

Consultation response: Office for Environmental Protection Strategy and Enforcement Policy



26 September 2024

Legislation and
Governance Unit

Green Alliance welcomes the opportunity to respond to this consultation. The Office for Environmental Protection (OEP) is one of the cornerstones of our new national environmental governance systems in England and Northern Ireland and its strategy and enforcement policy are of significant public interest.

We greatly appreciate the work the OEP has done in the first strategy period and the spirit in which it has pursued its mission. The OEP is an exemplar of evidence-led oversight, which, combined with its professional and expert staff and inspiring leadership, provides a radiant beacon for public service and accountability.

Section 1: who we are

We welcome this section which describes the OEP's role and recognises the importance of its independence. We query why the [existing strategy](#) used the helpful term "oversight body" to describe the OEP (Chair's foreword, page 5) whereas the revised strategy does not.

OEP publications occasionally use language that could be read to suggest that the OEP is a regulator, which it is not. For example, the term "primary regulators" in section 4.2 of the consultation document and "...other regulators" on page 2 of the [annual whistleblowing report](#) for the period ending 1 April 2024 could be misleading to those unfamiliar with the OEP.

Strategic objective 1: accountability on delivery of government environmental goals, targets and improvement plans

This strategic objective sits at the heart of the OEP's work. One of the proposed measures of success is that the OEP's annual reports will be recognised as definitive assessments of progress by Parliament, the Northern Ireland Assembly and others. This is welcome but there are some potential factors which may affect this.

The first is the reporting lag between the publication of the OEP's annual progress report on environmental improvement, the government's response to the OEP's progress report and the government's own assessment of progress. While the statutory reporting cycle is set out in the Environment Act 2021 and cannot be changed easily, it does allow for some flexibility. We encourage the OEP and Defra to agree a more logical publication sequence.

18th Floor Millbank Tower
21-24 Millbank
London SW1P 4QP

020 7233 7433

ga@green-alliance.org.uk

www.green-alliance.org.uk
[@GreenAllianceUK](https://twitter.com/GreenAllianceUK)

The Green Alliance Trust
Registered charity no. 1045395
Company limited by guarantee
(England and Wales) no. 303763

Leadership
for the environment

The second is the inconsistent format between the assessment reports published by the government and the OEP. While the OEP's processes and reports must of course remain wholly independent of the government's, a more consistent format would help external stakeholders, including parliamentarians and Assembly members, better understand where progress is on track and where there are failures or gaps.

Section 2.5: organisational excellence and influence

We note that one of the proposed success factors on organisational influence is "When we speak, those we are speaking to will hear and understand what we say". We suggest this is slightly amended to "When we speak, those we are speaking to will hear, ~~and understand~~ **and act on** what we say".

Section 3.5: values

We strongly support the OEP's values which are what we would expect and which we recognise from our interactions with it. The independence value is especially important and one that matters greatly to external stakeholders as it was a principle on which we engaged extensively during the development of the OEP's founding legislation and the set-up of the body itself.

The revised strategy states that the OEP will "protect the independence of our thinking and action, careful to avoid undue influence from any individual or organisation".

In 2021, the OEP Chair Dame Glenys Stacey said in a [speech](#) to the Aldersgate group that "Although OEP must be independent, it must not be detached, or remote. From day one, we must not just engage, but really listen. In my view we will be most effective if we form strong relationships not just with those we hold to account, but also wider stakeholders."

The careful balance articulated by Dame Glenys should continue to guide the OEP's approach to engagement to enable it to access scientific data and evidence held by external stakeholders, including civil society organisations, and to share relevant insights and perspectives.

Section 3.6: working across Northern Ireland and England

The draft strategy recognises that the suspension of the Northern Ireland Assembly until February 2024 delayed the implementation by DAERA of the environmental governance mandated by the Environment Act 2021 and that this impacted the OEP's scrutiny and reporting functions in Northern Ireland.

We would go further and suggest that this resulted in the OEP being unable to discharge its legal functions, which, in turn, had a seriously detrimental impact on environmental governance and accountability and limited its bi-jurisdictional operational effectiveness.

Without a published environmental improvement plan and environmental principles policy statement, the OEP was an isolated element of the new governance system in Northern Ireland. While it appears that progress on the missing components may at last be nearing, we question whether the OEP's strategy of not deploying its enforcement powers to hasten action was commensurate with the seriousness of the breach, its wider impacts and the ongoing delays and lack of firm timescales to address them.

We suggest that the new OEP strategy adopts contingency measures in case similar suspensions occur again. Non-environmental policy decisions were able to progress in the absence of a functioning Executive; we suggest that, as a minimum, assurance is sought from the Executive that this flexibility would extend to environmental policies in any future political hiatus.

The draft strategy notes that the OEP's board members are appointed to have specific expertise relevant to its work in England and Northern Ireland. Board members have had varying degrees of interaction with stakeholders with some chairing and attending meetings and discussions, and others less obviously interacting with external stakeholders. We suggest it would be helpful for board member responsibilities to be published on the OEP website and for each board member to be provided with opportunities to engage with relevant stakeholders as part of their governance role.

Section 3.7: the duty of co-operation

This section outlines the duty of co-operation placed on public authorities and the OEP's expectations for how it should be applied. It does not, however, include any assessment of how the duty has worked to date.

While the details of its operation are rightly reserved for direct dialogue between the OEP and public authorities, there have been issues. These have impacted on the OEP's ability to conduct its functions in a timely and effective manner but have also affected the public's experience of seeking to remedy potential breaches of environmental law.

OEP Chair Dame Glenys Stacey raised concerns in her [oral evidence](#) to the Environmental Audit Committee on 21 February 2024. In response to Q48, she referred to "rubbing points" and the fact that it can take a long time, sometimes almost two years, to get information about a matter of complaint. She also highlighted the view at that time of some public authorities that the OEP is not entitled to information if it is not already in the public domain.

While it appears that the new government is adopting a more positive interpretation of this duty, that is no bellwether for how future governments might choose to behave. We suggest that the duty of co-operation is reviewed during the period of the new strategy so that any lessons learned might be included in the post-legislative scrutiny of the Environment Act 2021 anticipated to commence in the current parliamentary session.

We note the strategy references engagement with the European Commission in relation to transboundary issues affecting Northern Ireland (section 3.8).

We suggest that, given the likely role of the OEP as a supervisory body under Article 395 of the Trade and Cooperation Agreement, the strategy should recognise that engagement with the Commission would need to extend beyond Northern Ireland matters given the requirement to “regularly meet with each other and co-operate on the effective monitoring and enforcement of the law with regard to environment and climate”.

Section 4.1: complaints

We support the overall approach taken to complaints. The OEP’s complaints function provides an important public service as it enables members of the public and civil society organisations to raise concerns about and seek remedies to potential breaches of environmental law by public authorities.

Ongoing experience of the complaints function has revealed a strategic issue that we suggest should be addressed by the OEP in the next strategy period. The [legal requirement](#) for complainants to exhaust a public authority’s internal complaints procedure before complaining to the OEP is a significant barrier to accessing environmental justice. The OEP’s complaints reports highlight this as the most common reason why complaints are not progressed.

We experienced this in respect of a complaint we submitted on which the public authority disputed whether its internal complaints process had been exhausted and whether our complaint could therefore be classified as eligible. This is despite our complaint being made in accordance with the public authority’s published guidance on how to submit a complaint.

A continued lack of clarity may either deter potential complainants from submitting a complaint or cause the investigation of their complaint to be delayed because of a contested view on the procedure. This presents a formidable barrier to those seeking to access to both the OEP complaints system and to remedying potential breaches of environmental law.

In its complaints handling during the current strategy period, the OEP has proactively engaged with complainants, for example by providing an eligibility checker, FAQs and signposting advice and meeting stakeholders and responding positively to feedback.

We suggest that in the next strategy period, the OEP should work more proactively with public authorities and publish an audit of whether their complaints procedures are publicly available, clear and capable of being completed swiftly. This fits well with the expectation expressed on page 29 of the draft strategy (“We expect the wider community of public authorities to learn from the matters we progress to better protect and improve the environment through their own compliance with the law.”).

We also suggest that it may be helpful to survey those who have accessed the complaints system so that their experience and reflections can inform the ongoing evolution of the system and its component parts.

Section 4.4: scrutinising environmental law

The OEP's monitoring environmental law function is one of the most versatile and impactful tools at its disposal. It has been used to produce expert reports through deep insight and evidence gathering, often on subjects that have lacked comprehensive, independent analysis such as the implementation of the Water Framework Directive regulations. The depth of these assessments is admirable but does limit how many laws can be assessed. We encourage the OEP to consider whether a slight rebalancing would be beneficial so that more reviews can be undertaken. We suggest that the next strategy could usefully allocate more resource and capacity for rapid assessments to inform policy development in a timely manner.

Section 4.5: advising government

We note that Defra recently issued a formal [advice request](#) to the OEP in respect of the Environmental Improvement Plan. This has provided helpful advice at the start of the rapid review of the plan. It also suggests a more constructive approach from the government in which the OEP's advice will be sought and heeded rather than [ignored](#). This is welcome, but should advice requests from the government grow significantly, this may present a strategic challenge for the OEP in relation to the overall balance of its work.

Enforcement policy

We support the enforcement policy and the OEP's use of it to date, notably the [intervention](#) in the Finch case, which the Supreme Court judges "found particularly helpful", the six live investigations into a range of issues and the [threat of legal action](#) which prompted DAERA to confirm that the Northern Ireland Environment Agency would no longer rely upon the Operational Protocol when advising planning authorities.

However, we note that the bespoke enforcement system of environmental review has not been tested to the fullest degree, with some investigations taking an unacceptably long time to progress, for example a [complaint](#) against the Environment Agency for its failure to monitor and enforce environmental protections on nitrogen pollution.

The next strategy period must address these issues, with anticipated complaint timescales communicated clearly to complainants and public authorities and remedial action taken to address any extended delays. If the environmental review system is not fully accessed, some may question whether it is needed, which would be regrettable.

We support the development of criteria to guide the OEP's decisions on whether to intervene in judicial or statutory reviews brought by other parties.

For more information, contact:

Ruth Chambers, senior fellow

rchambers@green-alliance.org.uk