

The Planetary Future

Innovations in Environmental Governance: The Significance of the British Office for Environmental Protection

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Abstract. The British Office for Environmental Protection was established in 2021 following the United Kingdom’s departure from the European Union. It is the most recent of just a handful of independent environmental watchdog bodies established in global jurisdictions to date, and has a broad range of powers. These include the evaluation of government policy, advice to government on new environmental law, reviewing the implementation of environmental law, and enforcement powers against government and other public bodies for breaches of environmental duties. The need for such bodies in the environmental field is important, and the Office for Environmental Protection may provide a useful model for other countries.

Keywords: Independent environmental watchdog, Brexit and the environment, Enforcement of environmental law, Implementation of environmental law

1. Introduction

The British Office for Environmental Protection (OEP) came into being in November 2021. It is essentially an independent watchdog body designed to hold government and other public bodies to account for failures in environmental policy and law. Specialist environmental courts and tribunals have proliferated¹ over the last few decades, but there are just a handful of national bodies similar to OEP. Examples would include the New Zealand Commissioner for the Environment,² the Hungarian Ombudsman for Future Generations,³ the Austrian regional environmental Ombudsmen for Environmental Protection (Umweltanwaltschaft),⁴ and the Indian National Green

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The author was appointed in 2021 one of the first non-executive directors of the Office for Environmental Protection. The views expressed herein are personal.

1 Bharat H. Desai (2021), “ICTs as the New Environmental Sentinels”, *Environmental Policy and Law* 51: 121–134, also available at: <https://content.iospress.com/articles/environmental-policy-and-law/epl219013>; Bharat H. Desai (ed.) (2021), *Our Earth Matters: Pathways to a Better Common Environmental Future*, Amsterdam: IOS Press, Chapter 21, pp. 213–226, also available at: <https://www.iospress.com/catalog/books/our-earth-matters>; George Pring and Kitty Pring (2016), *Environmental Courts and Tribunals*, Nairobi: UNEP.

2 Established under Environment Act, 1987.

3 Established under Ombudsman Act, 2011, replacing a predecessor body set up in 2007.

4 Established under Environmental Protection Act, 1993.

Tribunal (established in 2010).⁵ All have rather different specific powers and responsibilities, and the rationale for their establishment was distinctive in each jurisdiction. The British OEP is the most recent and arguably has the broadest set of legal powers. It is beginning to flex its muscles, and this article considers its background and provides examples of its activities and influence to date. This analysis should be considered in the context of two broader questions – first, why, compared to specialist courts and tribunals, have so few such bodies been set up by national governments? And second, does the OEP provide a useful model for other global and national initiatives?

2. Origin of the Office for Environmental Protection

Politics and personalities are often keen drivers in significant institutional and legal change, and both were present in the origins of the OEP. Following a referendum on 23 June 2016, the United Kingdom formally left the European Union on 31 January 2020, forty-seven years after it had joined the European Communities in 1973. This, ironically perhaps, was the same year that the Member States first decided to develop an environmental programme at EU level. During the period of UK membership, there was a massive growth in the substantive body of EU environmental law, and although the UK had a long history of pollution and nature protection laws, by the time of Brexit the main source of environmental law in the UK was from the EU.⁶ Following Brexit, the initial policy of the Government was that, in the interests of regulatory stability, existing EU law would be retained and ‘rolled over’ into UK law, but with any legislative amendments to make it operational in a national context.⁷ Even the national courts, with the exception of the Supreme Court, were required to follow rulings of the European Court of Justice made prior to Brexit.⁸

This was a sensible and pragmatic approach in handling such an enormous legal and political change, but a number of academics and non-governmental associations pointed out that this was simply dealing with the black letter of EU law. It did not address important aspects of the architecture of EU governance which would be lost post Brexit. In particular, the European Commission has a responsibility under the European Treaties to supervise and monitor the compliance of Member States with their duties under EU law, including the faithful implementation of EU legislation. The Commission had dedicated enforcement powers under the Treaty allowing it to bring proceedings against Member States, and if matters were not resolved, eventually take action before the Court of Justice of the European Union.⁹ Failure to comply with a judgment of the European Court allows the Commission to bring the case back before the Court, which then has powers to impose financial penalties on Member States for non-compliance with its judgment, effectively a contempt of court.¹⁰ These enforcement powers cover all areas of EU law, but since the 1980s the European Commission had been particularly active in the field of environmental law. Most cases have been resolved by negotiation between the Member State and the Commission without the need to bring proceedings before the European Court.

All this independent supervision and enforcement would be lost after Brexit. A Parliamentary Committee investigated the issue¹¹ and noted the importance of the EU institutions in ensuring effective enforcement of environmental protection ‘cannot be overstated.’¹² It recommended that post Brexit, ‘The evidence we have heard strongly suggests that an effective and independent domestic enforcement mechanism will be necessary,

5 For detailed study, see Bharat H. Desai (2010), “India’s National Green Tribunal”, *Journal of Court Innovation* (New York), 3(1): 361-374; Bharat H. Desai et al. (2010), “On the Quest for Green Courts in India”, *Journal of Court Innovation*, 3(1): 79-110.

6 UK Environmental Law Association (2022), “Evidence to the House of Commons European Scrutiny Committee: Retained EU Law - Where Next”, available at: <https://committees.parliament.uk/writtenevidence/107893/pdf/>.

7 For example, references in laws to ‘the ‘European Commission’ had to have new national substitutes, often the Secretary of State.

8 Section 6, European Union (Withdrawal) Act, 2018. More recent legislation has now extended this power to depart from existing rulings to the Court of Appeal: Retained EU Law (Revocation and Reform) Act, 2023.

9 EU (1957), *Treaty on the Functioning of the European Union*, Rome, 25 March 1957, Article 258, available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>.

10 *Ibid*, Article 260.

11 House of Lords European Union Committee (2017), *Brexit: Environment and Climate Change*, 12th Report of Session 2016-17, available at: <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/109/109.pdf>.

12 *Ibid*, para. 83.

in order to fill the vacuum left by the European Commission in ensuring the compliance by Government and public authorities with environmental obligations.’¹³

The immediate reaction of Government was to reject the need for any new body to replicate the role of the Commission. The Environment Minister noted before the Parliamentary Committee that it was the role of Parliament to hold the Government to account, and that, ‘if people believe that we are not complying with the law, they can take the Government to court about it.’¹⁴ It is true that the British courts have for many years adopted a liberal approach to standing for parties bring environmental judicial reviews against government and public bodies, and few environmental NGOs would now be precluded from bring a case on these grounds. At the same time implementation of the requirements in the Aarhus Convention¹⁵ concerning access to justice that is not ‘prohibitively expensive’ has limited exposure of adverse costs rulings should the case be lost.¹⁶ Only twelve months or so before the Minister made these assertions, Client Earth had won a significant victory against government before the Supreme Court in a case concerning air pollution.¹⁷ Although this litigation might be said to have proved her point, the UK Environmental Law Association continued to argue for the need for some form of independent review body and in a report published in July 2017 noted that, ‘Judicial review can provide a powerful long-stop check, but we question whether the process can in itself replicate the more systematic enforcement role hitherto conducted by the European Commission’.¹⁸

Personalities can sometimes have immense influence on policy change, and shortly after the UKELA report was submitted to Government, there was an unexpected cabinet shuffle, and Michael Gove was appointed the Secretary of State for Environment, Food and Rural Affairs. Michael Gove was a highly experienced government Minister, but his strong Brexit views made him a controversial figure, especially among environmental organizations. Nevertheless, he clearly decided that his core mission was to show that Brexit did not have to be an environmental disaster for Britain. He immediately accepted the case for a new independent environmental watchdog, and after a long period of consultation, the Environment Act 2021 was passed which included provisions for the creation of the new Office for Environmental Protection.

3. Core Legal Structure and Functions

In legal terms, the OEP is a non-departmental public body, meaning that it has its own legal status distinct from government departments, and its staff are employees of the OEP rather than part of the civil service. Non-departmental bodies permeate the governance of the United Kingdom,¹⁹ and are primarily designed to allow a degree of arm’s length operation away from day-to-day control by Ministers and civil servants. Nevertheless, no such body can be completely independent from government, and its degree of autonomy is primarily to be determined from the legislative provisions establishing the body in question. As with many other such bodies, the chair and non-executive board members of OEP are appointed by the Secretary of State,²⁰ but unlike other environmental non-departmental public bodies such as the Environment Agency, the Secretary of State has no powers to give binding directions to the OEP, whether general or specific, and indeed in exercising any functions relating to the OEP, the Secretary of State is under a specific legal duty ‘to have regard to the need to protect its independence.’²¹ Finance for the OEP is provided by Government, but in presenting its Annual Report to Parliament, the OEP must provide an assessment as to whether the Government has ‘provided it with sufficient

13 *Ibid*, para. 84.

14 *Ibid*, para. 80.

15 UNTS (2001), *Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters*, Aarhus, 25 June 1998, UNTS, vol. 2161, p. 447.

16 See Rule 46.26, Civil Procedure Rules. Generally, in an environmental judicial review, an individual cannot now be exposed to a cost claim by the successful defendant of more than £5K, while for NGOs and other organizations the limit is £10K.

17 *R (on the application of Client Earth) v. Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28.

18 UK Environmental Law Association (2017), *Brexit and Environmental Law: Enforcement and Accountability Issues*, London: UKELA, para 21.

19 Cabinet Office (2006), *Classification of Public Bodies: Guidance for Departments*, London: Cabinet Office.

20 Environment Act, 2021, Schedule 1, para. 1(2).

21 *Ibid*, Schedule 1, para. 17.

funds to carry out its functions.²² All non-department public bodies must provide annual reports and accounts to Parliament, but this provision about financial adequacy is very unusual, if not unique. There was real concern that the failure to provide proper funding could stifle the OEP's independence and activities. But at the same time this provision reflects a legal approach that permeates much of the Environment Act, 2021.

The Act contains many legal duties on government which are enforceable by the courts, but equally there are numerous provisions where transparency and parliamentary accountability rather than the courts provide the pressures for compliance. Here there is no legal requirement for the Government to provide OEP with sufficient funding, but it would be subject to Parliament scrutiny if it failed to do so. Another example of OEP's degree of independence from Government is the fact that it maintains its own website.²³ Since 2012, the Government has developed its own public sector website, GOV-UK, designed to replace the individual websites of hundreds of government departments and public bodies with a single portal and common style. Key environmental non-departmental public bodies such as Natural England and the Environment Agency no longer operate their own websites, and the ability of OEP to do so - not as a matter of legal requirement but one of political concession - is significant in allowing it to develop its own public and distinct identity.²⁴

The OEP came into formal existence in November 2021. Interestingly the first chair, chief executive, and head of enforcement are all lawyers with extensive experience in regulatory enforcement in the public sector, but little prior involvement in environmental law and policy. At first sight this might seem a weakness, but in practice it is apparent they can bring equally valuable and fresh insights, unaffected by prejudices that can inevitably build over a long career in one field. And the make-up is balanced by the fact that the current non-executive board members and many of the staff, including the lawyers, have a large degree of environmental expertise. The staff numbers in 2024 were around 75, including ten or so legal staff, making it about one third larger than the Climate Change Committee, and about half the size of the Equality and Human Rights Commission, another independent watchdog and enforcement body which covers both the public and private sector. This still makes in very small compared to key environment agencies such as Natural England with some 2000 staff and the Environment Agency with around 10000.²⁵

The Government originally would have preferred the OEP to have had a UK wide jurisdiction, but the environment is now largely a devolved matter with the UK, and doing so would have required the consent of the devolved administrations. Scotland preferred to set up their own watch-dog body, Environmental Standards Scotland,²⁶ while Wales is still developing proposals for their own body.²⁷ Due to its size, Northern Ireland felt unable to establish its own independent body, and OEP was given powers to assume jurisdiction in Northern Ireland.²⁸ In practice the different organizations maintain contact with each other, and significantly in March 2024 all three bodies announced on the same day that they were launching formal investigations into alleged failures by their governments and public bodies into compliance with wild bird protection law.²⁹ This was the first time a coordinated UK wide approach had been taken by all the new bodies.

The OEP has been in existence for just over three years, and it has now exercised nearly all its various powers, though not yet taken a case to court. Broadly its powers can be divided into four - (a) providing an annual critique on Government's progress in meeting its long term environmental plan and statutory targets;

22 *Ibid*, Schedule 1, para. 14(3).

23 OUP (n.d.), The Office for Environmental Protection; available at: <https://www.theoep.org.uk/office-environmental-protection>

24 The Climate Change Committee which has a similar independent advisory role under the Climate Change Act, 1998 also operates its own website.

25 Original plans for the OEP suggest around 100 staff would be appropriate for its functions.

26 Set up under the UK Withdrawal from the European Union (Continuity) Act, 2021. ESS has very similar functions to OEP, but with some differences, particularly in their enforcement powers.

27 The Welsh Government in the meantime has established an Interim Environmental Protection Assessor for Wales, but the Assessor essentially had advisory and critical functions rather than enforcement powers. Formal proposals for a new environmental governance body were published for consultation in January 2024. Welsh Government (2024), *Securing a Sustainable Future: Environmental Principles, Governance, and Biodiversity Targets for a Greener Wales*, White Paper No. WG48598, Cardiff: Welsh Government.

28 See Part 2, Sections 48-49, Environment Act, 2021.

29 OUP (2024), "OUP Launches Investigations into Special Protection Areas for Wild Birds"; available at: <https://www.theoep.org.uk/news/oeplaunchesinvestigations-specialprotectionareas-wildbirds>

(b) providing Government with advice on new environmental policy and law; (c) investigating and reporting on the implementation of environmental law; and finally (d) enforcement against Government and other public bodies where breaches of environmental law have occurred. The latter power is clearly modelled of the European Commission's enforcement powers, and not surprisingly attracted the most attention from non-governmental environmental organizations and interest groups during the development of the OEP's structure and powers. But the other powers are equally significant and indicate that the OEP is far more than simply an enforcement body. The boards of most non-departmental bodies are empowered to delegate many of the day-to-day functions of the body to its staff. But the sensitive nature of the OEP work is reflected in unusual provisions that do not allow the Board to delegate certain key functions – including approval of the annual report on the environmental improvement plan, approval of advice to Ministers, approval of reports on the implementation of environmental law, and approval of key steps in the enforcement process discussed below.³⁰ The feeling from Government may have been that these provisions would help the reign in an over-enthusiastic staff, though in practice while the Board has brought strategic perspectives it has not shunned from using its powers in ways that have sometimes been bold and controversial.

4. Long Term Environmental Plan and Statutory Targets

A new feature of the Environment Act was a requirement for the Government to produce a long-term environment improvement plan (EIP) described in the legislation as 'a plan for significantly improving the natural environment for the period to which the plans relates'.³¹ This period must be no shorter than 15 years.³² The rationale for the need for an EIP was that creating real environmental improvements can take many years, often spanning the life-time of governments and Parliaments. The provisions of the Climate Change Act, 1998 which also provide for the production of plans against long term climate reduction targets clearly had an influence. Parallel to the production of the plan, the Environment Act obliges the Government to produce regulations providing for a range of long-term statutory targets for the environment, covering areas such as air quality, water, biodiversity, and resource efficiency. While achievement of the targets is expressed as a legal duty,³³ the substantive content and ambitions of the Improvement Plan, are not legally binding on Government. Instead, the Environment Act employs the discipline of parliamentary accountability by requiring the Government to produce before Parliament an annual report on its progress towards meeting the goals in the plans. It is here that the OEP has a significant role to play in that it too had a duty to produce an annual report on Government progress, in effect providing an independent critique of the Government's own assessment.

In addition to requiring Government to achieve certain environmental outcomes by specific dates, the Environment Act also contains provisions that require it to do things by a date specified in the Act. Statutory Action dates, as these might be termed, appear to be a recent legislative feature in British legislation, and with respect to the long-term environmental targets, the Environment Act provides that draft regulations containing the actual targets must be laid before Parliament on or before 31 October 2022.³⁴ It became clear during the later summer of 2022 that the Government would not meet this deadline, partly because of lingering disruption caused by the Coronavirus virus but also by the fact that the Government appeared to have been overwhelmed by the number of responses to its consultation on proposed targets launched earlier in the year³⁵ – more than

30 Environment Act, 2021, Schedule 1, para. 10(4).

31 *Ibid*, Section 8(2).

32 *Ibid*, Section 8(3) d.

33 *Ibid*, Section 5. Section 6, however, provides that if it fails to meet a target, it must explain to Parliament why, and set out steps to be taken to ensure they will be met 'as soon as reasonably practicable'. It is possible that a court would feel that these explicit provisions override the powers of a court to grant a remedy beyond that of a declaration that there is a breach.

34 Environment Act, 2021, Section 4(9).

35 Department of Environment, Food and Rural Affairs (2022), *Consultation on Environmental Targets*, available at: <https://consult.defra.gov.uk/natural-environment-policy/consultation-on-environmental-targets/>.

180000 responses had been made,³⁶ and their summary and analysis of responses was not published until 6 weeks after the statutory deadline had past.³⁷

Once the statutory deadline was passed, the Government was in clear breach of a legal duty,³⁸ and the OEP could have immediately commenced formal enforcement action but that did not seem the most productive way to secure results. Instead, the Chair wrote (with all correspondence published on the OEP website) a sharp letter to the Secretary of State. She noted the importance of having the targets in place, pointed out that the Department had missed other deadlines, and declared it “imperative that the targets are in place by the end of this calendar year by the latest”.³⁹ It then referred to OEP’s enforcement powers, with the clear implication that these would be used if targets still had not been produced by the end of December. On 16 December 2022 the Government published its first draft set of statutory environmental targets,⁴⁰ including, as one example, ambitious biodiversity targets to halt the decline in species populations by 2030, and then increase populations by 2042 by at least 10% over current levels.⁴¹ No doubt, even if the OEP had not acted, the targets would have been produced at some point, but it seems highly likely that the letter from the Chair concentrated minds to ensure they were produced as soon as possible.

The first statutory long-term plan under section 8 of the Environment Act 2021 was published by Government on 31 January 2023.⁴² A year later, in accordance, with the statutory provisions, the OEP published its first annual assessment of Government progress in meeting both its plan and the long-term statutory targets.⁴³ A lengthy document of over 200 pages, the analysis noted that there had been progress in some areas, but that very substantial challenges remained, and the Government was still largely off target to meet its ambitions in the Plan and the long-term environmental targets. A core conclusion was that overall progress was being impeded by the lack of an effective and transparent detailed delivery plans – ‘plans that spell out who will do what, how much, and by when.’⁴⁴ There was still time to secure progress across the board, but as the Chair’s forward noted pithily, ‘To succeed, government must speed up and scale up, and together, government plans must stack up so that all can see that the environment is in safe hands.’⁴⁵

The publication of the report received considerable press coverage, often with dramatic headlines on the Government’s failings. In a subsequent Parliamentary committee inquiry into the Report, the Chairman and Chief Executive were subjected to some fairly tough questioning the extent to which their judgments were purely subjective and lacked robustness.⁴⁶ The OEP was able to provide a convincing response and pointed out they had published alongside the Assessment Report a Methodological Statement laying out in considerable detail the analytical approach taken. Nevertheless, the questioning touched upon a delicate balance the OEP must always take. It may criticize Government on its progress, but it is not an elected body, and it is Government’s role, not that of the OEP, to make policy. But this is not always a clear-cut line. The statutory provisions on the annual review of the Environmental Improvement Plan expressly allow the report to include ‘consideration of

36 Secretary of State for Environment (2022), *Letter from Secretary of State for Environment, Food and Rural Affairs to Chair of OEP*, 28 October 2022, available at: <https://www.theoep.org.uk/node/685> .

37 Department of Environment Food and Rural Affairs (2022), *Environmental Targets Consultation : Summary of Responses and government response*, 16 December 2022, available at: Environmental targets consultation summary of responses and government response: technical annexes (publishing.service.gov.uk).

38 The provisions concerning deadlines contain no conditions or possible defences.

39 OEP (2022), *OEP response to Secretary of State’s letter on Environmental Targets*, October 28 2022, available at: <https://www.theoep.org.uk/node/685>

40 UK (2022), “New legally binding environment targets set out”; available at: <https://www.gov.uk/government/news/new-legally-binding-environment-targets-set-out>

41 The Environmental Targets (Biodiversity)(England) Regulations, 2023, No. 21.

42 HM Government (2023), *Environmental Improvement Plan 2023*, available at: <https://assets.publishing.service.gov.uk/media/64a6d9c1c531eb000c64fffa/environmental-improvement-plan-2023.pdf>.

43 OEP (2024), *Progress in improving the natural environment in England 2022/2023*, available at: <https://www.theoep.org.uk/report/government-remains-largely-track-meet-its-environmental-ambitions-finds-oep-annual-progress>.

44 *Ibid*, p. 12.

45 *Ibid*, p. 7.

46 House of Lords Environment and Climate Change Committee (2024), *Office for Environmental Protection—One Off Session*, 14 February 2024, available at: <https://committees.parliament.uk/oralevidence/14285/pdf/>. See in particular the questions of Lord Frost and the responses, pp. 4-8.

how improvement could be improved',⁴⁷ and arguably this provision provides OEP with considerable leeway to suggest new policy measures. But whatever the legal cover, the OEP will need to consider with care the political wisdom of straying too much into policy design.

The Government is legally obliged to respond to the OEP report, but responses can also be included in the Government's own next annual report due in January 2025. The duty to respond is an important provision for holding government to account, but by then there may well be a new government in Britain.⁴⁸ At present, though, the indications are that the Environmental Improvement Plan itself and the long-term environmental targets are largely seen as non-party political and will survive changes of government.

5. Advice to Government

The OEP's second core function concerns powers to give advice to Government. The Act specifies that the advice concerning proposed changes in environmental law, or any other matter relating to the natural environment must be given where requested by a Minister.⁴⁹ Advice on law is therefore limited to 'environmental law' as defined in the Act, a definition that will prescribe the boundaries of OEP's other cores powers concerning implementation reports and enforcement, discussed below. At one point during the development of the legislation the Government was thinking of defining environmental law simply by providing a list of existing environmental laws in the Act. This might have provided certainty but was felt to be too unwieldy and would rapidly become out of date. Instead, the approach was to adopt a rather more open-ended definition referring to any legislative provision 'mainly concerned with environmental protection'.⁵⁰ The terms environmental protection and natural environment are also given broad definitions.⁵¹ Protection of human health from effects on the environment (such as air pollution), is clearly included while the welfare of domestic animals (as opposed to wild animals) is excluded. Judging whether a provision is 'mainly' concerned with environmental protection or not could lead to challenging decisions on the margins, but this has not yet happened to date. All the core existing environmental legislation concerning water, waste, nature protection, contaminated land, air pollution clearly falls within OEP's remit.⁵² But there are examples of legislation which may have significant implications for the environment but will fall outside the definition of environmental law. An important area would be decisions to grant development permission under town and country planning laws which would generally be excluded as the planning system is not 'mainly' to do with environmental protection.⁵³ This is a significant limitation on the OEP's remit but probably a sensible one to prevent it becoming overloaded. And the limitation only applies to those functions which refer to 'environmental law' - advice, implementation, and enforcement. OEP's obligations to review progress on the Environmental Improvement Plan contains no such boundaries, and if, say, OEP felt progress was being inhibited by the poor operation of the town and country planning system, it could legitimately say so.

OEP must provide advice on changes to environmental laws or other environmental matters where requested by a Minister. But for some reason which is not immediately apparent, OEP can also provide advice on environmental law changes even where not sought by Government. The clearest example to date of the OEP's power to influence the political debate using these powers occurred in August 2023. Under existing habitat protection law, and its interpretation by the courts, developers of large-scale housing project near environmentally sensitive areas were required to show that proposals would not increase nutrient levels in waters (termed as 'nutrient neutrality'), or provide compensatory measures if they did. During the passage of a non-environmental bill going through Parliament, the Government suddenly introduced new provisions which would have taken the core obligations burden off developers, and in effect transferred them to government bodies. Government did not seek any advice

47 Environment Act, 2021, Section 28(6)(a).

48 The next UK general election will be held on 4 July 2024.

49 Environment Act, 2021, Section 30.

50 Environment Act, 2021, Section 46.

51 *Ibid.*

52 Some areas such as matter concerned with national security or the allocation of resources within Government are expressly excluded from the definition: Environment Act, 2021, Section 46(2).

53 But detailed environmental regulations falling within the planning system such as those on environmental assessment would fall within the definition and OEP's remit.

on these changes from OEP, but OEP decided the matter was so important that they did so in any event in the form of a strongly worded letter from the Chair to the relevant Secretaries of State. The letter noted that, “The proposed changes would demonstrably reduce the level of environmental protection provided for in existing environmental law. They are a regression. Yet the Government has not adequately explained how, alongside such weakening of environmental law, new policy measures will ensure it still meets its objectives for water quality and protected site condition”.⁵⁴

These were strong words to Government from an official body, and the letter was quoted several times when the new amendments were discussed in the House of Lords, the second Parliamentary Chamber.⁵⁵ The Government amendments were defeated, and it remains to be seen whether new legislation will be introduced on the subject. Quite deliberately the OEP’s letter referred to ‘environmental regression’. This is essentially a cross-reference to a new provision in the Environment Act 2021⁵⁶ which requires that in any proposed new legislation concerning environmental law, the Government must make an explicit statement to Parliament that either the proposed provisions do not reduce the level of environmental protection provided by existing law or that they are environmental regressive, but the Government still wishes to proceed. The key is transparency and Parliamentary accountability rather than curtailing the Government’s legislative freedom - OEP accepted that the Government was free to propose environmentally regressive legislation but had to be explicit that it was doing so.

6. Implementation of Environmental Law

OEP’s third main function concerns the implementation of environmental law. It has a duty to monitor implementation, and a power to “report on any matter concerned with the implementation of environmental law”.⁵⁷ Despite the brevity of the legislative provision, it is potentially one of the most significant. There are very few examples of environmental legislation containing provisions that require Government to monitor and report on the implementation of the law in question.⁵⁸ A scandal or public concern may result in an investigation by a Parliamentary Select Committee, but the establishment of an independent body which can systematically investigate the implementation of environmental law is innovative. The reports are not binding on Government but are laid before Parliament and there is a legal obligation on Government to respond within six months.⁵⁹

The powers to date have been used sparingly. The first major implementation study, a 100 page report, accompanied by three commissioned research studies, was published in October 2023,⁶⁰ and concerned environmental assessment. Environmental assessment requirements for major new projects were first introduced into the UK in 1988 following the agreement of an EU Directive on the subject.⁶¹ Government felt, as did many others, that in practice written assessment studies produced by developers and often written by environmental consultants had become far too long to be of real value, and often written defensively to prevent to possibility of legal challenges. Potential failures to comply with the requirements had indeed led to many challenges in the courts since the legislation was introduced. The Government’s response had been to propose

54 OEP (2023), “Proposed changes to laws on developments will weaken environmental protections”; available at: <http://theoep.org.uk/index.php/report/proposed-changes-laws-developments-will-weaken-environmental-protections-warns-oeep>

55 Hansard (2023), *House of Lords Debates: Levelling-Up and Regeneration Bill*, 13 Sept. 2023. See also, House of Commons Library (2023), *Nutrient neutrality and housing development: Research Briefing 9850*, London: House of Commons.

56 Environment Act, 2021, Section 20.

57 *Ibid*, section 29.

58 The provisions in the Environment Act, 2021 concerning forest risk commodities contain an unusual provision requiring the Secretary of State to produce a report before Parliament every two years, reviewing the effectiveness of the legislation: Section 116 and Schedule 17, para. 17.

59 Environment Act, 2021, Section 28(9).

60 OEP (2023), *A Review of the Implementation of Environmental Assessment Regimes in England*, available at: <https://www.theoep.org.uk/environmental-assessment-regimes-england>.

61 Council of European Communities (1985), Council Directive 85/337/EEC of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects, pp. 40-48, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31985L0337>.

new legislation requiring environmental assessment in future to be focussed on their contribution to various environmental outcomes defined by Government.⁶² The OEP's analysis was distinctive and more nuanced, concluding that the problems were not so much with the design of the law, and that key barriers to more effective implementation lay with other more deep-seated causes. These included data accessibility, post-decision monitoring, evaluation and reporting, and the shortage of skills and expertise within local planning authorities. Through a large number of cases over the past three decades, the Courts had largely clarified the existing principles of environmental assessment, and OEP felt that the introduction of new legislation might simply encourage a whole new tranche of litigation, testing the meaning of the new provisions. The Government published its response in January 2024.⁶³ The response was succinct, accepted some of OEP's analysis and recommendations, but did not move from the fundamental position that the movement to an outcomes basis for assessment would be more effective. More implementation studies are planned for 2024, covering such areas as water pollution⁶⁴ and inspection regimes.

7. Enforcement of Breaches of Environmental Law

The final key function of OEP concerns the enforcement of environmental law, and these powers most resemble – but cannot completely replicate – the role of the European Commission in monitoring and taking legal action against Member States that do not comply with obligations under EU law. The provisions concern breaches of environmental legal duties by Government, local authorities, and other public bodies including regulators such as the Environment Agency.⁶⁵ The private sector is not under the direct scrutiny of the OEP.

Essentially, the OEP has been given enforcement powers which may lead to action before the courts in the form of a specialized judicial review, but the procedures are clearly designed to resolve issues where at all possible without the need for court intervention. As with the European Commission powers, there is a formal three stage procedure initiated by the service of an Information Notice on the body concerned where the OEP has reasonable grounds for suspecting there has been a breach of duties. After two months, this may escalate to the service of a Decision Notice where the OEP must set out steps that the OEP considers should be taken to deal with the failure. If matters are still not resolved, OEP may after two months then apply to a court for what is termed an environmental review. The legislation provides that courts must apply ordinary principles of judicial review in such an action, and the main distinctions from standard judicial review procedures are that prior leave of the court is not required, and there are no time limits for bringing an action. Power is also given to the OEP to carry out an Investigation⁶⁶ which is likely to take place before any formal enforcement proceedings take place and is essentially a fact-finding exercise to determine whether further action is needed. There is a general legal duty of co-operation between the OEP and Government and other public bodies, designed to assist the process of investigation and enforcement.

The European Commission tends to settle and resolve the vast majority of its enforcement cases without having to go to the European Court of Justice. Judicial reviews at national level brought by third parties such as environmental organizations can settle, but often parties want their day in court, and a clear victory for their

62 Department for Levelling Up, Housing and Communities (2023), *Environmental Outcomes Report: A New Approach to Environmental Assessment*, available at: <https://www.gov.uk/government/consultations/environmental-outcomes-reports-a-new-approach-to-environmental-assessment/environmental-outcomes-report-a-new-approach-to-environmental-assessment>. The legislation is now contained in Part 6 Levelling Up and Regeneration Act, 2023 but the provisions are very much of a framework requiring regulations to be made to flesh out the substance of the new requirements.

63 Department of Environment, Food and Rural Affairs and Department for Levelling Up, Housing and Communities (2024), *Government Response to the Office for Environmental Protection's Review of the Implementation of Environmental Assessment Regimes*, 22 January 2024, available at: Government response to the Office for Environmental Protection's review into the implementation of environmental assessment regimes - GOV.UK (www.gov.uk)

64 OEP (2024), *A Review of Implementation of the Water Framework Directive Regulations and River Basin Management Planning in England*, available at: <https://www.theoep.org.uk/report/oep-finds-deeply-concerning-issues-how-laws-place-protect-englands-rivers-lakes-and-coastal>

65 Case-law had indicated that privatized bodies such as water companies carrying out public functions and with distinct legal powers would be included within the context of a public authority in this context.

66 Environment Act 2021, Section 33.

constituencies. With the OEP enforcement procedures, the stepped process encourages the early resolution of issues, and this has been the experience to date. As yet no environmental review under the new provisions has been taken before the courts.

The OEP is selective in the cases it investigates, and both the legislation and its own enforcement policy require it to handle only cases deemed to be environmentally significant. OEP still has considerable leeway in deciding what is significant or not, but it is unlikely to get involved in a dispute involving, say, a single environmental licence or a very localized environmental problem, unless it raises issues of more general importance. To date, the OEP has been involved in around 15 cases of potential environmental breaches, and most have been resolved at early stages.⁶⁷ The most challenging case to date, and still unresolved, concerns overflow discharges from sewer pipes, a topic that for the last few years has been high on the political agenda but involving highly complex legislation. OEP has been investigating three bodies with potentially overlapping responsibilities – the Department of Environment Food and Rural Affairs, the Environment Agency (the main national environmental regulator) and the Water Services Regulation Authority, the public body responsible for the economic regulation of the privatized water and sewerage industry. The case has moved from an Investigation to the service of Information Notices in September 2023 on all three bodies, the first time these powers have been used.⁶⁸ But one of the overall benefits of the OEP enforcement system is its flexibility. Following the responses to Information Notices it could conclude that there has been no actual breach of duties by any of the bodies, but that it is the law that is defective, or the coordination of its implementation where more than one body is concerned. In such a case, OEP could switch from pursuing its enforcement powers to producing a report on the implementation of environmental law to which Government must respond.

Enforcement action by the OEP has yet to reach a court. An important distinction from ordinary judicial reviews is that whatever the final outcome, each side bears their own costs,⁶⁹ a principle which is commonly adopted within the Tribunal system but rarely found in ordinary civil litigation. The legislation expressly requires the court to apply the ordinary principles of judicial review in any case brought by the OEP. Generally, where the decisions of expert regulators such as the Environment Agency or Natural England have been challenged, the British courts have tended to be deferential to the expert body concerned and the success rate is not high, unless there are procedural illegalities involved. But these are often cases brought by third parties such as local citizens and non-governmental organizations, and it is hardly surprising that courts given considerable weight to the views of bodies set up with specialist functions. In an Environmental Review, though, the dispute is in effect between two expert official bodies, and in these circumstances, court may feel more justified in taking a rather more interventionist approach. But it remains to be seen to what extent this will happen.

In infringement cases brought by the European Commission the Court of Justice of the European Union has often been prepared to impose quite substantial fines on Member States.⁷⁰ Over the years the court's decisions have received considerable publicity, and some have criticised the UK post Brexit system as far weaker. But it is important to stress that the European court's powers to impose penalties is not for the breach of the obligation as such but for a failure to comply with a court judgment following an infringement action.⁷¹ In effect it is punishing for a contempt of court, and it is arguable that the British courts have more extensive powers in dealing with contempt where government or a public body fails to comply with an order of the court. A court may imprison the Minister concerned or civil servants involved or impose personal fines.⁷² These powers have sometimes been discussed in the courts but in practice never used since there is no tradition of defiance of court orders.

67 OUP (n.d.), "Our casework"; available at: <https://www.theoep.org.uk/our-casework>

68 OUP (2023), "OEP identifies possible failures to comply with environmental law in relation to regulatory oversight of untreated sewage discharges"; available at: [OEP identifies possible failures to comply with environmental law in relation to regulatory oversight of untreated sewage discharges | Office for Environmental Protection \(theoep.org.uk\)](https://www.theoep.org.uk/our-casework/oep-identifies-possible-failures-to-comply-with-environmental-law-in-relation-to-regulatory-oversight-of-untreated-sewage-discharges)

69 Civil Procedure Rules, rule 46.23, Environmental Review Costs.

70 Examples include *Commission v. Spain*, ECLI:EU:C:2003:625 (€624,150 per year and per cent of non-complying bathing waters) and *Commission v. Sweden*, ECLI:EU:C:2014:2413 (€2 million plus €4,000 a day for non-compliance of updating industrial permits).

71 EU, n. 9, Article 260. The one exception where the court can impose a penalty for a breach is where the Member State fails to send transposing national legislation within the time-limits specified in a Directive – see Article 260(3).

72 Woolf, Jowell, Donnelly, Hare (2018), *De Smith's Judicial Review* 8th Edition, London: Sweet and Maxwell, para 18.045. See also *Beggs v Scottish Ministers* [2007] UKHL 3.

Finally, two further important legal powers of OEP should be noted in the context of the courts. The standard enforcement action is deliberately a reasonably lengthy and stepped process, taking at the minimum six months before any referral to a court. But the OEP does have power to take an urgent judicial review before a court where it considers this is needed to prevent serious damage to the environment or human health.⁷³ To date the powers have been threatened only once. In Northern Ireland the Government had published policy advice on ammonia, designed to assist local authorities dealing with planning applications relating to intensive farming buildings. OEP considered that the advice was out of kilter with tougher nutrient standards being used elsewhere in the United Kingdom, and that it was illegal. The Government initially withdrew the advice, but later reinstated it following pressure from farming interests. OEO threatened an urgent judicial review, and the Government reversed its decision, withdrawing the policy advice, without the need to go to court.⁷⁴

In the last thirty years, British courts have often welcomed the presence of Intervening Parties who may be able to bring wider perspectives on a public law case.⁷⁵ The OEP has been given express power to seek leave from a court to intervene, and to date has done so for the first time in 2023 in an important case concerning environmental assessment before the Supreme Court.⁷⁶ Where a suitable case arises the opportunity to intervene can be attractive to OEP because it can bring a perspective on the broader issues involved, and the cost of intervening can be low, especially where the court is content with written submissions.

8. Conclusion

The British Office for Environmental Protection has only been in existence for a few years, and while some of its powers have yet to be fully tested, it has clearly had some immediate impact. Its advice has stalled potentially environmental regressive legislation before Parliament. It has secured action by government and other public bodies to deal with potential breaches of their duties without the need for formal legal proceedings. Its first statutory evaluation of government progress in meeting its longer-term environmental ambitions was well received in the press and Parliament, even if though it made uncomfortable reading for Government.

The OEP is the most recent of a very small number of independent environmental watchdog bodies that have been established in the world to date. Some of these are concerned solely with policy advice, others are embedded within existing Ombudsmen systems, and some are judicial led. OEP is distinctive in its broad combination of functions and powers. The potential need for such bodies largely derives from the legally vulnerable position of the environment. Owners of private assets or interests can and do use the law to protect them, but many aspects of the environment remain outside the legal concept of private ownership, and the legal powers of protection that comes with it. The response in most jurisdictions has therefore been to place particular responsibilities on public bodies such as specialized agencies or local government to protect the environment. Yet it is precisely these bodies which may real challenges in fulfilling their legal duties, not necessarily through ill-will, but often due to resource constraints or conflicting priorities. Legal action by environmental organizations may provide some safeguards but is unlikely to replace the accountability provided by a more dedicated agency holding such public bodies to account.

The underlying advantages of such a body may cross many jurisdictions, but the specifics are likely to reflect the distinctive characteristics and traditions of individual jurisdictions. In the UK, Brexit provided the political impetus, highlighting the need to replace in some form the role hitherto played by the European Commission in holding Member States to account for failures to implement EU obligations, and was the driving force for the OEP's enforcement role. But other factors were also at play. The Climate Change Act 1998 had introduced the concept of long-term statutory binding targets in environmental policy, and the important role of an independent expert committee, the Climate Change Committee, providing an annual report to Parliament on Government's

73 Environment Act 2021, Section 39.

74 Available at: <https://www.theoep.org.uk/node/1474>.

75 Baroness Hale (former Supreme Court judge) writes: "Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer". Baroness Hale (2014), "Who Guards the Guardians?", *Cambridge Journal of International and Comparative Law*, 3, p. 104.

76 *R (on the application of Finch) v. Surrey County Council and others*, Case ID 2022/0064, hearing 21-22 June 2023, judgment appealed.

progress towards meeting those targets. While the Climate Change Committee has no direct enforcement powers, the legal model of the Climate Change Act clearly provided the inspiration for the long-term environmental targets and Improvement Plan embedded in the Environment Act 2021, and the role of the OEP in providing an annual assessment of Government progress. Another recent and important precedent for the concept of an independent, government funded body providing critical expert-led assessments can be found in the Office for Budget Responsibility,⁷⁷ established in 2010. The OBR provides its own economic forecasts and analysis of public finances, and distinct from the potentially more political and sometimes overly optimistic assessments by the Treasury. As with the Climate Change Committee, the OBR cannot legally bind government, but can make life politically uncomfortable, and its role and existence remain subject to criticism in some quarters.⁷⁸ Nevertheless, international institutions such as the International Monetary Fund has praised it as a benchmark for other advanced countries.⁷⁹

The Office for Environmental Protection in many ways follows in the tradition of these recent institutional changes in the structure of British governance. It remains a small body and will need to use its powers carefully and selectively to make a difference. But the role of this type of body is to annoy and make life difficult for government at times, and this no doubt accounts for the very small number of similar environmental watchdog bodies established around the world to date. But it is arguable that it is a sign of a confident not a weak government to establish this type of independent body - one that can hold government and other public bodies to account, both legally and politically. The environment is a particularly challenging policy area, where government and public bodies play a critical role, and where the effective implementation of law is a constant challenge. The need for critical evaluation and enforcement of environmental public duties is all the more pressing. The longer-term impact of the British Office of Environmental Protection on environmental law and policy within the country cannot be judged for a number of years, but its very existence should provide food for thought in many jurisdictions around the world.

77 Budget Responsibility and National Audit Act, 2011.

78 See, e.g. Olly Bartrum (2022), “Rishi Sunak Should Stand up for the Office for Budget Responsibility”, 1 April 2022, available at: [Rishi Sunak should stand up for the Office for Budget Responsibility | Institute for Government](https://www.institute.org.uk/news/rishi-sunak-should-stand-up-for-the-office-for-budget-responsibility)

79 IMF (2016), *United Kingdom, Fiscal Transparency Evaluation*, Country report 16/351, Washington DC: IMF, available at: <https://www.imf.org/external/pubs/ft/sctr/2016/cr16351.pdf>