

Board Paper

Date

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Title

Judicial review interventions – policy and guidance

Report Author

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Paper for decision

Open paper

Issue

1. The OEP has powers to intervene in judicial and statutory review proceedings, conferred by section 39 and Schedule 3(13) of the Environment Act 2021 (“the Act”). At its 28 June 2023 meeting, the Board noted the need to document an approach to interventions to ensure consistent and efficient decision making. This paper sets out a proposed approach.

Recommendation

2. The Board is recommended to:
 - a. note and comment on the proposed approach for adopting the guidance (paragraphs 3 to 15)
 - b. note that updates to the Non-Financial Scheme of Delegation (NFSoD) will be desirable to improve clarity and that it is proposed this be done when the Board next revisits NFSoD more generally
 - c. adopt the intervention guidance documents (Annexes A and B).

Background

3. Section 39 of the Act confers powers on the OEP to intervene in judicial and statutory review proceedings in the following terms:
 - “(6) Subsection (7) applies to proceedings (including any appeal) that—*
 - (a) are in respect of an application for judicial review or a statutory review, and*
 - (b) relate to an alleged failure by a public authority to comply with environmental law (however the allegation is framed in those proceedings).*
 - (7) If the OEP considers that the alleged failure, if it occurred, would be serious, it may apply to intervene in the proceedings (whether it considers that the public authority has, or has not, failed to comply with environmental law).”*
4. Similar powers to intervene in judicial review proceedings in Northern Ireland are set out at Schedule 3, paragraph 13 of the Act.
5. To date, we have only intervened in one case (*R (Finch) v Surrey County Council* in the Supreme Court (not yet determined)). We do however anticipate that there will be an increasing number of judicial and statutory review claims in which we might have an interest in intervening. Members of the legal team have, for example, been approached by stakeholders who have alerted us to ongoing cases, or even directly asked that the OEP consider intervening in a particular case. *This section has been redacted as it relates to information recorded for the purposes of OEP’s functions relating to investigations and enforcement.*
6. In light of this, we consider that the adoption of guidance governing how the legal team, and subsequently the Board, should approach decisions whether to intervene would be sensible. To that end, we have drafted the documents annexed to this paper.

Analysis

7. As indicated above, we consider the adoption of guidance for the legal team as to the exercise of the section 39 and schedule 13(3) powers, for use in determining which decisions need to be taken by the Board and in advising the Board, to be necessary for the efficient and consistent implementation of those powers.
8. The Board has delegated authority to adopt guidance to Grade 6 employees (NFSOD para 6.3). However, in this instance we consider that it is desirable for the Board to approve these guidance documents. This is because it is the Board that must ultimately take any positive decision to apply to intervene in a judicial or statutory review: see schedule 1(10) of the Act.
9. The proposed guidance documents are appended to this paper. **Annex A** is the full internal guidance document on interventions (the “Internal Guidance”). We propose that this document be used by the legal team on a case-by-case basis to determine whether the OEP has the power to intervene in a particular case and, if it does, whether we should recommend that the Board *should* decide to apply to intervene in the case. The considerations set out in the Internal Guidance are modelled on the decision-making framework set out in the OEP’s

Enforcement Policy.¹ The Internal Guidance adds to that framework, drawing out important considerations and legal principles that are relevant specifically to a decision whether to apply to intervene. We draw particular attention to paragraph 7 of the Internal Guidance which states: *If the OEP is invited to intervene in a case by the court, we will therefore normally do so unless there is a good reason not to intervene.* This provides discretion to the Board to decide not to intervene in a case where we have been requested to do so by the court, but only where there is good reason to refuse the request. This is in order to ensure that we are courteous to the court. In practice, we anticipate that it will be rare for the court to invite the OEP to intervene in a case.

10. The annexes to the Internal Guidance also set out important information on the correct procedure to be followed if a decision to apply to intervene is taken. We have prepared an internal decision-making template for use by the legal team in individual cases.
11. **Annex B** is a summary of the Internal Guidance, which we propose should be published on the OEP's website for use by stakeholders and those interested in asking the OEP to intervene in a particular case ("the External Guidance"). This will ensure transparency, as well as helping to guide any representations made by stakeholders so that they are focused and useful to the OEP's decisions whether to intervene in particular cases. We are proposing a summary document for external use, rather than publication of the full Internal Guidance, as that it is more user-friendly and excludes information that is designed for use by internal lawyers only. Intervention decisions will need to be taken consistently with the published External Guidance.
12. If the Board approves the External Guidance, we intend to accompany it with brief wording on the website to introduce the concept of interventions and link to the guidance. We would direct individuals interested in bringing a case to the OEP's attention to email the enquiries email address.
13. We consider that the documents as a whole provide a comprehensive set of guidelines for how the OEP should take decisions over whether to intervene in claims. Our view is therefore that by adopting the various guidance documents, we will improve the efficiency and consistency with which such decisions are taken.
14. The Board should note that adopting the guidance documents may require changes to the NFSoD. We suggest making these changes when the Board next reviews NFSoD (and bearing in mind we expect to shortly make proposals for other changes to delegations).
15. Currently the NFSoD only expressly delegates steps "*arising in the conduct of environmental reviews, review applications, judicial reviews and statutory reviews...brought by the OEP*" (paragraph 5.20; emphasis added). The delegation does not therefore explicitly cover steps taken in the course of judicial and/or statutory reviews brought by *other* parties in which the OEP wishes to intervene. We will therefore propose that NFSoD be amended to accommodate interventions. We also recommend NFSoD is amended to provide that the legal team decides whether to recommend intervention to the Board (therefore having

¹ The power to intervene is one of the OEP's "enforcement functions" as defined by section 25(3) of the Act.

authority to decide not to intervene in some cases). This is intended to ensure efficient decision-making and avoid over-burdening the Board. We would, however, periodically report such decisions to the Board.

Northern Ireland

16. As set out in the draft guidance documents, the principles to be applied when deciding whether to intervene in judicial review claims are similar in Northern Ireland to those applicable in England. There are procedural considerations specific to Northern Ireland, which are explained in Annex 2 to the Internal Guidance.

Finance and Resource

17. We have already obtained external legal advice on the draft guidance documents, costing approximately £4,500.
18. Dealing with requests to intervene will inevitably take up some legal resource. Adopting the guidance documents will however reduce the time that is needed to deal with each individual request.

Impact Assessments

Risk Assessment

19. The risks to the OEP of adopting the intervention guidance documents is low overall. *This section has been redacted as it contains legally privileged advice.*
20. The risk of not adopting the intervention guidance documents is that we will lack a clear, transparent process by which to ensure consistent decision making that considers the specific factors relevant to whether the OEP should apply to intervene in a specific case. Currently we follow our Enforcement Policy and the relevant prioritisation criteria applicable to all decisions, but we do not have any formal way of expressing how we will consider individual decisions whether to intervene. The intervention guidance documents seek to address that gap and improve the efficiency with which we consider individual requests for the OEP to consider intervening in cases. We expect the number of such requests to increase over time. The intervention guidance documents should help to ensure that the requests we receive are more focused as the approach we take will be transparent to interested stakeholders.

Equality Analysis

21. We have considered our duty under section 149 of the Equality Act 2010. No material equality impacts or considerations have been identified.

Environmental Analysis

22. The documents are intended to facilitate the OEP's achievement of its strategic objectives by ensuring that decisions are taken in an efficient way, consistent with our Strategy and Enforcement Policy. The factors that we recommend be taken into account are consistent

with our general duties under environmental law, and we will take our duties into account as relevant in individual cases.

Implementation Timescale

- 23. If the Board adopts the guidance, we intend to disseminate the Internal Guidance to the legal team as soon as possible and follow it in relation to any future decisions relating to interventions.
- 24. The External Guidance will be published at the same time as our revised strategy and enforcement policy later this year. We can therefore alert relevant stakeholders to the existence of the interventions guidance during the consultation process before it is published.

Communications

- 25. We will update the OEP website to include the External Guidance. We will not actively promulgate the External Guidance, but we will inform stakeholders of its existence through relevant routine engagement and as part of our strategy revision.

External Stakeholders

- 26. We have not consulted external stakeholders in preparing the guidance documents. We will inform stakeholders of the guidance during the wider consultation on the revised strategy and enforcement policy and will let key stakeholders know when the guidance documents are published.

Paper to be published	<p style="text-align: center;">YES (in part)</p> <p style="text-align: center;">References to legal advice / risk to be redacted to maintain legal privilege. Annex C should not be published for the same reason. (FOIA s.42)</p> <p style="text-align: center;">References to the OEP considering a possible intervention should also be redacted (FOIA s.36)</p>
Publication date (if relevant)	When the External Guidance is published (if this is after the date on which Board minutes are published)

ANNEXES LIST

Annex A – *This section has been redacted as it contains legally privileged advice.*

Annex B – *This section has been redacted as it contains information available elsewhere.*

Annex C – *This section has been redacted as it contains legally privileged advice.*