



## **Office for Environmental Protection publishes its enforcement strategy**

**By Adam Heppinstall QC & Freya Foster**

**The Office for Environmental Protection, a body established under the Environment Act 2021, has published its enforcement strategy. This alerter looks at the new body's broad enforcement powers and considers the implications for public authorities and private enterprises exercising public functions that are subject to the new regulator.**

### **INTRODUCTION**

#### **The Environment Act 2021**

1. The Environment Act 2021 (EA 2021) contains a range of provisions that cover a wide range of areas relating to the environment – broadly defined to encompass all living things, their habitats, and the natural systems, cycles and processes through which they interact (s44). In addition to providing for the setting of targets for environmental protection by the Secretary of State (s1) it provides for the establishment of the Office for Environmental Protection (OEP) (s22) and grants it a range of powers to enforce environmental law.
2. The OEP was required to prepare a strategy to set out how it will exercise its functions, including an enforcement policy (s23). Following a public consultation, the OEP published that strategy at the end of June 2022,

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annexing its enforcement policy (available [here](#))<sup>1</sup> and launched its first investigation into the regulation of combined sewer overflows just five days later.<sup>2</sup>

## The OEP's jurisdiction and powers

### What does it cover?

3. The OEP's principal objective is to contribute to environmental protection and the improvement of the natural environment (s23(1)). This objective is subject to the broad definitions in the EA 2021:
  - a. **“natural environment”** encompasses “(a) plants, wild animals and other living organisms, (b) their habitats, (c) land (except buildings or other structures), air and water, and the natural systems, cycles and processes through which they interact” (s44). This broad definition has the scope to cover, for example, climate systems and humans themselves.
  - b. **“environmental protection”** means:
    - i. (a) “protection of the natural environment from the effects of human activity”;
    - ii. (b) “protection of people from the effects of human activity on the natural environment” ;
    - iii. (c) “maintenance, restoration or enhancement of the natural environment”.

It also includes “monitoring, assessing, considering, advising or reporting” on (a) to (c) above (s45).

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<sup>1</sup> <<https://www.theoep.org.uk/report/our-strategy-and-enforcement-policy>>

<sup>2</sup> OEP launches investigation into the regulation of combined sewer overflows (CSOs), 27.06.2022  
<<https://www.theoep.org.uk/news/oep-launches-investigation-regulation-combined-sewer-overflows-csos>>

- c. **“environmental law” includes any legislation “mainly concerned” with environmental protection** and **“*not* concerned”** with the disclosure or access of information, armed forces or national security, or taxation, spending or allocation of resources within government (s46). There are further exclusions for devolved legislative provisions and the Secretary of State has the power by regulations to specify that certain legislation is or is not within the scope of the s46 definition.

#### **Who does it cover?**

4. The OEP has broad powers to monitor and report on the government’s environmental improvement plans and targets (s28) and the implementation of environmental law (s29). They can also advise on changes to environmental law (s30).
5. However the OEP’s **enforcement powers are confined to failures of public authorities to comply with environmental law (s31)**. A public authority includes any person carrying out a function of a public nature (subject to specified exclusions)<sup>3</sup> – accordingly **a private company that exercises public functions might be within the reach of the OEP’s enforcement powers.**
6. The test is similar to that set out at section 6 Human Rights Act 1998 (**HRA**) which defines a public authority as any person certain of whose functions are functions of a public nature. The Courts have taken a restrictive approach to this definition. The Court of Appeal in *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366 rejected a HRA claim brought by state-funded patients against the privately-operated care home they were

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<sup>3</sup> The exclusions relate to devolved functions, parliamentary functions, and functions of the OEP, a court/tribunal, either House of Parliament, a devolved legislature, or devolved ministers or departments (s31(3)).

accommodated in because the provision of the accommodation did not have a “*public flavour*” not least because it provided the same accommodation services to private and public patients. It will have to be seen whether a similar approach is taken under the 2021 Act.

## **OEP Enforcement**

7. There are three key over-arching concepts that form part of the OEP’s enforcement strategy: prioritisation, cooperation, and the threshold of serious failure.

### ***Prioritisation***

8. OEP’s Strategy acknowledges its limited resources and accordingly sets out how it will prioritise the use of these resources. Prioritisation is stated to play a role in the OEP’s broader strategy as well as specifically within its enforcement policy.
9. More broadly OEP’s prioritisation seeks to focus on those functions that achieve an outcome that makes the most difference, based on OEP’s judgment and evidence available at the time (s3.2 of the Strategy). In doing so OEP will consider four questions:
  - a. The potential size of effect OEP’s action could have considering:
    - i. The seriousness of the harm or the extent of the opportunity for improvement.
    - ii. The singular or systemic nature of harm and its likelihood, degree and duration.
    - iii. The significance of the issues relative to the populations and geographies in which they apply.

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- b. The potential for OEP’s action to have that effect.
  - c. The “*strategic fit*” - this involves consideration of:
    - i. the role that other organisations may play;
    - ii. the risk of acting or not acting; and
    - iii. the extent to which it adds to other work of the OEP and the balance of work across OEP’s remit.
  - d. OEP’s capacity and capability to deliver.
10. OEP’s approach to prioritisation is to be set out in its annual corporate plan but is subject to reassessment – judgments about prioritisation will also be addressed in its annual reports and accounts. Those judgments are to be made on the basis of reasonably available information at the time – OEP indicates that it will not normally conduct detailed technical assessments for prioritisation but may do where there is limited or divided evidence.

### **Co-operation**

11. The wide definitions used and the broad remit of the OEP mean that it is inevitable that there will be a degree of overlap between the OEP’s jurisdiction and that of other regulatory bodies, such as the Environment Agency and the Climate Change Committee (CCC) – the overlap with the latter is expressly recognised in the EA 2021 (see e.g. ss.26, 29). OEP’s broader strategy suggests that memoranda of understanding may be concluded with a number of bodies (such as the European Union in respect of transboundary issues) but there is a notable lack of reference to the Environment Agency’s prosecution powers.
12. The Environment Agency will continue in existence with its powers to regulate mainly private activities by way of granting licences and taking

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enforcement action. The OEP's website makes clear that it will oversee the Agency, presumably keeping open the possibility of taking enforcement action to force the Agency in turn to take enforcement action against private persons or companies. This form of double regulation has been used in other contexts, for example health care and legal professionals (where the Professional Standards Authority regulates the medical professional regulators and the Legal Services Board regulates the legal professional regulators).

13. Local authorities (often acting in combination when dealing with matters such a land drainage and waste management) are also likely to be the subject of the OEP's enforcement actions, and it will be very interesting to see how the variation in approach to environmental regulation by local authorities is considered by the OEP. The Local Government Association has said that: *"It will be essential that the OEP board contains knowledge and direct experience of local government, as one of the public authorities which it will have to work with."*
14. In the context of enforcement, OEP recognises the need to avoid overlap and suggests that it will exercise its enforcement powers in a manner that is complementary to other regimes, including taking into account ongoing legal proceedings – however notwithstanding the strategy's nod to, *inter alia*, the ombudsman services, there is no reference to criminal proceedings in respect of breaches of environmental legislation. It suggests that the OEP will not normally use its enforcement powers when they judge another regime or authority is better suited, where legal proceedings are ongoing, or where statutory appeal proceedings have not yet concluded (or the time for bringing such a challenge has expired).

15. Communication with other responsible agencies seems to be at the forefront of the OEP's co-operation strategy – which may suggest that they could convey complaints to authorities with enforcement powers, including potentially the power to prosecute breaches of environmental law, before the OEP takes matters into its own hands.

### *The threshold of serious failure*

16. The concept of serious failure is the hook on which many of OEP's enforcement powers depend. It forms the statutory basis for the OEP's investigatory powers (s33), the issuing of information and decision notices (ss35-36), and its power to intervene in or bring environmental, judicial review (JR) and statutory review (SR) claims (ss. 38-39). It can only bring an urgent JR or SR if both the failure is serious and the application is necessary to prevent or mitigate serious damage (s39).

17. The EA 2021 does not define this concept but passes the buck to the OEP, requiring it to address how it would determine what was a serious failure and what constituted serious damage in its strategy documents (s23(6)) – accordingly the OEP's enforcement strategy is key to decoding the OEP's powers.

18. The OEP's Enforcement strategy sets out a non-exhaustive list of factors to consider both whether the threshold of serious failure is met, as well as the question of serious damage, at §4.2 – these are:

- a. Whether the conduct raises **points of law of general public importance** – including the potential to set a precedent with wider implications.
- b. The **frequency** of the conduct over time and its **cumulative impacts**.

- c. The **behaviour of the public authority or authorities**. The example given is their degree of responsibility for the failure and whether they have acted deliberately, recklessly, or negligently or whether the failure is, for example, in the context of them taking reasonable care in response to an emergency. However it seems possible that this could extend to an authorities' compliance or non-compliance with earlier stages (such as a complaint or information finding exercise conducted by the OEP).
  - d. The **harm or potential harm** to the environment or human health.
19. The final factor is any other relevant factor – OEP are clear that they will consider all of the relevant factors and that they will consider these both individually and in the round. It is clear that while one incident may not meet the threshold for seriousness, cumulative incidents may.

## Structure

20. The OEP's enforcement strategy suggests that there is a relatively linear progression to the exercise of its powers: starting with a complaint, moving to information gathering. If the 'serious failure' threshold is met, an investigation may be opened and an information notice served.

## Complaints Procedure

21. A complaint can be made by any person or body through the OEP's complaints system online, or by completing a form. This is subject to two pre-requisites:
- a. First, there is a time limit for complaints – they must be brought either 1 year after the latest alleged failure to comply or 3 months after the public authorities' internal complaints procedure has concluded,

whichever is later. This can be extended by the OEP in exceptional circumstances.

- b. Second, if the authority has an internal complaints procedure this must be exhausted.
22. The complaint is subject to an initial screening to check it meets OEP's criteria, then a detailed assessment, before a decision is taken in line with the Enforcement strategy as to whether to investigate.

### **Information Gathering & the duty to co-operate**

23. While not expressly set out as an enforcement function in the EA 2021, s27 requires public authorities to co-operate with the OEP and give it such reasonable assistance as it requests, including provision of information, where it is exercising functions under the Act. Given the broad remit of the OEP these information gathering powers are potentially wide and encompass all of its functions, including its enforcement remit.
24. Accordingly, in addition to utilising said powers in the course of, for example, a formal investigation, the Enforcement Strategy suggests that the OEP will use its 'information gathering' powers either in the course of a complaint or as preliminary activity prior to launching an investigation where it becomes aware of a potential failure to comply with environmental law.

### **Investigations**

25. Investigations can be commenced by the OEP or generated through a complaint but only where it has information (through the complaint or otherwise) that indicates, in OEP's view, that
- a. there may have been a failure to comply with environmental law; **and**

b. that failure would be a serious one.

The EA 2021 requires the OEP to notify the public authority that an investigation has commenced. Where the OEP has concluded that no further enforcement steps are to be taken it must produce a report with its conclusions, reasons for those conclusions, and any recommendations (s33). The reporting requirement does not apply if court action is taken in respect of the matters being investigated.

26. The OEP Enforcement Strategy suggests that it will aim, in the course of its information gathering and investigation, to seek to agree the factual background as to the complaint.

### **Information Notices**

27. Where the OEP does not have the information needed to generate an investigation, it has the power to issue an Information Notice where it has reasonable grounds for suspecting a failure to comply which it considers would be serious (s35). The Notice must contain specified information and requires a written response (again which must contain specified information) by the date stated in the Notice (or 2 months if no date is specified).
28. The OEP's strategy states that it expects to normally only serve these notices in the context of an investigation – suggesting it intends to rely primarily on the duty of cooperation and/or the complaints process to gather the information required to meet the threshold for an investigation.
29. Notably, OEP must serve an Information Notice before it can issue a Decision Notice (s36), which is in turn required to generate an Environmental Review (s38). Accordingly the service of such a notice

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should be taken by a public authority as indicating that the OEP is taking the first step on the path towards potential court action.

### **Reports and Recommendations**

30. Where an investigation has commenced and no further enforcement action is taken (i.e. an information or decision notice and/or court action) the OEP is required to produce a report with recommendations. Given that a Decision Notice and court action effectively require a conclusion that the failure is serious, a report and recommendations would appear to be the outcome where either (a) the OEP is satisfied that there has been no failure to comply with environmental law, or (b) any such failure is not serious.
31. The OEP Strategy states that the recommendations in such reports, which will normally be published, may be general rather than specific to the public authority and may include steps to rectify non-compliance, prevent recurrence of non-compliance, or to revisit a relevant decision. The expectation is that public authorities will comply with any recommendations – the OEP suggest that this will be monitored and further enforcement action may be taken. It is unclear whether this monitoring is confined to public authority-specific recommendations or could potentially apply in a broader manner where the recommendations made are more general.

### **Decision notice**

32. As noted above, the issuing of an Information Notice is a pre-requisite to the issuing of a Decision Notice. The Decision Notice is issued where OEP has concluded that, on the balance of probabilities, there has been a serious failure to comply with environmental law (s36). It contains specified information and may include specified steps that the authority should take

– the authority is required to respond in writing to the notice, including confirming whether or not they will take the steps suggested by OEP.

33. The strategy reiterates the above and emphasises that the issuing of a Decision Notice is a serious step – if it is not complied with, the OEP warns that they may take further enforcement action.

### **Court Action**

34. The OEP strategy expressly states that court action is a last resort and suggests that it will only proceed where there has been a failure to comply with other enforcement steps.

### **Environmental Review**

35. The environmental review (ER) process envisaged in the EA 2021 is tied into the issuing of a Decision Notice – indeed its express purpose is the review of conduct as described in such a notice. The OEP will bring ER proceedings to determine whether the Court agrees that the conduct described in a Decision Notice constitutes a failure to comply with environmental law. The Court will apply JR principles in deciding whether the authority which is facing the proceedings has failed to comply. The Act curiously says that “*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 [ER]*”. This is presumably to avoid anti-JR ouster provisions in other statutes preventing the ER from going ahead, although these are few and far between and rarely effective in any event.

36. The OEP strategy envisages a number of circumstances where ERs may be necessary, such as where the authority contests the conclusion of non-compliance in the Decision Notice, fails to implement the

recommendations (either in time or at all), and/or where there is a dispute as to the remedial steps proposed.

37. The outcome of such proceedings is limited to a Statement of Non Compliance (SONC), although the court retains the discretion to issue JR remedies (for example quashing decisions or mandating action) in limited circumstances – there is no scope to award damages. The requirement to consider the “no difference” defence in section 31(2A) Senior Courts Act 1981 will also not apply. There is scope to appeal the conclusion of the environmental review proceedings, but once this has concluded the authority must respond to the SONC by publishing a statement with the steps it intends to take within 2 months of the conclusion of proceedings.
38. The OEP Strategy suggests that the authority may wish to consult with the OEP about the response to the SONC, which should be detailed, and notes that further enforcement action may be taken. The ultimate enforcement remedy between the OEP and a public authority would presumably be proceedings for contempt for failure to comply with an injunction of the Court on *M v Home Office* principles, although it is to be anticipated that this sort of coercive action between public authorities will be very rare indeed.

### ***Judicial Review and Statutory Review***

39. The OEP can participate in JR and SR proceedings in two instances:
- a. First, the OEP may issue a JR or SR itself where it considers there may be a failure to comply with environmental law which is serious and this is required to prevent/mitigate serious damage to the natural environment or human health.

- b. Second, the OEP can apply to intervene in a JR or SR where a public authority is alleged to have breached environmental law.
40. OEP can only apply for a JR or SR in its own right where the ‘urgency’ condition is met (s39) – this means that the action is necessary to prevent or mitigate serious damage to the natural environment or human health. OEP’s strategy suggests in considering whether this is met they will look at both the opportunity to prevent or mitigate the serious damage and, effectively, whether it would take too long to use their normal ‘bespoke’ enforcement functions.
41. OEP also cites the broader availability of remedies in JR and SR proceedings as a relevant consideration – noting that, generally speaking, the court can only order an SONC in an environmental review.

#### **Transparency & publication of OEP enforcement action**

42. The OEP reiterates its commitment to transparency in its Enforcement Strategy. This information is potentially useful for public authorities, who will be able to see the issues that the OEP is taking an interest in and potential areas that are ripe for a ‘test case’ to set a wider precedent (see para. 18.a) above), as well as to parties who take a general interest in the enforcement of environmental law.
43. OEP states that it will publish its statistics as well as summaries of complaints received and what they have done in response (p39 Strategy). It is stated that this will be published quarterly with numbers of complaints, topics, and the current status of complaints, however it does not suggest that parties will be identified (p52 Strategy). It suggests that it will use the complaints process and data from it to identify any wider or systemic issues

– this it seems could feed into an assessment of whether the ‘seriousness’ threshold has been met in any individual case (see para. 18 above).

44. The OEP envisages publishing statements where it issues an Information or Decision Notice, and when they apply for an environmental, SR or JR – once proceedings are completed, OEP states that it intends to publish Notices in full on its website (following consultation with the public authority). Investigation reports are also expected to be published in full. This suggests that, once matters proceed beyond the complaint stage, the public authority that is the subject of the enforcement action will, sooner or later, be identified.

## Conclusion

45. The enforcement regime created by the EA 2021 for the OEP is somewhat convoluted, and the OEP’s strategy provides a degree of clarity for public authorities within its purview. The strategy appears focussed on promoting better compliance with environmental law by public authorities by co-operation where possible, resorting to ‘hard-edged’ enforcement action in court as a last resort. Time will tell whether the OEP’s proposed enforcement approach is successful in helping achieve the wide-ranging goals envisaged for it in the EA 2021.

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