

Case Commentary

How the OEP fits into the environmental governance jigsaw

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The Office for Environmental Protection (OEP) was created by the Environment Act 2021 ('the Act') to replace the role of the European Commission in overseeing implementation of EU environmental law by the UK Government after Brexit. However, as things have turned out, rather than government being the only target of its powers, it has a direct role in overseeing environmental law compliance by all English public authorities, plus holding the government to account on progress with environmental improvement plans and advising on proposed new law. The result is that its interfaces with other bodies are many and varied. This article examines the key relationships between the OEP and other bodies, and how it is anticipated that they will work together.

The OEP and the English Executive

Defra

The OEP's relationship with the Department for the Environment, Food & Rural Affairs (Defra) is complex. Defra has responsibility for the government delivering on national environment obligations in retained EU law, such as meeting air quality limits within urban areas. An important aspect of the OEP's job is to hold Defra to account on those and also on its progress with the measures contained in the 25-Year Environment Plan and its subsequent iterations. Another aspect is to advise Defra on changes in environmental law that Defra proposes.

However, Defra is also the OEP's paymaster and the Secretary of State for Defra appoints the Chair of the OEP as well as its non-executive directors and determines their pay and allowances. The Act provides that the OEP's funding must be set at a level which the Secretary of State considers to be reasonably sufficient to enable the OEP to carry out its functions. He or she is also required to 'have regard to' the need to protect the OEP's independence.¹

These arrangements have come in for much criticism as impairing the OEP's true independence from government. However, the OEP promises to develop its ties with Defra in a way that supports effective delivery of OEP objectives while maintaining its independence. The arrangements are to be set out in a framework document. It promises to act transparently, independently and without fear or favour, but much of its draft Strategy published on 25 January 2022 for

consultation is crafted with potential resource restraints in mind and hence the need to be focused in its efforts in order to achieve maximum impact. Similar resource constraints of course also impact public authorities such as the Environment Agency (EA), whose compliance the OEP is to oversee, and this may affect how much progress the OEP is able to drive.

Select committees and Parliament

The OEP promises in its draft Strategy to work with others, such as select committees and special interest groups in Parliament, to inform its assessments, amplify the OEP's messages, share lessons learnt and feed into other initiatives.

The OEP has no enforcement remit over either House of Parliament. On the contrary, many of the OEP's reports, including an annual progress report, must formally be laid before Parliament for scrutiny. The OEP pledges in the draft Strategy to listen to Parliament's concerns and views as part of a wider assessment of the OEP's priorities and approaches to work.

The OEP and the devolved regions

Environmental governance bodies in Scotland and Wales

Environmental Standards Scotland (ESS) and the Interim Environmental Protection Assessor for Wales ('the Wales Interim Assessor') are sister bodies to the OEP. The OEP is keen to build and maintain strong working relationships with them, as it recognises they have a broadly common cause and interest.

The three bodies already meet regularly and intend to share information and co-operate on specific subjects where appropriate. The Act provides that, where the OEP considers that a particular exercise of its functions may be relevant to one those bodies, it must consult them.

Again, a framework is to be put in place to support this co-operation, as part of which the three bodies have agreed a regular programme of engagement and are developing a memorandum of understanding (MOU) to record how they will work together.

Northern Ireland

The position with regard to Northern Ireland is not yet resolved due to interruptions to the functioning of the Northern Ireland Executive at Stormont. The OEP's remit over Northern Ireland requires the approval of the Northern Ireland Assembly which will not be possible until after new elections in May 2022, with the appointment of new party leaders following resignations in February 2022.

Although there is, of course, also the possibility of its renegotiation, under the Northern Ireland Protocol agreed as part of the Brexit process, certain EU environmental

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¹ Schedule 1, paragraph 17 of the Act.

legislation continues to apply in Northern Ireland. The European Commission is able to take enforcement action concerning non-implementation of this legislation, which would overlap with the OEP's enforcement function.

Consequently, the draft Strategy says that the OEP will seek to establish dialogue and arrangements with the European Commission, to manage situations where there is potential for overlap. This may include trans-boundary issues concerning the Northern Ireland/Republic of Ireland land border. The OEP says that it will make its own decisions independently of any action the Commission may take, but it will consider the relevance of any issues under the Protocol or any action taken by the Commission in deciding how to prioritise its activity within Northern Ireland.

The OEP and other public authorities

The OEP's enforcement remit extends over a failure by a public authority to comply with 'environmental law'. That is defined as any legislative provision to the extent that it is mainly concerned with environmental protection, unless it is one of a few excluded matters. It could therefore be an environmental provision that is contained in an Act that deals primarily with something else.

The explanatory notes to the Act comment that:

It will be for the OEP to assess whether or not it considers a legislative provision to fall under the definition on a case by case basis when determining whether or not it has legal powers to act in that area. In most cases, it is expected that the answer to this question will be clear, and agreed by all parties. However, there may be cases of uncertainty or disagreement, and in these instances it may ultimately be for the courts to decide whether a specific provision falls within the definition or not.

It is therefore possible that 'turf wars' will be fought in the courts early on in the life of the OEP by disgruntled authorities not particularly happy about their accountability to the new body, who argue that their roles do not involve environmental law for these purposes.

The three areas expressly excluded from the OEP's remit are provisions concerned with:

- disclosure of or access to information – that is, the Information Commissioner's Office with regard to its regulation of the Environmental Information Regulations;
- the armed forces or national security; and
- taxation, spending or the allocation of resources within government – such that measures in Finance Acts are excluded, which would, for example, exclude HM Revenue & Customs' role in administering the new plastic packaging tax and landfill tax.

The OEP and environmental regulators

The primary environmental regulators in England (and potentially Northern Ireland), such as the EA, local authorities and Natural England, will remain the principal bodies

regulating activities requiring environmental permits and licences and taking enforcement action against people and private entities who transgress environmental law. The OEP has no criminal law enforcement or inspection powers and will not be involved in regulating activities being operated 'on the ground'.

It may, though, have an indirect impact on private entities, for example if the OEP chooses to intervene in judicial review proceedings challenging the issue by the EA of a permit because an issue with wider implications is at stake. Or the OEP may pursue the EA for insufficiently implementing the law against third parties, perhaps being too lenient in its regulatory position statements or failing to require permits for certain activities, with the result that the EA takes stronger action against private entities in future.

Nor does the OEP's advisory role necessarily supplant or subordinate the role of the ability of the primary environmental regulators to also provide advice to government or to scrutinise proposals for new environmental law.

The OEP and offshore regulators

The OEP is not limited to compliance with environmental law onshore, and so can also investigate allegations of non-compliance against the Marine Management Organisation and OPRED (the Offshore Petroleum Regulator for Environment and Decommissioning), which oversees compliance by offshore oil and gas operators with regulations on oil and chemical discharges into the sea.

The OEP and the CCC

The Act contains provisions to manage the overlap with the functions of the Committee on Climate Change (CCC). It prevents the OEP monitoring the implementation of, or reporting on, matters within the remit of the CCC, such as providing advice on the setting of UK greenhouse gas emissions targets and risks to the UK from climate change. However, the OEP will, for example, be able to investigate the EA's role with regard to the UK emissions trading regime with which the CCC has no direct involvement.

According to the draft Strategy, the CCC and the OEP have already begun to work closely. Under section 26 of the Act, they must prepare a MOU setting out how they intend to co-operate with one another and avoid overlaps. The draft Strategy notes that the MOU will set out roles and responsibilities, areas of common interest and principles for joint working. The two bodies will work to develop common and consistent terminology, indicators, and datasets and to agree consistent reporting processes that allow each organisation's analyses to feed into the other's work. They will share relevant data and information where possible.

The OEP and ombudsmen services

The ombudsmen services handle complaints from the public about maladministration by particular public bodies and regulated entities which can also cover failures to

comply with the law, but they do not have an enforcement role.

The Act requires the OEP Strategy to say how overlaps with the complaints functions of certain ombudsmen services are to be avoided: namely with the Parliamentary and Health Service Ombudsman, the Local Government and Social Care Ombudsman, and the Northern Ireland Public Services Ombudsman. The draft Strategy does not go into specifics but announces that the OEP intends to agree MOUs with them on working together.

The OEP will develop arrangements to signpost complainants to the right organisation in the first instance and to share information with the ombudsmen services where allowed. (Information sharing is governed by sections 42 and 43 of the Act.)

Complaints about how the OEP itself functions can be made to the Parliamentary and Health Service Ombudsman.

The OEP and the HSE

There are some particular areas where the Health & Safety Executive (HSE) has a role which could also be termed 'environmental': regulation of the REACH chemicals safety regime and in its work with the EA as the COMAH (Control of Major Accident Hazards) competent authority for major accident hazard safety at sites where large volumes of dangerous substances are present. In these cases, the relevant regime is designed to protect both people and the environment. Whether the role is seen as mainly environmental or mainly safety will determine whether the OEP's enforcement role extends to the HSE in these cases. It may be difficult to determine.

The OEP and water companies

Private companies licensed as water and/or sewerage undertakers have certain environmental obligations and roles which are likely to fall within the OEP's enforcement remit to the extent they are functions of a public nature, resulting in those companies counting as 'public authorities'. Indeed, the draft Strategy makes this clear. The OEP may, for example, consider that this applies to whether and how sewerage undertakers exercise their power to prosecute people discharging trade effluent to the sewer network without the necessary trade effluent consent or in breach of agreed limits.

The OEP and the courts

The courts and tribunals are immune from the OEP's enforcement function. Instead, the OEP is able to bring environmental review proceedings in the High Court against public authorities where lesser attempts to bring them into line with environmental law have failed. As mentioned earlier, the OEP may also intervene in judicial review proceedings.

Working together

The draft Strategy recognises that there are overlaps between the OEP's remit and those of several other bodies, where the OEP will aim to understand the other bodies' priorities and plans and seek to avoid duplicating or pre-empting their work. They may have information gained through experience and established networks which it would be useful to the OEP to access.

The OEP expects public authorities to co-operate in a 'spirit of partnership and in pursuit of the wider public interest in all but the most exceptional circumstances'. However, if its expectations were to be dashed, the OEP is able to call in aid section 27(1) of the Act, which places a duty on other public authorities to co-operate and give the OEP 'such reasonable assistance as it requests (including the provision of information), in connection with the exercise of its functions under this Act'.

The explanatory memorandum accompanying the Act points out that this duty includes providing information in relation to OEP investigations, responding to formal information notices and decision notices served by the OEP, as well as providing the OEP with information relevant to its functions of scrutinising legislation and providing advice to government. The intention is said to be to enable issues to be resolved constructively, rather than, for example, the OEP having to rely on requests under freedom of information legislation, or resorting to court proceedings in order to make use of disclosure obligations to force the recipient public authority to divulge information.

Conclusion

The OEP is landing into a crowded field of public bodies, and its relationship with them is a rather Jekyll and Hyde arrangement. On the one hand, it is looking to benefit from their existing knowledge and to make use of their experts to support OEP research. Yet, on the other, the OEP is the fox in the hen coup ready to pounce on transgressions by those bodies, with the power to demand information where co-operation is not forthcoming. It is a difficult tightrope for the OEP to walk, but also for others such as the EA to manage, given that they previously answered directly only to Defra and the courts.

There is bound to be a bedding-in period where the exact boundaries and overlaps in functions between the OEP and other entities become more apparent and better understood. It is also a time of opportunity for NGOs, the public and the private sector to work out how the OEP might benefit them. Most importantly, however, the OEP needs sufficient goodwill and trust to allow it to establish its credentials and authority and allow it to prove its worth in holding government to account on its obligations where the OEP is the regulator of last resort, its original *raison d'être*.