

**Response to the Office for Environmental Protection  
Draft Strategy and Draft Enforcement Policy Consultation**

The Office for Environmental Protection (OEP) is a new public body, established by the Environment Act 2021.

It is seeking views on two documents namely its Draft Strategy and its Draft Enforcement Policy which have been shaped by the views of a broad range of stakeholders with whom it has engaged leading up to the Consultation.

The response to this consultation is provided by the Environment team of Irwin Mitchell LLP who has answered the specific questions raised by the consultation document. The Environment team also makes some important preliminary points which aim to inform the consultation process.

**Preliminary Points**

1. The publication of the draft strategy and draft enforcement policy is a crucial step to assist the OEP in achieving its principle objective set out in the Environmental Act 2021 to *“contribute to (a) environmental protection, and (b) the improvement of the natural environment”* and its mission statement to *“protect and improve the environment by holding government and other public authorities to account”*.

**The connection between the mission, objectives and functions**

2. We are supportive of the OEP's objectives, mission and overall function and consider that these are key in helping to improve environmental law and governance in the UK.
3. We consider that the overall structure and tone of the draft strategy and draft enforcement notice may be difficult for a layperson to follow. We would recommend condensing the content where possible, avoiding the use of legal terms and utilising

diagrams and bullet points to make sure the information is set out in a clear manner. There is also an element of duplication with the enforcement policy in some areas of the draft strategy, which should be considered and avoided where possible.

4. In relation to the four main functions, it appears that in many cases, each of these could apply to any of the four objectives (i.e. objective 3, improved compliance with environmental law could be achieved through each of the functions – by scrutinising EIPs, by scrutinising environmental law, by advising the government and through enforcement). We would recommend that further thought is given to this to ensure that functions are referred to in the context of each objective where appropriate.
5. As currently drafted, it is not clear from the contents of the draft strategy and draft enforcement policy that the OEP's remit covers all areas of environmental law and policy, not only those in force under the Environment Act 2021. We would recommend that the draft documents are amended to ensure that this is clear.

#### **Format, structure and accessibility of documents**

6. The OEP's work will be of interest to a wide variety of audiences including: members of the public, public bodies, lawyers etc. In order to ensure that the documents are accessible for each potential audience, it might be helpful to include an executive summary and/or move some of the more detailed commentary to additional Annexes.
7. When the UK was a member of the European Union the European Commission was the overarching body that ensured member states complied with EU laws. The European Commission was independent of all member states governments. It had authority to propose new environmental laws as well as enforce existing ones. It could use a process of infringement proceedings to investigate a failure by a member state to comply with EU laws and could ask the CJEU to impose fines on a member state that was found to be in breach. The OEP was created following pressure on government brought about by concern from a wide range of bodies that there would be a governance gap following the UK's exit in relation to compliance by the UK government and public bodies in respect of environmental law.
8. To ensure that the function of the OEP can be understood by all readers and to avoid confusion with the role of the OEP and other regulators for example the Parliamentary Ombudsman, Joint Nature Conservation Committee, the Environment Agency, Natural Resource Wales and Natural England amongst others, we would

recommend that a section is included in the introduction to make reference why the OEP was created. In the alternative an explanatory flow chart which demonstrates where the OEP 'sits' within the environmental enforcement and compliance regime could be useful.

9. There is concern that the Strategy does not make sufficiently clear how the work of the OEP complements the work of these public bodies and environmental agencies.
10. The OEP should also provide greater clarity in relation to how it will engage with members of the public and organisations beyond complaints that are raised through the OEP's complaint procedure. Particularly in relation to matters that may arise (in the courts or otherwise) that the OEP might not be aware of.
11. In conclusion Irwin Mitchell welcomes the creation of the OEP. It is a vital and much needed tool in ensuring that action is taken by government, public bodies and individuals to improve and protect our environment but it must remain independent and its aims and objectives must not be undermined.

## **RESPONSE TO SPECIFIC QUESTIONS**

### **Q1 Do you have any comments on Section 2.2 of our strategy (Sustained environmental improvement)**

12. In terms of the Strategic Objective 1: *sustained environmental improvement*, it is welcomed that there intends to be an independent analysis and critical assessment of the government's progress for delivery of environmental goals and targets and its plans for environmental improvement. The general public, NGO's and other stakeholders need to be reassured that following the UK's exit from the European Union and the loss of the overarching scrutiny and powers of the European Commission with its ability to take action against government for failing to comply with environmental legislation and meet legally binding targets that there is a body independent of government that has the ability to hold government and other public bodies to account. Due to the changes made over the past few years by the UK government to environmental judicial review procedure in the courts, the judiciary cannot be relied upon to be the sole source of holding government and public bodies to account when it comes to ensuring that the rule of law is upheld for the purposes of protection of the environment.

13. We consider that the emphasis of Section 2.2 should not just be upon central government being held to account to protect and improve the environment nor that it is only central government that will be under scrutiny. Section 2.2 should also encompass all public bodies including individuals, communities, NGO's, businesses and charities. The OEP's aim therefore should be for all public bodies to fall within Section 2.2.
14. We look forward to reading and assessing the monitoring report on the government's Environmental Improvement Plan due to be published early 2022 and are pleased that it will be provided so promptly.

**Q2 Do you have any comments on section 2.3 of our strategy (Better environmental law, better implemented)?**

15. Section 2.3 notes that the OEP will set out its first priority subjects for scrutinising environmental law in its corporate plan and that it will scrutinise the implementation of selected environmental law to determine if they are achieving their intended outcomes and make recommendations for improvements through changes in practical application. There has not been an identification of the 'selected environmental law' and therefore we would suggest that the following subject areas are given priority:-

- (1) Air quality;
  - (2) Poor water quality through unauthorised sewage discharge and agricultural pollution;
  - (3) Increase in large scale and uncontrolled illegal fly-tipping
  - (4) Degradation of SSSIs and failure by the regulator Natural England to take effective preventative action and/or enforcement action to prevent the degradation of our SSSIs
16. In relation to air quality there has been much criticism of the UK government and its failure to adequately tackle and reduce air pollution. In 2018 a group of Parliamentary Select Committees called air quality a "national emergency" and stated that the government was not doing enough to ensure the UK had safe clean air to

breath. Whilst there may have been some improvement in air quality in 2020/2021 as a result of the pandemic this cannot be relied upon by the UK government to assert that its current policies to tackle air pollution are working. The Coroner in the case of Ella Kissi Debra said legally binding maximum levels of particulate air pollution should be lowered in the UK to be in line with World Health Organisation limits but the UK levels for particularly harmful kinds of pollution are twice as high as the WHO recommendations.

17. In relation to water pollution the UK government pledged in its 25 year Environment Plan to deliver cleaner water and promised to secure clean and plentiful water by 'improving at least three quarters of our waters to be close to their natural state as soon as is practicable'. According to the UK Parliament Report the most recent figures published by the Environment Agency show that only 14% of English rivers met good ecological status and no river met good chemical status. This is of great concern to members of the public.
18. In relation to fly tipping on a large scale this has more than doubled over the past 6 years. It causes environmental pollution to land and water as well as adding to air pollution by the uncontrolled release of methane. It is submitted that there are effective laws in place to deal with fly-tipping both on a small and large scale but the regulators namely the Local Authority and the Environment Agency are not adequately dealing with and addressing the root causes of the problem. Fly-tipping both on a small and large scale cause environmental harm, is a risk to public health, reduces amenity and affects communities and may harm and injure wildlife.
19. Protection of SSSI's and to ensure that monitoring is undertaken to assess the condition of each site is essential in order to address the biodiversity crisis and halt the decline of a wide range of species. It was reported in 2019 that only 26% of the 1,100 SSSIs in National Parks were in good condition and SSSIs outside of the National Parks only 39% of a total of 4,100 were in good condition. SSSIs when in a good condition support an abundance of species including both fauna and flora including rare species such as the heath fritillary, curlew, and capercailly. Natural England is statutory obligated under the Wildlife and Countryside Act to look after these precious sites but are clearly failing in their statutory duty to do so to the detriment of biodiversity.

**Q3 Do you have any comments on section 2.4 of our strategy (improved compliance with environmental law)?**

20. In terms of the Strategic Objective 3: *improved compliance with environmental law*, this is a crucial objective, particularly in light of the UK's departure from the European Union and the consequent loss of the European Commission as an overarching body to seek to hold government and other public authorities to account.
21. We agree the approach as to how this will be achieved but consider that it should not just be inclusive to government and public bodies as there may be occasions when it is necessary to investigate individuals.
22. The Enforcement powers of the OEP should however be adequate to achieve the aims set out in the strategy. There appears to be an implication in the strategy that the OEP is a body of limited resources. This calls into question how the OEP can be an effective body overseeing government and public bodies in terms of environmental compliance but unable to take action in only a few limited cases where there has been a significant failure to comply with environmental legislation and/or serious environmental harm.

**Q4 Do you have any comments on section 2.5 of our strategy (Organisational excellence and influence)?**

23. In terms of the Strategic Objective 4: *organisational excellence and influence*, it is noted that OEP aims to exercise its voice in a manner to command authority and respect. We would highlight that it is especially important for the OEP to maintain its independence and to ensure that its voice is heard and respected to assist it in achieving its objectives.
24. As the OEP is a new and relatively small body, with a very wide remit, its main challenge will be prioritising complaints and dealing with these as efficiently as possible. We note that the OEP aims to recruit a chief executive and other staff members; we would add that any additional staff and resources would be hugely beneficial in helping the OEP to achieve its objectives.

**Q5 Do you have any comments on whether our four strategic objectives will lead us to pursue our principal objective and achieve our mission?**

25. As set out in the Environment Act 2021, the OEP's principal objective is to *"contribute to (a) environmental protection, and (b) the improvement of the natural environment"*.

The OEP's mission is to *"protect and improve the environment by holding government and other public authorities to account."*

26. It is our view that the four strategic objectives will be crucial in helping the OEP to achieve its principal objective and its mission.

**Q6 Do you have any comments on our approach to prioritisation?**

27. The Enforcement Policy does not determine at what point in time OEP's prioritisation exercise will take place. We consider that the Enforcement Policy should include a clear indication of when will this prioritisation take place. We consider that, ideally, the OEP should determine its general priorities at least once per year.

28. The second prioritisation principle provides that "[The OEP] will prioritise by judgement, supported by the evidence available at the time." Assuming the OEP's priorities will be set once per year, then a flexible approach should be implemented if new evidence becomes available. If the priorities remain unchanged for the entire year, the OEP would become too slow and unable to react to relevant changes. We recommend including in the Enforcement Policy a description of how the OEP will reorganize their priorities if new evidence appears and to clarify the procedure how members of the civil society could provide new evidence.

29. Due to the above, we agree with the provisions in *"D. What is our capacity and capability to deliver?"* Determining priorities is a relevant exercise, but retaining capacity to respond to with external events is also indispensable.

**Q7 Do you have any comments on our approach to determining whether a failure is serious?**

30. The test seems to be focused on the analysis of individual instances, which could become problematic for the OEP, because it needs to assess the behaviour of each authority as a whole. In that regard, the OEP should also incorporate in its assessment wider issues and look at authorities' non-compliances with environmental law collectively, even if these non-compliances affect different parts of the environment.
31. Regarding the frequency of the conduct, the Enforcement Policy should make it clear that the conduct over time includes all the historical conduct, even before the creation of the OEP. This would make it harder to argue that previous misconducts should not be taken in consideration just because they occurred before the OEP was installed.
32. While in "3.1 Scope of our enforcement functions" it is stated that "*Failures to comply with environmental law can include omissions as well as actions*", we recommend including a similar provision in "4.2 Step 2 – *serious failure*" for the avoidance of doubt.
33. Regarding the compounding factors, the OEP should evaluate incorporating the following amendments:
1. Clarifying that "*poor record of compliance with environmental law*" refers not only to previous convictions, but also to non-compliances that have not been previously sanctioned.
  2. Clarifying that "*previous warnings or concerns raised by us other parties*" involves any advice, notice, order or communication of warnings/concerns made during or as a result of the OEP's bespoke enforcement functions (as defined in "3.2 *Our powers: bespoke enforcement functions*") and its additional enforcement actions (as defined in "3.3 *Our powers: additional enforcement actions*").
  3. Adding as a compounding factor that the failure to comply with environmental law has substantially benefited a specific company, a group of companies, or industry sector.
  4. Adding as a compounding factor that the authorities did not provide all information requested by the OEP in a timely manner or failed to collaborate with the OEP during its

**Q8 Do you have any comments on our approach to determining whether damage is serious?**

34. The approach for the identification of damages proposed in the Enforcement Policy follows a similar structure as the one for identifying impacts in an environmental impact assessment for the development of a single new project. We consider that this choice was inadequate. In most situations, the harm to the environment due to the authorities' non-compliance with environmental law will have different sources. For that reason, we consider that the Enforcement Policy's approach should have a heavy focus on cumulative impacts, which at this moment is almost completely lacking.
35. The Enforcement Policy proposes to take into account the likelihood and magnitude (degree of actual or potential harm) of environmental impacts to determine if the damage is serious. However, it does not provide how this will be calculated. Methodologies for objectively identifying these elements (i.e. Leopold matrix - <https://pubs.er.usgs.gov/publication/cir645>) have already been developed and are widely used. We recommend the OEP to establish which methodologies will be used to determine the likelihood and magnitude of harm.
36. The Enforcement Policy proposes to use "compounding and mitigating factors" to determine if the harm to the environment is serious. While the Enforcement Policy shows a couple of examples of compounding factors, it still remains largely unclear what would be considered as compounding or mitigating factors for the OEP's purposes. We recommend including a non-exhaustive list of these factors, similarly as provided in "*Relevant factors for assessing seriousness*".

**Q9 Do you have any other comments on our approach to enforcement?**

37. We are concerned about the provisions regarding confidentiality and access to information. The current Enforcement Policy's provisions seem to overly restrict the public's access to information. In particular, the "*Box 1 – Confidentiality*" considers that the OEP "*must not normally disclose information notices, decision notices, or associated correspondence.*" We consider that a different approach should be taken

and these documents should be made available to the public at the earliest opportunity, unless confidentiality restrictions apply. We understand the OEP is subject to the provisions of the Environment Act 2021, but we also consider it should favour transparency whenever possible.

38. The limitation on the access to information is also seen in “3.8 *How we will work with others*” of the Strategy, as it provides that “*We recognise the value of transparency in working with others. We will communicate openly wherever this is appropriate.*” We consider the OEP should communicate openly at all times and only restrict the information that it shares with other parties when this information is subject to confidentiality restrictions.

39. On other matters, in “3.2 *Our powers: bespoke enforcement functions*” of the Enforcement Policy, it is provided that Gathering Information and Investigations are part of the activities of the OEP. However, there are no guidelines on how long should each of those activities take. We are aware that the exact duration of these activities will be dependent on the specific case, but still some referential time guidelines would be necessary to avoid undue delays in the OEP’s activities.

**Q10 Do you have any comments on our approach to balancing our activities between monitoring overall progress and monitoring selected areas in more detail?**

40. The approach that the OEP will adopt in its approach to balancing its activities between monitoring overall progress and selected areas in more detail. However we consider that it is important that the OEP undertakes a regular review of both its overall progress as well as selected areas. It is particularly important in this early stage of operations that the OEP can react promptly and change course if deemed necessary and therefore operate effectively.

**Q11 Do you have any other comments on our approach to scrutinising EIPs?**

41. In response to Questions 10 and 11 with reference to Section 3.5 we consider that government and public bodies should be scrutinised and monitored not just solely in relation to the targets as set out in the Environment Act 2021 as appears to be

implied by the OEP.

42. It is important that historic failures to comply with environmental policies and goals are taken into account by the OEP and not just in relation to obligations under the Environment Act 2021 otherwise the OEP will be too narrow in its conclusions when scrutinising government and public bodies in relation to EIP's and compliance with environmental law.

43. The Strategy should clearly make the point that the scrutiny role of the OEP is as set out in S29 of the Environment Act 2021

**Q12 To what extent do you agree with our interpretation of how we will scrutinise the implementation of environmental law**

44. We agree with the OEP's proposals regarding how it will scrutinise the implementation of environmental law. However it is not clear how the OEP will be able to measure government progress in improving the natural environment or its failure to do so. The Strategy makes no reference to evidence of the current state of the environment which could be used as a baseline to monitor improvement or failure. Whilst it is accepted that this is a potentially vast area of activity and resources may not be adequate it is an important task to undertake otherwise how is the OEP able to assess whether there has been improvement or failure.

**Q13. Are there any other approaches to scrutinising the implementation of environmental law you think we should consider?**

45. The OEP could consider clarifying in its Strategy on a broad basis what areas of environmental law it will be scrutinising in relation to implementation of the law or policy for example sewage overflows into our rivers is a major concern of the public at the present time that the law in relation to water pollution is not being enforced by the Environment Agency.

46. We would also submit that a flexible approach to its scrutiny of the implementation of environmental law should be maintained.

**Q14 Do you have any other comments on our approach to scrutinising environmental law**

47. No we do not have any other comments.

**Q15 Do you have any comments on our approach to advice?**

48. The Strategy does not make reference to the OEP providing advice to government on its duties and obligations under International Law. There should be some clarification in the Strategy of how far the OEP will take into account the international law as it relates to the environment. The UK government is a signatory to a wide range of international environmental treaties some of which have been transposed into UK legislation.<sup>1</sup> How will the OEP monitor the UK government's obligations under International environmental law particularly taking into account the impacts of transboundary environmental harm.

49. Equally there is no reference in the Strategy of how the OEP will deal with current EU law in force in the UK.

50. The Strategy has a definition of "Environmental Law" on page 10, which provides that *"Environmental law generally means both UK and Northern Ireland environmental law, unless we refer to either individually."* We consider this restriction inappropriate. Section 23 of the Environment Act 2021 provides that the principal objective of the OEP is to contribute to (a) environmental protection, and (b) the improvement of the natural environment. The act does not restrict the OEP's functions to environmental matters related only to national law. Also, neglecting the environmental duties and obligations under international and EU law would play the OEP's principal objective.

**Q16 Do you have any comments on how we will work with others?**

51. It is noted that the Strategy makes reference to the OEP working with a number of

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<sup>1</sup> The Convention on the Conservation of European Wildlife and Natural Habitats  
The Convention on Biological Diversity, Convention on International Trade in Endangered Species of Wild Fauna and Flora

bodies such as the Ombudsman, Climate Change Committee and Public Authorities which is welcomed. However there is no mention of how the OEP will be working with the Joint Nature Conservation Council (JNCC). This should be clarified in the Strategy.

52. Further, the OEP should include provision in its strategy for liaison with the European Commission (EC) and other EU bodies in relation to cross-border and international issues that may arise. It would be prudent to make reference to this wider remit in the strategy.

53. Lastly, it is important for the OEP to have an understanding of the potential for interaction with other litigation when taking public authorities to court and reference to this should be made and carefully considered in the strategy.

54. Marine environmental law in particular gives rise to cross-border and international issues as well as trade: see e.g. the recent UKELA submissions on the UK Australia Free Trade Agreement<sup>2</sup>. The Strategy might leave open the idea of wider co-operation with the EC and other comparable international bodies.

55. It is unclear whether there may be the need for some form of relationship with the judiciary perhaps the planning court and other dispute resolution fora. This would be in the context of the OEP having notice of current and future env law disputes that may give rise to systemic failure of environmental law.

56. This section describes how we will act objectively and impartially and have regard to the need to act proportionately and transparently in delivering our functions.

#### **Q17 Do you have any comments on our approach to objectivity?**

57. It is important to public perception amongst others that the OEP always acts objectively. In order to make decisions on an objective basis it needs to be aware of the full facts of the case and therefore should seek out reliable and quality

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<sup>2</sup> Submissions on Trade and Agriculture Commission consultation on the UK-Australia Free Trade Agreement: Evidence 31.1.22 [to be published: [www.ukela.org](http://www.ukela.org)]

information in order to meet this requirement.

**Q18 Do you have any comments on our approach to impartiality?**

58. It is welcomed that the OEP will protect its independence of thinking and action in order to maintain impartiality. In order to be impartial it should always if seeking views of government ensure that it has also sought out and considered the views of the opposing side.

59. On page 33 of the Strategy, it is provided that the OEP will set develop a “framework document” with DEFRA, which will define the arrangements for the “working relationship” between the two of them. The OEP should be cautious when developing this framework document and secure that its provisions will not hinder the OEP’s impartiality. Additionally, the Strategy does not explain how this framework document will be achieved. We would suggest allowing the participation of civil society for the elaboration of this document.

**Q19. Do you have any comments on our approach to proportionality?**

60. We agree with the OEP’s Strategy in relation to how it intends to act proportionally in relation to its principal objective to contribute to the protection of the environment.

**Q20 Do you have any comments on our approach to transparency?**

61. We welcome that the OEP intends to regularly publish information about its work particularly in relation to the evidence it will use about its work and how it will prioritise as this is considered important in relation to acting in a transparent manner.

**Q21 Do you have other comments on our strategy?**

62. We consider that it would be helpful if the Strategy could be clear on how the OEP will engage with the public.

**Q22 Do you have any other comments on our enforcement policy**

63. There is some overlap in the Strategy and Enforcement policy in relation to the OEP's enforcement response which could be confusing. Both the Strategy and Enforcement documents should be clear and succinct in order for the OEP's aims and objectives to be clearly understood by all.

**Q23 Overall how satisfied are you that the strategy and enforcement policy provide a sound basis for the OEP to fulfil its remit?**

- Very Satisfied
- Satisfied
- **Neither satisfied nor dissatisfied**
- Dissatisfied
- Very dissatisfied

**Consultee feedback**

Thank you for taking your time to participate in this consultation. It would be appreciated if you could provide us with some feedback on your experience to help us improve.

Overall how satisfied are you with the process of completing this consultation?

- Very Satisfied
- Satisfied
- Neither satisfied nor dissatisfied
- Dissatisfied
- Very dissatisfied

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