

ENVIRONMENTAL LAW & MANAGEMENT

SPECIAL ISSUE

UNITED KINGDOM ENVIRONMENTAL LAW ASSOCIATION
UKELA CONFERENCE PAPERS 2015

Water, water everywhere

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PUBLISHING

UNITED KINGDOM ENVIRONMENTAL LAW ASSOCIATION (UKELA) CONFERENCE PAPERS 2015

The University of Liverpool, 3–5 July 2015

Water, water everywhere

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ENVIRONMENTAL LAW & MANAGEMENT

Volume 27 Issues 3–4 2015 ISSN 1067 6058

Environmental Law & Management
www.lawtext.com
ISSN 1067 6058

Volume 27 (2015)
6 issues plus index
£585

CONTRIBUTIONS

The editors and publisher welcome submissions for publication. Articles, letters and other material should be submitted to:

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Office G18 – Spinners Court
55 West End, Witney
Oxon, OX28 1NH

E-mail: elm@lawtext.com
Tel: +44 (0) 1993 706183
Fax: +44 (0) 1993 709410

This journal is a refereed journal and may be cited as: (2015) 27 ELM 00

Environmental Law & Management is published by Lawtext Publishing Limited

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Typeset by:
The Studio Publishing Services Ltd
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www.publishingservicesuk.co.uk

Printed and Bound in the United Kingdom by
Information Press, Eynsham

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United Kingdom Environmental Law Association

UKELA Conference 2015

In association with the University of Liverpool
Central Teaching Hub and Crown Place, Liverpool,
3–5 July 2015

Water, water everywhere

Foreword

I'm delighted to welcome you to the annual UKELA Conference in Liverpool. This is the highlight of the UKELA year, and brings together world-class speakers with UKELA members and provides outstanding networking and cultural opportunities.

This conference has a theme that plays out over many sectors and areas of real and important interest, some of which are highly topical and local to our venue. While you may or may not know the Water Framework Directive inside out from the recitals to the annexes, all of you will appreciate the range of interactions both in the environment and as between professional disciplines, which is an essential feature of the law as it is concerned with the water environment.

One of UKELA's important functions is to nurture a new generation of environmental lawyers. Many are here. I never stop emphasising the dialogue and delivery of know-how that takes place in UKELA between those who come to environmental issues from different perspectives. UKELA is, and remains, unique in providing these opportunities.

UKELA is most grateful to 39 Essex Chambers; Exponent Engineering and Scientific Consulting; Landmark Chambers and Thomson Reuters. Without them and our other, much-valued, sponsors, it would not be possible to hold an annual conference in the style in which we do which allows us to welcome all UKELA's members, whether students, practitioners, academics or regulators.

The Recyclists deserve a special mention. They have got on their bikes for the fifth consecutive year to support the Lord Nathan Fund, which provides resources to support www.environmentlaw.org.uk and help people who urgently need environmental law information.

Next year's conference will be international in flavour and will be held at the University of Sussex, Brighton from 1–3 July 2016; we do hope you will join us there.

Richard Kimblin *Chair, UK Environmental Law Association**
www.ukela.org**
July 2015

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** Registered Charity in England and Wales 299498. Company registered in England number 2133283. Registered office: One Glass Wharf, Bristol, BS2 0ZX. The postal address is PO Box 487, Dorking, RH4 9BH.

Editorial note:

Since the conference in July 2015 the editors and some authors have added information about the recent developments where relevant to the original texts. Footnotes have also been inserted to provide general references.

Principal speakers at the UKELA Annual Conference 3–5 July 2015

James Burton is a barrister in private practice at 39 Essex Chambers. He specialises in environmental and planning law. His clients include water companies, environmental permit holders, developers, local authorities and national agencies such as Natural England and the Marine Management Organisation as well as private individuals. James is a UKELA trustee with particular responsibility for Young UKELA. He is also a founder member of the Recyclists, UKELA's informal cycling club.

Bishop James Jones is a Fellow of the Society for the Environment and is a longstanding champion of urban regeneration, with a passion for the environment. In addition to his role as Bishop of Liverpool, a post that he held from 1998 to 2013, the Bishop has served a wide range of public and professional bodies concerned with the environment. Recent and current activities and affiliations include: Fellow of the Society for the Environment; Fellow of the Institute of Foresters; Fellow of WWF; Vice President of Town and Country Planning Association; Chair, Independent Panel on Forests, 2011; Chair, St Paul's Cathedral Symposium on Climate Change, with UN Climate Ambassador Christiana Figueres, 2014; Keynote speaker, European Churches Environmental Network, 2014; Westminster debate with Nigel Lawson and Nick Stern on 'Can we afford to save the Planet?', 2014. Bishop James also chaired the Hillsborough Independent Panel, which led to the quashing of the original inquests.

Richard Kimblin is a barrister at No 5 Chambers, London practising environmental and planning law and Chair of UKELA's Council. He has appeared in many of the leading cases in the High Court and Court of Appeal on EIA, permitting and Habitats Regulations issues.

Richard has a long-standing interest in the water environment: he started out working on the impacts of gold mining operations in Victoria, Australia, completed a PhD on the Thames Water artificial groundwater recharge project in the Lee Valley, and undertook the comparative study of European legal systems which informed the drafting of the Water Framework Directive. He has recently been engaged in the only two High Court cases on the Water Framework Directive and the Environmental Liability Directive.

Camilla Lamont is a barrister at Landmark Chambers. She was called in 1995 and is recognised as a leading property litigation junior. Recent clients in her environmental practice include a developer in relation to flooding of a disused railway tunnel; the National Grid in litigation arising out of the installation of a gas pipeline; a factory operator in a claim regarding alleged pollution by discharge of organic effluent; factory owners seeking to establish rights to abstract water from and discharge into a river; local authorities in respect of contaminated land and coastal protection schemes; and a public body regarding the interpretation of a 'green lease' and the provision of CHP Plant.

Gordon McCreath is a partner at Pinsent Masons LLP, and specialises in consenting major projects and environmental law. He has had a particular specialism in water-related issues since advising on transposition and implementation of the Water Framework Directive while working at SEPA and the then Scottish Executive. After returning to private practice in 2004, Gordon led advice to Northern Ireland Water on reform of the water industry in Northern Ireland, and has advised clients including Scottish Water; United Utilities; Severn Trent Water and Water UK. Most recently Gordon advised London Borough of Southwark throughout the examination of the Thames Tideway Tunnel DCO application.

Steven T. Miano is a Shareholder and heads the Environmental Practice Group at Hangley Aronchick Segal Pudlin & Schiller in Philadelphia, PA. He also serves on the firm's Executive Committee. His practice, which spans more than 25 years, includes all facets of environmental law and litigation, including federal and state cases involving the Clean Water Act, Clean Air Act, Hazardous Waste laws, Superfund and Brownfields redevelopment. His clients include corporations, commercial entities and municipalities. Before entering private practice, he was an Assistant Regional Counsel for the U.S. Environmental Protection Agency. He is an adjunct professor at Rutgers University Law School.

Steven currently serves as the Chair of the American Bar Association's Section of Environment, Energy and Resources.

Professor Dr. John R. Mullin is a Professor of Urban Planning in the Department of Landscape Architecture and Regional Planning and Associate Director of the Center for Economic Development at the University of Massachusetts (UMass). His research interests focus upon industrial revitalization, port development and downtown revitalization. Dr. Mullin has written or edited over 100 book chapters, book reviews, technical reports, journal articles and conference proceedings. He is a Fulbright Scholar, charter member of the Fellows of the American Institute of Certified Planners and the recipient of the Chancellor's Medal, the highest honor bestowed to faculty at UMass Amherst. He is a retired, federally recognized, Brigadier General from the Army National Guard.

Jonathan Robinson is Executive Director of Resources and Legal Services at the Environment Agency, which he joined as Legal Director in 2009. Jonathan worked in the European Commission handling enforcement of EU environmental law, and working in international environmental policy negotiations in the UN, WTO and UNEP. He has managed teams working on environmental and planning law in Defra, and been Chief Legal Adviser in the UK Department of Communities and Local Government and the New Zealand Ministry of Social Development. Jonathan has published articles on environmental law and edited a book on greenhouse gas emissions trading. He is Visiting Professor of Environmental Law at University College London and recently co-authored (with

Eloise Scotford) the review of the state of English environmental law for the 25th anniversary edition of the Oxford Journal of Environmental Law. In 2013 he became the first President of the newly created European Network of Prosecutors for the Environment.

Duncan Spencer is a director and founder of EDIA Limited, an environmental insurance consultant and broker. He has worked in the environmental insurance industry since 2001 and the environmental engineering industry since 1989. Duncan has worked on the placement of environmental insurance programmes (both as an underwriter and as a broker) for a very wide range of clients, ranging from SME businesses to multinational merger and acquisitions. He has been central to the development of the UK environmental insurance industry along with the pan European industry response to the Environmental Liability Directive. Currently, Duncan also works as a consultant to a national environmental regulator in the determination of correct financial provision against environmental damage caused by licensed operations.

Lynda Warren is Emeritus Professor of Environmental Law at Aberystwyth University with research interests in the interface between law and science. She has particular expertise in

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Kate Zabatis is the Head of Environment Policy and Regulation at United Utilities. Having worked there for the last 16 years, Kate has a range of experience predominantly focusing on wastewater and strategic planning activities. For the last four years Kate has focused her efforts in the environmental regulatory department at United Utilities working closely with local and national Environment Agency contacts. Kate studies centred in the field of environmental science and geography at The University of Wales, Aberystwyth and Newcastle University.

Introduction

Water law: orientation, perspectives and pointers

Richard Kimblin *Chair, UK Environmental Law Association, Barrister No 5 Chambers*

Orientation

The human race has sought to accumulate understanding of water since time immemorial. Water has been a key focus in mythology, most world religions and in scientific and industrial endeavour. That proposition is shortly stated but is a life's work to explore and study.

Lawyers have sought to accommodate our needs and interactions with water through a series of legal instruments or codes. If there was little complaint about the legal framework, it went largely unaltered for centuries. However, when major social change or natural events have highlighted the inadequacies of the legal framework, it has frequently led to an overhaul.

There is a strong argument that evolution of our domestic controls in the water environment have in fact been reactive and responsive to events and circumstances rather than being derived from a principled or holistic approach. The Public Health Acts were in significant measure a reaction to the sewerage crisis in London. Similarly, the severe drought in 1959 and flooding events in 1960 were the precursor to the Water Resources Act 1963. More recent flooding such as the devastating events of the summer of 2007 led, in part, to the Floods and Water Management Act 2010. All of these major legislative reforms were enacted in response to events. Undoubtedly, however, the 1991 legislation¹ has been long-lived and a cornerstone of water infrastructure in all senses.

Water law seems to be a prime example of a collaborative exercise between disciplines. The imprint of engineers, geologists, hydrogeologists, biologists, economists, planners, fishermen and activists can be found throughout the law as it is applied to water. Whether the various needs of the population and the environment are adequately addressed by the particular legal framework which is in play is something that has been constantly tested since the Second World War and certainly since the Industrial Revolution. It is being tested now in the context of habitats protection, energy exploration and exploitation (fracking) and in the planning of infrastructure to accommodate significant development needs throughout the UK.

In their article entitled 'Maturity and methodology',² Fisher, Lange, Scotford and Carlane articulate the problems that environmental law has owing to its inter-disciplinarity, its utilisation of diverse instruments of governance and the multi-jurisdictional nature of the subject. They explain that environmental law is 'intellectually incoherent – ad hoc, a conceptual hybrid, straddling many fault lines and presumed to have no philosophical underpinnings'.³ We can go further in respect of water law. It is a component of environmental law which, because of its long-understood importance, has developed organically with a touchstone of effectiveness rather than principle. Perhaps, as environmental lawyers we would aspire to principled effectiveness but, if forced, would we choose effectiveness or principle?

When we stand back from the range of materials to be presented at UKELA's Conference in 2015, it may be that we can consider whether we see some of these characteristics in the following seven perspectives:

- 1 very long-standing common law principles
- 2 major practical reliance on the planning system
- 3 enduring schemes and regulatory mechanisms
- 4 fractures and incoherence as between areas of law and resultant conflict
- 5 reactive legislation
- 6 disparate bodies for sanctions, particularly for sewerage undertakers
- 7 rapid impact of EU measures and slow integration with domestic regimes.

Perspectives

Starting with a local and marine reference, within the manor of Great Crosby there was an alleged trespass on foot, with horses, and with the wheels of bathing machines, carts, and other carriages, passing over, tearing up, damaging the sand, gravel and soil.⁴ Briefly, the case brought before the court was an action for trespass over the beach and foreshore of Great Crosby in Lancashire. The defendant had been operating a business, charging money for transporting visitors in bathing machines over the beach and foreshore in order to bathe in the sea. It was also alleged that this activity caused damage to the land. The lord of the manor of Great Crosby (the plaintiff) was the

¹ The Water Industry Act 1991 set out the powers and duties of the water and sewerage companies, thus replacing those set out in the Water Act 1989, and defined the powers of the Director General of Water Services (now Ofwat). The Water Resources Act 1991 set out the functions of the National Rivers Authority (now the Environment Agency) and introduced water quality classifications and objectives for the first time. The Statutory Water Companies Act 1991 applied specifically to the former statutory water companies. The Land Drainage Act 1991 transferred the functions of previous internal drainage powers of local authorities to the National Rivers Authority (NRA).

² E Fisher, B Lange, E Scotford and C Carlane 'Maturity and methodology: reflecting on how to do environmental law scholarship' (2009) 21(2) *Journal of Environmental Law* 213.

³ N de Sadeleer *Environmental Principles: From Political Slogans to Legal Rules* (OUP 2002) 219.

⁴ *Blundell v Catterall* (1821) 5 Barnewall and Alderson 268, 106 ER 1190.

acknowledged owner of the land and had an exclusive right of erecting stake nets for fishing there; he maintained that the defendant had no right to carry on this commercial activity on his private property.

The question to be decided was therefore whether there was a common law right for all the king's subjects to bathe upon the sea shore, and to cross over it for that purpose, on foot, and with horses and carriages. However, because the land was proved to have been private property from time immemorial, the judges were also obliged to consider a further question: 'the question really is, whether there is a common law right in all his subjects to do so *in locus quo*, though the soil of the sea-shore, and an exclusive right of fishing there in a particular manner (namely with stake nets), are private property belonging to a subject, and though the same have been a special peculiar property from time immemorial'.⁵

The defendant had pleaded:

... as to the trespasses committed on the close called the Sea-Shore, and on that between the high and low-water mark, a public right of way on foot, and with cattle, carts, and carriages; and secondly, as to the same trespasses, that all the liege subjects of our lord the King, had been used and accustomed to have and enjoy, and of right ought to have had and enjoyed, and still of right ought to have and enjoy the right and liberty of bathing in the sea from time to time, being over and upon the whole or any part of, or adjoining to, the said close, in which, &c., at all seasonable and convenient times, for their health and recreation, and for that purpose, of going and returning, passing, and repassing into, through, over, and along the said close, in which, &c. on foot, and with their servants, and with carriages and bathing machines, and horses drawing the same to the sea and back again; and of staying in and upon the close a necessary and convenient time for the purposes of bathing as aforesaid: and thirdly, as to part of those trespasses, a right of bathing and of passing on foot only.

The plaintiff was the lord of the manor of Great Crosby, which is bounded on the west by the river Mersey, an arm of the sea. As lord of the manor, he was the owner of the shore, and had the exclusive right of fishing. The defendant was the servant at a hotel, which kept 'bathing machines' which were driven across the shore into the sea, for the purpose of bathing. No bathing machines were ever used before the establishment of the hotel, but it had been the custom for the public to cross it on foot, for the purpose of bathing. There was a common highway for carriages along the shore, and it was proved that various articles for market were occasionally carted across the shore, although the more common mode of conveyance for such things was by a canal, made about 40 years earlier. The defendant contended for a common law right for the public to bathe on the sea shore, and to pass over it for that purpose, on foot, and with horses and carriages.

The common law principle as to rights of access to the sea across the beach has held good since *Blundell v Catterall* and was not disturbed in *R (on the application of Newhaven Port and Properties Ltd) v East Sussex CC*.⁶ Indeed, the

Supreme Court in *Newhaven* maintained the *status quo*, despite observing both the criticisms of the land standing position and the alternative approach taken in Scotland:

[117] It seems that from the middle of the previous century, Scottish law had begun to recognise a public right to use the foreshore for recreation, without feeling inhibited by authorities from the other side of the border. In 2001, the Scottish Law Commission reviewed the cases, beginning with *Officers of State v Smith* (1846) 8 D 711, and concluded that such a right was 'well supported by authority'. The precise scope of the right was not clear:

It appears to include walking and running, having a picnic or barbecue, sunbathing and swimming. While it does not include the right to put up a hut on the shore, it does include the right to shoot wild fowl. The sale of refreshments on the beach is outwith the scope of the right. (Discussion Paper No 113 *Law of the Foreshore and Seabed*, para 4(25).)

So, with regard to **Perspective 1**, it is clear that water law includes some very long-standing legal principles.

Staying local to Liverpool, but moving from 1815 to 23 and 24 June 2015, Lancashire County Council considered an application to undertake hydraulic fracturing of the Bowland Shale reservoir, to extract shale gas at a site on the Fylde, 80 km north of our conference venue and likewise at the Little Plumpton site. The report to Committee advised in respect of impacts on groundwater:

The EA has granted the applicant the necessary environmental permits needed to carry out their proposed operations. The permits set out the conditions needed to protect groundwater, surface water and air quality. Now permits are issued, the applicant would have to comply with the proposed conditions that are designed to ensure that operations do not cause harm to people or the environment. The EA has assessed the proposed activities that could involve the discharge of pollutants into groundwater (a 'groundwater activity') and the nature of these pollutants. The EA is satisfied, subject to conditions, that there is minimal risk of direct discharge of pollutants into groundwater. The EA is also satisfied that the indirect entry of non-hazardous pollutants will be limited so as not to cause pollution.

Hydrogeological issues and the protection of surface and ground water have been assessed by the applicant and the risks associated with such were considered to be low or very low.

The EA has advised that the scenarios of pollution of shallow groundwater and surface waters due to fracking operations, as suggested in some representations, are not credible. They also say the suggestion the proposal is unsafe because there are faults in the vicinity are unfounded.

Hence, as is the case for all development proposals that will require an environmental permit, the planning system presumes that the regulation under the permit will be effective in mitigating the environmental effects of the proposal. Here we see planning relying heavily on environmental protection legislation. However, this is very much a two-way street.

⁵ *ibid* (Holroyd J) 17.

⁶ [2015] UKSC 7, [2015] 2 WLR 601.

To explain this further, the following excerpt from a judgment of Sullivan LJ is helpful:⁷

[I]t is a characteristic of the UK's approach to environmental protection that much (if not most) of the detail is contained, not in statutory regulations, but in policies, both national policies adopted by the Government (the NPPF), and local policies adopted by local planning authorities in their development plan documents. When preparing their local development plan documents local planning authorities must have regard to national policies; including the NPPF: see s.19(2)(a) of the 2004 Act. Decision-makers are then required by s.70(2) to have regard to such policies; and if the policies are contained in the development plan they must be followed unless material considerations indicate otherwise: see s.38(6) of the 2004 Act (at [22]).

So, swathes of what many call 'planning' is really 'environment'. UKELA should feel comfortable in planning 'territory' and inhabit it whenever it has something relevant to say or to contribute to wider understanding. I hope and expect that UKELA's status will become increasingly favourable in this area, and in all administrations in the UK.

The planning system has had and continues to have a major role to play in protecting and regulating the water environment, for example:

- it is effectively the gatekeeper in respect of flood risk, the sequential test in NPPF
- it is dragged into issues of forward planning of waste water infrastructure
- it plays a significant role in controlling, often by use of conditions, potential for groundwater and surface water pollution from contaminated land.

It is straightforward to illustrate just how fundamental the planning system is to the control of flood risk by turning to the key paragraphs of the Framework and the NPPG. The Framework deals with Flood Risk at paragraph [100] as follows:

Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk, but where development is necessary, making it safe without increasing flood risk elsewhere.⁸

There is a sequential test:

The aim of the Sequential Test is to steer new development to areas with the lowest probability of flooding. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower probability of flooding.⁹

The use of the sequential test is then explained:

When determining planning applications, local planning authorities should ensure flood risk is not increased elsewhere and only consider development appropriate in areas at risk of flooding where, informed by a site-specific flood risk assessment following the Sequential Test, and if required the Exception Test, it can be demonstrated that:

- within the site, the most vulnerable development is located in areas of lowest flood risk unless there are overriding reasons to prefer a different location; and
- development is appropriately flood resilient and resistant, including safe access and escape routes where required, and that any residual risk can be safely managed, including by emergency planning; and it gives priority to the use of sustainable drainage systems.¹⁰

The NPPF is supported by Technical Advice, which provides that:

As set out in the National Planning Policy Framework, local planning authorities should only consider development in flood risk areas appropriate where informed by a site-specific flood risk assessment. This should identify and assess the risks of all forms of flooding to and from the development and demonstrate how these flood risks will be managed so that the development remains safe throughout its lifetime, taking climate change into account. Those proposing developments should take advice from the emergency services when producing an evacuation plan for the development as part of the flood risk assessment.¹¹

Taken together, the policies are significant policies of restraint and set strict but proportionate tests. The two sides of the same coin have: (i) a major effect on the water environment and (ii) on the location of development. These policies have legal effect through sections 19(2)(a) and 38(6) of the Planning and Compulsory Purchase Act 2004. Thus, large parts of our 'water law' can be found in planning policy. This is **Perspective 2** in action: major practical reliance on the planning system.

However, the reverse is also true when one looks at the second example above, in respect of waste water infrastructure. Laws requiring the provision of sewers and that dwelling houses be connected to sewers were one of the first interventions of Parliament into the planning of settlements and the regulation of issues that might affect public health. We still have the imprint of that very early legislation in the Water Industry Act 1991, ie **Perspective 3** on enduring schemes and regulatory mechanisms.

However, before seeking to install a sewer to connect to the sewerage infrastructure, planning permission must be sought for the development that is to be connected. The relationship between these two schemes of control came to a head in *Barratt Homes Limited v Dŵr Cymru*.¹² In that case, Barratt took the point that section 106 of the 1991 Act provided an automatic entitlement for an owner of a

⁷ *Secretary of State for Communities and Local Government v Venn* [2015] Env LR 15.

⁸ Planning Practice Guidance http://planningguidance.planningportal.gov.uk/blog/policy/achieving-sustainable-development/delivering-sustainable-development/10-meeting-the-challenge-of-climate-change-flooding-and-coastal-change/#paragraph_100.

⁹ *ibid* para 101.

¹⁰ *ibid* para 103.

¹¹ Department for Communities and Local Government *Technical Guidance to the National Planning Policy Framework* (March 2012) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6000/2115548.pdf para 9.

¹² [2010] Env LR 14, 253.

dwelling house to connect to the public sewer. Section 94 of the 1991 Act places a duty on the undertaker to provide and maintain an effective sewerage system. The Supreme Court confirmed that Barratt could connect to the public sewer at a point of its own choosing.

There is an arbiter of disputes regarding the connection (Ofwat) whose function should not be displaced by the planning authority.

The National Planning Policy Guidance deals with Grampian Conditions in this way:

Q. When can conditions be used relating to land not in control of the applicant? A. Conditions requiring works on land that is not controlled by the applicant, or that requires the consent or authorisation of another person or body often fail the tests of reasonableness and enforceability. It may be possible to achieve a similar result using a condition worded in a negative form (a Grampian condition) – i.e. prohibiting development authorised by the planning permission or other aspects linked to the planning permission (e.g. occupation of premises) until a specified action has been taken (such as the provision of supporting infrastructure). Such conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission.¹³

It should be emphasised that the above is merely guidance. The background is that the House of Lords in *British Railways Board v Secretary of State for the Environment and Hounslow LBC*¹⁴ established that the mere fact that a negative condition appears to have no reasonable prospects of fulfilment does not mean that planning permission must necessarily be refused as a matter of law.

The result is that if a negatively worded condition overcomes the source of the concern and there is some possibility (rather than no possibility) of the condition being satisfied, then there is no sound reason to refuse permission. However, this does not address the question of whether a person who wishes to connect his development to the sewer can stand on his right to connect, whether or not a Grampian Condition has been imposed.

It is often suggested by statutory sewerage undertakers that the Supreme Court in *Barratt* accepted that Grampian Conditions were an appropriate way of addressing the tension between the Water Industry Act rights and the need for protection of environment and amenity. This is a misunderstanding of *Barratt*, because *Barratt* refers to the fact that the Court of Appeal canvassed the use of Grampian Conditions as a practical solution to the problem. The Supreme Court did not endorse that approach. Instead, it confirmed that there was a right to connect which could not be refused by the undertaker, and that further thought should be given to the interaction between the two regimes. The Supreme Court did, however, point to difficulties:

As OFWAT has pointed out, although the 1991 Act affords no such right, there is a case for deferring the right to connect to a public sewer in order to give a sewerage undertaker a reasonable opportunity to make sure that the public sewer will be able to accommodate the increased loading that the connection will bring. The only way of achieving such a deferral would appear to be through the planning process. Some difficult issues of principle arise, however: *is it reasonable to expect the sewerage undertaker to upgrade a public sewerage system to accommodate linkage with a proposed development regardless of the expenditure that this will involve? How long is it reasonable to allow a sewerage undertaker to upgrade the public sewerage system? Is it reasonable to allow the sewerage undertaker to delay planned upgrading of a public sewer in the hope or expectation that this will put pressure on the developer himself to fund the upgrading?*¹⁵

The *Barratt* judgment posed these questions but did not answer them. It gave rise to concern in the water industry and at Defra. In the result, section 106B was inserted into the 1991 Act by section 42(1) of the Flood and Water Management Act 2010. That section provided for a 'halfway house'. It required the person wishing to exercise his or her right to connect first of all to enter into an agreement with the sewerage undertaker. That allowed the parties to engage in negotiations and discussions, more particularly against the background of guidance produced by the Secretary of State.

One might have expected that progress would have been made through the necessary regulations for this halfway house to assist in bridging the gaps between development needs, infrastructure provision and the ultimate objective of environmental protection. Instead, the *status quo ante* remains the position: there is a right to connect and it is the sewerage undertaker's responsibility to sort it out. Moreover, it is the sewerage undertaker's potential liability that increases if capacity is exceeded and the terms of an environmental permit are breached.

So, this one example is illustrative of **Perspectives 1–5**. However, this is an instance where the planning system is not the ringmaster, as a recent appeal decision shows:¹⁶

Anglian Water sought a condition requiring on- and off-site mains foul sewage infrastructure works prior to occupation. This would prevent any new connection overloading the sewer. However, the appellant has argued that this would be unreasonable, citing case law that: *a sewerage undertaker has no right to refuse a developer the right to connect with a public sewer ...*¹⁷ I acknowledge that if only 21 days' notice was given (being all that is required under the Water Industries Act 1991) then there would be the potential for a serious problem. However, as Anglian Water replied to statutory consultation in July 2014, and as it is likely to be at least 2 more years before any houses would be occupied, it would have adequate time to take the necessary measures. The proposed condition would therefore be unreasonable.

¹³ <http://planningguidance.planningportal.gov.uk/blog/guidance/use-of-planning-conditions/what-approach-should-be-taken-to-imposing-conditions/>.

¹⁴ [1994] JPL 32.

¹⁵ *ibid* para 57 (emphasis added).

¹⁶ Appeal Ref APP/Y2810/A/14/2228921 New Street, Weedon Bec, Northamptonshire NN7 4QS.

¹⁷ *Barratt Homes Limited v Dŵr Cymru* (n 12) para 59.

I turn now to my penultimate topic area, namely domestic regulation of the water environment in the context of statutory water undertakings. Our 'Hot Cases' review deals with the facts and impacts of the *Thames Water* appeal against sentence very thoroughly.¹⁸ I simply introduce them here.

Thames Water appealed against a sentence by way of a fine of £250,000 for an offence contrary to regulation 38 of the Environmental Permitting Regulations 2010. The case was a pollution offence arising from escape of sewage from Thames Water's pumping station on National Trust land at Chase Brook within the North Wessex Downs Area of Outstanding Natural Beauty. Thames Water operated a pumping station to move sewage through its system. Both pumps failed and sewage overflowed for a period of time well in excess of the standard period set to respond to such incidents. Numerous warnings were ignored.

However, the real interest in the case is: (i) it is the third very clear indication from the Court of Appeal, and from the Lord Chief Justice in particular, that the tariff for such offences, and similar regulatory offences, has very substantially increased; (ii) in the case of very large organisations, fines may be appropriate in a range not previously seen, potentially in excess of £100 million; (iii) the sentencing of very large companies should be undertaken by senior circuit judges and High Court judges because of the complex issues which they raise; (iv) evidence of a responsible approach and active improvement by the boards of such large companies will provide substantial mitigation.

The first such indication was when the Lord Chief Justice dismissed an appeal against sentence in the *Sellafield/Network Rail* appeals.¹⁹ Sellafield had a turnover of £1.6 billion and an annual profit of £29 million; it had also been fined £700,000 for offences relating to the disposal of radioactive waste. Network Rail, with a turnover of £6.2 billion, had been fined £500,000 following a collision at an unmanned level-crossing, which resulted in very serious injuries to a child. The direction of travel was set: the court held that the fine imposed on a company of Network Rail's size represented a very generous discount for the mitigation advanced, and a materially greater fine could not have been criticised.

Thus, it was no real surprise that, shortly afterwards, the Lord Chief Justice dismissed an appeal against sentence for offences contrary to regulations 12(1), 38(1)(a) and 39(1) of the Environmental Permitting Regulations 2010 in *R (on the Prosecution of the Environment Agency) v Southern Water Services Ltd*.²⁰ That case concerned discharge of sewage effluent without compliance with the conditions of an environmental permit. The Court held that there was no basis for interfering with the £200,000 fine imposed by the judge. Indeed, again, the Court would not have interfered with a fine very substantially greater than that imposed upon this company in the circumstances of the case.

Hence, this case and similar sentencing appeals in 2014 repeat a well known message, namely that financial penalties should be of a level to bring home the message to the board and shareholders of corporate bodies that their duties in respect of the environment must be properly discharged.²¹ The difference between 1999 and today is that the message is to be measured in millions, not some low tens of thousands. That is a message which any large organisation might like to consider now, rather than when it has to explain its role in an unfortunate event.

All of that having been said, is it fair to ask circuit judges and magistrates to sentence water companies in the context of the new sentencing guidelines? The range of financial issues is very broad, if properly understood. In particular, Ofwat sets a price cap in association with asset management plans. There is, therefore, a fully informed and expert body that is able to assess the level of environmental penalty which might cause a statutory undertaker to change its behaviour. Is there scope here to use and adapt the role of Ofwat to deal with environmental performance? There has been some support for taking some environmental issues out of the criminal jurisdiction.²²

We now have a planning court with specialist judges. It is a court of the Queen's Bench Division whose judges exercise a very wide jurisdiction, including the criminal jurisdiction. However, a number of questions arise. Is it appropriate now that they develop specialist expertise in this area? Or is it a matter for the Environment Chamber of the Regulatory Tribunal (which has no criminal jurisdiction)? Why are water companies within the criminal jurisdiction at all? Save in egregious cases, why isn't the existing system of price controls used to penalise those companies who under-perform and vice versa? The criminal sanctions available on prosecution yield no more than a 'number': the amount of money to be paid on a fine. Surely these numbers should be dealt with by the industry's financial regulator, using the information provided to it by the industry's environmental regulator?

The background is, again, not new and was canvassed 10 years ago by Michael Watson.²³

Although sanctions (criminal and civil) have a vital role to play in achieving effective environmental protection, it is sometimes argued that their importance will decline as the environment improves. When modern environmental law began to emerge in the 1960s and 1970s, legislators and regulators were faced with very serious environmental problems. These included 'smog', 'acid rain', hazardous river pollution and the production of substances (chlorofluorocarbons, or CFCs) which depleted the ozone layer. These demanded a tough response.

18 *R (on the Prosecution of the Environment Agency) v Thames Water Utilities Limited* [2015] EWCA (Crim) 960.

19 *R v Sellafield/Network Rail* [2014] EWCA (Crim) 49 Env LR 19.

20 [2014] 2 Cr App R (S) 29.

21 See *F Howe and Son Engineering v HSE* [1999] 2 Cr App R (S) 37 (Scott Baker J): 'A fine needs to be large enough to bring that message home where the defendant is a company not only to those who manage it but also to its shareholders'.

22 R Navarro, D Stott 'A brief comment: sanctions for pollution' [2000] 14(3) JPL 299–300. (The authors are, respectively, the Director of Legal Services and Chief Prosecutor of the Environment Agency.)

23 Michael Watson 'Environmental offences: the reality of environmental crime' (2005) 7(3) *Environmental Law Review* 190–200.

As these acute environmental problems were brought under control, environmental standards rose. People now expect to see progressive improvements over time. This may lead to diminishing returns. It is one thing to discourage factories from discharging highly toxic waste into rivers. Ensuring that rivers become cleaner each year is a different proposition.

According to Richard Stewart, the traditional, centralised command and control approach to environmental protection 'is reaching its inherent limits and is no longer capable of ensuring sustainable progress at sustainable social cost'. He describes the situation in the United States:

Major sources of pollution and wastes are already tightly controlled. Further reductions will be quite costly ... In order to sustain further environmental progress in the face of continued economic growth, not only must additional reductions be obtained from major sources, but discharges from small, non-point or area sources must be significantly curtailed, including those in the consumer, services, and agricultural sectors. Overall, ways must be found to generate fewer and fewer levels of residuals per unit of output, a goal whose achievement requires a tide of innovation in resource efficiency that is both wide and deep.

Stewart believes that command and control strategies are too inflexible to achieve these improvements: 'Command environmental regulation is a form of central economic planning that shares the inherent inefficiencies of all such systems'.

The case has now been thoroughly made that intelligent, responsive approaches are needed for environmental sanctioning.²⁴ However:

We are at the foothills of a fundamental change in the way we think about regulatory sanctions. The Sanctions Review picked up on some of the best practice taking place in jurisdictions such as Australia and Canada, but proposed a distinctive system. Two special features stand out. First, placing criminal and civil sanctions into a single integrated system, which gives the regulator the responsibility of choosing the most effective routes. Secondly, it should be a system which lays emphasis on the need to address issues of reducing to a minimum those factors that can unwittingly distort the regulatory choices being made.²⁵

In the case of statutory water undertakers, rather than put criminal and civil sanctions into a single integrated system, we now put environmental penalties and sanctions in the hands of three bodies: the environmental regulator (civil sanctions); the criminal courts (fines, generally for breach of an environmental permit) and Ofwat (in assessing performance). The last of these three appears to be the one with the best handle on what, in financial terms, will address underperformance in environmental terms.

Moving on to **Perspective 6**, concerning disparate expertise for sanctioning sewerage undertakers, it seems

that this mix of regulation is already best optimised, and it remains the case that there is no evidence of how the quantum of financial penalty affects outcome.²⁶ 'If the deterrent effect is not aimed at defendants themselves, it must be *pour encourager les autres*. It would be illuminating to know what particular sectors of industry perceive to be the likely penalty for a range of regulatory offences. Indeed, it is surprising that such firm views on deterrent effect are held in the absence of such data'. It is a startling omission in the range of research in this area but is all the more ripe for consideration in the present context of a significant change in penalties.

Lastly, I turn to the obvious source of future trends in planning for our water resources and its quality, namely the Water Framework Directive (WFD), which announces immediately that: 'Water is a heritage – it is not a commercial product but something to be protected and defended'.²⁷ Thus, our links and the extent to which we are bound to the aquatic environment are acknowledged from the outset in the framework by which Europe now manages its inland waters. It is a matter of heritage and therefore is a piece of natural infrastructure to be protected and improved for the future – and not simply for ourselves.

The WFD is perhaps an unusual piece of EU environmental law. It is not the focus of litigation in the domestic courts in the UK. That is perhaps not surprising, given the focus on management measures to be undertaken by the national competent authorities and the general absence of directly enforceable rights in civil proceedings or in public law challenges to decisions. However, there remains a stark contrast between the substantial number of cases arising from the application and implementation of the EIA and Waste Framework Directives. Overall, the WFD has had a major effect in consolidating the existing river basin management regimes in the UK, but has done so relatively quietly and efficiently.

It has done that alongside the Habitats Directive. Under the Conservation (Natural Habitats etc) Regulations 1994, in Part IV, we had a scheme of adaptations of other regulatory regimes to seek to transport the Habitats Directive. There was no specific regulation to address water abstraction licences, but there is one now: see regulation 99 of the Conservation of Habitats and Species Regulations 2010. That omission did not prevent the Habitats Directive working to protect habitats where groundwater abstraction threatened a European site.²⁸ Groundwater abstraction may well (which is sufficient for a negative appropriate assessment (AA)) have sufficient altered groundwater conditions in the vicinity of a special area of conservation (SAC) to be harmful to the integrity of calcium-rich spring water fed fen (*Schoeno-juncetum* (M13)). The inspector simply dealt with matters in this way:²⁹

26 RT Kimblin 'Penalties in regulatory crime' (2005) 17 ELM 173.

27 The first recital of Directive 2000/60/EC establishing a framework for Community action in the field of water policy (Water Framework Directive, or WFD).

28 Appeal Ref APP/WAT/00/94 by J A Paterson & Co Ltd re land at Manor Farm, Dilham, Norfolk.

29 *ibid* (emphasis added).

24 R Macrory 'Regulatory justice: making sanctions effective' (Cabinet Office 2006).

25 R Macrory *Regulation, Enforcement and Governance in Environmental Law* (2nd edn Hart Publishing 2014) 130.

- [3] The Water Resources Act 1991 (WRA) provides the primary statutory framework for abstraction licensing and for the determination of appeals in respect of applications for abstraction licences. On appeal, the Secretary of State may deal with an application as if it had been made to her in the first place. Section 6 of the Environment Act 1995 requires the EA generally to promote the conservation of flora which are dependent on an aquatic environment.
- [4] The Conservation (Natural Habitats etc) Regulations 1994, which I shall hereinafter refer to as the Regulations, make provision for implementing the EC Directive (92/43/EEC) on the Conservation of Natural Habitats and of Wild Fauna and Flora (the Habitats Directive); *whether the Regulations are lawful, under European law, is not a matter for me to determine. These Regulations apply to planning cases, but not to water abstraction appeals. However, in my view, they should be applied by analogy because they specify the factors which the Habitats Directive requires to be taken into account in both planning and water abstraction cases.*
- [5] Regulation 48(1) indicates that, before deciding to license an abstraction that is likely to have a significant effect on a Special Area of Conservation (SAC), the competent authority must make an appropriate assessment of the implications for the SAC in view of the SAC's conservation objectives. English Nature (EN) must be consulted (48(3)) and the applicant must provide such information as the competent authority may reasonably require for the purposes of the assessment (48(2)). Unless there are overriding reasons of public interests, the authority shall only license the abstraction after having ascertained that it

will not adversely affect the integrity of the SAC (48(5)), being in mind the scope for conditioning the licence (48(6)).

In other words, the UK has not been a perfect example of implementing all aspects of EU environmental law, but in its own way has got on with the task at hand. Thus, **Perspective 7:** Rapid impact of EU measures, but slow integration with domestic regimes is fulfilled.

Conclusions

Water law appears to be (1) pervasive, (2) long-standing and (3) collaborative as between disciplines (rather like UKELA). With the above perspectives in mind, I point to some initial questions for our conference:

- If events and social changes prompt change, are we right to consider what events or changes are going to prompt the next change?
- Why have we made no progress in dealing with the interaction between infrastructure and development and how damaging has that been to the environment and to social and economic needs?
- To what extent are the criminal courts a useful place to address legal compliance by statutory water and sewerage undertakers?
- Do we have an adequate legal framework to address fracking?
- If (theoretically) there were a mass trespass on the beach at Crosby, how would the case resolve?

Summary of the address given by Bishop James Jones at the UKELA Conference gala dinner

Held in the crypt of the Catholic Metropolitan Cathedral in Liverpool, 4 July 2015

The Bishop introduced his address with a number of anecdotes about Liverpool, the Cathedrals and his own work on the environment.

He warned that anybody speaking about the environment risked the charge of hypocrisy. There is no human activity that is environmentally neutral. The challenge lies in ensuring that the human impact is sustainable. The antidote is to keep ourselves conscious of the relationship between humanity and nature of which we are a part.

The Bishop spoke of young people's consciousness of the environmental crisis that is looming. Engaging with thousands of 16–18 year olds in school over a short period he found that the vast majority were both worried about the future of the planet and determined that we should take remedial action. He showed how one school in particular, the Academy of St Francis of Assisi, which studies the environment as its specialism, had transformed the life chances of its pupils, drawn from the inner city, by raising its achievement from 27 per cent GCSE passes to over 90 per cent in 8 years. Quoting the African proverb 'We have borrowed the present from our children' he added that young people were aware of the fragility of the ecosystem and of this organism called Earth of which humanity is a part.

The Bishop spoke of his work as Chair of the Independent Panel on Forestry which successfully recommended that the public forest estate should remain in trust for the nation. He told the story of visiting the Forest of Dean with the Panel and praising the natural landscape only to be rebuked by the local forester, 'Bishop, that is not a natural landscape; it is a political landscape. Those oaks were planted to build ships for the British navy'. The Bishop added that landscapes reveal our values and political priorities and imagined that environmental lawyers more than most appreciate this point.

Talking about forests and woods he quoted from his preface to the Forestry Panel's Report: '[Woods and forests] are nature's playground for the adventurous, museums for the curious, hospitals for the stressed, cathedrals for the spiritual and a livelihood for the entrepreneur'. They are a microcosm of life in all its interdependence. The Bishop made connection with the Conference theme of water by showing that this interdependence is evident through trees purifying the water and protecting the land from flooding.

The Bishop added that 70 per cent of the earth is covered by water but that only 1 per cent of it is drinkable. He drew attention to a prediction from a previous Secretary General of the United Nations who speculated that the next World War would be about water. Already environmental refugees fleeing droughts and floods number in their tens of millions.

The Bishop spoke of his experiences in India of the super cyclones of West Bengal where children had drowned in the paddy fields because they could not run fast enough inland to escape the incoming tides. He then referred to Duncan Spencer's prediction that 'water risks will increase' (pp 144–6). It prompted the Bishop to say that whenever he debates with those people who are sceptical about a calamitous future he often advises them to listen to the insurance companies – it is they who are expert in assessing future risk.

Any discussion about the future of water cannot ignore the debate about the changing climate which raises the question of 'global neighbourliness'. The Bishop referred back to Camilla Lamont's exposition of the tension between 'neighbourliness' and 'everyone for themselves' (pp 138–43). He added: 'That is exactly where we are in the climate change debate!' He further welcomed Lord Carnwath's reference to the upcoming Paris Conference on climate change and international law, suggesting that climate change is a global problem that needs both local and global solutions.¹ The Bishop feared that in spite of the Pope's encyclical on the environment² and the progress towards Paris 2015 there was still a lack of urgency.

In one of the sessions on water one speaker had referred to the Thames Barrier. The Bishop reinforced this point by adding that the Barrier had gone up 4 times in the 1980s, 35 times in the 1990s, and over 80 times since the year 2000. He surmised that if the City of London and the Palace of Westminster had been flooded as many times as the Thames Barrier had gone up in the last 35 years then Parliament and the financial institutions would have taken much more radical action by now! The Thames Barrier is unfortunately an example of how adaptation has taken the pressure off the necessity for mitigation.

The Bishop then referred to Linda Warren's presentation (pp 154–60) in which she showed that there were more habitats of species in the sea than on the land. It provoked the Bishop to wonder about the projected sea level rise and its impact on coastal habitats. In particular, he questioned the siting of nuclear power stations past, present and future on the coastline. He said that when he was in the House of Lords he had asked whether any assessment had been done on the impact of rising sea levels on our coastal nuclear power stations. He had not been reassured by the answer which indicated that the assessment had been based on no more than 100 years. The impact of flooded

1 Rt. Hon Lord Carnwath of Notting Hill C.V.O., Justice of the UK Supreme Court and President of UKELA. The Paris Conference of the Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC) will be held from 30 November – 11 December 2015.

2 "*Laudato Si', mi' Signore*" *Praise be to you, my Lord* on care for our common home published 24 May 2015 by Pope Francis.

nuclear power stations on habitats on both land and sea would tragically, in the Bishop's opinion, give environmental lawyers a field day.

The Bishop drew attention to the ground-breaking work carried out in the City of Liverpool by the Proudman Oceanographic Laboratory³ and the National Oceanography Centre, which has demonstrated conclusively that the oceans are both changing and warming.

The problem is that those currently most affected by climate change are far from the levers of power and unable to change the situation, whereas those with the power do not as yet feel the consequences of our actions. The Bishop ended with a parable⁴ and with a definition of justice 'the whole point of justice consists precisely in providing for others through humanity what we provide for our own families through affection'.

3 <http://noc.ac.uk/about-us/history/proudman-oceanographic-laboratory>.

4 See the Bishop's website bishopjamesjones.com.

Key trends impacting port regeneration

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Introduction

Over the past four decades we have, like the German sociologist Walter Benjamin, served as “flâneurs” of the urban scene.¹ However, unlike Mr. Benjamin, our urban scene has consistently focused on industrial districts and the water's edge of cities large and small. It is the water's edge that is the focus of this article. By the water's edge we are referring to the seaside, to its harbor, ports, wharves, piers, and water-dependent uses. We are also referring to those land-side uses that are the proxemics to the water and which knit it to the host community.

The purpose of the article is to present a series of significant transformational elements that are changing the character of the waters' edge. Some of these are currently in place, while others are predictions on our part. We hope it is informative and will stimulate careful thought. Let us present just a few salient points to start:

1. International trade via ships is expected to increase by 50 percent between 2010 and 2020.
2. Containerized shipping is expected to increase by 75 percent in that same time period.
3. Our great harbors have had difficulty in keeping pace with dredging as our ships become larger and larger. In the 1930s, the average depth was 26 feet. Today, containers typically require 45 feet, while bulk carriers are increasingly requiring 60 feet.
4. There is a land rush of investment in our ports as waterside cities recognize the growth of sea-based trade. Based on 2012 data, 63 U.S. ports have prepared plans to make improvements costing more than US\$46 billion.
5. The cost of port development has become so staggering that it is beyond the ability of governments and the companies that visit the facilities to pay. Third party investors are increasingly becoming part of the investment package.
6. The Panama Canal expansion will have great significance for the United States, the Caribbean and South America.

The observations and thoughts presented in this article are based on our experiences in North America, Europe, Asia, and Australia. While the majority of our academic work, research, and consulting has been based in the United

States, we have worked as academics, consultants, and researchers in such diverse places as Northern Ireland, Eastern Canada, Northern Germany, Iberia, Estonia, the Caribbean, and South Korea. We have visited many of the world's largest ports, including Hong Kong, Bussan, Antwerp, Singapore, Rotterdam, and Sydney, as well as tens of smaller ones across the United States.

In the following narrative we present key trends that are important for those involved in port development to reflect upon and ponder. We conclude with a concise narrative, which calls on all of us to re-energize our efforts to insure that these places continue to maintain their unique characteristics in the coming decades.

Key trends in port development

The issue of global warming is arguably the most important long-term problem that must be faced in our port cities across the continents. The forecasts are before our eyes and the evidence is all around us. The long-term rising tides in Venice, while damaging and continually dangerous, have been treated almost as part of its unique character. Water seeping into the streets of Miami Beach is a different story: Long subject to rising tides due to climate change, it has budgeted US\$500 million to stem the flow of water into its streets. Unfortunately, for the City, this is only step 1.² The impacts are now occurring all around us.

Most places in Europe and the United States (significantly due to the destruction from Hurricane Katrina in 2005 in New Orleans), are entering into a phase where serious solutions are on the table. Conversations have been far fewer in other parts of the world. Moreover, this is not an issue that will impact selected ports around the globe but literally thousands of them ranging from the world's largest to tiny fishing villages. We must expand the discussion to all stakeholders, ranging from public officials to the business community, financiers, and to international stakeholders to face this problem with all deliberate speed. The problem clearly cannot be quickly resolved today but it can be seriously addressed.

The expansion of the Panama Canal has the potential to shift the shipping of goods dramatically between Asia and the United States. If trade by-passes west coast ports and moves directly through the Panama Canal to the East Coast, we expect that ports such as Miami and Savannah will benefit tremendously. What is more, there will be ripple effects as off-loaded goods move inland through truck

¹ See M. Bacal “Walter Benjamin, the Flâneur, and Redemption” *Telos: Critical Theory of the Contemporary* (November 29, 2011) <http://www.telospress.com/walter-benjamin-the-flaneur-and-redemption/>. See also Graeme Gilloch *Myth and Metropolis: Walter Benjamin and the City* (Polity Press 1996).

² Susannah Nebith “Miami Beach Readies for Sea-Level Rise” (2015) 81(2) *Planning* pp 8–9.

and rail routes. In any case, many U.S. ports have taken steps to ensure that they will capture a share of the off-loading of the additional goods carried by these ships.

We expect there will be increased interest in the coming years of allowing cabotage arrangements in the United States. We realize this will be difficult to implement but, as with tariffs and other corporative agreements, there are mutual advantages that can be gained. The international business community, we believe, would welcome this but America's political establishment is not as convinced of its advantages.

Modern infrastructure will dictate long-term uses. To put it another way, the capacity and form of the weakest elements of a port's infrastructure will dictate its maximum output. For example, many of our ports have street patterns designed for pre-automotive times: It is extremely difficult to offload goods quickly in such places. As well, piers are often too small for modern ships. Rail services are separated from storage areas, thus preventing rapid roll-on roll-off unloading (e.g. Viana do Castelo) and ship channels are too shallow and cannot be deepened due to the location of sewer and water lines or subway systems lying too close to the surface.³

Given that time spent in port can be costly, efforts to offload or to take on cargo and people as rapidly as possible are increasing. Port authorities and freight handlers in major harbors are fully aware of this and are almost constantly endeavoring to hasten the entry and departure process. However, progress in secondary harbors has been much slower. Sometimes this is due to tidal factors, sometimes cultural factors (no processing after midnight) and sometimes due to outmoded facilities. It is clear that future planning for the second tier ports (i.e. Viana do Castelo, Cartagena, Newport, and Nantes) must focus on their appropriate niche and maximize their advantages. Otherwise, we fear, they will decline.

Our ports will be increasingly separated from defense forces. The days when the fleet of the Royal Navy steamed down Liverpool's Mersey River into the Irish Sea have long passed. The days when 50,000 workers labored in Boston's Charlestown Navy Yard maintaining a good amount of the Atlantic fleet will never be replicated. And fewer of our ports will serve as points of disembarkation. According to the American Association of Port Authorities' publication *National Defense*,⁴ there are currently two dozen ports designated by the U.S. Department of Defense to support mobilization. We expect that in the future there will be even fewer as consolidation occurs. Throughout the Western world, naval ports are becoming ever more consolidated and, in many instances, quite separated from the center of urban port activities. As a case in point, three of America's most famous ports (Boston, New York, and Philadelphia) have no active duty fleets that use them as their home-ports.

Our storage areas and freight yards around the port will become increasingly security conscious. While the military may be withdrawing, the need for protection is becoming increasingly paramount. Given the extensive oil and gas tank farms that are often positioned close to the urban core, this is understandable. It is here that we can observe the principles of urban militarism at work. Geographer Stephen Graham has articulated a study of the encroachment of militaristic surveillance in urban areas,⁵ including for example the Coastguard on the seaside, the Port Authority Police and the City Police on the landside, and CCTV systems photographing vehicles at key entry points while pedestrians are observed moving from subways. At every pier and wharf there are gate guards and ubiquitous "rent-a-cops" typically dressed in black camouflage and fully armed. Finally, there are heavy gates that speak to visitors saying "you are unwanted". These areas no longer have the free spirited counterculture, rough and tumbling character they once had. What would Marlon Brando's famous character Terry Malloy from 1954's *On the Waterfront* think of these places today?

The question we must ask here centers upon whether all of the above will become bothersome to the public or will workers, residents, and visitors become used to it? Since 9/11, the American people have accepted urban militarism as the price for security and there is little complaint about the inconvenience. One wonders, however, as these areas become even more security conscious, whether this understanding will continue.

There will be pressure to change land use and to introduce regulation of waterfronts to allow non-water dependent activities. As waterfronts become increasingly attractive as places for residential and commercial uses, cities will have to come to grips with market pressures to change zoning regulations. We have already noted this across our Northeast and have served as expert witnesses in several instances where this has occurred. In the famous fishing port of Gloucester (Massachusetts) and the working class city of Bridgeport (Connecticut), the cities have been under siege to place shopping malls directly on the waterfront's edge. In Portland (Maine) the city has consistently remained firm against proposals that would weaken the industrial character of its waterfront but efforts to do so continue to be made. In Providence (Rhode Island), a group of waterfront landowners who operate heavy industrial uses such as a rubber shredding plant, salt storage and a tug boat repair yard recently fought a proposal to change its zoning to allow live-work housing units for artists, owing to the fear that it would stimulate owners to convert their properties away from heavy industry to this new use and that property values would increase to the point that the older businesses would suffer. They were unsuccessful.

Finally, in New London (Connecticut), the United States Supreme Court in 2005 approved the challenged plan of the city to acquire property through eminent domain⁶ and

3 See John Mullin and Zenia Kotval 'The Harbour at Viana do Castelo: Planning in a Vacuum' (April 1996) 4(2) *European Planning Studies* 131-46.

4 American Association of Port Authorities American Association of Port Authorities *National Defense* <http://www.aapa-ports.org/Industry/content.cfm?Itemnumber=1023>.

5 Stephen Graham *Cities Under Siege: The New Military Urbanism* (Verso 2011).

6 Eminent domain is the right of a government or its agent to expropriate private property for public use, with payment of compensation. In the UK it is used chiefly in international law, whereas in the U.S. it is used by federal and state governments.

place an office complex on its historic waterfront. This 2005 case of *Kelo v. City of New London*⁷ is the most significant review of economic development in modern times in the United States. There is every expectation that more of these challenges will occur in the future.

Most recently we have been following the efforts of the City of New York to regenerate the Gowanus section of Brooklyn's waterfront. With the re-birth of Brooklyn as a center of vital neighborhoods and small industries, great interest in the future of this heavily polluted, decayed and rotting waterfront is being eyed for renewal by private developers. Many in the community applaud these efforts but worry that it will become upscale and cause gentrification. They hope that the area can remain edgy.

Is there room for these new uses to be placed on working waterfronts? With careful planning, they can co-exist. If, for example, ground floor uses remain water dependent or water related, the aesthetic character of the waterfront is protected, and pedestrian movement is allowed through the district and view sheds remain open then there is a possibility that it could. We have noted this in Portsmouth (New Hampshire), where a Sheraton Hotel is juxtaposed with one of the largest scrap yards in the region.

Ship deconstruction will become an increasingly decentralized and environmentally safe industry. For decades we have observed the scene of "end of life" ships being dismantled in the most primitive manner in countries such as Bangladesh, India, China, and Turkey. The processes are dangerous and environmentally polluting. This has been noted by the European Union (EU) which, through the Basilea Agreement, has endeavored to stop these practices with minimal success to date. However, the EU is seeking through research and model applications to find alternatives to outmoded practices through the ongoing LIFE Environment Project centered in Aveiro, Portugal.⁸ Over time, the techniques, practices and regulations will combine, we think, such that deconstruction can become a healthy industry in local ports across the globe.

Industrial activities in the port will increasingly become observable by tourists and passers-by. The very presence of large vessels, the often hectic activity of ships being constructed or offloaded, and the noise and smells of ports continue to fascinate most of us. Viewing platforms, information kiosks, and even guides can add to the touristic appeal. Newport, Rhode Island does this well, as many of its ship facilities are intermingled with shops and restaurants. One can even stand on a mezzanine level and view apprentices working on the restorations of 19th century wooden vessels. In our home city of Boston, the coming of the *Queen Elizabeth II* into dry dock (owing to damage caused by grounding near Martha's Vineyard) became a crowd pleasing event for many days as emergency repairs were undertaken. Similarly, tourists, buyers, office workers, and fishermen regularly intermingle as the daily catch is unloaded at the City's Fish Pier.

As excited as we are about this, we are worried about the liability. One must remember that ports are working places where heavy machines, cranes, and trucks operate and move through crowded spaces. All around the piers and wharves one can find not only freight containers but, among others, bundles of rope, oil lines, food purveyors, and ship repair teams intermingling. They never have been "neat places" nor should they be. Liabilities are always an important element of their operations. Simple walking tours of Brooklyn's waterfront, for example, require more than six paragraphs of waivers of liability before a tour begins. Indeed, the private sector appears to be increasingly sensitive to any non-connected citizens coming close to their property. These view sheds will have to be developed with great care.

Residential developments will affect the view sheds and characteristics of the waterfronts. Residential condominiums and apartments will increasingly offer dock spaces (documiniuns) for small recreational crafts as an amenity. This is occurring primarily for two reasons: First, this combination has broad appeal to those who want to live on the water. Second, it ensures that at least part of the complex has a water dependent use, which so many communities are trying to maintain and expand. As long as this linkage does not block pedestrian or touristic traffic through the area it will make a positive contribution to the port's regeneration.⁹

There is increasing concern that cities, in a quest to increase densities in long-developed areas, will be less sensitive to the view sheds of the port valued by the residents of long-standing structures. In most cases, the law does little to protect the views so long enjoyed by them. We were involved in one instance in a town along the New Jersey side of the Hudson River where high rise residential and office buildings were proposed along the shoreline below the Palisades that would rise above the cliff's edge and block the town's view of midtown Manhattan and the city's ocean-going passenger line terminals. This was most contentious! More recently, we have been following the protests in Brooklyn over a new building now under construction that would take away the residents' views of the Brooklyn Bridge and the East River.¹⁰ This, too, we believe, may become litigious.

Old ports will be increasingly integrated into the downtown fabric. For most of the 20th century, ports were increasingly separated from the downtowns by walls of fences, parking lots, highways, and railroads, almost to the point that they were inaccessible by pedestrians. Endeavoring to cross New York's West Side Highway on foot was to risk your own life! And yet the facilities on the West Side of Manhattan have many tourist and recreational attributes that appeal to walking urbanites. However, in the United States today there are extensive efforts to reconnect these places through tunnels, cross-overs at traffic

⁷ 545 U.S. 469.

⁸ European Union 'Turning Waste Ships Into a New Green Economy' LIFE *Creating Green Jobs and Skills* (Luxembourg 2013) 15–18.

⁹ University of Florida Levin College of Law 'Water Dependent Use Definitions: A Tool to Protect and Preserve Recreational and Commercial Working Waterfronts' (Levin School of Law 2014).

¹⁰ Lisa Foderaro 'By Blocking View of the Brooklyn Bridge, a Building Incites a Battle' *The New York Times* (January 26, 2015) A14.

intersections, and through safe streets programs. Most interestingly, it is a combination of culture and recreational uses that have both benefited from this transformation and, in return, helped the city. In Reykjavik, the old port is a stunning convention center; in Sydney, it is an opera house; in Hamburg, it is a concert hall; and, in Boston, it is an art museum. Most of these places include extensive parklands for quiet, passive contemplation, and recreational running and walking trails. These often extend inland and provide easy connections between downtowns and the port. Wherever this connectivity has occurred there has been increased vitality, additional jobs, and more investment. We expect there will be more efforts in the future.

Cleanliness will increasingly become a virtue. While some ports have a long way to go before this happens (Mumbai comes to mind), most cities are endeavoring to improve sanitary conditions along their harbor sides. Sometimes this will be "detail driven" as we observed in Sydney, Australia: Every day sanitation workers working in dory-type boats and armed with nets endeavor to capture the waste brought to the water's edge at high tide. In other cases, it means holding boat and ship access to strict dumping standards. While, in still other cases, the cost of the cleanup has had price tags in the billions.

Such was the case in Boston Harbor. It was literally an open sewer and dumping ground for the detritus of urban life. In the 1980s, it was considered by many as the most polluted harbor in America. Indeed, in the 1988 presidential campaign, Vice President George H. Bush, the Republican candidate, accused Governor of Massachusetts Michael Dukakis, the Democratic candidate, of creating a "harbor of shame." In the years that followed, largely through the largesse of US\$3.8 billion from the Federal Government, the harbor is now cleaner than it has been in decades. It has now been labeled "A Great American Jewel!"¹¹

While Boston's harbor is now a point of pride, there is still more work to do on its periphery. The area in the vicinity of its Chelsea Creek near the mouth of the Mystic River on the northerly border of the harbor has been polluted for more than 100 years. It is here that tanker ships have been offloading domestic fuels for decades. Most recently, the Commonwealth of Massachusetts began offering very selective licenses for gambling casinos, one of which was to be located in Greater Boston. In a very competitive process, the license was offered to Wynn Casinos, which proposed to build its billion dollar facility near Chelsea Creek. One of the deciding factors in selecting Wynn was that it offered to spend US\$30 million of its own funds to clean up the Creek and the mouth of the river.¹² Sometimes luck can benefit communities. For every Boston story, where political activism and perhaps luck have turned

around the environmental condition of a harbor, there are too many others – from Mumbai to Shanghai – where the process has barely begun.

The chaotic and colorful waterfront may disappear with all of these ongoing changes. Throughout most of the industrial era waterfronts have been less than virtuous places. It is here that the tricksters plied their trade, where shysters emptied the wallets of the naïve through "cons," where sailors living for long periods without the warmth of "friendly relations" noisily purchased a night's worth of comfort, and where the lost soul seeking to escape from the chaos would sign up to go most anywhere. All of this, according to our writers, film-makers, and artists took place in areas where virtuous people did not travel: They were dark, dreary, dingy, and dangerous parts of the city. On the other hand, they have been part of our collective cultures for centuries. However, despite their reputations, they were places, if we were shipping goods, buying fish, or traveling abroad that were part of our lives. Perhaps we are being too romantic about this but, on the other hand, is there any place in today's city where our shysters, stevedores, and wayward ladies interact with the rest of society on the same turf?

In our experience, the one place where we have seen the *noir* side of waterfront life in a 21st century context is in Charlotte Amalie in St. Thomas, the U.S. Virgin Islands. Throughout the winter day, thousands of sun bronzed tourists flock to this small town to visit its shops and restaurants and stroll along its historic streets. It is a happy, crowded place. However, at approximately 5:00 p.m., as the winter sun begins to set, the ships blow their horns warning the travelers that departure from the island is imminent. As they leave, the tourist shops and restaurants empty and the cultural climate changes. The night belongs to the poor, the indigent, the purse-snatcher, and the drug dealer. Visitors are frequently warned to be careful as they walk the streets. It is as if Charlotte Amalie is two different places: Affluent and safe by day and poor and dangerous by night. Moreover, it is not a case where these two groups intermingle. They simply occupy the same space at different times. We also have to comment that neither the government nor tourist officials find anything positive about the night-time activity.¹³ Perhaps we are being a little too romantic over the mystery of the port.

Port cities must be careful in placing historic ships in their harbors. There is no doubt that great ships of the past add tremendous value to a city's waterfront. In the United States, for example, the frigate *Constitution* (Boston), frigate *Constellation* (Baltimore), aircraft carrier *Intrepid* (New York City), and aircraft carrier *Midway* (San Diego) continue to add great value to the ports. Similarly, in the United Kingdom, Lord Nelson's *Victory* (Portsmouth) and the clipper ship *Cutty Sark* (Greenwich) are national treasures. And, of course, there is Stockholm's *Rose* and St. Petersburg's *Aurora*. On the other hand, Philadelphia's battleship *Olympia* and Quincy's cruiser *Salem* are deteriorating quite quickly.

11 See Massachusetts Water Resources Authority (MWRA) 'The Boston Harbor Project: An Environmental Success Story' (MWRA 2014) 3 pp. See also Michael Levinson, 'Report Gives Boston Area Beaches High Marks' *Boston Globe* (May 23, 2015) <https://www.bostonglobe.com/metro/2015/05/22/new-report-gives-boston-area-beaches-high-marks>.

12 Casey Ross 'Everett Neighbors Recall Wynn Casino Parcel's Polluted Past' *Boston Globe* (November 9, 2014) <http://www.bostonglobe.com/business/2014/11/09/everett-neighbors-recall-wynn-casino-parcels-past>.

13 Fodor's Travel 'St. Thomas is Dangerous' *Caribbean Island Forums* (January 13, 2013) 1.

They are hardly celebrated and lie forlornly waiting for someone to save them.

Too often local historical society's and civic groups enthusiastically raise funds to bring those ships into harbor without a careful business plan that will attract the public, provide interesting and changing exhibits and, above all, create a funding stream to maintain them. If not maintained as an attraction they can become a blight on the seascape. As Christopher Rowson, executive director of Historic Ships of Baltimore, Inc. noted, it is "always a struggle" to find funds to preserve historic vessels and "that struggle is multiplied by the number of ships and assets you have."¹⁴

There is rising concern in some ports over the ability to handle tourist traffic. Each winter day, more than 30,000 tourists disembark from cruise ships in the port of Charlotte Amalie, St. Thomas, U.S. Virgin Islands. Overwhelmingly they all visit the downtown area, which consists of three major streets and 16 cross streets in an area that is less than a square mile. Attracted by the sun and warmth and bargain prices on jewelry, tobacco, alcohol, and fine art, as well as dozens of restaurants, they jostle through the crowded streets. (Sometimes the atmosphere is similar to the famous "Black Friday" shopping frenzy that takes place in the United States on the day after Thanksgiving). One wonders about the quality of this experience. And one wonders too if this visit matches the promotional materials of the tourist board and meets the tourists' expectations.

A similar experience can be found on Block Island, a rural, quaint outcropping of approximately 9.7 square miles located 13 miles off of the Rhode Island coast. Each summer's day, a hydrofoil with a capacity of 1000 passengers takes them on a day trip to its harbor. One wonders what they gain from the experience. Our point is simply that if demand is not controlled, the desired experience will not be achieved. Sometimes, in the words of architect Ludwig Mies van der Rohe and literary critic Gertrude Stein, "less is more."

Small fishing villages will increasingly suffer from this influx of visitors. We expect the larger ports, such as New Bedford and Gloucester, will survive and adapt but are concerned over the smaller ports that house only a few day-tripper type vessels. Several of these can be found at the entrance to Narragansett Bay in the vicinity of Jerusalem and Galilee, Rhode Island. With increased restrictions on the size of fish catches, fewer days that can be fished, and minimal technological advances, these villages will have to become places that focus on tourist activities and recreational boating if they are to survive. Unfortunately, the tourist season is typically short and generates less profit. Our sadness over this is compounded by the fact that these villages represent the quintessential New England maritime character of the region. We can only hope that their heritage is protected, that they are able to adapt, and that fishing opportunities increase in the future.

Recreational boating will only increase. It is a US\$125 billion business in the United States involving 89 million people. It continues to have prosperous growth.¹⁵ These boats are beneficial to harbor communities owing to the economic return that comes from both direct and indirect purchases associated with them. They are colorful, and they attract sailors, visitors, and tourists, as well as contributing to the vibrancy of the harbor. Despite all of this, there may be a downside. There are two questions: Will they replace the docks formerly occupied by fishing vessels that are no longer operating but could return in the future and will they interfere with the free movement of the remaining fishing boats, tankers, and freighters entering and leaving the harbor? Careful controls are in order.

Finally, as freight and passenger movements increase, vessels become larger; security becomes more desirable, and navigational channels become deeper; in addition, the question of who controls the port will be asked with far more frequency. In most cases, ports are beyond the ability of local governments to manage, develop, expand, and regulate. In several cases in the United States, the impacts of the port move even beyond state borders. We expect that jurisdictional squabbles will only increase, and decisions concerning operations and expansion will become more contentious and time consuming.

Conclusions

The future of our ports reflects our past: It will be marked by competing interests, both private and public, and will hardly be rational! Nonetheless, those involved in the planning of these special places will have an exciting career: Imagine that anyone of the people reading this article had the responsibility of addressing all of the 20 trends outlined above in terms of their own local port. No-one would be bored! Ports by their very nature are under the control of a considerable number of governmental agencies. Increasingly, these organizations will have to work together to ensure that the best results occur. Given the legacies and histories of past efforts at coordination, this will take considerable effort.

However, there is little choice: The revitalization and regeneration of our ports is too important to allow stovepipe thinking to get in our way. It is time for a new beginning. Our ports are too priceless to allow it to be otherwise. We also have no choice but to address the issues and concepts outlined above, for the very fabric of coastal life will depend upon our actions. Most of our cities are facing many of these issues but far too few are prepared for their combined impacts. It is a time to study, create visions, and to plan – but with all due speed. The time for action is now.

14 Alan Jaffe 'A Renewed Campaign to Keep Historic Olympia Afloat' *Planphilly* (May 13, 2014) <http://www.philly.com/phillynews/A-renewal-campaign-to-keep-historic-olympia-afloat.html>.

15 National Marine Manufacturers Association (NMMA) 'Boat Sales Ride a Rising Tide into 2015' Press Release <http://www.nmma.org/shared-2pages/news.aspx?id=19597>.

Water regulation in the UK

Gordon McCreath *Partner, Pinsent Masons*

As I was preparing for this talk I realised that it was exactly ten years since I last spoke at a UKELA conference – in Edinburgh. I had 20 minutes to talk about what was happening in Northern Ireland at that time, which was going to be testing, not least because of a whisper from the Chair saying 'Just make sure you can do it in 15, Gordon'. Now I have the task of covering the whole of the UK in 25 minutes ...

To set the scene, with the focus on water, I will run through the key pieces of statute law in each jurisdiction and make some comments as to the foibles of each jurisdiction, the key players and the impact of implementation and enforcement. Then I will look at some of the different approaches of these jurisdictions and the different experiences that you might have in advising them, and finally give some specific examples that I have had to think about recently.

Key water legislation

England and Wales

The Water Resources Act 1991 used to cover all aspects of water regulation; now it deals with abstraction, impoundment and works in major rivers. The Environmental Permitting (England and Wales) Regulations 2010 now regulate water discharge activity. The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 effectively filled the gaps in existing national legislation in order to transpose the Water Framework Directive (WFD) in England and Wales, and set up the infrastructure, management and planning and the overall duties required to promote the directive through the functions of public authorities.

For the water industry, the Water Industry Act 1991 was the model for the rest of the UK in commercialising the operations of water and sewerage companies and indeed, as far as England is concerned, privatisation, and as far as Wales is concerned, mutualisation. This Act was feeling its age and there is now the Water Act 2014, which brings in some wholesale changes on water retail and abstraction licensing that raise interesting points from the environmental perspective. I will look at these later.

In 2009 a hasty set of Flood Risk Regulations were brought in to stave off infraction proceedings for failure to transpose the Floods Directive; these were followed by the Flood and Water Management Act 2010 covering flood risk assessment and management.

Finally, turning to sea waters, the Marine and Coastal Access Act 2009 governs waters off England, Wales and Northern Ireland to 200 nautical miles and waters in devolved jurisdictions beyond 12 nautical miles.

Scotland

How does Scotland compare? It was decided that when the WFD had to be transposed the current body of Scottish regulation needed overhauling. That took the form of the Water Environment & Water Services (Scotland) 2003, which is really Henry VIII legislation – containing lots of powers to make subordinate legislation and with not a lot of substance. The hard work was then done by the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (CAR) – originally issued shortly following the act, but then re-enacted in 2011 (and since amended). Included were the standard trinity of discharges to water, abstraction and impoundment and engineering works, with groundwater following on. Scotland doesn't have environmental permitting – yet – so at the moment the Pollution Prevention and Control (PPC) (Scotland) Regulations 2012 continue to provide a separate regime for water regulation under PPC.

Thus the legislation appears to be quite modern in Scotland. Modern, that is, until you look at the acts applying to the water industry – the Sewerage (Scotland) Act 1968, and the Water (Scotland) Act 1980, dealing with water supply. Does this situation imply an ageing industry or ageing regulation of the Scottish water industry? The 1980 Act consists of approximately 30 pages compared to the 200 pages of the 1991 Act, but it has been brought up to date to some extent by the Water Industry (Scotland) Act 2002 which set up Scottish Water and, crucially, the Water Services etc (Scotland) Act 2005. These regulations took Scotland ahead of the rest of the UK as far as the water industry was concerned, because it introduced retail competition, which is one of the reforms coming through for England and Wales in the Water Act 2014.

Also not to be forgotten is the Water Resources (Scotland) Act 2013. This is an Act trying to make the most of Scotland's 'other great resource' – water – and placing duties on Scottish Water to promote hydro generation, among other things. Also, interestingly, at the last minute, as that legislation was making its way through the Scottish Parliament, the Scottish Government introduced a new, additional layer of abstraction licensing establishing that Scottish Ministers have to approve very large-scale abstractions where the water is being transferred outside of Scotland – and this in the age of streamlined permitting. Perhaps this is a case of 'If we can't get your hands off our oil, we'll keep your hands off our water'? The Flood Risk Management (Scotland) Act 2009 deals with flood management and the Marine (Scotland) Act 2010 covers marine regulation within Scottish territorial waters, up to 12 nautical miles off the Scottish coast.

Northern Ireland

And so to look at how regulation in Northern Ireland compares with the rest of the UK. In some respects it is more up to date, in other respects it is a little more dated. The Water (Northern Ireland) Order 1999 controls discharges to water. The Water Abstraction and Impoundment (Licensing) Regulations (Northern Ireland) 2006 were enacted in response to the Water Framework Directive. There was an abstraction licensing regime already in existence for large-scale abstractions, but now abstraction and impoundment licensing is applied across the board. Pollution Prevention and Control (PPC) is covered by the Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013.

The Water and Sewerage Services (Northern Ireland) Order 2006 is rather similar to the Water Industry Act – in fact it is pretty much a copy, setting up Northern Ireland Water, the government-owned water and sewerage utility in NI and its regulation. Finally the Water Environment (Floods Directive) Regulations (NI) 2009 implements the Floods Directive and the Marine and Coastal Access Act 2009 complete the picture.

Regulatory bodies across the UK

The regulatory bodies throughout the UK present a complex picture (see Figure 1). In England, obviously there is the Environment Agency (EA). The water industry consists of the various privatised water and sewerage undertakers, who are overseen by Ofwat; while offshore the Marine Management Organisation, created under the Marine and Coastal Access Act 2009 and sponsored by Defra, licenses, regulates and plans marine activities in the seas around England and Wales.

In Wales, Natural Resources Wales (NRW) was formed in 2013, amalgamating the functions of the Countryside Council, Forestry Commission and the Environment Agency; while Welsh Water is providing a very interesting model for the water industry in the way that it is ploughing the profits back for the benefit of customers.

The Scottish Environment Protection Agency (SEPA) operates in Scotland and Scottish Water, which is a creature of statute, is funded by water charges and the Scottish Government, but operated as a commercial enterprise. Scottish Water is subject to price controls which are regulated by the Water Industry Commission for Scotland. Off-shore regulation is carried out by Marine Scotland, an executive agency of the Scottish Government. Central government consists of Scottish Government overseeing matters.

The Northern Ireland Environment Agency, despite UKELA's best efforts over decades, still remains in central government. Northern Ireland Water (NIW) is the water and sewerage undertaker, and is in the unenviable position of being a government-owned company operating under the same regime as all the privatised water companies in England and Wales, and subject to price controls by the Utility Regulator; despite the fact that there are no water charges for domestic customers in Northern Ireland. NIW is overseen by the Department for Regional Development. It is hard not to think that at least some of the regulation applying to it is redundant.

Differences in approach

What is striking is just how different the administrative arrangements are across the various jurisdictions and the differences in regulatory approach that can result, depending on the jurisdiction. In England and Wales, there is mature regulation, a mature water industry, mature



Figure 1.

pollution control regimes and statutory impoundment and engineering regimes. Many of these controls existed before the WFD so in that respect we could refer to England and Wales as 'WFD-tolerant'. The systems of regulation largely remain as they were before.

However, some of those systems could be described as being a bit too mature. In relation to the water industry, that has been recognised and matters are in flux thanks to the Water Act 2014. Water industry regulation is also in flux, as new principles-based regulation is promulgated by Ofwat, which seeks to give water companies much more discretion in how they deliver the objectives assigned to them.

The environmental regulatory approach adopted by the EA is a formal one and is staffed by true specialists, whether technical or legal, including specialist prosecutors. In Wales, the case remains to be seen, depending on how Natural Resources Wales develops and, very importantly, upon the Environment (Wales) Bill which has just been introduced. But if the experience in Scotland is anything to go by, inevitably we will see a divergence of approach over the years.

In Scotland one might say there is an affinity for water, given that the Scots are so used to receiving it. You can also say there is an affinity for water within the environmental regulator because when SEPA was first set up, many of the people who worked there in senior positions had transferred across from the river purification boards. Transposition of the WFD was therefore enthusiastically embraced in Scotland and was seen as an area where Scotland could lead the UK and indeed the EU. This arguably can be apparent not just in the transposition but in the continuing, occasionally evangelical regulation of WFD matters within the jurisdiction.

I've already pointed out how in some respects the structuring and regulation of the water industry up north is ahead of the rest of the UK, with retail competition for business customers under the Water Services etc (Scotland) Act 2005. Can it be said that Scotland is leading the way in regulation and in water industry structuring? That may be debatable.

As far as regulatory approach is concerned, the environmental regulator SEPA is increasingly sophisticated. There will be a completely transformed environmental enforcement framework in Scotland within the year and a completely overhauled environmental permitting framework within a couple of years. Like the Environment Agency, SEPA is an arm's length regulator. However it does operate in a smaller community, so the opportunities for attention to detail and personal contact can be greater. And that can affect the way lawyers and others advise on policy and regulation, which in turn influences the way in which solutions to problems are reached.

In Northern Ireland, water pollution controls and water abstraction controls are generally up to date. Transposition of the WFD is in place. You might say that in Northern Ireland there would be a certain sensitivity to EU influence considering NI was at the receiving end of all the fines imposed as a result of infraction in respect of wastewater treatment regulations. So a thorough approach to the

WFD in Northern Ireland is clearly evident. As described above, the delivery of water industry modernisation, by way of a government-owned company under a model of regulation designed for privatised utilities, is slightly strange. As far as an environmental regulatory approach is concerned, Northern Ireland is a smaller place and a smaller community than the other jurisdictions and, as a result relationships are very important.

Some current issues in UK water law

After that brief run through the regulations and regulators across the UK jurisdictions, I would like to mention a few recent issues in UK water law that may provide some food for thought.

Exemptions under the WFD

Under the Water Framework Directive there is the core obligation to achieve good status of water bodies. That obligation is subject to a number of different exemptions.

Supposing a project will only be realised with an exemption from the good status obligations under the WFD, what is the procedure for applying for that exemption? How is the exemption confirmed so that there is no possibility of future enforcement action for failure to meet good status? Is there guidance on it?

There is European guidance, which is, as might be expected, pitched at an extremely high level, talking mainly about the intricacies of interpretation of the exemptions. SEPA has provided some guidance, which was really driven by the fact that SEPA had to sort out how to process a mass of applications for in-river hydro schemes, while still meeting the terms of the WFD. But there is nothing all-encompassing, no simple regime.

The regulators point out that environmental consent has to be applied for anyway and that process will identify whether the exemptions are satisfied. An environmental impact assessment will also accompany most major planning applications and if there is likely to be any potential impact on WFD objectives, a WFD assessment can be carried out as part of that. The same may apply if planning consent is necessary.

However, if there is no other need for a consent that can be used as a wrapper for the terms of the grant of the WFD exemption, the putative beneficiary of the exemption has no formal way of recording the grant, nor of preventing it from being derogated from once granted. I was involved in a major regeneration project on a brown-field site which happened to have deep groundwater contamination, and which required exemption from the good status obligation to be granted by the environmental regulator. However the mechanism for granting the exemption alongside planning permission did not exist.

WFD exemptions are likely to become increasingly important. The 2015 deadline for achieving good status is almost upon us and so one can expect increasing pressure from the Commission and others to explain why objectives might not have been met. In these circumstances, it seems strange that there is no simple legislative mechanism in

place for the grant of exemptions. As things stand, the beneficiary of the exemption is obliged to gather as much evidence as it can in the form of letters from the relevant parties. Inevitably, however, there is still some residual reliance on relationship. In circumstances where the exemption may be necessary to protect its beneficiary from multi-million pound liabilities, this is deeply unsatisfactory.

Obligations to restore under the WFD

Another obligation under Article 4 of the WFD (environmental objectives) is restoration. Environmental objectives include protecting and enhancing but also *restoring* bodies of water with the aim of achieving good status. Restoration of water bodies does not seem to have gained much attention, nor would there seem to have been many steps taken to achieve it over the years since the WFD was transposed. So I would expect to see more pressure for restoration projects to be implemented.

In which case, the same question arises: what mechanisms are in place to carry this out? If there is development planned anyway it should be straightforward: part of the condition of the necessary planning permission will be the restoration aspect of the project. The same would apply with an environmental consent. But inevitably there are going to be instances where the restoration required is not bolted on to other proposed development or activity. There is provision in the Water Resources Act 1991¹ which allows for notices to be served where the hydromorphological state of the water body in question is preventing the achievement of the required objective. But how often has

this been the case? And what happens if it is something other than the hydromorphological state of the water body that is the problem?

Some of the issues in imposing restoration have been considered in proposals that the Scottish Government put out to consultation earlier this year.² In these proposals the Scottish Government is trying to encourage voluntary remediation, through community partnerships and partnerships with various statutory bodies. There is a remedial notices mechanism included, but these notices can only be served on public bodies, and then only when they meet a number of tests including the provision that they are necessary and proportionate. This will be an interesting piece of draft legislation to watch.

The best one can say, then, is that legal mechanisms for formalising exemptions and requiring restoration are evolving. The reality is that a varied armoury of policy and legal mechanisms will be used to implement the environmental improvements required under the WFD. The fact that it is not always clear how the 'exempt' person is truly protected is a worry and the position ought to be clarified.

Water industry reform

The Water Act 2014 has finally been enacted, after a long time in the gestation (see Figure 2). The first major step under the Act will be retail market reform for business customers, following the structure of the energy markets, in other words opening up choice of supplier to the consumer. Effectively the infrastructure is still owned by the

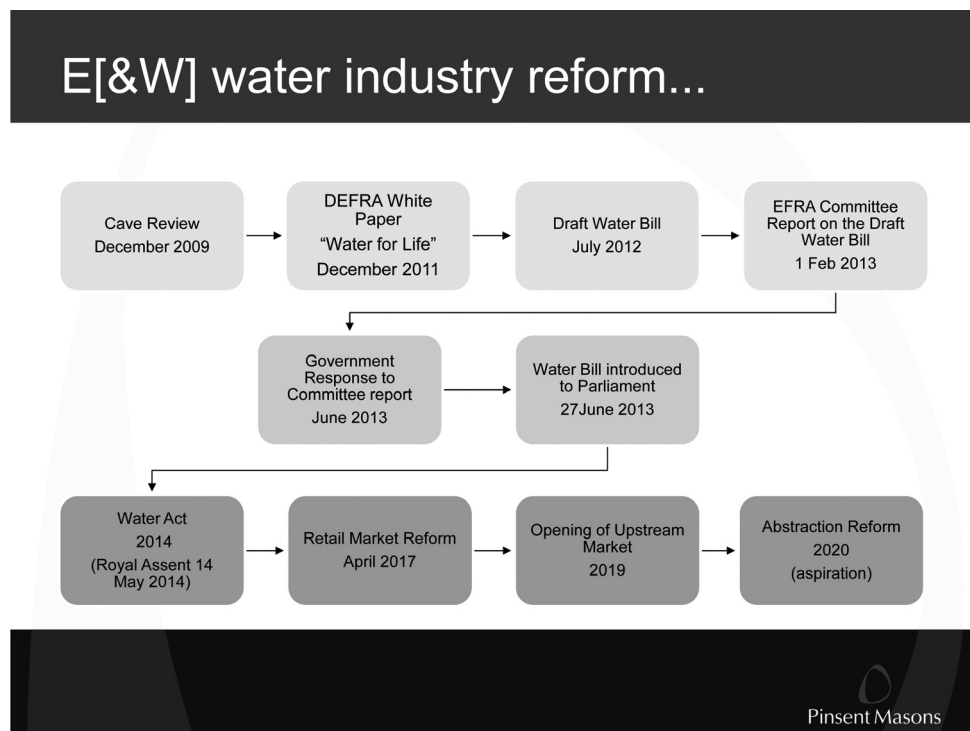


Figure 2.

¹ Sections 161ZA, 161ZB and 161A.

² Scottish Government 'Delivering Scotland's River Basin Management Plans: Improving the physical condition of Scotland's water environment' February 2015.

water undertaker, but the customer interface will change, so that businesses can choose which water and sewerage suppliers to use.

This may appear to be all to do with consumer power and the aim of driving prices down. While that is certainly true, the Scottish experience of retail competition in the water industry shows that actually it also has a reasonable amount to do with the environment. The Scottish retail market has been operating for a while now, and is doing well when you consider how small the market is. One reason suppliers – which consist largely of English water and sewerage undertakers – are getting involved in this market is to gain experience before the English and Welsh markets open up. And interestingly it shows how these various companies differentiate themselves. There is not much room for movement on the price because of market restrictions on margin, so to be competitive suppliers offer consultancy on water efficiency, which can result in less water use. If you believe the figures, reduced water usage could save customers a total of £10 million of volumetric water charges and save the environment 5,000 tonnes of CO₂. Compare the size of the Scottish market to that in England and Wales and the environmental benefits could be significant.

Abstraction reform

Abstraction reform is a key part of the Water Act 2014 and is of particular interest because it illustrates the differences between the abstraction regime in England and Wales and the regime in Scotland.

In Scotland, and indeed in Northern Ireland, the situation is quite straightforward. An abstraction licence is like any other environmental permit granted by the regulator and if necessary the regulator can choose to vary it. In England and Wales the abstraction rights are treated as property rights and therefore there is a statutory right to compensation in the event that those rights are taken away. This has completely stymied environmentally-efficient regulation of abstraction over the years, because the compensation figures that many water companies would be

entitled to as a result of reduction of rights to over-abstract are absolutely colossal.

Thus a crucial part of abstraction reform, and really the key to unlocking this age-old law, is that the right of compensation has been taken away by the Water Act 2014. Instead of being entitled to compensation, water companies will have to establish their loss and then recover it via the price review. The loss will therefore be shared among the companies' customers, in much the same way as other environmental improvement has had to be carried out.

The Act, however, is less effective in terms of reform of the actual distribution of water under abstraction licences, and in terms of finding more efficient ways of using water to avoid a few licensees sitting on rights to abstract large volumes of water which are not being used.

Water trading is the key and there will be a consultation on this around about the turn of the year. There are three different models currently on the planning agenda. But the important point is that this will be a gradual, if not prolonged process, since the government has made it clear that it does not want suddenly to reform abstraction licensing and therefore lose investor certainty in the water utility market within England and Wales.

Conclusion

So in abstraction licensing, as in almost all areas of environmental regulation of water in the UK, we continue to see a range of different approaches across the various jurisdictions. The diversity among the different jurisdictions reflects a long and complex history but also provides the opportunity for the employment of different approaches to regulation according to different circumstances, even within such a small geographical footprint. Advising across the UK's border might occasionally be challenging, but lawyers and experts have the luxury of three other jurisdictions close by and the opportunity continually to borrow the most successful approaches and learn from the less successful approaches in those jurisdictions. That has to be good for the UK as a whole, whatever direction further devolution might ultimately take.

Environmental law: hot¹ cases

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This article seeks to provide an update of the more significant environmental cases over the past year, with a particular eye on those with a watery flavour in line with the conference theme. In addition, the article seeks to identify such trends as are discernible from the jurisprudence (and beyond). Inevitably the case selection exercise is a subjective one. No doubt I will hear soon enough if those cases I have included are tepid at best. The law is as at mid-June 2015.

There are many more cases, and topics, that could be covered, not least the conclusion to (the latest) round of litigation over the badger cull (in which the Court of Appeal lost little time in dismissing the claimant's appeal against the dismissal of its case relying on legitimate expectation); *Bancoult*² (applications for permission to appeal to the Supreme Court were heard by the Supreme Court on Monday 22 June 2015) and a host of energy cases that inevitably bear on efforts to tackle global warming and climate change, including *DECC v Breyer Group plc*³ (which confirms that the UK Government will now have to compensate operators who had entered into contracts prior to its bolt-out-of-the-blue announcement that it was scrapping subsidy for various non-domestic solar installations – which judgment was handed down not long before the UK Government decided to announce it would cancel onshore wind subsidies one year early).

Then there is *Frack Free Balcombe*⁴ (the first substantive challenge to a fracking permission to reach the courts, and one that saw the claimants leave empty-handed) and *Ålands Vindkraft*⁵ (the need to tackle climate change can justify a support scheme), amongst others. However, this document is already sailing dangerously close to the line between 'paper' and 'small book' and I feel it best to quit whilst the going is (reasonably) good ...

Sentencing environmental crime

A brave new (and much more expensive) world – not least for the water industry

If it is appropriate to start a review of hot cases over the past 12 months with those that embody the greatest single

shift since last year's Edinburgh conference, then nothing is more appropriate than the revolution in sentencing for environmental crime brought about by the combination of shifting judicial attitudes and the July 2014 Sentencing Guideline,⁶ exemplified by the *Thames Water*⁷ and *Day*⁸ cases. Any notion that *R v Sellafield*⁹ was limited to its own radioactive waste facts has been firmly laid to rest.

The Sentencing Guideline should need no introduction. Suffice it to say that in the case of an offence committed negligently (culpability band 3 of 4), causing only minor harm (harm Category 3 of 4), the 'starting point' for sentencing a 'large' company (one with a turnover of £50 million or more) is £60,000, within a £35,000–£150,000 range. Compare that to the fines in the single thousands of pounds that were the norm beforehand.

In the case of 'very large' companies, with a turnover or equivalent that 'very greatly exceeds the threshold for large companies', the guideline advises that it 'may be necessary to move outside the suggested range to achieve a proportionate sentence'. *Thames Water*¹⁰ saw the Court of Appeal consider such a company, the first case of its kind to be sentenced after the guideline became effective. Its message should have sent a chill through the boardrooms of all high-turnover companies holding environmental permits. The case is an example of the risk involved when a company that is both well known and almost bound to commit further offences by the very nature of its business seeks to appeal against the sentence imposed upon it. It seems certain that the water industry, where offences are almost inevitable, will be affected more than most. So it should come as no surprise that it has led the way here and is doubtless a most unwelcome trailblazer.

*Natural England v Day*¹¹ concerned a private individual of enormous wealth and conveyed a similar message. Perhaps fortunately for the latter, he was sentenced before the guideline. In the circumstances, the expansion of enforcement undertakings assumes ever greater importance. Given the guideline and the judgments of the Court of Appeal concerning very large companies and wealthy private individuals, it seems that offenders will find enforcement undertakings increasingly attractive.

¹ Ideally watery.

² *R (on the application of Bancoult No 2) v Secretary of State for Foreign and Commonwealth Affairs* Supreme Court (22 June 2015).

³ [2015] EWCA Civ 408.

⁴ *Frack Free Balcombe Residents v West Sussex County Council* [2014] EWHC 4108 (Admin).

⁵ Case C-573/12 *Ålands Vindkraft AB v Energimyndigheten* http://curia.europa.eu/juris/document/document_print.js?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=154403&occ=first&dir=&cid=67445.

⁶ Sentencing Council: *Environmental Offences Definitive Guideline*, effective 1 July 2014 (issued pursuant to s 130 of the Coroners and Justice Act 2009).

⁷ *R v Thames Water* [2015] EWCA Crim 960.

⁸ *Natural England v Day (Philip Edward)* [2014] EWCA Crim 2683, [2015] Env LR 15.

⁹ [2014] EWCA Crim 49, [2014] Env LR 19.

¹⁰ Note 7.

¹¹ Note 8.

R v Thames Water¹² – very large companies can expect fines into the multi-millions

The offence in this case concerned the unauthorised discharge of untreated sewage from the defendant's pumping station into a watercourse, the Chase Brook, contrary to regulations 38(1)(a) and 39(1) of the Environmental Permitting (England and Wales) Regulations 2010. Chase Brook flows through a 143 acre National Trust nature reserve in the North Wessex Downs AONB. The discharge occurred because of a failure of the pumps, caused by them becoming blocked by 'rag' wrongly deposited in the sewage system by domestic and other users. The pumps had been similarly blocked and failed several times over the previous months. The defendant's staff had failed to respond to an alarm that alerted them to the failure of the pumps. It was not until a member of the public noticed the discharge and raised the alarm that action was taken. That action included replacement of the pumps with a superior model better able to cope with 'rag'.

Thames Water pleaded guilty at the first opportunity before the magistrates. It was committed up for sentence and, on 18 July 2014, just after the coming into effect of the guideline, was sentenced to a fine of £250,000, plus victim surcharge and costs of a little under £7000. That sentence was handed down after Thames Water had explained, by way of mitigation, the financial and regulatory environment in which it operated, the costs it had incurred in putting the situation right, including its voluntary funding of a National Trust community warden for three years at a cost of £90,000. The judge explained that she had sentenced on the basis that Thames Water was negligent and should have replaced the pumps before the incident. She accepted that the harm was Category 3 (minor). Thames Water's crown court counsel had indicated that he would not take issue with the categorisation of the harm as Category 3 or with the description of the culpability as negligent; further, its witness had acknowledged that the pumps required replacement before the incident.

Thames Water appealed the amount of the fine, and in particular those findings of the judge. In fact, it went so far as to seek to adduce fresh evidence on appeal. The Court of Appeal gave that submission short shrift, noting that the case was an example of the importance of complying with the Practice Direction, formalising the *Friskies*¹³ approach.

Regarding the level of fine, the court's dismissal of the appeal was equally forthright. The court noted that this was the first case of its kind to come before a court since the guideline came into effect. In the court's view, the guideline made clear that its starting points and range of fines 'do not apply to very large organisation' (paragraph 29). In support of that proposition, the court quoted the passage of the guideline set out above. It is interesting to note, then, that the word the guideline uses is *may* not *will*. The statement that the starting points and ranges there *do not apply* appears a rather bald one. The recorder had decided to

approach the matter on the basis that as the appellant had a turnover of £1.9 billion she would multiply the starting point for a negligent Category 3 case for a large company, £60,000, by five to £300,000, and similarly the range, from £35,000–£150,000 to £175,000–£750,000.

The Court of Appeal surmised that had mitigation factors and the early guilty plea been stripped out, the fine would have been not less than £500,000 (paragraph 30). Whilst having considerable sympathy for the position in which the recorder was placed, the court rejected such a 'mechanistic' approach to cases involving very large companies. It also rejected the crown's suggestion that any company with a turnover exceeding £150 million was 'very large', noting that in the case of most organisations 'it will be obvious that it either is or is not very large' (paragraph 37).

Referring to *Natural England v Day*¹⁴ and *R v Southern Water Services Ltd*,¹⁵ the court noted that it had previously observed that it would not have interfered with fines 'very substantially greater' than six figure fines imposed for environmental offences (paragraph 38). It proceeded to give detailed guidance, including that in the case of previous convictions 'repeated operational failures' should count as 'significantly more serious' than offences with low or no culpability, such that (at paragraph 39):

to bring the message home to the directors and shareholders of organisations which have offended negligently once or more than once before, a substantial increase in the level of fines, sufficient to have a material impact on the finances of the company as a whole, will ordinarily be appropriate. This may therefore result in fines measured in millions of pounds.

Beyond that, the court held that:

1. In the worst cases, Category 1 harm caused by deliberate action or inaction, the need to impose a just and proportionate penalty will necessitate a focus on the whole of the financial circumstances of the company and 'may well' result in a fine equal to a substantial percentage, up to 100 per cent, of the company's pre-tax net profit for the year in question 'even if this results in fines in excess of £100 million' (the court noted that 'fines of such magnitude are imposed in the financial services market for breach of regulations').
2. In the case of Category 1 harm resulting from recklessness 'similar considerations will apply, albeit ... the court will need to recognise that recklessness is a lower level of culpability'.
3. When the harm falls below Category 1 less, but nevertheless 'suitably proportionate' penalties 'which have regard to the financial circumstances of the organisation', should be imposed. In an 'appropriate case' the court 'may well consider ... the fine imposed must be measured in millions of pounds'.
4. There must not be a mechanistic extrapolation from the levels of fine suggested for large companies.

¹² Note 7.

¹³ *R v Friskies Petcare UK Ltd* [2000] 2 Cr App R (S) 401.

¹⁴ Note 8.

¹⁵ [2014] EWCA Crim 120.

The court added this (at paragraph 42):

In the case of a large statutory undertaker, such as the appellant, no amount of management effort can ensure that no unauthorised discharge can ever occur. In the case of an offence which causes no harm and which occurs without fault on the part of the undertaker, it would be difficult to justify a significant difference in the level of fine imposed on two very large organisations, merely because the infrastructure and turnover of one was twice as large as that of the other. Size becomes much more important when some harm is caused by negligence or greater fault. Even in the case of a large organisation with a hitherto impeccable record, the fine must be large enough to bring the appropriate message home to the directors and shareholders and to punish them. In the case of repeat offenders, the fine should be far higher and should rise to the level necessary to ensure that the directors and shareholders of the organisation take effective measures properly to reform themselves and ensure that they fulfil their environmental obligations.

Thames Water had been convicted on 106 occasions of 162 environmental offences since 1991. Whilst it was not possible to state with certainty which category of the guideline each offence would have been put into had the guideline been in force, it appeared there was a little over one more serious offence per annum on average over the years. There was, therefore, 'room for substantial improvement' (paragraph 44). In the circumstances, the sentence of £250,000 was lenient and the court 'would have had no hesitation in upholding a very substantially higher fine' (paragraph 46).

Recent experiences in the crown court suggest the courts are now taking not only the guideline but also *Thames Water*¹⁶ to heart.

Natural England v Day¹⁷ – a seven figure fine would be appropriate for an offence committed through the gross negligence of a person of enormous wealth

Natural England v Day was an appeal against a sentence handed down before the guideline and long before *Thames Water*,¹⁸ but the judgment of the Court of Appeal is entirely consistent. The facts were out of the ordinary. The extremely wealthy appellant (whose fortune the prosecution estimated at some £300 million), the owner with his wife of an estate in Cumbria that included part of a SSSI, had caused (by his own admission through his eventual guilty plea) substantial unauthorised works to the SSSI in order to conduct commercial grouse shooting, in breach of section 28E(1) of the Wildlife and Countryside Act 1981 and so constituting an offence under section 28P(1). The works included the felling of trees and the construction of a road and bunds. The sentencing judge found that Mr Day had thereafter, through solicitors, deliberately sought to intimidate local residents who were concerned to raise the alarm and alert Natural England.

Having elected trial by jury, Mr Day was then convicted on his own guilty plea, the prosecution having rejected his basis of plea but he having elected to maintain his plea. After a four-day Newton hearing, the judge found Mr Day had been grossly negligent in flouting the protection afforded the SSSI and sentenced him to a fine of £500,000 less 10 per cent to reflect his, belated, guilty plea, so £450,000. The judge remarked that the sentence would have been £1 million had he found the conduct deliberate. Mr Day was also ordered to pay full prosecution costs of a little more than that figure.

The Court of Appeal rejected Mr Day's appeal against sentence on every point. The court noted that the sentence had been handed down before its decision in *R v Sellafield*,¹⁹ which gave guidance as to the approach to fines to be imposed on companies of very significant size. Given the appellant's wealth, a fine 'significantly greater than that imposed by the judge would have been amply justified for his grossly negligent conduct in pursuit of commercial gain, particularly when so seriously aggravated by his conduct in obstructing justice' (paragraph 46).

The irony was that Natural England had been content to accept summary jurisdiction, which, had Mr Day agreed, would have meant a fine limited to £20,000 for each of the two offences for which Mr Day was convicted.

The Court of Appeal also took the opportunity to note, obiter dicta, that the *Empress Car*²⁰ approach to causation well known to environmental lawyers was much more likely to apply to the section 28P(1) offence than the narrower *R v Hughes*²¹ test applied to causing death by driving in circumstances defined in section 3ZB of the Road Traffic Act 1998 (paragraph 23).

Access to environmental information

Further barriers fall: starting with the privatised water industry

It is hard to shake the impression that substantive domestic environmental challenges have continued to encounter a degree of post-Walton²² judicial reluctance when it comes to the exercise of discretion (which trend the new section 31(3C)–(3F) of the Senior Courts Act 1981 will surely only accelerate).²³ What is most striking about the

19 Note 9.

20 *Empress Car Company (Abertillery) Ltd v National Rivers Authority* [1998] UKHL 5.

21 [2013] UKSC 56.

22 *Walton v Scottish Ministers* [2013] PTSR 51.

23 The new section provides that:

(3C) When considering whether to grant leave to make an application for judicial review, the High Court—

(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and

(b) must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.

(3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(3F) If the court grants leave in reliance on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied.

16 Note 7.

17 Note 8.

18 Note 7.

section is the extent to which it positively invites the court when considering leave for judicial review to descend into the merits and, ultimately, to second guess the decision-maker. It is a rare administrative decision that expresses itself contingently, in the way the judiciary do in anticipation of an appeal. But absent such a contingent analysis within the decision itself (if I am wrong about X, then Y) there can be no pretence; by deciding whether an error made a difference to the ultimate outcome the court is putting itself in the decision-maker's shoes.

By contrast with an increasing trend to refuse relief in the exercise of judicial discretion on substantive challenges, there has been no such brake on claims seeking access to environmental information. Two decisions have further pushed the boundaries, both of them long-awaited: *Fish Legal/Shirley v Information Commissioner*²⁴ and *R (Evans) v Attorney General*.²⁵

Fish Legal²⁶ – privatised water/sewerage companies 'public authorities' for the purposes of Directive 2003/4 and so the EIR

In these joined cases the Upper Tribunal (Administrative Appeals Chamber) held that privatised sewerage companies are 'public authorities' for the purposes of Directive 2003/4/EC²⁷ and so too the Environmental Information Regulations 2004 (EIR).²⁸ It reached that finding under the 'special powers' test, rejecting arguments that the finding could also be reached under the 'control' test. The decision opens the door for similar findings against the other privatised, regulated industries that deliver a once publicly owned service.

The claimants – one the legal arm of the Angling Trust, the other a private individual – had sought information from a number of the sewerage companies. Their requests had been rejected by the companies on the basis that they were under no duty to provide information under the EIR. When the claimants complained to the Information Commissioner, he decided that he had no jurisdiction as the companies were not public authorities. The Information Tribunal's successor, the First-tier Tribunal, dismissed appeals against that decision, but gave permission to appeal to the Upper Tribunal. By that time the information requested had in fact been provided, so the only issue was whether the information had been provided within the time stipulated by regulation 5(2) EIR, which turned on whether the companies were public authorities. The Upper Tribunal first made a reference to the CJEU, asking it to clarify the tests to be applied when a person is 'performing public administrative functions under national law' for the

purposes of Article 2(2)(b) of Directive 2003/4 and related questions.

The CJEU answered the Upper Tribunal's questions under Case C-279/12, essentially as follows: '... it should be examined whether those entities are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law'.

It was left to the Upper Tribunal to apply that 'special powers' test, which it noted was concerned to contrast the powers vested in the bodies in question with those that result from the rules of private law (paragraph 103), and by 'powers' meant that word in the general sense of an ability to do something that is conferred by law (paragraph 104). It considered the issue a 'practical one', namely 'do the powers give the body an ability that confers on it a practical advantage relative to the rules of private law' (paragraph 106).

By the time the case came on, the litigation had acquired additional complexity because the Secretary of State now argued that the First-tier Tribunal did not have jurisdiction over the issue of whether a body was a public authority under the Freedom of Information Act 2000 (FOIA) and the EIR, and that the proper route of challenge was by judicial review. The Secretary of State duly commenced judicial review proceedings, joining all others as interested parties, as did Fish Legal. Ultimately all proceedings, including other related claims against the Information Commissioner, were heard by the Upper Tribunal.

The Upper Tribunal considered the history of the water industry, from the mid-20th century, when most water and sewerage services were in public ownership and provided by local government authorities, often acting cooperatively with joint boards, through the transfer of those responsibilities to regional water authorities in the early 1970s, to the privatisation of the water industry in 1989 and its regulation by what is now the Environment Agency (paragraph 61). It sketched the framework of the Water Industry Act 1991 (WIA) (paragraphs 63–64), the companies' corporate structure and governance (paragraphs 65–70), the functions of Ofwat (paragraphs 71–73), the water and sewerage undertakers' duties and powers under the WIA (paragraphs 74–77) and the non-FOIA/EIR provisions by which the companies and the Environment Agency held, and were required to provide, information (paragraphs 79–87).

Having rejected requests for the companies that it 'indicate with precision which of the companies' powers (the Tribunal) considered were special powers' (paragraph 98), it found that the companies had several such powers, not least a power of compulsory purchase when authorised by the Secretary of State (paragraph 107), the power to make bye-laws the breach of which constitutes a criminal offence (paragraph 109) and, similarly, the power to impose hose-pipe bans the breach of which is an offence (paragraph 126). It also rejected an argument for the Secretary of State that the test was essentially whether the companies' powers were 'state' powers, noting as it did that the

24 Joined Cases *Fish Legal v Information Commissioner, United Utilities plc, Yorkshire Water Services Ltd and Secretary of State for Environment, Food and Rural Affairs; Shirley v Information Commissioner, Southern Water Services Ltd and Secretary of State for Environment, Food and Rural Affairs* [2015] UKUT 0052 (AAC).

25 *R (Evans) v Attorney General* [2015] UKSC 21, [2015] 2 WLR 813.

26 Note 24.

27 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L41/26).

28 SI 2004/3391.

meaning of 'state' powers had changed considerably even over the course of the 20th century (paragraph 113).

The tribunal's comment regarding the potential scope of the CJEU's judgment, as applied by it in this case, is of particular interest:

The extent to which the CJEU's judgment will result in bodies being classified as public authorities is unclear and undecided, but potentially wide. As Judge Jacobs noted in his reference, the reasoning in these cases is potentially relevant to other privatised, regulated industries that deliver a once publicly owned service: electricity, gas, rail and telecoms. It will have to be applied to these and other bodies as and when cases arise ...

As to whether the companies were under the control of a person falling within Article 2(2)(a) or (b) of Directive 2003/4 and did not determine in a genuinely autonomous manner the way in which they provide public services relating to the environment, since a public authority within Article 2(2)(a) or (b) was in a position to exert decisive influence over their action in the environmental field (the 'control' test set by paragraph 2 of the CJEU's order), the tribunal rejected that suggestion, noting that 'few commercial enterprises' would satisfy it and that the companies had genuine autonomy of action (paragraph 155).

R (Evans)²⁹ – scope for a section 53 FOIA certificate strictly limited, and nil when environmental information at stake

This case, known as the 'Prince's letters/black spider memos' case, will be well known to readers. The decision of the Supreme Court marks the culmination of almost a decade of litigation over whether letters written by the Prince of Wales to various government departments could or should be subject to disclosure under the FOIA/EIR. Mr Evans, the *Guardian* journalist who brought the claim, had first made the request of the departments in April 2005. It will be recalled that after his complaint against the rejection of his request had been refused by the Information Commissioner, his appeal against that refusal had been transferred to the Upper Tribunal and was upheld by it in relation to certain of the correspondence, namely 'advocacy' correspondence, which included correspondence concerning the environment. The Attorney General issued a certificate pursuant to section 53(2) of the FOIA, the effect of which was to override the Upper Tribunal's determination.

Section 53(2) of the FOIA provides that a decision notice or an enforcement notice served under the FOIA on, for example, a government department:

shall cease to have effect if, not later than the twentieth working day following the effective date, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or request concerned, there was no failure to comply ...

The language of section 53 as a whole makes clear that such a certificate could be served not only after a decision by the Information Commissioner but also after a determination by the Upper Tribunal.

The Divisional Court dismissed Mr Evans's claim for judicial review to quash that certificate; the Court of Appeal allowed Mr Evans's appeal and now, finally, the Supreme Court has upheld the decision of the Court of Appeal.

Lord Neuberger PSC gave the lead judgment for the majority. The point of general application decided by *Evans*, not specific to the field of environmental law, is that the circumstances in which a section 53 certificate might be issued after a determination by a court (and the Upper Tribunal is a court of record, equivalent to the High Court) are limited to the two identified by Lord Dyson MR in the Court of Appeal: (i) a material change of circumstances since the tribunal decision, or (ii) the decision of the tribunal was demonstrably flawed in fact or in law (paragraphs 71–78); a 'very narrow range' (paragraph 86).

These conclusions turned on the application of two fundamental constitutional principles: first, that subject to being overruled by a higher court or a statute, a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including the executive; and, secondly, that decisions and actions of the executive are reviewable by the court at the suit of an interested citizen, subject only to necessary and jealously scrutinised exceptions (paragraph 52). If such fundamental constitutional principles are to be disappplied, Parliament should make that 'crystal clear' when legislating, and it had not done so here (paragraph 90). As a result, despite the superficial breadth of the 'reasonable grounds' test in section 53, the context meant that the accountable person could not issue a section 53 certificate simply because, on the same facts and admittedly reasonably, he took a different view from that adopted by a court of record after a public hearing (paragraph 88).

The circumstances in which a section 53 certificate might be issued after a determination by the Information Commissioner were less constrained, although as the point was not directly in issue it was not necessary to decide it (paragraph 83), whilst the position following a determination by the First-tier Tribunal would likely be the same as the position following a determination by the Upper Tribunal, albeit it was again unnecessary to decide that point (paragraph 85).

Baroness Hale DPSC and Lord Mance JSC did not subscribe to the majority's narrow two-limb approach to the circumstances in which a section 53 certificate could be issued following a determination by the Upper Tribunal, but advanced a test that still set the bar for section 53 'reasonable grounds' higher than 'mere rationality' (paragraph 129), requiring 'the clearest possible justification', which might well only be possible to show in the two situations Lord Neuberger envisaged (paragraph 130). On the facts, they considered that the Attorney General's certificate proceeded on the basis of findings which differed, radically, from those clear and fully explained findings made by the Upper Tribunal, but without any real or adequate explanation (paragraph 145).

29 Note 25.

However, of greater interest to environmental lawyers is the Court's consideration of the 2003 Directive. Given Lord Neuberger's decision under the FOIA, shared by Lords Kerr and Reed JSC, it was strictly unnecessary for the majority judgment to deal with the directive, but Lord Neuberger did so as the point was 'of importance and (had) been fully argued' and here his judgment was also shared by Baroness Hale DPSC and Lords Mance and Hughes JSC (paragraphs 147, 167) (so six of the seven member Court, with only Lord Wilson JSC dissenting). Unlike the position under the FOIA, which depended upon a fairly tortuous construction based on fundamental constitutional principles, the position under the directive was clear-cut.

As Lord Neuberger observed (at paragraph 102):

The structure of article 6 is that, where the executive has refused a disclosure request and the applicant wishes to pursue the matter, (i) the executive must reconsider its refusal (article 6(2)), (ii) if it maintains the refusal, the applicant must be accorded recourse to the judiciary (article 6(2)), and, if he takes that up, (iii) the decision of the judiciary is to be 'final' (article 6(2)) and 'binding' on the executive: article 6(3).

As such, once the right of appeal against the Information Commissioner's determination had been exercised by Mr Evans's appeal to the Upper Tribunal, and that tribunal had made its determination requiring disclosure, there was 'simply no room for the executive to have another attempt at preventing disclosure' by the terms of Article 6 (paragraph 103). Nor could Article 4 of the directive justify the exercise of such a power, as Article 6 is intended to provide a means of challenging a public authority which seeks to rely on Article 4 to refuse information and Article 4 cannot be invoked after the Article 6 procedure has been gone through (paragraph 104). As such, had the majority been wrong regarding the conclusion in relation to section 53 of the FOIA; the effect of the directive would have been to invalidate the section 53 certificate in relation to the environmental information (but not in relation to the non-environmental information) in the advocacy correspondence (paragraph 113).

Aarhus Convention³⁰

Implementation issues for the UK (costs) and the EU

It is doubtful the government ever truly believed that CPR r 45.41 would mark the end of years of trench warfare around costs protection for environmental claims. If it did then it will have been sorely disappointed. Three cases at Court of Appeal level, *Austin v Miller Argent*,³¹ *Venn*³² and *HS2 Action Alliance*³³ show that the costs of bringing

environmental challenges in the UK remains the perennial hot topic.

*Austin v Miller Argent*³⁴ – Aarhus will rarely assist private nuisance claimants

The judgment of the Court of Appeal in this case, delivered shortly after the last annual conference, confirmed the fears of those who specialise in claimant nuisance actions: the UK courts will rarely countenance costs protection for claimants bringing nuisance actions by reason of the Aarhus Convention. However, the fact that the Court of Appeal was willing to countenance them at all does represent progress.

The underlying claim in the case concerned the effects of a land reclamation project carried out by the defendant opencast coal mining company. The claimant complained of nuisance by reason of the development, which she said was due to breach of the conditions attached to the planning permission that authorised it. She brought proceedings in private nuisance and sought a PCO. The judge at first instance (Judge Milwyn Jarman QC) found that the claimant was a woman of modest means, that public funds were not available to fund the litigation, that ATE insurance policies were prohibitively expensive, that she had a reasonably arguable case and that others living in the vicinity of her home would benefit were she successful, but that it was far from clear if it would have any wider impact. He refused a PCO.

The Court of Appeal rejected the claimant's appeal, which was brought on two bases. The first was that, in light of the well established principle of English law that, where possible, UK law should be interpreted and applied in harmony with the UK's international obligations, the court should exercise its discretionary powers of costs management to give effect to Article 9(4) of the Aarhus Convention. The second basis on which the case was brought, in the alternative, was the obligation to ensure that proceedings should not be prohibitively expensive, which has become binding on the domestic courts via EU law, because (a) the Convention has, in part, been incorporated into the EIA Directive which is part of domestic law, and (b) the EU itself is a party to the Convention (paragraphs 10–11).

The court accepted that private nuisance actions were, in principle, capable of constituting procedures which fall within the scope of Article 9(3) of the Convention, given the potentially significant public interest in the wider environmental benefits they may bring if successful (paragraph 17). However, this would not be true of all private nuisance actions, by any means; complaints such as those about damage from tree roots or water leaks from an upstairs flat, concerning only the claimant's property with no wider public interest, would not fall within Article 9(3). There 'must be a significant public interest in the action to justify conferring special costs protection on the claimant' (paragraph 21). As the court put it (at paragraph 22):

30 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark on 25 June 1998 (the Aarhus Convention or Aarhus).

31 *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012, [2015] 1 WLR 62.

32 *Venn v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539, [2015] 1 WLR 2328.

33 *R (HS2 Action Alliance and Anor) v Secretary of State for Transport and Anor* [2015] EWCA Civ 203, [2015] 2 Costs LR 411.

34 Note 31.

... there are two requirements which have to be met before a particular claim can fall within the scope of (Article 9(3)). First, the nature of the complaint must have a close link with the particular environmental matters regulated by the Convention, even although the action in private nuisance does not directly raise them. Second, the claim must, if successful, confer significant public environmental benefits ... if ... the purpose of the claim was principally to protect private property interests and any public benefit was limited and accidental, it ought not to attract the procedural costs protections afforded by article 9(4).

However, it rejected the claimant appellant's submission that the EIA Directive was applicable (paragraph 35) (no great surprise there) and, applying *R v Home Secretary ex parte Brind*,³⁵ rejected the claimant's further submission that the court was obliged to exercise its discretion to grant a PCO where the failure to do so would involve a breach of Aarhus (paragraph 37). The court said this (at paragraph 39):

39. In our view, therefore, the article 9.4 obligation is no more than a factor to take into account when deciding whether to grant a PCO. It reinforces the need for the courts to be alive to the wider public interest in safeguarding environmental standards when considering whether or not to grant a PCO.

Whilst the mere fact that a claimant has a personal interest in litigation does not bar a PCO (paragraph 44), the Court of Appeal had no doubt that the public benefit in the claim was both relatively limited and uncertain and, as such, the claim did not fall within Article 9(3). Even if it did, the court would not have disturbed the judge's finding against a PCO, given the strong element of private interest in the claim, the lack of satisfactory evidence that she had adequately explored the alternative, potentially cheaper, statutory route of contacting the local planning authority with her complaints and that the defendant, a private body, had already had to pay out substantial sums in costs in relation to the previous claim for a group litigation order unsuccessfully brought by the claimant in *Austin v Miller Argent (South Wales) Ltd*.³⁶

Venn v SSCLG³⁷ – lack of costs protection for section 288 TCPA claims Aarhus non-compliant

The judgment of the Court of Appeal in this case, which builds upon the decision in *Austin v Miller Argent*,³⁸ is surely a fine example of a pyrrhic victory for both sides.

Readers will recall that the case concerned a statutory challenge pursuant to section 288 of the Town and Country Planning Act 1990 (TCPA) to the decision of the Secretary of State's inspector to grant permission on appeal for a dwelling in a residential side-garden in Lewisham. The claimant lived next door. A particular basis of her challenge was that the inspector had failed to take

into account an emerging local plan policy that set its face against such 'garden grabbing'. She sought, and was granted, a protective costs order capped at £3500 in respect of adverse costs at first instance, in light of her means. Lang J ordered the PCO having concluded that the claimant could not avail herself of the protection afforded by CPR r 45.41 for 'Aarhus Convention claims' as defined by that rule, as CPR r 45.41 on its plain terms applied only to applications for judicial review. On appeal, that point was common ground. The live issues were whether the claimant's challenge was an environmental challenge falling within Article 9(3) of the Aarhus Convention and, if so, whether the *Corner House* rules³⁹ were to be applied differently for environmental claims, so as to give effect to Aarhus.

The court (Sullivan LJ giving the single judgment, with which Gloster and Vos LJJ agreed), noted that the definition of 'environmental' in Aarhus is a broad one, and arguably broad enough to catch most, if not all, planning matters, particularly in light of the decision of the CJEU in Case C-240/09 *Lesoochranarske VLK v Slovenskej Republiky (Brown Bear)*⁴⁰ (paragraph 11). It rejected the Secretary of State's submission that Article 9(3) was nonetheless not engaged as the claimant was not challenging an act or omission by a public authority which contravened a provision of *national law relating to the environment*, given that the matter the claimant said the inspector had missed was simply emerging local plan policy.

Sullivan LJ offered a swift rebuttal of that analysis, noting that Parliament had chosen to implement much of the UK's environmental protection through its sophisticated town and country planning system, EIA being a case in point. Given that, it would deprive Article 9(3) of much of its effect, contrary to *Brown Bear*, if a distinction were drawn between policies which relate to the environment at national or local level and the law which, whilst not relating directly to the environment, requires that those policies be prepared and taken into account (and sometimes followed unless material considerations indicate otherwise, eg section 38(6) of the Planning and Compulsory Purchase Act 2004) (paragraph 17):

In the Aarhus context the UK's combination of statute and policy, with the former requiring that the latter be prepared, taken into account and in some instances followed, is properly characterised as 'national law relating to the environment'.

On that basis the claimant's section 288 challenge fell within Article 9(3) Aarhus. However, absent any directly effective EU environmental directive incorporating the Aarhus principles, this did not assist her. The court rejected her submissions that CPR r 45.41 marked a change from the previous position, whereby the claimant had to satisfy the *Corner House*⁴¹ principles (flexibly applied and with allowance made for a private interest, as explained in *Austin v Miller Argent*⁴²) in order for a PCO to be justified. It was

35 [1991] 1 AC 696.

36 [2011] Env LR 650.

37 Note 32.

38 Note 31.

39 See *R (on the application of Corner House Research and Others) v Director of the Serious Fraud Office* [2008] UKHL 60.

40 [2012] QB 606.

41 Note 39.

42 Note 31.

telling that a conscious decision had been taken to afford Aarhus costs protection to judicial review only, not statutory challenges (paragraph 33).

This meant that the question of whether a claimant seeking a quashing order would enjoy costs protection under a PCO depended on the identity of the decision-maker, local authority or Secretary of State, which was anomalous and regrettable but a matter for Parliament. Similarly, this meant that the UK would be in breach of its obligations under Aarhus in relation to such statutory challenges and in specific breach were the claimant's application for a PCO to be refused, given the judgment of the CJEU in Case C-530/11 *Commission v UK*.⁴³ However, the court could not remedy that 'flaw' by exercise of judicial discretion; action by the legislature would be required (paragraph 35).

Note that the grant of a PCO in *Kendall v Rochford District Council*⁴⁴ (discussed below in the context of SEA), which grant imposed the same reciprocal caps as would apply under CPR r 45.43 and PD 45, was made before the judgment of the Court of Appeal in *Venn*,⁴⁵ but did not rely upon CPR r 45.41. It may be that Lindblom J would have granted a CPO in any event, applying *Corner House*⁴⁶ principles flexibly, even had his decision come after *Venn*.

R (HS2 Action Alliance) v SST⁴⁷ – public authority claimants entitled to CPR r 45.41 costs protection

In better news for Aarhus claimants, the Court of Appeal has held in this case that public authority claimants enjoy the costs protection afforded by CPR r 45.41 (a cap of £10,000 in respect of adverse costs) as much as any other non-individual claimant.

The court (Sullivan LJ giving the single judgment, with which both Longmore and Lewison LJJ agreed) noted that the touchstone to Aarhus costs protection, establishing a claim was an 'Aarhus Convention claim' for the purposes of CPR r 45.41(2), turned on the nature, or claimed nature, of the claim, not the nature of the claimant (paragraph 12). Once that issue has been resolved, further recourse to the Aarhus Convention in relation to costs protection is unnecessary, as the terms of CPR r 45.43 and the Practice Direction are clear and draw no distinction that would exclude public authorities from their scope. The word 'claimant' in the Practice Direction means what it says (paragraph 15). To hold otherwise would undermine legal certainty and promote satellite litigation, the very things the government wished to avoid through the Aarhus costs protection rules (paragraph 14). Moreover, CPR r 45.43 expressly provides that the Practice Direction may prescribe a different amount for the costs cap depending on the nature of the claimant.

As to whether the protection conferred by Article 9(3) of the Aarhus Convention in respect of, inter alia, prohibitively expensive costs applies only to members of the

public as defined in Article 2(4), not public authorities as defined in Article 2(2), with the Article 2(2) and 2(4) definitions being mutually exclusive, that was a matter for the Aarhus Compliance Committee (paragraph 22).

EU implementation

Vereniging Milieudefensie/Stichting Natuur⁴⁸ – Aarhus Convention gives no right to challenge acts of EU institutions unless of 'individual scope'

The judgments of the CJEU in these cases neatly encapsulate the tensions between the EU's institutions/the secondary legislation they enact and the international conventions the EU ratifies. In particular, it reveals the arguable disconnect between the Convention and Regulation (EC) No 1367/2006 (the Aarhus Regulation), which governs the application of the provisions of the Aarhus Convention to the institutions and bodies of the European Union, and the EU's obligations under the Aarhus Convention itself, to which the EU is a signatory.⁴⁹

Article 10(1) of the Aarhus Regulation prescribes a procedure for the internal review of 'administrative acts', by which a qualifying NGO is entitled to make a request for internal review to the Community institution or body that has 'adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act'. However, Article 2(1)(g) defines 'administrative act' as 'any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects'. As such, and as the AG observed, the EU legislature has thus excluded acts of general scope from the scope of the review that may be initiated by environmental protection organisations.⁵⁰

At issue in *Vereniging* was a Commission decision accepting the Netherlands' postponement of the deadline for attaining annual limits values for nitrogen dioxide set by the Air Quality Directive.⁵¹ The postponement was made pursuant to Article 22 of the Air Quality Directive. The Commission accepted the postponement by adopting Decision COM(2009) 2650 final (the Decision).

The NGOs, both environmental organisations, objected to the postponement. They first sought an internal review of the Decision from the Commission, pursuant to Article 10(1) of the Aarhus Regulation. However, the Commission refused that internal review, on the basis that the Decision was not of 'individual scope' and so not an 'administrative act' within Article 2(1)(g) capable of forming the subject of internal review under Article 10. The NGOs challenged that refusal. Before the general court they failed

⁴³ [2014] 3 WLR 853.

⁴⁴ [2014] EWHC 3866 (Admin), [2015] Env LR 21.

⁴⁵ Note 32.

⁴⁶ Note 39.

⁴⁷ Note 33.

⁴⁸ Joined Cases C-401/12 P to C-403/12 P *Council of the European Union, European Parliament and European Commission v Vereniging Milieudefensie & Stichting Stop Luchtverontreiniging Utrecht* (EU:C:2015:4) and Joined Cases C-404/12 P and C-405/12 P *Council of the EU v Ors v Stichting Natuur en Milieu and Pesticide Action Network Europe* (EU:C:2015:5).

⁴⁹ The Aarhus Convention was approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L124/1).

⁵⁰ AG Jääskinen, Opinion in Joined Cases C-401/12 P to C-403/12 P at [6].

⁵¹ Directive 2008/50.

to persuade it that the Decision was of 'individual scope', but they did succeed on their broader challenge, which was that Article 10(1) of the Aarhus Regulation was incompatible with Article 9(3) of the Aarhus Convention:

In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Therefore, the general court annulled the Decision.

The facts in the *Stichting Natuur* cases were similar, but concerned NGOs' attempts to annul Regulation 149/2008 of 29 January 2008, amending Regulation 396/2005, by establishing Annexes II, III and IV setting maximum (pesticides) residue levels for products covered by Annex I decisions in relation to pesticides.

For present purposes it is sufficient simply to consider the *Vereniging Milieudefensie* judgment, as the CJEU reached the same essential conclusion on both sets of proceedings.

The main appeals before the CJEU, brought (successfully) by the EU institutions, argued that the general court erred in holding that Article 9(3) of the Aarhus Convention might be relied upon in order to assess the compliance of Article 10(1) of the Aarhus Regulation with that (self-same) Article (of the Aarhus Convention). As the Advocate General observed, the appeals 'raised fundamental questions for the European Union legal order', reflecting the tension between 'on the one hand, the need to preserve the autonomy of EU law and, on the other hand, the will to comply with international commitments under agreements to which the European Union is party'.⁵²

The CJEU noted, first, its consistent case law that the provisions of an international agreement to which the EU is a party can be relied on in support of an action for annulment of an act of secondary EU legislation or an exception based on the illegality of such an act 'only where, first, the nature and broad logic of that agreement do not preclude it and, secondly, those provisions appear, as regards their content, to be unconditional and sufficiently precise' (paragraph 54); in other words, 'direct effect'. In the court's view, Article 9(3) benefited only members of the public who 'meet the criteria, if any, laid down in ... national law' and so that provision was subject, in its implementation or effects, to the adoption of a subsequent measure and so not directly effective (*Brown Bear*⁵³). Therefore, as it did not contain an unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals, it did not meet the key conditions (paragraph 55).

In so finding the CJEU rejected (by implication only, without express acknowledgement) the AG's reasoned argument that it should relax the 'direct effect' requirement

in the present case(s) in accordance with its decision in *Biotech*.⁵⁴ The CJEU simply did not address the AG's argument there, a cause for some concern.

Further, the CJEU was not willing to extend to the present case its jurisprudence concerning the WTO agreements, where the CJEU has held that where the EU intends to implement a particular obligation assumed under those agreements or where the EU act in issue refers explicitly to specific provisions of the agreement, then the CJEU will review the legality of the act in issue and the acts adopted for its implementation in the light of the rules of the agreements. The CJEU reasoned that those exceptions, essentially the GATT cases *Fediol v Commission*⁵⁵ and *Nakajima v Council*⁵⁶ 'were justified solely by the particularities of the agreements that led to their application' (paragraph 57). As Article 10(1) of the Aarhus Regulation did not make direct reference to specific provisions of the Aarhus Convention, nor confer a right on individuals, the first GATT case (*Fediol v Commission*) was irrelevant.

Likewise, Article 10(1) did not implement 'specific obligations' in the Aarhus Convention, as that term is explained by the judgment in *Nakajima v Council* (paragraph 59). Rather, the EU did not intend to implement the obligations which derive from Article 9(3) of the Aarhus Convention, with respect to national administrative or judicial procedures, by Article 10(1) of the Aarhus Regulation. Instead, those 'fall primarily within the scope of Member State law' (paragraph 60).

One of the real curiosities within the CJEU judgments in both sets of appeals is that Article 9(3) of the Aarhus Convention does not require parties to lay down criteria, but merely anticipates that possibility. As such, to suggest that Article 9(3) is not unconditional appears a markedly strained interpretation. Unsurprisingly, given that strained interpretation, combined with the CJEU's failure to so much as acknowledge the AG's argument regarding its decision in *Biotech*,⁵⁷ environmental NGOs have been left wondering whether Article 216(2) TFEU, which provides that international conventions are binding upon the EU institutions, is being robbed of all real force in environmental cases.

Habitats and Wild Birds Directives

Conservation objectives, mitigation and appropriate assessment

2014/15 has seen further confirmation of established principles, rather than any reinvention of the wheel. However, the case law includes some genuinely helpful further guidance on construction of conservation objectives (*RSPB v SSEFRA*⁵⁸), appropriate assessment and

52 Opinion of AG Jääskinen in C-401/12 P to C-403/12 P, at [1].

53 Note 40.

54 Case C-377/98 *Netherlands v Parliament and Council* (EU:C:2001:523) paras 52-54.

55 Case 70/87 (EU:C:1989:254).

56 Case C-69/89 (EU:C:1991:186).

57 Note 54.

58 *RSPB v Secretary of State for Environment, Food and Rural Affairs and Ors* [2015] EWCA Civ 227.

mitigation versus compensation (*Briels*,⁵⁹ *Smyth*⁶⁰ and *Abbotskerswell*⁶¹), along with two cases, one English (*Savage*⁶²), one Scottish (*Sustainable Shetland*⁶³), in which claimants/petitioners sought to extract hard-edged duties from the Wild Birds Directive outside a special protection area (SPA), neither with much success.

RSPB⁶⁴ – conservation objectives – hard-edged construction – ‘subject to natural change’ means just that (not deliberate anthropogenic measures such as a cull)

This case, known as the ‘gull cull’ case concerning the Ribble Estuary/Alt Estuary SPA, is a limpid appellate judgment at the heart of which is that interpretation of a European site’s conservation objectives is a hard-edged matter; with no *Wednesbury*⁶⁵ deference afforded to a decision-maker. Thus, even decision-makers who recognise the conservation objectives’ ‘fundamental importance’ to an understanding of integrity in appropriate assessment nonetheless err if they misinterpret those objectives. As Sullivan LJ put it (at paragraph 21):

The ... conservation objectives are not enactments, and should not be construed as such. However, it was common ground that they mean what they say, and do not mean what the Secretary of State, or for that matter, Natural England or the RSPB, might wish that they had said. The conservation objectives must be read in a common sense way, and in context. They are conservation objectives for an area that has been classified as being of European significance under the Wild Birds Directive.

However, given that the wording of the conservation objectives in issue are more or less standard, it is worth considering the detail of the facts, as the judgment has implications for most if not all European sites. As Natural England pointed out, the approach taken by the Secretary of State would, if correct, apply to *any* SPA.

At issue was the Secretary of State’s May 2013 decision to direct Natural England under section 28F (5) of the Wildlife and Countryside Act 1981 (the 1981 Act) to give BAE Systems (Operations) Ltd (BAES) consent for the culling of two species of gull in the Ribble Estuary part of the (joint) Ribble Estuary and River Alt Estuary SPA. The Ribble Estuary was also a site of special scientific interest (SSSI). The decision was reached after a public inquiry in 2011 and a report making recommendations from the inspector. There were two slightly different sets of conservation objectives for the site, comprising detailed August 2011 objectives for the SSSI and high-level June 2012

objectives for the SPA. However, both the 2011 and 2012 conservation objectives named the lesser black-backed gulls (LBBGs) and the (breeding) seabird assemblage as special interest/qualifying features and set broad objectives including:

(June 2012)

Avoid ... the significant disturbance of the qualifying features, ensuring the integrity of the site is maintained and the site makes a full contribution to achieving the aims of the Birds Directive.

Subject to natural change, to maintain or restore

...

- the populations of the qualifying features

(August 2011)

... subject to natural change, to maintain the ... habitats and geological features in favourable condition, with particular reference to any dependent component special interest features (habitats ... species, species assemblages etc) for which the land is designated ...

The August 2011 conservation objectives provided detail regarding ‘Conservation Objective for species extent’, which included ‘maintenance of the population of each designated species, assemblage. Maintenance implies restoration ...’ and the following:

Maintain population within acceptable limits ... Based on the known natural fluctuations of the population in the site maintain the population at or above the minimum for the site. Where the limits of natural fluctuations are not known, maintain the population subject to natural change within acceptable limits, above 75% of that as designation – loss of 25% or more unacceptable ...

... The baseline figure of Lesser Black-backed Gulls was confirmed as 4,100 pairs in 2008.

... 20,000 breeding seabird assemblage: assemblage baseline figure is 32,624 individuals.

The 2011 conservation objectives cross-referred to the JNCC *Common Standards Monitoring Guidance for Birds* for generic guidance on ‘favourable condition’.

The cull the Secretary of State decided on was to comprise (1) the culling of 552 pairs of LBBGs and further operations to maintain the population at the reduced level following the cull, provided that the population so reduced is no lower than 3,348 pairs; and (2) further measures to maintain the population of herring gulls (HGs) at the population level following an earlier cull. The cull was to be for the benefit of BAES’ aerodrome and manufacturing and research facility operated at Warton, to address the risk of bird strike. There were estimated to be some 4100 breeding pairs of LBBGs and, prior to the recent cull, some 500 breeding pairs of HGs in the Ribble Estuary.

BAES had in fact sought consent from Natural England (pursuant to section 28E of the 1981 Act) to cull a greater number of birds: 1700 pairs of LBBGs and 500 pairs of HGs. Natural England was prepared to consent to only 200 and 25 respectively. BAES appealed to the Secretary of State, who directed Natural England to give consent to the full balance of the HG cull sought by BAES, so 475 pairs, and indicated that he was minded to direct Natural England to give consent for the cull of a further 552 pairs

⁵⁹ Case C–521/12 *Briels and Ors v Minister van Infrastructuur en Milieu* [2014] PTSR 1120.

⁶⁰ *Smyth v SCLG and Ors* [2015] EWCA Civ 174

⁶¹ *Abbotskerswell Parish Council v Teignbridge DC* [2014] EWHC 4166 (Admin), [2015] Env LR 20.

⁶² *Savage v Mansfield DC* [2015] EWCA Civ 4.

⁶³ *Sustainable Shetland v Scottish Ministers* [2015] UKSC 4, [2015] Env LR 23.

⁶⁴ Note 58.

⁶⁵ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

of LBBGs, but not the full balance of the LBBG cull sought by BAES. Following representations from all parties, the Secretary of State directed Natural England to give consent for the cull of the further 552 pairs of LBBGs.

In his decision the Secretary of State correctly identified the SPA's conservation objectives as 'fundamental' to his consideration of whether the cull might have (i) a significant effect on the site and (ii) an adverse effect on the site. However, the Secretary of State construed the conservation objectives, reading the 2011 and 2012 conservation objectives together (which joint reading the court found he was entitled to (paragraph 20)), as meaning: '... subject to natural change within acceptable limits, to maintain or restore the population above 75% of that at designation ... Loss of 25% or more is unacceptable'.

In short, the Secretary of State concluded that up to 25 per cent of the baseline population could be lost through a deliberate intervention such as a cull and the interest feature still remain in favourable condition (paragraphs 13–14). The Secretary of State rejected Natural England's advice that the 25 per cent figure was to allow for natural change (paragraph 17). On that basis, the Secretary of State concluded that the cull would not adversely affect the integrity of the SPA (for the purposes of Article 6(3) Habitats Directive) (paragraph 19).

The Court of Appeal found, quite bluntly, that the Secretary of State was wrong. A deliberate reduction of the populations of two of the qualifying features to a level above 75 per cent of that at designation 'could [not] sensibly be said to be in accordance with an objective of maintaining those populations, subject to natural change' (paragraph 22). Natural England was entirely right to say that the reference to loss of 25 per cent or more being unacceptable was to allow for *natural* change (paragraph 24). The 'favourable condition' targets set were to take account of natural fluctuations, not non-natural phenomena (such as a deliberate cull) (paragraph 25).

Significantly, whilst the 25 per cent figure might allow for anthropogenic factors *outside* the SPA, it did not allow for anthropogenic measures *within* the SPA intended to reduce the population (and, indeed, maintain it at that reduced level) (paragraph 29). The Secretary of State's mistaken interpretation of the conservation objectives meant that his decision was 'fatally flawed' (paragraph 30).

The decision represents vindication not only for the RSPB, which brought the challenge (albeit by the time of the final LBBG decision the culling of the further 475 pairs of HGs had already been carried out), but also for Natural England, whose advice the Secretary of State rejected but the Court of Appeal fulsomely upheld.

Briels⁶⁶ – mitigation must avoid/reduce adverse effects – creation of more of the adversely affected habitat elsewhere (within the European site) is not mitigation

In *Briels* the Grand Chamber grappled with the difference between mitigation and compensation measures for the purposes of Article 6 of the Habitats Directive.

The essence of its decision is that a mitigation measure must avoid or reduce the adverse effects of a plan or project. A measure will not do so if, instead, it provides for the creation of more of the habitat that will be adversely affected elsewhere, whether on the site or outside it. Rather, under Article 6(3), a plan or project not directly connected with or necessary to the management of a site of Community importance, which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site and such habitat creation measures can be categorised only as 'compensatory measures' within the meaning of Article 6(4) (and only then if the conditions laid down therein are satisfied).

The underlying proceedings were a challenge to a proposal to expand the Netherlands' A2 motorway, linking Amsterdam and Maastricht pursuant to an order (the Motorway Order),⁶⁷ adopted by the Minister van Infrastructuur en Milieu (Minister for Infrastructure and the Environment). Most of the grounds of challenge were dismissed by the national court, but it referred a question to the CJEU concerning the effects of the road-widening on the Natura 2000 site Vlijmens Ven, Moerputten and Bossche Broek. The Netherlands Government had designated the site a special area of conservation (SAC) for, in particular, the Annex I natural habitat type *molinia* meadows (purple moor-grass),⁶⁸ of which it held approximately 11.5 hectares. The conservation objectives for the site were expansion of the area and improvement in quality.

Various environmental impact assessment reports confirmed that adverse effects on the site from nitrogen deposits owing to motorway pollution could not be ruled out at the two areas within the site that presently held *molinia* meadows, Moerputten and Bossche Broek, hence mitigation measures should be introduced to avoid the adverse effects of the road-widening. To this end the Motorway Order included provision for hydrological improvements at another part of the site, Vlijmens Ven, away from the reach of the motorway pollution, that did not presently host *molinia* meadows, or at least not in abundance, but with the right hydrological system would permit new meadows to develop there within a short period of time.⁶⁹

These new meadows would largely offset the effects of the nitrogen deposits on the existing 11.5 ha of *molinia* meadows and the overall result would be a larger and higher quality area of *molinia* meadow on the site than the existing one. The minister presented these measures as mitigation, arguing that there could be no question of an adverse effect on the site by reason of the road-widening as the development of these new *molinia* meadows would ensure the conservation objectives were met. The national court referred the issue to the CJEU of whether such

66 Note 59.

67 First adopted in June 2011, subsequently amended by further order in January 2012.

68 6410 *Molinia* meadows on calcareous, peaty or clayey-silt-laden soils (*Molinion caeruleae*).

69 With hydrological redevelopment of Vlijmens Ven in 2012, new *molinia* meadows were anticipated by 2013.

measures could lawfully mean that an adverse effect on the integrity of the site was avoided, through two questions:

1. Is the expression 'will not adversely affect the integrity of the site' in article 6(3) of [the Habitats Directive] to be interpreted in such a way that, where the project affects the area of a protected natural habitat type within the site, the integrity of the site is not adversely affected if in the framework of the project an area of that natural habitat type of equal or greater size is created within that site?
2. If the answer to the first question is that the expression 'will not adversely affect the integrity of the site' is to be interpreted in such a way that [in the circumstances set out in the first question] the integrity of the Natura 2000 site is adversely affected, is the creation of a new area of a natural habitat type then to be regarded in that case as a compensatory measure within the meaning of article 6(4) of the Directive?

Both the Advocate General (AG Sharpston) and the court relied heavily on the court's recent judgment on Article 6 in Case C-258/11 *Sweetman v An Bord Pleanála (Galway County Council intervening)*⁷⁰ and answered both questions in the affirmative.

The AG's Opinion contains a detailed explanation of her position, beginning with the proposition that it is clear from the language of both Article 6(3) and Article 6(4) that compensatory measures are not contemplated in Article 6(3), but logically and chronologically follow a negative Article 6(3) assessment. If the compensatory measures envisaged by Article 6(4) were taken into account in the Article 6(3) assessment, either they would be insufficient to prevent an adverse effect, in which case the project could not proceed, or they, and the plan or project, would be adopted without the need to consider alternatives or IROPI. Either way, Article 6(4) would be rendered ineffective and the scheme of Article 6 as a whole misunderstood (AG's Opinion paragraph 28).

The AG agreed that Article 6(3) allows for the inclusion of measures within a plan or project which effectively minimise its impact, for all that the Habitats Directive does not specifically mention mitigation measures. Article 6(3) effectively occupies the 'mitigate/minimise' position in a mitigation hierarchy (paragraph 33). However, Article 6(4) contemplates a situation where all the mitigation measures that can be implemented to avoid an adverse effect are together insufficient (paragraph 32). The AG's Opinion describes the principled distinction between Article 6 mitigation and compensation measures as follows (at paragraph 36):

The basic semantic distinction between mitigation (or minimisation or reduction) and compensation (or offsetting) does not appear to me to be very controversial. In the context of article 6(3) and (4) of the Habitats Directive, a mitigation measure must be one which lessens the negative effects of a plan or project, with the aim of ensuring, if possible, that (while some insignificant and/or transient effects might not be totally eliminated) the

'integrity of the site' as such is not adversely affected. A compensatory measure, by contrast, is one which does not achieve that goal within the narrower framework of the plan or project itself but seeks to counterbalance the failure to do so through different, positive effects with a view to, at the very least, avoiding a net negative effect (and, if possible, achieving a net positive effect) within a wider framework of some description ...'.

Given those principles, the measures proposed were compensation, not mitigation (paragraph 37). Moreover, their provision could not alter the fact that the road widening would result in an adverse effect on the *existing* natural habitat for which the site was designated and so an adverse effect on the integrity of the site (paragraph 41). AG Sharpston also relied on the inherent uncertainty surrounding the creation of the new habitat and the time it would take to become 'natural' (paragraph 42). She rejected the United Kingdom's argument that this could lead to absurd results, such as the rejection of a project that would ultimately result in a net benefit for a Natura 2000 site but the approval of a project that would cause harm, albeit below the threshold of adverse effect on integrity (paragraph 43). Nor did the wording of Article 6(4) mean that compensatory measures could only take place *outside* the particular Natura 2000 site (paragraph 46):

A compensatory measure differs from a measure of mitigation, minimisation or reduction by its nature, not by its geographical location. Although an adverse effect on the integrity of one site is unlikely to be mitigated by measures taken in another site, that logic does not apply where compensation is concerned. A compensatory measure is, by its nature, separate from that for which it seeks to compensate, whereas a mitigation measure is of necessity bound up with that which it is designed to mitigate. However, the fact that compensatory measures may be implemented elsewhere than in the affected site does not mean that they cannot be implemented within (possibly in another part of) that site. Nor is a measure any less likely to protect the overall coherence of Natura 2000 where it is implemented within the affected site than where it is implemented in another part of the Natura 2000 network (if anything, it may be more likely to do so).

Similarly, an Article 6(4) compensation measure could not be part of a management or conservation plan to be carried out in any event (paragraph 49).

In relation to mitigation measures, the AG essentially agreed with the submissions of the Member States (paragraphs 50–51):

50. On the one hand, not only is a mitigation measure necessarily bound up with the effect which it is intended to mitigate, so that it must concern the same site and the same habitat type, but it must, in order to be considered in the context of article 6(3), form an integral part of the plan or project under consideration. It may, as the United Kingdom submitted, be included in the original plan or project or be inserted as a condition at a later stage (but before approval of the plan or project), to deal with predicted effects. The mere fact that a measure is likely to mitigate the effects of a plan or project is not, however, enough: it must be specific to that plan or project and not part of any independent framework.

⁷⁰ [2014] PTSR 1092.

51. On the other hand, as a corollary to the above, the measures must form a legally binding condition for the implementation of the plan or project if it is to be given approval. They must also (as, so to speak, the other side of the same coin) not be required if the plan or project does not receive approval. That does not mean that they may not be carried out unless the plan or project is approved (because they might, of course, serve some separate, useful purpose) but only that they cannot be regarded as specifically included in the plan or project if they are in fact the subject of some independent legal requirement.

The court, agreeing with the AG, held at paragraphs 28–31 that:

... the application of the precautionary principle in the context of the implementation of article 6(3) of the Habitats Directive requires the competent national authority to assess the implications of the project for [the protected site] concerned in view of the site's conservation objectives and taking into account the protective measures forming part of that project aimed at avoiding or reducing any direct adverse effects for the site, in order to ensure that it does not adversely affect the integrity of the site.

...

31 It is clear that these measures are not aimed either at avoiding or reducing the significant adverse effects for that habitat type caused by the A2 motorway project; rather, they tend to compensate after the fact for those effects. They do not guarantee that the project will not adversely affect the integrity of the site within the meaning of article 6(3) of the Habitats Directive.

32 It should further be noted that, as a rule, any positive effects of a future creation of a new habitat which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, even where the new area will be bigger and of higher quality, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future, a point made in para 87 of the order for reference. Consequently, they cannot be taken into account at the procedural stage provided for in article 6(3) of the Habitats Directive.

Moreover, as the court observed at paragraph 33:

... the effectiveness of the protective measures provided for in article 6 of the Habitats Directive is intended to avoid a situation where competent national authorities allow so-called 'mitigating' measures, which are in reality compensatory measures, in order to circumvent the specific procedures provided for in article 6(3) and authorise projects which adversely affect the integrity of the site concerned.

Not only must the Article 6(3) assessment be carried out, in full, before any consideration can be given to Article 6(4) compensatory measures/IROPI, but to determine the nature of any compensatory measures the damage to the site must be precisely identified (paragraph 36).

Note that as the *molinia* meadows are not priority habitat, the minister would not have to cross the additional threshold within Article 6(4).

Domestically, *Briels*⁷¹ has been considered and applied by the Court of Appeal in *Smyth v SSCLG and Ors*,⁷² a

challenge to an inspector's grant of planning permission for a 65-unit residential development close to the Exe Estuary special protection area (SPA) in Devon, which SPA also incorporates the Dawlish Warren SAC. The development site was some 350m from the nearest part of the SPA, an area known as Exminster Marshes and managed as a nature reserve by the RSPB. Inevitably, potential recreational impact on birds from the development, alone and in combination, was to the fore.

The issue in *Smyth* was whether the inspector's grant of permission complied with Article 6(3) of the Habitats Directive, given the suggested mitigation of the development's impacts through a contribution to a proposed but not yet existing strategic suitable alternative natural green spaces (SANGSs),⁷³ and other measures such as wardening, as well as 1.2 ha of onsite public open space. The intended SANGSs were three substantial parklands dedicated to public use jointly proposed by the local planning authority (LPA) (Teignbridge DC) and neighbouring LPAs (Exeter CC and East Devon DC) to address anticipated pressure on the protected sites from the volume of new residential development in their areas.⁷⁴

Ecologists appointed by the three LPAs had suggested a joint interim strategy whereby the cost of implementing the strategic mitigation measures would be shared equitably across developments as they came forward and the result was the LPAs' adoption of a joint interim approach (JIA) to securing recreation mitigation, which provided for a developer to pay a 'standard habitat mitigation contribution', assessed by the number of houses in the development, in addition to making any standard public open space provision in relation to the development. However, delivery of the SANGSs was some way off by the time the inspector granted permission.

Both the LPA, Natural England and the developer had advised the inspector that, provided the strategic mitigation measures and the public open space were put in place, there would be no adverse effect on the integrity of the SPA or the SAC. As a result, the expert ecology evidence at the inquiry spoke with one voice. The developer's ecologist (the only expert to give live evidence) went further, and noted that the LPA had failed to take the mitigation into account at the Article 6(3) screening stage, whereas had it done so it would have appreciated that no significant effects were likely and so there was no need for Article 6(3) appropriate assessment at all. The inspector adopted that approach.

The Court of Appeal recalled both *Waddenzee*⁷⁵ and *Sweetman*,⁷⁶ and the importance of applying a precautionary approach under Article 6(3), to ensure that appropriate protection for a protected site will be in place before

73 The proposed parkland SANGS closest to the development site at Sentry's Farm was the Ridge Top Park of 60–70 ha in the south west of Exeter contemplated in the Council's developing core strategy.

74 The Teignbridge LDF sought to provide 15,000 new homes, the Exeter CC LDF 12,000 and the East Devon DC LDF 16,000.

75 Case C–127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheeren en Visserij (Waddenzee)* [2004] ECR I–7405.

76 Note 70.

71 Note 59.

72 Note 60.

any significant harmful effects occur in relation to the site (and also Case C-418/04 *Commission v Ireland*⁷⁷). The court⁷⁸ considered it clear that (at paragraph 65):

... preventive safeguarding measures which have the effect of eliminating completely or mitigating to some degree possible harmful effects of a plan or project on a protected site (in the sense that they prevent such effects from arising at all or to some degree) may be taken into account under Article 6(3), and a competent authority is not confined to bringing them into account under Article 6(4). If preventive safeguarding measures have the effect of preventing harmful effects from arising, or reduce them to a level where they are not significant, then the conservation objectives of Article 6(3) of the Habitats Directive will have been fulfilled to the requisite standard stipulated by the Directive, as interpreted by the Court of Justice, and there would be no further discernible or proportionate justification for preventing the plan or project from proceeding or for imposing the stricter requirements involved in satisfying Article 6(4) before authorising it. As the CJEU has said (see para. 23 of the judgment in *Sweetman*), 'article 6 ... must be construed as a coherent whole in light of the conservation objectives pursued by the Directive': this approach points firmly in favour of this interpretation of Article 6(3).

Such measures were to be contrasted with measures proposed once harm to a protected site has occurred, by way of off-setting compensation, which measures can form no part of the Article 6(3) assessment and must be justified under Article 6(4) (paragraph 68). The measures proposed in *Briels*⁷⁹ were one such off-setting compensation measure (paragraph 69).

The court also took the opportunity to uphold the reasoning of Sullivan J (as he then was) in *R (Hart DC) v SSCLG*,⁸⁰ that it is legitimate for a competent authority at the screening opinion stage under the first limb of Article 6(3) to have regard to proposed preventive safeguarding measures which are to be incorporated as a condition or requirement for authorisation of a plan or project, as well as at the 'appropriate assessment' stage under the second limb of Article 6(3). If the competent authority was satisfied that the proponents of a project had fully recognised, assessed and reported the effects and had incorporated mitigation measures into the project, then there was no reason why the competent authority should ignore such measures when deciding whether appropriate assessment was necessary.

Of course, if the competent authority did not agree with the proponent's view as to the efficacy of the mitigation measures, or was left in some doubt as to their efficacy, then it would require an appropriate assessment as it would be unable to exclude the risk of a significant effect on the basis of objective information. The Court of Appeal considered the judge's reasoning 'compelling' and 'clearly correct, to the *acte clair* standard' (paragraph 74). The appellant's request for a reference to the CJEU was refused.

The Court of Appeal also rejected the appellant's argument that a national court reviewing a competent authority's approach to the requirements of Article 6(3) is required to apply a more intensive standard of review than *Wednesbury*,⁸¹ and the national court should, in effect, make its own assessment afresh, as a primary decision-maker. The court noted the element of subjective judgment required of the competent authority under Article 6, drew upon the *Wednesbury* approach to EIA screening and distinguished case law⁸² under the Environmental Information Directive,⁸³ given the different judicial approach demanded by Article 6 of that directive.

The real merit in the appellant's argument was, of course, whether the inspector had been right to rely on the proposed mitigation, notably the SANGSs, in light of the precautionary principle, as he could not be certain that adverse effects would be avoided (paragraph 88). This was particularly the case as it was not known whether there would be sufficient funding for the SANGSs until many more residential developments had come forward and that compulsory purchase would almost certainly be needed (paragraph 89). The court considered there was 'force' in those submissions (paragraph 90). However, they failed on the particular facts, in particular as it was only by reason of effects *in combination* with other development that the proposed development might have adverse effects on the protected sites. On its own, its effect would be *de minimis* (paragraph 91).

The inspector was entitled to reach the view that any future adverse in-combination effects would be avoided, not least because as each new proposed site was brought forward and planning permission sought in future, the relevant local planning authority, in consultation with Natural England, would have to make a further assessment under Article 6(3) before permission was granted for the development of that site (ie a further screening assessment and, as necessary, an 'appropriate assessment', pursuant to the first and second limbs of Article 6(3), respectively). Accordingly, the potential in-combination effects identified could not occur without further screening and appropriate assessments by a relevant competent authority advised by Natural England (paragraph 98). That, ultimately, was the safeguard, which the JIA ensured (even if it might mean that developments later in the pipeline might well be held up). The court spelled out what this meant in practice, as follows (at paragraph 100):

If (for example) planning permission were sought in future for a substantial new residential development in the vicinity of the SPA and the [development site], the relevant competent authority would be obliged to subject it to screening and, as necessary, an 'appropriate assessment' under Article 6(3); and if the in-combination adverse effects of that new site plus the [development site] were not clearly going to be avoided by the preventive safeguarding measures which would be in place before the

77 [2007] ECR I-10947.

78 Sales LJ giving the single judgment, which Richards and Kitchen LJ adopted in full.

79 Note 59.

80 [2008] 1204 (Admin), [2008] 2 P&CR 16.

81 Note 65.

82 Not least *R (Evans) v Attorney General* (n 25).

83 Parliament and Council Directive 2003/4/EC regarding access to environmental information.

new housing was built and occupied, permission would have to be refused at that stage for the new development. If, say, those in-combination effects could only be satisfactorily avoided by the creation of a strategic SANG, there might have to be a delay before any permission was granted for the new development until the competent authority could be satisfied that sufficient funding and other arrangements would be forthcoming to ensure that the SANG would be in place before the dwellings in the new development were built and occupied. But the possibility that there might have to be pause in future development in this way does not indicate that planning permission could not properly be granted by the inspector for the [development site].

As is often true in life, so in development near a European site: first come, first served.

Abbotskerswell⁸⁴ – appropriate assessment – whether adverse effect on integrity a matter of judgment subject to *Wednesbury*⁸⁵ review

This case was a challenge to the Teignbridge local plan based on alleged breach of the Habitats Directive and, also, the SEA Directive. The essence of the Habitats Directive challenge, which focused on the impact of the local plan on a SAC which hosted almost one-third of the UK population of greater horseshoe bats, was that the effect of *Sweetman*⁸⁶ was that it was for the court to conduct a full merits-based review of the competent authority's appropriate assessment, which the claimants alleged was flawed. The judge (Lang J) followed earlier authority that the question of whether a plan would adversely affect the integrity of a European site was a judgment for the 'plan-making authority' (by which the judge meant the competent authority), subject to review by the court on conventional *Wednesbury* grounds (paragraphs 35–36). Having given thorough consideration to the local plan policies and the process, the court was satisfied there was no flaw. For the SEA Directive challenge see below.

***Savage v Mansfield*⁸⁷ – No requirement on LPA to consult Natural England, or carry out shadow AA, in respect of possible, but not yet proposed, special protection area (SPA)**

This case concerned a challenge to a grant of outline planning permission for a large mixed-use development, including 1700 dwellings, close to Harlow Wood. Harlow Wood is part of the Sherwood Forest region, in which there are substantial breeding populations of nightjar and woodlark. Some 300m from the development boundary was a SSSI, Rainworth Lakes. There was no complaint regarding the SSSI. There was no SAC, SPA or Ramsar site, existing or proposed, that would be affected by the development. However, Natural England was concerned by the possibility that the area including Harlow Wood might, one day,

become part of a SPA by reason of the nightjar population. It certainly considered that it 'qualified for consideration' as a SPA.

The developer proposed a 'barrier' between the development and Harlow Wood, along with wardens and the prohibition of domestic cats. Natural England advised the LPA that, whilst it could not object to the development, including the proposed mitigation, there being no SPA actual or proposed, nor could it support it. It drew attention to the fact that were an SPA at issue it would require a 400m buffer, which it advised as mitigation, and that the 'barrier' proposed by the developer was untested and unproven. A 400m buffer would effectively remove the residential element of the development. The council, however, accepted officer advice that the developer's proposals included 'adequate measures' to address issues relating to the possible SPA.

Natural England advised the LPA to take a 'risk-based approach', which advice was in line with the advice it gave to LPAs generally. The council understood that to be a reference to the possibility that a future designation of Harlow Wood as a SPA might require modification or revocation of the outline permission, so exposing the LPA to an obligation to pay compensation. A section 106 planning obligation was agreed by which the owners undertook not to claim compensation in the event the permission was modified or revoked.

The Court of Appeal dismissed an argument that the LPA had failed to follow Natural England's advice that it take a risk-based approach to the potential impact of the development on a possible SPA. As there was no requirement for an appropriate assessment, so there was no requirement to consult Natural England pursuant to regulation 61(3) of the Habitats Regulations; it was not a statutory consultee and hence its advice was no more than a material consideration. An argument that the LPA had misunderstood the nature of the 'risk' Natural England was advising it against was also dismissed, on the basis that the risk was no more and no less than that the LPA might have to modify or revoke the permission, so exposing it to a risk of compensation, as the LPA had anticipated and sought to provide for.

The most interesting of the claimant's grounds of challenge was the suggestion that the grant breached the final clause of Article 4.4 of the Wild Birds Directive⁸⁸ and the corresponding regulation 9A(8) of the Habitats Regulations,⁸⁹ as the LPA had not carried out a risk-based assessment of the effects on the possible SPA:

4.4 In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.

9A(8) So far as lies within their powers, a competent authority in exercising any function in or in relation to the

84 Note 61.

85 Note 65.

86 Note 70.

87 Note 62.

88 Directive 2009/147/EC.

89 Conservation of Habitats and Species Regulations 2010.

United Kingdom must use all reasonable endeavours to avoid any pollution or deterioration of habitats of wild birds (except habitats beyond the outer limits of the area to which the new Wild Birds Directive applies).

Given that the site was not even a proposed SPA, the LPA complied with its duty to 'use all reasonable endeavours' by adopting the protocol that the developers had proposed, which officers had advised was 'adequate'. The LPA was under no duty, neither under the Habitats Regulations nor the NPPF, to undertake a 'shadow assessment' or other quasi-appropriate assessment (paragraph 48).

Sustainable Shetland⁹⁰ – for non-Annex I birds, and outside a SPA, the Wild Birds Directive is no more than a material consideration amongst many

The final sentence of Article 4.4 of the Wild Birds Directive was again at issue, along with Articles 1, 2, 3.1 and 3.2(b), in this case, the culmination of litigation that initially had the entire wind energy industry scrambling for fear that hundreds of Electricity Act consents were worthless in the absence of a section 6 licence. The licence point fell away by common agreement, but what remained was a challenge focused on the potential effects of a very large onshore wind farm on the local (and by reason of its concentration on Shetland, national) whimbrel population. The whimbrel is not an Annex I bird. However, almost the entirety of the population is found in the Shetlands (some 290 breeding pairs, representing around 95 per cent of the national population) and Scottish Natural Heritage estimated the proposal would cause some 3.7 collision fatalities per year.

The Scottish Ministers rejected SNH's argument that this figure represented a significant national impact, pointing to the 72–108 deaths from other causes in the Shetland each year and the positive benefits the scheme would bring by way of a considered habitats management plan (HMP), which included steps to control the whimbrels' main nest predator (the hooded crow) during the nesting season. The HMP was said to have a high likelihood of more than offsetting any adverse effects of the proposal and a reasonable likelihood of causing the Shetland whimbrel population partially and even possibly fully to recover over the lifetime of the proposal.

The petitioners (the appellants before the Supreme Court) alleged that the Scottish Ministers had failed to take into account their positive duty under the Wild Birds Directive not merely to maintain the current level of whimbrel population but to bring it up to the appropriate level pursuant to Article 2 and to insist on special conservation measures to protect the whimbrel from the development. Article 2 provides:

Member States shall take the requisite measures to maintain the population of the species referred to (in Article 1) at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population . . . to that level.

As the court observed, the appellants' core arguments essentially reflected the reasoning of the Lord Ordinary at first instance, which had been roundly rejected by the Inner House on appeal. The decision of the Inner House was upheld. First, as a matter of principle, the Wild Birds Directive was but one of a number of material considerations for the ministers, exercising their statutory duty to consider whether to grant consent under the Electricity Act 1989. The 'starting point' for consideration of the proposal was not, contrary to the Lord Ordinary's finding, to establish the precise scope of the duties imposed by Article 2 of the Wild Birds Directive and so establish an 'appropriate level' for the whimbrel population (paragraph 32).

However, the Inner House was wrong to rule that once the ministers had found the impact on the whimbrel population would not be significant, then the Wild Birds Directive 'fell out of the picture'. If there had been evidence that the proposal might nonetheless prejudice the ministers' ability to fulfil their duties under the directive, then that would have been a potential objection (paragraph 33). However, the facts were against the appellants there, as the ministers had had regard to more than simply avoiding loss from the proposal, but improving the conservation status of the whimbrel as a whole (paragraph 34).

Unfortunately, the court did not rule on the most interesting point in the appeal, namely the scope and extent of the Article 2 duty. However, it did offer *dicta* that is food for thought (at paragraph 38, per Lord Carnwath JSC, with whom all members agreed):

Since Article 2 applies to wild birds of all kinds, regardless of their scarcity or vulnerability, it seems unlikely that it was intended to require an equally prescriptive approach in all cases, by contrast for example with the more specific measures required for the particular species protected by Article 4. Although some guidance is provided by the . . . European jurisprudence, the need for a further reference may arise in an appropriate case in which the resolution of those issues is necessary for a decision. This is not such a case . . .

A case for another day.

Environmental impact assessment

Although the flood of EIA cases of some years ago has slowed, the legislation continues to give rise to appellate litigation, not least as claimants explore some of its lesser travelled waters. The provisions concerning transboundary consultation the subject of *An Taisce* are one such relative backwater. Likewise, assessment of cumulative effects in relation to other projects not yet consented, the subject of both *Commercial Estates*⁹¹ and *Oldfield*.⁹²

90 Note 63.

91 *Commercial Estates Group Ltd v SSCLG and Ors* [2014] EWHC 3089 (Admin).

92 *R (Oldfield) v SSCLG* [2014] EWCA Civ 1446, [2015] Env LR 9.

R (An Taisce (The National Trust for Ireland)) v SSECC⁹³ – ‘likely significant effects’ does not mean anything more than zero risk

The judgment of Sullivan LJ in this case, with which the other members of the court agreed, is something of a *tour de force*.

The claimant, whose objectives include protection of Ireland’s natural and built heritage, sought judicial review of the Secretary of State’s decision to grant development consent for a new nuclear power station at Hinkley Point, Somerset. Prompted by an intervention from Austria suggesting that the Secretary of State should carry out a consultation with it, based on an expert report which, amongst other things, put the risk of a severe nuclear accident giving rise to significant transboundary effects at one in 10 million years, An Taisce argued that the Secretary of State should have carried out transboundary consultation with Ireland pursuant to Article 7 of the EIA Directive, and had been wrong to produce a ‘negative’ transboundary screening assessment on the basis that the prospects of a severe nuclear accident were ‘very low’. The Court of Appeal (Sullivan LJ himself) granted permission for judicial review and for the appeal, prompted largely by communications from the Espoo Convention Compliance Committee casting doubt on the first instance decision, but then proceeded to dismiss the claim.

The essence of the judgment is that the words ‘likely to have significant effects on the environment’ in Article 7(1) of the EIA Directive, which threshold if exceeded gives rise to the need for a transboundary consultation, do not require a ‘zero risk’ approach. As such, a very low risk of even a very severe environmental effect might fall below the threshold and justify a ‘negative’ transboundary screen. Of particular interest within Sullivan LJ’s reasoning are the following:

1. That comparisons with the similar wording within the Habitats Directive were inapt, given that directive was concerned to protect specific sites, whereas the EIA Directive was much wider in scope (paragraphs 19–21) and, moreover, it was common ground that the words ‘likely to have significant effects on the environment’ were to have the same meaning throughout the EIA Directive, yet Annex III, setting out criteria for Annex II projects, specifically included a criteria, at point 3, characteristics of the potential impact: ‘(d) the probability of the impact’, which was at odds with a ‘zero risk’ approach (paragraph 22).
2. As such, the judgment of the CJEU in *Waddenzee*,⁹⁴ requiring an appropriate assessment ‘if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site’, could not be carried over to the EIA Directive (paragraph 23).
3. The ‘real risk’ approach adopted by the domestic courts to the EIA Directive was the correct one and properly reflected the precautionary principle in the context of the EIA Directive (paragraph 23).

4. Whilst it could not be said that there was no doubt at all that the ‘real risk’ test was the correct one, a reference to the CJEU was not necessary to decide the claim, as it could not be said that even the *Waddenzee* test meant that anything above zero risk required appropriate assessment. That test was concerned with the absence of scientific doubt. If the scientific information was complete and it demonstrated, as here, a very remote risk, then a negative screen was possible (paragraph 39). There was no realistic prospect of the claimant’s ‘zero risk’ approach to the EIA Directive being adopted by the CJEU (paragraph 43).

On the actual facts it was clear the Secretary of State had applied a far more demanding test than the ‘real risk’ test, unsurprisingly given the potential consequences of a serious nuclear accident. But having done so his negative screening decision under Article 7, on the basis of complete scientific evidence which agreed that the risk of a serious nuclear accident were very low indeed (paragraph 42) (considerably lower than the risk of a meteorite of over a kilometre hitting the earth (paragraph 39)), was lawful.

The Court recognised that this decision conflicted with the views of the Espoo Convention Compliance Committee. However, as Sullivan LJ noted, those were not the views of lawyers (paragraphs 44–45). The court also rejected a second ground put on the basis that the Secretary of State should not have granted permission until the details of the proposal had been fully worked out with the appropriate regulators.

Oldfield,⁹⁵ Commercial Estates Group⁹⁶ – threshold for inclusion of another project within cumulative effects

We have the benefit of two decisions here, one (*Oldfield*) a decision of the Court of Appeal in which the issue of principle was dealt with in a single line; the other (*Commercial Estates Group*) a mere decision on permission in which the issue of principle was dealt with over several pages. Unusually, then, it is worth taking the permission decision first.

*Commercial Estates Group Ltd v SSCLG and Ors*⁹⁷ was a decision on permission only, in which Stuart-Smith J refused the claimant permission for judicial review. As such, the case is not authoritative, but it is interesting nonetheless as a careful judicial consideration of the meaning of ‘reasonably foreseeable’ in the European EIA Guidance in relation to cumulative impact with other projects at the EIA screening stage.

The claimant was a (rival) house builder with an extant outline application for a large mixed-use development across the whole of an area identified as a sustainable urban extension (SUE) by the LPA’s submission draft core strategy, which application essentially mirrored the LPA’s

⁹³ [2014] EWCA Civ 1111.

⁹⁴ Note 75.

⁹⁵ Note 92.

⁹⁶ Note 91.

⁹⁷ Note 92.

plans. However, the examination in public into that submission draft had been suspended following significant criticism by the appointed inspector and no further draft had been produced. The second interested party, another house builder, had applied (prior to the claimant) for outline planning permission for a development of 150 homes within the SUE, albeit on land marked by the draft core strategy for employment. It had already obtained a 'negative' screening opinion from the LPA but, following that opinion, the claimant sent the LPA legal advice to the effect that the LPA had failed to take into account the cumulative effect of the second interested party's development and the proposal for the SUE in the draft core strategy. The second interested party then sought a screening opinion from the Secretary of State, who also provided a 'negative' opinion.

The claimant's challenge was brought essentially on the basis that the Secretary of State could not lawfully have excluded the SUE from his consideration of cumulative effects when screening the second interested party's proposal. That challenge faced obvious factual difficulties, given the state of play regarding the core strategy. However, the focus of argument was the words of the Commission guidance on indirect and cumulative impacts (the European Guidance),⁹⁸ which describes cumulative impacts as: 'impacts that result from incremental changes caused by other past, present or reasonably foreseeable actions together with the project'.

The judge rejected the claimant's argument that the words 'reasonably foreseeable', which the court noted appear only in the European Guidance, not in the EIA Directive itself,⁹⁹ where Annex 3 speaks only of 'cumulation with other projects',¹⁰⁰ nor the domestic EIA Regulations 2011, nor even the domestic guidance from DCLG, are to be equated with the approach to reasonable foreseeability at common law in nuisance or negligence (the claimant had relied, ambitiously, on *The Wagon Mound (No 2)*)¹⁰¹ and argued that the words meant 'a real risk which would occur to the mind of a reasonable man . . . and which he would not brush aside as far-fetched'¹⁰² (paragraphs 30–31). That rejection was for a variety of reasons, not least the difference between public and private law, that reasonable foreseeability is only one part of the cause of action in tort and general inconsistency with the thrust of the directive and the European Guidance (the judge's reliance upon the new wording of the 2014 Directive was a little surprising, although only a small part of his overall reasoning) (paragraph 32).

The court considered it clear that the threshold for when another project/development was 'reasonably

foreseeable', and so to be taken into account in the consideration of cumulative impacts at the screening stage, was set 'significantly higher' than when used in the assessment of the foreseeability of risk in the law of tort (paragraph 33).

In *R (Oldfield) v SSCLG*¹⁰³ the Court of Appeal was concerned with a challenge to the Secretary of State's decision to grant permission for the redevelopment of a sizeable site on the Margate front, known as the 'Arlington site', immediately adjacent to the well known Dreamland site, for which redevelopment was also proposed (and had been the subject of considerable recent CPO litigation). The question was ultimately whether the Secretary of State had failed, as a matter of fact, to have regard to the Dreamland site and its proposed development when assessing cumulative effects in the course of the EIA screen for the Arlington proposal, which led the Secretary of State to produce a 'negative' screening direction. Both Moses LJ at first instance and the Court of Appeal found there had been no such error.

As to the test for when another project must be included within the cumulative effects of the project subject to EIA, the court (Maurice Kay LJ) said this (only): 'It is important that an assessment is made in the light of what is known and what is reasonably predictable on or ascertainable at the time'.¹⁰⁴

Given the future of the Dreamland site 'remained uncertain', with the issue of the CPO unresolved and no planning application yet forthcoming, it was permissible for the Secretary of State to conclude that there were 'at that point no cumulative significant environmental effects [by reason of the Dreamland site/proposal]'.¹⁰⁵

A further ground of challenge, which the Secretary of State had impermissibly failed to take a holistic view of the proposal's environmental effects because foul and surface drainage were left up in the air at the time of his screening decision, also failed. The statutory water and sewerage undertaker, Southern Water, had stated that the proposed drainage strategy was acceptable and recommended a *Grampian* condition requiring full details to be submitted to the LPA for its approval in consultation with Southern Water. The Secretary of State was not 'hiving off' an important issue by dealing with this by way of condition (paragraph 28).

EIA agriculture regulations: a new growth area?

Before leaving EIA, it is worth noting that the long period during which farmers have been able to carry out their activities as if the EIA Directive did not capture some agricultural projects appears to be coming to an end, as the public wakes up to the potential of the Environmental Impact Assessment (Agriculture) (England) (No 2) Regulations 2006.¹⁰⁶

There appears to be an upsurge in the number of challenges to Natural England's decision-making under the

98 Document EC DG XI *Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions* (May 1999)

99 Directive 85/337 as amended and codified by Directive 2011/92/EC.

100 The Judge did note the different wording of Directive 2014/52/EU "the cumulation with other existing or approved projects", but also that it was not in force at the time of the screening decision (the judgment does not expressly state the Judge was aware that the 2014 Directive is still yet to be transposed, but that is immaterial).

101 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound (No 2))* [1967] 1 AC 617 (PC).

102 *ibid* at 643 (Lord Reid).

103 Note 92.

104 *ibid* para 24.

105 *ibid*. Macur LJ DBE also agreed on this point.

106 SI 2006/2522.

regulations, including by members of the public who see them (rightly or wrongly) as a roundabout way to secure a village green. To date the complexities within the regulations have been explored at permission stage only, although the permission judgment of Ouseley J in *R (Chanter) v Natural England*¹⁰⁷ makes interesting reading regarding the meaning of 'cultivated' within the regulations (only 'uncultivated land' and land that is a 'semi-natural area' are caught by the regulations, hence the significance of the construction of 'cultivated').

Strategic environmental assessment

A clutch of SEA cases confirms two basic trends: the domestic courts are reluctant to construe the SEA Directive¹⁰⁸ as extending beyond the normal planning policy documents and purely procedural challenges to plans that have gone through examination-in-public (EiP) face an uphill struggle.

HS2 Action Alliance¹⁰⁹ – HS2 safeguarding directions purely procedural and not a 'plan or programme' for the purposes of the SEA Directive

This case was the substantive litigation that generated the CPR r 45.41 costs decision noted above. It was yet another unsuccessful attempt to derail the HS2 project through the courts.

The claimants/appellants alleged that the safeguarding directions put in place by the Secretary of State along the proposed HS2 route were a 'plan or programme' subject to the SEA Directive. The claim was always a difficult one, given that the directions added nothing by way of planning policy but simply (i) imposed a procedural requirement that a LPA faced with a planning proposal within the safeguarded zone consult HS2 Ltd and (ii) allowed the Secretary of State to intervene in the planning process by restricting the grant of planning permission. However, the claimants contended that the effect of the directions was to make their threefold objective, explained within the guidance notes accompanying them as 'Safeguarding aims to ensure that new developments along the route do not impact on the ability to build or operate HS2 or lead to additional costs', a mandatory consideration for any LPA considering a planning application within the safeguarded zone. It was on this basis that they submitted that the directions, which the framework for other projects.

As with the judge below (Lindblom J) the Court of Appeal gave the claimants' case short shrift. The directions did not 'set the framework for development consent for projects', including EIA projects, within the safeguarded zone. The claimants' case failed to distinguish between procedure and substance in the decision-making process. If an applicant for planning permission had its application refused by the LPA, or made subject to unwelcome conditions, because the Secretary of State had issued a direction

restricting the grant, or if the LPA refused to determine the application as it did not wish to follow the Secretary of State's direction, then either way the applicant would have the right to appeal to the Secretary of State pursuant to section 78 of the 1990 Act, at which point the effect of the directions simply fell away (paragraph 17).

The Secretary of State would proceed to determine the section 78 appeal in the normal way, in accordance with section 38(6) of the 2004 Act (paragraph 18). The objectives were not policy and were weighty planning considerations in any event, owing to the national importance of HS2. Nor did the safeguarded zones somehow set the framework for the HS2 project; they simply reflected it, and as the design of the HS2 project evolved so too had the directions changed (paragraph 20).

Abbotskerswell & Kendall¹¹⁰ – defects in SEA consultation on a plan the subject of EiP unlikely to cause prejudice – so even if a procedural breach of the SEA Directive established the court will be slow to give relief

Abbotskerswell Parish Council v Teignbridge DC,¹¹¹ a challenge to a local plan pursuant to section 113 of the Planning and Compulsory Purchase Act 2004, has been noted above by reference to the Habitats Directive ground of challenge. Another ground was an alleged failure on the part of the LPA to comply with regulation 13(2)(b) of the Environmental Assessment of Plans and Programmes Regulations 2004 (the SEA Regulations) by reason of a failure to take steps to draw the attention of those interested in or affected by the local plan to the existence of the environmental information in the SEA and to invite comments upon it.

The LPA acknowledged that when it published the SEA and subsequently the Addendum to the SEA it failed to invite the public to comment expressly. However, the judge was in no doubt that the claimant's interests had not been 'substantially prejudiced', given that the text of the SEA stated it was 'being published for consultation', the claimant was aware of the SEA and the Addendum(s) when it made written representations to the EiP inspector and the EiP included specific consideration of the SEA (amongst other reasons) (paragraph 94). That ground of challenge also failed: the claimant '(was) seeking to rely on a procedural failing which (had) not caused it any substantial prejudice' (paragraph 95).

The decision in *Kendall v Rochford District Council*,¹¹² handed down only three days after *Abbotskerswell*,¹¹³ was another section 113 challenge that involved more promising facts for the claimants, but led to the same result.

At issue was the Rochford district allocations plan, adopted by the defendant LPA in February 2014 following a September 2013 EiP and at the heart of the claim was a complaint that residents had not been adequately consulted regarding proposed allocations for Rayleigh, including

¹⁰⁷ CO/4415/2014, judgment of 29 January 2015.

¹⁰⁸ Directive 2001/42 (OJ L197/30).

¹⁰⁹ Note 33.

¹¹⁰ Note 44.

¹¹¹ Note 61.

¹¹² Note 44.

¹¹³ Note 61.

land for 15 gypsy/traveller pitches at West Rayleigh. The claimant relied upon the EIP inspector's finding that 'about 93% of 5,000 objectors' had been unaware of the specific proposals (paragraph 42).

The judge (Lindblom J) lost little time in dismissing the claimant's first ground, alleging that the EIP inspector's conclusion that the LPA had complied with its statement of community of involvement (which SCI was not itself the subject of criticism) was perverse and he should have found the LPA in breach of section 19(3) of the 2004 Act (paragraphs 53–54). In fact, the court would have gone further, and had it been required to it would have 'unhesitatingly' found that the LPA did comply with section 19(3) of the 2004 Act (and regulation 18 of the Town and Country Planning (Local Planning) (England) Regulations 2012) (paragraph 62).

The claimant's second ground, alleging breach of Article 6 of the SEA Directive/regulation 13 of the SEA Regulations, which require public consultation on the SEA environmental report, had more promise in its complaint of breach regarding 'public consultees'. Again, however, like ground 1, it went 'only to the procedural integrity of the plan-making process', with no complaint about the substance of the environmental report (paragraph 80). The judge saw 'some force' in submissions that the LPA had not consulted directly with individual members of the public regarding the draft plan and its sustainability appraisal and when it did consult the public it relied solely on its website (paragraphs 82–83). Whilst accepting that it was for the LPA to decide who 'public consultees' are pursuant to regulation 13, there was 'potential for problems to arise if an authority resorts to the internet alone when consulting the public' (as noted by the Court of Appeal, albeit for a different process, in *R (Breckland DC) v The Boundary Committee*¹¹⁴ (paragraph 90). As the judge observed (at paragraph 92):

The real problem here is . . . that in purporting to discharge its duty to consult the 'public' under Article 6 of the SEA directive, the council relied on its website . . . in Rayleigh . . . exclusively, or almost so – not only as the sole means by which it invited the general public to comment on the draft plan and its sustainability appraisal but also as the sole means by which it made known to them that this is what it was doing. Only a very small number of individual members of the public were consulted directly. Those who were not consulted directly, the overwhelming majority, were left to find the consultation for themselves on the internet, either once they had been prompted by someone else to do so or acting on their own initiative. Unless one knew that the sustainability appraisal for the draft allocations plan was being prepared and unless one was resourceful or inquisitive enough to be regularly checking the council's website to find out if formal consultation on those two documents had begun, one would not have known of their existence or that consultation upon them had begun . . .

That was 'not good enough' (paragraph 93) and breached Article 6 of the SEA Directive and regulation 13 of the SEA

Regulations. In addition to using its website, the LPA ought also to have announced and carried out its consultation on the draft plan together with the sustainability appraisal 'by some other means which would not have excluded those without access to the internet' (paragraph 94).

However, having found breach, the judge applied *Walton*,¹¹⁵ rejecting the claimant's submission that the paragraphs in that judgment were inconsistent with the judgment of the CJEU in *Gemeinde Altrip & Ors v Land Rheinland-Pfalz*,¹¹⁶ noting further that the *Walton* principles should guide the court and were sufficient, unenlarged and unrefined, for the decision he had to make, and refused to exercise his discretion to quash (paragraph 113). As 'the plan-making process as a whole gave the public a sufficient opportunity to reflect upon and respond to the policies and allocations proposed in the draft plan in the light of the sustainability appraisal', this was 'to afford the public effective participation in the plan-making process' (paragraph 120), such that neither the claimant nor any other individual member of the public had suffered 'substantial prejudice' for the purposes of section 113 of the 2004 Act (paragraph 122).

In fact, it was inconceivable that the outcome of the plan-making process would have been different if the breach had not occurred (paragraph 123) and neither the claimant nor any other had suffered even 'any real prejudice' (paragraph 124). The judge was, however, keen to emphasise that his judgment should not be seen as encouraging LPAs to rely upon their website in the way the defendant council had done (paragraph 127).

No Adastral New Town¹¹⁷ – earlier failures in the plan-making process, such as a failure to subject early draft plans to SEA or consultation, may be cured by later steps

The judgment in *Kendall*¹¹⁸ preceded that of the Court of Appeal in *No Adastral New Town*. In simple terms, *No Adastral New Town* confirms that earlier breaches of the SEA Directive/SEA Regulations may be cured by later steps (paragraphs 56–59). The Court of Appeal essentially endorsed the reasoning of Singh J, at paragraphs 112–113 and 125, in *Cogent Land v Rochford DC*¹¹⁹ (an unsuccessful challenge to the core strategy that preceded the allocations plan the subject of *Kendall*¹²⁰).

As Singh J had noted in *Cogent Land*,¹²¹ SEA is not a single document, nor the same thing as the environmental report, but a process. Although Articles 4 and 8 of the SEA Directive require a SEA to be carried out and taken into account during the preparation of the plan, neither article stipulates when in the process this must occur, other than that it must be 'before [the plan's] adoption'. Similarly,

¹¹⁵ Note 22 citing, in particular, paras 138–39 (Lord Carnwath SCJ).

¹¹⁶ Case C–72/12 [2014] PTSR 311.

¹¹⁷ *No Adastral New Town v (1) Suffolk Coastal DC (2) SSCGL* [2015] EWCA Civ 88.

¹¹⁸ Note 44.

¹¹⁹ [2012] EWHC 2542 (Admin), [2013] 1 P & CR 2.

¹²⁰ Note 44.

¹²¹ Note 119.

¹¹⁴ [2009] EWCA Civ 239.

Article 6(2), which requires that members of the public be given an 'early and effective opportunity . . . to express their opinion on the draft plan or programme and the accompanying environmental report' does not prescribe what is meant by 'early', other than that it must be before adoption of the plan.

If earlier defects in the process, such as failure adequately to conduct a sustainability appraisal of early drafts, could not be cured at a later stage, then the result would be absurdity; that a local plan with proposals which at some prior stage had not been the subject of sufficient appraisal, or sufficient consultation, could never be adopted even if before adoption they had subsequently been sufficiently appraised and sufficiently consulted on. Obviously, a later, compliant, SEA must not be a 'bolt-on consideration of an already chosen preference'.

Criticisms that the earlier flaws in *No Adastral New Town* meant that the LPA had 'closed its mind' by the time sufficient appraisal had been carried out, or that the public was required to follow an unlawful paper chase to understand the appraisal, failed on the facts (paragraph 56–59).

Satnam Millennium Ltd v Warrington BC¹²² – a claimant success

This case witnessed another claimant fail to satisfy a court that a belated lawful SEA was a 'bolt-on' consideration of an already chosen preference, the judge (Stewart J) ultimately agreeing with the EiP inspector on that point. However, the claimant ultimately succeeded in obtaining a quashing order. That was because there had been substantial non-compliance with many of the requirements contained within Schedule 2 to the SEA Regulations, namely paragraphs 4, 7, 9 and 10, along with omissions in relation to paragraphs 6(b), (d), (e), (j) and (m), when preparing the environmental report (paragraph 55). Given that these breaches, including breaches going to the non-technical summary, intended to make the key issues and findings of the environmental report accessible and easily understood by the general public as well as by decision-makers (paragraph 56), they were more than a mere procedural defect and, therefore, it would be 'wholly wrong' for the court not to exercise its discretion to quash (paragraph 57).

Larkfleet¹²³ – new clarity in relation to neighbourhood development plans – circumstances in which they fall within the SEA Directive and require SEA

2014/15 saw confirmation of a point that came as no surprise to those responsible for preparation and screening of neighbourhood development plans (NDPs), namely that they may be a 'plan or programme' for the purposes of the SEA Directive and so require SEA. The issue, long discussed, finally came before the courts just before Christmas in *R (Larkfleet Homes Ltd) v Rutland County Council and*

Uppingham Town Council, and Collins J's first instance judgment has recently been upheld by the Court of Appeal in *R (Larkfleet) v Rutland CC and Uppingham TC and SSCLG*.¹²⁴ The first instance decision confirmed that a NDP may lawfully be held to fall within regulation 5(6)(a) of the SEA Regulations. However, the main issue in *Larkfleet* was whether a NDP might contain site allocation policies. Neither Collins J nor the Court of Appeal had much difficulty in rejecting the claimant's submissions that it could not. A challenge to the SEA itself, on the basis that it had considered only negative effects, not also positive effects, failed on the facts.

Of course, any confusion over the need for consideration of whether a NDP may require SEA has been removed by new regulation 15(1)(e) of the Neighbourhood Planning (General) Regulations 2012, which require the body submitting the NDP either to include an environmental report for the purposes of the SEA Directive or to explain why it is not doing so.

Reservoirs, flooding and sewerage outfalls

Two decisions – one only at first instance, the other a decision of the Supreme Court – are of particular interest to those responsible for reservoirs and the sewerage side of the water industry: *R (Heath and Hampstead Society) v City of London*¹²⁵ and *Manchester Ship Canal v United Utilities*.¹²⁶

R (Heath and Hampstead Society)¹²⁷ v City of London – the ponds on Hampstead Heath

At issue in this case was the interface between the celebrated (and historic) ponds on London's Hampstead Heath and the Reservoirs Act 1975. The defendant, in whom the heath is presently vested, was concerned that the ponds (the Hampstead and Highgate chains) might overtop and the dams fail, causing extensive flooding with attendant loss of life and substantial (and expensive) property damage in the dense residential areas below the heath. The risk of weather capable of causing such a flood from dam breach, however, was estimated at around 1 in 400,000 per annum.

A number of the ponds were 'large raised reservoirs' for the purposes of the 1975 Act. Section 10 of the 1975 Act provides for a series of at least 10-yearly inspections of such reservoirs by an independent engineer, whose role it is to recommend measures 'required in the interests of safety'. Recommendations made under section 10 are binding on the 'undertaker' responsible for the reservoir (in the case of the ponds, the defendant) and must be implemented, subject only to a statutory dispute mechanism to a qualified engineer (and a right of appeal against enforcement). The 1975 Act also requires the undertaker to appoint an independent engineer as 'supervising' engineer, conducting more regular inspections and with power to call for a section 10 inspection at any time, albeit no power himself to make binding recommendations under the Act.

¹²² [2015] EWHC 370 (Admin).

¹²³ *R (Larkfleet Homes Ltd) v Rutland County Council and Uppingham Town Council* [2014] EWHC 4095 (Admin).

¹²⁴ [2015] EWCA Civ 597.

¹²⁵ [2014] EWHC 3868 (Admin), [2015] Env LR 11.

¹²⁶ Note 126.

¹²⁷ Note 125.

Under the inspection regime laid down by the 1975 Act, the last 10-yearly inspection (in 2007) had not required the defendant to undertake works to the ponds. However, it had suggested studies be carried out to measure the risk of dam failure and consequent flooding. Those studies had revealed the 1 in 400,000 pa risk of weather sufficient to cause catastrophic failure of the dams. The defendant's supervising engineer had given it advice that if steps were not taken to address the risk he would likely call for a statutory inspection ahead of time. He relied upon ICE guidance that required pond dams to be able to resist the 'probable maximum flood' and so 'virtually eliminate risk'. The defendant was concerned that at the next 10-yearly inspection it would be told to carry out works to address that risk, in the 'interests of safety', and that it would have little room to manoeuvre so far as the nature of the works was concerned once a section 10 inspection report was produced. The defendant wished to pre-empt any such section 10 inspection by undertaking works immediately.

The claimant, a society whose principal object is to preserve the heath, objected that the proposed 'ponds project' comprised disproportionate works, that the engineer's approach to 'safety' involved an unwarranted search for absolute safety, when what was required was a level of safety that was reasonable in all the circumstances, which circumstances included safety measures in place under regimes outside the 1975 Act, that 'measures' need not only involve physical measures, but could include warning systems and human intervention to ameliorate risk and that those 'measures' had to require consideration of the historical, social and ecological value of the heath. Further, the claimant argued that the defendant's duties under the 1975 Act were subject to and qualified by its duties pursuant to the specific legislation, the Hampstead Heath Act 1871, which prohibited building and required preservation of the heath's natural aspect and state.

The judge (Lang J) dismissed the challenge. A large part of the judgment is concerned with the Hampstead Heath Act 1871, for which there is already previous authority (and analogous authority concerning the similar legislation for Wimbledon Common) and about which it is unnecessary to say more. However, the judgment represents the first High Court decision on the interpretation of the 1975 Act. Lang J held that:

1. The purpose of the 1975 Act was to *prevent* the escape of water from large raised reservoirs and so avert the potential danger to persons and property from such an escape, not to mitigate the effects of an escape by flood warning and evacuation strategies (paragraph 52).
2. The ICE guidance does include an assessment of risk, but the risk which is assessed is the likely consequence of a breach, not the probability of a breach occurring (paragraph 58).
3. 'Safety' is a relative concept, but Parliament had conferred responsibility upon independent civil engineers to decide what safety measures were necessary for any particular dam (paragraph 66). There was nothing untoward in such independent engineers applying the

safety standards generally recognised by their profession, found in the ICE guidance (paragraph 68).

4. The 1975 Act did not require a balance to be struck between the historic, ecological or other importance of a large raised reservoir and the 'interests of safety' (paragraph 72).
5. However, safety standards could often, although not always, be met in a variety of ways, and it is firmly within the competence of a civil engineer to take into account environmental considerations when making recommendations pursuant to section 10 (paragraphs 76–77).
6. The inspecting engineer under section 10 is performing a statutory function, not acting in a purely private capacity, and is subject to general public law requirements to act rationally and fairly and to take into account material considerations. Legal restrictions such as the 1871 Act and environmental considerations are 'plainly material considerations when deciding the manner in which to secure the safety of the dam' (paragraph 82).

The interesting result is that the standards of safety expected of large raised reservoirs, found in the ICE guidance to which all panel engineers appointed under section 10 will inevitably have regard and which the court approved, are arguably more demanding than those expected of nuclear reactors under ALARP principles (as low as reasonably practicable).

Manchester Ship Canal Company Ltd v United Utilities¹²⁸ – sewerage undertakers enjoy no implied rights to post 1991 outfalls

The decision of the Supreme Court in *Manchester Ship Canal Company Ltd v United Utilities Water plc* involved a statutory sewerage undertaker's appeal against an earlier decision¹²⁹ that the right of discharge onto third party property of the respondent owner of a private water-course had not been transferred to private water companies as part of the privatisation process.

The court held that sewerage companies do not enjoy an implied right under the provisions of the Water Industry Act 1991 to discharge sewage from outfalls created *after* 1991 into private canals or onto private land. They do, however, continue to have an implied right of discharge from pre-privatisation outfalls, subject to the safeguards contained in the 1991 Act (concerning foul sewage and interference with the assets of canal and other statutory undertakers), and payment of full compensation for damage caused.

Nuisance

Past its peak?

It now seems not so very long ago that group-action nuisance claims, conducted with the benefit of old-style CFAs

¹²⁸ *Manchester Ship Canal Company Ltd v United Utilities Water plc* [2014] UKSC 40, [2014] 1 WLR 2576.

¹²⁹ [2013] EWCA Civ 40.

and backed by recoverable ATE policies, were the coming thing. After all, *Barr v Biffa*¹³⁰ was barely three years ago. However, the end of old-style CFAs and recoverable ATE policies brought about by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) has changed matters hugely. So too has *Lawrence v Fen Tigers (No 1)*.¹³¹ Given that nuisance claims are a paradigm example of a high-litigation-cost/low damages actions, the fact that a claimant can no longer proceed safe in the knowledge that unless the defendant puts a stop to the nuisance his claim cannot be bought off by a Part 36/*Calderbank* offer (given *Lawrence*), combined with the inability to recover ATE and the reduced attraction for the legal profession of zero/low uplift CFAs, one wonders whether they have passed their peak almost as soon as they reached it.

The trenchant criticisms of the costs involved in *Lawrence* made by the Supreme Court in *Lawrence v Fen Tigers (No 2)*¹³² have done nothing to dilute this impression; likewise, the decision in *Austin v Miller Argent*.¹³³ Equally, the judgment of the Court of Appeal in the *Northumbrian Water v Robert McAlpine*¹³⁴ case marks yet a further blurring of the boundaries between nuisance and negligence.

***Lawrence v Fen Tigers (No 2)*¹³⁵ – landlord not liable for nuisance unless letting involves a ‘very high degree of probability’ of nuisance (or has directly participated)**

Readers will need no introduction to the facts of this case, given *Lawrence v Fen Tigers (No 1)*¹³⁶ was one of, if not the, most important environmental decisions of 2013/14. It will be recalled that the fourth and sixth defendants, the landlords (past and present) of the stadium and speedway track in question had not appeared before the Supreme Court in *Lawrence (No 1)*, the claims against them having been dismissed at first instance and the Court of Appeal not considering the claimants’ cross-appeal against that decision. *Lawrence (No 2)* was the resumption of the appeal to the Supreme Court in order to determine whether they were liable.

The Court held (Lord Neuberger JSC giving the lead speech) that a landlord would not be liable for nuisance caused by the tenant of a property unless the landlord either could be said to have authorised the nuisance by letting the property in question (on the basis of a very high degree of probability that the letting of the property would result in nuisance) or had participated directly in the commission of the nuisance. It was not enough that the landlord had been aware of the nuisance but had taken no steps to prevent it. On the basis of the first instance judge’s findings of fact, there were no grounds for holding the fourth and sixth defendants liable.

Lord Neuberger also took the opportunity to express trenchant criticism and ‘grave concern’ regarding the level of costs and ATE insurance premium, which the claimants had incurred in order to bring the proceedings. Unfortunately, the truly interesting point, the defendants’ argument that their liability for costs infringed their rights under Article 6 ECHR, was adjourned for further hearing after notice to the Attorney General and the Secretary of State for Justice (paragraph 49).

***Northumbrian Water v Sir Robert McAlpine*¹³⁷ – no liability for isolated escape – nuisance causing physical damage to property if unforeseeable and unintended**

This case marks a further inching step towards the coalescence of nuisance and negligence. The Court of Appeal dismissed the appellant water company’s appeal from the High Court’s dismissal of its claim seeking damages for blockage of its sewerage network. The essence is that even where an isolated but unintentional escape causes physical harm to property, no claim will lie unless the resultant damage was reasonably foreseeable.

To recap, the defendant/respondent construction company had been developing a previously developed site within Newcastle. Whilst pouring concrete into shafts for the purposes of forming concrete piles for the new structure, wet concrete leaked from one shaft into an old private sewer, and from there into the claimant/appellant’s public sewerage network. The concrete set and formed a blockage, which the claimant remedied at substantial cost. It brought a claim against the defendant in nuisance and negligence, but with nuisance to the fore. It was a fact that the existence of the private sewer was unknown to the defendant, and only discoverable from a 1908 map held in the archives of a local museum. The judge at first instance dismissed the claim, noting that there was no evidence of negligence and that for a one-off nuisance such as this it was necessary for a claimant to prove that the damage was reasonably foreseeable, which it could not.

The Court of Appeal made fairly short work of the appeal (the judgment is a modest 10 pages).

Moore-Bick LJ, giving the lead judgment (with which both McFarlane and Christopher Clarke LJ agreed) reviewed the authorities, notably *Cambridge Water Co v Eastern Counties Leather plc*¹³⁸ and *Transco Plc v Stockport Metropolitan Borough Council*¹³⁹ and neatly summarised the key principles from the speeches of Lords Goff (in *Cambridge Water*) and Hoffmann (in *Transco*):

1. although liability in nuisance has traditionally been regarded as strict, in the sense that it does not depend on proof of negligence, if the defendant’s user of his land is reasonable, he will not be liable for interference with his neighbour’s enjoyment of his land;

¹³⁰ [2012] EWCA Civ 312, [2013] QB 455.

¹³¹ [2014] UKSC 13, [2014] AC 822.

¹³² [2014] UKSC 46, [2015] AC 106.

¹³³ Note 31.

¹³⁴ *Northumbrian Water Ltd v Sir Robert McAlpine Ltd* [2014] EWCA Civ 685.

¹³⁵ Note 132.

¹³⁶ Note 131.

¹³⁷ Note 134.

¹³⁸ [1994] 2 AC 264.

¹³⁹ [2003] UKHL 61, [2004] 2 AC 1.

2. unless the case can be brought within the scope of the rule in *Rylands v Fletcher*,¹⁴⁰ the defendant is not liable for damage caused by an isolated escape, ie one that is not intended or reasonably foreseeable;
3. foreseeability of harm of the type suffered by the plaintiff is necessary for the defendant to be liable in damages for nuisance.

Applying those principles, the judge had been right to dismiss the claim in nuisance (as well as that in negligence). Nor was there an exception to be made for cases where physical damage was caused by such an isolated event. The case upon which the appellant placed particular reliance – *Clift v The Welsh Office*¹⁴¹ – was not an example of an isolated event.

Readers may note the similarities between the reasoning of the Court of Appeal here and that of the Court of Appeal in the *Wyvern Tyres* (fire nuisance) case.¹⁴²

Other: air quality and activism

Air quality

If 2014/2015 have not been particularly good years for the planet, they have at least been particularly good to ClientEarth in the courts, as first the decision of the Commission to launch infraction proceedings against the UK, then the November 2014 decision of the CJEU, followed finally by the April 2015 decision of the Supreme Court marked a rousing *crescendo* to years of litigation over the UK (non-)compliance with the Air Quality Directive.¹⁴³

In *R (ClientEarth) v Secretary of State for Environment, Food and Rural Affairs*,¹⁴⁴ the CJEU answered the Supreme Court's reference for a preliminary ruling on a number of questions raised by the wording of the Air Quality Directive, namely (as posed by the Supreme Court) whether: (1) in the event the limit value for NO₂ in a given zone/agglomeration was not achieved by the 1 January 2010 deadline specified in Annex XI, is a Member State obliged to seek postponement of the deadline in accordance with Article 22; (2) if so, in what circumstances (if any) may a Member State be relieved of that obligation; (3) to what extent (if at all) are the obligations of a Member State which has failed to comply with Article 13 affected by Article 23, in particular Article 23(2); (4) in the event of non-compliance with Articles 13 or 22, what (if any) remedies must a national court provide as a matter of European law in order to comply with Article 30 of the Directive and/or Article 4 or 19 TEU?

Having reformulated the questions so as to remove the need to answer the first question (as the Supreme Court later observed, the CJEU's reformulation had introduced a degree of ambiguity missing from the questions) the Court answered very much as ClientEarth would have wished it to. In relation to Article 22, the Court's approach was a

hyper-purposive approach, even by the CJEU's standards. As was acknowledged: 'the wording of that provision does not give clear indications [that an Article 22(4) application must be made to the Commission in order to benefit from the Article 22(1) postponement]' (paragraph 27). However, the CJEU held that in order to benefit from a postponement, an Article 22(4) application had to be made. There was no exception to that obligation (paragraph 34). Nor could the fact that an Article 23 compliant plan was in place relieve a Member State of its Article 13(1) obligations (paragraph 49).

As to the final question, the Court had no doubt that the national courts ought to be prepared, in circumstances where a Member State was in breach of Article 13(1) and had not obtained a postponement pursuant to Article 22(1), to require the competent authorities 'to establish an air quality plan which complies with the second subparagraph of Article 23(1)' (paragraph 56).

Those entirely helpful rulings (for ClientEarth) obtained from the CJEU, the matter returned to the Supreme Court in *R (ClientEarth) v SSEFRA*.¹⁴⁵ On 29 April 2015 Lord Carnwath JSC delivered the sole speech, with which all other members of the Court agreed. He noted that there had been 'a significant deterioration' (in progress towards compliance with NO₂ limits) since the matter was last before the court, owing primarily to the fact that 'the real world emission performance of (diesel vehicles) has turned out to be quite different to how the vehicle performs on the regulatory test cycle' (evidence on behalf of the Secretary of State, quoted at (paragraphs 20–21)). However, even if it were right that some of these problems were affected by matters beyond the control of individual Member States (the Secretary of State had pointed to the fact that the vehicle emission standards are set at EU level), there had been no loosening of the limit values set by the Air Quality Directive, which remained legally binding (paragraph 22).

Whilst the CJEU had omitted to provide a straight answer to the Court's first question, it was largely academic given that the maximum postponement was five years and January 2015 had come and gone (paragraph 24). Moreover, the difference between the requirements for a plan produced under Article 22 and a plan produced under Article 23 were 'more apparent than real' (paragraph 25).

Given the CJEU's answer to the fourth question, the position that it was for the Commission to enforce compliance with the Air Quality Directive was 'clearly untenable' (paragraph 28). Although the court would normally accept a suitable undertaking from a public authority in admitted breach of a legal obligation but willing to take appropriate steps to comply, in this instance the case came before the Court during the *purdah* period. Mindful of restriction on government business, and the time it might take for a new government to act on any undertaking given, the 'only realistic way' to address the UK's non-compliance was by way of a mandatory order requiring new plans compliant with Article 22(1) to be drawn up in

¹⁴⁰ (1866) LR 1 Ex 265, (1868) LR 3 HL 330.

¹⁴¹ [1998] 4 All ER 852.

¹⁴² *Gore v Stannard (t/a Wyvern Tyres)* [2014] QB 1.

¹⁴³ Directive 2008/50 (2008) OJ L152/1.

¹⁴⁴ Case C-404/13 [2015] Env LR 17.

¹⁴⁵ [2015] UKSC 28.

accordance with a defined timetable, and delivered to the Commission not later than 31 December 2015 (paragraph 35).

Activism

Although not fitting cleanly within the rubric 'environmental law', the decision of the Supreme Court in *Sea Shepherd UK v Fish & Fish Ltd*¹⁴⁶ deserves mention, if only because direct action and environmental law have often marched in time. The case concerned a ramming attack on a vessel owned by the claimant fish-farm operator, specifically the cage in which it was holding tuna, carried out by a vessel commanded by a Mr Paul Watson (the third defendant), who was the founder of the second defendant Sea Shepherd Conservation Society (a US conservation society) and a director of the first defendant, Sea Shepherd UK. The claimant alleged that the ramming attack was part of the 'Operation Blue Rage' campaign, which had been conducted by all three defendants and hence all three were liable as joint tortfeasors. The need to establish joint liability was particularly important, given that the third and second defendants were based in the US and challenged the jurisdiction.

The judge at first instance (Hamblen J) dealt with the claim that the first defendant was a joint tortfeasor so liable for the attack as a preliminary issue, and decided it against the claimant on the basis that, whilst the first defendant had passed on the names of those who had contacted it about volunteering in connection with the operation and had been involved in raising funds from the public to support it, the extent to which it had assisted the second defendant had been of 'minimal importance' and it had played no effective part in the commission of the alleged tort. The Court of Appeal allowed the claimant's appeal. The Supreme Court overturned the Court of Appeal, ultimately on the facts.

So far as points of principle go, the majority held at paragraphs 21–22 (Lord Toulson JSC) and at paragraphs 55, 57–60 (Lord Neuberger JSC) that:

Lord Toulson JSC

... D will be jointly liable with P if they combined to do or secure the doing of acts which constituted a tort. This

requires proof of two elements. D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort ...

The principle was expressly crisply in the statement in *Clerk and Lindell on Torts* (7th edn (1921), p. 59): 'Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design' ...

Lord Neuberger JSC

... in order for the defendant (who did not directly join with the primary tortfeasor in actually committing the tort, and was not the primary tortfeasor's agent or employee) to be liable to the claimant ... three conditions must be satisfied. First, the defendant must have assisted the commission of an act by the primary tortfeasor; secondly, the commission must have been pursuant to a common design on the part of the defendant and the primary tortfeasor that the act be committed; and, thirdly, the act must constitute a tort as against the claimant ...

So far as the first condition is concerned, the assistance provided by the defendant must be substantial, in the sense of not being *de minimis* or trivial ...

As to the second condition, mere assistance by the defendant to the primary tortfeasor, or 'facilitation' of the tortious act, will not do ...

A common design will normally be expressly communicated between the defendant and the other persons, but it can be inferred ...

As to the third condition, it is unnecessary for the claimant to show that the defendant appreciated that the act which he assisted pursuant to a common design constituted, or gave rise to, a tort or that he intended that the claimant be harmed. But the defendant must have assisted in, and been party to a common design to commit, the act that constituted, or gave rise to, the tort ...

Those statements of principle were not disputed by the minority, Lords Sumption and Mance JSC (see the speech of Lord Sumption JSC (at paragraph 37)), who disagreed with the majority purely in relation to the interpretation of the facts.

¹⁴⁶ [2015] UKSC 10, [2015] 2 WLR 694.

Flooding: the role of the Environment Agency

Jonathan Robinson *Executive Director of Resources and Legal Services, Environment Agency*

It may come as a surprise to many to realise that the Environment Agency's work in preventing and mitigating flooding across England is much greater than its work on environmental protection. In financial terms, the money spent on flood defences far outstrips the money spent on permitting and environmental restoration and protection.

The Agency's roles

I will run first through the roles of the Environment Agency to give a practical overview of what the Agency does, and then look in more detail at flood defence law and the Agency's work.

The Agency's powers are extensive: it also has very few duties. Its powers are still set out in the Water Resources Act 1991, and to a limited extent in the Floods and Water Management Act 2010.

Under section 165 of the Water Resources Act 1991 the Agency has powers to restore flood defences and to maintain them, with attendant powers of entry, compulsory purchase and so on. Maintenance encompasses a very wide variety of vital actions and projects which are hardly evident from those words 'power to maintain'. For instance, it includes clearing trash screens in front of culverts under cities, which if they are blocked by debris washing down a river prevent flood water from escaping. So in the run up to heavy rainfall the Environment Agency work force will be out round the clock clearing and digging out drains and ditches as well as culverts. Another example of rather different work is using excavators to pull shingle back up beaches such as Chesil beach in Dorset and Medmerry on the south coast, where the natural shingle bank absorbs the force of the waves and provides a defence against flooding from the sea. And more obviously in terms of maintenance, the iconic Thames Barrier is a vital flood defence which requires regular maintenance. The work force is also on the alert to set up temporary flood defences when necessary, and respond to flood incidents.

The Agency's duties

The Agency's duties include surveying for flood risk.¹ Although phrased as a duty, its open-ended nature means that in practice the Environment Agency exercises a very wide discretion in how and where to survey. The most impressive element of this work is an aeroplane with LIDAR – LIDAR is like radar using laser – which flies over the country and measures the precise height of the ground throughout, focusing particularly on risky areas. On the basis of this information expert hydrologists work out and

model how water will flow. The aim is to establish where flood defences are needed before floods arrive.²

Under section 166 of the Water Resources Act the Agency can issue flood warnings. The information needed to calculate possible flood areas comes from meteorologists and hydrologists and these two professions have been combined at the Flood Forecasting Centre based at the Met Office in Exeter, which has shortened the time taken to issue flood warnings.

A further function relates to the issuing of consents. Under section 109 of the Water Resources Act any works proposed in a main river, which may have an impact on the flow of water and possible flooding, need consent from the Agency. The Agency also has attendant enforcement powers.

Finally, the Agency is a statutory consultee for planning applications, essentially for these purposes to advise on proposals for development at risk of flooding, where the Agency will either advise against development (which can have the effect of requiring the application to be called in by the Secretary of State), or advise how it can be made resilient. The risks of building in the flood plain are often focused on houses, whilst in fact infrastructure affecting wide areas and populations in the UK is equally at risk. Unsurprisingly – given what they do – about half of our water pumping stations and water treatment stations are at some risk of flooding.

Shared responsibilities

Turning to the Agency's position in the wider governance of flood risk management, there are three government departments involved: Defra is the sponsoring department with legal responsibility for floods and coastal erosion and risk management; the Cabinet Office leads on civil contingencies, so in an incident it is the Cabinet Office that summons the COBRA committee,³ and the Agency will probably attend those meetings along with other government departments. Finally planning and development, which has a big impact on flood risk and flood mitigation, is the responsibility of the Department of Communities and Local Government.

In terms of planning for development, the responsibility is shared through the government tiers down to local government tiers of district and county councils.

A tier of governance unique to flood risk management is the regional flood and coastal committees (RFCCs).

¹ Water Resources Act 1991 s 105.

² As part of a government open data initiative, we put the LIDAR data up on the web, so that the precise contours of the country are there for all to look at; <https://data.gov.uk/dataset/lidar-composite-dsm-1m1>.

³ COBRA, Cabinet Office Briefing Room A, ie emergency response committee.

These are made up of representatives of the local authorities and independent representatives. They have a veto over the Agency programme insofar as it affects their area. Before the Agency can spend public money building flood defences in an area, a prior, very close dialogue takes place which leads, hopefully to the committee giving consent to the Agency's proposed programme. RFCCs also have a power to levy money locally for local flood risk management works.

The Agency itself has both a strategic overview, and also primary responsibility for managing flood risk from main rivers. Main rivers are those such as the Trent, the Severn etc that are designated by Defra and which carry the biggest potential flood risk. Those that are not designated main rivers are ordinary water courses and are the responsibility of local government.

Finally there are third party assets – flood defences around for instance industrial sites on the north-east coast which are protected from flood risk by private or independent owners. These flood defences are likely to provide protection also for surrounding communities, and the Floods and Water Management Act 2010 introduced a new power for the Agency to designate these and to regulate any proposed alterations or work to them under a new regulatory framework.

Flooding incidents and the 2010 Act

Looking back over recent history, the worst event in living memory was the east coast surge in 1953. It was the worst flooding incident in the entire recorded UK history and resulted in 307 deaths. However, in recent years the pattern of floods has been changing due to increasingly heavy localised rainfall which is occurring with greater frequency (for instance at Boscastle in Cornwall in 2004). This means that small catchments respond very quickly and create mudslides and water walls lower down. In these catch-

ments in Cornwall it is not practicable to build big flood storage areas upstream from conurbations, such as the one that has recently been built upstream of Morpeth in Northumberland.

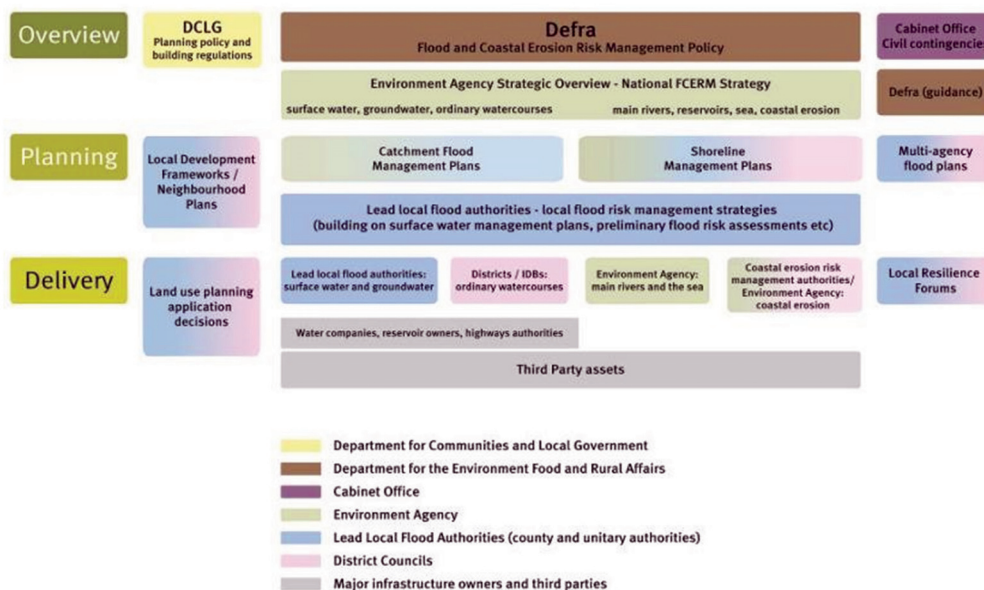
Over the last decade flood incidents have had a visible impact on the development of the law. The mix of responsibilities across different sectors, and the allocation of responsibilities across different authorities was highlighted by the flooding in 2007. The shortcomings were set out in a report by Sir Michael Pitt,⁴ which led to the Floods and Water Management Act 2010, which tried to bring some coherence to an inevitably complex web of responsibilities. The 2010 Act gave the Agency a strategic overview role, as already mentioned, and the duty to produce a national flood and coastal erosion risk management strategy, setting out – to a large extent in a descriptive rather than a prescriptive form – the functions of the different authorities. It also created lead local flood authorities to bring more emphasis to the role of local government, and clarified the relationship between the Agency and local government in the development of a programme of flood risk management works.

European legislation

Sandwiched between the Pitt Review and the 2010 Act is the parallel stream of legislation of the European Floods Directive⁵ implemented by the Floods Regulations.⁶

In contrast to the environmental legal landscape, which most readers will be familiar with, where the main obligations are defined essentially by European law and then merely implemented under national regulations by the simple conduit of section 2(2)(b) of the European Communities Act,⁷ floods regulation and implementation in the UK is far in advance of the European instruments. These latter consist essentially of the requirement for flood risk mapping and planning under the Floods Directive.

Framework of responsibilities



⁴ Cabinet Office 'The Pitt Review: Learning lessons from the 2007 floods' 10 November 2008 <http://www.cabinetoffice.gov.uk/thepittreview>.

⁵ Directive 2007/60/EC on the assessment and management of flood risks.

⁶ The Flood Risk Regulations 2009, SI 2009/3042.

⁷ European Communities Act 1972.

Flood defences – the politics and the cost

In terms of the budget for flood defences, Figure 1 shows government flood risk management funding from 2010–2015/16. There are three things which are politically interesting here.

First, the difference in the height of the columns between 2010/11 and 2011/12: the latter is smaller. At the start of the Coalition Government the Chancellor of the Exchequer announced in his first spending review that the government was spending more on flood risk management than ever before. The Opposition claimed spending had gone down. Both were right, in a sense. Although year on year the funding went down from the last year of the Labour Government into the first year of the Coalition Government, if you look at the whole Parliament the amount has increased. And indeed, the government has indicated that it intends to maintain that level until 2020 if re-elected five year's time.

Secondly, the 2014/15 bar is way higher as a result of the government's decision in 2014–15 first to invest more in flood risk capital, ie to fund the development of new schemes projected forward to 2021; and secondly, the revenue available was greatly increased to repair the damage done to flood defences in the 2013–14 storms. This cycle is typical of flood risk funding over the years.

And thirdly, government funding formulas to 2020 now require 15 per cent of flood defence funding to come from private sources, companies and local government.

The 2013–14 floods

The statistics of the winter 2013–spring 2014 floods are extraordinary. The bulk of the country during that period had about 200 per cent of the normal rainfall. Throughout all of December, January and February there were flood warnings – 111 days of flood risk. The surge on 5 and 6 December 2013 was as high as, and in many places higher than, the surge in 1953. In 1953 the surge led to more than 300 deaths and huge amounts of flooding across the country; December 2013 led to some very bad flooding, but very limited compared to '53 and with no deaths: it shows what has been achieved in just over 60 years in terms of flood risk management in the country. Another statistic relates to the Thames Barrier; between 1987 and 2015, a quarter of all the barrier closures during that period took place over the winter of 2013–14.

The floods at the Somerset levels

As everyone who watched the television news during those winter floods will know, the Somerset levels suffered extended flooding. The river Parratt, which you will have seen in some of that coverage, is higher than the land around it. Water is pumped up from the Somerset levels into the river and if there is exceptional rainfall which outstrips the capacity of the pumps to pump it up into the river, or the river to carry it out to the sea at low tide, the surrounding land floods. The Agency's recovery operations

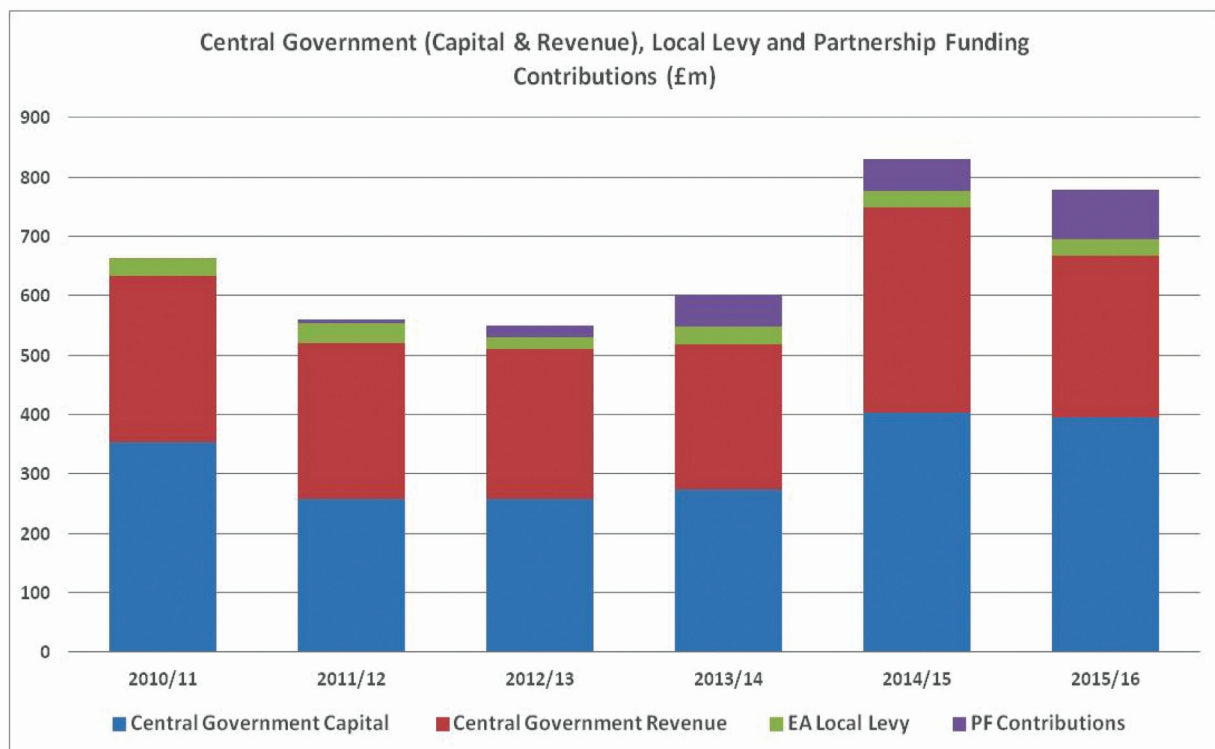


Figure 1.

involved carrying out the largest ever mobile pumping operation in the UK to pump the water up off the land into the river. The government also allotted £10 million which the Agency has spent dredging an 8km stretch of the river Parratt, and some of the river River Tone, clearing pinch points which had silted up and allowing more water to pass along the river to the sea. There will always be a risk of flooding on the Somerset levels, but with this work it is

less likely to happen and will not last so long when it does happen.

Conclusion

I hope this has given you an overview at least of the roles, funding, practicalities, and recent history of flood risk management in England.

Leakey v National Trust:¹ a high water mark for flood liability?

Camilla Lamont *Landmark Chambers*

The hydrologic cycle from a lawyer's perspective

As a child I remember being fascinated by the simplicity and completeness of the iconic image of the hydrologic cycle that speaks volumes as to the movement of water around our planet. Water evaporates from the seas, rivers and lakes; it gets put back into the air by transpiration from plants and then circulates in the clouds above our heads before being deposited as precipitation. It in turn percolates by force of gravity through the ground, flows in rivers down to the sea and bubbles back to the surface in springs; so continues the cycle.

As a lawyer several decades older I look at this iconic image with different eyes. I know that the land upon which the water falls and percolates belongs to corporations, individuals, charities and governments. I appreciate that water can be both a blessing and a curse. I understand from experience that when people suffer loss they tend to want to blame someone else and to be compensated accordingly.

Thus, the law has to answer some grown up and complex questions that arise from this image. In terms of rights, the question will be, who is entitled to the water that flows naturally over and under land? In terms of liability, the law has to determine the circumstances in which a person can be held responsible for the damage that water causes when it passes from the land under his control to that of his neighbour. It is with the second inquiry that this article is concerned.

'Everyone for himself' versus 'neighbourliness'

As Lord Wright recognised in the leading case of *Sedleigh-Denfield v O'Callaghan*,² 'a balance has to be maintained between the right of the occupier to do what he likes with his own and the right of his neighbour not to be interfered with'. The more difficult but essential task of the law is to tell us how that balance is to be struck. It is trite law that the answer is rooted in the idea of 'reasonableness between neighbours', although that tells us little as to what behaviour might be reasonable in any given situation.

In addressing this balance there has long been a tension between two opposing concepts. I will refer to these competing concepts as 'everyone for himself' versus 'neighbourliness'. What I want to address is the question as to which of these two concepts is more dominant in the law

relating to flooding as it stands today: in other words, which is more likely to influence the striking of the balance in any particular case?

I seek to show that the 'everyone for himself' ethos remains largely dominant in water cases, despite the introduction of the measured duty of care in *Leakey*³ and the increasing assimilation of concepts of neighbourliness within the law of nuisance. I say that is a good thing too, which encourages efficient use of land.

The dominance of the autonomous proprietor

The 'everyone for himself' theory asserts that landowners are entitled to use and exploit their respective properties, provided that such use is not unreasonable. The concept of 'reasonable user', which lies at the heart of the law of nuisance, closely aligns with the theory. By corollary, these same landowners bear responsibility for protecting their own properties from the elements and are not entitled to expect others to do so for them. The 'no liability' rule for non-feasance for natural nuisances was, it has been said, based on notions of expediency and self-help.⁴

The modern law of nuisance finds its genesis in a dissenting judgment of Scrutton LJ in *Job Edwards Ltd v The Company of Proprietors of the Birmingham Navigations*,⁵ which, in its recognition of a duty of care towards one's neighbour, implicitly rejects the totality of the *mantra* of 'everyone for himself'. However, the majority in that case held that the owner of abandoned mining land on which a fire had been started by trespassers was not liable to adjoining owners to take steps to put out the fire. The dominance of the prevailing 'everyone for himself' ethos is clearly evident in the majority judgments. Bankes LJ asked:

Why, as between two entirely innocent parties, should the one in whose interest an expenditure is required in order to abate a danger to himself not be the person to bear the necessary expenditure?⁶

In *Goldman v Hargrave*⁷ the Privy Council recognised the historical predominance of the 'everyone for himself' theory. It was said there that the law was: 'for long satisfied with the conception of separate or autonomous proprietors, each of which was entitled to exploit his territory in a "natural" manner and none of whom was obliged to

¹ *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485 (CA).

² [1940] AC 880 at 903.

³ Note 1.

⁴ As stated by Jackson LJ in *Vernon Knight Associates v Cornwall District Council* [2013] EWCA Civ 950 at [37].

⁵ [1924] 1 KB 341.

⁶ *ibid* at 350.

⁷ [1967] AC 645 at 647.

restrain or direct the operations of nature in the interests of avoiding harm to his neighbours'.

Historically, the law's response as to where the balance was to be drawn in relation to water was to be found in a body of specific rules that had been developed over time, largely over the course of the 19th century. The rules were pragmatic, clearly delineated and rooted in the idea that a proprietor could consider his own self-interest, provided he did not actively interfere with the natural order of things. For example, an owner or occupier of land had no right to interfere with or redirect the flow of a natural watercourse.⁸ If he erected artificial watercourses or other artificial erections that redirected water onto his neighbour's land, he would likewise be liable for ensuing damage.⁹ In addition, he had no right to remove floodwater which was on his own land and direct it onto his neighbour's land.¹⁰

On the other hand, a landowner generally owed no duty to his neighbour to take positive steps to protect his neighbour's land from natural hazards, including flood water. This is well illustrated in *Thomas and Evans Ltd v Mid-Rhondda Co-operative Society Limited*,¹¹ where a riparian owner had erected a wall alongside the river bank to prevent flooding onto his own land. He subsequently took down part of the wall in the course of wider building operations. Halfway through those operations, when there remained gaps in the newly constructed wall, the river flooded and his neighbour's land was damaged. The neighbour's claim failed on the basis that he had no right to protection from the river in the first place and therefore could not complain when the wall was taken down. Sir Wilfred Greene MR opined that, if such a duty existed, a person putting up a flood defence on his own land would act at his peril because, by erecting it, he would be conferring upon his neighbour rights to insist he should never remove the defence.

The long-standing 'common enemy' rule or defence is itself a paradigm application of the 'everyone for himself' theory. Water was seen as a 'common enemy' in respect of which each owner was entitled to protect his own land by erecting sea and other flood defences, otherwise than in an established watercourse, even where that would increase the volume of water flooding onto his neighbour's. As Lord Tenterden CJ put it in *R v Commissioners of Sewers for the Levels of Pagham*:¹²

... each landowner for himself, or the commissioners acting for several landowners, may erect such defences for the land under their care as the necessity of the case requires leaving it to others, in a like manner, to protect themselves against the common enemy.¹³

The meteoric rise of the 'neighbour principle'

So stood the law until the middle of the 20th century but times have changed and the law has moved on. The last century saw great changes in our legal system, such as the development of the 'neighbour principle' in the law of negligence. In turn, this impacted on the law of nuisance, which to a large extent has been assimilated within this general trend. No longer, it is said, can landowners and occupiers act largely out of self-interest. In some circumstances, at least, they are expected to act to protect their neighbour's land from the forces of nature.

The key decision that paved the way for this change was that of the House of Lords in *Sedleigh-Denfield v O'Callaghan*,¹⁴ which approved the earlier dissent of Scrutton LJ in *Job Edwards*.¹⁵ In *Sedleigh-Denfield*, trespassers had placed a culvert in a ditch on the respondent's land. The culvert was defective in that a grate had been placed in the wrong place, with the result that the culvert became choked with leaves in heavy storms, which in turn caused flooding on the appellant's land. The respondent was held liable even though it had not installed the culvert itself. In other words, the respondent had a duty in respect of a non-natural hazard that had been placed on its land by a trespasser once it knew or ought to have known of its existence. In that case all that was required was 'the very simple step' of placing a grate in the proper place.

Having allowed the 'neighbourliness' concept to take hold in this way, it was only a matter of time before the duty to take steps to abate artificial hazards of which the occupier of land knew or ought to have known was extended to naturally occurring hazards, as subsequently happened in *Goldman v Hargrave*¹⁶ and *Leakey v National Trust for Places of Historic Interest or Natural Beauty*.¹⁷

In some respects the logic behind the extension of liability to natural hazards is hard to fault, particularly considering that it is not easy to draw clear distinctions between 'natural' and 'artificial' hazards. This was recognised in *Green v Lord Somerleyton*,¹⁸ which concerned flooding over marshes emanating from a man-made lake constructed in medieval times through ditches that were found to be artificial watercourses of great antiquity. It was said that, in the context of the English landscape, any distinction between natural and artificial features was an inherently uncertain foundation upon which to rest a decision as to the existence of a liability in nuisance.

8 *Greenock Corporation v Caledonian Railway* [1917] 1 AC 556.

9 *Hurdman v NE Railway Co* (1878) 3 CPD 168; *R H Buckley & Sons Ltd v N Buckley & Sons* (1898) 2 QB 608.

10 In *Whalley v Lancs and Yorks Ry Co* (1884) 13 QBD 131, for example, by reason of unprecedented rainfall a quantity of water was accumulated against the defendant's railway embankment. In order to protect its embankment the defendant cut trenches in it, through which the water flowed onto the plaintiff's land, resulting in damage. The defendant was liable on the basis that it had no right to transfer the mischief, even though it had not brought the water onto the land in the first place.

11 [1940] 1 KB 381 (CA). Likewise, an occupier of land had no cause of action against the occupier of higher adjacent land for permitting the passage of natural, unchannelled water over or through the higher to the lower land: see *Smith v Kendrick* (1849) 7 CB 515. In *Home Brewery Co Ltd v William Davis & Co (Leicester) Ltd* [1987] 1 QB 339 at 346 D–E, it was expressly recognised that it is perhaps doubtful that this principle is still good law in its widest application in light of *Leakey* (n 1).

12 (1828) 8 B & C 355.

13 *ibid* at 361.

14 Note 2.

15 Note 5.

16 Note 7.

17 Note 1.

18 [2002] EWCA Civ 198, (2004) 1 P & CR 33.

However, the extension of the duty to act in relation to hazards brought about by the forces of nature, including naturally flowing water, constituted a very real expansion of the scope of potential liabilities of those who control land. The consequences in respect of water took some time to be fully appreciated. For example, even as late as 2002, it was held at first instance in *Green v Lord Somerleyton*¹⁹ that the *Leakey*²⁰ duty did not apply to naturally flowing water, although that decision was reversed by the Court of Appeal on the basis that no sensible distinction could be drawn between unreasonably allowing fire to escape and unreasonably allowing floodwater to do so.

The first instance judge there had held that naturally flowing water was not a hazard at all. This idea, although rejected by the Court of Appeal, also finds a voice in the following *dicta* in *Home Brewery Co Ltd v William Davis & Co (Leicester) Ltd*:²¹

Although in one sense water is water and always has the same properties it does not always have the same effect. Floodwater can properly be described as a common enemy, but water as such is not an enemy of man or beast or land. Indeed, in most circumstances, water can be described as a common friend. Certainly the human race could not survive long without it. Rainwater is generally beneficial and the same can be said of rainwater percolating naturally through the ground.

The problem with *Leakey*

The difficulty is not so much in the recognition of a duty but rather with defining the scope of the duty, particularly if naturally flowing water is treated as a hazard. Left unameliorated, the recognition of the duty of care could work serious injustice the other way, as Megaw LJ in *Leakey*²² recognised in giving the example of the small and relatively poor landowner whose stream had a propensity to flood onto the land of his much wealthier neighbours. The duty upon the controller of land is therefore a 'measured one', which requires that he take such steps as are reasonable in all the circumstances to reduce or abate the risk of certain hazards judged by reference to his own circumstances.

The law post *Leakey*²³ is now easy to state but rather less so to apply. The duty is 'to take such steps as are reasonable in all the circumstances to prevent or minimise the risk of injury or damage to the neighbour or his property of which the occupier knew or ought to have known'.²⁴ Of course, that begs the question as to what it is reasonable to expect the controller of land to do or not to do in any given situation.

The assimilation of the law relating to artificial and natural hazards and the inclusion of water as a hazard has essentially done away with a distinct and hard-edged set of rules for determining liability for flood damage in favour of a more far-reaching inquiry, which requires the judge to carry out a 'somewhat daunting and multi-factorial assessment'.²⁵ It is questionable whether this is a positive development. The breadth of the *Leakey*²⁶ principle means that, whilst it has the flexibility to produce just outcomes in particular cases, the law is in danger of becoming unpredictable.

In the context of land, it is important that owners and occupiers can anticipate and make provision for the obligations imposed on them by virtue of such ownership and occupation. Likewise, occupiers of land should be entitled to understand what standards of behaviour they can objectively expect from their neighbours.

The idea that the scope of the duty should depend on the particular resources or circumstances of individual litigants does not fit easily with the idea that the law ought to lay down objective standards of behaviour. An owner of land should bear the legal burdens that come with that ownership, regardless of his means. After all, the basis upon which liability is imposed is the 'possession and control of the land from which the nuisance proceeds'.²⁷ If an owner of land cannot afford the 'cost' of land ownership or occupation, it is open to him to divest himself of it. If the owner of land is not skilled or well enough to carry out a task that an occupier of his land might objectively be expected to perform, it could with some force be said that the landowner ought to employ someone else to do it for him, rather than expect his neighbour to take up the slack.

That is not, however, what *Leakey*²⁸ says, given the express reference to the relevance of the respective means of the parties in determining the scope of the liability. Arguably however, the emphasis on a broad brush approach might be said to require simply an objective assessment as to the likely means of the owner or occupier of any particular parcel of land. In a later case the idea that one landowner could plead lack of means to increase the burden on the other was itself described as not only 'unjust, unfair and unreasonable' but also as 'unneighbourly'.²⁹

The Court of Appeal has also recently expressed misgivings as to the appropriateness of taking the availability of insurance into account in determining the scope of the duty.³⁰ This point remains to be decided. Arguably, adopting a very broad brush approach, it might be relevant to consider whether a particular class of litigant (such as the householders in *Lambert v Barratt Homes Limited*³¹) could

19 *ibid.*

20 Note 1.

21 Note 11.

22 Note 1.

23 *ibid.*

24 The circumstances to be taken into account include his knowledge of the hazard, the extent of the risk, the practicability of preventing or minimising the foreseeable injury or damage, the time available for doing so, the probable cost of the work involved and the relative financial and other resources, taken on a broad brush basis.

25 *Vernon Knight Associates v Cornwall District Council* (n 4) at [37] (Jackson LJ).

26 Note 1.

27 *Sedleigh-Denfield v O'Callaghan* (n 2) at 903 (Wright LJ).

28 Note 1.

29 See *Abbahall Ltd v Smea* [2003] 1 WLR 1472 (Munby J), where the owners of a flying freehold and adjacent premises beneath it were held liable to contribute to the repair of the roof in proportion to the relative benefits they each derived from it (in that case 50:50).

30 *Vernon Knight Associates v Cornwall District Council* (n 4) at [70] (Sir Stanley Burnton LJ) and at [47] (Jackson LJ).

31 [2010] EWCA Civ 681.

be expected to take out insurance to cover the risk of flooding. However, in the current climate it is unsafe to assume that all such householders will be able to obtain such cover or maintain it in future. The insurance status of a litigant is generally not a relevant factor in deciding questions of liability; it is said to be *res inter alios acta*. To allow the existence of insurance cover to influence findings as to liability would be to put the cart before the horse and to penalise those who take out insurance in favour of those who do not. It could also impact on the insurance market artificially.

Imposition of a *Leakey* duty: the exception to the norm?

The findings of liability in *Leakey*³² and *Goldman*³³ arguably constitute the exceptions rather than the norm. In *Goldman*, the hazard was a burning tree that had been struck by lightning. The defendant was aware of the fire and had actually taken steps to contain it once the burning tree had been felled. However, he negligently adopted the wrong method of containment. He should have put the fire out by the simple expediency of dousing it with water but instead he tried to let it burn itself out. The winds picked up and the fire from the burning remains of the tree spread to his neighbour's buildings, causing extensive damage.

In *Leakey*,³⁴ the hazard was a naturally occurring mound in Somerset that had developed cracks and from which soil and rubble was liable to fall onto the plaintiffs' properties. The plaintiffs had pointed out the hazard to the National Trust and had asked it to do something about the mound, which it refused to do. As a result of further natural erosion, part of the mound collapsed, thereby causing extensive damage to the plaintiffs' cottages. The steps required to abate the same were not extensive and were well within the means of the National Trust.

In some cases the existence of a duty is likely to be so obvious that it will go without saying, as in *Goldman*³⁵ and – albeit to a lesser extent – in *Leakey*³⁶ as well. One can readily see why the courts in each case strove to find a cause of action that would fit the bill. If the owner has knowledge of the hazard which, if left unabated, is likely to cause substantial damage to his neighbour, he has a duty to carry out simple and straightforward acts that would prevent such damage: for example, the simple act of replacing a defective grate in *Sedleigh-Denfield*³⁷ or the stamping out of a fledging fire as in *Goldman*.³⁸ It would be strange if the law did not recognise the existence of such a duty. It is the ease of carrying out the act demanded by the law contrasted with the dire consequences of inaction that is key. This is especially so if the neighbour is not himself in a position to act to abate the threat.

The turning of the tides

In other cases the *Leakey*³⁹ formulation will not always produce a clear answer. It is not surprising, therefore, that the courts have sought to find answers by referring back to earlier case law. This has resulted in the courts straining the old doctrines in order to reinterpret them consistently with the *Leakey* 'measured duty of care'.

For example, the outcome in *Thomas*⁴⁰ was reinterpreted in *Leakey* as being consistent with an application of the measured duty of care. The risk of a flooding event was such that the riparian owner could not reasonably foresee that a flooding event would occur during his reconstruction works and had not breached any duty in carrying out those works in the manner in which he did. This amounted to a neat trick, but one that nonetheless ignores the underlying acceptance of the 'everyone for himself' theory in the reasoning given for the earlier decision.

In turning back to the earlier cases, the old tensions between the competing concepts of 'everyone for himself' and 'neighbourliness' resurface. This can be seen no more clearly than in *Arscott v Coal Board*,⁴¹ in which the Court of Appeal sought to 'reinterpret' the common enemy defence as an example of the resolution of the balance between 'self-interest' and 'duty to neighbour' on the basis that the limitations on the common enemy defence were themselves 'partial guarantors of reasonable user'.⁴²

In *Arscott*⁴³ the coal authority had raised the level of a floodplain in Aberfan by applying colliery spoil heaps to it, primarily in order to create community playing fields. This in turn meant that water that would otherwise have flooded the plains instead flooded a nearby housing estate, causing a great deal of loss and damage to a number of households. The common enemy defence was held to apply with the result that the authority avoided liability for the resulting flooding, even insofar as that was foreseeable.

Therefore, it can be seen that the Court of Appeal in *Arscott*⁴⁴ essentially reverted to the 'old rules' to find the answer but in so doing 'rebranded' them as achieving the 'right balance', consistent with *Leakey*.⁴⁵ The case provides welcome certainty in relation to a landowner's ability to erect flood defences, but does leave the law in respect of liability for flooding somewhat lacking in coherence.

Despite the spin put on the case by the Court of Appeal, the tension between the two competing views is clearly evident when one compares the outcomes in *Leakey* and *Arscott*. The law may, depending on the circumstances, require a landowner to erect or maintain flood

32 Note 1.

33 Note 7.

34 Note 1.

35 Note 7.

36 Note 1.

37 Note 2.

38 Note 7.

39 Note 1.

40 *Thomas and Evans Ltd v Mid-Rhondda Co-operative Society Limited* (n 11).

41 [2004] EWCA Civ 892, [2005] Env LR 6.

42 The limitations on that rule are threefold: (1) the rule does not justify interference with the alveus or established watercourse; (2) does not entitle a landowner to pass on the flood once it has come onto his land; and (3) the works must be reasonable and limited to what is required to prevent the flood.

43 *ibid.*

44 *ibid.*

45 Note 1. The court in *Arscott* recognised that the common enemy rule represented a 'pragmatic drawing of the line' and that the departures from the general rule would to some eyes look 'fragile'.

defences on his land in order to protect his neighbour but, on the other hand, provides that the landowner is free to build defences on his land that result in his neighbour's land being flooded.

Likewise, *Home Brewery Co Ltd v William Davis & Co (Leicester) Ltd*⁴⁶ is another example of a post *Leakey* case in which the court took account of the earlier authorities in order to reach a decision on the facts. In that case, naturally occurring water drained unchannelled over and by percolation through the plaintiff's land into a disused osier bed and clay pit on lower adjoining land. The defendants bought the adjoining land for housing development and filled in the clay pit, thereby erecting a partial barrier against the drainage of water from the plaintiff's land and causing it to flood.⁴⁷ It was held that the defendant had no obligation to accept the naturally occurring water draining into the osier bed and clay pit from higher land and was entitled to take steps consistent with its reasonable user of the land to prevent it entering, even though that caused loss to the occupier of the higher land.

The decision can therefore be seen as a paradigm application of the 'everyone for himself' theory and is one that closely correlates with the common enemy rule. The filling in of the land with a view to its development was a 'reasonable' user by the defendants and they had no liability so far as that development erected a barrier against the water flowing downstream. The deputy High Court judge there read the *Leakey* and *Goldman* 'measured duty of care' as not applying to cases where 'all the landowner is doing is exercising his right to reject water coming on his land and is doing so in a reasonable manner'. In other words, the old rules provided the answer, not the *Leakey* measured duty of care.

Perhaps the true analysis is that no single theory or doctrine can answer all the questions we require answers to. The law of nuisance is 'protean'. It was said in *Arscott*⁴⁸ to involve a 'constellation of themes', namely (a) a bias in favour of natural user, subject to its being no more than reasonably enjoyed; (b) a bias (effectively a conclusive rule) against non-natural user where that involves the escape of something noxious onto a neighbour's land; (c) a bias against the harbouring of a danger, a hazard on one's own land whether the hazard is natural or man-made; (d) and no liability without reasonable foreseeability of damage. The *Leakey*⁴⁹ measured duty, viewed thus, is just one star in a wider constellation.

This reformulation is more helpful than the nebulous concept of a measured duty of care. It does allow back into the equation the idea, deeply rooted in liberal property theory, that each proprietor is entitled to exploit his own land for his own purposes, provided he acts within

reasonable bounds. The indications are therefore that, like the fire in *Goldman*,⁵⁰ the 'everyone for himself' theory continues to smoulder and in fact underpins much of the recent case law.

The narrow application of *Leakey* in water cases

Even where judges have applied the *Leakey*⁵¹ measured duty of care directly to flooding cases, the decisions demonstrate a reluctance to impose liability for non-feasance. For example, in *Green v Lord Somerleyton*⁵² the Court of Appeal held that the duty did not on the facts extend to an obligation to maintain barriers against occasional flooding from the defendant's marsh to the claimant's marsh. In that case the costs of taking the necessary steps would have been disproportionate to the damage likely to be caused if the neighbouring land was flooded intermittently. Further, whilst a joint effort to clear certain watercourses would have substantially reduced the risk of flooding, clearing the defendant's stretch would have been of questionable effect unless the claimants had done the same.

Likewise, in *Lambert v Barratt Homes Limited*,⁵³ surface water flowing from land belonging to Rochdale Metropolitan Borough Council on occasions flooded the claimants' properties, causing damage. The Court of Appeal reversed a first instance finding that the local authority had breached a measured duty of care, holding that the council's duty did not extend to constructing drainage ditches and a catchpit at its own expense. Local authorities were under a degree of financial pressure and held their funds for public purposes. The claimants as householders were likely to be insured and had a remedy against the construction company that had built their houses. On the facts, therefore, no duty was owed.

In the most recent case, *Vernon Knight Associates v Cornwall Council*,⁵⁴ the Court of Appeal held that a duty of care was owed by a highway authority in respect of maintenance of a highway drainage installation. However, the finding of liability was not unexpected; the decision is very much on a par with both *Sedleigh-Denfield*⁵⁵ and *Bybrook Barn Garden Centre Ltd v Kent County Council*,⁵⁶ in that the flooding arose from failings in an artificial drainage installation that were known about.

In that case, the local highway authority's employee responsible for maintenance on the ground was aware that this was a flooding hotspot. Indeed, his usual practice at times of heavy rain was to break off from other work and drive straight over to the 'hotspot' so that he could remove any debris from the gratings over gullies. However, on two occasions he did not follow his normal practice and as a result flooding occurred, which damaged the claimant's adjoining holiday park. The council was held liable for the

46 Note 21.

47 The plaintiffs were forced to install pumps to prevent future flooding from the impeded drainage. The defendants also filled in the osier bed, forcing the water already present there back onto the plaintiff's land; that 'squeezing out' lasted for about five years. So far as that development resulted in additional water being discharged from or rather squeezed out of the defendant's land onto the plaintiff's land, it did amount to actionable nuisance on well established principles.

48 Note 44.

49 Note 1.

50 Note 7.

51 Note 1.

52 Note 18.

53 Note 31.

54 Note 4.

55 Note 2.

56 [2001] BLR 55.

flooding in nuisance. In a sense the council's own practice was used against it as indicative of the standard of practice which it was reasonable for it to follow. Viewed another way, it could be said that the flooding had been caused by operational negligence. There is nothing particularly radical or surprising about the finding of a breach of a duty of care in this case, in my view.

There are other indications that the courts are unwilling to extend the *Leakey*⁵⁷ principle too broadly so as to impose overly extensive duties of care as between neighbours. A clear example of this is *Holbeck Hall Hotel Ltd v Scarborough Borough Council*,⁵⁸ in which the Court of Appeal overturned a first instance decision imposing liability on the council in respect of a catastrophic subsidence of a cliff within the council's ownership that caused extensive damage to an adjoining hotel on the basis that the local authority could not have foreseen the extent of the risk to the hotel without commissioning extensive geological investigations, which it was not obliged to do.

This decision limits the potential scope for imposition of liability on the basis of *Leakey*⁵⁹ since the defendant must have actual or constructive knowledge of not only the hazard but also the particular risk it poses. The same principle is likely to apply to restrict liability for flooding where the risks, or at least of the extent of the risks, cannot be said to be reasonably foreseeable in the absence of more detailed hydrogeological investigations. Even if a particular locality is prone to flooding, it may very well be said that a more catastrophic flooding event at such a locality was not such as could reasonably have been foreseen.

As can be seen from the discussion above, there are also signs that the courts are uncomfortable with investi-

gating or taking into account the relative means of individual litigants⁶⁰ or the extent to which they would be able to obtain insurance cover, preferring to adopt rather more objective standards.⁶¹

Going round in legal and hydrological circles

So where does all this leave us? The answer is probably not very far from where we started. Although *Leakey*⁶² is welcome insofar as it imposes a duty in relation to true hazards that can be dealt with using minimal effort and/or expense, on the whole it has brought with it an acceptable level of unpredictability into an arena where rights and obligations ought to be certain. The *Leakey* duty is so broadly framed that it says little as to the actual duties owed by neighbouring owners to each other as regards naturally flowing water. It is therefore not surprising that the courts have found themselves turning to earlier decisions to find answers in particular cases.

Therefore, the results in any given cases are likely to be similar if not the same. However, the pathways to establishing liability are less certain and transparent than they were before. Furthermore, the broadness of the *Leakey* duty will have encouraged or required neighbours to litigate to resolve disputes, usually at great expense to themselves. That is an unwelcome development in itself. Why should litigation be necessary? On closer reflection it can be seen that the *Leakey* principle has done little to shift the underlying dominance of the 'everyone for himself' ethos that has been so strongly entrenched in our water law for more than 200 years.

57 Note 1.

58 [2002] QB 836.

59 Note 1.

60 See *Abbahall Ltd v Smee* (n 29), where the owners of a flying freehold and adjacent premises beneath it were held liable to contribute to the repair of the roof in proportion to the relative benefits each party derived from the roof (in that case 50:50). It was held that it was not reasonable to reduce the financial liability of one party based on that party's financial circumstances.

61 *Vernon Knight Associates v Cornwall District Council* (n 4) at [70] (Sir Stanley Burnton LJ) and at [47] (Jackson LJ).

62 Note 1.

Flood risk and insurance

Duncan Spencer *EDIA Limited*

Introduction

My specialist subject is really insurance for pollution, but flood risk insurance is becoming increasingly important. The insurance industry is very reactionary, in that it waits for problems to arise before policies and processes are adjusted. As a result, as far as floods are concerned, the industry is going through a huge transition, with respect to both liabilities and protection and therefore there are very few specialists in this area as yet.

Flooding affects us all, usually in obvious ways but sometimes indirectly too. Owing to the radical change taking place in our industry, we need to establish whether insurance is available, and for what. We need to know whether the flooding events that have occurred all around the world are responsible for the pollution it is alleged they have caused, where some of the case studies referred to later on are particularly helpful.

The 2014 floods in the UK gained significant coverage in the press. At the same time, the proposed solution to flood insurance “Flood Re” became a focus of attention. However, this simplifies an issue that is extremely difficult to predict and manage in a sustainable way. Flood events are set to increase in scale and frequency over the coming years, and with this comes a need to manage them and make financial provision against them.

This article examines the impact of flooding and the methods of managing their impact both from a first party and third party viewpoint.

How flooding affects us

When we hear about floods, our first thoughts are of residential properties damaged by rising water levels, and of people's lives being devastated as a result. However, flooding affects us in many other ways too, such as the impacts on businesses and infrastructure, and particularly on the railways, many of which were built more than 100 years ago.

The Environment Agency has stated that, in 2014, some 5800 properties were affected by flooding. However, in comparison, in the summer of 2007 more than 48,000 residential properties were affected, as well as nearly 7000 businesses, which puts these numbers into a different perspective. How bad is it going to get in the future? The guestimate at the moment is that 5.2 million properties are at risk of flooding, with a potential bill for repairs of £1.1 billion a year, which could rise to £27 billion by 2080 and could mean that, by 2035, flooding could cost us upwards of £1 billion a year.

Clearly, for various (largely political) reasons, the flooding of 2014 has been publicised much more heavily than it was in previous years.

The role of insurance

Insurance is the principle of a risk of a few people being spread amongst many people. It is a method of financial provision that we all use. However, as the costs increase, the number of people who actually buy the insurance reduces, and it is this factor that is causing the changes that the insurance industry has been going through. For example, if I live at the top of a hill, why should I pay for insurance for someone who lives at the bottom of the hill whose property is at risk of flooding? Here, there is an element of self-choice: living in an area at risk of flooding is (at some level) a choice and, as a result, the premium associated with insurance for living there should be expected to increase. Consequently, fewer people are going to buy it. Therefore, the insurance industry or, rather, the government, has been led to consider ‘Flood Re’, which is a way of actually managing the cost of insurance.

I will discuss ‘Flood Re’ in more detail later on. First, however, we need to dissect insurance costs from two different aspects, namely first-party risks and then third-party risks. First-party risks cover the risk of damage to your own property, ie through household insurance. Almost three-quarters of claims for flooding relate to residential (ie first-party risk) properties. When providing guidance to clients with property in flood plains, advisers should consider these first- and third-party liabilities and ensure that adequate insurance is in place.

Regarding third-party exposure, however, very little has been achieved. Third-party exposure in this context refers to the insured's own liability. Their concern is that the UK Government has failed to manage flood plains correctly, that it has failed to install adequate protection measures and that the flooding events that occurred in 2014 in particular have caused additional pollution for which they should not be liable. Owing to the cause of these events (gradual pollution or events caused by an operator's actions), standard public liability insurance may not respond.

Flood reinsurance

In an effort to resolve the problem, as well as the escalating costs of first-party risk, the UK Government has developed a Flood Reinsurance scheme known as ‘Flood Re’. However, owing to the change in government following this year's general election, Flood Re's implementation has been delayed and, following a further consultation period, it is not now due to come into effect until April 2016. The Flood Re scheme will be a not-for-profit flood reinsurance fund,¹ owned and managed by the insurance industry and

¹ See <https://www.abi.org.uk/Insurance-and-savings/Topics-and-issues/Flooding/Government-and-insurance-industry-flood-agreement/Flood-Re-explained>.

established to ensure that those domestic properties in the UK at the highest risk of flooding can receive affordable cover for the flood element of their household property insurance.

Reinsurance is one way in which insurers themselves can insure against large-scale losses with other insurers. Although insurers will be selling policies to their customers in the normal way, they can subsequently pass on the risk under those policies to a reinsurance company or, in this case, a reinsurance vehicle such as Flood Re, where those risks will be pooled into a fund which refunds the insurers if claims are made by their customers. The contractual liability of the original insurer to make payments to those customers if a claim is made still remains, and the insurers will be obliged to make those payments, although they will now be able to reclaim from the Flood Re pool, in their turn. In this way insurers are able to assume more risk on the basis that the burdens of large claims are more widely spread.

The delay in the implementation of 'Flood Re' is not the only problem. When it does become available it will *not* provide cover for:

- commercially-insured privately rented homes
- leasehold properties that are also commercially insured
- all properties built since January 2009
- properties in council tax band H.

Commercially-insured homes could include social housing. Thus, if an investor buys insurance for all of its tenants and then claims that insurance back, the premiums will not be repayable under Flood Re. It is estimated that about three million properties will not be covered under Flood Re on that basis alone. The Leasehold Knowledge Partnership² estimates that there are almost five million leasehold properties in England and Wales, of which more than three million are owned privately (almost two million in the social rented sector). Thus, for new properties and all leasehold properties it is inevitable that insurance premiums are going to increase hugely, to the point where insurers will not be able to offer cover.

Third-party risks and public liability insurance

Third-party risks are liabilities to third parties. Public liability insurance covers the costs of legal action and compensation claims made against a business if a third party is injured or their property suffers damage whilst at business premises or when work is undertaken in their home, office or business property. In a much wider context, included within third-party risks is the responsibility to maintain the UK's flood defences, as well as pollution caused by flood defences. Much will depend on interpretation of the policies and the resilience of insured properties to ensure that adequate protective measures have been implemented. It is a question of establishing the point at which the liability starts or stops, which can very often be merely a matter of semantics.

Public liability insurance relates to pollution damage caused by flooding. For the liability to bite, it must be demonstrated that the damage was accidental and was caused by a sudden event, which can be very difficult to prove one way or another. In addition, damage to the environment may not be immediately evident or its future impact assessable and, often, public liability insurance policies will not cover the potential risks, either to the environment or to natural habitats, and exclusions will mean that claimants will have no remedy.

Case studies

Cited here are some examples of flood events in which I have been involved, in one way or another, where pollution incidents are unlikely to have been covered by standard insurance protection.

First, in Coffeyville in the US in 2007 there was a storm surge coming down the river and the EPA informed the refinery that the surge was fast approaching both the refinery and its fuel storage area, which were located close to a residential area that was already heavily flooded. At the time the refinery was pumping liquids into one of the huge storage tanks located at the site. The planned procedure was that, shortly before the surge was due to arrive, the pumps would be switched off and everything would be battened down so that, in the event of flooding, the water could continue travelling without causing any spillage. Unfortunately, when the surge arrived the pump valves failed to close owing to a maintenance failure and 71,000 gallons of oil were released into the environment.

The insurance cover paid for the cost of demolishing the severely damaged oil-covered residential properties and compensating their owners accordingly, whilst leaving the environmental damage caused by the oil to resolve itself over a period of time, as nothing further could be done to remove it from the ground.³ With a population of 11,000, Coffeyville was hit hard, whilst the oil slick travelled down the Verdigris River and into Oklahoma.

Secondly, and rather closer to home, at the Beddington sewage works storm events in 2014 produced huge quantities of rainwater and the sewage works were inundated. Rather than allowing the sewage works to flood, the grey water was released into the River Wandle, which flows through Croydon, Sutton, Mitcham, Wimbledon and Wandsworth, which caused significant and long-lasting environmental pollution damage.⁴

Thirdly, during a huge storm, 150 people died in Accra in 2015 after attempting to take shelter by hiding under an awning at a petrol station. The rainwater flooded the diesel and petrol tanks, which displaced the fuel so that the fuel was on top of the water. An adjacent building caught fire and the resultant fireball blew up the petrol station. President Mahama of Ghana has vowed to take tough measures to stop people building on waterways, which was a major factor here when the fire started.⁵

2 <http://www.leaseholdknowledge.com/lkp-urges-minister-include-leaseholders-flood-re-insurance-plan>.

3 <http://www.cbsnews.com/news/oil-spill-adds-to-kansas-flooding-misery/>.

4 <http://www.wandletrust.org/?p=5060>.

5 <http://www.theguardian.com/world/2015/jun/05/death-toll-accra-floods-petrol-station-fire>.

Conclusions

Damage caused by flooding is an extremely emotive subject which is often waded into by politicians and the press, who have little understanding or knowledge of the complex nature of its management and prediction.

However, it is a recognised fact that the risk of flooding will increase and as a result its impact will also become more significant. Insurance as a tool to provide financial provision against this impact is set to become more expensive. The UK Government is in the process of implementing methods of controlling these costs through

Flood Re, although it will not deal with all properties; neither will it deal with provision against liability caused by flooding.

The risks associated with flooding, as well as the risks following a flood event, are not only going to increase with time, but there are going to be more and more instances of insurance being unavailable or limited, particularly with regard to pollution damage caused by flooding events under public liability insurance policies. There is no solution to this widening gap in insurance coverage. We can only try to ensure that we are prepared and ready for whatever the British weather might throw at us!

Water regulation in the United States: background and current major issues

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Introduction

Good morning. I'm Steven Miano. I am an environmental lawyer in Philadelphia in the United States, where I have been practicing for about 30 years. I am also the Chair of the American Bar Association Section of Environment, Energy and Resources ("SEER"). SEER is somewhat equivalent to UKELA, although we are larger, with about 9,000 to 10,000 members. We produce a number of publications; put on several different conferences during the year and we have 28 substantive committees. We also are developing what I think is a terrific relationship with UKELA. Members of UKELA have come to speak at our conferences in the States and I think this is not the first time a SEER lawyer from the States has addressed one of UKELA's conferences. So we really appreciate our work together and we hope to further strengthen our relationship in the years to come.

So, I have the enviable task of addressing you on water law in the US but I have the unenviable task of trying to do it in about 20 minutes. I will do my best. By way of introductory remarks, the Clean Water Act is our main federal statute in the United States.¹ It recently turned 40 years old and, with middle age, things can change! It sometimes appears that the Clean Water Act is under attack on all sides in terms of basic questions like jurisdiction. In other words, basic questions have arisen regarding the jurisdiction of the Clean Water Act. You would think that we would know what the jurisdiction of this law is after 40 years, but it turns out we may not. Other important issues that keep US lawyers busy in the water law area are nutrient pollution and bay and estuary clean-ups. Also, the interplay between the Endangered Species Act² and water law, particularly in the western part of the country is a very big issue. Finally, flooding, stormwater, and droughts are urgent matters that need addressing right now in the States.

Clean Water Act: background

I thought that I would start off with a bit of a basic primer on US water law – how we regulate water in the States. To put US water law in context, the main federal water law first passed by Congress was the Federal Water Pollution Control Act (a.k.a. Clean Water Act)³. It was passed in 1972. It was also known as the Clean Water Act. It was passed on the heels of what is known as the Cuyahoga

River fire, which occurred in 1969 near Cleveland, Ohio. The fire started because many of our rivers back then were used essentially as chemical sewers. It was at a time when there was little prohibition on dumping chemicals into most of the waterways in the U.S. One day, when welders were working on a dock along the Cuyahoga River, which is in a heavily industrialized area of Ohio, a spark hit the water and the river burst into flames and burned for quite some time. It was a huge catastrophe and Congress took notice and decided that something must be done about the pollution.

Reactive legislation is very typical in the States, and many of our federal environmental laws have been triggered by some sort of environmental catastrophe, which is what led to the Clean Water Act. Interestingly, it was initially vetoed by President Richard Nixon, who was not particularly well known for his environmentalist views. Congress overwhelmingly and quickly overrode his veto, but Nixon, being a tricky guy with strident conservative views, decided to impound all of the funds to be used to implement this new law. Eventually the whole mess ended up before the US Supreme Court, which decided in a famous case *Train v. City of NY*⁴ that Nixon could not impound the funds. Clearly the Clean Water Act had a rough birth.

Key aspects of regulation under CWA

The original goals set out in the legislation are broad and include the eventual elimination of all discharges to water and the maintenance of fishable and swimmable waters.⁵ These are two wonderful goals, although they are somewhat unrealistic as discharges are inevitable, and will continue to be so in our lifetime.

Minimum industrial effluent standards are set out in the Act, together with stringent water quality standards, which may depend on the quality of the receiving water body. Discharges are controlled by a permitting system, although generally it is only surface water discharges that are regulated in the US, at least at the federal level. Permits are typically issued by the states. Most US federal environmental laws provide a framework of basic standards and the program may be delegated to states. States can apply to be the delegated entity under that law and will run the program with oversight from the federal government. That is the case in most states under the Clean Water Act. The Clean Water Act also contains oil spill clean-up provisions (Section 311),⁶ which have been used in the *Exxon Valdez*

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¹ Clean Water Act 33 U.S.C. §1251 et seq.

² Endangered Species Act 16 U.S.C. §1531 et seq.

³ Pub. L. 92-500 (October 18, 1972).

⁴ *Train v. City of N.Y.*, 420 US 35 (1975).

⁵ See 33 U.S.C. §1251(a).

⁶ 33 U.S.C. §1321.

case⁷ and, more recently, in the BP *Macondo* oil spill.⁸ Under that provision the government can take over and conduct the clean-up itself, sue the responsible parties for the cost of the clean-up, and seek civil penalties.

Enacting bodies and permits

The US EPA is responsible for issuing permits for most discharges under Section 402 of the Act except in delegated states.⁹ It oversees the delegation to states, and the administration of the delegated programs. It also promulgates standards – including high level technology-based industrial standards for the issuance of discharge permits and maintenance of water quality. The US Army Corps of Engineers (ACOE) is involved with wetlands, and it issues permits for discharges of fill material into wetlands; under Section 404 EPA retains veto authority over such permits.

The National Pollution Discharge Elimination System (NPDES) under Section 402 EPA is the discharge permit program. All dischargers must have a permit for a “discharge of a pollutant” into the “waters of the US” from “point sources.” These terms are broadly defined¹⁰ and are still sometimes disputed in the courts – “Discharge of pollutants” means the “addition” of pollutants. “Pollution” is very broadly defined to include virtually all wastes and materials and also heat, so that a plant discharging heat is subject to permitting in the States. “Point sources” are generally defined as discernable, confined and discrete conveyances; not necessarily limited to a pipe, and so may include a gully or something akin to a gully that discharges water. Interestingly, to demonstrate how powerful the farm lobby is in the US, there is a broad exclusion for agricultural stormwater discharges under the CWA.

Effluent standards under Section 402 are based on a variety of different things: the type of pollutant, the source of the pollutant, the body of water into which the pollutant is discharged, the technology available, and so on.

It is important to note that, at the federal level, discharges from nonpoint sources are not regulated under the Clean Water Act. This is often seen as a major failing of this Act. Therefore, runoff from farms, golf courses etc, which are huge sources of pollution, are generally exempt. In some cases, certain agricultural discharges have been defined as point sources under the law – e.g., concentrated animal feeding operations, or “CAFOs” – and there is some regulation of these discharges. However, by and large, non-point sources are simply not covered.¹¹

Also, states can be more stringent. A delegated state can implement a program that is more stringent and more comprehensive (although not inconsistent) but not all states do. Some just incorporate the federal regulations by reference.¹²

Wetlands under Section 404

A permit is required under Section 404 to discharge what is called “dredge and fill” material to wetlands and the permitting regime is administered by the US Army Corps of Engineers.¹³ EPA retains veto power, which is very rarely used. Regulations define wetlands, although jurisdictional issues have arisen over the years.¹⁴ Wetlands are defined based on the types of soils, the hydrology, and the types of vegetation. Permits can be individual or general. General permits are called nationwide permits and cover routine actions such as road crossings.¹⁵

Groundwater generally is not regulated by the federal government, whereas many states do regulate discharges to groundwater.

Water quantity and uses of water

The regulation of water uses and the development of water resources is a complex area in the US, depending upon the geographic location. In some parts of the eastern US management may be through water basin commissions that have been developed over the years and created by Congress. In the west, the doctrine of prior appropriation prevails whereby water is treated almost as property. For example, if I appropriated water many years ago, I “own” it now, and I can typically sell it to somebody else. And so water transfers take place all over the western part of the country. This can make the legal framework of water use very complex.

Jurisdiction: the new waters of the US Rule

Under the Clean Water Act, jurisdiction is limited in the statutory language to navigable waters, which are defined as “waters of the United States and territorial seas.” Initially, this definition appeared to establish limitless jurisdiction. I used to say, “if you can float a paper cup in it, it is jurisdictional.” But this is no longer necessarily the case. In a series of US Supreme Court cases, the Court has looked at the breadth of the Act’s jurisdiction and questioned it. It also started to limit it. In the *U.S. v. Rapanos* case,¹⁶ the Court took up the question of jurisdiction. Frankly, the case made a complete mess out of jurisdictional issues. Five different decisions were filed by nine justices as almost none of them could agree on the scope of jurisdiction. The EPA attempted over the ensuing years to set out some guidance and draft regulations – but it has always been a very political issue, pitting environmentalists against farmers and energy companies among others.

On May 27, 2015, the EPA and ACOE issued a Final Rule on jurisdiction.¹⁷ The rule tries to define what are and are not jurisdictional waters based on the “significant nexus test” from Justice Kennedy’s concurrence in the *Rapanos* case. Here, waters must have a “significant effect on the

7 Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008).

8 <http://www.justice.gov/opa/pr/transocean-agrees-plead-guilty-environmental-crime-and-enter-civil-settlement-resolve-us>.

9 33 U.S.C. §1342.

10 See 33 U.S.C. §1362.

11 See 40 C.F.R. §122.23.

12 33 U.S.C. §1370.

13 33 U.S.C. §1344.

14 33 C.F.R. §§320-332.

15 33 U.S.C. §1344(e).

16 *Rapanos v. U.S.*, 547 US 715 (2006).

17 Published in the federal register at 80 FR. 37054 (June 29, 2015).

chemical, biological and physical integrity of truly jurisdictional waters" to be considered jurisdictional. The agency will have considerable discretion under this test. The rule also attempts to define as "jurisdictional" all "traditionally navigable waters" and their tributaries which have a specific bed, bank, and an ordinary high water mark. Certain ditches that drain waters, or discharge directly to waters, or that drain wetlands are also included. Finally, certain adjacent waters, even though they might be separated by a manmade gully, can also be considered jurisdictional. In some cases waters may be considered jurisdictional based on the distance to truly navigable waters.

The rule also contains many new definitions that ought to be reviewed. Prior to issuance of the rule, the Science Advisory Board (SAB) produced a study demonstrating that actual science not only justified the breadth of jurisdiction proposed by the EPA/ACOE under the rule, but also justified much broader jurisdiction.¹⁸

Challenges to the Rule

Since the rule was published, over half of the states have filed challenges to it and several mining and other industrial and farming interests have filed challenges in both federal district courts and courts of appeal. Many more are expected. Interestingly, an environmental group in New York called the River Keeper – Robert Kennedy, Jr. runs it – has filed a challenge because the rule is not stringent enough. At the moment, the focus is on which courts have jurisdiction to hear the challenge! Thus we have a very controversial but very basic issue in the States over the jurisdiction under the federal Clean Water Act. Perhaps in 10 years we'll better understand jurisdiction; likely after it makes its way through the courts. I am sure it will make its way to the Supreme Court once again.

Groundwater

As already noted, discharges to groundwater are not regulated under the federal CWA, but certain states do regulate discharges to groundwater. However, and interestingly, seven federal district courts have held that federal CWA jurisdiction may extend to groundwater under certain circumstances. On the other hand, two Circuit Courts of Appeal and three district courts have held otherwise. Interestingly, under the rule discussed above, the EPA stated that it is not extending jurisdiction over groundwaters in the US under federal law, so it will be interesting to see whether the environmental groups bring that issue up in their challenges to the rule.

Endangered Species Act and water

The Endangered Species Act (ESA)¹⁹ prohibits the take²⁰ of any endangered and threatened species and their habitats.

Interestingly, questions have arisen over whether the presence of endangered species may affect the classification and use of water bodies. Moreover, because ESA analysis typically arises in the context of permitting, the reduction (or expansion) of the definition of jurisdictional waters under the new CWA rule could impact the ongoing protection of such species. There are numerous cases in the US covering the interplay of the Endangered Species Act and the CWA which are worth reviewing.²¹

Estuary remediation

There are significant issues with bay and estuary degradation and remediation in the States, much of which is based on nutrients. And so we have major programs to develop clean-up strategies for these waters. One is the Chesapeake Bay, which is among the largest estuaries in the US. In fact, if you drove from the bottom to the top of the Chesapeake watershed, it would take you about 10 or 11 hours – a huge geographic area that we are trying to wrestle with. There are many other examples up and down the east coast and on the west coast. Water law practitioners spend a great deal of time on these issues. A great deal is at stake, both in terms of environmental protection and costs of remediation. Consequently, there is a great deal of litigation ongoing.

Stormwater

Stormwater is generally regulated under the NPDES permit program;²² if stormwater is discharged through a point source it requires a permit. But there are also provisions in the CWA regulations that allow certain discharges to be defined as point sources for the purpose of regulating stormwater. For instance, runoff from industrial activities, factories, and so on are defined as point sources. Municipal storm sewers are also generally classified as point sources. The EPA has produced a large body of guidance on stormwater NPDES permitting.²³ As a consequence of the cost of dealing with such municipal stormwater, many communities are developing "green infrastructure" to reduce pollutants in stormwater runoff. Such prospects include infiltration systems, wetlands creation, rooftop gardens, and similar structures that trap and purify stormwater runoff. EPA has had a National Stormwater Rulemaking in draft for some time. It is currently on hold.

Flooding

Since Hurricane Katrina (2005) and Hurricane Sandy (2012), which caused particularly severe damage in New York and in New Jersey, flooding has become a major concern in the US. The US Army Corps of Engineers has engineered flood defenses over the decades, many of which failed in these floods. Consequently it has been roundly

¹⁸ yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activities/watershed%20connectivity%20Report?OpenDocument.

¹⁹ 16 U.S.C. §1531 et seq.

²⁰ "Take" includes harass, harm, wound or kill endangered or threatened species, and "significantly modifying habitats." See 16 U.S.C. §1532.

²¹ See e.g. *National Association of Homebuilders v. Defenders of Wildlife*, 127 S. Ct 2510 (2007).

²² See 40 C.F.R. §§122.21–37.

²³ See water.epa.gov/polwaste/npdes/stormwater/.

criticized, although it cannot generally be sued because of sovereign immunity. States and the federal government are struggling to decide what to do about flooding issues due to ever increasing frequency and severity of storms and associated flooding. The national flood insurance program is facing large debts after the floods of the past decade.²⁴ At the same time, the volatility of water levels – from extreme lows in times of drought to flood waters – creates severe problems with resource management.

Efforts are aimed at trying to identify flood prone areas and developing adaptive strategies and regulations. For example, an Executive Order from the President of the US, issued in January 2015, requires federal agencies to consider rising seas and stronger storms when it builds or when it makes grants for building and infrastructure projects.²⁵ Also, the Federal Highway Administration Directive of December 2014 was issued to increase preparedness and resilience to extreme weather events by removing regulatory barriers, incentivizing states and local communities, and conducting research.²⁶

States are also developing varied new storm control management plans with federal help. New York City has proposed a US\$4.1 billion disaster recovery program involving green infrastructure and wetlands restoration, along with massive projects to protect Lower Manhattan from

future floods. Other states have developed strategies including Sea Level Rise Task Forces to combat flooding. Insurance companies and lenders are also looking closely at liability for floods and law firms have set up specialized flooding practices to manage risks, property rights, loss, compliance, and liability for infrastructure damage.

There are some very significant cases in litigation over flood issues and flood protection planning. For example, there is a case in New Jersey where a landowner sued over dune protection projects, essentially arguing, “I don’t want you to build dunes to protect other properties because I won’t be able to see from my ocean front mansion.” The New Jersey Supreme Court dismissed that case but did say there might be an element of takings associated with such protections.²⁷ Case law is developing in the takings area in which courts are balancing losses against actual benefits of flood control projects. Suffice to say, flood cases and takings cases in the flood protection context are both interesting and active.

Conclusion

I appreciate the opportunity to address you on CWA issues in the US. To be sure, water law work in the US is extremely varied and lively.

²⁴ See www.fema.gov/national-flood-insurance-program.

²⁵ <https://www.whitehouse.gov/the-press-office/2015/01/30/executive-order-establishing-federal-flood-risk-management-standard-and->

²⁶ <http://www.fhwa.dot.gov/engineering/hydraulics/policymemo/0650asu2.cfm>.

²⁷ *Borough of Harvey Cedars v. Harvey Karan*, Docket No. A-120-111 (July 8, 2013).

Water and wastewater services and planning – a water company's view

Kate Zabatis *Regional Regulation Manager, United Utilities**

Introduction

This brief article will look at water and planning generally, touching on aspects of the Planning Act 2008¹ and how this is linked to a water company's environmental work and responsibilities, before turning to a particular water resource case study. At the end the question 'Is the planning system really able to deliver the water infrastructure we need across England?' will be discussed.

Planning

What has changed – if anything – for a water company under the Planning Act 2008 and the provisions in the Act for nationally significant infrastructure projects (NSIPs)?²

The Act sets out the regime for identifying and progressing NSIPs in order to reduce the amount of time and effort it has taken previously for major projects in the field of energy, transport, water, waste and waste water to be given planning consent. Under the Act the system for England is based around the preparation of policy documents for England setting out the case for major infrastructure. The National Infrastructure Planning team at the Planning Inspectorate make recommendations to the Secretary of State who then determines the application.

There are three main elements to the new procedures for NSIPs:

1. The designation of National Policy Statements (NPSs)
2. The creation of the National Infrastructure Directorate (NID) which has been established in the Planning Inspectorate
3. The creation of Development Consent Orders (DCOs) to authorise NSIPs.

National Policy Statements were introduced in order to provide a clear strategic policy framework for decision-making on nationally significant infrastructure. They are subject to parliamentary scrutiny, public consultation and Appraisal of Sustainability (AoS) including, where appropriate, Strategic Environment Assessment (SEA).

The Act specifies that National Policy Statements can include:

- the amount, type or size of the specified development
- criteria to be applied in deciding suitable locations
- the identification of 'strategically suitable' sites for location-specific NPSs for aviation and nuclear power
- the appropriate statutory undertaker to carry out specified development
- mitigation measures.

Development Consent Orders are orders granting development consent, introduced by the Act. They can include a range of separate consents which can take the place of, for example:

- consents including planning permission
- listed building consent
- conservation area consent.

Future plans for the north-west of England

For United Utilities this has not meant much change because it depends whether one of our projects hits one of those nationally significant infrastructure project 'triggers'. It is more about how we plan for the future within United Utilities that is important. Stakeholder management is a key aspect to ensure that we secure successful outcomes.

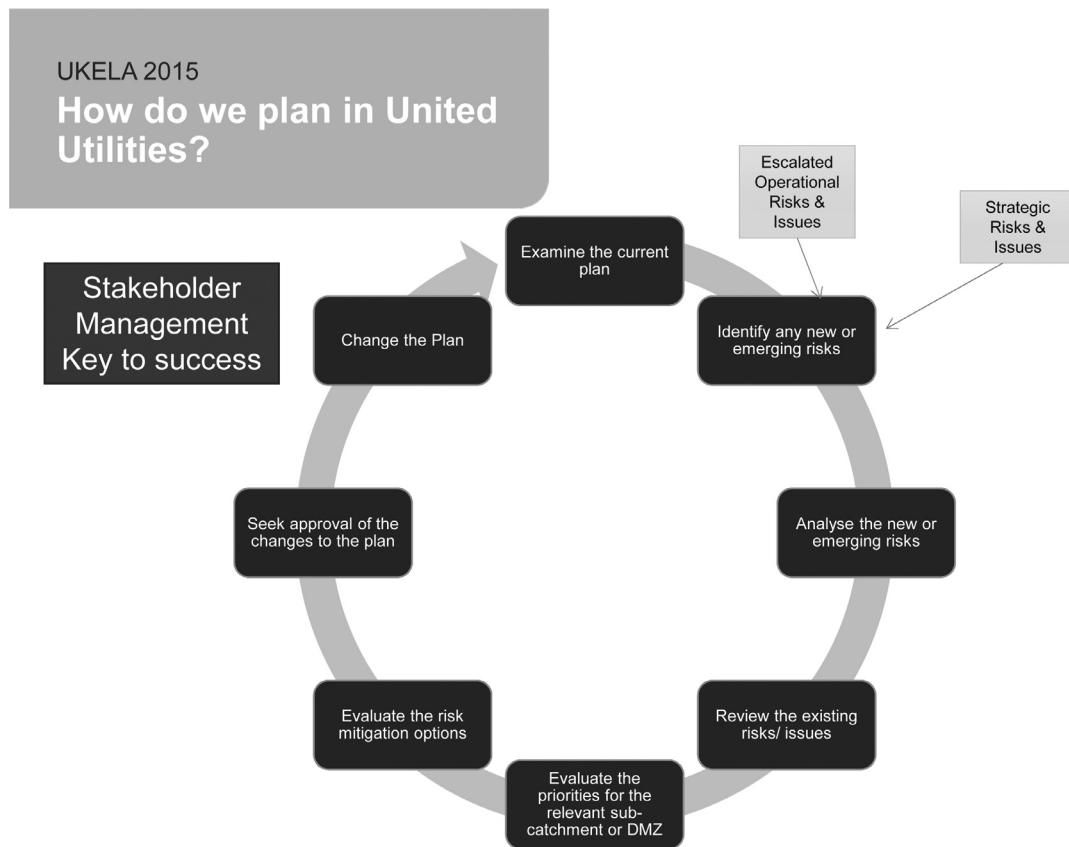
Within the north-west of England in the period 2010–2015 United Utilities is spending approximately £3.5 billion in improving our water and wastewater network and treatment capabilities. This investment has been made to ensure that we can change, adapt and modify our systems to changes in lifestyles and in weather patterns, which also reflect the ever-increasing regulatory requirements. The factors that are taken into account are population growth, climate change – the need to make sure our assets are resilient – and the necessity to ensure that what we discharge back into the environment complies with European directives and all the national legislation. All the water companies have to assimilate the national legislation, the EU directives, and the ever-tightening standards required whilst delivering the core services of supplying water and collecting and treating wastewater so that it is safe to return to the environment. (See Figures 1 and 2)

Ultimately the improvements required to comply with water quality obligations are defined in the River Basin Management Plans (RBMPs). River Basin Management Plans are a requirement of the Water Framework Directive and a means of achieving the protection, improvement and sustainable use of water (including the discharges to the

* United Utilities is one of the UK's largest water and wastewater companies supplying 7 million people in the North West of England with drinking water. There are around 3 million homes and 200,000 businesses in the region which covers Cumbria, Lancashire, Greater Manchester, Merseyside, and parts of Cheshire and Derbyshire.

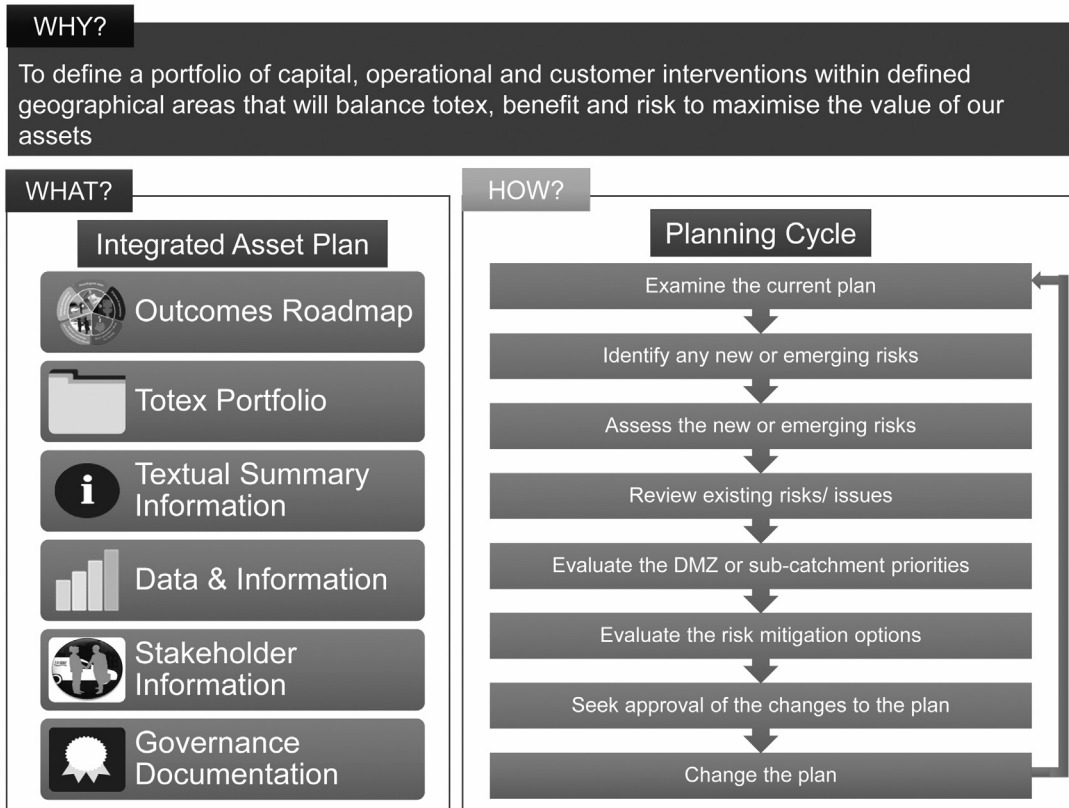
1 <http://www.legislation.gov.uk/ukpga/2008/29/contents>.

2 The responsibility for decision-making for NSIPs was granted to the Infrastructure Planning Commission (IPC) by the provisions laid out in the Planning Act 2008.



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Figure 1.



Copyright © United Utilities Water Limited 2015

Figure 2.

environment) within river basin districts. Currently, the first cycle RBMP is in place, the second cycle RBMP is to be agreed by Defra and will be published in early 2016. The plan outlines the objectives for each water body, the reasons for not achieving objectives where relevant and the programme of actions to meet the objectives. The second cycle plan outlines the requirements to meet the challenges of the Water Framework Directive in particular and also the Habitats Directive over the next 5–10 years and up to 2027. Tightening chemical standards due to a European-wide focus on the reduction of priority and hazardous substances is a key focus over the next planning period.

Water resource case study

United Utilities supplies water in the North West of England from Carlisle down to Crewe under a very complex system. Our obligations as a water company are to ensure we can deliver water to customers that is wholesome, and make sure that that water is delivered in a sustainable way. One area of focus is the sustainable supply of water in the West Cumbria zone which only serves 2 per cent of our customers around Workington, Whitehaven, Maryport and Cockermouth, but includes the Lake District which is recognised as an outstandingly beautiful area.³ The area around the Ennerdale and River Ehen is particularly environmentally sensitive, providing unique challenges due to the presence of a protected species called freshwater pearl mussels.

In order to ensure a more resilient water supply network, we are proposing to link the West Cumbria zone with the rest of our network by a major pipeline. A new supply pipe for West Cumbria would mean Ennerdale Water, plus a number of other protected habitats, would no longer be used to supply drinking water. The new pipeline will ensure there is enough water for the area's households, businesses and the environment long into the future. The Lake District contains many protected and

unique environments, so trying to connect that small zone of 2 per cent of our customers to the rest of the network with a new supply pipe will need careful planning. It is also important to consider water efficiency and the involvement of customers so that they understand the challenge that we face and can play their part. Local engagement – including the local authorities, the NGOs, the third sector groups – is increasingly important to ensure that the improvements are delivered.

United Utilities also maintains the sewer networks and makes sure that wastewater is collected, treated and discharged back into the environment in an appropriate manner. Investment in our sewers is needed to keep up with demand from the region's growing population, changing patterns in rainfall and the risk of flooding. We want to look at how we can deliver improvements to water quality, focusing beyond our own treatment plants and sewers by working in partnership with other organisations. We want to ensure through the introduction of the new stakeholder management that the local authorities, the Environment Agency stakeholders and other stakeholders are involved and understand our plans, so that when it comes to seeking planning permission and new protective measures for the environment as many people as possible are aware of the pros and cons.

So in summary, the changes to the planning system we think are timely, because although the West Cumbria area and the new proposals have been managed successfully without reference to the NSIP, there will be other developments in the future that may require use of NSIPs. The investment required to meet challenging time scales and generally much tighter environmental standards over the next ten-year period is significant. Project management involving stakeholders and the coordination of regulatory bodies is essential to avoid delays in project development and delivery. This is the area which is particularly important for water companies to expand so as to deliver a sustainable water supply and sewerage service for the future.

³ The Lake District, in Cumbria is a National Park and contains all the land in England higher than 3,000 ft (910 m) above sea level, including Scafell Pike, the highest mountain in England. It also contains the deepest and longest lakes in England, West water and Windermere.

Protection for aquatic habitats: are land-based legal tools appropriate?

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Legislation for the protection of habitats by protected area designations has generally been drafted to meet the needs of terrestrial habitats and the species they support. It is argued that this approach is not always conducive to marine and freshwater conservation, especially for mobile species for which fixed sites are both difficult to define and of limited value. The list of species and habitats protected is also inadequate for most types of designation because there is an emphasis on vertebrates, especially birds and mammals.

Terrestrial and aquatic habitats

The land area of the UK is approximately 240,000 square kilometres, of which about 0.7 per cent is inland water comprising lakes, reservoirs and major rivers. The sea area, including the Exclusive Economic Zone (EEZ), which extends to a maximum of 200 nautical miles from the territorial sea baseline, is approximately 774,000 square kilometres. If the full extent of UK jurisdiction over the continental shelf is included, the area is even greater. These statistics alone suggest that conservation policies and laws should take account of aquatic habitats and their conservation requirements. The fact that these aquatic habitats support a wide range of types of organism, many of which have no equivalent land-based forms, makes the case for adequate protection even stronger.

Freshwater conservation, as such, has traditionally been seen as part of terrestrial conservation and there are no specific freshwater conservation tools. Prior to 1981, the same could be said of marine conservation. There is no doubt that marine conservation has a shorter history than terrestrial conservation, mainly because of a lack of knowledge and understanding of the need. Much has been written on marine conservation as the Cinderella of the conservation movement.¹ In theory, this is all in the past and considerable attention has been paid at international, European and UK levels to improving the scientific understanding of marine habitats and providing legal management tools.

This article considers the present situation and argues that there still is not an even-playing field between aquatic and terrestrial conservation. The discussion is largely confined to the situation in England and Wales, although similar arguments could be applied to other parts of the UK and, indeed, other administrations.

Legal measures for habitat protection

There is a plethora of formal and voluntary protected area designations in England and Wales but the main legal mechanisms for habitat protection are sites of special scientific interest (SSSIs) and regulations implementing the Birds and Habitats Directives. There are also some specific measures for aquatic environments that include protection of habitats, notably European framework directives covering water environments. Political interest in the marine environment has not been limited to marine conservation and there is now a strong emphasis on the need for better ways of managing human impacts, mostly driven by European and international policies.

The first of these European initiatives led to the adoption of the Water Framework Directive (WFD) in 2003.² One of the purposes of this directive was to bring together disparate pieces of legislation relating to different aspects of the water environment. More significantly, it introduced a novel, cyclic process whereby Member States were obliged to take action to achieve good quality and quantity standards for water. Member States were required to produce river basin management plans including a characterisation and assessment of features, provisions for environmental monitoring, the setting of environmental objectives and a programme of measures all designed to improve and/or maintain water quality.

The directive does not introduce any new types of protected area but the identification and monitoring of relevant protected areas designated under other legislation is required. The implementing regulations define protected areas as 'areas and bodies of water . . . requiring special protection under any Community instrument providing for the . . . conservation of habitats and species directly depending on water'³ and, in particular, 'areas designated for the protection of habitats and species where the maintenance or improvement of the status of water is an important factor in the protection of the habitat or species'.⁴

The Marine Strategy Framework Directive (MSFD), adopted in 2008,⁵ is the environmental pillar for the EU's integrated maritime policy. It provides a framework for an ecosystem-based approach to management with the overall goal of achieving good environmental status (GES) by

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1 See eg A D McIntyre 'Introduction: a perspective on marine conservation' *Proceedings of the Royal Society of Edinburgh, Section B, Biological Sciences*, vol 100 (1992) 1–2; P J Jones *Governing Marine Protected Areas: Resilience Through Diversity* (Routledge 2014).

2 Directive 2000/60/EC establishing a framework for community action in the field of water policy. OJ L327/1 (22.12.2000).

3 Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 (SI 2003/3242) reg 8(2)(b).

4 *ibid* reg 8(2)(b)(iv).

5 Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive). OJ L164/19 25.06.2008.

2020 throughout the European marine environment. Each Member State is required to develop a marine strategy covering:

- an initial assessment of current environmental status of marine waters
- determination of what GES means for its marine waters
- targets and indicators designed to show whether GES is being achieved
- monitoring programmes to measure progress
- a programme of measures designed to achieve or maintain GES.⁶

The directive specifies the need for marine protected areas within the suite of measures but, like the WFD, it does not introduce new categories of designation. Unlike the WFD, the programme of measures are prescribed to include:

... spatial protection measures contributing to coherent and representative networks of marine protected areas, adequately covering the diversity of the constituent ecosystems such as special conservation areas pursuant to the Habitats Directive, special protection areas pursuant to the Birds Directive, and marine protected areas as agreed by the Community or Member State concerned in the framework of international or regional agreements to which they are parties.⁷

It is not surprising, therefore, that protected areas are included in the UK's proposals for implementing stage 5 of the directive. A consultation on proposals for the UK programme of measures ran across the UK and the devolved administrations from January to April 2015.⁸ By their own admission, the UK administrations have adopted a proportionate approach that avoids gold-plating but is considered sufficient to meet the requirements of the directive. The consultation document contains details on each of the 11 descriptors in the MSFD⁹ covering, inter alia, biodiversity, non-native species, fisheries etc. A number of generic measures are identified as important tools for achieving GES across a range of descriptors. Marine planning and licensing, impact assessments and marine protected areas are regarded as particularly important tools.

The reference to marine protected areas created under other international or regional frameworks is highly relevant in the UK context because of government commitments under the Convention on Biological Diversity (CBD)¹⁰ and the OSPAR Convention¹¹ to establish marine protected areas. In 2004, the Conference of the Parties to the CBD decided in favour of national frameworks of marine protected areas.¹² In a statement at the OSPAR

meeting in Sintra in 1998, ministers agreed to promote the establishment of a network of marine protected areas.

In 2003, the agreement was taken forward as a commitment for contracting parties to establish a network of marine protected areas which is both ecologically coherent and well managed by 2016.¹³ Special areas of conservation (SACs) and special protection areas (SPAs) under the Habitats and Birds Directives contribute greatly to this network but their focus is on features of importance at the European level. At the time these commitments were made, the marine nature reserve was the only type of protected area capable of protecting nationally important marine habitats but the legislation¹⁴ had proved difficult to implement and few designations were made.¹⁵

A new type of designation, the marine conservation zone (MCZ) was introduced in the Marine and Coastal Access Act 2009 to address this deficit. The purpose of MCZs is defined as the conservation of marine flora and fauna, marine habitats and features of geological or geomorphological interest.¹⁶ Rare or threatened species are identified as being of particular relevance but there is also a need to provide for the protection of species and habitat diversity. One of the reasons for establishing an MCZ is to contribute to the creation of a marine protected area network which contributes to the conservation or improvement of the marine environment and protects features representative of the range of features present in the UK marine area.¹⁷

Geographic scope of designations

The SSSI was introduced as a way of alerting planning authorities of the scientific interest of an area of land. Its importance as a conservation measure in its own right was considerably enhanced by changes introduced in the Wildlife and Countryside Act 1981 and its amendments and it has subsequently been changed from what was in essence a tool to protect the *status quo* to a mechanism for positive management. Its success as a conservation device has been questioned and it is undoubtedly the case that many SSSIs are in poor condition. However, the situation might well have been far worse had the sites not been designated and the importance of the SSSI should not be underestimated.

Because SSSI designation requires notification to landowners and occupiers, site boundaries have to be clearly defined.¹⁸ Notification of linear features such as rivers can

6 *ibid* chs II and III.

7 *ibid* art 13(4).

8 Defra 'Marine Strategy Framework Directive consultation: programme of measures' (January 2015) <https://consult.defra.gov.uk/marine/msfd-programme-of-measures>.

9 MSFD Annex I 'Qualitative descriptors for determining good environmental status'.

10 31 *ILM* (1992) 818 <https://www.cbd.int/convention/text/>.

11 32 *ILM* (1993) 1072 <http://www.ospar.org/convention/text>.

12 Cop 7 (9–20 February 2004) Decision VII/5 'Marine and coastal biological diversity' <https://www.cbd.int/decisions/cop/?m=cop-07>.

13 OSPAR ministerial conference (Bremen 2003) Recommendation 2003/3 <http://www.ospar.org/convention/agreements>.

14 Wildlife and Countryside Act 1981 ss 36–37.

15 There were two designations in England and Wales: Lundy and Skomer. For a discussion of the limitations of the legislation see J Gibson, L Warren 'Legislative requirements' in S Gubbay (ed) *Marine Protected Areas: Principles and Techniques for Management* (Chapman & Hall 1995) 32–60.

16 Marine and Coastal Access Act 2009 s 117.

17 *ibid* s 123.

18 Section 28(1) of the Wildlife and Countryside Act 1981 (as amended) requires the nature conservation body to notify owners and occupiers, the local planning authority and the Secretary of State of any area of land that is of special interest. Notification is a land charge (s 28(9)).

therefore be complicated because many different owners and occupiers may be involved and the line of the river is likely to change with time. There are also interesting legal questions over landowners' rights and responsibilities with respect to the water flowing over their land, as opposed to the river bed itself. Nevertheless, some important stretches of riverine habitat and their associated riparian land have been protected in this way.

The situation for marine environments is less favourable. The legislation does not define the geographical limit of the SSSI designation but it has always been assumed to be limited seaward by the extent of local authority planning powers. In effect, this limits the SSSI to land and waters above low water mark.

The Birds Directive¹⁹ provides protection for all species of wild bird in the 'European territory' of Member States and requires Member States to designate special protection areas (SPAs) to provide protection in 'the geographical and sea and land area where this Directive applies'.²⁰ The Habitats Directive²¹ also refers to conservation in the 'European territory of the Member States to which the Treaty applies'.²² The phrase 'European territory' was originally interpreted, in the UK at least, as meaning the land and territorial sea but it is now clearly established that the directives apply out to 200 nautical miles.²³ There is no doubt, therefore, that European law on the conservation of habitats extends to the full geographic scope of freshwater and marine habitats.

Similarly, the geographical scope of the MSFD covers the whole marine environment of Member States. Marine waters are defined as extending seaward from the territorial sea baseline to the 'outmost reach of the area where a Member State has and/or exercises jurisdictional rights, in accordance with the UNCLOS and also includes coastal waters landward of the territorial sea baseline'.²⁴ MCZs under this Act are limited to England and Wales and UK offshore areas;²⁵ different but broadly comparable measures apply in Scotland²⁶ and Northern Ireland²⁷ and the network of marine protected areas relates to the whole 'UK marine area'²⁸ including Scotland and Northern Ireland. The emphasis of the WFD is on freshwaters and groundwater but its geographic scope extends to up to one nautical mile offshore.²⁹

Scientific scope of designations

There is no definition of the scientific interest to be protected through SSSI designation³⁰ and scientific interest is a matter for the designating authorities.³¹ Detailed guidance³² has been produced based on habitat surveys and threshold criteria and this has stood the test of time. Coastal SSSIs have been designated but this has mainly been done for the protection of salt marshes and dune systems.

The scientific scope of SPAs under the Birds Directive is very wide. There is a requirement³³ to make suitable designations for the protection of species listed under Annex I, which are deemed to require special conservation measures in order to ensure their survival and reproduction. The list includes many wetland species and coastal nesting birds that feed at sea including, for example, many species of waders, divers and terns. SPAs are also required for regularly occurring migratory species not included in the Annex and particular attention is to be paid to the protection of wetlands of international importance.³⁴

The Habitats Directive provides for the designation of special areas of conservation (SACs) for sites hosting natural habitats listed in Annex I and habitats of species listed in Annex II.³⁵ Both lists show a bias towards terrestrial and freshwater habitats. Of the nine major categories of habitats, only one – 'Coastal and Halophytic Habitats' – is concerned with the marine environment and its 'Open Sea and Tidal Areas' sub-category accounts for just 4 per cent of the full list of habitat types. The list of marine species is also remarkably short compared with the terrestrial and freshwater species.

Marine protected areas in the UK

The UK's network of marine protected areas (MPAs) is an integral element of the programme of measures under the MSFD. The network comprises Natura 2000 sites designated under the Birds and Habitats Directives (SPAs and SACs) as well as designations made under domestic legislation. The consultation document on the MSFD programme of measures noted that the extent of the network – which is intended to cover predominant habitats as well as special habitats and species – was still being finalised and management measures were still under development for many sites. Nevertheless, it was estimated that the UK MPA network would be in place with effective management of a suite of sites by 2016.

19 Directive 2009/147/EC on the conservation of wild birds (codified version) OJ L20/7 (26.1.2010) replacing Directive 79/409/EEC <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009L0147>.

20 *ibid* art 4(1).

21 Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora OJ L 206/7 (22.7.1992).

22 *ibid* art 2(1).

23 See decision in *R v Secretary of State for Trade and Industry and others, ex parte Greenpeace Ltd (No 2)* CO/1336/1999 (5 November 1999) [2000] Env LR 221.

24 MSFD art 3(1).

25 Marine and Coastal Access Act 2009 s 116.

26 Part 5 of the Marine (Scotland) Act 2010 provides for the designation of marine protected areas for a number of purposes (s 67) including Nature Conservation Marine Protected Areas (s 68–70).

27 Part 3 of the Marine Act (Northern Ireland) 2013 provides for the establishment of MCZs.

28 Marine and Coastal Access Act 2009 s 42.

29 WFD art 2(7).

30 The legislation merely refers to 'special interest by reason of any of its flora, fauna, or geological or physiographical features'. See Wildlife and Countryside Act 1981 s 28(1).

31 See decision in *R (Western Power Distribution Investments Ltd) v Countryside Council for Wales* [2007] EWHC 50 (Admin), [2007] All ER (D) 216 (January).

32 'Guidelines for selection of biological SSIs' <http://jncc.defra.gov.uk/page-2303>.

33 Birds Directive art 4(1).

34 *ibid* art 4(2).

35 Habitats Directive Annex I 'Natural habitat types of Community interest whose conservation requires the designation of special areas of conservation' and Annex II 'Animal and plant species of Community interest whose conservation requires the designation of special areas of conservation'.

The domestic designations referred to above include MCZs made under the Marine and Coastal Access Act 2009 and similar types of MPA under the Marine (Scotland) Act 2010 and the Marine Act (Northern Ireland) 2013. At the time of writing, Defra was considering responses to its consultation³⁶ on the second tranche of MCZs proposed for English waters and offshore and was expecting to make a decision in January 2016. The aim of this second tranche is to address major ecological gaps in the network of marine protected areas. If all 23 sites are designated this will bring the total number to 51 covering a total area of over 20,000 km². A third tranche is expected to follow shortly thereafter. Meanwhile, the MCZ process in Wales has led to just one designation of an existing protected site: the Marine Nature Reserve off Skomer was redesignated as the 'first' Welsh MCZ in December 2014.³⁷

There has been no further progress on plans for 10 MCZs which were withdrawn by the previous minister for Natural Resources and Food in the Welsh Government, following a consultation which attracted 7000 responses and exposed some strongly held views. The current minister's update on the Welsh Government's Marine and Fisheries Strategic Action Plan, issued in April 2015,³⁸ is silent on MCZs. In Scotland, there are 30 Nature Conservation MPAs, the Scottish equivalent of MCZs. Of these 17 are in Scottish territorial waters, covering some 10 per cent of the Scottish territorial sea area and the other 13 are offshore.³⁹ The Northern Ireland administration issued a draft strategy for MPAs in May 2013 but as yet no sites have been designated.⁴⁰

Discussion

There is no doubt that considerable progress has been made in establishing marine protected areas for nature conservation purposes including the creation of a network of protection. Superficially, the provisions look appropriate and adequate. Taken together they cover the full geographical extent of the UK marine area; they address both the water column and the seabed and there is an acknowledgement of the need to include representation of all types of feature. There are two main types of problem, however; that could greatly limit the success of both individual sites and the network; these relate to the appropriateness of the measures for management and protection and the criteria for deciding which features are worthy of protection.

Appropriateness of measures

Protected area designations are defined spatially with fixed boundaries. Protected areas on land are easy to define in

this way because the habitats are on the ground and their importance for species is also fixed in space, if not in time. It is very different for protected areas at sea where the interest may be as much in the water column as on the seabed. Add to this the practical difficulties of habitat survey work and it is apparent that area based designations may not always be appropriate. This is particularly the case for those species that do not permanently reside in a particular site; they migrate, passing through many different areas as they do so, or they may be 'of no fixed abode'. Many marine species fit into this latter category.

The draftsmen of the Habitats Directive were aware of the difficulties presented by such species and included special provisions. Article 4 states that 'for animal species ranging over wide areas [SACs] shall correspond to places within the natural range of such species which present the physical or biological factors essential to their life and reproduction' and goes on to state that for 'aquatic species which range over wide areas, such sites will be proposed only where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction'.

The Welsh minister's update on the Welsh Government's Marine and Fisheries Strategic Action Plan⁴¹ referred to 'some challenges in the MPA network such as the need to identify SACs for the protection of harbour porpoise'. This species has attracted a great deal of political attention over the years and has left the UK somewhat out of kilter with the rest of Europe. It is listed in Annex II of the Habitats Directive as a species of Community interest requiring the designation of SACs and, along with all other cetaceans, it is included in the Annex IV list of species in need of strict protection. The European Commission sent a reasoned opinion to the UK in October 2014⁴² requiring the UK to designate SACs to protect harbour porpoise. The reasoned opinion followed a formal notice sent to the UK in June 2013. A WWF Report published in 2012⁴³ provided detailed recommendations for the designation of six sites for the protection of harbour porpoise and identified five areas of search where further research was required to define boundaries for additional SACs.

At the present time, there is only one SAC, in Northern Ireland, for which the harbour porpoise is a qualifying feature, although it is listed as a grade D (non-qualifying) feature on 26 UK SACs. There is no doubt that UK waters provide important habitat for this species. The difference of opinion between the UK and the Commission is about the need for SACs as a protection measure over and above protection already provided by the fact that the harbour porpoise is a strictly protected species. The UK's view, on the advice of the Joint Nature Conservation Committee

³⁶ <https://consult.defra.gov.uk/marine/tranche2mczs>.

³⁷ For further information about Skomer MCZ see <https://naturalresources.wales/conservation-biodiversity-and-wildlife/find-protected-areas-of-land-and-seas/skomer-marine-conservation-zone/?lang=en>.

³⁸ <http://gov.wales/about/cabinet/cabinetstatements/2015/marinefisheriesactionplan/?lang=en>.

³⁹ See <http://www.snh.gov.uk/protecting-scotlands-nature/protected-areas/national-designations/mpas/> for further information on these sites.

⁴⁰ A draft strategy for marine protected areas in the Northern Ireland Inshore Region (May 2013) http://www.doeni.gov.uk/marine_policy.

⁴¹ <http://gov.wales/about/cabinet/cabinetstatements/2015/marinefisheriesactionplan/?lang=en>.

⁴² http://europa.eu/rapid/press-release_MEMO-14-589_en.htm.

⁴³ P G H Evans, J S Prior *Protecting the Harbour Porpoise in UK Seas: Identifying a Network of Draft SACs for the Harbour Porpoise in the UK* (WWF UK 2012) http://www.wwf.org.uk/wwf_articles.cfm?unewsid=6225.

over a number of years⁴⁴ had always been that it is not possible to identify suitable sites because the species is so widespread and utilises so much of the UK maritime area. The reasoned opinion stated that if the UK failed to reply within two months, the Commission might refer the case to the EU Court of Justice.

Because of this threat of infraction proceedings, the UK has embarked on a flurry of scientific activity to identify sites for proposals as SACs.⁴⁵ Consultations over some of the proposed sites had been expected to be held in the summer of 2015⁴⁶ but the process has been delayed. Substantial areas of sea are likely to be included in the proposed sites and there is no doubt that the proposals will be controversial. Whilst the non-governmental organisations may regard the proposals as a victory, the fishing industry will no doubt be less receptive. The real question, however, is whether designation will result in more protection for the harbour porpoise than would have occurred anyway or merely create more bureaucracy because of the need to comply with the regulations with respect to conservation objectives and permissions to carry out activities.

Similar issues arise in respect of SPAs. The government is conducting a sufficiency assessment of UK marine SPA network with a view to completing the programme of identification and, where possible, designation by the end of 2015, the deadline it has agreed with the European Commission. Although the UK has a well established suite of terrestrial SPAs, marine coverage is currently insufficient because there is presently no SPA protection for aggregations of seabirds feeding at sea. Two main types of SPA are considered necessary: marine extensions to existing seabird breeding colony SPAs and offshore SPAs for areas used by the most important aggregations of feeding seabirds.⁴⁷

Surveys of seabirds at sea are costly, not least because of the area to be covered, and there is also no certainty that birds will remain 'loyal' to an area. Changes in ocean currents and other factors influence the distribution of fish populations and this in turn will have an effect on bird aggregations. Nevertheless, the nature conservation bodies are confident that the scientific evidence is now sufficiently robust to enable them to make proposals for setting boundaries for possible marine SPAs. Informal public

engagement on some proposed sites has already taken place⁴⁸ and formal consultation will follow, although not in time for the government to meet its intended deadline.

Adequacy of coverage

One of the most important aims of nature conservation is to safeguard biodiversity. The Convention on Biological Diversity makes it clear that biodiversity is relevant at several levels and includes diversity within species, between species and of ecosystems.⁴⁹ As noted at the beginning of this article, there is roughly three times as much seabed as there is land under UK control and that seabed is covered by a body of water which is itself a mega-habitat. There is also a much wider range of types of organisms to be found in marine waters than occur on land. All but one of 33 higher taxonomic groups of animals occur in the sea;⁵⁰ 15 of these are exclusively marine and five are nearly so, with at least 95 per cent of the known species being marine.

The terrestrial environment only comes into prominence for plants and insects. However, from a glance at the lists of species that are legally protected it is immediately apparent that most of the attention is placed on the terrestrial component and on the so-called higher animals classified as vertebrates (ie fish, amphibians, reptiles, birds and mammals). The list of protected animals in Schedule 5 of the Wildlife and Countryside Act 1981, for example, has three times as many terrestrial species as marine ones.

The Habitats Directive follows a similar pattern. There is even the anomalous situation whereby a species may be protected whilst it is in freshwater but not in marine waters. The Atlantic salmon is listed under Annex II to the directive (species whose conservation requires the designation of SACs) but SACs are only required for it in freshwater. Its absence from Annex IV (species in need of strict protection) means that it is not strictly protected, although it is a species whose taking in the wild and exploitation may require management measures under Annex V. Salmon populations have been in decline across their range for many years and this has prompted urgent and sometimes drastic measures to restrict exploitation and improve the freshwater habitat. In Scotland, for example, the Government is planning to introduce a carcass tagging scheme and make it an offence to kill salmon without a licence.⁵¹

Natural Resources Wales has recently decided⁵² to end salmon stocking with hatchery grown fish because of

44 A JNCC committee has discussed a number of papers on the possible designation of SACs for harbour porpoise over the last 10 years, some of them in confidence, including 'Background and protocol for designation of SACs for harbour porpoise and other highly mobile, wide ranging marine species' JNCC 08 P 10; 'Maintaining favourable conservation status of harbour porpoise in UK waters' JNCC 09 P21; 'Review of harbour porpoise as qualifying feature of the Dogger Bank SAC' JN 09 P23 <http://jncc.defra.gov.uk/page-2671>.

45 'The identification of areas that could potentially be designated as SACs for harbour porpoise' JNCC 13 P16; 'UK harbour porpoise dSAC proposals and sufficiency considerations' JNCC 14 P17; 'UK harbour porpoise SAC proposals: a summary of selection method and process' JNCC 14 P18; and 'Harbour porpoise SACs: site documentation and UK conservation strategy' JNCC 15 P20 <http://jncc.defra.gov.uk/page-2671>.

46 Possible new marine special areas of conservation and special protection areas in Wales: frequently asked question April 2015 <https://naturalresources.wales/conservation-biodiversity-and-wildlife/find-protected-areas-of-land-and-seas/possible-new-marine-protected-areas-in-wales/?lang=en>.

47 For further information see 'Establishing marine special protection areas' Natural England Technical Information Note TIN120 <http://publications.naturalengland.org.uk/publication/1476400>.

48 See eg 'A possible new marine special protection area for birds in Northumberland' TIN165 <http://publications.naturalengland.org.uk/publication/5451695513403392?category=1501679>.

49 Convention on Biological Diversity art 2.

50 The statistics on biodiversity are taken from E A Norse (ed) *Global Marine Biological Diversity* (Island Press 1993) 14–15.

51 Scottish Government 'Wild fisheries reform: a response to the report of the Wild Fisheries Review' (May 2015) <http://www.gov.scot/Topics/marine/Salmon-Trout-Coarse/fishreform/consultation>.

52 As recommended in 'Protecting, through best-practice, scientific management and the ecosystem approach, the sustainability and productivity of our wild salmon and sea trout stocks in Wales' NRW BB 66.14 and approved by the Board (see Board Meeting (Business) Minutes 2 October 2014) <https://naturalresources.wales/about-us/our-chair-board-and-management-team/board-meeting-agendas-minutes-and-papers/previous-board-and-committee-meetings/?lang=en>.

concerns that hatchery fish are less likely to return to reproduce. However, these measures, worthy though they are, do not address the more serious problem of survival at sea. The main reason for the decline in numbers is almost certainly the decline in marine survival. The causes are unclear but may well be a response to changing sea temperatures and current patterns.⁵³ Addressing these causes is an immense task that is probably unachievable in the short term; in the meantime, however, the species remains unprotected under nature conservation law whilst it is at sea. This is but one example, albeit a high profile one, of a species that it is not being afforded the level of protection that it deserves. Meanwhile, the harbour porpoise, a species that already has this protection is about to attain a higher level of protection, on paper at least.

The terrestrial bias is even more apparent in the list of habitats protected, especially under the Habitats Directive. It is obvious to anyone looking at the categories of habitat that the list was drawn up by terrestrial ecologists and was based on vegetation classifications. Work on criteria for the identification of sites for consideration as MCZs⁵⁴ sought to redress the balance somewhat. Site selection projects⁵⁵ were set up to identify suitable sites across a range of broad habitat types categorised by a range of factors including depth (intertidal, sub-tidal, deep water), energy level, substrate (rocky, sediment types, biogenic). However, as the name suggests, these are broad scale descriptors and do not provide the level of discrimination that is found in the terrestrial categories.

An alternative approach

Protected area designations, including marine protected areas, have an important conservation role especially if they can be linked into networks⁵⁶ but, as described above, they have limitations. The question then is whether other approaches might prove more successful.

The MSFD includes a range of different approaches that might be employed to improve and maintain good environmental status (GES) of the marine environment. The government's consultation on the programme of measures places considerable reliance on marine planning and licensing as a means of meeting the requirements of MSFD. All four UK administrations have signed up to the UK Marine Policy Statement issued in 2011⁵⁷ and their marine Acts contain provisions for marine planning including a new

marine licensing regime. The process of producing plans and determining planning and licence applications includes the use of assessment procedures (Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA) and Habitats Regulations Assessment (HRA)), which are also considered crucial for achieving GES. According to the consultation document, marine planning in the different UK administrations is on track for meeting the March 2021 deadline set in the Marine Spatial Planning Directive (although this is beyond the date set in the MSFD for achieving GES).

Marine planning and associated licensing regimes provide an alternative way of safeguarding marine biodiversity. Whereas the protected area approach is predicated on the identification of scientifically interesting sites whose features are to be given special status, marine planning approaches the problem from a socio-economic perspective and is concerned with achieving a sustainably balanced use of the marine environment and its resources. Would this approach, coupled with scientific evidence of important species and habitats, provide a more workable solution? The way in which developments for marine renewable energy are proposed provides some insights into this question.

Offshore wind turbines have been established at several sites around the UK and have all been authorised following environmental assessments, including those relating to the Habitats Directive where appropriate. The latest technology under consideration is the tidal lagoon, for which the first project was granted a development consent order (DCO)⁵⁸ in June 2015. The project is Tidal Lagoon Powers' plan for the Swansea Bay Tidal Lagoon.⁵⁹ Although the DCO was granted, not all aspects of the proposed development could be progressed as part of a nationally significant infrastructure project under the Planning Act 2008 because some planning matters have been devolved. It will be for Welsh ministers to consider ancillary matters such as proposed amenity developments and associated developments, notably the grid connections.

The proposals were progressed through the Infrastructure Planning Inspectorate very quickly and with remarkably little controversy, no doubt due in part to the excellent stakeholder and public engagement undertaken by the company. Nevertheless, there are still real concerns over the potential environmental impact of the project. Some of these concerns will be addressed as part of the consideration of the application for a marine licence. The licence application was submitted to Natural Resources Wales (NRW) at the same time as the planning application in 2014 and the company has been in ongoing discussion with NRW over the details.

Several technical issues remain to be resolved, including the coastal processes and navigational risk assessments and a number of biodiversity-related assessments. These include a migratory and marine fisheries assessment, consideration

53 'Management options to address the decline in status of salmon and some sea trout in Wales' NRW BB 40.15 <https://naturalresources.wales/search?lang=en&query=salmon>.

54 'Marine Conservation Zone Project: Ecological Network Guidance' JNCC and Natural England <http://jncc.defra.gov.uk/page-4881>.

55 There were four regional projects covering English and UK waters, namely Finding Sanctuary, Irish Sea Conservation Zones, Net Gain and Balanced Seas and a separate Welsh MCZ project. See <http://jncc.defra.gov.uk/page-2409>.

56 See eg J H Lawton, P N M Brotherton, V K Brown, C Elphick, A H Fitter, J Forshaw, R W Haddow, S Hilborne, R N Leafe, G M Mace, M P Southgate, W J Sutherland, T E Tew, J Varley and G R Wynne *Making Space for Nature: A Review of England's Wildlife Sites and Ecological Network* (Report to Defra 2010).

57 <http://www.gov.uk/government/publications/uk-marine-policy-statement>.

58 DCOs are made under the Planning Act 2008 for defined nationally significant infrastructure projects.

59 See <http://www.tidallagoonswanseabay.com/the-project/proposal-overview-and-vision/51/> for further information on the proposals.

of potential impacts to marine mammals especially in relation to the Habitats Directive and consideration of impacts on intertidal and subtidal species and possible issues relating to invasive species. The development will necessitate the UK's first exemption from the Water Framework Directive (WFD) and NRW is responsible for a WFD Assessment and the Article 4(7) derogation.

This is a new technology so there is no library of previous studies for comparative purposes. Instead, there has been a reliance on modelling to assess the likely impacts. There is no doubt that its construction and subsequent operation will be followed closely both by the non-governmental community and the regulators.

This example shows that there is a link between a likely planning decision and the presence of a protected area designation. The most important aspect of the protected area is the fact of its existence because it is at this point that the site is recognised as being of special importance. The planning decision and the protected area designation can then be taken into account. This suggests that protected areas remain important and are still the primary way of protecting species and habitats from damaging impacts from human activities. However, as noted above, this will only work if the protection adequately extends to the full biodiversity interest and the regulatory controls address the conservation needs.

A more effective, and efficient, way forward would be to ensure that the ecological requirements of the species and habitats comprising the ecosystems that might be impacted by development are fully taken into account in the decision-making process. Achieving this would require a shift in emphasis from the rigid approach in the Habitats Directive with its focus on a few species and habitats and its bureaucratic process for approving activities to a much more flexible system. Ideally, the starting point would be a marine development plan or spatial plan which could identify, in broad terms, areas of importance for nature conservation alongside other uses with a presumption against development in the conservation areas. Elsewhere, human activities could continue and new development could proceed on condition that the biodiversity interests were taken into account. Such an approach, first suggested in

1991,⁶⁰ accords with the aspirations of sustainable development and would go some way towards achieving the same stage of maturity towards managing the natural resources of the marine environment as is purported to apply to the terrestrial environment.

The MSFD espouses the principle of an ecosystem-based approach to management, a principle that accords well with current government thinking on natural resource management. The Welsh Government's Environment (Wales) Bill provides for the sustainable management of natural resources, the objective of which is 'to maintain and enhance the resilience of ecosystems and the benefits they provided and, in so doing, meet the needs of present generations of people without compromising the ability of future generations to meet their needs'. The list of principles of sustainable management of natural resources⁶¹ includes taking account of the resilience of ecosystems and, in particular:

- diversity between and within ecosystems
- connections between and within ecosystems
- scale of ecosystems
- condition of ecosystems
- adaptability of ecosystems.

These are laudable aims, although it is not clear how these principles are to be applied. The UK National Ecosystem Assessment, published in 2011,⁶² concluded that marine habitats exhibit the greatest level of deterioration with continued or accelerated decline across 60 per cent of marine habitats compared to only 8 per cent for terrestrial habitats. Bearing in mind the geographical extent of these habitats and the biodiversity contained within them, these are alarming figures. Although considerable progress has been made in marine surveying and monitoring techniques, and marine nature conservation is now (almost) fully embedded in the suite of nature conservation law, the critical leap of imagination that will enable society to recognise the importance of the marine natural resources, as well as the habitats that support them as something of direct relevance to our future wellbeing, has yet to be taken.

60 L M Warren, S Gubbay *Marine Protected Areas: A Discussion Document* (WWF 1991) 1–12.

61 Environment (Wales) Bill cl 3(2).

62 *ibid* cl 4.

Working party presentations

UKELA has a wide and varied range of working parties, comprised of UKELA members, which meet regularly to discuss issues including the practice and impacts of environmental law, and recent developments and proposals for reform in relation to environmental law, policy and practice. They actively contribute to the development of their area of interest, and have an impressive record of contributing working papers and responses to government in relation to the development and reform of environmental law.

At the 2015 conference five different working party sessions were held with short presentations from several speakers at each session: four of those speakers have kindly contributed their articles to this conference issue.

See the UKELA website

<http://www.ukela.org/rte.asp?id=17>

Waste Working Party

The circular economy: waste not, want not

Angus Middleton

Argyll Environmental, Landmark Information Group

This article is about good business management: how to improve your bottom line by eliminating waste from your operations. It is not about saving the planet. Certainly, I would like my children to inherit a world rich in biodiversity, but that will be the side-effect of successfully managing business in the changing world in which we live. If we do not adapt our businesses to these changes they will become extinct: think Kodak, which failed to embrace the business reality of digital photography and so went bankrupt. The UK currently injects 600 million tonnes of raw materials into its economy every year, with informed estimates suggesting that over 90 per cent of this has been thrown away within six months.¹ This massive loss of value presents a huge opportunity for companies to become more efficient, more profitable and more resilient in the face of change.

So, what are these changes of which I speak? The answer is 'many and varied', such as consumer attitudes to responsibility and demographic changes. However, the fundamental drivers of change that affect most UK businesses are the following.

First, we are running low on resources. The known reserves² (see Figure 1) of many key metals and other mineral resources will last less than 50 years at current rates of extraction. Global population growth and the rise of the middle classes will undoubtedly accelerate consumption, so the known reserves of some vital minerals will be

exhausted within a matter of years. It is almost certain that new reserves will be found, but they are likely to be in more remote parts of the globe and contain lower ore concentrations, so the cost of production will be higher. The UN Department for Economic and Social Affairs estimates that almost half of the world's population will be living in areas of high water stress by 2030, with the production of most raw materials requiring huge volumes of water.³ The resulting conflict of interest will further increase production costs and reduce supply, just at a time when demand is growing. This will destabilise the UK supply chain, making material supply not only more expensive but sometimes unavailable.

Secondly, there is a climate calamity. The effects of climate change⁴ are already being felt in many parts of the world and scientifically the debate is only about the details. All businesses will be affected by climate change in two ways. First, a hotter planet means a more energetic atmosphere and this, in turn, means more weather extremes. This will damage business premises, harm customers, disrupt supply routes and impair vital infrastructure, all of which will make it more difficult to operate and reduce profits. For instance, 60 per cent of businesses in the UK that experience serious flooding go out of business within two years. Secondly, consumers will demand ethical products more assiduously as climate change affects their lives more obviously. This change in attitude will resonate throughout the whole business community.

Thirdly, in connection with government and big business corporations, the environmental debate is over: they have seen the writing on the wall and are acting to avoid the consequences. The UK Government has set a target of 50 per cent of municipal waste to be recycled by 2020,⁵ Wales is looking to go zero-waste⁶ by 2050 and Scotland has a Zero Waste Plan⁷ that requires only 5 per cent of waste to be sent to landfill by 2025. The EU parliament has recently endorsed recycling rates of up to 80 per cent by 2030.⁸ Creating waste will become expensive, which will have knock-on effects throughout business operations. This situation will be exacerbated by many large companies looking to have no net detrimental impact on the environment. They are starting to 'engage with their supply chain', which means that a higher level of sustainability will soon become the norm throughout the business community.

3 Water Footprint Network: the materials in an average car take 400,000 litres to produce.

4 See IPCC <http://www.ipcc.ch/>.

5 Waste Management in England - Environment, Food and Rural Affairs Committee <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmenfrfu/241/24106.htm>.

6 Welsh Assembly Government June 2010 Towards Zero Waste. <http://gov.wales/docs/desh/publications/100621wastetowardszeroen.pdf>.

7 Natural Scotland, The Scottish Government 2010 <http://www.gov.scot/Resource/Doc/314168/0099749.pdf>.

8 <http://www.letsrecycle.com/news/latest-news/meps-keep-up-pressure-over-circular-economy-laws/>.

1 World Economic Forum 'Driving sustainable consumption' (2010).

2 <http://intercontinentalcry.org/wp-content/uploads/2012/03/axHu1.jpg>.

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An emerging business model that will counter these hazards (directly or obliquely) is called 'the circular economy', but other phrases such as 'closing the loop', 'restorative systems' or 'the sharing economy' are almost interchangeable. There is much confusion surrounding these names, partly because this area is still the domain of academics and specialists, so I will briefly explain the concept.

The traditional manufacturing model is to buy in raw materials, make products for sale and dispose of all related waste. The products are then purchased, used and thrown away. This 'take-make-discard' approach is thought of as a linear process, as all the materials move in one direction towards landfill. The circular manufacturing model also works by making products for sale, but the 'waste' of manufacture is captured for reuse by that company or sold to another company. The products are sold, used and then returned to the manufacturer to be reused within new products. These are then sold, used and returned to the manufacturer for reuse again. The same materials therefore go round and round the economy, never being thrown away but looping continually between use and remanufacture.

In reality there will always need to be some addition of virgin materials, since some proportion will be lost to wear and tear, but this can be comparatively small. A greater consideration is the energy needed to push materials around each loop of the circular economy.

Imagine a well-made toy that a child grows out of. This could be resold to another child, which would involve transport from one to the other and possibly some cleaning. It could also be returned to the manufacturer, where the component parts are disassembled, altered slightly and used in new toys. This requires transport to the factory, minor energy in remanufacture, transport to a shop and then to be taken home by the new owner. Alternatively, the toy could be recycled. This would involve transport to the processor, energy used in shredding and sorting the various metals and plastics, transport to a factory, energy in heating, moulding and finishing component parts, assembly and then the sales process. The more that has to happen to something to keep it moving around the loop, the greedier that process becomes and the less circular the outcome (see Figure 2).

It is easy to get carried away in the details of the theory, but let us consider the underlying principle for a moment, as this is actually very easy.

There is no such thing as waste. Forget all the jargon and detailed analysis for the moment and think about where that statement leads. Waste does not exist, so everything that your company produces has value, even if you currently call some of it 'waste' and pay someone to take it away to a landfill. Furthermore, your products will be more valuable to your clients if you design them with the knowledge that they will never be thrown away, thereby making it easier for your clients to extract value when they no longer need them. This will indirectly return value to you through increased client satisfaction, loyalty and trade. We will look in more detail about how to do this later.

So why are you throwing away so much profit? It might be that you are not convinced of the benefits of

eliminating waste for you and your clients, so let us work through some figures.

You know how much you spend on waste management, so you will immediately save that cost if you stop producing waste. With some careful thought and process redesign, you will be able to reuse your own by-products as raw material or use those from other businesses. This will further reduce your costs, as they will be less expensive than virgin materials. This type of resource efficiency alone would save the UK economy at least £20 billion a year.

With the right design, most products can be taken back from customers when they have finished with them and refurbished or remanufactured for resale. Not only does this make the process more circular but also more valuable. The lower inputs of energy, water and virgin materials will reduce the cost of creating a product of the same specifications and quality as one manufactured from scratch. The World Economic Forum and Ellen MacArthur Foundation have calculated that this would generate US\$600 billion for the world economy by 2025, even assuming realistic rates of uptake, and McKinsey put this figure at US\$1 trillion.⁹ These numbers do not take into account the substantial benefits that business will accrue from security of supply and not having to rely on dwindling raw materials from often unstable parts of the world (see Figure 3).

This form of reuse and remanufacture is not merely a theoretic opportunity, but has been creating value for some companies for many years. A commonly cited example is the Renault remanufacturing plant near Paris, which has a €200 million turnover and is the most profitable of all of Renault's factories. Caterpillar has remanufactured equipment since 1972, but recently expanded this into seven countries and tripled its revenues.

Now I have persuaded you about the benefits of going circular, I will try to give you some idea about how to do so. Unfortunately, this is where it starts to get complex.

The first hurdle that needs jumping is the novelty of circular business models, which can confuse and concern people. New ways of operating need new solutions to new problems and this can be very disruptive: change is dangerous, but also offers great opportunity. Almost all of the businesses that have taken the plunge have reaped unexpected benefits in addition to those predicted: thinking differently and keeping agile will open up entirely new avenues towards profit. For instance, some traditional thinkers are worried about share centres,¹⁰ repair cafés and hackerspaces – places where people share consumer products and knowledge about their repair, reuse and alteration – but how might you benefit from these rising trends? Perhaps you could learn from them, reach new markets or improve brand identity.

The second hurdle will be how you collaborate with your supply chain and customers. To create no waste you will probably have to change the materials that you

9 McKinsey & company Hanh Nguyen, Martin Stuchtey and Markus Zils 'Remaking the industrial economy' February 2014 http://www.mckinsey.com/insights/manufacturing/remaking_the_industrial_economy.

10 <http://www.theguardian.com/world/2014/mar/17/berlin-borrowing-shop-benefits-share-leila>.

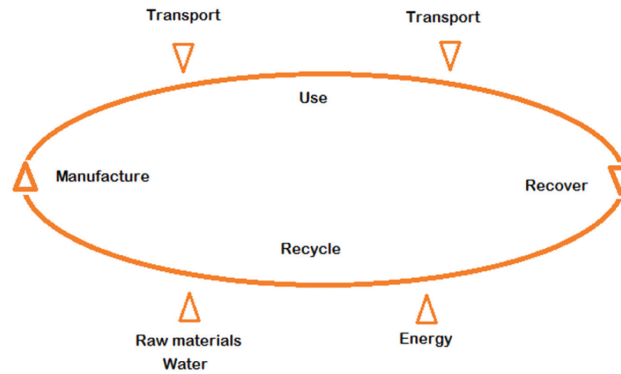
Linear consumption model

Products are manufactured from virgin materials and disposed to landfill at end of their first use



Towards a circular economy

Products are manufactured, used for the first time, sent for recycling and their materials used to manufacture new products. The energy used to do this and requirement for additional virgin materials means that some resources are consumed, which introduces some linearity into the system. This creates an elliptical cycle.



Reaching circularity

Products are reused or their component parts used for remanufacture rather than recycled for their base materials, so sufficiently small amounts of energy and virgin materials are consumed in each cycle for the system to be sustainable.

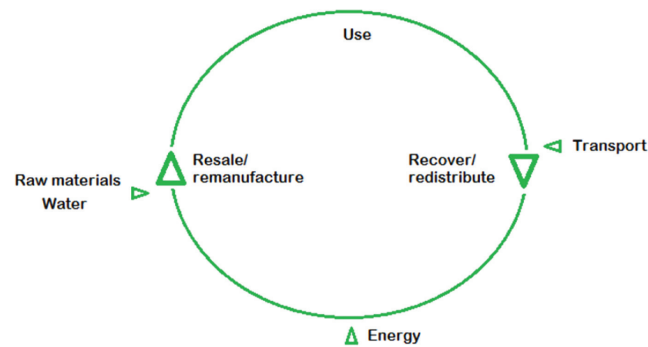


Figure 2.

Source: A Middleton.

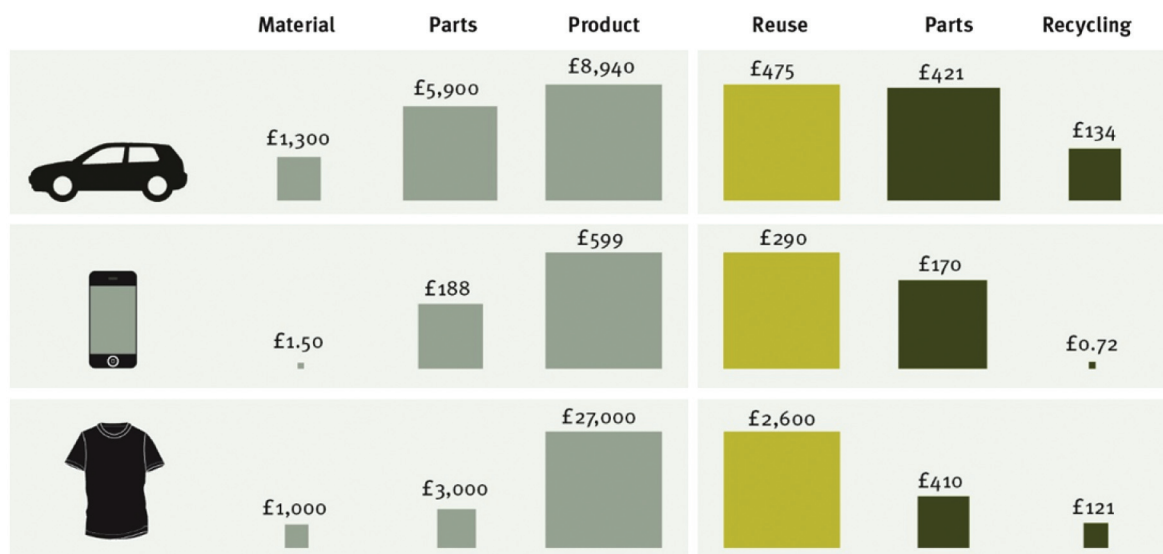


Figure 3: The reuse–remanufacture–recycle value comparison.

Source: Diagram reproduced with kind permission from the Green Alliance after Resource Resilient UK: a report from the Circular Economy Taskforce 2013.

purchase, the way they are supplied, the systems you use to create products and how you supply them to your customers. You may also need to supply your customers with information about the composition of your products, so that they can capture onward value after they have finished with them. This could be relevant whether they are passing them to a new user or returning them for remanufacture.

Some specialists identify the procurement process as a major stumbling block to companies becoming more circular, especially the use of incentives and targets. You may find that aligning the procurement and waste management activities could solve some of these problems, especially if you can integrate the process management up and down your supply chain.

The third hurdle is keeping control of products and materials. This could either concern the 'stuff' itself or information about that stuff: it is very difficult to remanufacture something if you do not know what is in it. A good way of keeping control of 'stuff' is to lease it or sell it with an associated service contract. This is becoming increasingly common, from Philips' pay-per-lux lighting to Spectrum's leasing of office refurbishments.¹¹ Leasing or service¹² models can reduce costs to clients, whilst increasing profits and improving client relations. This will not suit all circumstances, so the alternative is to embed information into products. The 'internet of things' can be useful here, as can coding data directly onto components, but often the challenge is to ensure that users know the information is there to be accessed.

Finally, customer perception needs to be carefully managed, as remanufactured goods or even those containing recycled materials can be viewed as substandard. A possible solution is to offer the same warranties as 'new' products, but leasing or service models can negate the problem entirely.

I hope this brief introduction has whetted your appetite about the circular economy, but you will need to do more research. The best places to start are the Ellen MacArthur Foundation,¹³ Green Alliance,¹⁴ EEF (manufacturer's association)¹⁵ and RSA The Great Recovery.¹⁶ They have all published research of varying academic and practical content.

Imagine a world where there is no waste and the less you have to break something apart when you change its use, the more value it has. Think about how your business can enter such a world and how you can help your supply chain to follow. Do this and you will profit from leading the charge into the new business landscape. The world is changing and we must all change with it, but it is up to you whether you thrive in these exciting times or wither in your attempts to cling on to the past.

Legal and policy barriers to the circular economy

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Introduction

This article is intended to provide an overview of some of the existing legal and policy barriers to moving towards a more circular economy, both at European and domestic level. It does not purport to provide an exhaustive list of those barriers, but aims to highlight some examples of where often well intentioned law and policy hinder the circular use of resources.

EU policy and legal barriers

One of the principal barriers to a more circular use of resources is the EU Waste Framework Directive,¹ in particular the definition of 'waste' and its interpretation by the European Court of Justice (ECJ) and the Court of Justice of the European Union (CJEU). The Waste Framework Directive defines waste as 'any substance or object which the holder discards or intends or is required to discard'.² This definition has been given a very broad interpretation by the ECJ/CJEU. For example, in the cases of *Vessoso and Zanetti*³ and *Zanetti and Others*,⁴ the ECJ ruled that: 'The concept of waste within the meaning of [the Waste Framework Directive] is not to be understood as excluding substances and objects which are capable of economic reutilization. The concept does not presume that the holder disposing of a substance or object intends to exclude all economic reutilization of the substance or object by others' and that: 'National legislation which defines waste as excluding substances and objects which are capable of economic reutilization is not compatible with [the Waste Framework Directive]'.

Although there are often valid environmental protection reasons for treating discarded substances as waste, the ECJ/CJEU's decisions and their interpretation by domestic courts and regulators have often hindered the reuse of discarded substances and products that could easily remain in the economic chain of utility without any increased risk of harm to the environment.

The Waste Framework Directive also contains the 'waste hierarchy'. The waste hierarchy, as set out in Article 4 of the Waste Framework Directive, must be applied in the following priority order in waste prevention and management legislation and policy: prevention; preparing for reuse; recycling; other recovery, eg energy recovery; and disposal. This hierarchy arguably envisages a linear rather than a circular economy.

Other pieces of EU waste management legislation, such as the Landfill Directive⁵ also perpetuate the linear

11 <http://www.spectrumworkplace.co.uk/our-services/leasing-office-furniture/>.

12 <http://raconteur.net/business/bringing-production-and-service-together>.

13 <http://www.ellenmacarthurfoundation.org/>.

14 <http://www.green-alliance.org.uk/CETF.php>.

15 <http://www.eef.org.uk/default.htm>

16 <http://www.greatrecovery.org.uk/>.

1 Directive 2008/98/EC on waste.

2 *ibid* art 3(1).

3 Joined Cases C-206/88 and C-207/88 [1990] ECR I-1461.

4 Case C-359/88 [1990] ECR I-1509.

5 Directive 1999/31/EC on the landfill of waste.

economy. Although the Landfill Directive sets ambitious targets for the reduction of waste sent to landfill and has undoubtedly resulted in an increase in the proportion of waste recycled or sent for energy recovery, its ultimate goal is reduction rather than a ban (with limited exceptions, such as liquid waste⁶ and tyres⁷).

Against this legislative and policy background, there are some more encouraging signs at the European level. Some Member States have imposed landfill bans for untreated or combustible waste⁸ and, in 2012, Germany, Austria, Sweden, Belgium and the Netherlands all reported amounts of 'household and similar wastes' landfilled of less than 15 kg per inhabitant.⁹ The European Commission's *Roadmap to a Resource-efficient Europe*,¹⁰ published in September 2011, sets out a number of milestones to be achieved by 2020, including that residual waste should be 'close to zero'. More recently, on 9 July 2015, the European Parliament adopted a resolution on 'Resource efficiency: moving towards a circular economy',¹¹ in which it advocated the following:

- strictly limiting incineration, with or without energy recovery, by 2020, to non-recyclable and non-biodegradable waste
- a binding, gradual reduction of all landfilling, implemented in coherence with the requirements for recycling, in three stages (2020, 2025 and 2030), leading to a ban on all landfilling, except for certain hazardous wastes and residual waste for which landfilling is the most environmentally sound option.

Although the resolution is unlikely to become law, it is an interesting example of thinking on the circular economy in Europe.

UK policy and legal barriers

As an EU Member State, the UK is bound by the requirements of the EU Waste Framework Directive and by the judgments of the ECJ/CJEU on the definition of waste. It is possible to assess the policy and regulatory approaches adopted in the UK (or at least in England) by considering those approaches against the different levels in the waste hierarchy outlined above.

Prevention

EU Member States had no legal duty to adopt formal policies on the prevention of waste until the adoption of Article 29 of the Waste Framework Directive, which requires the establishment of waste prevention programmes by no later than 12 December 2013. Although Defra published such a programme¹² on 11 December 2013 in order

to meet the deadline, the programme met with a mixed response from stakeholders, including some strong criticism from UKELA.¹³

Preparing for reuse

The reuse of products and substances is often subject to scrutiny by regulators such as the Environment Agency. Such scrutiny and the administrative burdens involved in dealing with regulators may deter some businesses from reusing products and substances. An example of the regulatory difficulties in reusing products is the case of *Environment Agency v Thorn International UK Limited*,¹⁴ an appeal by way of case stated by the Environment Agency against a decision of West Bromwich Magistrates' Court to acquit Thorn International of the offence of keeping controlled waste under section 33 of the Environmental Protection Act 1990. Thorn International bought unwanted or faulty electrical goods collected from retailers by a third party, which were capable of repair. The goods were taken to Thorn International's workshops for repair or refurbishment and then offered to the public for sale. The Environment Agency claimed that the goods were waste until they had been repaired or refurbished, but both the Magistrates' Court and the Divisional Court held that the goods were not waste because Thorn International intended to reuse them. Whether these decisions are a correct interpretation of the ECJ/CJEU's case law is a moot point.

Recycling

There are few incentives offered for recycling waste, but one of the best known schemes is the system of packaging recovery notes (PRNs) and packaging export recovery notes (PERNs) established by the Producer Responsibility Obligations (Packaging Waste) Regulations 2007.¹⁵ The PRNs and PERNs issued by accredited reprocessors are tradable, with the revenue generated from sales of PRNs and PERNs to compliance schemes and obligated businesses being used (amongst other things) to improve collections of packaging waste materials and fund investment in new recycling plants. However, the system is only effective if the market price of PRNs and PERNs is sufficiently high to act as an incentive to those operating in the market.

Other recovery, eg energy recovery

In order to divert waste from landfill and ensure that the UK meets its targets in the EU Landfill Directive, renewable and low carbon energy incentives such as the Renewables Obligation, Feed-in Tariffs, the Renewable Heat Incentive and Contracts for Difference have been made available for waste to energy technologies. Whilst this has undoubtedly resulted in significant tonnages of waste that would formerly have been destined for landfill being used for energy recovery instead, moving waste from disposal to recovery

⁶ *ibid* art 5(3)(a).

⁷ *ibid* art 5(3)(d).

⁸ See http://cewep.eu/media/cewep.eu/org/med_557/1200_2014-02-06_cewep_-_landfill_inctaxesbans.pdf.

⁹ See http://ec.europa.eu/eurostat/statistics-explained/index.php/Waste_generation_and_landfilling_indicators.

¹⁰ COM(2011) 571 final.

¹¹ P8_TA-PROV(2015)0266.

¹² See <https://www.gov.uk/government/publications/waste-prevention-programme-for-england>.

¹³ See www.ukela.org/content/doclib/263.pdf.

¹⁴ [2008] EWHC 2595 (Admin).

¹⁵ SI 2007/871.

is only moving it one step higher up the waste hierarchy. More importantly, however, no such incentives are available for any waste management activities higher up the waste hierarchy, such as reuse. At the time of writing, the future for incentives for renewable and low carbon energy looks very bleak as the new Conservative Government seeks to reduce expenditure on them, so it remains to be seen what impact these policy changes will have on the development of new waste management infrastructure.

Disposal

Since 1996, the UK Government has disincentivised the disposal of waste to landfill by means of the landfill tax. The standard rate of tax is now £82.60 per tonne, with the lower rate for inert waste being £2.60 per tonne. The tax will now increase in line with RPI, rather than by the £8 annual escalator that previously applied, which may slow the decrease in the amount of waste landfilled in England.

As can be seen from the above examples, the UK Government's policy approach to the waste hierarchy is somewhat inconsistent, with energy recovery being heavily incentivised (although that may change) and no incentives being offered for waste prevention or reuse. That is unlikely to stimulate the development of a more circular economy in the UK.

Other legal barriers

So far, this article has focused on those aspects of waste management law and policy that arguably stand as barriers to a circular economy. There are several other areas of law (and not just environmental law) that act as barriers to a circular economy. Some examples include:

- *REACH*.¹⁶ This extensive piece of EU chemicals legislation requires information on the chemicals content of goods and products to be made available to downstream users and consumers. A business selling a remanufactured product may not be able to obtain such information.
- *The EU RoHS Directive*.¹⁷ This directive prohibits the use of certain hazardous substances in electrical and electronic equipment placed on the market in the EU. Remanufactured or reused equipment may contain prohibited substances and therefore cannot be sold in the EU.
- *The EU Energy-using Products Directive*.¹⁸ This directive establishes a framework for setting minimum eco-design standards for energy-using products. Again, remanufactured or reused products may not meet the minimum standards, so they cannot be sold in the EU.

- *The EU Transfrontier Shipment of Waste Regulation*.¹⁹ Whilst this regulation undoubtedly serves a useful purpose in preventing the shipping of waste for disposal to countries outside the EU that do not have such strict environmental standards as the EU, it may also hinder the reuse and recycling of certain waste streams, such as waste electrical and electronic equipment, which are in demand in developing countries. The case of *R v Ezeemo and Others*²⁰ is a good example of some of the difficult issues involved in trans-frontier shipment of waste cases.
- *Sale of Goods Act 1979*. Under this Act it is the seller (and not the manufacturer) who is liable to the buyer for any defects in any goods that are the subject of a contract of sale. This may make retailers reluctant to sell reused or remanufactured goods, owing to a perception that such goods may be more likely to have defects than newly manufactured goods.
- *Intellectual property law*. Manufacturers may fiercely protect trade secrets in how their goods are manufactured, making it difficult for third party remanufacturers to remanufacture their goods. Remanufacturers and repairers reselling branded goods may also face claims for trademark infringement from original manufacturers.
- *Competition law*. Any trade association or group of manufacturers seeking to collaborate to develop standards for goods or products needs to act very carefully to avoid breaching competition law. The development of new environmental standards for goods or products may involve the exchange of sensitive information, the creation of barriers to entry (for example, by the setting of mandatory standards) or the use of selective or collective boycotts (against non-compliant goods and products). Any of these activities might breach competition law, even though they have environmental protection as their aim.
- *The EU Single Market rules*. The EU is a single market for goods, labour and services. Measures adopted with environmental protection as their aim have on occasion breached the EU Single Market rules. The so-called *Danish Bottles case*²¹ is an example of this. In 1981 Denmark adopted a law that required beer and soft drinks producers to market their products only in reusable containers that had to be approved by the Danish Environment Ministry. The European Commission argued that this infringed Article 30 of the EEC Treaty²² on the freedom of movement of goods and took infraction proceedings against Denmark. Denmark argued that the measure was justified on environmental protection grounds, as the protection of the environment was one of the EEC's 'essential objectives'. The ECJ ruled that a deposit and return system for containers was acceptable, but that the container

16 Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94, as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

17 Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electrical and electronic equipment (recast).

18 Directive 2009/125/EC establishing a framework for the setting of eco-design requirements for energy-related products (recast).

19 Regulation (EC) No 1013/2006 on shipments of waste.

20 [2012] EWCA Crim 2064.

21 Case C-302/86 *Commission v Denmark* [1988] ECR 4607.

22 Now art 34 of the Treaty on the Functioning of the European Union.

approval system was disproportionate and could lead to the refusal of consent for importers or make the importation of products into Denmark more expensive and difficult. The outcome was therefore that Denmark had to allow the use of non-reusable drinks containers, even if that was not the best environmental option.

What next?

In February 2015 the European Commission withdrew its proposal to review waste legislation, stating that it would publish 'a new, more ambitious proposal' to promote the circular economy by the end of 2015.²³ At the time of writing, that proposal is awaited. In the meantime, the European Commission has not been idle. In April 2015 it published a roadmap on its Circular Economy Strategy²⁴ and in the summer of 2015 it conducted two public consultations. The first consultation,²⁵ on the circular economy, ran from 28 May to 20 August 2015 and sought views on:

- the production phase (product design, production and sourcing)
- the consumption phase (such as how to influence consumer choices)
- the barriers to the development of markets for secondary raw materials
- sectoral measures (i.e. which sectors should be priorities for action) and
- enabling factors (such as innovation and investment).

The second consultation,²⁶ on the functioning of waste markets, ran from 12 June to 4 September 2015 and sought views on:

- the main perceived regulatory failures
- the obstacles to the functioning of waste markets connected to the application of EU waste legislation or other EU legislation and
- the obstacles to the functioning of waste markets arising from national, regional or local rules or requirements and decisions which are not directly linked to EU legislation.

Now that the consultations have closed, the next step in the development of the EU's strategy on the circular economy is expected to be the publication of the European Commission's proposal on promoting the circular economy.

Water Working Party Environmental litigation Working Party (Joint session)

Fracking as a nuisance – the legal landscape

Charles Morgan

4–5 Gray's Inn Square Chambers

Introduction

This article is a prosaic version of a slideshow presentation to the water workshop at the UKELA 2015 conference in Liverpool. It is intended to identify the main considerations that might apply to the legal analysis of any private law claim arising out of contamination of aquifers during fracking activities. It is far from being a comprehensive guide, but the references to recent case law may point the reader in the right direction.

Context

Land ownership

Typically:

- The fracker will own the land immediately above and beneath the well.
- The government will own the oil and gas beneath the soil but not the surrounding *stratum*.¹
- Away from the well, third parties will own the surrounding *stratum* and the land above.
- The fracker will have power to obtain ancillary rights over surrounding land to lay pipelines etc.

Use of local aquifers

Typically:

- The aquifers may be used for abstraction for both public supply and private supply.
- Both public and private supplies might be used for industrial, agricultural and domestic purposes, including:
 - drinking water for both humans and animals
 - food production
 - sensitive chemical manufacturing processes
 - crop irrigation.

Permits and licences

The fracker will have obtained all necessary regulatory permits and licences including:

- DECC consents
- planning permission
- environmental permits for groundwater activities and discharge activities.

Each will have been granted following close consideration of concerns and protests concerning possible risks to surrounding groundwater and aquifers.

²³ See <http://ec.europa.eu/environment/circular-economy/>.

²⁴ See http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2015_env_065_env+_032_circular_economy_en.pdf.

²⁵ See http://ec.europa.eu/environment/consultations/closing_the_loop_en.htm.

²⁶ See http://ec.europa.eu/environment/consultations/waste_market_en.htm.

¹ Petroleum Act 1998 Sched 3; *Bocardo SA v Star Energy UK Onshore Ltd* [2011] UKSC 35.

Statutory safeguards

Once section 4A is inserted into the Petroleum Act 1998² there will be additional statutory 'safeguards'. The well consent must contain:

- a condition which prohibits associated hydraulic fracturing at a depth of less than 1000 metres³
- a condition which prohibits associated hydraulic fracturing at a depth of 1000 metres or more without a hydraulic fracturing consent.⁴

The Secretary of State must not issue a hydraulic fracturing consent unless he is satisfied that a number of conditions have been satisfied. These are that:⁵

- environmental impact has been taken into account by the local planning authority
- appropriate arrangements have been made for independent inspection of the integrity of the well
- the level of methane in groundwater has, or will have been monitored during the 12 months before fracking begins
- appropriate arrangements have been made for monitoring methane emissions to air
- fracking will not take place within protected groundwater areas or other protected areas
- the local planning authority has taken the cumulative effects of fracking applications into account
- the substances to be used are approved or will be subject to approval by the EA/NRB Wales
- the local planning authority has considered a restoration condition
- the relevant water or sewerage undertaker has been consulted before grant of planning permission
- the public was given notice of the application for planning permission.

The forthcoming section 4A contains a table setting out the circumstances in which these conditions are deemed to be satisfied.

The Secretary of State must additionally be satisfied that:

- appropriate arrangements have been made for publication of monitoring results⁶
- a scheme is in place to provide financial or other benefit for local area⁷
- it is otherwise appropriate to issue the consent.⁸

The scenario

With all of the above precautions, what could possibly go wrong? The retort might be that the very complexity of the regulatory régime is itself a recognition that plenty might.

Let us assume that, despite everything, a local aquifer has been contaminated and fracking is indeed the cause. The results are that:

- people have been poisoned
- cattle have been poisoned
- crops have failed or are inedible
- manufacturing processes have failed or been interrupted
- costs have been incurred in installation of filtering and purification equipment
- commercial custom and goodwill have been lost.

There has, however, been no breach of any consent or permit. Nor has the fracker been negligent in any respect. Something unanticipated has happened deep underground.

The legal position

Introduction

The obvious potential cause of action in English law is nuisance. The following will each be briefly considered:

- private nuisance
- the rule in *Rylands v Fletcher*
- public nuisance
- statutory nuisance.

Private nuisance

Private nuisance is now firmly established to be concerned only with interference in the enjoyment of an interest in land, which any claimant must possess.⁹ This has for present purposes several significant consequences:

- it significantly limits the eligibility of potential claimants
- the conventional measure of damages is the diminution in value of the interest, although this might to some extent take account of the effect upon amenity of occupiers¹⁰
- damages for personal injury are irrecoverable
- damages for pure economic loss are irrecoverable
- damages for economic loss consequent upon physical damage *may* be recoverable, by application of principles derived from 'common sense' or 'policy'.¹¹

Rylands v Fletcher

The rule in *Rylands v Fletcher* concerns liability for escapes resulting from non-natural or extraordinary use of land. The fundamental problem with the rule, which any frank lawyer (aren't we all?) would surely admit is that, as 'clarified' by subsequent cases, it is completely incomprehensible. In Scotland it has been described as 'a heresy which ought to be extirpated'.^{12,13} In England, Lord Hoffmann has

2 This will be inserted by operation of s 50 of the Infrastructure Act 2015; the present Infrastructure Act 2015 (Commencement No 4) Regulations 2015 presently only bring into force part of s 4B, which contains certain definitions.

3 Petroleum Act 1998 s 4A(1)(a) (forthcoming).

4 *ibid* s 4A(1)(b).

5 *ibid* s 4A(3).

6 *ibid* s 4A(6).

7 *ibid*.

8 *ibid* s 4A(3).

9 *Hunter v Canary Wharf Ltd* [1997] AC 695.

10 *Dobson v Thames Water Utilities Ltd* [2011] EWHC 3253 (TCC).

11 There is a very useful recent distillation and analysis of the many authorities in *Network Rail Infrastructure Ltd v Conarken Group Ltd* [2011] EWCA Civ 644, [2011] 2 CLC 1 especially the summary of the current position in the judgment of Jackson LJ at [145]–[146].

12 The word 'extirpate' is believed to be uttered by Daleks when visiting Scotland but not otherwise in common or popular usage.

13 *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* 1985 SC (HL) 17 (Lord Fraser).

observed that 'counsel could not find a reported case since the Second World War in which anyone had succeeded in a claim under the rule'.¹⁴ It is hard to escape the conclusion that the intellectual effort devoted to the rule by judges and writers over many years has brought forth a mouse'. Nevertheless, according to Lord Hobhouse in the same case: 'the rule . . . should not be abrogated. The rationale for it was and remains valid'.¹⁵

One thing which can be said for certain is that the rule is now firmly identified as a sub-category of private nuisance.¹⁶ It is therefore concerned with injury to property rights and subject to the same consequential limitations in scope as a claim in private nuisance.

Whilst any rigorous consideration of a claim on the postulated facts would include the revisitation of the rules of this doctrine, it is unlikely to add anything but cost and intellectual frustration.

Public nuisance

This is both a crime and a tort. Indeed, the criminal law definition found within *Archbold*¹⁷ was said by Lord Bingham in *R v Rimmington*¹⁸ to be equally applicable to civil claims:

A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects.

A rather more accessible definition is:

... an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of a right belonging to him as a member of the public.¹⁹

It differs from private nuisance in fundamental respects:

- some degree of generality in the nuisance must be demonstrated²⁰
- no interest in land is required (but nor does such an interest oust the claim)²¹
- damages in personal injury are recoverable²²
- it may be that recovery of damages for economic loss is approached more liberally than in the case of private nuisance.²³

14 But see now *Colour Quest Ltd v Total Downstream UK plc* [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep 1, where liability in *Rylands v Fletcher* was conceded; reversed in part, but not on this point: [2010] EWCA Civ 180, [2011] QB 86.

15 *Transco plc v Stockport MBC* [2004] 2 AC 1.

16 *ibid*.

17 *Archbold Criminal Pleading Evidence and Practice* (Sweet & Maxwell 2015) §31-40.

18 [2006] 1 AC 459.

19 *Clerk & Lindsell on Torts* (21st edn Sweet & Maxwell 2014) §20-01.

20 Note 14.

21 *ibid* [430].

22 *Corby Group Litigation* [2009] QB 335 (preliminary issue), [2009] EWHC 1944 at [892] (trial).

23 *Colour Quest Ltd v Total Downstream UK plc* [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep 1 at [435]–[437]; reversed in part, but not on this point: [2010] EWCA Civ 180, [2011] QB 86.

There are some interesting questions:

- Given that the existence of and compliance with public law consents and permits provide no defence to claims in private nuisance,²⁴ is the position any different in the case of public nuisance, where the public law approvals may constitute a greater justification?
- Given that foreseeability is an ingredient of the cause of action (and this is equally applicable to claims in private nuisance),²⁵ does the existence of and compliance with all the permits and approvals mean that whatever has happened must have been unforeseeable, or does the fact that pollution of aquifers was so thoroughly addressed mean to the contrary that it was damage of a kind that was manifestly foreseeable and indeed actually foreseen? One would suppose the latter.

Statutory nuisance

This requires only passing mention. It is entirely a public law régime, created by Part III of the Environmental Protection Act 1990. Although it is possible for aggrieved individuals to bring proceedings for an abatement order in the magistrates' court, there is no power to award damages, nor does the commission of a statutory nuisance per se give rise to any liability for breach of statutory duty.²⁶ There is also a defence of 'best practicable means'.²⁷

Note should also be taken of section 79(1A) of the Environmental Protection Act 1990:

No matter shall constitute a statutory nuisance to the extent that it consists of, or is caused by, any land being in a contaminated state.

Section 79(1B) provides (so far as relevant) that:

Land is in a 'contaminated state' for the purposes of subsection (1A) above if, and only if, it is in such a condition, by reason of substances in, on or under the land, that . . . (b) pollution of controlled waters is being, or is likely to be, caused.

These provisions mean that statutory nuisance is unlikely to have any relevant role to play.

In conclusion

Combined claims in private nuisance and public nuisance are both permissible²⁸ and likely between them to cover most of the ground. *Rylands v Fletcher* should also be considered, but is likely to be no more than a makeweight. In other circumstances, negligence may also have a part to play. However, the causes of action available to any particular claimant will need careful analysis on every occasion.

24 *Coventry v Lawrence* [2014] AC 822; *Barr v Biffa Waste Services Ltd* [2013] QB 455.

25 *The Wagon Mound (No 2)* [1967] 1 AC 627 and *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 at 301D (Lord Goff).

26 The same facts will, or course, often give rise also to a private law claim in public or private nuisance.

27 Environmental Protection Act 1990 ss 79(9) and 80(7).

28 See eg *Corby Group Litigation* (n 22) and Note 14.

Wales Working party

Recent developments in environmental law in Wales

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This contribution summarises some of the recent legislative developments in the realm of environmental law that have occurred in Wales. The Well-being of Future Generations Act 2015 and the Environment (Wales) Bill 2015 are discussed in some detail, with much briefer treatment of the Historic Environment (Wales) Bill 2015 and the Planning (Wales) Act 2015.¹ Note, however, that even for the first two, a clause-by-clause or section-by-section analysis is not presented; rather, the focus is on the areas that confer new duties and create innovative approaches to environmental governance in Wales, concentrating in particular on the coherence, transparency and integration of the provisions.² Some conclusions are presented on the potential workability of the extant and proposed legislation and an assessment of some of the challenges presented both to regulators and regulated alike.

Introduction

Devolution in Wales was brought about by a different mechanism from that used in Northern Ireland and Scotland. The Northern Ireland Act 1998³ and the Scotland Act 1998 devolved all matters to the respective legislatures, except those explicitly reserved to Westminster, and conferred primary legislative powers on the Northern Irish Assembly and Scottish Parliament. Thus, there was an assumption of full legislative devolution in those regions. In Wales, by contrast, Schedule 7 of the Government of Wales Act 1998 (GOWA 1998) laid down those matters which were devolved to Wales. Anything not listed in Schedule 7 remained outside the competence of the Welsh Government,⁴ and there was no provision for

primary legislative powers. Thus, in 1998 Wales received something more akin to administrative devolution.

Since GOWA 1998, the powers of the Assembly and the Welsh ministers have been extended by the Government of Wales Act 2006 (GOWA 2006) and the Wales Act 2014. GOWA 2006 made provision for a referendum of the Welsh people to be held over the question of primary legislative powers,⁵ which was duly held on 3 March 2011. As a result of the referendum, enhanced primary legislative powers took effect in May of the same year and the Welsh Government has taken full advantage of them since then.⁶ Of particular significance (actual or potential) in environmental law terms have been the Well-being of Future Generations (Wales) Act 2015 (WFGA), the Environment (Wales) Bill 2015, the Planning (Wales) Act 2015 and the Historic Environment (Wales) Bill 2015.

The Well-being of Future Generations (Wales) Act 2015 (WFGA)

This Act could be said to be the fulfilment (at least in part) of the Welsh ministers' obligation under section 79(1) of the GOWA 2006:

(1) The Welsh Ministers must make a scheme ('the sustainable development scheme') setting out how they propose, in the exercise of their functions, to promote sustainable development ...⁷

A detailed history of the genesis of the Act is beyond the scope of this contribution,⁸ but it can be traced back to the Welsh Government's vision for sustainable development articulated in *One Wales One Planet* in May 2009.⁹ This was followed by a green paper in January 2012,¹⁰ an interim consultation paper in May 2012¹¹ and a white paper in

* The author gratefully acknowledges the contribution of Professor Bob Lee, Head of School, Birmingham Law School, University of Birmingham, in the drafting of this article. Any errors remain the author's own.

1 For more detailed treatment of the Planning (Wales) Bill 2014 see V Jenkins 'The proposals for the reform of land use planning in Wales' (2014) 10 *Journal of Planning Law* 1063–80. Note that the Bill received royal assent on 6 July 2015.

2 These criteria formed the basis of the research into the state of environmental law undertaken jointly by UKELA, King's College London and Cardiff University's ESRC Centre for Business Relationships, Accountability, Sustainability and Society. The findings are summarised in *The State of UK Environmental Law in 2011–2012: Is there a case for legislative reform?* (May 2012). Box 1 (at 19–20) of the interim report (April 2012) contains more detailed explanations of coherence, transparency and integration <http://www.ukela.org/rte.asp?id=143>.

3 In fact, a full understanding of the devolution arrangements in Northern Ireland requires joint scrutiny of the Good Friday Agreement of 10 April 1998, the Northern Ireland Act 1998, the St Andrews Agreement of October 2006 and the subsequent St Andrews Act 2007.

4 Formerly known as the 'Welsh Assembly Government' until changed to 'Welsh Government' (*Llywodraeth Cymru*) by virtue of s 4(1) of the Wales Act 2014.

5 GOWA 2006 s 103.

6 At the time of writing 18 Acts of the Assembly have been passed http://www.assembly.wales/en/bus-home/bus-legislation/Pages/assembly_acts.aspx. It should be noted, however, that the Welsh Assembly did have legislative powers in relation to environmental measures even prior to the referendum, by virtue of the National Assembly for Wales (Legislative Competence) (Environment) Order 2010 (No 248), made on 10 February 2010 and entering into force the following day. This amended GOWA 2006 and allowed the passing of measures of the Assembly in relation to certain environmental matters.

7 However, s 79(1) of GOWA 2006 has been amended by s 16 of WFGA so that it now reads: 'The Welsh Ministers must, in the exercise of their functions, make appropriate arrangements to promote sustainable development'.

8 More historical detail can be found at H Davies 'The Wales Sustainable Development Bill' (2013) 25 *Environmental Law and Management* 99–105.

9 Welsh Assembly Government, May 2009 (ISBN 978 0 7504 5169 7, CMK-22-01-163). Although this document was ostensibly about sustainable development, it was, even then, heavily couched in the language of well-being – later to enter the title of the WFGA – no doubt as a result of the global influence of the Fitoussi Report of 2009 which, inter alia, recommended that well-being be used internationally as a more humanistic measure of the success of a nation than GDP. See J Stiglitz, A Sen and J-P Fitoussi *Issues Paper: Commission on the Measurement of Economic Performance and Social Progress* (2008) http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf. This was heavily influential in the EU. See also European Commission *GDP and beyond: Measuring progress in a changing world* COM(2009) 433 final, Brussels (20 August 2009).

10 Welsh Government *Sustaining a Living Wales: A Green Paper on a new approach to natural resource management in Wales* WG13943 (30 January 2012).

11 Welsh Government *Proposals for a Sustainable Development Bill* WG15440 (May 2012).

December 2012.¹² However, following a government reshuffle and a change of departments in July 2013,¹³ the name of the proposed bill was changed from the Sustainable Development (Wales) Bill to the Well-being of Future Generations (Wales) Bill. It finally received royal assent on 17 May 2015.

Gweithgor UKELA ar gyfer Cymru (UKELA Wales Working Party) was involved in the consultation process at all stages, gave evidence to the Environment and Sustainability Committee of the Welsh Assembly on 25 September 2014 and followed the subsequent committee amendment stage with great interest. It is fair to say that the bill suffered considerable damage in the committee stage and what emerged was, to say the least, significantly lacking in coherence and a pale shadow of its former self.¹⁴ However, much was recovered at the next stage of scrutiny to give us the final Act.¹⁵

The Act contains four parts: Part 1, Introduction; Part 2, Improving Well-being; Part 3, The Future Generations Commissioner for Wales; Part 4, Public Service Boards, and; Part 5, Final Provisions. The introduction is nothing more than a summary of the remainder of the bill and the substantive material begins with Part 2.

Improving well-being

The most important provision in Part 2 of the WFGA is the imposition of a well-being duty on public bodies in Wales. This duty operates within a 'sustainable development principle', which is itself supplemented with a definition of sustainable development. Section 2 defines sustainable development as a *process* undertaken in accordance with a *principle* to achieve a particular *outcome*, as follows:

... 'sustainable development' means the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle [see section 5], aimed at achieving the wellbeing goals [see section 4].

Note that this goes beyond the conventional Brundtland definition by including a cultural element, as do many of the more recent environmental instruments in Europe.¹⁶

¹² Welsh Government *A Sustainable Wales, Better Choices for a Better Future. Consultation on proposals for a Sustainable Development Bill* WG17030 (3 December 2012).

¹³ The Ministry for the Environment and Sustainable Development (which originally introduced the bill) was closed and the bill became the responsibility of the Minister for Communities and Tackling Poverty, Jeff Cuthbert AM, who introduced the bill in July 2014. From September 2014, the responsibility for the bill passed to the Minister for Natural Resources, Carl Sargent AM, who was to see it to completion.

¹⁴ See <http://www.bbc.co.uk/news/uk-wales-politics-31802841>. The bill was said to have been left with 'gaping holes' owing to the voting procedure adopted in committee, which resulted in large sections of the bill being voted out, with no agreement as to their replacements. For example, part of cl 53 of the bill after the committee amendment stage read thus: sustainable development principle (*egwyddor datblygu cynaliadwy*) has the meaning given by section []; ... the meaning apparently having been amended out of existence. Sources close to the Welsh Government have suggested that this situation may have arisen out of the relative inexperience of the Assembly as a primary legislative body.

¹⁵ A guide to the legislative process in the Welsh Assembly may be found at <http://www.assembly.wales/en/bus-home/bus-legislation/bus-legislation-guidance/Pages/bus-legislation-guidance.aspx>.

¹⁶ See eg the Floods Directive 2007/60/EC OJ L288/27 of 6 November 2007 art 1.

The sustainable development principle is defined thus:

In this Act, any reference to a public body doing something 'in accordance with the sustainable development principle' means that the body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs.¹⁷

The well-being goals are the *raison d'être* of the Act and are listed in section 4 as:

- a prosperous Wales
- a resilient Wales
- a healthier Wales
- a more equal Wales
- a Wales of cohesive communities
- a Wales of vibrant culture and thriving Welsh language
- a globally responsible Wales.¹⁸

It is to the furtherance of these goals that the well-being duty imposed on public bodies in Wales is directed. As may be imagined the well-being duty was the subject of extensive commentary by many of the respondents in the consultation stages but the ultimate wording was as follows:

- (1) Each public body must carry out sustainable development.
- (2) The action a public body takes in carrying out sustainable development must include—
 - (a) setting and publishing objectives ('well-being objectives') that are designed to maximise its contribution to achieving each of the well-being goals, and
 - (b) taking all reasonable steps (in exercising its functions) to meet those objectives.
- (3) A public body that exercises functions in relation to the whole of Wales may set objectives relating to Wales or any part of Wales.
- (4) A public body that exercises functions in relation only to a part of Wales may set objectives relating to that part or any part of it.¹⁹

The list of 'public bodies' comprises:

- (a) the Welsh ministers
- (b) a local authority
- (c) a local health board
- (d) the following NHS trusts:
 - (i) Public Health Wales
 - (ii) Velindre
- (e) a national park authority for a national park in Wales
- (f) a Welsh fire and rescue authority
- (g) the Natural Resources Body for Wales
- (h) the Higher Education Funding Council for Wales
- (i) the Arts Council of Wales
- (j) the Sports Council for Wales
- (k) the National Library of Wales
- (l) the National Museum of Wales.²⁰

¹⁷ WFGA 2015 s 5(1).

¹⁸ *ibid* s 4, Table 1.

¹⁹ *ibid* s 3.

²⁰ *ibid* s 6(1).

Thus, the definition of a 'public body' entirely excludes private entities, such as statutory undertakers, even though they might perform public functions which may well have a profound effect on social, cultural, environmental or economic well-being in Wales.²¹

The effect of all this is to place a substantive duty upon public bodies, such that they *must* carry out sustainable development, and in the course of which they *must* set and publish well-being objectives and take all reasonable steps to meet them. On the face of it, this is a considerable step forward in terms of making sustainable development a statutory duty and fulfils the Welsh Government's long-standing commitment to make sustainable development the 'central organising principle' of governance in Wales.²²

However, a closer scrutiny of the wording of this duty reveals some potential difficulties. These arise from the fact that the combined effects of section 3(1) and 3(2) are not very transparent. Section 3(1) can be interpreted as standing alone, with section 3(2) imposing a requirement *within* section 3(1). Hence, a public body is required to 'carry out' sustainable development and one (required) way of doing this is to set well-being objectives (commensurate with the well-being goals) and 'take all reasonable' steps to meet them; but it is not the only way of carrying out sustainable development.

However, the duties in section 3(1) and 3(2) could also be considered independently in terms of their fulfilment. Such a consideration gives rise to a question: if a public body sets objectives and takes all reasonable steps to meet them under section 3(2) (thereby discharging that duty), could it nevertheless be considered to have failed to have discharged its duty under section 3(1) if those steps were considered inadequate to 'carry out' sustainable development? The drafting certainly appears to leave open this possibility. However, if it was the intention of the Assembly to draft the final Act in this way, it represents a considerable departure from the Welsh Government's intentions discernible in the early drafts of the bill, the statutory guidance and the consultation papers, all of which stressed the importance of public bodies setting in place *specific* processes and outcomes to address well-being in Wales.

Moreover, this wider interpretation seems at odds with the definition of sustainable development in section 4 of the Act (described above) and the powers of the Auditor General of Wales in section 15 (see below). It is likely that tying down the exact meaning of section 3 in practice will require judicial intervention at some stage. It is possible that instead of the words '... must include ...' in section 3(2), a better rendition of what was intended would have been brought about by the words '... must consist of ...'.

Whatever the duty actually means in practice, it will only be as strong as the mechanisms in place to encourage or demand compliance with it. Throughout the consultation

and legislative stages of the bill this issue has been the subject of considerable criticism by respondents, stakeholders and providers of evidence. Although the Act creates a Future Generations Commissioner (see further below), he or she will have no enforcement powers. Assessing the extent of compliance with the duties in the act is ultimately the responsibility of the Auditor General for Wales:

- (1) The Auditor General for Wales may carry out examinations of public bodies for the purposes of assessing the extent to which a body has acted in accordance with the sustainable development principle when—
- (a) setting well-being objectives, and
 - (b) taking steps to meet those objectives ...²³

However, the Act is rather less than forthcoming about what happens to any public bodies found wanting in these respects. Section 15(4) requires that the AGW lays a report (informed by the Future Generations Commissioner) on the performance of public bodies before the Assembly at least once in the lifetime of each administration, but there is no provision beyond that. Any steps to be taken will then presumably lie at the discretion of the Assembly and/or the Welsh ministers themselves. The Act is entirely silent on the matter of sanctions or penalties for failing to comply with the well-being duty. It is further notable that the AGW's assessment is limited only to the setting of objectives and the taking of reasonable steps, which is further evidence that section 3 is intended to be read in the narrower of the two senses discussed above.

The Future Generations Commissioner

Part 3 of WFGA sets out the roles and duties of the Future Generations Commissioner (FGC), who is to be appointed by the Welsh ministers, in consultation with the 'responsible committee' of the Assembly.²⁴ In essence, the Commissioner's role is that of a critical friend towards public bodies but the Commissioner's role in enforcement or compliance is limited to making recommendations.

The general duty of the Commissioner is:

- (a) to promote the sustainable development principle, in particular to
 - (i) act as a guardian of the ability of future generations to meet their needs,²⁵ and
 - (ii) encourage public bodies to take greater account of the long-term impact of the things that they do, and
- (b) for that purpose to monitor and assess the extent to which well-being objectives set by public bodies are being met.²⁶

Section 19 then provides guidance on the Commissioner's functions which, in summary, are to 'provide advice [or assistance]', 'seek advice', 'encourage', 'promote awareness'

21 Note, however, that this is not a closed list as the Welsh ministers have the power, under section 52 of the WFGA, to extend it. However, a person can be added to the list only 'if that person exercises functions of a public nature'. In principle, therefore, a statutory undertaker (or any other appropriate private entity for that matter) *could* be added to the list.

22 See *One Wales One Planet* (n 9) ch 3 at 24 ff.

23 WFGA 2015 s 15.

24 *ibid* s 17.

25 This form of words was suggested in UKELA's response to consultation and in oral evidence (although it is possible that other respondents made the same suggestion).

26 WFGA 2015 s 18.

or to 'undertake research' in the carrying out of the general duty. The Commissioner may conduct reviews of a public body's performance (section 20) and make recommendations to that body, which must be published (section 21). A duty is imposed on public bodies in respect of the Commissioner's recommendations:

- (1) A public body must take all reasonable steps to follow the course of action set out in a recommendation made to it by the Commissioner under section 20(4) unless—
 - (a) the public body is satisfied that there is good reason for it not to follow the recommendation in particular categories of case or at all, or
 - (b) it decides on an alternative course of action in respect of the subject matter of the recommendation.
- (2) The Welsh Ministers may issue guidance to other public bodies about how to respond to a recommendation made by the Commissioner.
- (3) In deciding how to respond to such a recommendation, a public body must take such guidance into account.
- (4) A public body must publish its response to a recommendation made by the Commissioner and if the body does not follow a recommendation, the response must include the body's reasons for that and explain what alternative course of action, if any, it proposes to take.²⁷

Clearly this duty 'to take reasonable steps' is a qualified one which can, in certain circumstances, be eschewed on the basis of a public body's own judgment, although if it does so it is required to give its reasons. Once again, the Act make no provision in terms of penalty or compliance measures for a failure by a public body to discharge this duty.

Public service boards (PSBs)

Section 29 requires that a public service body be set up for each local authority in Wales, which must be comprised of: the local authority itself; the local health board for an area any part of which falls within the local authority area; the Welsh Fire and Rescue Service for an area any part of which falls within the local authority area; National Resources Wales. Moreover, section 30 requires that invitations to participate *must* be issued to: the Welsh ministers; the chief constable of the police force for a police area any part of which falls within the local authority area; the police and crime commissioner for a police area any part of which falls within the local authority area; a representative of local probation services; at least one body representing relevant voluntary organisations authority. Finally, section 32 lists 'other partners' in a PSB which are:

- (a) a community council for a community in an area which (or any part of which) falls within the local authority area (but see also section 40)
- (b) the Public Health Wales NHS Trust

- (c) a Community Health Council for an area which (or any part of which) falls within the local authority area
- (d) a national park authority for a national park in Wales any part of which falls within the local authority area
- (e) the Higher Education Funding Council for Wales
- (f) an institution in the further education sector or the higher education sector situated in whole or in part within the local authority area
- (g) the Arts Council of Wales
- (h) the Sports Council for Wales
- (i) the National Library of Wales
- (j) the National Museum of Wales.

Thus each PSB is made up of essentially the same institutions upon which the well-being duty is imposed by section 6. Each PSB is also subject to the well-being duty:

- (1) Each public services board must improve the economic, social, environmental and cultural well-being of its area by contributing to the achievement of the well-being goals.
- (2) A public services board's contribution to the achievement of the goals must include—
 - (a) assessing the state of economic, social, environmental and cultural well-being in its area (see sections 37 and 38),
 - (b) setting objectives ('local objectives') that are designed to maximise its contribution within its area to achieving those goals, and
 - (c) the taking of all reasonable steps by members of the board (in exercising their functions) to meet those objectives (but see section 39(2)(b)).²⁸

This is very much a repeat of the duty to which each individual member of a PSB is subject except that this is couched in terms of the 'local' area. The collective setting of well-being objectives must be collated into a 'local well-being plan', where the steps to be taken to achieve the objectives may fall on any single member of the PSB or any combination of its members, partners or invited participants (section 39). The final layer in the hierarchy of well-being duties is set out in section 40. Any community council with a gross income or expenditure of £200,000 or more must 'take all reasonable steps' towards meeting objectives in a local plan 'that [have] effect in its area'.

Summary and analysis

The WFGA sets up a framework for achieving the well-being goals for Wales through the imposition of a well-being duty, which extends to individual public bodies, but in such a way as to ensure that their objectives are integrated with other public bodies through the operation of PSBs (with, in some locations, the involvement of community councils).

The extent to which this framework will operate in practice is likely to depend heavily on the personality of the FGC and her/his ability to encourage public bodies to take her/his recommendations seriously in respect of the

²⁷ *ibid* s 22.

²⁸ *ibid* s 36.

well-being duty. The language used to frame the duties is not such as to make them legal duties in the full sense of the word; they are political duties, although fairly strongly worded as political duties go, and there appears to be no enforcement mechanism or enforcement body in the usual, regulatory, paradigm.

As discussed above, there is some ambiguity about the precise nature of the duty and the criteria to be used to assess the extent to which it is discharged in practice. However, whatever the final meaning is judged to be, the steps taken to meet the well-being objectives need only be 'reasonable'. The unanswered question is who decides what is reasonable, the public body (either as an individual body or as part of a PSB), the FGC, the AGW or the Welsh ministers. The other important consideration is the extent to which this duty framework will form the central organising principle of governance in Wales, particularly in conjunction with the other legislative initiatives taken by the Welsh Government. It is to these that we now turn.

The Environment (Wales) Bill 2015

The bill contains six parts but only the first is considered here.²⁹

Part 1: Sustainable resource management in Wales

This part sets out the means by which the ecosystems goods and services approach to sustainable resource management will be implemented in Wales. The goods and services approach encompasses: 'provisioning' – where natural resources represent a source of naturally occurring goods and materials (such as timber, water, breathable air and so forth); 'regulating' – where natural processes and cycles regulate the quality of the services and goods provided; and 'cultural' – where the natural environment provides opportunities for relaxation, recreation, the acquisition of knowledge and the pursuit of cultural enhancement.

A specific example illustrates the integration of these goods and services. A temperate woodland ecosystem provides raw materials for medical innovation; greenhouse gas sequestration; climate change mitigation and/or adaptation mechanisms; contributes to aquatic health, flood prevention and soil improvement; provides a supply of timber; a means of recreation and a range of sub-habitats for large numbers of species of flora and fauna.

In line with the overarching aims of the WFGA described earlier, the Environment Bill attempts to inculcate an approach to sustainable natural resources management (NRM), which involves embedding sustainable development and the ecosystems approach as guiding principles to help deliver environmental well-being. The objective of Part 1 of the bill is laid down in section 3(1): 'to maintain and enhance the resilience of ecosystems and the benefits they provide and, in so doing, meet the needs of present generations of people without compromising the ability of future generations to meet their needs'.

Resilience is a rather nebulous concept but certainly encompasses the diversity, the condition, adaptability and extent of ecosystem components.³⁰ It also has economic and social implications as well as environmental ones since it suggests that, in spite of untoward events, the ecosystem retains the capacity to deliver its goods and services.³¹

Part 1 is a fairly extensive provision and variously imposes both substantive and procedural duties on public authorities, public bodies, Natural Resources Wales (NRW) and the Welsh ministers and potentially extends the powers of NRW. In outline Part 1:

- defines 'natural resources'
- creates (or more accurately strengthens) the biodiversity duty on public authorities
- amends the general statutory purpose for NRW
- imposes NRM duties on public bodies (as opposed to public authorities)
- requires the Welsh ministers to compile a biodiversity list
- requires the Welsh ministers to compile a national natural resources policy (NNRP)
- requires NRW to compile a state of natural resources report (SoNaRR)
- requires NRW to compile area statements
- makes new provision for greatly enhanced land management agreements
- makes provision for the suspension of certain statutory obligations when NRW is exercising experimental powers.

Turning first to the biodiversity duty: 'A public authority must seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions'.³²

A public authority (*awdurdod cyhoeddus*) encompasses:

- (a) the Welsh ministers
- (b) the first minister for Wales
- (c) the Counsel General to the Welsh Government
- (d) a minister of the crown
- (e) a public body (including a government department, a local authority, a local planning authority and a strategic planning panel)
- (f) [Crown or Assembly appointees]
- (g) a statutory undertaker (defined in clause 6(7)(a–h)).³³

Thus, the biodiversity duty extends to a larger number of authorities than was the case for the well-being duties in the WFGA and, notably, includes statutory undertakers. Under the terms of clause 6(7), this includes all the utilities providers in Wales, and the clause is drafted in such a way as to make it clear that this does not apply only to providers operating *exclusively* in Wales.

29 Part 1: Sustainable Resource Management in Wales; Part 2: Climate Change; Part 3: Charges for Carrier Bags; Part 4: Collection and Disposal of Waste; Part 5: Fisheries for Shellfish; Part 6: Marine Licensing.

30 Environment (Wales) Bill 2015 cl 4.

31 See J B Ruhl, 'General Design Principles for Resilience and Capacity in Legal Systems – with applications to Climate Change Adaptation' (2010/11) 89 *North Carolina Law Review* 1373.

32 *ibid* cl 6(1).

33 *ibid* cl 6(6).

Once again, as statutory duties go, this is moderately lightly worded in the sense that the term 'seek to maintain and enhance biodiversity' is susceptible to generous interpretation. A public authority can seek to maintain and enhance without necessarily having any tangible impact and yet still, arguably, discharge the duty.³⁴

A similar point can be made in respect of the statutory purpose created for NRW in respect of NRM by clause 5.³⁵ Under this clause, NRW must: (a) seek to achieve sustainable management of natural resources in relation to Wales; and (b) apply the principles of sustainable management of natural resources, in the exercise of its functions, so far as consistent with their proper exercise.

It is fair to say that couching the achievement of one of the principal purposes of a statutory enforcement body in terms of 'seeking to' smacks a little of faint-heartedness. Moreover, sub-clause (b) requires that NRW need apply the principles of sustainable NRM³⁶ only insofar as this is consistent with *the proper exercise of its functions*. However, since the entire purpose of part (a) of this clause is to make the exercise of (or at least the 'seeking to achieve') these principles a purpose (or function) of NRW,³⁷ a significant degree of circularity is introduced.

In addition to this new statutory duty, NRW is also required, within four months of the coming into force of the Act, to compile a state of natural resources report (SoNaRR). According to the statutory guidance, this report is to form a 'baseline which will inform the development of policy'.³⁸ The policy referred to is the national natural resources policy (NNRP), to be compiled by the Welsh ministers under clause 9. This must be completed within 10 months of the coming into force of the Act³⁹ and must contain the key priorities and opportunities that the Welsh ministers consider necessary to bring about sustainable NRM in Wales.

Additionally, the Welsh ministers are required, with the statutorily required advice of NRW, to draw up a biodiversity list 'of the living organisms and types of habitat which, in their opinion, are of principal importance for the purpose of maintaining and enhancing biodiversity in relation to Wales'.⁴⁰ Finally, NRW must, under clause 10, draw up area statements 'for the areas of Wales that it considers appropriate for the purpose of facilitating the implementation of the national natural resources policy'.

Three of these four procedural obligations are associated with additional substantive duties or powers.

In respect of the biodiversity list, the Welsh ministers must: '(a) take such steps as appear to them to be reasonably practicable to maintain and enhance the living organisms and types of habitat included in any list published under this section'.⁴¹ In relation to the NNRP, the Welsh ministers must: '(a) take such steps as appear to them to be reasonably practicable to implement the national natural resources policy, and (b) encourage others to take such steps'.⁴²

In respect of area statements NRW must: '(a) take such steps as appear to it to be reasonably practicable to implement an area statement, and (b) encourage others to take such steps'⁴³ and the Welsh ministers may:

- (1) ... direct a public body to take such steps as appear to them to be reasonably practicable to address the matters specified in an area statement under section 10(3).
- (2) Before giving a direction the Welsh ministers must consult the public body they intend to direct.
- (3) Where a direction is given to a public body under this section, the body must comply with it.
- (4) A direction under this section may not require a public body to do something it may not otherwise do in the exercise of its functions.
- (5) A direction under this section—
 - (a) must be published;
 - (b) may be varied or revoked by a later direction;
 - (c) is enforceable by mandatory order on an application by, or on behalf of, the Welsh ministers.⁴⁴

Clauses 13–15 require: (i) public bodies to 'have regard to any guidance given ... by the Welsh ministers about steps ... specified in an area statement';⁴⁵ (ii) that public bodies observe a duty 'to provide information or other assistance to NRW' for the purposes of implementing area statements;⁴⁶ and, (iii) that NRW observes a duty 'to provide information or other assistance to public bodies' for the purposes of implementing area statements.⁴⁷

Summary and analysis of Part I⁴⁸

The bill proposes a raft of obligations which fall on various bodies in respect of various elements of the bill. The efforts of the Welsh Government in taking the initiative to place biodiversity protection and sustainable resource management on a statutory and duty-bound basis are greatly to be commended. However, there is still a good way to go in terms of the coherence and integration of these obligations in terms of their content, scope and enforceability.

34 A point made by UKELA when the Wales Working Party gave evidence to the Welsh Assembly Committee on Environment and Sustainability on 24 June 2015 <http://www.senedd.tv/Meeting/Archive/b4d86816-222e-4c33-a115-9caff224a431?autostart=True> (UKELA evidence begins at 3h 0min on timeline).

35 Which proposes an amendment of the Natural Resources Body for Wales (Establishment) Order 2012 (SI 2012/1903).

36 See Environment (Wales) Bill 2015 cl 4.

37 Indeed, para 53 of the Explanatory Memorandum states that this 'provision updates the core purpose of NRW' (emphasis added) www.assembly.wales/laid%20documents/pri-ld10201-em/pri-ld10201-em-e.pdf.

38 *ibid* para 83.

39 Environment (Wales) Bill 2015 cl 9(5).

40 *ibid* cl 7(1).

41 *ibid* cl 7(3)(a).

42 *ibid* cl 9(4).

43 *ibid* cl 10(4).

44 *ibid* cl 12.

45 *ibid* cl 13.

46 *ibid* cl 14.

47 *ibid* cl 15.

48 In the interests of brevity discussion of the Land Management Agreement provisions and the experimental powers for the NRW has been omitted. However, UKELA's response and critique of these provisions may be found in the written evidence submitted to the Welsh Assembly paras 16–21 <http://www.ukela.org/content/page/4278/UKELA%20Evidence%20paper%20on%20the%20Environment%20Bill%20final%20draft.pdf>.

One of the more obvious sources of confusion relates to the definitions of public bodies and public authorities. The definition of a public authority for the purposes of clause 6 (the biodiversity duty) includes 'a public body (including a government department, a local authority, a local planning authority and a strategic planning panel)'. However, for the purposes of clauses 12–15 there is a different definition of a public body (which is the same as the definition in section 6(1) WFGA except that it omits, understandably, the Welsh ministers and NRW). Moreover, a local authority in clause 6 'means a council of a county, county borough or community in Wales',⁴⁹ whereas for the purposes of clauses 12–15 a local authority is 'a council of a county or county borough in Wales'.⁵⁰ Whilst it is conceded that different public authorities may necessarily need to bear different obligations, the current drafting scarcely makes the provisions transparent to those likely to be subject to the duties, let alone the lay public.⁵¹

In terms of the duties imposed, the biodiversity duty under clause 6 has the widest scope and falls broadly on 'public authorities'. As alluded to above, discharging of the duty may not necessarily result in tangible benefit to the biodiversity of Wales since 'seek[ing] to maintain and enhance biodiversity' is not the same as, for example, 'contributing to'. However, even if a public authority was found wanting in respect of its duty, it is difficult to see what action would follow. True, each public authority is required to publish a report on 'what it has done to discharge the duty',⁵² but if the contents of the report are unsatisfactory the bill is silent on what follows in terms of sanction or even exhortation to greater efforts in the future.

Duties in relation to the NNRP, the SoNaRR, the biodiversity list and area statements fall either on NRW or on the Welsh ministers and all require the taking of 'such steps as appear to [the relevant body] to be reasonably practicable'. In all cases the assessment of the reasonableness of the steps taken lies with the body required to take them which does not appear to be a very robust form of accountable governance. Having said that, there are 'teeth' in the provisions relating to area statements in that the Welsh ministers can direct public bodies (as distinct from 'authorities') to take steps to address matters specified in an area statement and these can be enforced by application for a court order (although this will presumably only be resorted to if NRW has failed to 'encourage' the public body to take steps).

Given that the area statements are intended to be the working documents designed to implement the NNRP (informed in the first place by the SoNaRR), then this does appear to be a fully-fledged legal duty on public bodies at the correct 'functional' level. Thus, provided that the area statements are an accurate reflection of the strategic needs of sustainable resource management in Wales, then this

could be a workable and appropriate mechanism. However, some misgivings must remain about that accuracy given the very short periods envisaged for the generation of the SoNaRR and NNRP and the lack of provision for wider consultation in relation to them.

Finally, a number of the authors of UKELA's evidence to the Committee pointed out that Part 1 is notably lacking in precautionary and preventive measures and in explicit opportunities for public participation, both in relation to the biodiversity duty itself, but also in the measures relating to the drafting of the NNRP, biodiversity lists and area statements. The principles of sustainable resource management (clause 4), in particular, require many aspects of natural resources to be 'managed', 'considered' or 'taken account' of, but the language of preservation, conservation or protection is conspicuously absent. It is also surprising that neither these central principles nor the definition of sustainable natural resources management (clause 3) make any mention of well-being,⁵³ which would appear to be a missed opportunity for integration with the WFGA.

The Environment (Wales) Bill 2015 has the potential to set a benchmark for integrated natural resource management which could well act as a model for other governments, not only in the UK, but worldwide. However, like the WFGA, much will depend on the resources made available, the goodwill of those charged with achieving the objectives and, most importantly, the integration of the Bill, not only with the overarching well-being objectives in the WFGA, but also with other primary legislation, notably the Historic Environment (Wales) Bill 2015 and the Planning (Wales) Act 2015.

The Historic Environment (Wales) Bill 2015 and the Planning (Wales) Act 2015

The preceding discussion has highlighted some of the challenges involved in integrating the objectives and purposes of the WFGA and the Environment (Wales) Bill. The extent to which these two pieces of legislation are integrated (notwithstanding the room for improvement) owes much to the fact that they were drafted in the same ministry. However, two further provisions add to the complexity of this challenge, namely the Historic Environment (Wales) Bill 2015 and the Planning (Wales) Act 2015, both of which were drafted in a different department of the Welsh Government and, arguably, are not as integrated with the overarching themes of the WFGA as they could be.

The Historic Environment (Wales) Bill 2015 (HEW)

This bill aims to protect the considerable cultural heritage in the built environment of Wales, whilst at the same time permitting some disturbance of historic sites where 'sustainable new use' is envisaged. There are also a number of improvements in terms of registration, management and enforcement in respect of historic sites,⁵⁴ better

49 Environment (Wales) Bill 2015 cl 6(7).

50 *ibid* cl 11.

51 Considerable confusion ensued over these definitions even among the UKELA members who jointly drafted the evidence for the Assembly Committee – all of whom are either experienced practitioners or academic lawyers of long standing.

52 Environment (Wales) Bill 2015 cl 6(5).

53 In fact this term is entirely absent from Part 1 of the bill.

54 Historic Environment (Wales) Bill 2015 cll 5–10, 12–14, 18, 19, 29 and 34–36.

partnership working to ensure more sensitive work programmes⁵⁵ and the setting up of a formal advisory panel on historic environmental policy and strategy.⁵⁶

Clearly all this has implications for, and potential conflicts with, the well-being duties and NRM imperatives of the measures discussed above. In particular, the cultural element of well-being in the WFGA is bound to encompass the historic environment, and the large estates in Wales are likely to play an important part in NRM. Also, the landscape in Wales is one of the country's foremost assets and a primary ecosystem service; the importance of good management of the historical environment in this respect can hardly be overstated. However, there is very little cognisance of these matters in the HEW bill itself.

Planning (Wales) Act 2015 (PWA)

The implications of this Act have been expertly assessed elsewhere.⁵⁷ For present purposes, it is sufficient to summarise the principal features. The PWA creates a national development framework for Wales, which impinges on local development plans and local planning authorities through strategic planning plans for defined areas of Wales overseen by strategic planning panels. This represents a distinctive approach to planning in Wales, which is considerably more centralised than the system now operating in England. However, like the HEW, the PWA makes little explicit reference as to how the various tiers of governance in the planning system will be integrated with the achievement of well-being objectives and sustainable NRM.

Conclusions

It can be said with all sincerity that this is an exciting time to be studying the evolution of environmental law and governance in Wales and the extent to which the Welsh Government has exercised its recently-obtained powers to legislate is evident to all. Moreover, the Welsh Government has sought to be innovative and creative in attempting to protect the considerable environmental resources and heritage in Wales for present and future citizens and its efforts so far are highly commendable. However, the challenges involved in ensuring that these initiatives are workable, efficient and cost-effective at a time of ongoing austerity are immense.

The key to success unquestionably lies in the integration and balancing of the duties and objectives to which public bodies are subject, and in the extent to which the citizens of Wales perceive the operation of a coherent and transparent set of principles, which are self-evidently in their collective interests (if not always in the interests of a particular individual). If the perception arises that these measures are mere political exercises they will fail. Thus, in addition to integration, public participation will be a vital element, as will the need to demonstrate that public bodies who ignore, or fail to take seriously, their obligations, will be held properly and publicly to account. As UKELA (and others) have pointed out repeatedly during the consultation and evidence-provision stages of all the above legislation, these factors are the principal areas in need of enhancement.

⁵⁵ *ibid* cll 11, 28.

⁵⁶ *ibid* cll 37–38.

⁵⁷ Note 1.



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ISSN 1067 6058