



UKELA

# e-law

Better law for the environment

January/February 2020 | Issue 116



**Welcome to the January/February edition of elaw where the focus is on the Environment Bill.**

The theme for this edition is well timed, given that the January 2020 version of the Environment Bill was introduced to Parliament on 30 January. In fact, we have delayed publication of this edition slightly to allow for the rather tight timescales for our authors in producing articles that reflect the new Bill rather than

the previous October 2019 version of the Bill. We are very grateful to them for this hard work under time pressure!

The provisions in the Environment Bill constitute a real shake up of UK environmental law, offering the potential for a new legal framework with wide-ranging changes to environmental laws and governance and of huge importance to our members.

The Bill is of course of huge importance and its attempt to plug a governance gap post Brexit via creation of the Office for Environmental Protection (OEP), replacing recourse to the European Court of Justice, and to protect environmental principles is welcomed. However there are some shortcomings in how the Bill has been drafted and we have two scrutiny pieces which look at these.

Firstly, Catherine Dobson of 39 Essex Chambers has produced a fantastic piece [The Environment Bill: what the government says and what it actually does](#), which examines two of the government's claims about what the Bill will achieve: that it will introduce ambitious, legally-binding targets and that environmental principles will be enshrined in law.

Secondly, Hatti Owens of ClientEarth in [Government failing to seize opportunity to establish strong environmental law post-Brexit](#) has put together an excellent critique of the January 2020 version of the Bill and focuses on two distinct aspects of the Bill: new clauses 19 and 20 that make noises about the future of environmental law – but fail to adequately safeguard our laws from regression – and a new mechanism for the enforcement of environmental law that contains significant weaknesses.

We are also most grateful to Peter Kellett and Dan Summers of the Environment Agency's Legal Services Team for explaining in [The Environment Agency's commitment to become a carbon "Net Zero" organization](#) why the Environment Agency's Board felt compelled to adopt a net zero target for its operational impacts by 2030. The article explains

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how the target was set and the buzz of creativity that has followed that initial decision and considers some of the challenging issues that flow from moving a substantial public operational organisation towards a net zero target.

Please note that we are recruiting for a new Elaw Editorial Assistant, and applications are open until Monday 9 March 2020. See the student news and jobs and adverts section for more detail.

Best wishes,

*Sophie Wilkinson*

**Sophie Wilkinson**  
UKELA e-law Editor

## E-law editorial team

**Sophie Wilkinson**, Editor – Sophie is an environmental law specialist at LexisPSL with 13 years' experience, including 11 years' experience in private practice. She moved to LexisNexis from Shoosmiths LLP where she was a Senior Associate. Prior to this Sophie trained at Browne Jacobson LLP and spent 6 years at Eversheds LLP.

**Cecily Kingston** is a trainee solicitor at R&R Urquhart solicitors based in northern Scotland.

**Dr Ben Christman** – Senior editorial assistant, is an independent environmental law researcher.

# Words from the Chair



Dear UKELA colleagues and friends.

Here we are in the first Elaw of the year, indeed of the decade! Perhaps, like me, some of you celebrated the New Year in homage to the Roaring Twenties of the previous century. The Jazz

Age of the Twentieth Century certainly [captured the spirit of a generation, driven by a break with tradition. Everything seemed to be feasible through modern technology.](#)

Looking ahead to the decade we are entering into it would be instructive to take a moment to think *how we would wish the UKELA membership to refer to this decade in a century*. The impetus and motivation being for us to proactively 'name the decade' as would wish it to unfold. You have seen me write before about this being the 'Year of Action and Ambition'. Myriad opportunities present themselves to us to drive forward an agenda of action and ambition through engaging in policy and legislative processes from the development of the Environment Bill to the progression of the UN climate and biodiversity negotiations.

Many of you as practitioners will have noticed the increasing trend in your clients looking to integrate and incorporate ESG into their businesses. You will perhaps have seen a shift towards greener and more sustainable approaches in the sort of legal problems you are being asked to solve. Or perhaps you are able to take on more pro-bono work for community groups and smaller enterprises that seek your input.

Whatever it might be, as a UKELA member, I have no doubt that in your own (little or big!) way you are contributing to this important year and substantiating my hope that we will look back and define this as the beginning of the ambition and action year!

With the last two weekends seeing two significant storms hit our shores, causing flooding and storm damage across the country, you will have considered just how close to home the impacts of climate change really are now. Perhaps you will also have seen the PWC-WWF report stating that ['Nature is too big to fail'](#), outlining the real risks that biodiversity loss is posing to the global economy.

UKELA exists to support your efforts in using the power of the law to drive forward action that will enhance and improve the environment. In the face of such stark challenges it can sometimes feel as if actions like drafting a response to a government

consultation or engaging in the legislative passage of a relevant Bill can seem too small. My view is, and I hope it is one shared by you all, that every step counts; every action contributes to the greater ambitions of us collectively; and that together we really can make a difference.

The start of the year has already seen some excellent events get underway and looking ahead there are many more on the horizon! You can find out more about those either on the [website](#), or later on in your Elaw. I am delighted that the Annual Conference is open for booking and the line-up is already looking like a fantastic opportunity to engage in conversation about the legislative landscape post-exiting the EU; evolving and developing marine law issue; and innovation to deliver net-zero targets (to name a few!). I hope to see many of you there in Plymouth. The Scottish Conference is also open for booking; as is the wild law weekend, another two fantastic ways to meet members of UKELA and share ideas and news on the latest in environmental law in Scotland.

In addition to UKELA events, it is very exciting to see the [Chancery Lane Project](#) will launch its 'Green Playbook' and model laws on climate and environmental issues. For those of you not aware, the Chancery Lane Project was set up last year to run a 'legal hackathon' bringing together lawyers from all disciplines to 'hack out' new ideas on model laws or practical ways of using the law to support environmental and climate aims. Thanks to the Practical Law Company for hosting this event and of course the Steering Committee for driving forward such a successful event! Watch this space for the publications out soon.

Your Council has been working hard these last two months on drafting up a proposal for UKELA's Strategic Plan 2020-2025. We will be reaching out to you via Patrons, former Chairs, Working Party Convenors, Regional Group Leaders, those of you active in the devolved groups too, students etc. to consult with you on the proposed draft. This will be an important opportunity for you to engage in the strategic planning process and we really do welcome your thoughts and input into that!

I do hope you enjoy this edition of law with its focus on the Environment Bill; as well as the Environment Agency's commitment to net-zero. It really is fantastic to see our friends at the Agency taking such a bold stance and demonstrating clear leadership on such an important target. I was also interested to read more about the Woodland Carbon Guarantee Scheme and it is also encouraging to see our government support schemes to promote planting of woodlands.

Finally, we are recruiting for an Elaw assistant. The editorial team and the editorial board committee on Council do a fantastic job producing your Elaw every two months – no mean feat! Please do share far and wide with your contacts – we really appreciate the support.

I do look forward to seeing many of you at upcoming events and also hearing from you if you have anything you might like to contribute to Elaw or perhaps the UKELA events calendar. It is always good to have such input from the membership.

All and many best wishes,

*Kirsty Schneeberger*

**Kirsty Schneeberger**  
UKELA Chair

# UKELA news

## New UKELA website and Customer Relationship Management system

We hope you have all had the opportunity to login and familiarise yourselves with your UKELA accounts on our new website. By having a more secure and interactive website we hope that you, as members, enjoy the benefits this will bring, such as being able to amend your personal details and add to your bio. Look out for more emails over the coming months and don't forget our helpful [FAQs section](#) on the website.

If you have any questions that cannot be answered via the FAQs page regarding the new Customer Relationship Management system, please contact UKELA's Senior Administrator, [Elly-Mae Gadsby](#).

## Membership renewals for 2020

Renewals have now been sent out to all members who need to renew for 2020. We would be grateful if you would please ensure that you have received your 2020 invoice. Please contact [Elly-Mae Gadsby](#) if you have any questions or wish to receive another copy. Our new system generates invoices for both UKELA memberships and events using the details within your accounts. Please do take a moment to log in and check that the account information we have is up-to-date. Thank you for your continued support.

## Presentations from the 2019 annual conference

We are pleased to attach the 2019 Special Issue of Environmental Law & Management which includes some of the presentations from the 2019 Annual Conference in Sheffield. We hope you enjoy reading the articles. Thank you to our speakers for their contributions. Don't forget that early bird bookings are now open for the 2020 Annual Conference in Plymouth. Book now on our [website](#).

## Paper on climate change, sustainability and competition law

We are pleased to attach to this edition Simon Holmes' paper on climate change, sustainability and competition law. A longer version of the paper has been published by the Oxford Centre for Competition Law and Policy. The final paper will be published shortly in the Oxford Journal of Antitrust Enforcement.

Climate change is an existential threat. Simon argues that competition law must be part of the solution and not part of the problem. The paper draws on the constitutional provisions of the EU treaties and remarks by leaders such as Commissioner Vestager to show how competition law need not stand in the way of urgent action and co-operation by the private sector to fight climate change. It also shows how sustainability is relevant to both the analysis of mergers and dominance cases. It is a call to update our thinking, our guidelines and, if necessary, our law. Based on EU law it contains ideas that could inspire changes in other jurisdictions.

# News from the devolved administrations

## Northern Ireland

The Department of Agriculture, Environment and Rural Affairs in Northern Ireland is currently conducting a consultation on the waste prevention programme, launched in 2019. The consultation closes on 18 March 2020, and aims to explore views on how the waste prevention programme can ensure a downward trend in increased waste and meeting the current EU landfill diversion targets.

## Scotland

The legal strategy group of the organisation Scottish Environment LINK – a forum for Scotland’s voluntary environmental community – will be launching an Environmental Rights Centre for Scotland. This new charity will be supported by the Joseph Rowntree Charitable Trust and will be set up with a view to enable and support communities and NGOs across Scotland to take action to protect the environment. Such support will include delivering legal education on environmental rights and responsibilities under law, to offer support and advice on environmental and planning matters, and ultimately support Scotland to ensure improved environmental compliance and provide a strong vehicle for environmental justice.

## Wales

The [Well-being of Future Generations \(Wales\) Act 2015](#) celebrates its five year anniversary in April 2020. The 2015 Act was introduced to Wales in the aim to improve the social, economic, environmental and cultural well-being of the present and future population of Wales. The Act puts legal duties on the public sector to set wellbeing objectives and maximise contributions to nationally agreed wellbeing goals.

The consultation period on Wales’ Clean Air Plan will soon come to a close as of 10 March 2020. The aim of the Clean Air Plan is to improve air quality in order to reduce the effects of poor air quality on human health, biodiversity and the natural environment in Wales. The plan includes ambitious targets to meet and, where possible, exceed requirements as set by UK and international guidance and legislation, though planning, infrastructure, regulation and health communication measures.



# Working party news

## The public health and environmental law working party

The public health and environmental law working party has been very active since the last elaw edition. It held two joint meetings in November 2019; one with the Legal Sustainability Alliance (LSA), and the other with the UKELA nature conservation working party. These two unique collaborations brought together a wide scope of expertise from the public and private sectors and included scientists, psychologists, physicians, lawyers, urban planners, environmental economists, academics and front line charity advocates. The overarching themes covered environmental protection as a social justice issue, and the link between human health and the health of nature. Special thanks to Amanda Carpenter from the LSA, and Pip Goodwin from the nature conservation working party for their enthusiasm and energy to bring these two meetings to fruition.

Collaborations of this kind will continue to be a key focus for the working party as demonstrated by the preparations of a full day conference on Toxic Tort planned for Thursday 1 October 2020. Mike Quint, member of the working party, is liaising with colleagues at the Royal Society of Chemistry to bring together an impressive array of national and international speakers on this area of law.

The annual conference in June 2020 will also be an opportunity to think creatively about how the law can be used to improve the environment for the health of all. On the background of a successful debate at last year's conference, another debate will be organised for this year. As a taster, if you fancy getting involved then please get in touch. There may be a place for you at the hustings planned for the conference working party session!

# Students news

## UKELA moot competition 2020

We are pleased to announce the 2020 moot competition [problem](#). All the details may be found in the [competition rules](#). All skeleton arguments should be submitted in Word document format along with a completed [competition form](#) to [Elly-Mae Gadsby](#) no later than 4pm on 3 March 2020. All competitors will be notified of the outcome on 10 March 2020. Both the semi finals and finals will be held on 31 March 2020 at King's College, London.

## Andrews Lees Prize article competition 2020

UKELA is pleased to announce its annual article competition – “The Andrew Lees Prize”. Andrew Lees was the Campaigns Director for Friends of the Earth and a leading environmental campaigner on a range of issues from water pollution to illegal waste dumping. He died suddenly in 1994 while on a working holiday in Madagascar campaigning against a large opencast mine.

The article question is:

**“Anthropocentric notions of the value of nature at the heart of environmental law have failed to stem biodiversity loss. Discuss.”**

Entries must be received between 17 February 2020 and midday on 14 April 2020. Full details and rules are available on the [website](#) and the prize is a place at our annual conference being held at Plymouth University from 26-28 June 2020. Good luck!

## UKELA student members' Facebook group

Want to link up with fellow UKELA student members? Share your views? Then please join our [UKELA Student members' Facebook group](#)!

## Public Interest Environmental Law conference

UKELA is proud to be sponsoring this year's Public Interest Environmental Law (PIEL) UK 2020 conference which will take place on the 17 April 2020 at Cass Business School. PIEL is a student-led conference focussing on the topic of “Environmental law in the decade of action”. 2030 has been highlighted in the IPCC 1.5oC report as the deadline for the “rapid and far-reaching” social, legal, economic and technical change that is needed in order to reach net zero by 2050. As such, we will be looking at the various roles that the law can play in helping us to instigate the broad sweeping institutional change that we will need to see in the coming ‘decade of action’.

We hope that you will be able to join us on the 17th April to engage in a multi-faceted discussion on the many roles that law, lawyers, and societal actors will need to play in these coming years.

Early bird tickets are almost sold out; buy your tickets [here](#).

To find out more information, please check out: [www.piel.org.uk](http://www.piel.org.uk) and @pielukconference on Facebook.

## Free membership

Our student advisors are happy to announce that the free student membership offer for environmental law students was a success, with over 70 students signing up to UKELA membership. If you are interested in this offer or know an environmental law student who would be interested, email [Beatrice](#) or [Sophie](#)



# Develop your legal editorial skills – UKELA elaw editorial assistant

UKELA is looking for a volunteer editorial assistant for elaw.

The role requires the volunteer to:

- Liaise with regular elaw contributors regarding their copy.
- Manage emails to the [elaw@ukela.org](mailto:elaw@ukela.org) account.
- Prepare the first draft of elaw based on content sent by contributors.

This is a great opportunity to develop your legal editorial skills and grow your network in the legal and environmental sector. While the position is on a voluntary basis and requires a commitment of up to 15 hours per bi-monthly edition, the successful candidate will be eligible for a variety of UKELA benefits, including free membership for the period of their role and free or reduced cost attendance at a number of UKELA events. To express interest, please write to the Operations Director, Alison Boyd, attaching your CV, by midday on Monday 9th March 2020.

If you would like to discuss the role, the current role holder would be pleased to hear from you. Contact them in the first instance by email – [cecilykingston@r-r-urquhart.com](mailto:cecilykingston@r-r-urquhart.com).

# Student publication opportunity

Interested in co-authoring a hot topic article with an environmental professional? UKELA provides an opportunity for students to publish their work in e-law, our members' journal which is circulated to over 1400 practitioners. Students are invited to email a short abstract of up to 500 words to [Sophie Tremlin](mailto:Sophie.Tremlin@ukela.org) or [Beatrice Petrescu](mailto:Beatrice.Petrescu@ukela.org), our student advisers. If selected, the Editorial Board will endeavour to pair students with a supervising practitioner in that field. Articles can be on the e-law issue theme or on any topic related to environmental law. The theme of the next issue is environmental crime, enforcement and prosecutions, expected to be published in March.

# UKELA events

*In order to secure your place at an event please do ensure that you have logged in to your account prior to booking, thank you.*

## **Waste law after Brexit: 4 March 2020**

**Organised by the Waste Working Party**

After the interest and success of the last two years of UKELA seminars on the topic of waste law, we are pleased to be able to offer a further update seminar. The post-Brexit world is almost upon us, and will present new challenges for the waste and resources industries. Please see the [website](#) for more information and to book your place.

## **South West regional group networking evening: 5 March 2020**

**Organised by the South West regional group**

The South West regional group will be hosting drinks and a picture-based pub quiz at Yurt Lush, close to the Temple Meads station in central Bristol from 5.30pm on Thursday 5 March. The evening promises to be an excellent chance to meet a wide range of environmentally-minded people, including representatives from UKELA, Osborne Clarke and Burges Salmon amongst others. Both members of UKELA and non-members are welcome to this event. Attendees will also have the opportunity to learn a bit about UKELA's national work, as well as upcoming regional events in the South West. Tickets cost £5 and include your first drink of the evening. Please see the [website](#) for more information and to book your place.

## **North West regional group seminar: humans & the environment – what are our rights when it comes to environmental issues: 10 March 2020**

Our expert speakers are Dr Ole Pedersen from Newcastle University who will discuss how the European Court of Human Rights might deal with a climate change claim in light of its recent environmental case law and Simon Pook from Robert Lizar Solicitors who will be speaking from a practical perspective about rights to protest about environmental issues.

Please see the [website](#) for more details and to book.

## **East Midlands regional group event: Introduction to environmental law: 16 March 2020**

The UKELA East Midlands group welcomes students and those considering a career in environmental law to gain an insight into life and work within environmental law. Join us to develop your understanding of the field through talks from and discussions with local practitioners. To be followed by informal refreshments. Please see the [website](#) for more details and to book.

## **UKELA annual conference: 26 – 28 June 2020**

**Organised by the annual conference team**

We are looking forward to being in Plymouth for our annual conference in 2020, as the city commemorates the 400th anniversary of the sailing of the Mayflower. As well as a wide range of plenary and working party sessions there will also be opportunities to network and relax. On the Friday evening we will be at The Box, an arts and culture major redevelopment scheme and a symbol for the city's current regeneration and future. Our annual conference 2020 will culminate in our Gala dinner which will be held at the National Marine Aquarium. It is the largest aquarium in the United Kingdom with charitable aims of research, education and conservation. [Bookings](#) are now open; secure your place before **29 February 2020** to take advantage of our **Early Bird** offers!

# Non-UKELA events

## Justice week: 24 – 28 February 2020

Justice week 2020 runs from 24-28 February 2020 and will see the Bar Council, Chartered Institute of Legal Executives (CILEx) and The Law Society team up to promote the importance of the rule of law to young people. At a time of widespread discussion about citizens' rights and obligations, the role of Parliament and the rule of law, Justice week activities will boost young people's support and understanding of the justice system in England and Wales. For more information about the week and how you can get involved, please see [here](#).

## Brownfield summit 2020: 12 May 2020

### Organised by Environment Analyst

This new event is a large-scale conference, exhibition and networking day for the contaminated land and groundwater sectors. Three conferences, covering groundwater, ground gas, and site data and analysis, will run concurrently in the same venue, alongside workshops and roundtables. Delegates will have the opportunity to select and move between each of the three topic streams as they wish throughout the day, designing their own programme. There will also be interactive break-out sessions, with workshop-style discussion groups, some addressing brownfield skills aimed at early career professionals, and some exploring business-focused topics, market drivers and opportunities, aimed at business leaders and directors. Find out more [here](#).

UKELA members receive **10% discount off the conference**. To claim your discount and book your place [click here](#) and enter the code **UKELA10** at the checkout, or email [sales@environment-analyst.com](mailto:sales@environment-analyst.com) / phone on +44 (0)20 3637 2191 and quote code **UKELA10**.

# UKELA diary dates

## **Book launch: 7 May 2020**

Save the date! Richard Macrory's new book 'Irresolute Clay' provides personal insights of key developments in environmental law and policy over the past four decades. UCL are holding a launch event early evening Thursday May 7th – a discussion with Richard and Lord Carnwath followed by an informal reception. There is no charge but you must register with the Faculty of Laws, UCL. More details to follow.

## **Annual Wild Law weekend: 22 to 25 May 2020**

This year the wild law group is heading to Pitlochry for its annual weekend. Bookings opening very soon.

## **Annual Scottish conference: 24 September 2020**

**Organised by UKELA Scotland**

Join us in Edinburgh at the Apex Waterloo hotel for our annual conference. [Booking](#) opens later in the year.

# The e-law 60 second interview



*Oliver Spencer is an associate solicitor at BDB Pitmans LLP. Oliver advises infrastructure promoters on obtaining consent for major infrastructure projects. He regularly advises clients on environmental issues arising in the context of such projects. He is currently advising the promoter of only the second development consent order application to seek development consent under the Planning Act 2008 on the basis of the IROPI derogation under the Habitats Directive. Views expressed in the interview are the author's alone and should not be attributed to BDB Pitmans LLP.*

## **What is your current role?**

I am a solicitor in the planning and infrastructure team at BDB Pitmans LLP. I act both for promoters of major infrastructure projects and those affected by them, including businesses and landowners. A large part of my work involves the promotion of statutory orders to authorise major infrastructure projects, many of which have environmental implications.

## **How did you get into environmental law?**

I have a background in general planning law from a previous stint in-house in local government.

Although it is a whole discipline in its own right, in my current role I encounter environmental law in my day to day work through the prism of major infrastructure schemes.

Most of the schemes I am involved with trigger the requirement under the Environmental Impact Assessment Directive to produce an environmental statement as part of the consenting process. The environmental statement must describe the environmental effects of the scheme so that decision-makers and the public can scrutinise the proposals. Similarly, some of the projects I work on also affect habitats and species which are protected at a European level under the Habitats Directive. This gives rise to a further layer of legal complexity.

## **What are the main challenges in your work?**

To keep abreast of the ever-evolving legal and policy landscape in this area (not just the 'B' word!) Just in the last year, there have been so many important policy announcements and court judgments. The net zero legislation, together with the judgments in *People Over Wind* and the *Airports National Policy* statement challenge immediately spring to mind.

## **What environmental issue keeps you awake at night?**

I have a young daughter so try not to let other things keep me awake at night!

## **What's the biggest single thing that would make a difference to environmental protection and well-being?**

I'm a vegetarian so it would probably be remiss of me not to mention it: eating less meat.

## **What's your UKELA working party of choice and why?**

Environmental litigation. The courts have such an important role in clarifying and developing the law in this area.

## **What's the biggest benefit to you of UKELA membership?**

To meet like-minded professionals working in this field and the many and varied opportunities to continue learning.

# Environmental law headlines

A selection of recent environmental law news and updates prepared by the teams at [Lexis®PSL Environment](#) and [Practical Law Environment](#).

## Introduction of the Environment Bill and timing for other government environmental and climate change measures

[Practical Law Environment](#)

On 30 January 2020, the government introduced the Environment Bill 2019-20 into Parliament, as announced in the Queen's Speech in December 2019. The Department for Environment, Food and Rural Affairs (Defra) also published a policy statement on the Bill. The contents of the Bill are similar to the Environment Bill 2019, which failed to progress before the December 2019 General Election.

The Environment Bill 2019-20 will:

- Establish the Office for Environmental Protection (OEP) and enshrine environmental principles in law. The OEP will be a new independent environmental watchdog based in Bristol to scrutinise environmental policy and law, investigate complaints and take enforcement action against public authorities.
- Introduce measures to improve air and water quality, tackle plastic pollution and extend producer responsibility. Defra has highlighted that in addition to the 2019 Bill provisions, the 2019-20 Bill includes powers to stop exports of polluting plastic waste to non-OECD (developing) countries.
- Introduce a mandatory biodiversity gain requirement for developers, provide a framework for conservation covenants and create new legally binding environmental improvement targets.

The Bill includes a new commitment to review the most significant developments in environmental legislation from around the world every two years and consider including them in the government's statutory environmental improvement plans.

On 20 January 2020, Lord Gardiner of Kimble, the Parliamentary Under-Secretary of State for Environment, Food and Rural Affairs, also confirmed the intention is for the OEP to be fully operational from 1 January 2021 (the end of the Brexit transition period).

In addition, the government confirmed that the Budget on 11 March 2020 will prioritise the environment. The Budget could include announcements on:

- A tax on plastic packaging, which is expected to be introduced in 2022.

- A waste incineration tax.
- A national infrastructure strategy addressing climate change as a key aim, to be published alongside the Budget.

The government also confirmed timings for other environmental and climate change measures, including that:

- The government will set out further plans to reduce emissions in key sectors such as transport, energy and building while seizing the economic benefits of clean growth later in 2020.
- Findings from the Treasury Committee decarbonisation review will be published in autumn 2020 (see [Legal update, Treasury Committee launches inquiry into decarbonisation of the UK economy and green finance](#)).
- The government will consult on the English Tree Strategy in spring 2020.

For more information, see [Legal updates, New Environment Bill 2019-20 introduced into Parliament, Initial indications of timing for government environmental and climate change measures](#) and [Government confirms timing and independence of Office for Environmental Protection](#).

## Conference of the Parties 25

[LexisPSL Environment](#)

The 25th session of the Conference of the Parties (COP25) was held in Madrid, Spain from 2 to 13 December 2019. COP25 was intended to be a technical review to finalise the framework and operational rules of the Paris Agreement, however delegates failed to reach an agreement in three key areas:

- Funding for climate change adaptation and relief from loss and damage: many developed countries blocked proposals by developing countries calling for increased levels of funding and increased commitments regarding their provision.
- Article 6 of the Paris Agreement (often referred to as the 'rule book' for the operation of the Paris Agreement): the following components, concerning the creation and management of a carbon emissions market, are still to be decided:
  - Accounting rules regarding the length of time to be reported on, the avoidance of double counting, what is to be reported on and any consequences for non-compliance.
  - The ongoing validity of Kyoto units, referring to credits generated under Kyoto Protocol carbon



trading and projects which can be used to offset a country's carbon emissions.

- Whether, and to what extent, countries should be required to invest a portion of sale proceeds from the carbon market into climate change adaptation.
- Ambitious climate goals: countries are due to renew/update their respective 'nationally determined contributions', or carbon reduction targets, in 2020. To satisfy the commitments in the Paris Agreement regarding keeping a global temperature rise this century below two degrees above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degrees, these reduction commitments generally need to be more ambitious. While some countries and the EU did create more ambitious reduction targets in the run up to the conference, COP25 failed to secure a collective raising of individual country goals.

Such failures led to a sense of disappointment in the outcome of the COP25, with UN secretary general Antonio Guterres noting 'the international community lost an important opportunity to show increased ambition on mitigation, adaptation and finance to tackle the climate crisis'.

In terms of successes, the conference did bring about the following positive outcomes:

- A majority of delegates did support a Gender Action Plan, which seeks to advance women's full, equal and meaningful participation in climate policy.
- 177 companies pledged to cut their emissions in line with the 1.5 degrees Paris Agreement ambition and 477 investors called on world leaders to update and strengthen their national commitments.
- A declaration was made calling for better consideration of the importance of oceans for global equilibrium.
- 23 EU and Latin American countries came together in support for the San Jose principles, which set an ambitious benchmark for the standards and integrity of an international carbon market.

The UK was one of the signatories to the San Jose principles, and committed in 2019 to a carbon target of net zero by 2050, which is aligned with the 1.5 degrees aspiration of the Paris Agreement.

COP25 received extensive media coverage, owing to the increased public awareness of the need for climate action and the resulting political pressure as well as the attendance of high-profile climate change figures such as Greta Thunberg.

The final Conference of the Parties before the Paris

Agreement comes fully into effect, COP26, will be held in Glasgow in 2020. Agreements not finalised in COP25 will need to be reached in this upcoming conference, to avoid jeopardizing the implementation of the Paris Agreement.

For more information on the background and next-steps for the COP25, see:

[Conference of the Parties 25—keeping up with Paris Agreement obligations.](#)

## Dutch supreme court confirms Netherlands government must do more to tackle climate change in landmark decision (Netherlands Supreme Court)

[Practical Law Environment](#)

Urgenda, a climate change non-governmental organisation (NGO), brought proceedings against the government of the Netherlands in respect of its climate change policy and greenhouse gas (GHG) emissions reduction targets.

In June 2015, the District Court of the Hague decided that the Netherlands government must take more action to reduce GHG emissions in the Netherlands and ensure that there is a reduction of at least 25% GHG emissions from 1990 levels by 2020 (see [Legal update, Dutch court rules that government must take more action to tackle climate change \(Hague District Court\)](#)). The Netherlands government subsequently appealed the decision, but the Hague Court of Appeal upheld the Hague District Court's decision in October 2018 (see [Legal update, Dutch supreme court confirms Netherlands government must do more to tackle climate change in landmark decision \(Netherlands Supreme Court\)](#)).

In December 2019, the Supreme Court of the Netherlands gave its landmark decision in [The State of the Netherlands \(Ministry of Infrastructure and the Environment\) v Urgenda Foundation](#) [ECLI:NL:HR:2019:2006](#) (in Dutch). The Court upheld the Hague Court of Appeal's decision and confirmed that the Netherlands government:

- Is acting unlawfully because it is contravening its duty of care under Articles 2 and 8 of the European Convention on Human Rights (ECHR), involving the right to life and the right to a private and family life, by failing to pursue a more ambitious GHG reduction target for the end of 2020.
- Should reduce GHG emissions by at least 25% by the end of 2020, compared to 1990 levels.
- Should consider the latest climate science when drawing up policies to achieve that GHG reduction. That means putting those policies in line with the maximum 1.5 Celsius global warming target stressed by the Intergovernmental Panel on

Climate Change (IPCC) (see [Legal update, UNFCCC Paris Agreement: IPCC publishes special report on global warming of 1.5°C](#)).

The Netherlands government has taken note of the decision and plans to issue a formal response soon. For more information, see [Legal update, Dutch supreme court confirms Netherlands government must do more to tackle climate change in landmark decision \(Netherlands Supreme Court\)](#).

## The European Green Deal

[LexisPSL Environment](#)

On 11 December 2019 the European Commission published [‘The European Green Deal’](#).

The overarching objective is to provide a roadmap for the transformation of the European economy and to ensure that Europe is the first continent to be carbon neutral by 2050.

There are many specific proposals in the green deal but some of the most notable are:

- Two carbon emissions targets: cutting emissions by 50% (if not 55%) compared to 1990 levels by 2030, and achieving net zero emissions by 2050.
- The Commission is going to review a number of policies and legislation in the next 18 months to see what changes may need to be made in order to meet the Green Deal challenges. Most notably there are proposals to review the EU Emissions Trading Scheme to bring in new sectors—most obviously shipping—and possibly road transport and buildings.
- Transport will also come under the scrutiny of the Green Deal and a variety of measures will likely be introduced to promote clean fuels, greater electrical charging infrastructure, road pricing and rail freight.
- A new chemicals strategy is expected in 2020.
- A strategy will likely be launched in 2020 called ‘farm to fork’ which will improve the sustainability of the production and distribution of food.
- There will be a number of strategies and measures to increase sustainable green financing.

The next steps are set out in an Annex to the Commission’s [communication](#) on the Green Deal and include:

- In March 2020, a proposal for a new ‘climate law’, which will enshrine the climate neutrality objective by 2050
- In summer 2020, the Commission will publish a plan as to how it intends to hit 50–55% emissions reductions by 2030.
- Various legislative proposals will follow in the coming months, and in particular new proposals for a revised EU Emissions Trading Scheme will

follow in June 2021.

- In the next six, 12 and 18 months the Commission will publish numerous strategies, evaluations, action plans and proposals relating to clean energy, industrial strategy, sustainable transport, greening agriculture, preserving biodiversity, pollution control etc.

For more information, see: [The European Green Deal—a clear vision for EU climate change action?](#)

## Forestry Commission publishes further guidance on Woodland Carbon Guarantee scheme

[Practical Law Environment](#)

The Woodland Carbon Guarantee (WCaG) scheme, which is an objective of the government’s 25 year plan to improve the natural environment, was launched in November 2019. The WCaG scheme aims to create a domestic market for UK woodland carbon credits. The WCaG scheme is intended to overcome the barrier to creating woodland in the UK for long-term carbon dioxide (CO<sub>2</sub>) storage that is caused by the low market price for credits from domestic forests. It will incentivise carbon sequestration in new woodland by providing a guaranteed income stream for those projects (see [Legal update, Government launches scheme to increase tree planting to tackle climate change](#)).

On 9 January 2020, the Forestry Commission published further guidance on its WCaG scheme, including a question and answer document. Key features of the scheme include:

- The scheme is open to landowners and farmers in England who intend to plant new woodland and owners of existing woodland in England who intend to expand their woodland. Only the new section of existing woodland will be covered by the scheme.
- To apply for the WCaG scheme, woodland creation projects must be registered with and managed under the Woodland Carbon Code (WCC). The WCC is the voluntary standard for UK woodland created to sequester CO<sub>2</sub> and provides independent verification of the carbon stored by these projects. Landowners or farmers use the WCC to calculate how much carbon their woodland will produce and use this calculation to submit a WCaG application.
- Once a landowner or farmer’s WCaG application has been approved, they will be invited to participate in the next WCaG auction. Online auctions to agree the sale price of Woodland Carbon Credits will be held approximately every six months for four or five years depending on the rate of uptake of the scheme and the available funds.
- Successful bidders at the auction will be offered a conditional contract that will give them an option

to sell Woodland Carbon Units (WCUs) to the government over 35 years at a guaranteed price set by auction.

For a more detailed coverage of the guidance, see [Legal update, Forestry Commission publishes further guidance on Woodland Carbon Guarantee scheme.](#)

## **Liability to pay landfill tax for ‘fluff’ – Devon Waste Management Ltd and other companies v Revenue and Customs Commissioners; Biffa Waste Services Ltd v Revenue and Customs Commissioners**

[LexisPSL Environment](#)

In this case, relating to liability to pay landfill tax, the landfill site operators in question used black bag waste in order to provide protection, as a buffer layer, for the geomembrane liner or geotextile protection layer at the bottom and sides of the cell and the cap at the top of the cell, referred to as ‘fluff’.

The Upper Tribunal (Tax Chamber) held that the First-tier Tribunal (Tax Chamber) had erred in finding that this use had amounted to a disposal made by way of landfill within the meaning of the Finance Act 1996 and accordingly attracted landfill tax.

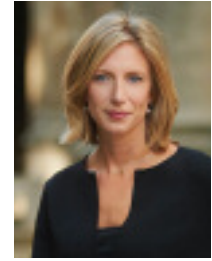
In allowing the taxpayers’ appeals, it held that the question was whether, at the time of disposing of the material by way of landfill at a landfill site, the operator had intended to discard it, and, in the present appeals, the taxpayers had not, at the time of depositing the fluff on their landfill sites, done so with the intention of discarding it.

The issue is relatively moot going forwards as new provisions dealing with ‘fluff’ were introduced in the Finance Act 2018, but the liabilities for the ‘fluff’ that has already been used, and taxed or not, reportedly run into the hundreds of millions of pounds. HMRC are considering appealing to the Court of Appeal.

For more information, see: [Devon Waste Management Ltd and other companies v Revenue and Customs Commissioners; Biffa Waste Services Ltd v Revenue and Customs Commissioners.](#)

# Environment Bill

## The Environment Bill: what the government says and what it actually does



Catherine Dobson, 39 Essex Chambers

When the Environment Bill was initially published on 15 October 2019, it was accompanied by a fanfare of claims that it was a 'landmark Bill' that would be 'ground-breaking', 'transformative', and 'historic'.

The Bill fell with the dissolution of Parliament, but was reintroduced to Parliament on 30 January 2020 in substantially the same form. This article examines two of the government's claims about what the Bill will achieve: that it will introduce ambitious, legally-binding targets and that environmental principles will be enshrined in law.

### Environmental targets

The environmental target provisions are new to the version of the Bill published on 15 October 2019. They were introduced in response to concerns raised after publication of the draft Environment Bill in December 2018 that the absence of legally binding targets left a significant gap in the framework for environmental protection.

The government's claim when introducing the Bill was that it sets '*long-term legally binding targets on biodiversity, air quality, water and resource and waste efficiency*' and '*an ambitious, legally-binding target to reduce fine particulate matter, PM2.5*'.

This claim overstates what the Bill achieves. The Bill does not itself introduce legally binding targets. Rather, it imposes an obligation on the Secretary of State to introduce one long-term target in each of the four priority areas of air quality, water, biodiversity and resource efficiency and waste reduction (clause 1(2)), and a further target in respect of PM2.5 (clause 2). The Bill does not state what these targets are, let alone require the setting of ambitious targets. Beyond these mandatory targets, the Bill confers on the Secretary of State a discretion as to whether to introduce further targets and what targets to set (clause 1(1)).

As to the claim that the targets are ambitious and progressive, the Bill is silent on the content of the targets. There is nothing within the Bill which requires the Secretary of State to set targets which are ambitious, progressive or aimed at specified environmental goals.

The discretion as to what targets to set is broad and subject to only one express limitation: that the Secretary of State is satisfied that the target can be met (clause 3(2)). And although the Secretary of State must seek independent expert advice, clause 3(1) affords a broad discretion as to whom to consult, there is no obligation to follow that expert advice.

Most significantly, clauses 1 and 2 do not specify the overall environmental objective(s) which the targets should seek to attain. It may be that this can be inferred from clause 6, which states that the Secretary of State must review targets set under clauses 1 and 2 to determine whether they '*would significantly improve the natural environment in England*' (clause 6). However, as Professor Maria Lee noted in a comment on the Bill, there are limits to the extent to which the 'significant improvement test' can be relied upon to ensure that the target-setting power is used to introduce ambitious and progressive environmental standards. In particular, she points out that the Bill does not refer to existing targets and standards, opening up the possibility that 'significant improvement' may be measured against current environmental conditions rather than existing targets and standards.

Are the targets binding? Clause 4 provides that the Secretary of State is under a duty to ensure that the targets are met. But the Bill also gives significant latitude to the Secretary of State to lower or revoke targets for a range of reasons, including if the Secretary of State is satisfied that, due to a change in circumstances, the financial costs of the measure would be disproportionate to the environmental benefits: clause 3(3)(b). Given the ability to achieve targets is almost inevitably going to come at a significant economic or social cost, this provision seems to afford the Secretary of State a very broad power to lower or revoke a target. And although it is a condition that there has been a change in circumstances, that could in theory include a change in economic circumstances. So it is unclear whether this requirement will act as a real constraint on the ability of the Secretary of State to rely on this power to avoid having to meet targets which are proving expensive or unpopular.

Overall, it is simply wrong to state that the Bill introduces legally binding and ambitious targets.

Whether targets which will in due course be set under powers granted by the Bill prove effective in improving environmental standards will depend on how a future Secretary of State exercises his or her broad discretion to set those targets, and in particular whether successive Secretaries of State can resist the temptation to revoke or amend the targets when the going gets tough.

## Environmental principles

During passage of the EU (Withdrawal) Act 2018 (EUWA), concern was expressed about the loss of environmental principles from UK law. Although the effect of the EUWA is that any question as to the validity, meaning or effect of any retained EU law is to be decided in accordance with 'retained general principles of EU law' (i.e. general principles of EU law, as they have effect in EU law immediately before exit day) (s.6(3) EUWA), these principles will not affect the interpretation or application of future legislation.

More broadly, at the end of the implementation period, the UK government will not be under a legal requirement to ensure environmental principles guide policy-making.

Lobbying on this issue led to a late stage amendment to the EU (Withdrawal) Bill to introduce the requirement, in what became section 16 EUWA, that the Secretary of State include provisions in the Environment Bill which:

- Listed a set of environmental principles;
- Imposed a duty on the Secretary of State to publish a policy statement in relation to the interpretation and application of those principles; and
- Imposed a duty on Ministers of the Crown to have due regard to the statement.

The government's claim when publishing the Environment Bill was that 'environmental principles will be enshrined in law'. Is this correct?

It is right that the environmental principles are listed in the Bill. However, the Bill does not legally require that those principles are protected or adhered to.

The obligation (under clause 18) is to 'have due regard to' a policy statement which the Secretary of State must publish (under clause 16) explaining how the principles will be interpreted and proportionately applied when making policy. It is not an obligation to act in accordance with those principles.

Another limitation on the status of the principles is that the obligation to have due regard to the policy statement only applies to Ministers of the Crown when making policies which fall within the scope of clause 18. So most public authorities, including courts when interpreting and applying environmental

legislation or common law rules, will not have to have due regard to these principles.

The fact that the courts will no longer be obliged to interpret and apply environmental legislation in accordance with these environmental principles will mark a significant change from the position under EU law, which requires the CJEU and domestic courts to interpret and apply legislation in accordance with general principles of EU environmental law.

Concerns about the status of the environmental principles under the Bill, and that the duty to have regard to them was 'not very strong', were put to Michael Gove, then Environment Minister, by the Environment, Food and Rural Affairs Committee in March 2019. This prompted a somewhat bitter response in which Michael Gove drew on his personal experience of having been successfully judicially reviewed for failing to 'have regard' to a matter he was required to under legislation. He stated:

*It is a well-understood legal term. There are all sorts of requirements on Ministers and other decision-makers to "have regard to", in a variety of pieces of legislation. If it can be shown that I or anyone else has not had regard to it, they can be JR-ed. When I was Education Secretary, I was JR-ed successfully by a group of councillors because I did not have appropriate regard to a particular set of criteria in ending a school building scheme. It can be argued in court, and it was a painful moment, for the Government and for me, to lose. You can argue that there should be a stronger wording but it is a perfectly well-understood form of wording.*

This exchange led Defra to submit supplementary written evidence on the duty to have regard. In that submission:

Defra stated that the duty 'to have regard to' placed 'substantial, clear duties on Ministers of the Crown' and that case law in other areas showed that this duty was 'strong enough to confer [a] clear legal expectation that the relevant approach is used in making decisions'. In support of this position the paper referred to similar duties in the other areas: section 19 of the Planning and Compulsory Purchase Act 2004, the Public Sector Equality Duty in the Equality Act 2010 and the Prevent Duty in the Counter-Terrorism and Security Act 2015. Defra explained its view that "'have regard" is an appropriate duty because the suggested application of the principles in the policy statement should provide guidance, not absolute rules. Controversially, the Defra submission justified this position on the basis that 'the duty to have regard to the policy statement on environmental principles is considered to be broadly equivalent to the practical effect of the principles in Article 191(2) of the TFEU', ignoring the



fact that general principles of EU law also affect the interpretation and application of environmental legislation (not only the making of policies).

In the version of the Bill published in October 2019, clause 18 was amended so that the obligation is now 'to have *due* regard to' environmental principles. The significance of that change is unclear. It may suggest a strengthening of the obligation on Ministers but does not represent a change in status of the principles. It remains the case that, contrary to the government's claim, there is no obligation to act in accordance with those principles.

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## Endnotes

- 1 Government introduces ground-breaking Environment Bill); Press Release (October 2019), <https://www.gov.uk/government/news/government-introduces-ground-breaking-environment-bill>
- 2 'Government publishes (half) a draft Environment Bill, [https://www.wcl.org.uk/government-publishes-\(half\)-a-draft-environment-bill.asp](https://www.wcl.org.uk/government-publishes-(half)-a-draft-environment-bill.asp), David Abrahams, December 2018.
- 3 'Government introduces ground-breaking Environment Bill); Press Release (October 2019).
- 4 Professor Maria Lee 'The Environment Bill: A framework for progressive environmental law?' (18 October 2019) <https://www.brexitenvironment.co.uk/2019/10/18/framework-progressive-environmental-law/>
- 5 Supplementary written evidence submitted by Defra (March 2019).



# Government failing to seize opportunity to establish strong environmental law post-Brexit



Hatti Owens, ClientEarth

## At a glance

- In January 2020, the Environment Bill was re-introduced to Parliament.
- The Environment Bill is a landmark piece of primary environmental law – an opportunity for the government to establish a legislative and governance framework that will secure and enhance post-Brexit environmental protection in the UK.
- The version of the Bill introduced into parliament fails to properly lock-in important legal measures which would secure ambitious environmental law in the future – including, for instance, a legal commitment to non-regression.
- The new mechanism for the enforcement of environmental law is unsatisfactory. It does not improve enough on the existing process of judicial review and is undermined by restrictions on the grant of remedies at the end of the process.
- The Environment Bill provides the scope and legislative opening for the government to make good on its ‘world-leading’ rhetoric. However, as the legislation currently stands, the Bill represents another missed opportunity to safeguard the environment and the health and well-being of all those relying on it.

In January, the government re-introduced the Environment Bill to Parliament. In substance, it is largely the same as the earlier version – published in October 2019 before Parliament was dissolved in advance of the general election.

There’s lots to say about this Bill. Problematic issues concerning its approach to executive discretion, treatment of environmental principles and lacklustre new enforcement processes persist from the earlier version(s). But there are also a couple of new provisions that are worth some attention.

Let’s focus on two distinct aspects of the Bill: new clauses 19 and 20 that make noises about the future of environmental law – but fail to adequately safeguard our laws from regression – and a new mechanism for the enforcement of environmental law that contains significant weaknesses. These elements are vitally important if the government is to ‘*deliver the most ambitious environmental programme of any country on earth*’.

Based on these provisions, the government is falling short of this vision.

## This is not non-regression

A new addition to the 2020 version of the Bill is clause 19: statements about bills containing new environmental law.

Clause 19 requires ministers in charge of new environmental laws to make a statement about its content before a new bill’s second reading in Parliament.

In particular, a minister must make a statement that either (a) in the minister’s view, the new legislation will not have the effect of reducing the level of environmental protection provided for by existing environmental law or (b) the minister cannot make such a statement, but the government wishes to proceed with the legislation in any event.

If this clause is the government’s attempt to respond to calls for a legal commitment to non-regression, it leaves a lot to be desired. Modelled on the approach taken in the Human Rights Act 1998 (the HRA), clause 19 lacks the surrounding bite and power of that legislation and it has its scope limited by the narrow approach taken to defining ‘environmental law’.

Let’s be frank: clause 19 is not non-regression. It is a procedural nicety. It provides neither prevention of, nor remedy to, a rollback in environmental standards. And it will do nothing to stop a gradual undermining of our environmental law through technical regulations and changes in approaches to implementation and enforcement.

This new procedure does mean that ministers will, at times, have to consider whether or not new law is regressive. But, any welcome for clause 19 cannot go beyond the tepid. Here are three significant drawbacks.

First, its scope. Statements are only required for primary legislation that falls within the definition of ‘environmental law’. The Bill defines this as legislation ‘*mainly concerned with environmental protection*’. But many laws may well have an impact on the environment without falling within this scope. As such, laws with significant potential environmental effects – which do not happen to fall within the narrow definition of ‘environmental law’ – will be capable of being enacted without having to go through the clause 19 statements process. It is worth noting that again the HRA statement of compatibility

process is broader: it applies to all bills rather than some subset of them.

In any case, it is unclear how much more environmental primary law is in the legislative pipeline. There are already three flagship environment-related bills at various stages of the parliamentary process. Due to the timing of the legislation, this requirement to make statements will not apply to these. This is particularly unfortunate given, for instance, the clearly regressive approach taken by the Fisheries Bill to manage fishing at sustainable levels.

In any event, most of our environmental law and regulation is established through secondary legislation, policy and guidance – sources that attract far less scrutiny than Acts of Parliament. That the clause 19 statements do not apply to these rules is concerning and severely undermines the procedure's potential.

Elsewhere in the Bill, the government has happily introduced the principle of integration: 'that environmental protection should be integrated into the making of policies'. This is clear recognition that environmental conditions are affected by influences, rules and decisions 'outside' of a narrow environmental sphere. It is remiss that this principle is not reflected in the scope of clause 19.

The second drawback is the lack of accountability: there are no measures to provide an alternative narrative to the government line. The minister simply has to make a statement on the matter: not necessarily even an oral statement on the floor of the House. No parliamentary committee or expert body will be assured a role in this process.

Back in the human rights context, there is an extra safeguard. Pursuant to section 4 of the HRA, a higher court may make a declaration of incompatibility if it considers that a provision in primary legislation is incompatible with human rights. Courts cannot 'strike down' incompatible primary law but, using this declaration, the courts can draw attention to issues and attempt to open up dialogue within Parliament with a view to getting the law changed. There is no equivalent power in the context of regressive environmental law.

The third drawback is the space the minister has for imaginative interpretation. Under clause 19(6), the minister can factor in '(a) ... any protection which *could* be provided for under powers conferred by ... existing environmental law and (b) ... any powers *conferred by the Bill* to provide for any environmental protection...' (emphasis added). This enables the minister to include as yet unexercised powers in their assessment. Powers that have no guarantee of whether, when or how they will be realised. The inclusion of hypothetical, possible environmental

protections in the assessment of whether proposed law is regressive is unwise, unjustified and unhelpful.

Another new provision relating to the future of environmental law is clause 20: reports on international environmental protection legislation. This requires that, every two years, the Secretary of State must produce a report on environmental law developments from around the world. Again, however, this clause lacks any real substance. There is no guarantee that the scope of these reports will be adequate, nor a requirement that such developments are reflected in an appropriate way in UK legislation.

Rather than more instances of mere process as provided by clauses 19 and 20, we instead need substantive guarantees of non-regression in our domestic law. This means making it unlawful for government action to water down, weaken or reduce in scope measures in place that protect the environment. Amendments were tabled to this effect at both the Environment Bill's first attempt and during the passage of the Withdrawal Agreement Act. We expect the same to occur again.

Non-regression is now receiving increasing recognition as an emerging norm of environmental law. Both the 2015 IUCN Draft Covenant and the 2017 Draft Global Pact for the Environment contain non-regression commitments, as does the 2018 Escazú Agreement that mirrors the Aarhus Convention for the Americas. The principle also appears within domestic legislation in France, which has recently incorporated non-regression into its Environmental Code. French courts have issued a number of judgments on the application of the principle and have found both for and against its breach. This demonstrates that the principle is justiciable, having a meaningful 'hard edge'.

In short, neither clause 19 nor clause 20 create a guarantee of tangible improvements to our domestic environmental law framework.

If the UK wants to show its ambition for global green leadership in this Bill, a hard-edged non-regression provision is a must.

The same is true for toughening up the Bill's approach to enforcement.

## **Environmental review fails to deliver**

Clause 35 of the Bill establishes a new mechanism for the enforcement of environmental law: 'environmental review'. Following an investigation into an alleged failure to comply with environmental law by a public authority, the new environmental watchdog, the Office for Environmental Protection (OEP) will be able to commence environmental review proceedings.

In the earlier Draft Environment (Principles and

Governance) Bill published in December 2018, the OEP's only recourse was through existing inadequate judicial review proceedings. In this light, the creation of a new mechanism is encouraging.

The environmental review process will sit within an, as yet, unspecified chamber of the Upper Tribunal. By housing the process within the Upper Tribunal, the possibility opens for technical expert adjudicators to sit on the panel alongside legal judges. This is a welcome addition. However, this alone provides no guarantee that a more thorough, and less deferential, approach to reviewing compliance with environmental law will become the norm. And this must be the norm.

In any case, the current environmental review provisions fail to do enough to improve on the existing judicial review process.

For instance, the Bill specifically provides that the judiciary must apply the usual judicial review principles when determining an environmental review. In judicial review, consideration of substantive legality is limited to cases where the high threshold of *Wednesbury* unreasonableness is cleared. Requiring the application of the judicial review principles in this way restricts the ability of the Upper Tribunal to consider issues with the more intense scrutiny required in order to improve access to environmental justice.

The OEP, on the other hand, may well be able to reach different findings of fact to those of the public authority in question and make recommendations on that basis. But its ability to quash public authority decisions may be restricted due to the *functus officio* doctrine.

This creates a fundamental mismatch between the review work of and remedies available to the two bodies. The OEP will need to get into the substance, but then will be forced to pull its punches (don't forget that its notices are not binding). But the supposedly more powerful Tribunal will then be hampered in its ability to engage with the issues raised throughout the OEP process.

The curtailment of the OEP's enforcement process to non-binding notices and environmental review in the Upper Tribunal is very different to regimes established for other bodies performing enforcement functions. For instance, the Information Commissioner can issue binding enforcement notices and levy potentially very significant fines. Appeals against the Information Commissioner's decision notices are made to the First-tier Tribunal and are usually full re-hearings of the matter, with the Tribunal able to make primary findings of fact based on witness evidence.

In addition, the Upper Tribunal's remedies are limited. With no fines (unlike under the EU and in other policy areas and jurisdictions), and indeed a restriction on granting remedies that may cause hardship to or prejudice third parties, including developers, the OEP will be hamstrung in its ability to seek meaningful, dissuasive and effective remedies at its own discretion and the Upper Tribunal in its ability to grant them.

Finally, the environmental review process is curtailed by its dependence on the OEP, which is the only party that can commence environmental review proceedings. Instead, the important role that civil society plays in ensuring compliance with environmental law must be recognised by giving civil society access to an improved environmental review mechanism. As a minimum, complainants should be able to commence environmental review proceedings and join proceedings as interested parties. The environmental review process will work best if it is open to all. As recognised by the Supreme Court, in order for the judiciary to ensure that the government carries out its functions in accordance with the law, people must in principle have unimpeded access to it.

Environmental review has potential to be a valuable and significant element of a new regime for environmental oversight and enforcement. However the process as it is currently envisaged is disappointingly inadequate and undermines this potential. These provisions must be amended and clarified in order for environmental review to fully deliver.

With potential reforms to the role of the courts on the horizon, it is of utmost concern that the UK delivers on its commitments under the Aarhus Convention and does more than just patch over the existing governance gaps. The role of civil society in holding the powerful to account is essential to good decision-making, and a vibrant democracy.

## Concluding remarks

The Environment Bill fails to deliver on the government's repeated ambition to be a world-leader in environmental protection. Attractive and headline-grabbing commitments can only have real value if they are actually delivered. The proof of the pudding is in the eating: and the lack of ambition and eroding of accountability in the Environment Bill is cause for concern. Statements and reports (as clauses 19 and 20 are tellingly titled) and flimsy enforcement mechanisms will not provide the robust legal framework our natural world so desperately needs.

The government has an open opportunity to meaningfully enhance environmental protection – it could commit to non-regression; it could introduce a robust new system for the enforcement of environmental law; it could commit to meeting WHO

levels for air quality by 2030 – and yet, time and again, it fails to seize this opportunity.

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## Endnotes

- 1 Defra, Environment Bill 2020 policy statement (30 January 2020): <https://www.gov.uk/government/publications/environment-bill-2020/30-january-2020-environment-bill-2020-policy-statement>.
- 2 Greener UK, 'Briefing on non-regression in the Environment Bill' (4 October 2018): [https://greeneruk.org/sites/default/files/download/2019-01/Greener UK briefing on non-regression in the Environment Bill.pdf](https://greeneruk.org/sites/default/files/download/2019-01/Greener%20UK%20briefing%20on%20non-regression%20in%20the%20Environment%20Bill.pdf).
- 3 For instance, the requirement that where it is possible to do so, a provision of subordinate legislation which results in a breach of right provided for by the European Convention on Human Rights must be disregarded: s. 6, HRA and *RR v Secretary of State for Work and Pensions* [2019] UKSC 52.
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- 5 Section 19, HRA.
- 6 The Agriculture Bill, the Fisheries Bill and, of course, the Environment Bill itself.
- 7 Greener UK, 'Briefing: Lords second reading of the Fisheries Bill' (February 2020): [https://greeneruk.org/sites/default/files/download/2020-02/GreenerUK briefing Lords second reading Withdrawal Agreement Bill.pdf](https://greeneruk.org/sites/default/files/download/2020-02/GreenerUK%20briefing%20Lords%20second%20reading%20Withdrawal%20Agreement%20Bill.pdf).
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- 9 NC2: 'Environmental standards: non-regression', Environment Bill 2019, House of Commons Notices of Amendments given up to and including Tuesday 29 October 2019: [https://publications.parliament.uk/pa/bills/cbill/2019-2019/0003/amend/environment\\_rm\\_pbc\\_1029.pdf](https://publications.parliament.uk/pa/bills/cbill/2019-2019/0003/amend/environment_rm_pbc_1029.pdf).
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- 11 Greener UK, 'Briefing on non-regression in the Environment Bill' (4 October 2018): [https://greeneruk.org/sites/default/files/download/2019-01/Greener UK briefing on non-regression in the Environment Bill.pdf](https://greeneruk.org/sites/default/files/download/2019-01/Greener%20UK%20briefing%20on%20non-regression%20in%20the%20Environment%20Bill.pdf).
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- 13 See <https://www.clientearth.org/munich-air-pollution-case-minister-failure-may-mean-prison-sentence/>, and for more detail see ClientEarth, 'A New Nature and Environment Commission' (May 2018) <https://www.documents.clientearth.org/library/download-info/a-new-nature-and-environment-commission/>.
- 14 Clause 35(8), Environment Bill 2020.
- 15 Clause 35(1), Environment Bill 2020.
- 16 *R (oao Unison) v Lord Chancellor* [2017] UKSC 51, [68].
- 17 Such as Boris Johnson's recent announcement to bring forward the introduction of a ban on the sale of petrol and diesel cars from 2040 to 2035: <https://www.bbc.co.uk/news/science-environment-51366123>.

# Matters in practice

## The Environment Agency's commitment to become a carbon "net zero" organisation



*Peter Kellett and Dan Summers of the Environment Agency*

### At a glance

- Peter Kellett and Dan Summers of the Environment Agency's Legal Services Team explain why the Environment Agency's Board felt compelled to adopt a net zero target for its operational impacts by 2030.
- The article explains how the target was set and the buzz of creativity that has followed that initial decision.
- Some of the challenging issues that flow from moving a substantial public operational organisation towards a net zero target are considered, including some of the inevitable supply chain procurement issues.
- The authors hope that the article will contribute to a debate within UKELA's membership who will of course be advising upon similar issues.

### Why net zero?

In June 2019 Parliament amended the Climate Change Act 2008 to place a duty on the UK Government to ensure that the entire economy becomes net zero by 2050. International courts have required governments to take action to protect people from the impacts of climate change including the December 2019 Dutch Supreme Court human rights ruling in the Urgenda case.

The Environment Agency for England has a very broad range of functions as an environmental operator (building and maintaining flood structures like the Thames Barrier, managing navigations and pumping water between catchments), regulator (from protecting salmon to regulating the nuclear industry) and adviser to Government. This article focuses mainly on that operational role.

On 10 October 2019, the Environment Agency announced its commitment to becoming a net zero organisation by 2030. Our current annual footprint is 180,000 tonnes of carbon. You can perhaps imagine the gasps of astonishment from hardened lawyers and engineers about the wisdom of an organisation that builds things setting such a challenging target, but others applauded the leadership shown in an uncertain world. Ambition releases creativity and innovation and as environmental lawyers know, targets can work. And of course the alternative is much worse. Refreshingly, that initial reaction has

been replaced by excitement as people debate and test how we might reach that aim. Some other organisations have followed. This piece describes what we have committed to and why we have made that commitment. It also starts to tease out some of the questions we are grappling with.

Tackling the climate emergency is one of the greatest challenges of our time. The Environment Agency supports the net zero target by regulating industry and helps the country become more resilient to the effects of the climate emergency, including by building flood defences and creating better places designed for a different climate.

But helping others address the climate emergency isn't enough. We knew we needed to go on the same journey and to set an example – if we don't who else will? We have already substantially reduced our carbon output. But we are still contributing to climate change with every tonne of carbon our operations put into the atmosphere. There was a real excitement at the Environment Agency Board when our net zero commitments were set (and also in our frontline teams who work in our local communities across the nation when the commitments were announced).

### What are our net zero commitments?

The Environment Agency has set itself the following goals:

- Becoming a net zero organisation by 2030. That means that by then we will be taking as much carbon out of the atmosphere as we are putting into it, so that we are no longer contributing to climate change ourselves.
- Achieve this by reducing our carbon emissions by at least 45% by 2030, and addressing the effect of our remaining emissions including by tree planting and other measures that will lock up carbon and deliver multiple benefits like reduced flood risk.
- Adopt a tough, internationally recognised definition of net zero: not just the carbon we produce ourselves but also the carbon produced through our supply chain.

We have also set ourselves an even more ambitious aspiration for 2050, one that is the gold standard: we will explore whether we can become, by then, an absolute carbon zero organisation – one that does not produce any carbon at all.



We recognise that this will be a huge challenge. Our current carbon footprint is 180,000 tonnes a year: 44,000t from our own activities, 136,000t from our supply chain. Our main emissions come from construction of flood defences (around 80,000t), pumping to alleviate flood and drought (17,000t), travel (12,000t) and buildings (9,000t). We'll need to reduce significantly all of these emissions to get to net zero, and remove them altogether if we want to reach absolute zero.

Success will require wholesale change in how we do things, and in how we work with others. It will require challenging choices: we may need to stop doing some things, or do them very differently. It will require innovation, because some of the technologies we'll need do not yet exist. It will require sustained focus on our goal, an acceptance that we will fail in some areas as we seek to find solutions and ensuring that our future decisions support our net zero objective. Others have to play their parts too and the impact of the planning system and decisions by others should not be underestimated.

Of course we will not stop building necessary flood defences, pumping water out of people's homes if they flood or moving water around the country to alleviate drought, travelling, heating our buildings, using energy or all the other things we need to do to create a better place. It does mean we will need to find better ways to do these things which produce less – and ultimately zero – carbon emissions.

Of course the goal is ambitious but:

- We've already reduced our carbon emissions by more than 40% compared to 2006/07.
- Renewable energy and other green technology is accelerating and innovating; and
- We are already changing by adopting more nature-based solutions and moving away from carbon intensive ways of doing things.

## Some operational and supply chain questions

Many questions arise from this ambition for an organisation like the Environment Agency.

Given the winter we have just experienced and the increase in more extreme weather, there is a growing recognition that new approaches need to be taken to managing flooding and coastal change. The proposed new statutory Flood and Coastal Erosion Risk Management Strategy for England, (the Strategy) for example, places flooding and coastal change within the context of the climate emergency. It acknowledges the net zero commitments made by the Environment Agency and others. It therefore may help drive us towards meeting these commitments. The Strategy also recognises the need to adapt to already inevitable climate change. We are exploring what combination of

hard and soft measures can best protect and mitigate flood risk in uplands, lowlands, urban and rural environments – we cannot continue to simply build ever higher walls against water. We perhaps need to think not so much of saying 'no' to all development in areas of flood risk but saying 'yes... but only if' proposed development does not increase the risk of flooding for others and is built to resilient standards. We also need to ensure that flooded infrastructure and housing is replaced to resilient standards with the appropriate legal mechanisms in place to incentivise infrastructure providers, householders and insurers to achieve this.

During the flooding in parts of the country in Autumn of 2019 we also faced the paradox of a sustained drought in the South and East of England. As a country we face more weather extremes and will want in consequence to transfer water resources on a greater scale than previously to alleviate drought. We will need a combination of innovation and regulatory levers and are exploring how far we can ensure that those transfers (whether made by the Environment Agency or others) can be achieved in different and more sustainable ways that minimise carbon emissions.

In terms of the land we own we are also looking at our land policy and how we might retain and use land to help deliver our commitment, for example through installation of on-site renewables and tree planting. We already know that tree planting can provide valuable flood mitigation alongside other benefits that include increased carbon capture and storage. We are beginning to assess agreements for tree planting and considering how we secure the desired benefits given that trees need to stay in place for a long time to continue taking carbon out of the atmosphere. Innovative legal mechanisms such as conservation covenants (although environmental covenants might be even better) under the previous Government's Environment Bill could be of real use here.

The supply chain question is key and is a topic we are already examining carefully.

We have for some time signed up (for example) to the Law Society's Diversity and Inclusion Initiative and ask relevant questions of those we instruct to provide legal services but we have started to think how we might sensibly ask net zero questions of legal suppliers who wish to do business with us. More broadly of course net zero questions are particularly challenging for the many organisations in our supply chain whether they operate locally, nationally and/or internationally. We work with a very broad range of suppliers and cast a long shadow.

Reaching the target by 2030 means we need to encourage those many organisations who will supply us over the next decade to put in place firm steps of their own. Many of our contracts are long term so



even now, as we procure, we need to have net zero embedded in our considerations. We want to take suppliers on a journey with us and help them develop their net zero carbon offering. If we went out to market for zero carbon solutions now then we are unlikely to receive many compliant bids – this needs to change for us to be successful in achieving our net zero objective and we will have to help suppliers along this path with us.

We understand that whilst the procurement legislation is helpful in many ways (allowing us to take environmental considerations, such as carbon emissions into account when selecting the most economically advantageous tenderer) it also limits us in other ways (permissible inclusions of environmental requirements are limited to those relevant to the subject matter of the procurement and there are limits around the allowable technical specifications to ensure competition). We will have to make decisions as an organisation on where the balance lies between price, quality and environmental factors. The majority of our contracts are let through framework agreements or using the open or restricted procedures. We will have to look at how we can build frameworks and contracts that drive innovation and also consider alternative means of procuring our supply chain – potentially using the purpose built but rarely used innovative partnership procedure. Achieving our net zero goal will require that we look carefully at our approach in all aspects of appointing our supply chain.

The contractual terms that we ask suppliers to sign up to will need to strike the right balance between ambitious and achievable objectives. If we get this balance wrong we will either not achieve our net zero objective or have no suppliers that are willing to work with us. The carbon monitoring standards and clauses in these contracts will need to be objective and have real teeth. The contractual remedies available to us for failing to meet contractual commitments on carbon must act as a sufficient deterrent without being penalty clauses and we will have to take difficult decisions on enforcing them – this may be especially difficult on otherwise well performing contracts.

Whilst we always expect the organisations we work with to share our goals and values, it will be important that we also understand the commercial objectives of our suppliers. We really believe that innovative working to achieve the net zero objective can be a huge benefit to suppliers, as well as us and wider society.

## Broader issues

In terms of regulation a wide range of legal questions affect how the UK transitions to net zero. The Environment Agency is already considering issues through the lens of regulation including: how far our existing and diverse permitting frameworks can drive net zero; what to do when we face a choice between

competing proposals one of which is more carbon efficient; the trade-off between further reductions in pollution and the energy efficiency of the techniques involved; the enforcement of the carbon regimes we regulate; circular economy issues for waste and whether our now very out of date statutory guidance under Section 4 of the Environment Act 1995 is fit for a net zero world.

And of course in our advisory role as we advise Government on its proposals for new or amended interventions, we are mindful of the need to deliver a step change in carbon efficiency not just in those regulated but also, and crucially, in supply chains.

We are also, separate to our net zero commitment, a £4 billion asset owner through our pension fund. Our pension fund aims to protect member interests in part by taking a long term view of those it invests in including a programme of active engagement, such as challenging organisations to operate more sustainably. We are a founder member of the Transition Pathway Initiative which is a global initiative to assess organisations' preparedness for the transition to a low carbon economy. The legal framework of course facilitates this and as Mark Carney, the outgoing Governor of the Bank of England, has warned climate change needs to be taken much more seriously by institutional investors.

## Conclusion

We didn't put people on the Moon through a lack of ambition. The Environment Agency, and others, will have to make choices about how we operate in future. Public and private organisations, like those UKELA members work for and advise, will face similar challenges internally and in their supply chains. We hope that this note has explained why the Environment Agency, as the largest environmental organisation in Europe, set a high level of ambition in adopting a net zero 2030 target and the excitement it has generated. We wanted to share some of the issues we are grappling as we start to turn ambition into action. Please share your experiences with us as together we are more powerful:

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January 2020

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## Endnotes

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- 11 Case C-513/99 *Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne* [2002] ECR I-07213; Case C-448/01 *EVN AG and Wienstrom GmbH v Republik Österreich* [2003] ECR I-14527.
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# Adverts, jobs and tender opportunities

## Develop your legal editorial skills – UKELA elaw Editorial Assistant

UKELA is looking for a volunteer editorial assistant for elaw.

The role requires the volunteer to:

- Liaise with regular elaw contributors regarding their copy.
- Manage emails to the [elaw@ukela.org](mailto:elaw@ukela.org) account.
- Prepare the first draft of elaw based on content sent by contributors.

This is a great opportunity to develop your legal editorial skills and grow your network in the legal and environmental sector. While the position is on a voluntary basis and requires a commitment of up to 15 hours per bi-monthly edition, the successful candidate will be eligible for a variety of UKELA benefits, including free membership for the period of their role and free or reduced cost attendance at a number of UKELA events. To express interest, please write to the Operations Director, Alison Boyd, attaching your CV, by midday on Monday 9th March 2020.

If you would like to discuss the role, the current role holder would be pleased to hear from you. Contact them in the first instance by email – [cecilykingston@r-r-urquhart.com](mailto:cecilykingston@r-r-urquhart.com).

## Book reviews

The e-law editors are regularly sent book lists by various publishing houses which may appeal to UKELA members keen to write a review. If you are interested in contributing a book review to a future edition of e-law, but would first like some guidance or suggestions, please drop [us](#) a line.

# Blockchain Climate Institute

## Position details

Role title: Legal Research Officers  
(Principal/Senior/Junior)  
Designation: PR04/ SR06/ RO12/ RO13  
Division: Research Division III  
Number of vacancies: 4  
Role nature: voluntary  
Estimated time requirements: 3-4 days per month on average  
Location: Home-based

## Vacancy description

The Blockchain Climate Institute (BCI) is an international volunteers-led think tank supporting and advocating the application of blockchain technology in the global fight against climate change. One of the most important aspects of BCI's mission is to support legislators and policymakers to create an enabling environment for the adoption of distributed ledger technologies. To achieve these ambitious endeavours, we are expanding our legal research team by deepening our legal research on the interaction between existing legal frameworks and innovative technologies.

Benefits of volunteering with BCI include but not limited to:

- Honing or learning new skills (including climate change case analyses, legal research presentation, publishing opportunities, etc.).
- Achieving a stronger sense of purpose with hands-on experience in the emerging field combining blockchain technology, climate change and environmental law.
- Boosting your professional career through building professional connections at conferences and
- Opportunities to participate in legislative research programmes with governments.

For the full profile for this position, follow this link: [Additional information about this role.](#)

## Person specification

- Excellent oral communication, legal English writing, and organisational skills, and the ability to balance competing demands under pressure.
- Purpose-driven professional, strong presentation skills and ability to present ideas in a clear and truthful way.
- Fluency in one of these languages is desirable: Arabic, Chinese, French, Russian or Spanish (desirable).
- Knowledgeable on climate change, UNFCCC processes and public international laws related to climate change and the environment and the basic understanding of the distributed ledger technology, token economy, smart contracts, and crypto-assets.
- Proficiency in MS Office, legal research databases e.g. Lexis Nexis, academic and referencing tools e.g. Mendeley.
- A Degree in law is required and/or a master's degree in International Environmental Law, Climate Policy, Information Technology Law or relevant fields is highly desirable.
- Proven experience working independently and collaboratively in a team to drive forward projects using his/her own initiative.
- Proven ability to independently conduct (academic) research in the fields of international environmental law, climate change policy, and/or the Internet/Technology law (desirable) and
- No law firm or start-up experience is required but it is desirable.

## How to apply

Candidates must submit their CV, cover letter with some English writing samples (including at least one legal research paper) to the BCI Recruitment Unit at [recruitment@blockchainclimate.org](mailto:recruitment@blockchainclimate.org).

# UK Environmental Law Association

## elaw

The editorial team is looking for quality articles, news and views for the next edition due out in April 2020. If you would like to make a contribution, please email [elaw@ukela.org](mailto:elaw@ukela.org) by 11 March 2020.

Letters to the editor will be published, space permitting.

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