



Countdown to Brexit Series

What should you be doing now?

**The third in our series of Countdown to Brexit -
A new Office for Environmental Protection: what does
Brexit have in store for environmental enforcement in the
UK?**

Introduction

Much of the UK's environmental law originates in the EU, and is currently enforced by the EU Commission, which has the power to bring a case against a member state in the European Court of Justice (the ECJ) to secure the implementation of EU environmental law domestically. If an EU member state does not comply with an ECJ ruling, it may be fined by the Court following a second referral from the Commission.

The UK Government has repeatedly assured the public and other stakeholders that Brexit will not result in the dilution of environmental protections in the UK. An essential part of fulfilling this assurance is providing an alternative enforcement body to step into the shoes of the EU Commission; the present proposal is the creation of the Office for Environment Protection (the OEP). Alison Ogle and David Monteith consider the implications the OEP's proposed investigative and enforcement powers will have for businesses and wider stakeholders.

Analysis

Much of the OEP's processes will not be set out until it publishes a 'strategy' specifying how it will operate. Until the strategy is available, uncertainty will remain over the OEP's interactions with other enforcement agencies, the devolved administrations, and existing statutory regimes, such as the planning system, which involve significant amounts of environmental law.

The current proposals do, however, crystallise some of the new powers the OEP will have to investigate and enforce breaches of environmental law. In particular, the OEP will have the power to carry out an 'independent review' of a public body's compliance with environmental law. This will see the OEP regulating the decisions of public bodies in a similar way to the Local Government Ombudsman at present.

Unlike the LGO, however, the OEP will be able to pursue judicial review actions against public bodies with extended powers, increased flexibility.

Firstly, in all UK jurisdictions, the OEP will have more generous time limits for commencing judicial review actions. It will have three months, from the deadline for a public authority to respond to the OEP's initial findings, to bring an action through the Courts. This could result in public bodies being at risk of court proceedings for well in excess of three months from the date the actual event complained of first occurred. It remains to be seen how this will fit with the drive in recent years to, for example, curtail the time limit within which planning decisions can be subjected to judicial review challenges.

Secondly, where the OEP brings an action in England and Wales the Court will have a wider discretion to impose sanctions or quash a decision. The Courts will not be restricted by the existing statutory provisions which require the refusal of any substantive remedy where the decision challenged would not be "substantially different" in any event.



These two changes mean that the OEP will not be hindered by mechanisms that are aimed at preventing judicial review being used academically or obstructively and ensuring cases are pursued in the shortest time possible. This increased flexibility will give the OEP greater freedom to hold public authorities to account.

The potential implications of this are wide reaching. The creation of the OEP may result in a new avenue for members of the public to enforce environmental claims (such as noise nuisance complaints) against businesses. In situations where a public authority refuses to issue an abatement notice, for example, a complaint to the OEP may result in a public authority being compelled to take action. This could result in businesses being subject to increased scrutiny and sanctions by public authorities. The same ramifications may face businesses currently regulated by the Environment Agency in England and the equivalent bodies in other parts of the UK with individuals using the OEP to address environmental permit breaches or illegal waste activities.

This is an area which deserves to be closely monitored as the proposals for the OEP, and indeed Brexit itself, develops over the coming months.



Contact



Alison Ogley, Partner
Planning & Environment
+44 (0)113 283 2669
alison.ogley@walkermorris.co.uk



David Monteith, Associate
Planning & Environment
+44 (0)113 283 4430
david.monteith@walkermorris.co.uk

