

## Consultation on amending the Civil Procedure Rules to establish environmental review

23 August 2021

We welcome the opportunity to respond to this consultation. Environmental review will be an important new mechanism which should help to enable the Office for Environmental Protection (the “OEP”) to meet its principal objective of exercising its functions to contribute to environmental protection and the improvement of the natural environment.<sup>1</sup> Ensuring that the rules and procedures associated with environmental review are fair, effective and not unduly costly or cumbersome is an important aspect of establishing the new mechanism and enabling it to operate to support the OEP’s objective and ambition.

Set out below are some opening remarks followed by our key recommendations and fuller responses to questions 7 to 14 of the consultation. This response is provided on behalf of the environmental coalitions Greener UK and Wildlife and Countryside Link. We do not require this response to be confidential.

### Introduction

We broadly agree with the indication given in the consultation document that the procedure rules relevant to environmental review ought largely to mirror existing provisions for judicial review. However, given the bespoke nature and special role of environmental review, there is a need to consider how the existing rules should be amended to ensure that environmental review is as effective as possible and sufficiently flexible to enable the OEP to utilise the new mechanism as it considers it appropriate and valuable.

The different approaches in relation to the permission stage and time limits that are noted in the consultation document are welcome, necessary, and provide a helpful precedent for adopting different rules for environmental review that will have significant positive impacts for the efficiency and efficacy of environmental review, as well as for the OEP and its delivery of its objective and realisation of its ambition.

Central to our consideration of these matters and our recommendations are two important objectives:

- the overriding objective established in Part 1 of the Civil Procedure Rules (the “CPR”) which provides that the Rules should enable the court to deal with cases “justly and at proportionate cost”; and
- the OEP’s principal objective to contribute to environmental protection and the improvement of the natural environment.

Environmental review must advance both of these objectives simultaneously. As such, meaningful engagement with the meaning and requirements of these objectives is fundamental to the development of the environmental review procedure rules.

## Key recommendations

As discussed in further detail in the main body of this response, our key recommendations for the development of the environmental review procedure rules are set out below.

- **Environmental review is a new and bespoke mechanism and the rules establishing it should reflect this.** As such, the creation of environmental review provides an important opportunity to create a set of specific new procedure rules that are carefully tailored to the environmental review context. Getting these rules right will facilitate the proper functioning of environmental review, enabling it to be effective and efficient in identifying and remedying unlawfulness and clarifying the meaning and proper interpretation of, and improving compliance with, environmental law.
- **The roles of interested parties and interveners are important, and appropriate participation must be facilitated and protected.** Interested parties and interveners can be of significant assistance to the court in judicial review and their contributions could be even more valuable in the environmental review context. In addition, people who have submitted complaints to the OEP which lead to environmental review proceedings should be presumed to be interested parties (subject to the costs position below).
- **The approach for allocating costs should be different from the ‘general rule’ applicable in judicial review proceedings.** Instead, the default position should be that each party bears its own costs unless there is good reason to depart from this (for instance, as a result of unreasonable commencement or continuation of proceedings) in which case the court should use its discretion in making an order for costs.
- **The rules should create a mechanism to enable the court to determine uncontested cases.** This would enable the court to consider and make decisions in cases in which the defendant public authority has accepted that there was or may have been a breach of the law. This eventuality would be unusual in judicial review proceedings, but could have a valuable role in the different context of environmental review by allowing the court to consider and clarify the legal position in precedent-setting and publicly available judgments in relation to matters of significant strategic importance and of real public interest.
- **The rules should minimise unnecessary procedural complexity and enhance clarity.** The removal of the permission stage is helpful in this respect. In addition, requiring the filing of full submissions at an early stage would expedite the process. Another useful step would be for HM Courts & Tribunals Service to publish an ‘Environmental Review Guide’ equivalent to the Administrative Court Judicial Review Guide.
- **The rules should adopt a more flexible approach to reliance on expert evidence.** As in judicial review, environmental review cases are likely to involve complex technical topics. The OEP will employ its own experts who could help with the development of its investigations – their valuable input should not be precluded from being relied upon in environmental review proceedings. As such, the rule in judicial review that the court’s permission is required before expert evidence can be relied upon should not be replicated for the OEP in environmental review.
- **The rules should clarify that the duty of candour will apply in environmental review proceedings.** This duty is critical in judicial review proceedings in ensuring that the parties and the court have before them all of the relevant information. Its application will be equally valuable in environmental review proceedings.
- **Environmental review cases should be capable of being transferred to the Upper Tribunal if that forum becomes an appropriate venue.** The value of tribunal-based procedures is widely acknowledged. Although currently there is no obvious part of the Tribunal system appropriate for environmental review cases, there is value in

preserving the possibility of transfer of environmental cases to an appropriate Tribunal setting if a suitable forum is created in the future.

- **Consideration should be given as to whether there is a need to create rules around statements of non-compliance.** These statements could be useful in that they will require defendant public authorities to consider the court's decision and determine and publish the steps it will take in response. As the statements and follow-up response are a new form of interaction between the courts and the defendant, there may be a need to make provision for this in the procedure rules.

## Responses to consultation questions

### Interested parties

#### *Question 7: What provision should be made in the rules regarding the role of interested parties in environmental review?*

The rules establishing environmental review should make provision for interested parties to participate in proceedings. CPR 54.1(f) establishes that an 'interested party' is any person (other than the claimant or defendant) who is directly affected by the claim. Whether a person is 'directly affected' will turn on whether they are affected by the grant of a remedy in the proceedings and/or whether they are directly affected by the claim without "the intervention of some intermediate agency".<sup>2</sup>

In the context of environmental review, where the claimant will necessarily be the OEP and the OEP only, it is even more important that members of the public directly affected by the matter are capable of joining the proceedings. This will enable such parties to make valuable contributions to the environmental review process, drawing on their specific interest and on the ground knowledge of the issues. While environmental review is not a substitute for compliance with the access to justice requirements in Article 9 of the Aarhus Convention, it should be established in such a way that is consistent with and facilitates that access, as well as the Convention's public participation requirements.

Our view is that, generally, it is appropriate for the same 'directly affected' criteria to apply to potential interested parties in the context of environmental review. In addition to this, and bearing in mind that environmental reviews could flow from public complaints submitted to the OEP, we recommend that specific consideration is given to the position of any complainant. Pursuant to clause 34 of the Environment Bill, the OEP is under a duty to keep complainants informed about the progress of their complaint and, in particular, must notify the complainant where it applies for environmental review proceedings. In addition to these helpful requirements, the procedure rules establishing environmental review should include a provision that complainants are treated as interested parties for the purpose of environmental review proceedings subject to an indication from the complainant that they do not wish to participate and subject to the position on costs as articulated above and further explored below. This could build on the wording of paragraph 4.6(2) of the Practice Direction ("PD") for CPR 54A which provides a helpful template for a rule that establishes a presumption that certain stakeholders will be interested parties.

## Interveners

*Question 8: What provision should be made in the rules regarding the role of interveners in environmental review?*

*Question 9: If you consider there should be a role for interveners, should the application procedures differ in any way from those for judicial review?*

The rules establishing environmental review should make provision for the participation of interveners. The contribution of interveners to judicial review proceedings can have real value. Intervenors often represent community-led voices and can add useful technical and scientific perspectives to litigation. Whereas the main parties to litigation are more usually (and understandably) focussed on the specific and often narrow points related to the issue in question, intervenors can identify to the court relevant broader trends and patterns in the subject matter and the wider (legal) implications of the issues before the court. Through this, intervenors can assist the court and better enable the reaching of a just outcome.

The role of intervenors will be even more important in environmental review proceedings where, it is generally accepted, that the cases will be strategically brought and are more likely to be dealing with systemic issues with broad implications and in which there is considerable public interest. As such, the new rules must clearly facilitate the participation of intervenors.

Pursuant to CPR 54.17, an intervener can apply to the court to file evidence or make representations at a judicial review hearing. Any such application must be made “promptly”.

Recent changes to the PD for CPR 54A (May 2021) have made applications to intervene more resource intensive than previously. Those seeking permission to intervene must now do so by way of an application notice under Part 23, rather than simply by letter (as could be done previously). This means that a Court fee is now payable (currently £255 in the England and Wales High Court and £528 in the Court of Appeal). In addition, at the point of applying for permission, the prospective intervener must now provide any evidence upon which they intend to rely, and, if they want to make oral representations, a summary of those proposed representations. All of this significantly frontloads costs before the prospective intervener knows that they will actually be able to participate in the case. A better approach would limit the materials an intervener must provide in support of their application to intervene perhaps by requiring only a summary or list of evidence on which the intervener will rely (rather than the evidence itself). Such provision should be made in the environmental review procedure rules.

## Costs

*Question 10: What provision should be made in the CPR regarding the awarding of costs in environmental review?*

*Question 11: Should provision be made in the CPR regarding the costs of interested parties and intervenors in environmental review?*

## **Departure from the general rule**

As recognised in the consultation document, environmental review is a bespoke procedure open only to the OEP. Given this special nature, it is important to carefully consider what approach to the allocation of costs is most appropriate in this unique context. There are good reasons for adopting a different approach to costs in environmental review than the general rule civil claims – reflected in judicial review – that the loser pays the winner’s costs.

An alternative model that reflects the particular nature of the environmental review proceedings should be developed. Our recommendation is that, similar to in the tribunal context, the default position should be that parties bear their own costs. However, provision should be made for the successful party to apply to the court to claim their costs where a party has acted unreasonably in commencing, defending or participating in proceedings.<sup>3</sup> We note that the test for unreasonableness should reflect any change in approach in relation to the issue of uncontested cases (recommended below).

This approach is consistent with a line of case law from specialist jurisdictions outside of the judicial review context which establishes that public authorities acting honestly and reasonably should not automatically be liable for costs (as the application of the general rule would require). Lord Bingham held that, in a context where the court has discretion regarding costs, when considering awarding costs against a public authority, the court should take into account, amongst other things, “the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.”<sup>4</sup> The principle and its underlying rationale, which have both been adopted in subsequent decisions,<sup>5</sup> are equally applicable and important in the environmental review context where both parties will be public authorities. These cases will deal with systemic environmental issues; they are likely to have significant public interest angles and implications for the environment and environmental decision-making beyond the bounds of the issue in question. Given this, the costs rules should not deter the OEP from commencing and continuing – or the defendant public authority from defending – environmental review proceedings where they are acting honestly and reasonably in doing so.

Further, in the environmental review context, there is little need for the filter role that the general rule can play in judicial reviews. The OEP can only launch environmental review proceedings once it has completed its investigation process, which requires that it considers at each stage that the potential failure to comply with environmental law, if it occurred, was serious. In order to launch environmental review proceedings, the OEP must again satisfy itself that, on the balance of probabilities, the failure to comply with environmental law has occurred and that that failure was serious. Given the multiple and repeated checks embedded within the OEP’s processes both before and at the point of launching environmental review proceedings, there is minimal risk of the OEP using environmental review to pursue unmeritorious cases.

## **Interveners’ costs**

The costs rules for interveners in judicial review proceedings are established in s.87 Criminal Justice and Courts Act 2015 (the “CJCA”). That provision establishes two presumptions that apply in judicial review:

- that an intervener will pay their own costs unless there are exceptional circumstances that make it inappropriate for them to do so (ss. 87(3) and (4)); and
- that where a party to the proceedings applies, and one of four specified conditions is met, the court must order the intervener to pay the reasonable costs incurred by the party as a result of the intervention, unless there are exceptional circumstances that make this inappropriate (ss. 87(5)-(8)).

The provisions risk significantly penalising interveners and, as a result of this, deterring potential interveners from applying to intervene.<sup>6</sup>

We suggest that a different approach is adopted in the context of environmental review. As noted above, because of the content and nature of the issues with which environmental review will deal, the role of interveners is likely to be even more significant than in judicial review cases. As such, the costs rules for interveners should facilitate, rather than discourage, their participation. As the CJCA provisions expressly refer to judicial review, they will not – without legislative intervention – apply to environmental review. We support this approach and suggest that, rather than following the CJCA, the costs model outlined above – where no costs orders are made unless unreasonable behaviour is demonstrated – should apply to interested parties as well as interveners.

### **Environmental review cases without hearings**

*Question 12: Should provision be made in the CPR to allow claims to be decided without a hearing, replicating CPR 54.18?*

In our view, it is acceptable for provision to be made that environmental review claims be decided without a hearing provided that the requirement in CPR 54.18 that all parties must agree to this is replicated.

In certain cases, it may be appropriate to direct proceedings through this route in order to avoid unnecessary pressure on the courts and parties, and to support the overriding objective by ensuring that costs are proportionate. One such circumstance where this might be appropriate is where there is no dispute that the unlawful conduct alleged by the OEP actually happened – that is, where the public authority does not contest that its action or decision did breach environmental law – but where there is still value in obtaining a precedent-setting judgment from the court on the matter. Please see further discussion of this point below under the heading ‘Uncontested cases’.

### **Additional matters**

*Question 13: Are there any further areas where you consider the procedure for environmental review should differ from that for judicial review?*

*Question 14: Do you have any further comments on the approach that should be taken to amending the CPR to establish environmental review?*

### **Uncontested cases**

In judicial review proceedings, cases which are uncontested are usually settled by way of a consent order approved by the court. However, thought should be given as to whether

there is value in adopting a different approach – at least in some cases – in the environmental review context.

Environmental review is the final step in the OEP's enforcement process. As provided in the Environment Bill, in order to launch environmental review proceedings, the OEP must be satisfied, on the balance of probabilities, that the public authority has failed to comply with environmental law and that the failure is serious. On the face of the Bill, it is not necessary that the public authority contests the alleged failure or, for instance, denies that the alleged conduct occurred. In this way, environmental review is not *necessarily* an adversarial process: it is, as provided for at clause 38(2) of the Environment Bill, a review of conduct by the court.

It could very well be the case that a public authority accepts that the alleged conduct did occur and that it was, or may have been, unlawful but that, in spite of this, there is still real and tangible value and public interest in the court reviewing the case.

One significant advantage of this relates to legal clarity. Following an environmental review, the court will be able to clarify the relevant legal position through its decision and any statement of non-compliance and order. As Government has recognised, a core aspect of the OEP's enforcement role is its ability to exercise its powers to help ensure that public authorities avoid future breaches. As Lord Goldsmith acknowledged, the statement of non-compliance issued following an environmental review is "an important means by which the court can clarify the law for future cases."<sup>7</sup> Through environmental reviews, the court will make certain whether or not specific conduct was indeed unlawful – this is valuable regardless of whether the OEP and relevant public authority have previously reached consensus about the conduct. And, because the High Court is a superior court of record its judgments will set precedent. All of this goes to increasing the certainty around the legal position which of course will be of real value for all public authorities, future environmental decision-making and application of, and compliance with, environmental law.

A further advantage is that this approach would secure and enhance transparency and public awareness about the work of the OEP. Without the ability to pursue environmental review for uncontested cases, there is a risk that the discussions had, and understandings reached, between the OEP and the public authority are not shared with members of the public (there is no such requirement under clause 41 (Public statements) of the Environment Bill). In addition to the openness of the environmental review proceedings themselves, the issuing of a statement of non-compliance and the commencement of the process flowing from this (which requires the public authority to meaningfully and publicly engage with the court's decision by publishing the steps it intends to take in the light of the court's finding) is particularly valuable for ensuring that the legal position and the outcome of the case is readily accessible for members of the public.

Given that environmental review proceedings are likely to focus on systemic non-compliance and strategic matters, a settlement which is not publicised and not binding on other public authorities in a broader way makes little sense in terms of the OEP's enforcement functions and delivery of its principal objective. There is also a risk that, by not creating an option for uncontested cases to proceed smoothly and speedily through the courts (including without an oral hearing where appropriate) in order to obtain a binding decision, the OEP is encouraged to take a more litigious approach because bilateral agreement of matters earlier on would not contribute to the OEP's delivery of its objective. This outcome is not in the interests of the parties; the public nor the courts. The

approach we recommend is preferable; it discourages costly and lengthy court proceedings and promotes the overriding objective as well as legal certainty.

This approach – which is different from that usually taken in judicial review – is particularly appropriate in the environmental review context. Environmental review is – in some ways – not like judicial review. For instance, because the OEP will be the only claimant in environmental review proceedings, Government has already recognised the need to disapply a provision of the Senior Courts Act 1981 (the “SCA”) which precludes the court from granting a remedy where the outcome of the unlawfulness would not have been substantially different for the claimant if a lawful approach had been taken.

In a similar way, environmental review is not like judicial review in that there will not necessarily be a genuine dispute at the heart of the proceedings (i.e. where the parties disagree about what happened or disagree about the lawfulness of what happened). In this way, this review process can have a more strategic role, contributing to the enhancement of legal clarity and certainty and, through this, supporting the rule of law.

Given that the suggested approach is not usually employed in judicial review, it would be beneficial for the procedure rules establishing environmental review to make express provision for uncontested cases, possibly by establishing a new mechanism for handling these cases in a proportionate and streamlined way that avoids unnecessarily onerous procedural stages but still enables the court to issue a clear decision which is subsequently published in the law reports. As noted above, given the specific context and to release the parties and court from extensive burden in this kind of case, it might be appropriate for the court to determine these cases without an oral hearing (subject to the consent of the parties).

### **Procedural complexity and clarity**

As noted in the consultation document and mentioned above, some of the procedure rules which apply in judicial review cases are not relevant to environmental review. We welcome the recognition of this and encourage further consideration of any additional ways in which the environmental review process may be procedurally simplified given its different nature.

For instance, given that there will be no permission stage in environmental review, our understanding is that there will be no need for the parties to prepare the preliminary pleadings usually filed in the initial stages of a judicial review before permission has been granted. Such documents include statements of facts and grounds and summary grounds of defence. Removing the permission stage as well as the associated additional and sometimes duplicative filings should make the environmental review process less onerous and more efficient for all parties and the court. This is especially appropriate given there will have been several investigation stages already completed before the OEP launches an environmental review.

Instead, we suggest the inclusion of a specific requirement that full submissions are filed at an early stage. This frontloaded approach should expedite the process and ensure that later on, broader subsequent submissions do not lead to a need for further replies and additional evidence.

In addition, HM Courts & Tribunals Service should develop and publish an ‘Environmental Review Guide’ similar to the Administrative Court Judicial Review Guide.<sup>8</sup> The Judicial

Review Guide is an invaluable handbook for practitioners containing legal guidance on bringing and responding to judicial review cases. It is updated on a regular basis to reflect legislative and practice changes. Its straightforward and clear approach should be replicated in a new publication providing guidance on environmental review proceedings.

## Experts

Technical expertise can bring a depth of knowledge to complex environmental litigation which is invaluable to the court in getting to grips with the factual matters in play. Environmental litigation often has greater scientific content because the environmental impacts at issue tend to require specialist (scientific) expertise in order to properly understand and evaluate them.

In other litigation contexts, there are relatively strict controls on the filing of evidence: in all civil proceedings, expert evidence is restricted to “that which is reasonably required to resolve the proceedings” (CPR 35.1) and, in judicial review specifically, the court’s permission is required in order for a party to rely on written expert evidence (CPR 54.16). This reflects the orthodox position that because the judicial review court’s function is not to assess the merits of the decision in question – but, rather, its legality – the role of expert evidence is limited.<sup>9</sup> The courts have generally adopted a pragmatic approach to this guiding principle, recognising that extension of the categories of admissible expert evidence identified in *R v Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584 might, in certain circumstances, be appropriate.<sup>10</sup> In spite of this, in environmental cases, the reality is the science is rarely far from the surface and the Administrative Court’s reluctance to grapple with the science in judicial review proceedings by permitting expert evidence can hamper its ability to dispose of cases justly.

Given this, it is important to consider whether, in the environmental review context, a different, and more flexible approach would be useful.

We anticipate that the OEP will be an expert body. As Dame Glenys Stacey explained during a recent evidence session with the Environmental Audit Committee and the Environment, Food and Rural Affairs Committee, the OEP’s board members bring with them a range of backgrounds and expertise: “...between us we have pretty good experience of law, environmental science, environmental policy and, critically, investigatory and enforcement proceedings.”<sup>11</sup> Further, alongside its lawyers, we understand that the OEP will employ its own experts who could be called upon to contribute to the OEP’s investigations and enforcement work-streams. This integration between the OEP’s resources and functions will inevitably influence and inform its investigation strategies and approaches in a valuable way. It would be unfortunate if the expertise usefully deployed, say, at the earlier stages of an investigation could not subsequently be readily relied upon in court. Given this, there is value in considering whether a more flexible approach to expert evidence is appropriate in environmental review.

In addition, it is worth noting that, as both parties to environmental review proceedings will be public authorities, there is a relatively slim risk of an arms race for experts, as can happen in the judicial review context.

Our recommendation is that there should not be a requirement for the OEP to obtain the court’s permission before relying on written expert evidence which arises from or is

otherwise related to the relevant investigation process preceding the environmental review.

### Duty of candour

The defendant's duty of candour and co-operation is critical to the effective functioning of judicial review proceedings. It helps to ensure that the parties and the court are on the same page about relevant facts. The duty reflects the special nature of judicial review – the reasons for its importance are well-documented in case law and government guidance:

- “A public authority's objective must not be to win the litigation at all costs but to assist the court in reaching the correct result and thereby to improve standards in public administration...”<sup>12</sup>
- “[Judicial review] has created a new relationship between the courts and those who derive their authority from public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration...”<sup>13</sup>
- “It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why...”<sup>14</sup>
- “[Judicial review] is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands.”<sup>15</sup>
- “It is the function of the public authority itself to draw the court's attention to relevant matters... This is because the underlying principle is that public authorities are not engaged in ordinary litigation trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.”<sup>16</sup>

The duty of candour has equally applicable value and relevance in the context of environmental review. Although the operation and impact of the duty are likely to be slightly different because of the OEP's ability to require the provision of information by public authorities under clause 35 of the Environment Bill, it will still have a crucial role in 'flushing out' further information and ensuring that it is put before the court in good time.

Clarification that the duty (and relevant case law exploring and interpreting it) will apply in the context of environmental review would be valuable in clarifying public authorities' obligations once environmental review proceedings are launched.

### Transfer to the Upper Tribunal

Pursuant to the Tribunal, Courts and Enforcement Act 2007 (the “TCEA”) and s.31A SCA, the Upper Tribunal has jurisdiction over certain judicial review cases (specified either according to their category or on a case-by-case basis). The benefits of 'tribunal justice' in appropriate cases are widely-recognised. As Lord Carnwath wrote shortly after the TCEA was enacted but before its implementation, the tribunals' “principal distinguishing features, as compared to the courts, are flexibility, specialisation, and accessibility.”<sup>17</sup>

When the Environment Bill was initially introduced to Parliament in January 2020, the intended forum for environmental review cases was the Upper Tribunal.<sup>18</sup> In making provision for this, Government recognised that this “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...".<sup>19</sup> In October 2020, the Government proposed amendments in the Public Bill Committee which moved the environmental review process back to the High Court.<sup>20</sup> We were concerned about this U-turn in respect of which little in the way of justification or rationale was advanced.<sup>21</sup>

Although environmental reviews will take place in the High Court as provided for in the Bill, there may be value in establishing a mechanism for some environmental review cases to be transferred to the Upper Tribunal where to do so would be appropriate. As the Government itself has recognised, the tribunal model provides something of a template for the engagement of experts – including, crucially,<sup>22</sup> as panel members who work with judges to decide cases.

At present, there is no clear part of the Tribunal system which has access to the kinds of environmental specialisms likely to be valuable in environmental review cases. As such, this suggestion is very much aimed at ‘future-proofing’ the new mechanism of environmental review by ensuring that *if* the Upper Tribunal becomes an appropriate forum for certain environmental review cases to be heard, the provision exists for those matters to be transferred across.

Whilst we acknowledge that this is beyond the scope of the CPR, we note that, given that the current version of the Environment Bill very clearly provides that environmental reviews will take place in the High Court (and that seems unlikely to change before the Bill receives Royal Assent), in order to establish Tribunal jurisdiction, it may be necessary to subsequently amend the SCA to clarify that environmental reviews – just like judicial review cases – can be transferred to the Upper Tribunal where certain conditions are met.

### **Statements of non-compliance**

The Environment Bill creates a new process for the end of environmental review proceedings where the court has found unlawfulness. As noted above, the issue of a statement of non-compliance creates a requirement on the recipient public authority to publish, within two months, a statement setting out what steps it intends to take in the light of the environmental review.

Consideration should be given as to whether there is a need for the procedure rules establishing environmental review to make provision for the issue of statements of non-compliance and also for the monitoring of public authorities’ compliance with the requirement to publish a statement in response and the adequacy of those responses.

### **Concluding remarks**

As we have recognised and welcomed throughout the life of the Environment Bill so far, the establishment of a new environmental law enforcement mechanism opens up a unique opportunity to strengthen compliance with environmental law, environmental decision-making and public accountability.

The development of these procedure rules is a significant and exciting step on the way to creating a well-functioning, effective and meaningful new environmental review mechanism which is consistent with the overriding objective and genuinely supports the OEP in its principal objective of contributing to environmental protection and the improvement of the natural environment.

Our suggestions and recommendations for these rules attempt to find the right balance between, on the one hand, adopting approaches tried and tested in the judicial review context with, on the other, recognising where environmental review procedure should differ because of the special nature of this unique and important new environmental law mechanism.

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## Endnotes

<sup>1</sup> Environment Bill, clause 23(1).

<sup>2</sup> *R v Rent Officer Service ex parte Muldoon* [1996] 1 WLR 1103 & *R (Elmes) v Essex County Council* [2019] 1 WLR 1686 at [183].

<sup>3</sup> We note, as an aside, that in most environmental judicial review cases parties benefit from a degree of protection afforded through the system of Aarhus costs caps. Unfortunately, the way in which this regime currently finds expression in the legislation can cause uncertainty and risks a chilling effect (see, for instance, [comments on the UK's final progress report on implementation of decision VI/8k made by observers](#) (the RSPB, Friends of the Earth (Scotland), Environmental Rights Centre for Scotland, C & J Black Solicitors) (29 October 2020) [14]). In this sense, the usual regime of protective costs orders which applies in other areas of litigation has less relevance in the context of most environmental cases. In any event, the Aarhus requirements will not apply to this aspect of environmental review proceedings because the OEP does not meet the relevant criteria of 'the public concerned' (Aarhus Convention, Article 2(5)).

<sup>4</sup> *Bradford Metropolitan District Council v Booth* [2000] EWHC Admin 444, [26].

<sup>5</sup> See, for instance, *R (Perinpanathan) v City of Westminster Magistrates' Court* [2010] EWCA Civ 40.

<sup>6</sup> Indeed, the Aarhus Convention Compliance Committee (the "ACCC") has recently held in draft findings (the final report is expected shortly) that whilst the UK is in compliance with the Convention with respect to persons who intervene against the claimant, this is not the case in respect of members of the public intervening in support of the claimant. Specifically, the ACCC held that such persons are also entitled to benefit from the Convention's requirement that proceedings must not be prohibitively expensive (ACCC, [Draft report of the Compliance Committee: Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention](#) (5 July 2021), paragraph 108.) Amending the approach in relation to the costs provisions applicable to those who intervene in environmental review proceedings would be a valuable first step for remedying this matter more generally.

<sup>7</sup> HL Deb, 30 June 2021, Vol 813, Col 821.

<sup>8</sup> HM Courts & Tribunals Service, [Administrative Court Judicial Review Guide](#) (July 2020).

<sup>9</sup> *R (The Law Society) v The Lord Chancellor* [2018] EWHC 2094 (Admin) [36].

<sup>10</sup> *Ibid.*, [38]-[39].

<sup>11</sup> Environmental Audit Committee and Environment, Food and Rural Affairs Committee, Oral evidence: Work of the Interim Office for Environmental Protection, HC 496 (7 July 2021), Q20.

<sup>12</sup> Treasury Solicitor's Department, Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings (2010), 1.

<sup>13</sup> *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941, [945].

<sup>14</sup> *Ibid.*

<sup>15</sup> Ibid.

<sup>16</sup> *R (Citizens UK) v Home Secretary* [2018] 4 WLR 123 [106].

<sup>17</sup> Robert Carnwath, 'Tribunal justice – a new start' PL 2009, Jan, 48-69.

<sup>18</sup> Clause 35(1), [Environment Bill 2019-21 \(as introduced\)](#).

<sup>19</sup> Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: [Government Response to the Committee's Fourteenth Report of Session 2017–19](#).

<sup>20</sup> House of Commons, [Notices of Amendments given up to and including Tuesday 20 October 2020](#).

<sup>21</sup> Greener UK, [Environment Bill: briefing for Commons Committee - Response to proposed government amendments on the Office for Environmental Protection](#) (November 2020).

<sup>22</sup> George (Rock) Pring & Catherine (Kitty) Pring for the United Nations Environment Programme, '[Environmental Courts & Tribunals: A Guide for Policy Makers](#)' (2016) at page 46 "Including both law-trained judges and science-technical decision makers (scientists, engineers, economists, planners, academics) is a best practice for most experts surveyed... This brings two essential skill-sets into the adjudication process – law competence and scientific-technical competence, both crucial to successful decision-making in complex environmental cases".

## GREENER UK

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