



Office for Environmental Protection Consultation: Draft Strategy and Enforcement Policy

Written submission of the Institution of Environmental Sciences (IES), March 2022

Question 1. Do you have any comments on Section 2.2 of our strategy (Sustained environmental improvement)?

The commitment to holding the Government to account for the delivery of environmental objectives is positive, though the Strategy should set out more proactive steps to ensure that the objective is achieved. Currently, the approach to ensuring sustained environmental improvement is broadly passive, with a degree of reliance on identifying gaps to be actioned elsewhere.

For example, although section 2.2 sets out a process for setting recommendations and identifying gaps in monitoring, the current scope for steps beyond recommendation or identification are limited to enforcement, exclusively in cases of “serious failures to comply with the law that undermine environmental improvement”. Where public authorities do not sufficiently act on the recommendations of the OEP, the current Strategy is limited in its approach to holding the Government to account. This is particularly concerning as the situations where it will be most important for the OEP as an independent body to hold the Government to account will be those where the Government is intentionally not sufficiently meeting environmental goals, targets, and plans.

The Strategy should provide greater clarity about how the OEP will work to ensure its recommendations are recognised and acted upon by public authorities, going beyond ‘problem identification’ to providing meaningful independent accountability. Our responses to question 15 and question 16 address the Strategy’s intended solution to this challenge in greater detail.

Question 2. Do you have any comments on Section 2.3 of our strategy (Better environmental law, better implemented)?

Section 2.3 sets out a broadly positive approach to tackling crucial questions of implementation which will often underpin the success or failure of interventions through environmental law. In that context, the section could be further improved with increased clarity on the process under which future environmental law will be improved and better implemented.

While Strategic Objective 2 outlines the ambition to improve design and implementation of environmental laws, section 2.3 does not sufficiently set out actions to significantly influence the design stage. The primary means of delivery on this objective are through scrutiny, advice, recommendations and monitoring, which are unlikely to directly change the process of policy design. For example, while this section correctly identifies the importance of “the



wider context and framework in which the law is applied in practice”, this section does not sufficiently outline how the OEP will influence those factors at the point of intervention.

The Strategy could be improved by more explicitly identifying the means by which OEP interventions will improve the design process (and how the OEP intends to manage its engagement during the design stage to result in better environmental law and better implementation of that law). While there is some indication of the priorities of the OEP for engagement on a broad category of implementation issues, the Strategy should explicitly outline the OEP’s Strategy for achieving progress on those issues.

It is positive that the Strategy notes that the OEP “may also make recommendations where legislative, policy or other gaps or barriers limit the effectiveness of environmental law”. Further clarity would be welcomed on when the OEP will take this step, how these barriers will be identified, and whether the process of identifying gaps will be continuous or intermittent.

Question 3. Do you have any comments on section 2.4 of our strategy (Improved compliance with environmental law)?

Section 2.4 sets out a reasonable approach to tackling complex compliance issues within the context of the OEP’s limited resources. While it is understandable that the OEP’s capacity will be limited and that some inevitable prioritisation will be necessary, it is concerning that, from this early stage, the Strategy already appears to make concessions on the likelihood that serious cases of failure to comply with environmental law will be inevitable.

Where section 2.4 states that the OEP will “identify, address and resolve serious failures in public authorities’ compliance with environmental law in prioritised cases”, it implies that some instances of serious failures in compliance will not be identified, addressed, and resolved.

If this is not yet an inevitability, the OEP should be more ambitious in this initial Strategy, rather than conceding at this early stage that some serious failures will not be addressed. At the strategic level, there is a difficult compromise between the ambitious pursuit of the OEP’s principal objective and the realism of what it is likely to be able to achieve on compliance issues. The OEP will be able to adjust to difficult realities as its work progresses, though it will only have a single opportunity to set the tone for its ambitions for compliance, so that balance should be struck slightly more ambitiously than it is under the current wording of the Strategy. The Strategy also takes significant steps elsewhere to set expectations for delivery and to clarify its limited resources.

In terms of the specific approach to compliance, the one presented in the Strategy is positive. In particular, the intention in cases “to determine if the public authority has complied with the law, and if it has not, to establish what it should do to correct the failure” offers an approach which has the potential to right environmental wrongs and correct for environmental harms. It should be noted that the success of this approach will rely on the



ability of the OEP to meaningfully encourage public authorities to take on the recommendations of the OEP for correcting their failure.

Question 4. Do you have any comments on section 2.5 of our strategy (Organisational excellence and influence)?

The Strategy's commitments to attracting and retaining a high-quality workforce are commendable. Following from this commitment, it would be prudent for the OEP to outline how it will effectively learn from recent staffing failures at environmental arms-length bodies. Understandably, section 2.5 does not provide details of how past failures will be prevented at a strategic level, though further reflections elsewhere would support confidence in the OEP and may be a strong opportunity to promote the OEP's commitments.

As outlined previously, the initial capacity and resourcing of the OEP will be crucial to the success of the Strategy, so it is helpful that this section commits to "review [the OEP's] effectiveness and the resources needed to deliver this strategy" within the OEP's first year. Section 2.5 would benefit from slightly greater clarity on the extent of that review, and in particular whether it will be purely internal or if it will involve external stakeholders and the Government.

The OEP's commitment to independence, demonstrated throughout the Strategy, could be strengthened by making two statements more explicit. Firstly, section 2.5 states that the OEP "will draw on specialist support and economies of scale from across government where these are most effective and efficient", and secondly it raises the option of "short-term secondments, expert panels and evidence commissions". These are both appropriate options to utilise to ensure an efficient and effective OEP.

In that context, the OEP's goal of independence would be strengthened by explicitly clarifying how the OEP intends to fully maintain its independence while making use of these options. For example, taking secondments or specialist support from a particular government department could bring implicit modes of thinking or assumptions which could limit the integrity and independence of the OEP in certain scenarios.

Question 5. Do you have any comments on whether our four strategic objectives will lead us to pursue our principal objective and achieve our mission?

The four strategic objectives set out in the Strategy are sound principles to support the OEP in achieving its principal objective. In practice, the strategic objectives may be limited in their ability to lead the OEP to achieving its principal objective and mission.

While the first of the four objectives is sustained environmental improvement, the four objectives are most explicit when dealing with reactive approaches to the environment. This may not be sufficient to achieve the OEP's mission, which will rely on the ability to secure progress towards environmental improvement and protect against harm, rather than solely responding to harm once it has taken place. Whilst this challenge is, to some extent, unavoidable, acknowledging the challenge within these strategic objectives would



demonstrate the OEP's commitment to the principal objective in full, rather than only in reactive situations.

The success of the objectives is also reliant on overcoming the challenges linked to achieving impacts, as outlined in response to questions 1, 2, and 3. Further details are also provided in our response to question 21.

Question 6. Do you have any comments on our approach to prioritisation?

It is positive that the OEP explicitly outlines its approach to prioritisation in both the Strategy and the Enforcement Policy, as this will be crucial to delivering the principal objective of the OEP. There are nuances which the Strategy should capture to ensure that the approach to prioritisation is sufficiently clear.

Currently, the second principle underpinning the OEP's response, specifically to prioritise "by judgement, supported by the evidence available at the time", should provide greater clarity on the nature of the evidence which will be considered. To understand how effectively the OEP will be able to hold public authorities to account on environmental issues, it will be necessary to understand what evidence the OEP will view as being "available".

The process of collecting, assessing, and reviewing that evidence will make a considerable difference in whether or not the correct issues are prioritised by the OEP. In particular, on topics where there are not systematic reviews of existing evidence, it will be important to understand how the OEP will manage the trade-off between different issues where evidence is less readily-available.

There are also different interpretations of what constitutes "evidence", so slightly greater clarity is required on the nature of that evidence to ensure that decisions are being made appropriately. While a broad category of evidence will be relevant and necessary to sound prioritisation, consideration of evidence cannot be so widely interpreted that in practice it leads to the exclusion of scientific data in favour of other sources. The Strategy should therefore reflect that, where possible, scientific data will be utilised in evidence-based approaches to prioritisation.

Question 7. Do you have any comments on our approach to determining whether a failure is serious?

The Strategy's current approach to determining the seriousness of a failure is broadly positive and could represent significant progress to dealing with the most serious causes of environmental harm.

While it is important that a range of factors are considered while determining whether or not a failure is serious, it will be important to ensure that the scale of environmental harm remains a primary consideration at all times. If the principal objective of the OEP is to contribute to protection of the environment, with seriousness playing a pivotal role in the OEP's prioritisation, it will be necessary to ensure a strong correlation between the failures



which are considered to be serious and those which pose the greatest challenge to environmental protection.

For example, the current approach to determining seriousness might deem a situation where a public authority is routinely failing, with a history of poor compliance and a contentious legal situation to be more serious than a failure where the extent of environmental harm is greater. In the context of the OEP's limited resources and the need for prioritisation, the current approach may lead to conflicts between protecting against the greatest extent of harm and tackling the 'most serious' issues.

Whilst it will be difficult to ensure balance between these factors, the current approach does not sufficiently prioritise environmental protection. It may also be prudent to ensure that the Enforcement Policy's commitment to assessing matters collectively extends to ensuring that the most serious environmental harms are effectively protected against, even if those harms are not individually considered to be the most serious failures by the approach (for example, when the public authority's conduct makes less extreme environmental harms a higher priority).

Question 8. Do you have any comments on our approach to determining whether damage is serious?

It will be important to ensure that the effects of policies on natural systems are routinely considered in full. Both the Strategy and the Enforcement Policy rightly recognise the importance of natural systems across multiple scales, including the effects of "common, cumulative and related issues or opportunities", however the approach to determining the seriousness of harm does not reflect that recognition in a sufficiently explicit manner.

The Strategy implies that these considerations may be evaluated as part of the approach to the seriousness of environmental harm. However, the approach should more explicitly recognise not only the potential of a serious harm to affect natural systems, but also the impact of less individually-serious harms on a given natural system, which may lead to multiple failures cumulatively increasing pressures on systems to the point that they become serious. The specific nuance which needs to be captured is that serious harm can be caused cumulatively, even if its causes are not themselves serious harms.

Question 9. Do you have any other comments on our approach to enforcement?

Comments on enforcement are reflected in the response to questions 7 and 8, as well as in response to question 21.

Question 10. Do you have any comments on our approach to balancing our activities between monitoring overall progress and monitoring selected areas in more detail?

The Strategy's commitment to a scheduled programme of assessments and research is positive and will help to coordinate wider efforts at scrutiny and monitoring, while also providing certainty for professionals working to research gaps in monitoring. As the Strategy



identifies, many of these individuals and organisations will be crucial to effectively monitoring progress.

However, the Strategy is not sufficiently clear how it will prioritise between in-detail monitoring and monitoring of overall progress, and does not clarify the extent to which it is anticipated that it will be necessary to balance between them. To a large extent, the capacity of the OEP to engage in effective monitoring and scrutiny will depend on its ability to mobilise data and make holistic assessments, which is addressed in response to question 11.

Question 11. Do you have any other comments on our approach to scrutinising EIPs and targets?

The Strategy's commitment to a system-wide approach to environmental harms in section 3.5 is positive and will be crucial to ensuring that the limited capacity of the OEP is correctly prioritised. Naturally, this applies directly to the context of monitoring, which is reliant on having adequate data to make assessments about complex holistic pressures on natural systems. To that end, further clarity is needed on the means by which monitoring will be achieved in the face of data gaps, either in the Strategy or in subsequent OEP policy.

The Strategy identifies that "where monitoring progress is constrained by the accessibility or quality of data and information we will say so, and work with others to improve it". This commitment correctly recognises that the ability of the OEP to effectively monitor across systems will rely on engaging with others. To that end, the Strategy should explicitly identify the types of organisation it will work with and the means by which it will do so. Although section 3.8 sets out the general approach of the OEP to working with others, it does not fully identify the scope of engagement needed to fill gaps in evidence across a complex and interconnected range of natural systems.

Section 3.5 should more explicitly identify the means by which the OEP will facilitate engagement with the broad array of stakeholders needed to fill data gaps. Whilst it is correct not to set too prescriptive an approach in the Strategy itself, more clarity will be necessary to ensure that the OEP is positioned to routinely engage with relevant organisations to fill data gaps and provide evidence of progress against areas under the EIP where the OEP is unable to do so itself.

Question 12. To what extent do you agree with our interpretation of how we will scrutinise the implementation of environmental law?

The Strategy's interpretation is broadly positive and will help to address many of the barriers to effectively achieving the outcomes sought by environmental law. To some extent, a broad interpretation will always be important to ensuring that environmental law represents in implementation that which was intended in design. Scrutiny of implementation should, at the fundamental level, be calculated to ensure that environmental law has been put into effect as desired.



To that end, a maximal interpretation of scrutinising implementation is the preferable option. The OEP's approach to prioritisation should help to manage the effects of any marginal broadening of the definition. In that context, while the interpretation of the OEP's role in scrutinising implementation is positive, there are specific challenges which the Strategy should acknowledge, which are set out in more detail in response to question 21.

Question 13. Are there any other approaches to scrutinising the implementation of environmental law you think we should consider?

As outlined in response to question 12, the OEP should make use of any approaches as necessary to ensure effective scrutiny. In particular, where it is appropriate, the OEP should consider working with practitioners and professionals to scrutinise implementation in practice. Further details are outlined in response to question 14.

Question 14. Do you have any other comments on our approach to scrutinising environmental law?

Section 3.6 identifies that the OEP will "seek information from those who design, implement and are affected by environmental law". Greater clarity is required on who this information will be sought from. To some extent, almost everyone is affected by environmental law and its implementation, which is recognised by the Strategy as a whole. However, the effectiveness of scrutiny will depend considerably on who provides information.

To properly scrutinise whether or not the implementation of environmental law is having its desired consequences, it will be necessary to engage beyond the design stage to consult those outside public authorities who are able to identify whether desired consequences have been achieved.

In particular, the Strategy should more explicitly identify practitioners and professionals as stakeholders for engagement, as they will often be especially well-placed to make assessments on whether or not environmental law is being effectively implemented. This engagement is implied by the current approach but should be more explicitly stated to ensure effective scrutiny. This category of stakeholders should be identified separately to those who are "affected by environmental law", recognising the involvement in practical implementation which go beyond observing the effects of environmental law.

Question 15. Do you have any comments on our approach to advice?

The Strategy should identify the criteria under which the OEP will provide advice on proposed changes on its own initiative. Greater clarity will ensure that opportunities for the Government to seek advice are taken where the OEP's other activities provide relevant insights. It will also ensure a more certain relationship with the Government which supports the 'no surprises' approach set out in the Strategy and which enables the OEP to more proactively engage where it is necessary or desirable to do so.



While it is unlikely that the OEP will regularly need to propose changes to environmental law on its own initiative, it is vital that the means to do so are readily-available and properly facilitated in the Strategy.

Additionally, where the Strategy identifies that the OEP “will periodically review the action taken in response to the advice”, the Strategy should commit to a more explicit and timely process of review. The success of the OEP in achieving its principal objective through advice (as well as its broader enforcement functions) relies on ensuring timely and complete responses from public authorities, and the Government in particular.

It would be insufficient to provide advice without explicitly ensuring the extent to which that advice is being followed. The Strategy should at least commit to reviewing whether or not advice is being followed at a specific period after it is given, as well as identifying steps which can be taken to support positive action to improve the impact of the OEP’s advice.

Question 16. Do you have any comments on how we will work with others?

As stated in response to question 14, the OEP’s ability to succeed will depend on how well it can work as part of a wider ecosystem of organisations and experts, so it is positive that the Strategy identifies the importance of working with others. The Strategy should more explicitly commit to including practitioners and professionals in its regular engagement, as these experts will be crucial to providing insights about the state of natural systems and the extent to which environmental law is succeeding or failing.

The Strategy recognises the importance of ‘on-the-ground’ delivery insights in the context of public authorities, but the OEP could increase its ability to capture those insights through more direct engagement with a broader category of professionals. While it is likely that this will take place in practice regardless, it is important that the Strategy commits to some degree of professional engagement to ensure that these relationships become embedded in the OEP’s processes and practice.

Section 3.8 identifies the use of ‘Memoranda of Understanding’ to help facilitate strong working relationships with key collaborators. Either in the Strategy or in another OEP policy document, such as the forthcoming Corporate Plan, the OEP should seek to provide clarity on the timeline for delivering MoUs to cover its most important relationships, such as the relationship with the CCC and the devolved administrations.

This is particularly vital on issues such as climate change which require immediate action across complex interconnected systems where both the OEP and another body such as the CCC have responsibilities and expertise. Clarifying the timeframe under which MoUs will be delivered will be crucial to providing certainty for public authorities on how their actions will be regulated and how both bodies will work in a complementary manner to ensure environmental protection and improvement.



Question 17. Do you have any comments on our approach to objectivity?

The OEP's desire to avoid being inappropriately driven by public concerns where they do not represent the most important issues when viewed objectively is extremely positive and will be important in the current context surrounding key environmental challenges. In practice, this approach may require a more detailed approach to how subjective concerns expressed by the public are properly separated from objectively important issues which have not previously been identified by the OEP, particularly in circumstances where gaps in evidence exist.

Given the Strategy's recognition of the difficulty of identifying objective importance, section 3.9 should give a more explicit approach to evaluating public concerns in the context of evidence and the wider prioritisation processes of the OEP. While the approach to prioritisation set out in section 3.2 makes this implicit, the Strategy would be improved by clarifying how these processes of prioritisation will relate to the OEP's commitment to objectivity. This would clarify the OEP's position and ensure a greater degree of certainty in how the OEP will act on issues which are likely to be especially politically-sensitive.

The approach to objectivity should also explicitly identify that the precautionary principle will be utilised. Where the Strategy notes that "if information is scarce, ambiguous, or otherwise imperfect, we may need to make reasoned judgements on the best information available or develop the evidence where we can", it is not clear whether or not the Strategy is intended to prevent action where an evidence base does not yet exist, which could increase the potential for unabated environmental harm. This could be clarified with explicit reference to the precautionary principle, as recognised in the Government's environmental principles policy statement and other relevant policy documents.

Question 18. Do you have any comments on our approach to impartiality?

The OEP's approach to impartiality in the Strategy could be significantly improved. The claim that impartiality "is about being independent and fairly giving all sides equal consideration without bias" has the potential to create situations where scientific evidence is erroneously considered to warrant equivalent examination to unjustified or subjective claims, jeopardising the OEP's goal of objectivity. It is also likely to lead to inefficiencies and poor prioritisation of limited OEP capacity if significant time is given to the consideration of perspectives or "sides" which lack evidentiary merit.

A better approach to impartiality would be to avoid partiality. Impartiality should be 'about being independent and not giving any perspective or party undue consideration or favourable attention'. A negatively-defined form of impartiality is more appropriate here, not implying the need for the OEP to overly consider all possible perspectives, while explicitly avoiding the behaviours which the OEP is seeking to avoid.



Question 19. Do you have any comments on our approach to proportionality?

The Strategy's approach to proportionality is broadly very positive, particularly the claim that the OEP "will not be satisfied ... with only confirming that there has been a failure, or with partial remedies, where such outcomes are inadequate relative to the scale and impacts of the failure". If this claim is actioned effectively through the OEP's work in practice, it will represent a significant opportunity to secure environmental protection.

To fully capture the approach to proportionality outlined in section 3.9, assessments about the extent of environmental harm will be crucial, so the effectiveness of the approach to proportionality will depend considerably on a robust, comprehensive, and systems-informed understanding of harm. The responses to question 7 and 8 provide more information on how this can be effectively embedded into the Strategy.

Question 20. Do you have any comments on our approach to transparency?

The approach to transparency is set out well in the Strategy, and will be vital to the success of the OEP, particularly in providing accountability. Ultimately, claims of transparency must be met with consistent action to be meaningful, though the OEP has already demonstrated its commitment to transparency through this Consultation and its wider engagement activities thus far. If these continue, then the positive approach to transparency set out in this Strategy will be a welcome improvement on previous environmental protection activities in the UK.

Question 21. Do you have any other comments on our draft strategy?

Taken as a whole, the Draft Strategy represents a significant amount of progress from past environmental protection efforts in the UK, and there is a considerable amount of positive evidence that the OEP will engage robustly and effectively to work towards environmental protection.

Though referenced in previous responses, there are three key caveats to the positive elements of the Strategy which will be necessary to ensure that the progress secured so far is effectively capitalised upon, such that the OEP can deliver its principal objective effectively.

Firstly, the strategic efforts of the OEP are naturally reliant on its ability to effect change. Given the OEP will often need to achieve environmental protection through 'soft' mechanisms, such as advice and monitoring, it will be crucial that the OEP becomes effective at driving impact through its engagement, particularly in its early years, which will set the tone for future interactions with public authorities.

To that end, it is crucial that the OEP has committed to devising a structured approach to determining its impact, which must happen at the earliest opportunity. Much of the positive progress made in the Strategy will depend on its implementation in practice, because regardless of the strength of a strategic document on paper, its influence is only as strong as its execution.



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Secondly, the implementation of the Strategy will also be subject to managing the limited capacity of the OEP. While the OEP has reflected these concerns sufficiently in its approach to prioritisation and throughout the Strategy (subject to the responses to specific questions above), the Strategy as a whole must be taken in the context of ongoing challenges for capacity and resourcing which will inevitably be subject to changing circumstances, and the OEP should be mindful of those challenges and agile in the face of them. That agility must be reflected on a strategic level.

Thirdly, regardless of how well processes are designed, a successful OEP will be reliant on ensuring it has the evidence and data to focus those strategic efforts correctly on interventions which are calculated to be effective. In addition to the responses above, the OEP should clarify and review its approach to evidence, which should be carefully linked to its approach to achieving impact as an organisation. The positive progress made in the Strategy relies on a strong relationship with evidence and science, which must remain at the heart of the OEP.

Question 22. Do you have any other comments on our draft enforcement policy?

Comments on the Draft Enforcement Strategy are reflected in the general response to question 21.