

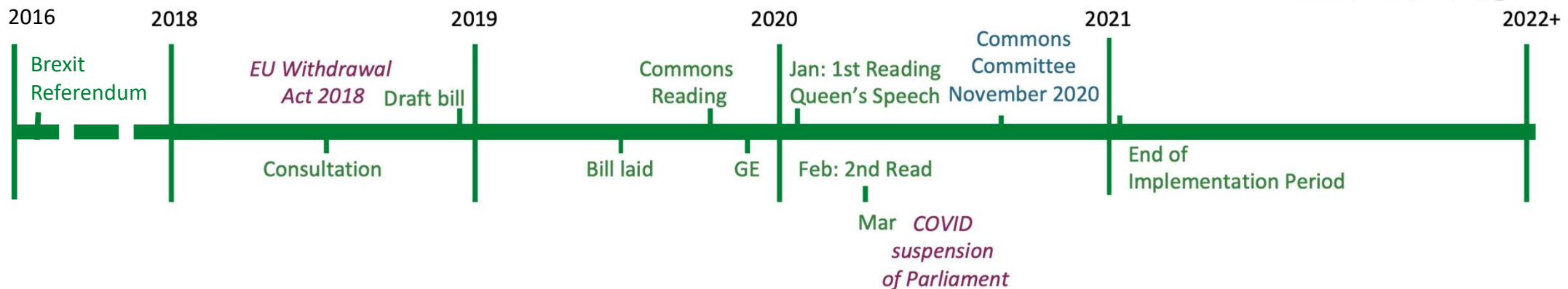
# ACUITY LAW.

The Office for Environmental Protection

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# Why we need the Office for Environmental Protection

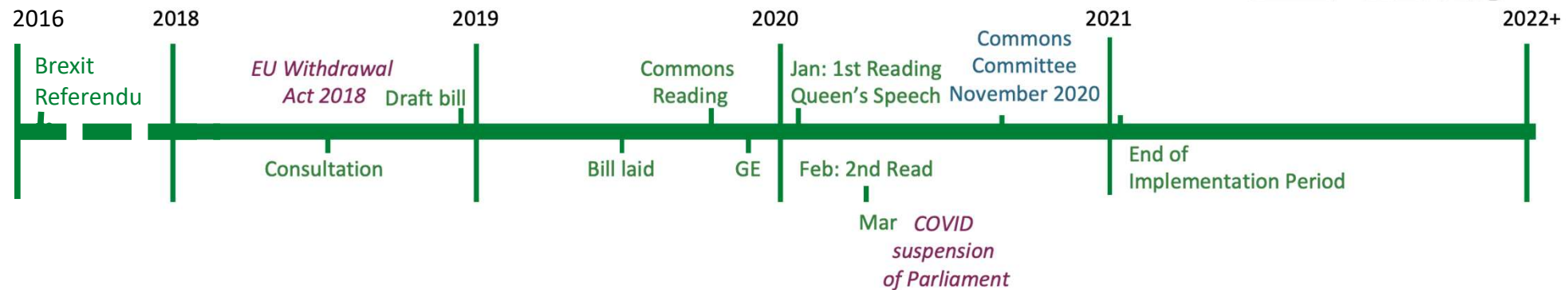
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- Brexit
- EU Withdrawal Act 2018
  - Created the concept of EU retained law in the UK
  - Required the government to come forward with a draft bill within 6 months
    - Require ministers to have regard to a policy statement on environmental principles when developing policies
    - Establish and independent public authority with powers to take legal proceedings against the Govt for failure to comply with environmental law.

# Why we need the Office for Environmental Protection

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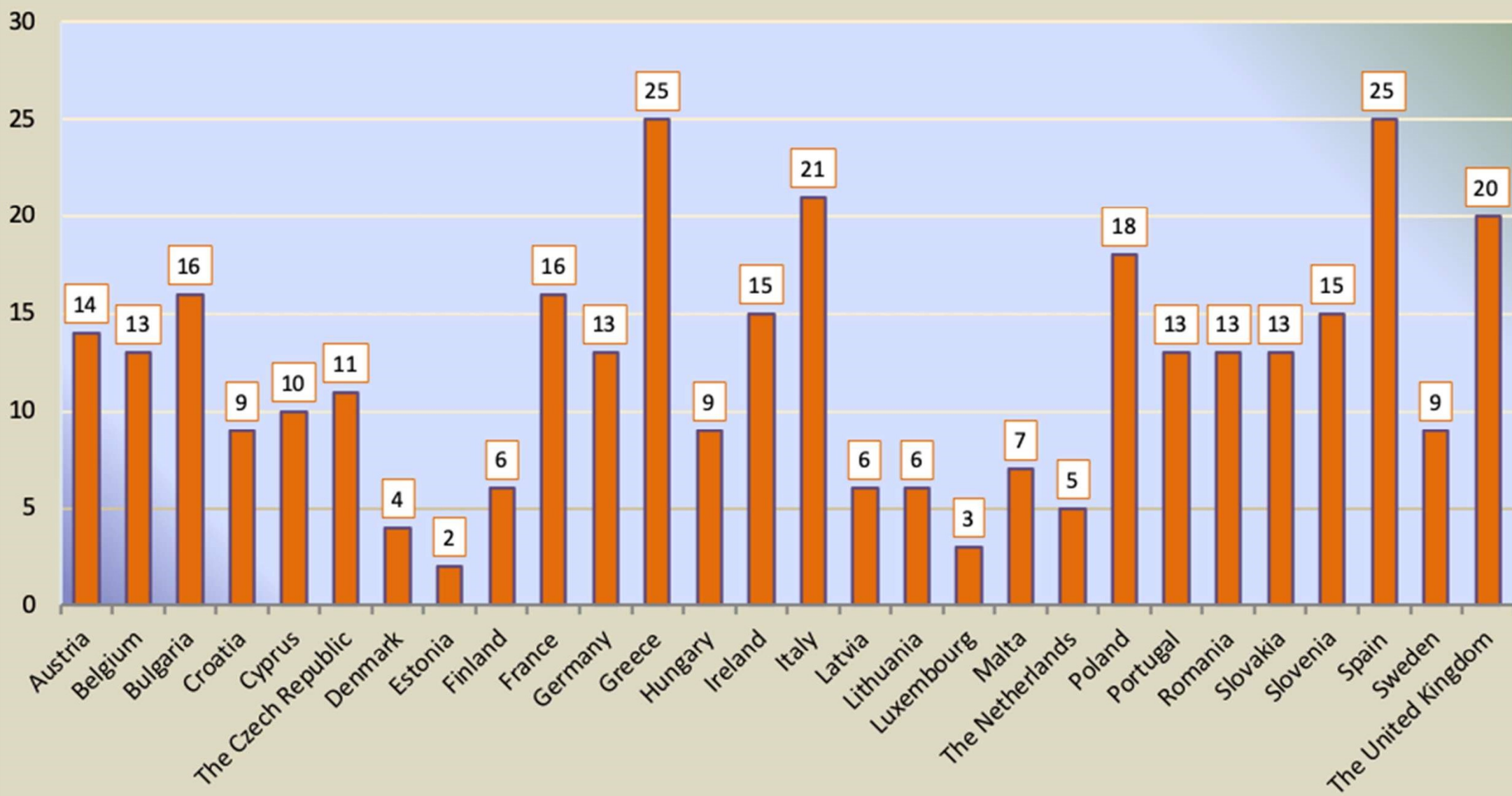
- Dec 2019 - Govt published a draft Environment (Principles and Governance) Bill which included:
  - Environment Improvement Plans – the first being Defra’s 25 year plan – having statutory basis
  - Requiring government ministers to have regard to a policy statement on environmental principles
  - Creating a new independent body the Office for Environmental Protection with scrutiny, advisory and enforcement powers
- October 2019 - announced in queen’s speech – first reading in Commons 15 October 2019
- November 2020 – Today at Commons committee stage

# The Commission's Role

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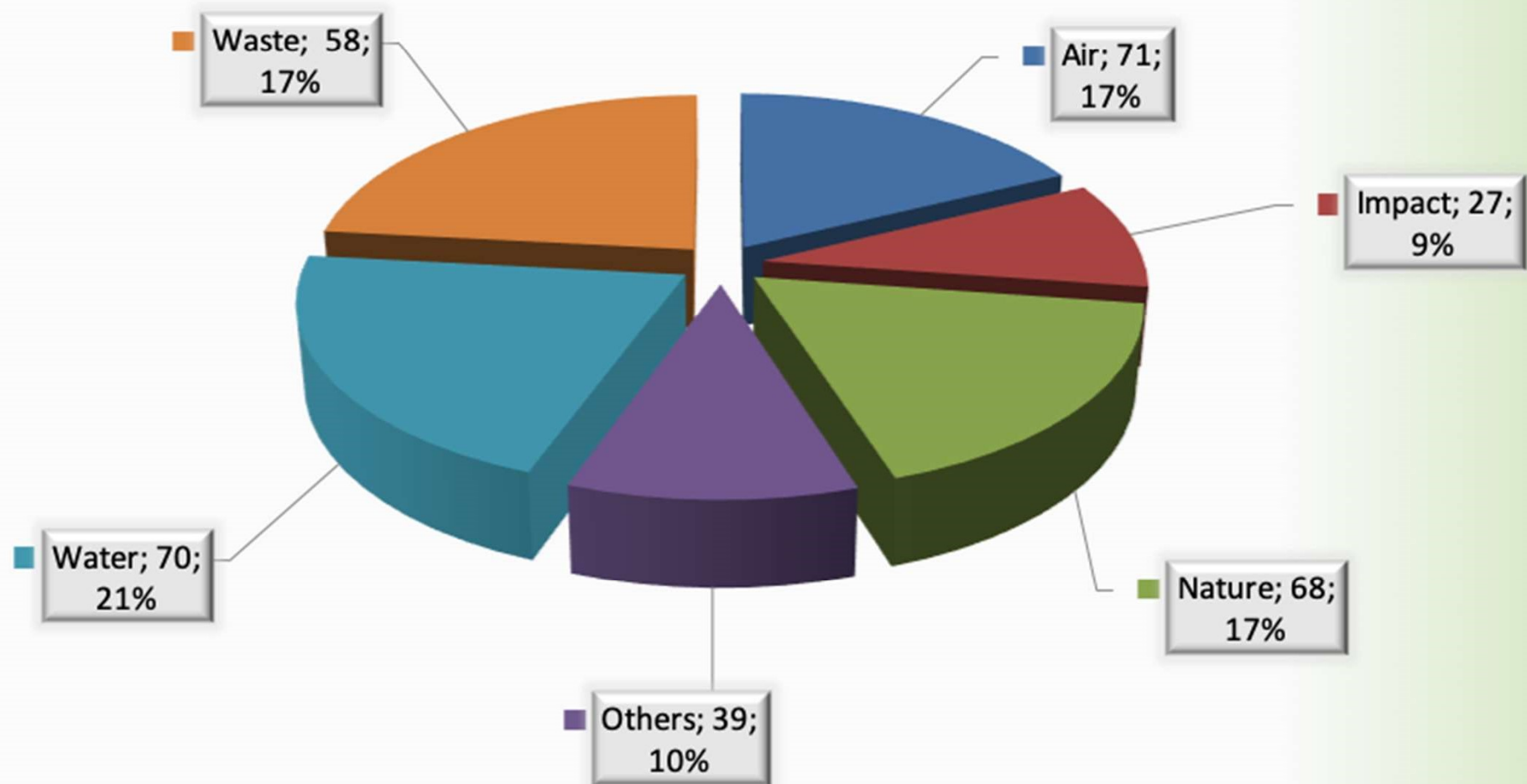


- DG Environment – Governance framework - ensure MS comply with environmental law
- Monitors and reports on compliance with environmental law – MS provide reports
- Carries out investigations following complaints or on its own accord
- Complaint forms and special complaint forms
- Bringing infringements proceedings before CJEU against MS for breaching or non implementation of environmental law – process
  - "letter of formal notice"
  - "reasoned opinion"
  - referral to the CJEU
- Remedies in court
  - Can ask the CJEU for interim measures if irreversible damage could be done – urgent and serious cases e
  - Can ask for a judgment of mandamus
  - If MS fails to comply – can take further action and Court may impose a fine.



**Total: 327**

## Infringements by sector in 2019



Total: 337

# What is the OEP

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- Non-Departmental Public Body (NDPB)
- Governed by a Board exec and non exec members – ideally more non exec
  - Interim Chair and Chair
  - Interim CEO and CEO
  - Non exec and exec members
- Secretary of State appoints Chair and non exec members
- Can appoint committees of experts
- Power
  - To determine how it will carry out its functions
  - To determine its own procedures.....
- Funding – line in Defra's budget

# Guiding Principles

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- Principle objective - to contribute to **environmental protection and improvement of the natural environment**
  - **Natural environment** includes means
    - (a) plants, wild animals and other living organisms,
    - (b) their habitats,
    - (c) land (except buildings or other structures), air and water, and the natural systems, cycles and processes through which they interact.
  - **Environmental protection** means:
    - Protection of the natural environment and people from effects of human activity
    - Maintain, restore or enhance the natural environment
- Act with **impartiality, objectively in a proportional way and with transparency**



# Work Lead by its Strategy

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- How it will exercise its functions – laid before Parliament – reviewed every 3 years
- Include – how it will further its objectives, act objectively, impartially with transparency and in a proportional way
- Contains – enforcement policy
  - When will a non compliance be serious ?
  - What does serious damage to the natural environment mean?
  - How will it ensure that it is the last place of appeal / complainants exhausted the internal provisions for appeals
  - How will it prioritise cases? National implications, ongoing or recurrent conduct
- Issues with new clause 24

# What will it do

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- Monitoring functions
- Reporting functions
- Advisory functions
- Enforcement Functions

# Scrutiny and Advice Functions - 1

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- Monitoring and reporting on Implementation of the EIPs and Targets
  - Progress on the EIPs
  - Progress towards priority targets long terms and interim– air quality, water quality, waste and resource efficiency and biodiversity
  - Yearly report to Parliament – may also report on how progress could be improved and question data published by the Secretary of State
  - Secretary of State must respond to report no later than 12 months after the report is laid, publish response and send to Parliament

# Scrutiny and Advice Functions - 2

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- Monitoring and reporting on environmental law
  - Monitor implementation of environmental law
    - Environmental law is **any legislative** provision to the extent that it is **mainly concerned** with **environmental protection** and not excluded
  - Yearly report to Parliament – may also report on how progress could be improved and question data published by the Secretary of State
  - Secretary of State must respond to report no later than 3 months after the report is laid, publish response and send to Parliament

# Scrutiny and Advice Functions - 3

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- Advising on changes to environmental law or other matter relating to the natural environment
  - When a Minister so requests
  - Must publish if gives advice

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With many thanks to Martin Baxter and Mariabelen Malaga-Hardy

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26 November 2020

Weightmans

# Weightmans

The OEP – Office for Environmental Protection  
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## Role of OEP?

- 4 key functions – one of which is Enforcement action against ‘public authorities’ for serious failure to comply with EL
- ‘PA’ definition – s28(3) – very broad – “function of public nature not devolved” – Govt Dept, Enviro Regs, LAs, Utility Companies...
- S43 EL – “mainly” – planning, transport, energy, public health – also enviro taxes?

### 43 Meaning of “environmental law”

- (1) In this Part “environmental law” means any legislative provision to the extent that it—
  - (a) is mainly concerned with environmental protection, and
  - (b) is not concerned with an excluded matter.
- (2) Excluded matters are—
  - (a) disclosure of or access to information;
  - (b) the armed forces or national security;
  - (c) taxation, spending or the allocation of resources within government.



## Breach of EL...

- (2) For the purposes of those sections, a reference to a public authority failing to comply with environmental law means the following conduct by that authority –
    - (a) unlawfully failing to take proper account of environmental law when exercising its functions;
    - (b) unlawfully exercising, or failing to exercise, any function it has under environmental law.
- Not necessary – ‘breach of law’
  - Too restrictive – what about failures to achieve standards? – Increasingly important

## Enforcement Process

- Complaint/OEP
- Urgent JR/SR if serious failure = serious harm/damage
- Informal discussion/negotiation – duty on PAs to cooperate with OEP
- Information notice – requiring PA to provide specified information
- Decision notice – specifying alleged breach and steps to remedy/mitigate/prevent recurrence – 2 months to respond (no right of appeal)
- Lack of appropriate action = reference to UT for environmental review

## Complaint...time limits

- Exhaust PAs own complaints process first
- Time limits –
  - 1yr from last day of alleged failure; or
  - 3-months from day on which PAs own complaints procedure exhausted
  - NB OEP can waive if exceptional reasons
- Interaction with JR time limits?
- What does that mean in the context of a project/scheme? Do you wait?

## Enforcement policy – Seriousness/Priorities?

- Forms part of Strategy – consult/review
- What is considered –
  - a ‘serious’ failure to comply with environmental law?
  - or ‘serious’ damage to the environment/human health will result (JR intervention)?
    - Outcome focused
    - Possible consequences
    - CICS
    - EDR example –
      - Category 1 – major, serious, persistent and/or extensive impact or effect on the environment, people and/or property

## Enforcement policy – prioritise...

- OEP to prioritise cases – will not have unlimited resources – so...
  - Those of national importance
  - Ongoing/recurrent conduct
  - May cause/has caused ‘serious’ damage
  - Point of EL of general public importance= high bar

NB – akin to public interest test so not unfamiliar

NB – SofS proposed amendment to Env Bill to allow SofS to issue guidance to OEP re Enforcement Policy – preparing & exercising...& can change Guidance at any time!

## Environmental Review (1)

- OEP serves decision notice
- Not satisfied with PA response
- Applies to UT for enviro review (NB – High Ct?)
- Not prior to expiry of 2-months/JR/other similar proceedings time limit
- UT determines if – failure to comply with EL applying JR principles – Illegality, irrationality or procedural error (limits scope)
- Flexible procedural rules – High Ct restricted
- Use of expert members alongside judicial chair

## ER (2)

- If UT finds there has been a failure –
  - Publish a statement to that effect = statement of non-compliance (no effect of quashing)
  - Grant any remedy other than damages applying JR principles – injunction, declaration, orders... not if = substantial hardship/prejudice a third party/detrimental to good administration
- So no real teeth...
- Failure to comply with order = contempt of court – fine/imprisonment so closer to Euro Comm – but very rare/unlikely
- With in 2-months PA to publish details of steps take going forward – Learning? Compensatory measures if harm resulted?

## Conclusions

- Only big issues
- No real teeth
  - Monetary penalties
  - Overturn decisions
- Greater focus on publicising and learning
- Complex process – what, when, how...
- Government seeking to water down further – e.g. No UT
- Suspect OEP real influence likely to come from areas other than enforcement – reviews of EL, environmental plans etc.
- But likely to see a couple of early enforcement actions



## Questions



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