

## ENVIRONMENT ACT 2021: TWO POINTS TO WATCH

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### Introduction

The [Environment Act 2021](#) has been described as historic and world-leading. It also led to sewerage footage going viral. But what should we watch out for now?

By way of overview, the Act serves to fill the 'environmental governance gap' left as a result of the UK leaving the EU. It facilitates the setting of long-term environmental targets and oversight of their progress. As a result, the Act has broad application, covering matters such as environmental targets and improvement plans, waste and resource efficiency, air quality, water, sewage and land drainage, biodiversity and conservation covenants.

This article highlights two key points to watch out for:

1. **New watchdog:** The Office for Environmental Protection (OEP) and its enforcement powers for public authorities.
2. **Planning permission:** This will in most cases be subject to meeting biodiversity aims.

### New Watchdog:

#### Office for Environmental Protection (OEP)

The OEP is a body corporate created by Part 1. Its principal objective in exercising its functions is to contribute to environmental protection and the improvement of the natural environment. It must act objectively and impartially, and *have regard to the need to act proportionately and transparently*. It must prepare a strategy setting out how it intends to exercise its functions, including an enforcement policy. However, the Secretary of State may issue guidance to it, and it must have regard to that guidance.

It strikes us that the guidance that is to be issued could be of considerable and fundamental importance to how the legislation operates; which we may return to once we know the contents.

Headline points include:

- **Duty to co-operate (s.27):** Persons whose functions include functions of a public nature must co-operate with the OEP and give it such reasonable assistance as it requests (s.27). There are exceptions, e.g. for the devolved legislatures, courts and the Houses of Parliament.
- **Information notices (s.35):** If the OEP has reasonable grounds for suspecting a public authority has failed to comply with environmental law and considers that the failure, if it occurred, would be serious, it *may* give the authority an information notice. The authority is required to respond in writing within 2 months, setting out any steps it intends to take and so far as is reasonably practicable, providing the requested information. A public authority means most persons carrying out any functions of a public nature (s.31(3)).
- **Decision notices (s.36):** The OEP *may* give a public authority a decision notice and set out steps it considers should be taken, if satisfied there has been a serious failure to comply with environmental law. The recipient must respond within 2 months.
- **Environmental review (s.38):** Where the OEP has issued a decision notice, it may also apply to the High Court for environmental review. An environmental review is a review of alleged conduct that is described in the decision notice as constituting a failure to comply with environmental law. If the Court finds the authority has failed to comply with environmental law, it must make a *statement of non-compliance* and may grant certain remedies. The authority must within 2 months publish a statement setting out the steps it intends to take.
- **Judicial review in urgent cases (s.39):** Where the OEP considers a public authority has seriously failed to comply with environmental law, *and the urgency condition is met*, it may apply for judicial review or statutory review. The urgency condition is that it is necessary to prevent or mitigate serious damage to the natural environment or to human health. If the Court finds the authority has failed to comply with environmental law, the authority must within 2 months publish a statement setting out the steps it intends to take.

## Planning permission:

### Subject to meeting biodiversity aims

Headline points include:

- **Town and Country Planning Act 1990 (s.90A and schedule 7A):** These new additions make most developments under the 1990 Act subject to a condition to secure that the *biodiversity gain objective* is met. However, there are exceptions for development orders, urgent Crown developments and other developments to be specified by the Secretary of State in regulations. It will be interesting to see whether a specific exception is made for the Government's 'Freeports' that are intended to be hives of activity subject to a simplified planning process.
- **Biodiversity gain objective:** The *biodiversity gain objective* would be met where there is at least a 10% increase in biodiversity after development. The Secretary sets the metric for measuring biodiversity values and may amend the relevant percentage, so there is flexibility, allowing it to be revised from time to time. [DEFRA](#) currently refer to the biodiversity metric 3.0 published [here](#).
- **Planning Act 2008 (s.103(1A), 104(3)(3A)(3B), 105(3)(4) and schedule 2A):** These new additions make similar provision for development consent orders for nationally significant infrastructure projects. Where there is a *biodiversity gain statement* in any relevant national policy statement, the Secretary of State may not grant an application unless satisfied that it is met by the development. However, certain developments may be excluded by regulations made by the Secretary of State.
- **Biodiversity gain statement:** This is a statement of government policy in relation to the biodiversity gain to be achieved in connection with certain developments. It *must* set out a biodiversity gain objective of at least 10% and *may* specify how particular developments must meet the objective. The Secretary of State similarly sets the metric for measuring biodiversity values and may amend the relevant percentage.

These provisions give added statutory status to existing policy provisions, such as:

- The NPPF ( ¶170(d)) statement that planning policies and decisions should provide net gains for biodiversity; and
- The London Plan policy G6 statement that development proposals should aim to secure net biodiversity gain.

The primary legislation provides the potential for wiggle room. For example, it is possible that exceptions to the need to meet the biodiversity gain objective could be made on grounds of viability. Therefore, secondary legislation from the Secretary of State is likely to be particularly important and will no doubt be eagerly anticipated.

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