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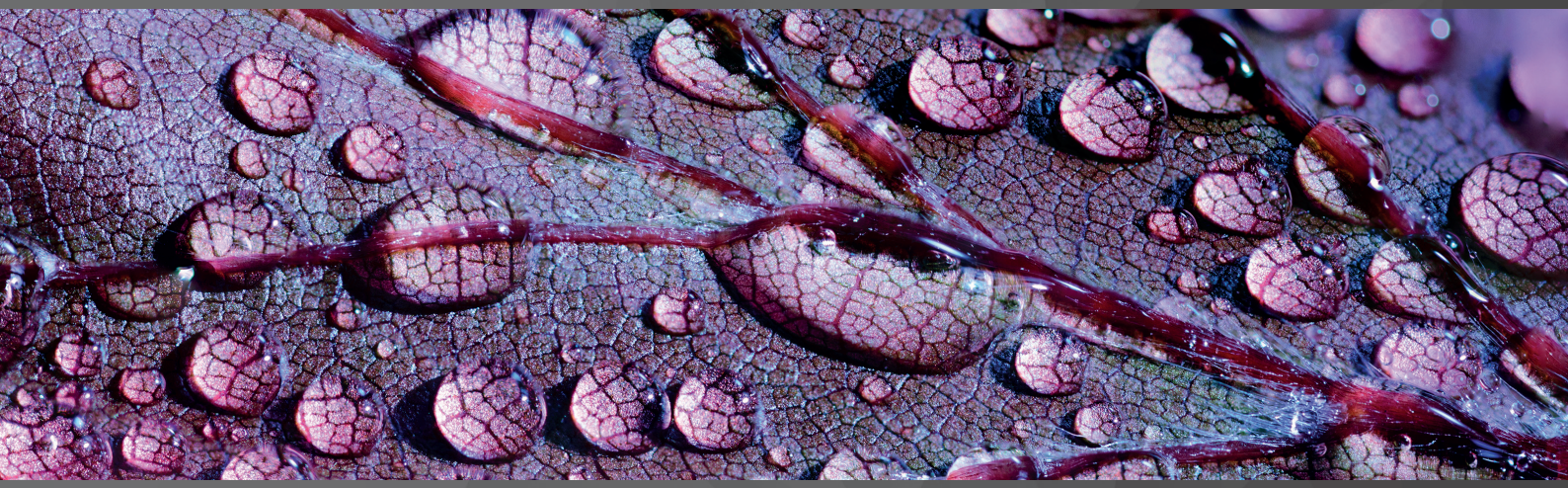

Environment & Climate Change Law 2021

A practical cross-border insight into environment and climate change law

18th Edition

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UK Environmental Law in the 21st Century: An Unsettled Picture

United Kingdom Environmental Law Association (UKELA)

Ned Westaway

Introduction

I am delighted to be asked to author this short introductory chapter to *ICLG – Environment & Climate Change Law 2021*, on behalf of the UK Environmental Law Association (UKELA).

As with the rest of the world, the UK has been considerably shaken by the COVID-19 pandemic. Unlike the rest of the world, however, the UK has also been negotiating the transition from being a member of the European Union, which ended on 31 December 2020. With just one week to go, on Christmas Eve, the UK and the EU finalised the Trade and Co-operation Agreement (TCA), which was hastily endorsed by the UK Parliament on 30 December 2020.

Withdrawal from the EU represents the most profound change for environmental law in the UK in living memory. The EU has heavily influenced domestic environmental law and policy – it is responsible for some two-thirds of our environmental law. The substantive and procedural shift from EU law and institutions is therefore enormous. This also happens to coincide with global environmental crises, in particular, of climate change and biodiversity loss. It is right to observe that neither has there ever been a period of greater change, nor a need for greater change, to environmental law.

With some exceptions, the general approach to retained EU law has been a "holding position", largely leaving in place EU-derived law, for example, on habitat protection, environmental assessment and the control of chemicals. There have been amendments to make the laws workable outside of the EU context but, more significantly, there is scope for more extensive change by way of secondary legislation in future. Those changes look set to vary between the constituent jurisdictions of the UK: England; Northern Ireland; Scotland; and Wales. Brexit was not contemplated when the vast majority of environmental matters were transferred from Westminster to the devolved administrations over the last 20 years. More substantial internal divergence lies ahead.

The COVID-19 pandemic has also substantially impacted the work of UKELA. Despite that, UKELA's Governance and Devolution Group and working parties have been exceedingly active, responding to an unprecedented number of consultations on proposed changes to law and policy, and submitting evidence to Parliamentary committees. We successfully held our first ever entirely digital annual conference in 2020 and, in November 2020, welcomed Judy Ling Wong, Honorary President of the Black Environment Network (BEN), to present our annual lecture on what environmental lawyers can do to address and promote inclusion and diversity in environmental law.

In this chapter I share some perspectives gained from the debates and discussions that have taken place this year within UKELA and between UKELA and others (including the UK Government). The views, however, are my own.

I will reflect, in particular, on the environmental governance challenge facing the UK post-Brexit, the TCA and some recent developments in (and concerning) the courts.

An important area of environmental law in which the UK will take centre stage in 2021 is climate change – as Chair of the 26th UN Climate Change Conference of the Parties (COP26) in Glasgow in early November. In December 2020, the UK communicated its new Nationally Determined Contribution under the Paris Agreement to the UNFCCC Secretariat committing to reducing economy-wide greenhouse gas emissions by at least 68% by 2030 (compared to 1990 levels), which is in line with the domestic "net zero" 2050 target from 2019. The role of law in achieving these ambitious targets is a matter that is discussed separately in this guide, by my colleague Simon Tilling.

Fish, Agriculture… Environment?

Three key bills were promoted by the Department for Environment, Food & Rural Affairs (DEFRA) in preparation for Brexit: the Agriculture Bill; the Environment Bill; and the Fisheries Bill. All three have important implications for environmental protection. The bills were introduced into Parliament in quick succession in January 2020. However, while the Agriculture Act 2020 obtained Royal Assent on 11 November and the Fisheries Act 2020 on 23 November 2020, the Environment Bill is still awaiting completion of its report stage in the House of Commons (before going to the House of Lords) and will likely not become law until Autumn 2021 at the earliest.

The Agriculture Act provides for the creation of a new Environmental Land Management Scheme (ELMS), a new system providing payments to farmers to replace the EU Common Agricultural Policy (CAP). The detail of what will be provided by ELMS is subject to ongoing consultation and trials, but the basic principle is of "*public money for public goods*" – where "*public goods*" includes biodiversity enhancements, air quality improvements and carbon sequestration. By putting land management at the core of agricultural production, the Act may be described as radical, though perhaps more evolution than revolution. It is potentially very significant indeed and goes a long way to bringing the environmental agenda into an area where it has often been overlooked. The policy approach in Northern Ireland and Wales will vary from England. In Scotland, the Agriculture (Retained EU Law and Data) (Scotland) Act 2020 retains CAP payments for now and allows for future amendment to suit local circumstances, but present indications are that the focus is less on radical change than in England – in line with the Scottish Government's policy of closer alignment to the EU.

The Fisheries Act sets out a framework for fisheries management to meet eight broad objectives (including sustainability and

climate change). Elements of the EU Common Fisheries Policy are retained, but fisheries quotas and management will be determined in the future according to a Joint Fisheries Statement (JFS) that must be produced by the UK's four national fisheries policy authorities in the different jurisdictions.

The Environment Act 2021 (as it should be) will be much wider in scope (although it applies principally to England). That may be one reason why it has not been progressed with the legislative urgency of the other DEFRA bills; another may be that it will not directly affect trade in the same ways as food or fish. Following a long period of stasis in 2020, the Bill was anticipated to complete its Parliamentary process by Easter 2021. However, in January 2021, the Government made a surprise announcement that the Bill would be carried over to the next parliamentary session on account of "*exceptional pressure on the parliamentary timetable which has reduced the amount of Parliamentary time available for the scrutiny of legislation*". This could be interpreted in different ways: that the Bill is not a Government priority; or, conversely, that the Bill is a priority (and so requires full scrutiny). Whatever the reason, the delay in finalising the law is problematic for a number of reasons, most importantly because it lengthens the period of the "governance gap" that has opened up following departure from the EU. In an attempt to reduce the gap, an Interim Environmental Governance Secretariat has been established within DEFRA that will operate on a temporary basis. The fact remains, however, that the Bill is the first major legislative intervention in the environmental field for over 25 years (since the Environment Act 1995). In introducing it, the Government claimed that the Bill "*sets a gold standard for improving air quality, protecting nature, increasing and cutting down on plastic waste*". It is therefore important to understand its scope and ambition.

Environmental Governance 1: Targets and Principles

The Environment Bill proposes the introduction of long-term (15-year) statutory targets in four priority areas – air quality, water, biodiversity and resource efficiency/waste reduction. There is also a requirement to set a separate target for the reduction of fine particulate matter in the air ($PM_{2.5}$). Achievement of the statutory benchmark will be binding on the Secretary of State. Interim targets must be included within an "*environmental improvement plan*" that is defined as "*a plan for significantly improving the naturel environment in the period to which the plan relates*". Interim targets will not have the same statutory force, but annual reports must be prepared on the environmental improvement plan.

How ambitious the targets will be remains to be seen. They will depend upon regulations to be made, and – at present – laid before Parliament on or before 31 October 2022. The Government's policy paper *Environment Bill – environmental targets* (updated 21 October 2020) notes:

> "*It is a major new step to set environmental goals, beyond climate change mitigation, in a way that legally binds this government and future governments, and we want to get it right. We believe that the best way to deliver targets is through a robust, evidence-led process that seeks independent expert advice, provides a role for stakeholders and the public, as well as scrutiny from Parliament.*"

What is clear is that there is scope for ambitious targets to be set, which go beyond the targets currently provided by EU law. In some areas, such as $PM_{2.5,}$ that seems a likely outcome. Similarly, targets for biodiversity will very likely not be limited to EU protected areas and protected species, but will be of more general application. Targets will be a topic of legal, scientific and political debate over the next few years, in which UKELA will play a role.

The Bill establishes the 2018 publication, *A Green Future: Our 25 Year Plan to Improve the Environment* as the first environmental improvement plan. This document is arguably a poor model for future plans. The National Audit Office has criticised it as containing a "*complex mix of aspirations and policy commitments for action, with varying and often unclear timetables*". The *25 Year Plan* does contain some firm commitments, such as the banning of new conventional petrol and diesel cars by 2040 (though that goal was brought forward by 10 years in November 2020); however, if future plans are to be successful strategic frameworks for environmental improvement, they will need to be more focussed and specific.

Other interesting questions arise as to how the targets might be enforced. Following the example of the carbon budgets and targets in the Climate Change Act 2008, the Environment Bill includes reporting duties on the Secretary of State, including the setting out of steps to be taken if targets are not met. They must also be monitored by the new Office for Environmental Protection (OEP) (see below). Their legal force, however, is likely to go beyond those formal mechanisms. For example, they are likely at least to be powerful material considerations when decisions are made that potentially prejudice the attainment of the targets.

Exactly how the new plans and targets dovetail with retained EU law is not entirely clear. As drafted, the Environment Bill does not prevent regression from existing standards. The proposal is that proposed new environmental laws must be accompanied by a statement, which either says that they will not have the effect of reducing existing levels of environmental protection or that they will do have that effect but "*Her Majesty's Government nevertheless wishes the House to proceed with the Bill*".

One aspect of EU law that is difficult (if not impossible) to translate into the domestic UK context is the foundational importance of the EU Treaties. It is the Treaties that primarily give us the principles on which EU environmental law is founded (and against which it falls to be interpreted), including the precautionary principle and the "polluter pays" principle. The Environment Bill requires the most important of these principles to be incorporated into a policy statement, to which ministers must have "*due regard*" when making policy. That relatively lukewarm provision is far removed from the central role that the principles have in the making of EU environmental law (not just policy).

Environmental Governance 2: Regulator of Regulators

A clear governance gap created by Brexit is the loss of the EU Commission as an independent monitor and enforcer of EU environmental law. This is a point that UKELA emphasised in its early submissions. UKELA's July 2017 report *Brexit and Environmental Law – Enforcement and Political Accountability Issues* highlighted the practical importance of the Commission's role:

> "*In many areas of European Union law (such as competition law, employment rights, internal market) there are individuals or bodies with clear legal and economic interests to protect and defend. The environment is in a different position. It may be unowned, and while environmental organisations are committed to promote the general interest of the environment they vary in strength and coverage, and cannot be expected to take on the role of systematic enforcement. The distinctive nature of the environment means that in most jurisdictions, including the UK, public bodies (government departments, local authorities, specialised agencies) have a particular responsibility for environmental protection – but it is often these same bodies that face conflicting policy priorities and financial constraints, making it all too easy for their environmental obligations to be compromised or underrated. The supervisory role of the Commission in ensuring that the obligations of these bodies under European environmental law are properly implemented has, as a consequence, been especially important.*"

The Environment Bill proposes to substitute the role of oversight provided by the Commission with the OEP. The OEP

will be an independent public body tasked, among other things, with holding to account the Government and public authorities on their compliance with environmental law. Where the Commission had established an informal procedure whereby it could receive complaints about non-compliance by member states from the public, the new domestic equivalent is to be put on a statutory footing. The Commission's powers to carry out investigations, issue reasoned opinions and – if necessary – bring infringement cases before the Court of Justice of the European Union (CJEU) (with powers to exact fines for repeated non-compliance) will be replaced by the OEP's investigation and enforcement procedures, which include issuing information notices, decision notices, and – if necessary – seeking a new procedure of "*environmental review*" from the High Court.

There are real concerns about the ability of the OEP to carry out these functions independently, efficiently and effectively. For example, complaints may only be made to the OEP after an internal complaints procedure has been exhausted and the OEP can only seek environmental review once the period for another party seeking judicial review has expired. The OEP's interventions are therefore likely to come late in the day, and may not be able to affect the outcomes of individual cases (indeed, such a result is made likely by clause 37(8), which limits the High Court's ability to grant remedies following environmental review). Unlike the CJEU, the High Court will have no power to issue fines.

That said, the OEP's powers are broad and its role novel. It is part-regulator, part-ombudsman – a kind of "regulator of regulators". Moreover, it must monitor and report on targets, the environment improvement plan and environmental law. While it is yet to be formally established, the Government has already appointed a chair and an interim chief executive of the OEP (in shadow form) and is in the process of recruiting non-executive directors. The resources available to the OEP will be critical to its success, as will the culture that is established. Provided the wording of the Environment Bill does not preclude this (and arguably, the current version does), there is every prospect that the OEP could be a vigorous investigator and upholder of environmental law that emulates, if it does not replicate, the EU Commission.

Biodiversity Gain and Other Matters

The Environment Bill covers a miscellany of other important topics. It provides new powers and duties to promote producer responsibility, resource efficiency and waste management. It strengthens water resources and drought management powers and, controversially, provides for the revocation of water abstraction licences without compensation. It also contains significant changes to air quality law and provides for amendment of chemicals regulations.

The most radical and worked-out of the other proposals in the Bill, however, are the proposals to enhance biodiversity. Three particular aspects are novel and ambitious. The first is mandating biodiversity net gain of 10% as a condition of planning permissions. This will be based upon a biodiversity metric that has been developed by DEFRA. The second is the creation of a network of "*local nature recovery strategies*" – a kind of parallel planning framework for nature through which monitoring and improvement can take place. The third is the bringing into law of a new form of land agreement – a conservation covenant – enabling the protection, restoration and enhancement of biodiversity to be secured for the long term.

Scotland Ahead? The Challenge of Devolution

North of the Tweed, there is no "governance gap". The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 became law on 31 January. The Act is more focussed than the Environment Bill and is limited to governance and principles. It has some parallels with the Westminster proposal, but is more faithful to the EU structures that it seeks to replicate.

Part 1 of the Act empowers Scottish Ministers to make regulations corresponding to or implementing EU laws – in other words, to keep step with developments in EU law. This reflects the Scottish Government's policy of "*dynamic alignment*" – protecting the position of a future independent Scotland being able to apply for EU membership. The legal ramifications of that, including the real possibility of tensions with the UK Internal Market Act 2020, are fascinating, although beyond the scope of this short note.

Part 2 Chapter 1 covers principles. It sets out five principles drawn from the EU environmental *acquis*: the integration principle; precautionary principle; preventive principle; principle of rectification at source; and the "polluter pays" principle. It then states (for the avoidance of doubt) that these principles "*are derived from the equivalent principles provided for in Article 11 of Title II and Article 191(2) of Title XX of the Treaty on the Functioning of the European Union*". Scottish Ministers must publish guidance on the principles, but the legal duty in section 14(1) is to have regard to the principles themselves in making policies – defined as "*including proposals for legislation*".

Chapter 2 sets up Environmental Standards Scotland (ESS), the equivalent of the OEP, on which it is obviously modelled. Again, however, there are a number of differences. ESS has a greater measure of independence from the executive than is currently proposed for the OEP, both in relation to appointments and in setting its strategy. Its enforcement powers are also stronger and more direct. ESS can issue an improvement report on a public authority where it identifies problems with the implementation of, compliance with or effectiveness of environmental law. It can issue a compliance notice (binding but subject to appeal) where an authority fails to comply with law in a way that risks causing harm. The focus, however, is on systemic issues. ESS may not take action where the failure arises in relation to "*a particular person or case*" – in practice that may considerably limit its scope for intervention.

The Welsh Government consulted on environmental principles and governance post-Brexit in March 2019, and Ministers decided in late 2020 that they would establish a new independent commissioner, but the details of that have not yet been published. The Environment Bill proposes applying key parts of the environmental governance provisions from England to Northern Ireland, including the statement on principles and OEP.

This fragmentation illustrates the tension of treating environmental concerns as a devolved matter. For some issues, it makes sense; however, as was noted at a recent UKELA event, there are approximately 600 farms on the English-Welsh border. It is potentially very onerous on farmers that straddle the border to be subject to different (and possibly conflicting) regulatory regimes. The same can be said for businesses that trade throughout the UK.

Trade and Cooperation Agreement

The Trade and Cooperation Agreement (TCA) was hurriedly agreed at the end of 2020 and is incorporated into UK law through the EU Future Relationship Act 2020. It is a very substantial document governing future trade between the parties. Understandably, it covers environmental law relatively briefly. Various commitments are made to prevent either party obtaining a competitive advantage across a number of areas. The specific environmental commitments relate primarily to climate change and energy, including commitments to 2050

net zero carbon targets, renewable energy targets and an effective carbon-pricing system. It covers co-operation over renewable energy in the North Sea and provides that the parties "*give serious consideration*" to linking the UK and EU emission trading systems (ETSs) – something that ought not to prove too difficult given that the brand-new UK ETS is modelled heavily on the EU version it replaces.

Notably, there is a requirement under the TCA for each party to refrain from acts or omissions that would materially defeat the objective and purpose of the Paris Agreement. This is one of the "*essential elements*", the breach of which could entitle the other party to terminate or suspend all or part of the agreement. Other provisions are subject to different dispute resolution mechanisms, which each entail varying levels of clout, bindingness and availability. Of these, the non-regression provision in Article 7.2(2) of Title XI of Part 2 has attracted most attention among environmental lawyers. This is that:

> "*A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection.*"

What is meant by "*a manner affecting trade or investment between the Parties*" is surprisingly unclear. It does not reflect common drafting, and could be interpreted broadly or narrowly. For such a critical provision, that is somewhat unfortunate. However, as with most bilateral trade agreements, politics will likely be more important than law.

Unlike EU law, the TCA is of not of direct (or indirect) effect, so cannot (at least on its own terms) be relied upon to uphold or enforce environmental law in domestic courts. In times of flux though, nothing is ever completely certain. Section 29 of the EU Future Relationship Act 2020 provides that existing domestic law has effect "*with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement*". The import of this provision – like so much connected with Brexit – is far from clear.

Just as it took decades of legal argument to recognise the full implications of membership of the EU – including the *Factortame* saga (that was heard on four separate occasions in the House of Lords) – it may take many years for the legal implications of leaving to settle.

The Role of the Courts

The last point I want to mention is the role of the courts. The courts' role in the UK is generally confined to a supervisory jurisdiction: review of the lawfulness of decisions, but not the merits. The courts are extremely wary about straying, even subconsciously, into the "forbidden territory" of merits. However, it is difficult conceptually to draw a bright line between facts and law, especially when the question is whether or not an authority acted rationally on the evidence before it, or gave adequate reasons addressing a particular matter. Climate change is an issue that challenges the distinction. In March 2020, the Court of Appeal allowed an appeal and quashed the Airports National Policy Statement favouring a third runway to the north west of Heathrow Airport. It did so on the basis of failure to have regard to the Paris Agreement; it was regarded as "*so obviously material*", that it needed to be specifically addressed in the Policy Statement. In a landmark decision in December 2020, the Supreme Court overturned that decision, holding (in very brief summary) that the Paris Agreement had been considered and did not need to be addressed further in the policy, but could lawfully be left as a matter for individual decision-making. On that basis, the Supreme Court did not consider it necessary to determine the underlying question of the materiality of the Paris Agreement for decision-making, although it noted that it "*is not a straightforward issue*".

The present approach to judicial review is one of relative conservatism. What is unavoidable is that as environmental and climate crises become more urgent, the courts are likely to be increasingly tested as a forum for redress.

On the other side of the spectrum, the UK Government is separately concerned by the power of "activist judges". In July 2020, it commissioned an Independent Review of Administrative Law with a remit, among other things, to look at whether certain areas of public administration should be immune from challenge and whether there should be further limits on judges' powers to grant relief. UKELA responded to the consultation submitting that radical change is unwarranted (at least from the perspective of environmental law) but that there may be merit in certain minor changes, such as broadening the remedies available to judges (beyond the usual mandatory orders, quashing orders and declarations) to make judicial review a more effective tool in addressing unlawfulness.

Returning to the theme of Brexit, it is now the case that the higher tiers of courts (the Supreme Court, Court of Appeal and Inner House of the Court of Session) may depart from previously binding CJEU decisions (retained EU case law) if they consider it right to do so (section 6 of the European Union (Withdrawal) Act 2018 (as amended)). It therefore seems only a matter of time that some of the more legally controversial interpretations of the law made by the CJEU – for example, on strategic environmental assessment or the definition of waste – will be revisited, and may be overturned, domestically. Enabling the Court of Appeal (of England and Wales or Northern Ireland) and the Court of Session to do so independently of each other gives rise to the possibility of divergent interpretations across the jurisdictions, although the Supreme Court would, in theory, be able to ensure consistency.

Concluding Remarks

This is a period of unprecedented change for environmental law. There are reasons for optimism. There are also reasons for concern. Many environmentalists are saying that the 2020s need to be the "decade of action". The law cannot stand still, nor will it.

As it goes on its own path, it seems likely that the UK will (i) go further than the EU in some areas, (ii) keep step in others, and (iii) relax controls in others. Even at this early stage, that is apparent, for example: (i) more wide reaching controls are proposed in the Environmental Bill for diligence on forest risk commodities than are covered by the EU Timber Regulations; (ii) the announcement in January 2021 of regulations to ban the burning of blanket bog habitats is in line with a pre-Brexit complaint pursued by the EU Commission against the UK; and (iii) there have already been minor relaxations in a number of detailed areas such as pesticides control – see, for example, regulation 9 of the Persistent Organic Pollutants (Amendment) (EU Exit) Regulations 2020.

It is also certain that there will be increased divergence between England, Northern Ireland, Scotland and Wales.

What is perhaps most important, however, is that the institutional framework of environmental law in the UK is properly protected, and that the regulators – both existing and new – are properly empowered, supported and funded.

As ever, UKELA will be watching and seeking to ensure that the interests of the environment are properly represented.

Ned Westaway is Vice-Chair and Chair Elect of the UK Environmental Law Association and a barrister specialising in environmental law at Francis Taylor Building in London, a leading chambers in planning, licensing, public and environmental law. Ned's practice encompasses the full breadth of environmental law, from flooding to emissions controls. He is consistently rated as a leading junior by *Chambers and Partners* and *The Legal 500* in planning law, environmental law and agricultural & rural affairs. *Who's Who Legal* lists him as one of the most highly regarded juniors for environment law. *The Legal 500 Environment* describes Ned as "*[a] real specialist, very bright and perceptive, his knowledge of the law is top-class and he will argue the case with vigour*".
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The United Kingdom Environmental Law Association (UKELA) is the UK forum that aims to make better law for the environment and to improve understanding and awareness of environmental law. We were established in 1988. UKELA is a registered charity and a limited company. Our charitable objects include promoting, for the benefit of the public generally, the enhancement and conservation of the environment in the UK and advancing the education of the public in all matters relating to the development, teaching, application and practice of law relating to the environment. We encourage collaboration between those interested in environmental law, as well as advising and commenting on relevant issues.
Membership of UKELA is open to all and we offer a range of entry points to suit all pockets. We offer a comprehensive events programme throughout the year and across the UK on a range of hot topics. Each summer, we organise the leading conference in environmental law in the UK – join us on 14–18 June 2021 for our annual conference week of events, culminating in the formal conference programme on 17–18 June – details can be found at https://www.ukela.org/UKELA/Annual-Conference/UKELA/UKELA-Annual-Conference/Annual%20Conference%20information.aspx?hkey=1fba1db3-fe45-485c-b98a-dc32eeb540e2.

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