Guidance on interventions by the OEP in third party judicial reviews

Contents

1. This document sets out guidance on the approach that the OEP will take to any decision whether or not to intervene in a judicial review application (or associated appeal). This guidance will be updated in line with any updates to the OEP's strategy and enforcement policy. If you are involved in a claim which you think meets the criteria below, we would encourage you to make us aware of the claim by emailing enquiries@theoep.org.uk.

2. The OEP's power to intervene[1] is set out in section 39 of the Environment Act 2021 ("the Act"), entitled "*Judicial review: powers to apply in urgent cases and to intervene".* Subsections (6) and (7) provide as follows:

> *"(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)."*

3. Schedule 3, paragraph 13 of the Act empowers the OEP to intervene in judicial review cases in Northern Ireland as follows:

> *"(5) Sub-paragraph (6) applies to proceedings (including any appeal) that—*
> *(a) are in respect of an application for judicial review, and*
> *(b) relate to an alleged failure by a relevant public authority to comply with relevant environmental law (however the allegation is framed in those proceedings).*
>
> *(6) 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 relevant public authority has, or has not, failed to comply with relevant environmental law)."*[2]

4. The OEP's power to intervene is one of its "*enforcement functions*", as defined by section 23 of the Act. Any decision whether to intervene will therefore need to have regard to the approach set out in our enforcement policy. This guidance has been prepared to align with the enforcement policy, drawing out specific considerations that apply in the context of applications to intervene in judicial review proceedings.

I. Approach to identifying cases in which the OEP may intervene

5. The OEP will seek to identify judicial review claims in which it may intervene in one of two ways:

[1] Section 87 of the Criminal Justice and Courts Act 2015 ("CJCA 2015") defines an intervener as a person who is (a) granted permission to file evidence or make representations in judicial review proceedings, and (b) is not at that time a claimant, defendant, or interested party to the proceedings.
[2] "Relevant environmental law" is defined at Schedule 3, paragraph 5 of the Act.

(a) We will ensure that we maintain our own knowledge base by monitoring ongoing environmental judicial review claims as they progress through the courts. We will, in particular, monitor first instance environmental judicial review claims as they are handed down to ascertain whether or not the OEP can exercise its power to intervene in cases that progress to appeal, and whether it should consider doing so. This monitoring work will be supported by our intelligence team.

(b) We will engage with external stakeholders, organisations, individuals, and professional connections who may bring cases of interest to our attention (or who may directly ask us to consider intervening in a particular case). Our legal team will engage actively with stakeholders to ensure that we are well informed of ongoing cases of interest that concern environmental law, and will keep a record of that engagement.

6. Once we become aware of a particular case, we will apply the same flexible principles to any decision whether to intervene in a particular case, regardless of how the case comes to our attention. We will ensure that we are acting objectively, impartially, and proportionately, as we are required to do by the Act.

7. It is rare, but not unheard of, for the court to directly solicit interventions.[3] We recognise the importance of the OEP building and maintaining a positive reputation with the judiciary, as this will increase the impact and influence of any applications to intervene – and indeed applications for judicial or environmental review proceedings – that we do make. 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.

II. Deciding whether to intervene: the three-step decision-making framework

8. The OEP's power to intervene requires it to be satisfied that (i) the relevant case is a judicial or statutory review, (ii) there is an alleged failure to comply with environmental law and (iii) that, if it occurred, the failure would be serious. In line with our enforcement policy,[4] once we have confirmed that the relevant case is a judicial or statutory review, we will approach potential applications to intervene as follows:

(1) We will consider whether there may have been a failure to comply with environmental law by a public authority (**Step 1**).
(2) We will consider whether the potential failure is (or would be) a serious failure (**Step 2**).
(3) We will consider the best use of our resources and determine where we can make the most difference (**Step 3**). This involves determining whether a case we act upon is a priority to pursue through intervention.

9. Any applications we make to intervene will be made in line with the need to contribute towards our principal objective by providing assistance to the court (Enforcement Policy, p.56). Our principal objective is to contribute to environmental protection and the improvement of the natural environment (s.23(1) of the Act).

[3] See, for example, *Rogers v Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134 at [10].
[4] See Figure 1, p.58.

(1) Is there a potential failure to comply with environmental law?

10. As explained in our enforcement policy (see section 4.1), we will always ensure that we have a reasonable basis to act based on the information available. We will ensure that any case in which we apply to intervene "*relates to*" an alleged failure by a public authority to comply with environmental law, as defined in the Act, however the allegation is framed in the proceedings. In many cases the alleged failure will be apparent on the face of the claim, but in other cases the OEP may need to consider whether a potential failure to comply with environmental law has been overlooked by the parties.

(2) Would the failure be a serious failure?

11. As our enforcement policy explains (see section 4.2), we will assess whether any alleged failure by a public authority to comply with environmental law would be serious if it occurred. We will consider all relevant factors for assessing the seriousness of a potential failure to comply with environmental law.

12. In the context of interventions, the following non-exhaustive list sets out factors that we may take into account:

    (a) Whether the case raises any **point of law of general public importance**. For example, will the case set a precedent with wider potential implications, or address an important area of law where clarification will be valuable or important.
    (b) The **frequency of the conduct** over time (including historically and whether by the same public authority or others), including cumulative impacts. For example, whether the conduct is a one-off event, occasional, frequent, recurrent or ongoing and the potential impact of multiple instances of the conduct taken together.
    (c) The **behaviour** of the public authority or authorities. For example, whether the public authority has a high degree of responsibility for the failure, for example by acting deliberately, recklessly, or negligently; or, on the other hand, whether the authority was responding with reasonable care to an emergency or other exceptional circumstances not of its making.
    (d) The **harm or potential harm** to the natural environment or to human health associated with the issue. We will assess the seriousness of any harm in line with our enforcement policy (see section 4.2).
    (e) Any **other** relevant factors.

13. In deciding whether to intervene in a case, point (a) will generally be the most important consideration. This is discussed further below at paragraph 18.

14. Any decision to intervene should also take into consideration whether the threshold for the OEP bringing its own judicial review proceedings under section 39 or Schedule 3, paragraph 13 would be met, and whether doing so (in the English and Welsh Context)

would be preferable given the wider circumstances in which the court is able to grant remedies in claims brought by the OEP.[5]

(3) Prioritisation

15. When we are deciding whether to intervene in a case, we will follow the prioritisation approach set out in the strategy and enforcement policy. We will intervene in cases where we consider that we can contribute most to securing environmental protection and improvement.

16. As we are required to do by the Act, we will have regard to the importance of prioritising cases:

    - That relate to **ongoing or recurrent conduct**;
    - That relate to conduct that we consider may cause (or has caused) **serious damage** to the natural environment or to human health; or
    - That we consider raise a **point of environmental law of general public importance**.

    These statutory prioritisation criteria are built into our approach for assessing the seriousness of failures to comply with environmental law and, as indicated above, the third criterion will often be the most important in the intervention context.

17. We will further prioritise our intervention activity in accordance with the four questions set out at section 3.4 of our strategy. In the intervention context, these questions may be approached as follows:

    a. **How significant an effect could our action have?** How serious is the harm alleged in the claim? Will intervening contribute to the improvement of the natural environment, or to remedying the harm in question? Will a successful outcome preserve or strengthen the interpretation and/or application of environmental law?

    b. **How likely is our ability to have that effect?** How confident are we that we will have a positive impact by intervening?

    c. **What is the strategic fit?** Are we best placed to intervene in the case, or are there other potential interveners (or claimants) who would be better placed to raise the legal issues we have identified? Will taking action align with our other work to increase our impact? How would intervening align with our strategic objectives and the approach to delivery of our functions set out in the strategy (including the issue-based approach outlined at section 3.3)?

[5] Pursuant to section 39(3) of the Act, section 31(2A), (3C) and (3D) of the Senior Courts Act 1981 does not apply to an application for judicial review made by the OEP under s.39(1). This means that the High Court is not obliged to refuse to grant relief on an application for judicial review, or refuse to make an award of damages, if it appears to be highly likely that the outcome for the OEP would not have been substantially different if the breach of environmental law complained of had not occurred. The court is also not obliged to refuse to grant permission for the OEP to apply for judicial review in the same circumstances.

d. **What is our capacity and capability to deliver?** What resources would we require in order to intervene effectively? Will any resources be diverted from other projects, and if so what will the impact on those projects be? Will the likely impact on the environment (or environmental law) justify the resources needed to achieve that impact? Are there more effective ways of achieving the desired outcome?

18. Our focus when intervening will be on cases in which there is an opportunity for the OEP to help clarify the law, or to ensure that environmental law is interpreted in a way that best contributes to environmental protection and/or improvement. We will therefore prioritise cases in which we can help to **clarify or determine a point of environmental law of general application or public importance**.

III. Other considerations for deciding whether to intervene

19. The guidance set out above details the core factors, derived from the OEP's enforcement policy, that will be applied when determining whether to intervene in a case. In the specific context of intervention, however, it will normally be important for us to consider the following additional factors beyond those listed in our strategy and enforcement policy.

Can the OEP add value to proceedings?

20. Traditionally, the courts have allowed third parties to intervene in court proceedings where they have particular knowledge and expertise in the area with which the proceedings are concerned. This may be knowledge gained through the work which the third party carries out; through close study of the law, practice, and problems in an area; or because of the experience and knowledge which the third party's activities have brought.[6] An effective intervener will deploy that knowledge base to provide the court with a more rounded picture on a question of public importance than it would otherwise obtain.[7]

21. It is therefore crucial that in deciding whether to intervene in a particular case, the OEP carefully consider **whether it can add value to the claim** (in the form of evidence and/or representations) over and above the evidence and arguments presented by the main parties to the dispute. Intervention is always subject to the control of the court. Whether a third party is allowed to intervene is generally dependent upon the court's judgment as to whether the interests of justice would be promoted by allowing the intervention. Courts must balance the benefits that will be derived from an intervention against the inconvenience, delay, and expense which an intervention by a third party can cause to the main parties.[8] An intervener's role is to assist the court in the interests of justice. An intervention which merely repeats points made by one of the main parties will be of no assistance to the court.[9] Doing so could lead to adverse costs consequences for the OEP.

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[6] *Air Transport Association of America* [2010] EWHC 1554.
[7] *Re E (a child) (Northern Ireland)* [2008] UKHL 66.
[8] Per Lord Oliver in *Re Northern Ireland Human Rights Commission* [2002] UKHL 25.
[9] *E (A Child) v Chief Constable of Ulster* [2008] UKHL 66 at [3].

22. In the event that the OEP does intervene in a case, it is important to maintain communication and to coordinate with **all** parties to the claim to ensure that the OEP avoids any duplication or overlap as the case develops.

23. Specific questions that the OEP should ask itself both before and during proceedings, include:

    - Can we add value to the proceedings and assist the court in its determination of the dispute?
    - Do we have knowledge and expertise that will provide the court with a more rounded understanding of the legal issues or factual basis of the claim, and the consequences that may flow from the court's judgment?
    - Is there a risk that an issue of public importance may not be sufficiently well addressed by the submissions of the parties to the claim?
    - Is there a risk that an important principle or point of law relevant to the dispute has not been brought to the attention of the court?
    - Having reviewed the main parties' submissions, do we have any evidence or arguments to add?
    - Have we been approached to intervene in the case by one of the main parties and if so, is there a risk of the OEP simply echoing that party's case?
    - Are we best placed to intervene, or is there another body that could be of greater assistance to the court?
    - Has the court asked the OEP to intervene?

24. We will seek to reach a balanced view, taking into account the above non-exhaustive list of questions, as to whether we can add value to proceedings. In certain cases, one factor may be countervailing.

25. In reaching any decision whether to intervene, we will take into account the potential reputational harm to the OEP that would occur if we did intervene, and the court concluded that our intervention had not added value to the proceedings and/or was unnecessary. We will also take into account the risk that if we do intervene in a case and end up largely mirroring the case of one party, this would raise questions as to our independence and impartiality (see further section 3.5 of the strategy).

Is it the right time to intervene?

26. The OEP should consider whether it is the right time to intervene in a case. This will involve both short-term and longer-term considerations.

27. In terms of short-term factors, we will always consider the impact that an application to intervene could have on the progress of the proceedings in question. Generally we should avoid intervening in circumstances where this would put the hearing date for the proceedings at risk, or cause prejudice to any of the parties. In a case where the applicant has applied for permission to appeal, a short-term factor could be our assessment of whether an application by the OEP to intervene could make it more likely that the court would grant leave to appeal.

28. In terms of longer-term factors, **we will generally not intervene at first instance unless there are good reasons indicating otherwise**. This is because it will generally

be difficult for the OEP to obtain information about ongoing challenges until a first instance judgment is issued. This will often prevent us from intervening in a case at first instance quickly enough to avoid prejudicing any of the parties already involved. Moreover, intervening in the High Court too regularly could dilute the impact of our interventions, and generate an unsustainable level of work for us.

29. We will consider the following non-exhaustive list of questions to decide whether good reasons to intervene at first instance exists:[10]

- Will the OEP's intervention be relevant to the court's assessment of any factual dispute between the parties, and/or will the OEP wish to file witness evidence? If so, it will be more appropriate to intervene at an early stage.
- Does the case raise a new legal issue not considered by either party? If so, it will be more appropriate to intervene at an early stage.
- Are there costs and resource implications associated with intervening at an early stage?
- Will intervening in a higher court help the OEP to have a greater impact, or conversely limit the OEP's ability to shape the issues?
- Would intervening at an early stage help to ensure that an important question of law is resolved satisfactorily before a decision of a lower court becomes settled law?

Risks associated with intervening

In deciding whether to intervene (or continue to intervene) in a case, the OEP should also consider:

- What is the risk that the OEP will be subject to an adverse costs order?
- What is the risk of the OEP's intervention being unsuccessful, setting an adverse precedent that will weaken environmental protection?
- Does the positive contribution that the OEP can make to the case outweigh the risk that it may be subject to a costs order?
- Is there a risk that the OEP could be associated with an unwelcome change in law, policy or practice?
- Could intervening unsuccessfully undermine the OEP's credibility or its reputation as an independent and impartial body?

[10] Where we do apply to intervene at first instance, we would usually make the application promptly after permission has been granted.