



Department  
for Environment  
Food & Rural Affairs

# Consultation on amending the Civil Procedure Rules to establish environmental review

July 2021

We are the Department for Environment, Food and Rural Affairs. We're responsible for improving and protecting the environment, growing the green economy, sustaining thriving rural communities and supporting our world-class food, farming and fishing industries.

We work closely with our 33 agencies and arm's length bodies on our ambition to make our air purer, our water cleaner, our land greener and our food more sustainable. Our mission is to restore and enhance the environment for the next generation, and to leave the environment in a better state than we found it.



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## Contents

Introduction .....	4
The Environment Bill and the Office for Environmental Protection .....	4
The OEP's enforcement function.....	4
Environmental review .....	5
Purpose and scope of this consultation .....	5
Responding to this consultation.....	6
After the consultation.....	7
You and your organisation .....	8
About you .....	8
About your organisation.....	8
Amending the Civil Procedure Rules to establish environmental review.....	9
Interested parties.....	9
Interveners.....	9
Costs .....	9
Whether cases may be decided without a hearing .....	10
General approach and other matters of procedure.....	10

# Introduction

## The Environment Bill and the Office for Environmental Protection

The Environment Bill, which is currently before Parliament, will establish a new independent statutory environmental body, the Office for Environmental Protection (OEP). The OEP's principal objective will be to contribute to environmental protection and to the improvement of the natural environment.

The OEP will provide independent scrutiny and advice, investigate complaints about the implementation of environmental law by government and public authorities, and carry out enforcement action where necessary.

Royal Assent for the Environment Bill is expected in the autumn. The OEP will be legally established as soon as possible after Royal Assent. Ahead of the OEP's formal establishment later this year, the Interim Office for Environmental Protection was launched on 1 July 2021. It will undertake some non-statutory environmental governance activities and continue work to set up the full organisation.

All clause numbers in this document refer to [HL Bill 43](#) (as amended in Committee).

## The OEP's enforcement function

The Environment Bill will establish the OEP with statutory functions that will enable it to hold government and public authorities to account on their environmental responsibilities.

The OEP will be able to investigate alleged serious breaches of environmental law by public authorities. These investigations could initially be based on a complaint, or other information obtained by the OEP. Where the investigation indicates that a public authority has breached environmental law, and the OEP considers that the failure would be serious, the OEP can put those allegations to the public authority, request further information, and recommend remedial measures, through a series of notices.

Enforcement cases will usually be resolved by the OEP via this process of information and decision notices and through constructive dialogue with the relevant public authority; legal proceedings should only be taken as a last resort. Nonetheless, following the issuing of notices, there may be cases where matters cannot be resolved through dialogue. In those cases, the OEP will be able to bring a legal challenge through the new mechanism of environmental review.

In exceptional cases, the OEP may need to act quickly in order to prevent serious damage to the environment or human health. In such circumstances, the OEP may apply directly for a judicial review, under clause 39 of the Bill, rather than issuing notices. Rule changes will not be necessary for this provision.

## **Environmental review**

Clause 38 of the Environment Bill sets out the new mechanism of environmental review. It provides that:

- The OEP may apply to the High Court for an environmental review where it has issued a decision notice to a public authority if it remains satisfied, on the balance of probabilities, that a failure to comply with environmental law has occurred, and it considers that the failure is serious.
- Once an environmental review has begun the court must determine whether the public authority has failed to comply with environmental law, applying the same principles as are applicable in judicial review. If the court finds that a public authority has failed to comply with environmental law, it must issue a statement of non-compliance. This statement serves to clarify the law but it does not in itself affect the validity of the decision in question.
- Where the court makes a statement of non-compliance, it may grant standard judicial review remedies (other than damages) but only if it is satisfied that the remedy would not be likely to cause substantial hardship, substantial prejudice or detriment to good administration. This recognises that the environmental review will take place after the expiry of judicial review time limits and that serious prejudice to third parties may result from quashing the decision at this later date.
- The court will determine whether there has been a failure to comply with environmental law applying the same principles as are applicable in judicial review, and therefore will maintain the same standard of review in cases involving the exercise of discretion.

Whilst the Environment Bill makes provision regarding the nature of and forum for environmental review, as well as some matters of process, amendments will be required to the Civil Procedure Rules (CPR) to establish the mechanism in practice, and to specify important matters of procedure. The CPR set out the practice and procedure to be followed by the Civil Division of the Court of Appeal, the High Court, and the County Court in England and Wales.

## **Purpose and scope of this consultation**

Policy proposals for the OEP were consulted on in 2018, and first published in the same year as part of the draft Environment (Principles and Governance) Bill. This consultation does not revisit questions about the OEP's establishment and functions, but specifically relates to the amendments which will be required to the CPR to establish environmental review in the High Court.

The Civil Procedure Rule Committee (CPRE) was established by the Civil Procedure Act 1997. It is an advisory non-departmental public body empowered to make rules, which apply in the civil courts, including the High Court. The Lord Chancellor must allow the

rules. The Committee has a statutory duty to, “consult such persons as it considers appropriate”.

This consultation does not present any new government proposals. Rather, we are openly seeking the views of interested parties and stakeholders on the provision which should be made in the CPR to establish environmental review, and on several key matters of procedure.

Given the similarities in some respects between judicial review and the new mechanism of environmental review as provided for in the Environment Bill, it is expected that the rules for environmental review will largely mirror the existing provision in [Part 54 CPR](#), with adjustments made to reflect the technical differences between the two procedures. Specific questions are not asked on these technical matters, but we welcome views on this approach.

However, in some other areas the Environment Bill does not provide a guide as to the procedural approach which should be taken, and it is on these matters which the specific questions (7-14) in this consultation relate.

## Responding to this consultation

This consultation will run for six weeks. This is in line with the Cabinet Office’s ‘Consultation Principles’ which advises government departments to adopt proportionate consultation procedures. The consultation opens on 26 July 2021 and closes on 6 September 2021.

Please respond to this consultation:

- Via the Citizen Space consultation hub, at:

<https://consult.defra.gov.uk/environmental-governance-team/consultation-on-amending-the-civil-procedure-rules>

- By email, to [environmental.review@defra.gov.uk](mailto:environmental.review@defra.gov.uk); or
- In writing to Consultation Coordinator, 2nd Floor, Foss House, Kings Pool, 1-2, Peasholme Green, York, YO1 7PX.

**Question 1: Would you like your response to be confidential? A) Yes/No B) If Yes please give your reason**

## After the consultation

A summary of responses to this consultation will be published on the government website at: [www.gov.uk/defra](http://www.gov.uk/defra). An annex to the consultation summary will list all organisations that responded but will not include personal names, addresses or other contact details.

Defra may publish the content of your response to this consultation to make it available to the public without your personal name and private contact details (e.g. home address, email address, etc).

If you click on 'Yes' in response to the question asking if you would like anything in your response to be kept confidential, you are asked to state clearly what information you would like to be kept as confidential and explain your reasons for confidentiality.

The reason for this is that information in responses to this consultation may be subject to release to the public or other parties in accordance with the access to information law (these are primarily the Environmental Information Regulations 2004 (EIRs), the Freedom of Information Act 2000 (FOIA) and the Data Protection Act 2018 (DPA)). We have obligations, mainly under the EIRs, FOIA and DPA, to disclose information to particular recipients or to the public in certain circumstances.

In view of this, your explanation of your reasons for requesting confidentiality for all or part of your response would help us balance these obligations for disclosure against any obligation of confidentiality. If we receive a request for the information that you have provided in your response to this consultation, we will take full account of your reasons for requesting confidentiality of your response, but we cannot guarantee that confidentiality can be maintained in all circumstances.

If you click on 'No' in response to the question asking if you would like anything in your response to be kept confidential, we will be able to release the content of your response to the public, but we won't make your personal name and private contact details publicly available.

Defra may share your response, where appropriate, with the Civil Procedure Rule Committee.

There may be occasions when Defra will share the information you provide in response to the consultation, including any personal data, with external analysts. This is only for the purposes of consultation response analysis and provision of a report of the summary of responses.

This consultation is being conducted in line with the Cabinet Office "Consultation Principles" which can be found at:

<https://www.gov.uk/government/publications/consultation-principles-guidance>.

If you have any comments or complaints about the consultation process, please address them to: Consultation Coordinator, Defra, 2nd Floor, Foss House, Kings Pool, 1-2 Peasholme Green, York, YO1 7PX Or email: [consultation.coordinator@defra.gov.uk](mailto:consultation.coordinator@defra.gov.uk)

# You and your organisation

## About you

**Question 2. What is your name?**

**Question 3. Are you responding (a) as an individual, or (b) on behalf of an organisation?**

**Question 4. Are you a practising lawyer?**

## About your organisation

[Please note this section only applies if responding on behalf of an organisation]

**Question 5. Please provide your organisation's name.**

**Question 6. What type of organisation are you responding on behalf of?**

- A government body
- Non-governmental organisation
- Business
- Industry or professional association
- Legal association
- Member of the judiciary
- Responding on behalf of another type of organisation

# Amending the Civil Procedure Rules to establish environmental review

## Interested parties

In a judicial review an interested party is any person (other than the claimant and defendant) who is directly affected by the claim. Procedures setting out how interested parties may apply to participate in judicial reviews are set out in the CPR, and any similar or amended procedure for environmental review would need to be similarly set out.

The Environment Bill makes provision that in certain circumstances, where the defendant on an environmental review is not a Minister, it may be appropriate for ‘the relevant Minister’ (with overall responsibility for the policy area) to join proceedings as a form of interested party.

Another example of an interested party could be a person who has been directly impacted by the decision which is being challenged, or would potentially be impacted by the granting of a remedy.

### **Question 7: What provision should be made in the rules regarding the role of interested parties in environmental review?**

## Interveners

Any person can apply for permission to intervene to file evidence or to make a legal submission in a judicial review. Unlike interested parties, interveners are generally not directly affected by the claim. On a judicial review, when deciding whether to permit an intervention, the court will consider what if anything the intervener can add to the hearing. The court will look to balance the benefits of the intervention (in terms of what the intervener can do to assist with understanding the legal issues or factual basis of the claim on the basis of their expertise) against the inconvenience, delay and expense which the intervention would cause the existing parties.

### **Question 8: What provision should be made in the rules regarding the role of interveners in environmental review?**

### **Question 9: If you consider there should be a role for interveners, should the application procedures differ in any way from those for judicial review?**

## Costs

Provision will need to be made in the CPR regarding the awarding of costs on environmental review. This will need to recognise the unique nature of environmental

review, whereby both parties will always be public authorities, as the OEP is the only possible applicant.

In the High Court, the default position on a judicial review is that the unsuccessful party will pay the costs of the successful party. The court is awarded discretion, however, to depart from this if it considers it appropriate to do so.

However, alternative models are also available. For example, the default position for challenges being heard in the Upper Tribunal differs from that in the High Court. Under the Tribunal Procedure Rules, the default position is that both parties bear their own costs, although the Upper Tribunal has discretion to award costs if it considers that a party or its representative has acted unreasonably in bringing proceedings (for example, bringing a vexatious case).

#### **Question 10: What provision should be made in the CPR regarding the awarding of costs in environmental review?**

While all costs decisions are within the discretion of the court and will depend upon the individual circumstances in each case, on a judicial review interested parties and interveners are generally unlikely to be able to recover their own costs unless they have made a worthwhile, separate contribution to that made by the principal parties. Both interested parties and interveners are at risk of an adverse costs order. For example, although uncommon, an interested party could be held liable for some or all of the costs of other parties to the proceedings if their involvement leads to other parties incurring greater expense.

#### **Question 11: Should provision be made in the CPR regarding the costs of interested parties and interveners in environmental review?**

### **Whether cases may be decided without a hearing**

On a judicial review, CPR 54.18 sets out that the court may decide the claim for judicial review without a hearing where all the parties agree. We are interested to explore whether it would be beneficial to replicate this rule for environmental review, where circumstances will be different. Unlike on a judicial review, cases will already have been subject to significant pre-litigation discussion through the OEP's investigation and notice procedures, and that process will have resulted in a failure to come to an agreement or resolution of the issue.

#### **Question 12: Should provision be made in the CPR to allow claims to be decided without a hearing, replicating CPR 54.18?**

### **General approach and other matters of procedure**

Given the similarities in some respects with judicial review it is expected that the rules for environmental review will largely mirror the existing provision in Part 54 CPR, with

adjustments made to reflect any differences in approach in relation to the matters set out above, as well as the technical differences between the two procedures. For instance, the lack of a permission stage in environmental review, and the lack of a time limit within which to bring environmental review.

Further to the matters described above (the role of interested parties; the role of interveners; provision regarding costs; and whether claims may be decided without a hearing), in order to implement the provisions of the Environment Bill, we consider the amendments to the rules will need to set out a range of provisions, including:

- A definition of “environmental review”, as set out in clause 38 of the Environment Bill.
- Confirmation of who may exercise the powers of the High Court, replicating CPR 54.1A with the exception of CPR 54.1A(3)(a).
- A description of what the claim form must contain.
- Confirmation of who the claim form must be served on.
- Provision requiring an acknowledgment of service to be filed.
- Provision setting out the consequence of a failure to file an acknowledgement of service.
- Provision about the response, replicating CPR 54.14.
- Provision about evidence, replicating CPR 54.16.
- Provision on the court’s powers in respect of quashing orders, replicating CPR 54.19.
- The rules on permission and time limits in CPR 54 will not apply to environmental review. Depending on how the provisions are drafted, it may or may not be necessary to specify this through the amendments.

**Question 13: Are there any further areas where you consider the procedure for environmental review should differ from that for judicial review?**

**Question 14: Do you have any further comments on the approach that should be taken to amending the CPR to establish environmental review?**