)](https://theoep.org.uk)
- Section 23(1) says:
 - (1) The principal objective of the OEP in exercising its functions is to contribute to—*
 - (a) environmental protection, and*
 - (b) the improvement of the natural environment.*
- The OEP is not, however, given direct functions in relation to the protection of the environment (e.g. environmental permitting, flood defence, planning oversight etc). These functions are left with the appropriate pre-existing public body / regulator. Rather, the OEP is given two broad sets of functions:
 - “Scrutiny and advice functions”, under sections 28-30
 - “Enforcement Functions”, under sections 31-41
- These functions are all to be exercised in relation to acts of other public bodies, so that the OEP is best thought of as a regulator of other environmental regulators.
- Original conception was of a body that would replace EU Commission, but this is fundamentally problematic. Role of EU Commission was to monitor of compliance by UK, as EU Member State, with overriding EU legislation. Role of OEP is to monitor compliance of UK public bodies with UK environmental law

OFFICE FOR ENVIRONMENTAL PROTECTION: STRATEGY, AND LIMITS IN RELATION TO CLIMATE CHANGE

- Under section 23, the OEP is required to prepare a strategy setting out how it intends to exercise its functions. No such strategy published as yet – OEP website indicates early / mid 2022. Strategy required to contain “enforcement policy” which explains its approach to whether cases are “serious”, and which has regard to the “particular importance” of:
 - ... prioritising cases that it considers have or may have national implications, and the importance of prioritising cases—*
 - (a) that relate to ongoing or recurrent conduct,*
 - (b) that relate to conduct that the OEP considers may cause (or has caused) serious damage to the natural environment or to human health, or*
 - (c) that the OEP considers may raise a point of environmental law of general public importance.*
- The OEP’s remit means that there is a potential overlap between its role and that of the Committee on Climate Change (“CCC”). The OEP is not, in general, precluded from considering issues in relation to climate change, but the possibility of overlap is recognised in the 2021 Act in various ways:
 - Under section 23(5), OEP’s strategy required to set out how it intends to avoid overlap with CCC.
 - Under section 26, the OEP and CCC must enter into a memorandum of understanding on avoiding overlap and co-operation
 - The OEP’s scrutiny functions are in some respects limited in relation to climate change.

OEP ADVICE AND SCRUTINY FUNCTIONS

- OEP's advice and scrutiny functions are given by sections 28-30:
 - Under section 28, the OEP has functions in relation to the monitoring of environmental plans and targets
 - Under section 29, the OEP has a function of monitoring and reporting in relation to the “implementation” of environmental law
 - Under section 30, the OEP has a function in giving Ministers of the Crown “advice” about changes to environmental law.
- Not directly relevant to High Court Planning litigation, but fruits of these functions (e.g. reports etc) may of course become important ammunition in such litigation.

OEP – ENFORCEMENT FUNCTIONS

- OEP has enforcement functions under sections 31-43 of the Act. All such functions relate (see section 31(1)) to
 - ... *failures by public authorities to comply with environmental law ...*
- Three main enforcement functions:
 - (i) Consideration of complaints and carrying out of investigations (sections 33-38);
 - (ii) Bringing proceedings for “environmental review” (section 39);
 - (iii) Bringing and intervening in claims for judicial review (section 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.

“FAILURE TO COMPLY WITH ENVIRONMENTAL LAW”

- Section 31(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 section 46:

... 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?

(iii) Note limitation to “legislative” provisions

(iv) Mostly focussed on “public” environmental law, but OEP could arguably consider e.g. commission of statutory torts by statutory undertaker

OEP – COMPLAINTS AND INVESTIGATIONS

- Members of the public may make a “complaint” to the OEP concerning an alleged failure to comply with environmental law (section 33)
- No limitation on subject matter, and can include planning related matters including grant of planning permission
- 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 section 34. Note that OEP is not limited to investigating complaints, but may also initiate investigation of its own motion.
- Process further delineated in sections 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 section 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 (section 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 (section 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
- So fruits of investigation may not have much implications for the individual planning decision, or satisfy the complainant

OEP – ENVIRONMENTAL REVIEW

- Section 38(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.
- Critical features:
 - Can only be brought at *conclusion* of investigation, following issuing of decision notice
 - Subject of application / claim is conduct in decision notice i.e. the original conduct of the public body which the OEP has investigated. Thus in effect this is a *statutory review* / *JR* of that decision (section 38(2))
 - No time limit for bringing of ER claim
 - No time limit by reference to timing of original decision
 - No time limit by reference to timing of ER investigation or decision notice
 - Statutory ouster clauses are ignored (section 38(4)). So e.g. OEP would be entitled to bring ER of grant of planning permission by Secretary of State on appeal, or even grant of DCO
 - “Highly likely” test does not apply
- Role of court specified by section 38(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

OEP – ENVIRONMENTAL REVIEW REMEDY

- Section 38(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.
- Section 38(2) – subject of application is conduct in decision notice
- Role of court specified by section 38(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”) (section 38(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

RESTRICTION ON ER REMEDIES

- Primary / first remedy in ER, if successful, will be “statement of non-compliance” under section 38(5) and (6)) – that is, a “statement ... that the authority has failed to comply with environmental law”
- Major controversy in Parliament over court’s ability to grant remedies in ER beyond that. Final upshot is that it can grant Any remedy available on judicial review other than damages, but subject to satisfaction of “condition A” or “condition B”.
 - Condition A:
 - (9) Condition A is that the court is 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.*
 - Condition B:
 - (10) Condition B is that Condition A is not met but the court is satisfied that-*
 - (a) granting the remedy is necessary in order to prevent or mitigate serious damage to the natural environment or to human health, and*
 - (b) there is an exceptional public interest reason to grant it.*
- Condition A will look familiar from section 31 SCA 1981, but is not linked to “delay”. In practice it means that is likely to mean that no substantive remedy can be granted in the great majority of cases
- Condition B provides a get out, but will presumably be limited to rare cases

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

OEP INVESTIGATIONS AND ER: POSSIBLE “TARGETS” IN PLANNING

- What are the possible targets of these OEP enforcement powers in the planning context:
 - Planning permissions Potentially radical new ability to bring challenges to planning permissions outside of the mechanisms provided for in the Planning Acts, with no time limit, no “highly likely” protection, etc. But may be rare in practice:
 - Not attractive to complainants for “mismatch” reasons, loss of control of process
 - Restrictions on remedies will be key, generally will protect planning permissions
 - OEP’s strategic priorities means that it is unlikely to become involved in routine, even important, planning cases routinely
 - DCOs: Similar considerations apply, may be more likely to meet OEP’s “seriousness” threshold
 - Plan-making Challenge here would fit in with OEP’s strategic priorities. Will be interesting to see court’s approach to grant of remedies *vis a vis* quashing of individual policies, prejudice to third parties

OEP JR

- Section gives the OEP power, *inter alia*, to seek judicial review of other public bodies, 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.
- Probably 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.
- OEP nevertheless potential major new player in environmental, including planning, judicial review.

Thank you for listening

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