



## The enforcement provisions of the Environment Bill PLP Briefing for House of Lords Report Stage 06 September 2021

1. The proposed Environment Bill establishes a new Office for Environmental Protection (OEP), which will be responsible for oversight and enforcement of environmental law following the UK's departure from the European Union. Whilst Public Law Project ('PLP') welcomes the government's continued commitment to ensuring environmental protection, we share the concerns raised by others such as the [Bingham Centre for the Rule of Law](#) and [Greener UK](#) as to the adequacy of the enforcement mechanisms involved, particularly in respect to environmental review, and the resulting implications for the rule of law. We support **Amendments 27 and 28** for the following reasons.
2. If the OEP believes that a "serious" breach of environmental law has occurred, it can bring the public body responsible before the High Court via a new process, "environmental review", which is similar to, but separate from, traditional judicial review. If the court conducting environmental review finds a breach of environmental law, it must issue a so-called "statement of non-compliance".<sup>1</sup> Whilst public bodies are required to publish a response to any such statement, they are not required to undertake any substantive action, and a statement of non-compliance does not affect the validity of the impugned conduct in any way.<sup>2</sup> This is a toothless remedy.
3. The statement of non-compliance is not the only remedy available to courts conducting environmental review. However, as it stands the bill prohibits judges from issuing stronger remedies such as quashing orders (the norm in judicial review), where doing so would "be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority" or would otherwise be "detrimental to good administration".<sup>3</sup>
4. This approach stands in stark contrast to the discretion available to judges in judicial review. Whilst courts currently have discretion whether to grant a remedy, it is left to judges to decide whether this is appropriate based on all relevant circumstances,<sup>4</sup> and in any case, a quashing order is the normal remedy where a decision has been found to be unlawful.<sup>5</sup> Instead, in environmental review, judges will not be able to grant a remedy for the public

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<sup>1</sup> Clause 37(6) of the Bill

<sup>2</sup> Clause 37(7)

<sup>3</sup> Clause 37(8)

<sup>4</sup> Some relevant factors are listed at ClientEarth – [Environment Bill Advice](#), para 30.

<sup>5</sup> *R (Edwards) v Environment Agency* [2008] UKHL 22, [63].

authority's unlawful actions, if a third party (such as a developer) can show substantial prejudice or there would be administrative inconvenience. As *Greener UK* have pointed out, no adequate justification for this reversal of the normal presumption in favour of relief has been provided.<sup>6</sup>

5. Further, the circumstances that would lead to judges being unable to grant a remedy are unconscionably wide. It has been suggested, for example, that money spent on a project might qualify as a relevant detriment<sup>7</sup> and it is difficult to point to environmental actions, which do not, in some way, impact others. The circumstances in which judges may be required to refuse a remedy risk eviscerating the effectiveness of environmental review.
6. **PLP therefore supports Amendment 27**, which would go some way to limiting the weaknesses described above by removing the non-binding nature of statements of compliance and removing this fetter on judges' remedial discretion.
7. The environmental review procedure is said to compliment, rather than replace, existing judicial review safeguards. However, the proposed Bill allows the OEP to bring judicial review only when the so-called "urgency condition" is met.<sup>8</sup> As such, judicial review can only be brought when "it is necessary... in order to prevent or mitigate serious damage to the natural environment or to human health".<sup>9</sup> There is no good reason for this restriction; the OEP is an expert body and will be well placed to decide whether a judicial review should be brought. Taken together with the provisions limiting the effectiveness of environmental review, this restriction on the OEP's ability to use judicial review seriously undermines its ability to meet its principal objective of contributing to environmental protection through enforcement. **Amendment 28** removes the "urgency condition" and we support it.
8. Overall, PLP is concerned that the proposed environmental review procedure will inadequately protect the rule of law. Further, we do not think the proposed mechanisms will secure adequate environmental protection. We agree with the Bingham Centre for the Rule of Law that it has the potential to "radically alter the balance of power in favour of executive action, and against the environment, the courts and the citizen".<sup>10</sup>
9. PLP is concerned about this Bill, but also about the place it has in the government's wider plans for constitutional reform. The problems identified above foreshadow reforms to judicial review on which the Government has recently consulted. Judicial review and the new environmental review play an important role in ensuring that the executive complies with the law. As PLP said in its [response to the Government's judicial review consultation](#), proposals which restrict judges' discretion to grant a remedy or seek to immunise unlawful action from challenge risk undermining that role. **Amendments, 27 and 28** would go some way to ensuring that the new environmental review procedure enables the OEP to effectively hold government to account for compliance with environmental law.

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<sup>6</sup> Greener UK, [Environment Bill briefing for Lords Committee Days 3/4 OEP enforcement functions](#).

<sup>7</sup> Stephen Tromans QC and Gethin Thoman (39 Essex Chambers) for ClientEarth – [Environment Bill Advice](#), para 35.

<sup>8</sup> Clause 38(1)

<sup>9</sup> Clause 38(2)

<sup>10</sup> Bingham Centre for the Rule of Law, "[Environment Bill - Office for Environmental Protection: A Rule of Law Analysis](#)", p.10.