Office for Environmental Protection

Enforcement Policy

Draft for consultation

January 2022

© Copyright 2022

This information is licensed under the Open Government Licence v3.0. To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/.

This publication is available at https://consult.theoep.org.uk/oep/the-oep-strategy-and-enforcement-policy

Any enquiries regarding this publication should be sent to us at

Office for Environmental Protection
County Hall
Spetchley Road
Worcester
WR5 2NP
www.theoep.org.uk
03300 416 581
enquiries@theoep.org.uk

Contents

Part 1. Introduction and aims

Our enforcement policy explains how we approach our enforcement role and exercise our enforcement functions. These enforcement functions provide us with a range of powers and duties, give us discretion in exercising them and require us to use our judgement in determining where, when and how we choose to act.

This policy sets out:

- the nature of our enforcement powers
- how we will use our enforcement powers to further our principal objective
- a clear decision-making framework that will support a consistent approach to how we use our enforcement powers
- how we will ensure that we are objective and impartial in our enforcement activities, and
- how we will have regard to the need to act proportionately and transparently

In addition, this policy is intended to meet the requirements in the Environment Act 2021 to set out how we intend to:

- determine whether failures to comply with environmental law are serious
- determine whether damage to the natural environment or to human health is serious
- exercise enforcement functions in a way that respects the integrity of other statutory regimes
- avoid any overlap between how we exercise our complaints functions and similar functions undertaken by the relevant ombudsmen services (covered in section 3.8 of our strategy), and
- prioritise cases

Part 2. Our approach to exercising our enforcement functions

Our enforcement functions encompass a range of investigatory and enforcement powers and duties. These enable us to act in relation to suspected failures by public authorities to comply with certain laws intended to protect people and the environment. We can, amongst other things, receive complaints from members of the public, conduct investigations and launch court proceedings regarding serious failures.

In this section, we provide an overview of the enforcement powers we have, how we will determine what enforcement action to take and our focus on seeking meaningful resolution to issues of non-compliance. This section also sets out 3 general principles which underpin our enforcement activities.

We set out further details of the scope and nature of our enforcement functions in section 3 below.

2.1 Powers and prioritisation

Our principal objective in exercising all our functions, including our enforcement functions, is to contribute to environmental protection and the improvement of the natural environment. As set out in figure 3 of our strategy, the term 'environmental protection' includes the protection of people from the effects of human activity on the natural environment, as well as protecting the natural environment itself.

Use of many of our powers is subject to meeting legal thresholds, principally that a suspected failure to comply with environmental law is, or would be, 'serious' (see section 4 below). Where we are satisfied relevant thresholds are met, we have discretion in whether and how to use our powers.

In accordance with our principal objective, we will seek to target enforcement action where we can most contribute to environmental protection (which includes protection of people) and the improvement of the natural environment. In doing so, we may take steps designed to remedy, mitigate or prevent recurrence of a failure to comply with environmental law. We will focus on the most significant areas of non-compliance, including recurrent issues, systemic matters, and those which are associated with serious damage to the natural environment or to people's health.

However, just because we can exercise our powers does not mean that we necessarily will. We will have to make choices about the matters to prioritise to make the most effective use of our finite resources and act where we can make the most difference. We will do this in accordance with the broader prioritisation approach set out in section 3.2 of our strategy. That approach incorporates the factors set out in section 4.3 below as well as consideration of where we can make the most difference and whether and when enforcement action is most appropriate.

2.2 Resolution and respect

For environmental laws to be effective in protecting people and the environment, they must be properly understood, implemented and complied with. Our objective in using our enforcement functions is to achieve environmental outcomes by improving government's and other public authorities' compliance with these laws. We will identify, address and, importantly, resolve issues by holding government and other public authorities to account for serious failures in compliance where they arise.

We will adopt a proportionate approach to our enforcement activities. This means we will normally aim to resolve non-compliance through co-operation, dialogue and agreement with public authorities. Where we reach resolution by agreement with public authorities, we will normally make this public unless there are good reasons not to. However, where a satisfactory outcome cannot be reached through these means, we will not hold back from exercising our stricter enforcement powers including, if necessary, through court proceedings. Exceptionally, where urgency requires it, we may take a matter to court outside of our bespoke enforcement functions (see section 5 below).

In carrying out our enforcement functions, we will seek to respect the integrity of other relevant statutory regimes and avoid overlap with other relevant authorities (see section 6 below).

2.3 Independence

We are legally separate from government and will act independently. We will consider the views of government alongside those of others, but government has no powers to give us legally-binding directions as to how we exercise our enforcement powers. The Environment Act provides that the Secretary of State for the Environment, Food and Rural Affairs [or the Northern Ireland Department for Agriculture, Environment and Rural Affairs (DAERA)][1] may issue guidance on certain matters covered in this enforcement policy, although such guidance cannot preclude us from investigating individual cases or subject areas. Should the Secretary of State [or DAERA] issue guidance, we must have regard to it when exercising our enforcement functions and when revising this policy.

[1] Inclusion of this, and other, square-bracketed text in the final strategy is subject to Northern Ireland Assembly approval of the OEP's remit extending to devolved matters in Northern Ireland.

2.4 General principles

Three general principles will underpin our enforcement approach, helping to provide consistency. Whilst these principles will work in conjunction with one another, they each reflect a different but equally important aspect of our approach to enforcement.

Principle 1 – public authorities must comply with the law

Public bodies must comply with the law and we expect them to give due weight to their obligations. Non-compliance can undermine public confidence in environmental governance, good administration and the rule of law. Failures to comply with environmental law can also jeopardise ambitions for environmental protection and improvement (including as this relates to people's health and wellbeing). We can exercise our enforcement functions only where a public authority may have failed to comply with environmental law. As such, any failure by a public authority is potentially within the scope of our enforcement functions.

Principle 2 – enforcement activity should be targeted to where it is most needed

Targeting our enforcement activity to where it is most needed enables us to maximise our contribution to environmental protection and the improvement of the natural environment. This means we will focus on more significant failures to comply with environmental law. This could include tackling individual failures which indicate systemic issues or which, when considered alongside other matters, cumulatively give rise to serious damage. This principle reflects the importance of prioritising our work (considered in section 4.3 below).

Principle 3 – our enforcement activity should take account of all the relevant circumstances

We will consider all the relevant and known circumstances of a suspected failure to comply with environmental law. The relevant circumstances are likely to vary from case to case but this principle reflects the need to make decisions on when and how to act on the basis of available evidence and exercising judgement within our decision-making framework.

2.5 Our other functions

We have other functions beyond enforcement, such as monitoring and reporting on the implementation of environmental law. These are set out in the main body of our strategy. These and our enforcement functions are mutually reinforcing. As such, and as reflected in the strategy, we will consider all our available functions to determine what approach would make the most difference to protecting people and the environment. Use of our enforcement powers may not always be the most effective approach.

Part 3. Scope and content of our enforcement functions

Our enforcement functions comprise different powers and duties as described in section 3.1 below.

We have enforcement functions which are unique to us and which we can use to secure compliance with environmental law in non-urgent cases. These functions are described in section 3.2 below.

In addition, we have powers which are not unique to us. In urgent cases, we may bypass our bespoke enforcement functions. We may, instead, immediately bring more conventional court proceedings (judicial review or statutory review). We can also apply to intervene in court proceedings brought by others. These powers are set out in section 3.3 below.

3.1 Scope of our enforcement functions

Our enforcement powers apply to alleged or suspected failures of public authorities to comply with environmental law. In general, 'public authorities' encompass any person carrying out any function of a public nature, subject to some exclusions set out in the Environment Act (see figure 3 of our strategy).

Our enforcement functions, which can be exercised in relation to England and UK-wide matters, relate to what the Environment Act defines as 'environmental law'. This means any legislative provision to the extent that it is mainly concerned with environmental protection. 'Environmental protection' has a specific meaning in this context and includes both protection of the natural environment from the effects of human activity and protection of people from the effects of human activity on the natural environment. Laws concerned with disclosure of or access to information, the armed forces or national security, and taxation, spending or the allocation of resources within government are excluded.

[In relation to devolved matters in Northern Ireland, our enforcement functions relate to what the Act defines as 'relevant environmental law'. This encompasses both 'Northern Ireland environmental law' and 'UK environmental law' (each as defined in the Act). In brief, this extends to both Northern Ireland and UK legislative provisions that are mainly concerned with environmental protection and are not concerned with any of the excluded matters set out above.

Where we refer to environmental law in this document, this is intended to encompass both 'environmental law' and 'relevant environmental law', as defined in the Environment Act.]

Our remit extends to failures to comply with environmental law by public authorities. This means where a public authority unlawfully fails to take proper account of environmental law when exercising its functions or where it unlawfully exercises or fails to exercise a

function it has under environmental law. Failures to comply with environmental law can include omissions as well as actions.

3.2 Our powers: bespoke enforcement functions

We have specific and unique functions to deal with suspected failures to comply with environmental law. The framework in which these functions sit is designed to encourage resolution at the earliest possible stage. We will use our functions accordingly, and we will expect public bodies to approach our enforcement activity in the same way. However, where there are unsatisfactory responses we will not hesitate to use the formal enforcement mechanisms available to us, including by taking court action.

Where we consider that exercising our bespoke enforcement functions is the most appropriate course of action, we may make use of the steps set out below, generally starting with gathering information. These steps are broadly escalating in nature. If a matter remains unresolved, we will be able to progress it further through our bespoke enforcement functions.

Gathering information

When we become aware of a public authority potentially failing to comply with environmental law, we may undertake preliminary information-gathering, though this will not always be necessary. Where we undertake such preliminary activity, this would be before we have formally launched an investigation. This activity may include gathering views, evidence and other relevant materials from public authorities or others so that we can assess whether we can and should pursue an investigation.

By law, public authorities must co-operate with us and we expect them to do so, including by promptly volunteering such information and assistance as we may reasonably request. This duty to co-operate applies in relation to all our functions, including enforcement. Such information gathering may be light-touch or it may be more substantive. We will be clear about the status of our interactions with public authorities, including whether we are undertaking preliminary information-gathering or whether we have decided to open an investigation.

Investigations

We have the power to carry out **investigations** concerning a public authority's alleged or suspected failures to comply with environmental law. We may commence investigations because of someone complaining to us or on our own initiative. We may do so where we have information that indicates that a public authority may have failed to comply with environmental law and, if it has, the failure would be serious.

The primary purpose of an investigation is to establish whether a public authority has complied with environmental law. Where they have not, we can use our enforcement functions to secure actions that can remedy, mitigate or prevent reoccurrence of the failure including through making recommendations (see below).

We can serve an **information notice** requiring that public authorities provide certain information if we have reasonable grounds for suspecting that the authority has failed to comply with environmental law (and where we consider that the failure, if it occurred, would be serious). Public authorities must respond in writing to such notices and must provide the information requested so far as it is reasonably practicable to do so. We expect that we would normally only serve information notices in the context of an investigation.

We can use our powers for gathering information and investigation to try to agree the factual background to an issue with the relevant public authority even where disagreements remain about, for instance, whether those agreed facts amount to a breach of the law. In such cases, we will need to determine whether it would be appropriate to take further action under our other enforcement powers.

Reporting and recommendations

Following all investigations (save those where we take the matter to court) we must prepare a report. Such reports will set out our conclusions on whether a public authority has failed to comply with environmental law.

We may also make recommendations, both specifically for the public authority concerned and more generally. We will determine what, if any, recommendations are appropriate for each case we investigate. Recommendations might include steps to rectify the environmental or human health effects of the non-compliance, prevent recurrence of the failure, or a recommendation to revisit the decision in question. We will only issue recommendations to a public authority that are within the authority's powers to follow.

We will expect public authorities to comply with any recommendations we make. We will take steps to monitor public authorities' implementation of our recommendations and may take further enforcement action where needed. We will also aim to ensure that any remedies we recommend are proportionate as well as effective. We will therefore normally provide draft recommendations to the public authority concerned. This will afford them an opportunity to comment and potentially take action before we finalise our reports. However, what recommendations to finally make, and what content to include in our final reports, will remain our decision; we need not adopt any comments we may receive back on our drafts.

Having regard to the need to act transparently, we will keep complainants and others informed as we investigate where we can do so consistently with our confidentiality obligations (box 1). We will publish our investigation reports, doing so in full unless there are good reasons to only publish extracts or to withhold publication. We will only withhold from publication the minimum information that we consider necessary.

Decision notices

In appropriate cases, where we have previously issued an information notice, we may issue a **decision notice**. A decision notice is a formal document which sets out our conclusions on a public authority's failure to comply with environmental law, why we think that failure is serious, and the steps we consider the public authority should take in relation to that failure. These steps may include, amongst other things, action to remedy, mitigate

or prevent reoccurrence of the failure. We will not specify steps that the authority concerned does not have the legal powers to implement.

Public authorities must respond in writing to decision notices, including to confirm whether they will take the steps we require. We may only issue a decision notice where we are satisfied, on the balance of probabilities, that the public authority has failed to comply with environmental law, and where we consider that the failure is serious. Consequently, decision notices represent a significant step that public authorities should take seriously and comply with. We may take further action if a public authority does not comply.

Taking public authorities to court

We expect public authorities to rectify any non-compliance promptly when brought to their attention. Where appropriate, we will set out for public authorities the timescales within which we expect such rectification to happen. We also expect public authorities to comply with any of the enforcement steps we may take as discussed above. Consequently, court action should only be necessary as a last resort.

However, we recognise that court action may sometimes be required. In England, we may commence proceedings in the High Court via an **environmental review** enabling the court to determine the matter in law. [The equivalent process in Northern Ireland is a **review application**.] We may be required to take such court action in circumstances where, for example, a public authority:

- contests our conclusion that they failed to comply with environmental law
- does not implement our recommendations from a decision notice, or does not do so in a timely manner
- cannot revisit its decision in the absence of a court quashing order, or
- accepts its breach but disputes the remedial steps we suggest

We can launch proceedings for an environmental review [or a review application] if we are satisfied, on the balance of probabilities, that the authority in question has failed to comply with environmental law and we consider that the failure is serious. This is the same as the test for issuing a decision notice.

If, on an environmental review, the court agrees that a public authority has failed to comply with environmental law, it will publish a statement of non-compliance (SONC). Subject to certain conditions specified in the Environment Act, the court may also grant any remedy available via a judicial review. This might include a quashing order that has the effect of overturning or setting aside an unlawful decision, or a mandatory order that requires the public authority to take certain steps. The court will not be able to award damages.

A public authority must publish a response to a SONC within 2 months. That response must set out the steps it intends to take in light of the SONC. [In the context of a review application, although the court is not required to publish a SONC, the public authority must still publish a statement setting out the steps it intends to take in the light of a court finding that it has failed to comply with environmental law.]

We can only apply for an environmental review [or a review application] where we have previously served an information notice and a decision notice in relation to the case.

Where the court has found a public authority not to have complied with environmental law, we will expect the public authority's response to present a meaningful and substantive approach to tackling the findings. Unless a public authority intends to appeal, this should generally set out the details and timing of the steps they will take to correct the failure or address its consequences, including to meet the requirements of any specific remedies granted by the court. We generally expect the public authority may want to confirm the response with us before publishing it. We may make our own observations on the adequacy of their response.

We will also expect the public authority to implement fully any actions they present in their response and will monitor their progress accordingly. We may take further action to enforce compliance with court judgments where needed.

Informing and involving government in enforcement action

UK government departments may be subject to our enforcement action. In addition, the Environment Act provides for us to inform or involve the relevant government minister where certain action is taken against other public authorities. In particular, in applying for an environmental review, we must state whether we consider a minister should join the proceedings we bring against another party. [Similar requirements apply in relation to informing the relevant Northern Ireland department about review applications we make concerning other Northern Ireland public authorities.]

Box 1 – Confidentiality

The Environment Act requires that we must not normally disclose certain information supplied to us by public authorities. In addition, we must not normally disclose information notices, decision notices, or associated correspondence. We may only disclose such information, or share it with certain other bodies, in the specific circumstances set out in the Environment Act.

The Act establishes that where information notices, decision notices, associated correspondence and information supplied to us by public authorities is 'environmental information' as defined in relevant information legislation, it is held in connection with confidential proceedings. Consequently, such information must not be disclosed where the disclosure would adversely affect the confidentiality of those proceedings, unless the public interest in disclosing the information outweighs the public interest in maintaining confidentiality.

Where we have decided not to take any further steps and a matter is concluded, we may give consent for the disclosure of an information notice or a decision notice. Once proceedings are over, we will normally publish information notices and decision notices in full on our website unless there are good reasons why confidentiality should be maintained over all parts of them. We will usually consult with the public authority concerned before publishing.

3.3 Our powers: additional enforcement actions

In addition to our bespoke enforcement functions, we have the following powers to take more conventional enforcement actions.

Urgent court proceedings

We may apply for **judicial review** or a **statutory review** in appropriate cases, without having issued an information notice or decision notice where we consider there is or may be a failure to comply with environmental law which is serious. We can do this only in cases where an 'urgency condition' is met. This requires that the judicial review or statutory review is necessary to prevent, or mitigate, serious damage to the natural environment or to human health (see section 5 below).

If the court finds that a public authority has failed to comply with environmental law, the authority must publish a statement setting out the steps it intends to take in the light of that finding within 2 months of the end of the proceedings. We will monitor the public authority's progress against this statement. As discussed above in relation to environmental review [and review applications], we may take further action to enforce compliance with court judgments where needed, including, where appropriate, by returning to the court.

The court may also grant any remedies available through judicial review or statutory review.

If we apply for an urgent judicial review or statutory review in which the relevant UK government minister is not a party, we must consider whether they should be joined to the proceedings. [A similar requirement applies in relation to Northern Ireland departments.]

Intervention in other parties' court cases

We may apply to **intervene** in judicial reviews or statutory reviews brought by others that relate to an alleged failure by a public authority to comply with environmental law (however the allegation is framed in those proceedings).

We would generally consider interventions when our assessment of seriousness and our usual prioritisation criteria point towards it as a suitable course of action, and where we consider that our intervention would be of assistance to the court. It will be for the court to determine whether our intervention is permitted.

We will consider any requests we may receive from a party to a judicial review or statutory reviews to apply to intervene in their proceedings. However, we will approach decisions as to whether to intervene impartially. Any interventions we make would be on the basis of contributing towards our principal objective by providing assistance to the court. This assistance might be, for example, by enabling the court to consider wider contextual information which, without our intervention, would not otherwise be available.

If we have previously considered a matter and decided not to investigate or progress it beyond a certain stage of our enforcement process, we would not normally expect to apply to intervene in a subsequent case brought on the same matter by a third party. However, we would determine this on a case-by-case basis. As part of this we would consider whether the case brought by the third party would involve any wider significant factors that were not part of our earlier consideration of the matter.

We can apply to intervene whether or not we consider that the public authority has failed to comply with environmental law. However, we may only do so where we consider that the alleged failure (as framed in those proceedings), if it occurred, would be serious. We would not normally expect to intervene in a case where we consider that the public authority has complied with environmental law. We may do so though if this is considered appropriate, for example because the case deals with important points of law or has other wider implications.

Other enforcement actions

Further to the specific enforcement powers outlined above, we may also take complementary steps to maximise the effectiveness of our enforcement activity and its outcomes.

Part 4. Our decision-making framework

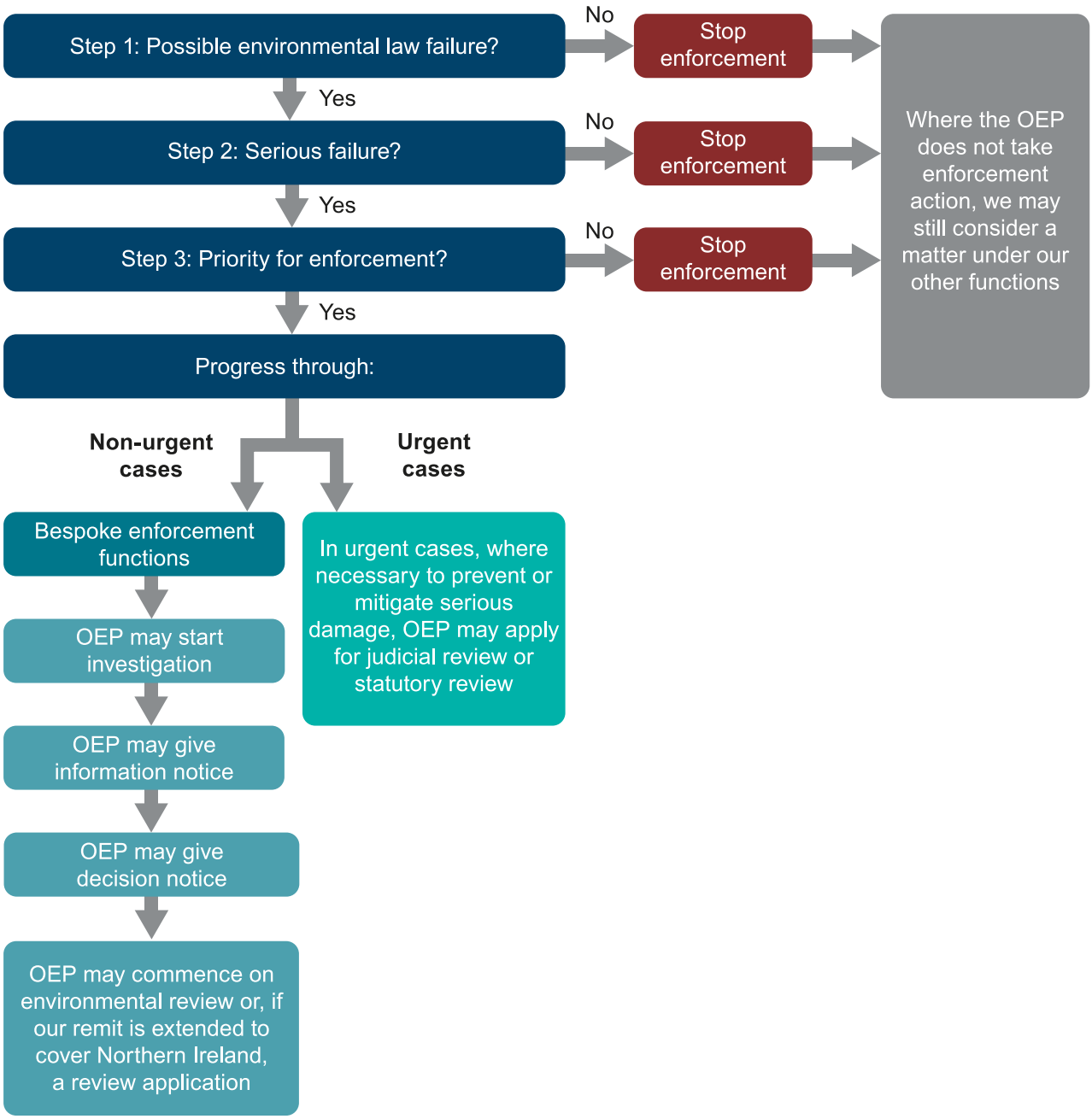
When we receive a complaint or consider other information with a view to possible investigation, we must first determine if the matter falls within our remit.

We have published a complaints procedure, which is available on our website at www.theoep.org.uk/can-i-complain. This procedure is complementary to this enforcement policy but does not form a part of it. People must follow our complaints procedure when making a complaint to us regarding a public authority that they believe has failed to comply with environmental law. We may amend the procedure from time to time and will publish any revisions on our website.

Where we are satisfied that a matter falls within our remit, we will apply the decision-making framework set out in figure 1 below to determine whether and how to exercise our enforcement functions – either our bespoke enforcement functions (section 3.2 above) or our powers to take additional enforcement actions (section 3.3 above).

Where we cannot pursue enforcement activity we may still act through our other functions (such as reporting on the implementation of environmental law or advising ministers). We may also do this where we could take enforcement action but judge that the exercise of other functions would be more effective.

Figure 1. Decision-making framework



As set out in figure 1 above, our decision-making framework involves 3 steps. In **step 1**, we will consider whether the information we have indicates that there may have been a failure to comply with environmental law by a public authority. This will involve considering the basis for any action.

In **step 2**, we will consider whether a potential failure is or would be a serious failure. This determines whether we can exercise our powers to investigate, serve an information notice or decision notice, or go to court. Section 4.2 below sets out our approach to this assessment.

As an integral part of step 2, we will assess whether the conduct could give, or has given, rise to harm to the natural environment or human health that amounts to 'serious damage'.

Where this is the case, we will also assess whether the urgency condition noted above (section 3.3) is met such that we are able to decide whether to apply for an urgent judicial review or statutory review. Section 5 below sets out our approach to assessment of the urgency condition.

Step 3 applies to all those cases which we have determined fall under our remit, and which we consider may represent serious failures. Where this is the case, we can exercise our enforcement powers. However, we will not be able to act on all possible cases and, in some cases, functions other than our enforcement powers might be more appropriate. We will need to consider the best use of our resources and determine where we can make the most difference. Step 3 therefore involves determining if a case that we can act upon is a priority to pursue through enforcement. If we determine it is not an enforcement priority, this would not preclude us from pursuing the matter under a different function. Our approach to prioritisation is discussed in section 4.3 below.

Procedural stages when we must consider whether a failure is serious

When using our bespoke enforcement functions, we must assess whether a failure is serious when:

- initiating an investigation, whether on the basis of a complaint or some other information
- issuing an information notice
- issuing a decision notice
- applying for an environmental review [or a review application]

We must also assess whether a failure is serious when considering the following additional enforcement actions:

- applying for an urgent judicial review or statutory review
- applying to intervene in a judicial review or statutory review brought by a third party

When we determine a matter to be serious at one of these stages, we will normally publish a statement setting out why we think this is the case.

Procedural stages when we must consider 'serious damage'

We must consider the seriousness of harm or potential harm associated with the failure to comply with environmental law when considering applying for an urgent judicial review or statutory review (the 'serious damage' test). If serious damage has been, or might be, caused, we will assess whether the urgency condition is met such that we can consider applying for a judicial review or statutory review (see section 5 below).

The serious damage test does not apply to any of the stages within our bespoke enforcement functions. However, where harm to human health or the environment could be serious, we would necessarily view the conduct as a serious failure.

Given this, and the need to make decisions on urgent action swiftly, we will consider the possibility that harm might amount to 'serious damage' in parallel with our assessment of the seriousness of a potential failure as part of step 2.

4.1 Step 1 – assessing the basis for enforcement action

Whenever we take enforcement action, we will ensure we have a reasonable basis to act based on the information available. The Environment Act establishes the relevant level of certainty we must satisfy to exercise each of our enforcement powers. This is outlined in section 3 above.

4.2 Step 2 – serious failure

Through step 2, we will assess whether a suspected failure by a public authority to comply with environmental law would be a serious failure. This section sets out certain factors that may be relevant in determining (a) whether a suspected failure to comply amounts to a serious failure and, as part of that, (b) whether any associated harm or potential harm amounts to serious damage.

Relevant factors for assessing seriousness

In accordance with General Principle 3 set out above, we will consider all relevant factors when determining if a failure to comply with environmental law is or may be serious. Factors that we may take into account when assessing the seriousness of a failure include:

a. whether a public authority's conduct raises any **points of law of general public importance**. This may be, for example, by setting a precedent with wider potential implications (beyond those of the case) or addressing an important area of law where clarification would 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, which could involve **compounding or mitigating factors**.

   Compounding factors could include where:

- the public authority has a high degree of responsibility for the failure, for example by acting deliberately, recklessly or negligently

- the public authority has received previous warnings or concerns raised by us other parties or within its own workforce regarding this or similar matters

- the public authority has a previous poor record of compliance with environmental law

- the conduct may be repeated by this public authority or others

Mitigating factors could include where:

- the public authority acted in good faith, with all reasonable due diligence and in the public interest

- the public authority was responding with reasonable care to an emergency or other exceptional circumstances not of its making

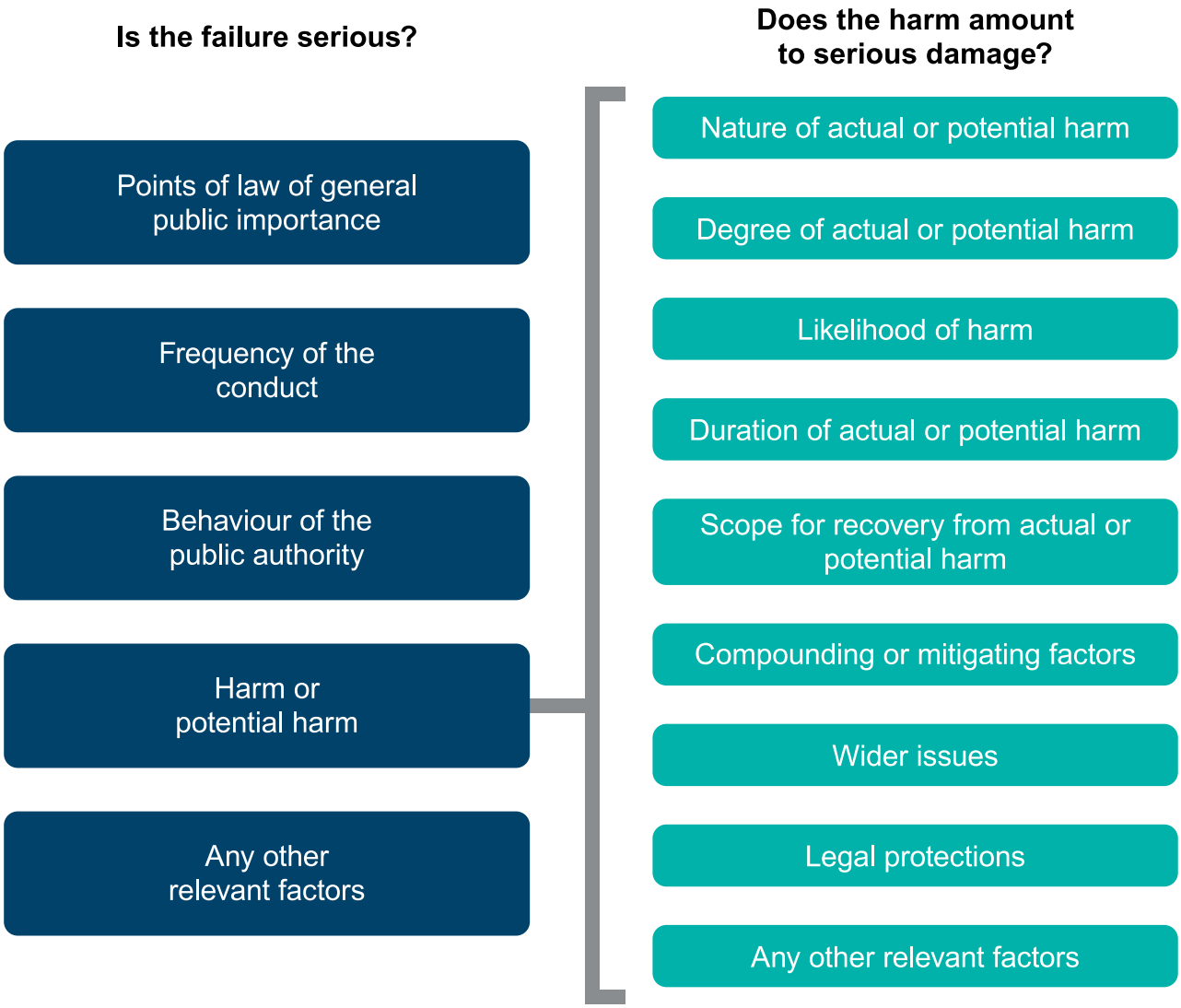
d. the **harm or potential harm** to the natural environment or to human health associated with the failure

e. any **other** relevant factors

The harm or potential harm referred to above relates to the actual or potential harm to the environment or to human health associated with the failure to comply (referred to in the Environment Act as 'damage'). Harm is assessed as part of our consideration of the seriousness of a failure to comply; that a public authority's conduct did or could result in harm may indicate that the failure itself could be serious.

Factors we may consider when assessing harm and, for the purpose of identifying urgent cases, whether it amounts to serious damage are set out in the list below entitled 'Relevant factors for assessing seriousness of harm'. However, harm is just one factor that we may consider when assessing whether a failure is serious. Figure 2 (Spotlight on harm) below illustrates this.

Figure 2. Spotlight on harm



Relevant factors in assessing seriousness of harm (including the 'serious damage' test)

Our assessment as to whether a failure would be serious will normally involve taking account of **harm or potential harm to the natural environment or to human health** associated with the failure and whether this amounts to serious damage.

Factors that we may take into account when considering whether harm amounts to serious damage include:

a. the **nature of the actual or potential harm**. For example, we may consider what is being or might be harmed, including consideration of the characteristics and context of the people or environmental features concerned. For people, this might include considering any particular sensitivities of those put at risk. For environmental features, this might include considering their rarity and role in wider environmental systems at the relevant level (e.g. local, national or global). This could also include consideration of the particular type of harm that has arisen or might arise

b. the **degree of actual or potential harm**. This could include consideration of the severity of the harm or the extent of the harm (for example, the size of the area or the number of people affected)

c. the **likelihood of harm**. For example, has it already occurred, or is it inevitable, likely, possible or speculative

d. the **duration of the actual or potential harm**, that is how long it will or may last

e. the **scope for recovery from the actual or potential harm**. Here we might consider the scope for the people or environmental features at risk to recover from harm, anything which impedes recovery or would need to be in place to allow it to occur, the anticipated time-period for any recovery, and the likelihood of some other form of satisfactory remediation or compensatory action being taken

f. whether there are any **compounding or mitigating factors**. For example, we may consider the importance of particular features of the environment put at risk, as recognised by domestic or international law, as well as their importance in ecological or natural capital terms. We may also consider issues such as the specific impacts on vulnerable members of the public, those with protected characteristics (as set out in the Equality Act 2010) or inter-generational equity

g. **wider issues**, including any indication of a more widespread or systemic problem meaning that the harm should be considered at this wider level

h. the application of any **legal protections** to the relevant environmental features

i. any **other** relevant factors

The factors included in the lists above are not exhaustive. Nor will each factor always be relevant. In addition, these factors are not necessarily discrete. We will consider all relevant factors in the round, recognising the potential for inter-relationships between them.

As well as considering matters individually, we may also assess them collectively. The factors listed above should be read with this in mind. For example, we may receive a complaint about a specific aspect of a public authority's conduct and judge that this conduct on its own does not amount to a serious failure or occasion serious damage. However, if we receive more complaints or have other information about similar or related matters occurring more widely, whether in relation to the same authority or others, we may determine that cumulatively this indicates a serious failure or serious damage.

Finally, the ordering of the factors we refer to above is immaterial – there is no hierarchy between them.

Approach to assessing seriousness

This section covers the approach we will take in carrying out our assessments of seriousness.

We will exercise professional, impartial and evidence-based judgements in reaching our determinations. In considering relevant circumstances, we may be faced with situations in which uncertainty is a factor. The greater the importance of the feature of the natural environment that is or may be affected, or the more significant the human health impact, the greater the scope for adopting a proactive approach that addresses the risk of harm through proportionate enforcement action.

We will have regard to the need to act proportionately and would not normally expect to conduct detailed technical assessments (for example, scientific studies or primary data collection or analyses) to assess the level of actual or possible harm to the natural environment or human health associated with a suspected failure. Rather, we will exercise judgement in our assessments of harm and the possibility of serious damage. Our judgements will be based on the information that is reasonably available to us ensuring that they are undertaken objectively and consistently.

Once we have looked at relevant factors we will make an overall appraisal of the seriousness of the failure.

Some high level, illustrative examples of conduct that, based on a broad assessment, would normally be considered as clear serious failures to comply with environmental law include as follows.

Recurrent, frequent or ongoing conduct that is reckless, negligent, wilful or deliberate and which raises fundamental points of law will normally be considered serious. Cases which raise multiple instances of similar conduct which, when considered together, indicate a systemic issue potentially leading to significant local, regional, national or wider-scale damage will also normally be considered serious. In addition, conduct by a public authority which has failed to act on previous warnings or advice, or has been uncooperative or sought to conceal or mislead will normally be considered serious.

4.3 Step 3 – prioritisation

Our overall approach to prioritisation is set out in section 3.2 of our strategy and applies to all of our functions. This section of our policy sets out specific considerations applying to prioritisation of enforcement cases within that broader context. It should be read alongside section 3.2 of our strategy.

In accordance with our principal objective, we will target enforcement action to where we can most benefit environmental protection and the improvement of the natural environment. The Environment Act also requires that, in considering our enforcement

policy, we must have regard to the particular importance of prioritising cases that we consider have or may have national implications (see box 2).

We must also 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 raise a point of environmental law of general public importance

Box 2 – national implications

A case with national implications is one that has implications that extend beyond the immediate local area. This does not mean that direct physical impacts must be felt nationally. For instance, the Grenfell Tower fire tragedy happened at a single location but had much wider implications in terms of loss of life and public concern, leading to a public inquiry and national review of the fire safety of high-rise buildings.

When we receive individual complaints or other inputs that raise a concern at a particular site or sites, we will consider if the matter may have broader, and potentially national, implications based on any information that suggests a wider problem.

We may, conversely, receive complaints about a failure within the context of a nationally significant project or initiative. Such a failure need not have nation-wide implications simply because it relates to a high-profile or national project. Rather than focusing on the significance of the underlying project, our assessment of the potential for national implications will be based on the broader significance of the alleged failure and its consequences. This might include consideration of whether the failure indicates the existence of wider-spread systemic issues across the country or the cumulative impact of multiple, isolated failures which individually affect different areas.

The above statutory prioritisation criteria are built into our approach for assessing the seriousness of failures to comply with environmental law. As a result, we will consider them as an integral part of our seriousness assessments.

We will then prioritise our enforcement activity guided by the four questions set out in section 3.2 of our strategy:

- how large an effect could our action have?
- how likely is our ability to have that effect?
- what is the strategic fit?
- what is our capacity and capability to deliver?

Part 5. Urgent cases

Where a potential failure to comply with environmental law has given or could give rise to harm to the natural environment or to human health, we will consider whether this harm amounts to serious damage. Where we consider this to be the case, we will also assess whether the urgency condition is met for those cases.

Meeting the urgency condition has 2 elements. The first is that the failure could give rise to serious damage. This is considered in section 4.2 above. The second involves deciding whether it is necessary to prevent or mitigate serious damage by applying for a judicial review or statutory review, rather than using our bespoke enforcement functions towards environmental review [or a review application]. In deciding this we will consider, in particular, the **different timescales** and the **limits on the scope for remedies** associated with environmental reviews [and review applications] compared to applying for a judicial review or statutory review.

We will approach the **timescale element** by considering whether the serious damage would occur, or become unavoidable or worse, if we pursued our bespoke enforcement functions to resolve matters rather than progressing through a judicial review or statutory review. The likely period to progress any specific case to an environmental review [or a review application] will depend on the facts of that case.

The second element relates to the **limits on the scope for remedies** in environmental reviews [and review applications] compared to judicial review and statutory review. Generally, in an environmental review a court may not grant a remedy other than a SONC unless satisfied that doing so would not be likely to cause substantial hardship or substantial prejudice to a third party, or be detrimental to good administration. This condition does not apply where the court is satisfied that granting the remedy is necessary to prevent or mitigate serious damage to the natural environment or to human health, and that there is an exceptional public interest reason for granting it. [These conditions also apply in the context of Northern Ireland review applications.]

In considering the urgency condition, we will make our own assessment of the relevant conditions that a court would have to consider to grant a remedy. We will do so proportionately, having regard to the need to act urgently so having to assess matters quickly, potentially with limited information.

In determining whether to progress a case through the urgent procedure, we will also proportionately assess the matter according to our prioritisation criteria as discussed in section 4.3 above.

Part 6. Avoiding overlap with others

As we recognise in section 3.8 of our strategy, working well with others will be critical to our success. As part of this, our enforcement functions should be complementary to other

relevant statutory regimes and to the work of other bodies charged with overseeing public authorities in relation to environmental matters. Such regimes include public authorities' complaints procedures, appeals mechanisms and legal challenges as well as the functions of the relevant ombudsmen services.

To avoid conflict and duplication when prioritising cases we will take into account the existence of such regimes and any information we have concerning whether they are being applied to a particular allegation of non-compliance.

We will not normally commence enforcement action where we judge another regime or authority is better suited to hold a public authority to account.

We also will not normally act where a public authority's decision remains subject to further statutory regimes before becoming final. Some decisions normally made by one authority can be scrutinised by another before being finally confirmed; many Environment Agency permitting decisions can be appealed to the Secretary of State for example. In such cases we will not usually take action before that appeal has concluded or relevant time limits have expired without the procedure being commenced. We may, however, act if we consider that other regimes are unlikely to be as effective at securing environmental protection and improvement (including as related to people's health) as our own intervention would be. In such cases, we would usually communicate with those responsible for other regimes to get their views before deciding whether or not we should act.

We endeavour to avoid overlap between the exercise of our functions – in particular those associated with the receipt and handling of complaints – and the exercise by the relevant ombudsman services of their functions. How we will do this, and further detail on how we will work with other bodies, is set out at section 3.8 of our strategy.

Part 7. Monitoring and review

We will monitor our implementation of this enforcement policy. In particular, we will develop approaches to measure and evaluate:

- when and how we use our enforcement powers
- the improvements in public authority compliance with environmental law to which our enforcement action has contributed
- the contribution to environmental protection and the improvement of the natural environment (including in relation to people's health) made by that action

We will periodically assess the outcomes of our enforcement decisions and consider the lessons learned.

We expect to review this enforcement policy in light of our experience and, in any event, within the first 18 months of its adoption as part of our broader review of our strategy.