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Environment Bill: briefing for Commons Committee

November 2020

Response to proposed government amendments on the Office for Environmental Protection (G203 to G220, NC24)

Introduction

The government has tabled a suite of amendments to the functioning and powers of the Office for Environmental Protection (OEP). These amendments can be grouped into five clusters:

1. Power to issue guidance
2. 'Seriousness'
3. Forum for environmental review
4. Scope of environmental review
5. Judicial review and 'urgency'

The existence of any one of these clusters of amendments would be cause for significant concern. However, taken together, they appear to represent an intention to narrow the scope and influence of the OEP. This package of amendments is so prescriptive and limiting as to thoroughly undermine the strategy and working practices of the OEP – as well as restricting its remit and powers. The current version of the bill does not give the OEP a sufficiently wide remit to ensure adequate oversight of environmental law or to properly fulfil its potential. We have published a separate briefing on the other proposed amendments to the bill as it is currently drafted, which would clarify and strengthen the OEP's enforcement role.

1. Power to issue guidance (new clause 24)

NC24 provides that the Secretary of State may issue guidance to the OEP on certain matters that must be included in the OEP's enforcement policy (which will sit within its strategy). The OEP "must" have regard to this guidance. Crucially, this means the Secretary of State can issue guidance on how the OEP ought to determine whether failures to comply with environmental law are "serious", how the OEP ought to determine whether damage to the natural environment or to human health are "serious" and how the OEP ought to prioritise cases. The meaning attributed to "serious" matters – it will fundamentally shape the OEP's remit, work and approach.

The government has provided little clarity on why it believes the power it is seeking in NC24 is necessary, although the Secretary of State told the Today programme on 28 October that this is a standard clause that we see for other comparable bodies. He also said that the government does not want "unaccountable regulators" who "make it up as they go along", "change their remit" or "change their approach entirely", suggesting that the government wanted to shift the balance between executive control and independence for the OEP.

The government's factsheet on these amendments sets out some further points on this proposed new power. We provide some commentary on these below.

No matter what the government claims, there can be no doubt such a broadly cast power will undermine the OEP's independence and render the government's ambition for a world leading watchdog impossible to achieve.

The government has no such similar power in relation to existing enforcement bodies

The Secretary of State has said that this is a "normal, standard clause" that applies to other public bodies with independent regulatory roles. There is not strictly correct as we explain below.[1]

We have examined the powers that the government has to issue guidance to other non-departmental public bodies. It is correct that the government does have a similar power in relation to some existing public bodies, but the critical fact that has thus far been omitted from the government's narrative is that **ministers do not have a similar power to issue guidance in relation to bodies charged principally or partly with enforcing potential breaches of the law by other public bodies**. For example, the Equality and Human Rights Commission and the Information Commissioner which enforce breaches of the law on human rights, equality and data protection legislation are not bound by a similar such power in relation to their enforcement functions.

Ministers do have powers to issue guidance to some bodies in the Defra family such as Natural England[2] and the Environment Agency[3] as well as other non-departmental public bodies such as the Office for Budget Responsibility.[4] However, none of these are enforcement bodies with the power to take the government to court if there is a suspected breach of law. **That is a critical difference.**

We understand that the government has drawn a comparison with the Committee on Climate Change as the Secretary of State has a power to issue guidance to that Committee.[5] That comparison is not well made however, as the two bodies perform very distinctive roles. The Committee on Climate Change is an advisory and scrutiny body whose success depends on having a close working relationship with BEIS, whereas the OEP is a supervisory and enforcement body, with the power to take the government and other public authorities to court if necessary.

The Supplementary Delegated Powers Memorandum on the bill cites the Office for Students as another example of a body that ministers can give guidance to. Again, the role and functions of this body differ markedly to that of the OEP, as while the Office for Students has enforcement powers, these relate to higher education providers and not to the government. Furthermore, the nature of the guidance that ministers give to the Office for Students should give cause for considerable concern if this is what they have in mind for the OEP. The Office for Students receives an annual guidance letter from the Department for Education which "sets out [its] priorities for the coming year, and tells [them] how much money to distribute to higher education providers".

Public body accountability is important but there are better routes for this

We believe that there are more appropriate routes to address what we understand to be the government's policy intention of ensuring accountability and strategic purpose. As a non-departmental public body the OEP will be subject to a tailored review every three to five years. Such reviews provide an opportunity for the government to "ensure public bodies remain fit for purpose, well governed and properly accountable for what they do".[6]

Furthermore, Clause 23(5) requires the OEP to consult such persons as it considers appropriate before preparing, revising or reviewing its strategy. Paragraph 232 of the Explanatory Notes clarifies that this could include government. The Secretary of State therefore already has a route to express views to the OEP about its priorities over the coming three year period and the proposed new clause is unnecessary.

The power will undermine the independence of the OEP

The government has said that "any guidance from the Secretary of State will be subject to scrutiny, as it must be laid before Parliament".[7] However, NC24 does not require any scrutiny of the guidance prior to it being provided to the OEP or before it is published. There is a difference between publication and scrutiny: the act of laying the guidance in Parliament will ensure that it is published at that point, but the bill does not provide for the guidance to be available for either parliamentary or public scrutiny before it is issued to the OEP.

The government claims that the new power does not grant the Secretary of State any ability to intervene in decision making about specific or individual cases and that the OEP does not have to act strictly in accordance with the guidance where it has clear reasons not to do so. While technically correct, when considered in the context set by all of the other government amendments, it is clear that the new power will have the effect of allocating ministers a central role in shaping the basic principles of the watchdog and have a severely constraining effect on the OEP's ability to act independently. This will be statutory guidance which typically carries greater weight, or at least is treated in this way by public bodies. The bill would create a duty that public bodies will follow guidance which relates to their functions (the so-called law of legitimate expectation). **This guidance power inverts the intended hierarchy (in which the OEP oversees ministers) and gives ministers the role of overseeing the OEP.**

2. 'Seriousness'

Explanation of 'seriousness' (government amendments 205 + 206)

Amendments 205 and 206 introduce new requirements for the content of information and decision notices. They require the OEP to include in those notices an explanation of why it considers that the alleged failure that is the subject of the notice, if it in fact occurred, would be serious. The rationale for these amendments is not clear. Given that the OEP will be an independent body potentially with an extensive workload, it is inappropriate to require it to explain its rationale and approach at each stage of the enforcement process. This inflexible approach is problematic and creates a rigid and obligatory administrative burden.

The OEP is already tasked with devising its own enforcement policy (Clause 22(6)) – **a more balanced and sensible approach would be to require that, alongside the explanation of how seriousness will be determined, the enforcement policy also incorporates an explanation of the OEP's decision making process which public authorities can review.**

Condition of 'seriousness' (government amendments 208 + 220)

Amendment 208 alters Clause 35(1) by introducing a new condition on the OEP's ability to launch environmental review proceedings. It requires that, before the OEP can commence an environmental review, it must:

a. be satisfied, on the balance of probabilities, that the authority has failed to comply with environmental law; and
b. consider that the failure is serious.

As the Member's explanatory statement notes: "This aligns the conditions for bringing an environmental review with the conditions for giving a decision notice." While this is correct, it also means that the new condition is arguably unnecessary. Under the existing drafting, in order to issue a decision notice, the OEP must (Clause 33(1)):

a. be satisfied, on the balance of probabilities, that the authority has failed to comply with environmental law; and
b. consider that the failure is serious.

The decision notice criteria are identical to the new launch of environmental review criteria. And the issue of a decision notice is a pre-requisite to the launch of environmental review proceedings (Clause 35(1)). So the OEP already needs to consider a (potential) failure to comply as serious before it can progress to environmental review proceedings. **There is no reason to duplicate this test.**

Overall, this amendment establishes an additional obstacle to the OEP in applying for an environmental review. There is also a danger that it converts the OEP's decision about whether to proceed with an environmental review into a quasi-judicial decision. This will slow down the progress of the enforcement process and further increase the OEP's paperwork load. **We are not familiar with any equivalent legislative provision under which a regulator is required to meet a specified threshold in its internal decision making.**

Amendment 220 alters Clause 36(6) by introducing a new 'serious' test for when the OEP can apply to intervene in judicial or statutory review proceedings. Under the existing drafting, the OEP may apply to intervene in judicial or statutory review proceedings which relate to an alleged failure by a public authority to comply with environmental law. The amendment provides that the OEP may only make an application to intervene where it considers that had the alleged failure occurred, it would be serious. The rationale for this change is unclear and the explanatory statement fails to shed any light on why the addition of a seriousness condition here is either necessary or of any value.

There is no immediately obvious justification for why the OEP should be able to apply to intervene in a 'serious' case but not in an 'unserious' one. It may be there is a perceived risk that by allowing the OEP the ability to apply to intervene in any case, it could over-burden itself. However, removing this choice from the OEP itself significantly undermines its independence and curtails its discretion. In addition, this would deprive judicial and statutory reviews of the OEP's valuable expertise and evidence-based judgement. In certain cases, the OEP's intervention may help to bring about a speedier resolution, helping to reduce the burden on the courts. And it is not clear that it would be appropriate for the OEP to be applying the same 'serious' test for interventions as for its own enforcement actions. **The test for whether or not to apply to intervene in a review should be one for the OEP to exercise based on its own assessment of whether that action is necessary, having regard to its strategy and goals.**

It is important to recall that, as reflected in the clause, a prospective intervener to judicial review cannot join proceedings without permission. Instead, the intervener must apply to the court which will determine whether or not to hear from that person.[8]

There is no need for legislative restriction on the OEP's ability to intervene – the OEP is best placed to determine whether to apply to intervene and, ultimately, it is up to the court to determine the value of that potential intervention and, on that basis, to grant permission – or not. Further, because of changes made by the Criminal Courts & Justice Act 2015, it will be at costs risk if it does intervene but the court does not find its intervention helpful.

Finally, the amendment notes that the OEP can make this application regardless of whether it thinks the public authority has actually failed to comply. We note that there was nothing in the previous drafting that prevented the OEP from applying to intervene whether or not it thought the public authority had actually failed to comply.

Meaning of 'serious' (government amendments 203 + 204)

Amendments 203 and 204 are consequential on amendments 208 (which amends Clause 35(1) and introduces a new seriousness condition for the commencement of environmental review proceedings) and amendment 220 (which amends Clause 36(6) and introduces a new seriousness condition regarding the OEP's ability to apply to intervene in a judicial or statutory review). The meaning of 'serious' for these – and other – OEP enforcement purposes will be set out in the OEP's enforcement policy which will be contained in the OEP's strategy (Clause 22(6)(a)). As such, it initially appears reasonable that amendments 203 and 204 amend Clause 22 to align it with the proposed changes to clauses 35(1) and 36(6).

However, these amendments give more cause for concern than they might immediately appear. It is important to consider these changes alongside NC24 which, as noted above, provides that the Secretary of State may issue guidance on the matters listed in Clause 22(6) including, amongst other things, "how the OEP intends to determine whether failures to comply with environmental law are serious" for the purposes of each of the clauses reliant upon this. By explicitly linking this government-guided seriousness determination to OEP actions across the enforcement process, the government is introducing a clear barrier to the independent operation of the OEP at every stage. This impacts the following clauses:

- whether the OEP can carry out an investigation (Clauses 30(1)(b) and 30(2)(b));
- whether the OEP can issue an information notice (Clause 32(1)(b));
- whether the OEP can issue a decision notice (Clause 33(1)(b));
- whether the OEP can commence environmental review proceedings (amended Clause 35(1)(b)); and
- whether the OEP can apply to intervene in judicial or statutory review proceedings (amended Clause 36(6A)).

The OEP "must" have regard to the Secretary of State's guidance in preparing its enforcement policy and exercising its enforcement functions. **This means that wherever the serious condition applies, there is scope for the Secretary of State to shape and influence the OEP's approach and ability to take action: there is scope for the government to meaningfully shape the OEP's operations and curtail its enforcement powers across the piece, potentially in a way that risks creating a conflict of interest.**

3. Forum for environmental review (government amendments 207 + 210 to 16)

This group of amendments change the forum of environmental review from the Upper Tribunal to the High Court. Environmental review is a new mechanism through which the OEP can escalate potential issues of public authority non-compliance with environmental

law to a judicial forum. Under the existing drafting, environmental review would be housed in the Upper Tribunal. Depending on its determination, the Upper Tribunal could issue a statement of non-compliance (Clause 35(6)) and, in certain circumstances, other remedies could be granted (Clause 35(8)). Pursuant to these amendments, the mechanism will now sit within the High Court.

It is very concerning that the government is seeking to introduce such a fundamental change to environmental review at this stage of the Environment Bill's proceedings and after these clauses have cleared pre-legislative scrutiny. This is all the more troubling as the government has reversed its own logic as set out in its response to the EFRA Committee's pre-legislative scrutiny report recommendations on enforcement (our emphasis):

> "We note the Committee's recommendation and have made provision for a new environmental review mechanism in the Upper Tribunal for the OEP to bring legal challenges. **The approach will have a number of benefits compared to that of a traditional judicial review in the High Court. In particular, taking cases to the Upper Tribunal is expected to facilitate greater use of specialist environmental expertise…**"[9]

To date, the government has not provided any rationale for its U-turn in this regard.

This change represents a fundamental weakening of the environmental review mechanism and, by extension, the OEP itself. For instance, conducting environmental reviews in the High Court rather than the Upper Tribunal would:

- risk resulting in a review that is, in important ways, more limited and less effective than traditional judicial review. It would:
    - seriously impede the government's aspiration for a greater use of environmental expertise in the review mechanism. Upper Tribunal panels frequently combine legal and expert members but this is not a feature of High Court hearings; and
    - retain some of the more problematic aspects of the environmental review process including, for instance, the Clause 35(8) restrictions on when a remedy can be issued which do not exist in the context of most regular judicial reviews;
- undermine the deliberative and holistic approach that we expect the OEP to take and that could have been supported in the Upper Tribunal due to the Tribunal's traditionally less adversarial approach;
- create confusion for court users and practitioners due to a loss of distinction and blurring of procedural requirements between the two similar but different in name processes of environmental and judicial review; and
- given experience with judicial review,[10] create the danger that this would result in a narrower review focused on process at the expense of substance.

4. Scope of environmental review (government amendment 209)

Amendment 209 removes the OEP's ability to apply for environmental review proceedings in relation to alleged conduct occurring after the issue of a decision notice but which is similar, or related, to the conduct described in the notice. Pursuant to this change, the OEP will only be able to apply for an environmental review in relation to the specific conduct described in a decision notice.

This represents a significant and problematic narrowing of the scope of environmental review proceedings. Instead of the strategic approach to enforcement that should define the OEP's role, this change would necessarily result in a more piecemeal approach. The OEP would be unable to bundle similar offences by one public authority together into one environmental review. Instead, for serial offenders, for example, the enforcement clock would have to be restarted for each offence – with separate sets of proceedings needing to be commenced in relation to each breach.

This change would significantly weaken environmental review in several respects. Instead of escalation through the enforcement process being seen as a last resort, only used in the most concerning and egregious cases, it would likely become more frequent – with a larger number of small and less systemic issues (provided they still met the 'serious' threshold) being funnelled through it. These no doubt unintended consequences would undermine the mechanism – making it less efficient and poorer value for money. As well as putting increased pressure on the High Court, this would reduce the effectiveness of environmental review as decisions would be narrower and more specific and, therefore, it might be easier for public authorities to distinguish earlier decisions from their circumstances in subsequent challenges.

There is also a risk that this amendment could make it more difficult for an issue to be considered 'serious' (if issues can only be considered discretely, they might not seem so egregious). This would reduce the scope for 'small but systemic' breaches to be escalated to environmental review, hindering the efficacy of the whole enforcement process by encumbering the OEP and making it less fit for purpose. Finally, this would fragment the process of enforcement and restrict the court's field of vision and ability to take into account the wider context in any one single review, thereby weakening the enforcement capacity of the OEP and the environmental review mechanism itself.

5. Judicial review and 'urgency' (government amendments 217 + 218 + 219)

This group of amendments alter the circumstances in which the OEP can apply for judicial review rather than proceeding down the information notice → decision notice → environmental review track.

Amendments 217 and 218 establish "the urgency condition": the OEP may only apply for a judicial review when the urgency condition is met. The urgency condition is that an application for judicial review "is necessary to prevent, or mitigate, serious damage to the natural environment or to human health". Initially, this change may not seem particularly substantive.

The existing drafting provided that the OEP could apply for judicial review "only if the OEP considers that it is necessary to make such an application (rather than proceeding under sections 32 to 35) to prevent, or mitigate, serious damage to the natural environment or to human health" (existing Clause 36(2)). The amendment may be attempting simply to give a name to this test. However, its actual effect is potentially more significant and concerning. It removes from the OEP's discretion the question of whether an application for judicial review is necessary. The test is an objective one under the new drafting: 'is an application for judicial review necessary?' rather than 'does the OEP consider that an application for judicial review is necessary?'.

This change is concerning and inconsistent with the discretion afforded to the OEP in determining whether the serious threshold has been reached – which is critical element to its enforcement functions.[11] In other contexts, although NC24 introduces the possibility

of the government influence on how the OEP is to understand 'serious', the OEP has clear discretion to use its expertise and experience in applying this meaning to an issue in order to determine whether a specific failure to comply (if it has occurred) would be serious. There is no justification for a different, objective approach in the context of an application for judicial or statutory review. Further, an objective test is more likely to lead to satellite litigation in which the court may be called on to resolve whether the test was met in a particular case. The previous wording, which conferred a discretion on the OEP to decide whether judicial review is "necessary", would be more difficult to challenge successfully because contingent on the subjective decision making of a public body (which the courts typically give a wide margin).

It is important to acknowledge at this point that the court too plays an important role in determining whether an application for judicial review is granted permission to proceed to a substantive hearing. It is not necessarily the case that every judicial review the OEP applies for will progress to trial.

The effect of this change is compounded by NC24 which empowers the Secretary of State to issue guidance on how the OEP ought to determine whether damage to the natural environment or to human health is "serious" for the purpose of deciding whether to apply for judicial review. In this sense, there is already considerable risk for external influence on the ability of the OEP to launch judicial review proceedings. Introducing an objective necessity test (the urgency condition) undermines the OEP's position even further. **There is no justification for this change and, as such, the position should be withdrawn.**

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Endnotes

[1] Today Programme interview, 28 October 2020.
[2] Section 15 of the Natural Environment and Rural Communities Act 2006.
[3] Section 4 of the Environment Act 1995.
[4] Section 6 of the Budget Responsibility and National Audit Act 2011.
[5] Section 41 of the Climate Change Act 2008.
[6] Tailored reviews: guidance on reviews of public bodies.
[7] Defra factsheet, October 2020.
[8] Civil Procedure Rules Rule 54.17.
[9] Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Government Response to the Committee's Fourteenth Report of Session 2017–19 https://publications.parliament.uk/pa/cm201919/cmselect/cmenvfru/95/9502.htm
[10] See, for instance, the communication of RSPB et al. in ACCC/C/2017/156 UK, which raises issues regarding the ability of judicial review to provide a mechanism for review of the substantive legality of public authority acts and omissions as required by Article 9(2) Aarhus Convention. The matter has been heard by the Aarhus Convention Compliance Committee (the ACCC) and a decision is pending. In its findings in response to the communication of ClientEarth et al. in ACCC/C/2008/33 UK, the ACCC held that it was "not convinced that the Party concerned…meets the standards for review required by the Convention as regards substantive legality".
[11] Clauses 30(1) and (2) – Investigations; Clause 32(1) – Information notices; Clause 33(1)(b) – Decision notices; Clause 35(1) – Environmental review; and Clause 36(6A) – Judicial review.

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