UKELA

e-law

Better law for the environment

July/August 2020 | Issue 119

Welcome to the July/August edition of elaw.
The focus of this issue is food, farming, land use and net zero.

To this effect we are most grateful to Richard Byrne, for his excellent piece New agricultural policy for old, which discusses the Agriculture Bill and Environmental Land Management scheme, as the replacement for the EU Common Agricultural Policy.

Thanks also to Ryan Bowie, for summarising so succinctly in The Agriculture (Retained EU Law and Data) (Scotland) Bill and Scottish agricultural policy the differing position in Scotland, where the existing Common Agricultural Policy will continue to apply by virtue of the Agriculture (Retained EU Law and Data) (Scotland) Bill and where a future direction for agricultural policy has not as yet been set out.

John Hunt has also written a fantastic piece on Wetlands, which discusses the loss of wetland habitats and associated decline in biodiversity and the fact that these habitats can be easily restored. There is discussion of the opportunity that Brexit provides to encourage more environmentally friendly farming with priority given to wetland restoration and practical suggestions are made for restoration which would help mitigate climate change, reduce flooding problems and increase biodiversity.

We are also extremely lucky this edition to also have the benefit of an additional three non-themed articles spanning a range of interesting and current topics and all touching in their own way on the pervasive impact of the COVID-19 pandemic.

Firstly, Richard Macrory has provided us with the benefit of his wealth of experience, including his service on the Royal Commission on Environmental Pollution, in his analytical piece Science, values and environmental standards. The piece highlights that not only has being 'guided by the scientists' been a core feature of the coronavirus crisis, science is also relevant to the setting of environmental standards post-Brexit and lessons can be drawn from the past.

In this issue

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Secondly, Niall Watson in Is it the right time for the UK to adopt mandatory environmental and human rights due diligence for business? provides an insightful and topical discussion of the call for the UK to legislate for mandatory environmental and human rights due diligence obligations on business in the current context of the pandemic.

Thirdly, Sir Crispin Agnew in Rights of nature – standing – Universal Declaration of Rights of Mother Earth-Covid 19 conundrum has written eloquently on the development of the concept of rights of nature in legal theory and then goes on to examine the conundrum presented by a 'being' such as COVID-19, when it conflicts with the human rights of people.

Finally, we have the benefit of a super student submission: A critical analysis of whether anthropocentric notions of the value at the heart of environmental law have failed to stem biodiversity loss from Mateusz Slowik, guided by Charlie Banner. Well done Mateusz!

I would also like to draw to your attention that we are intending to trial a Letters to the Editor section in the next edition, whereby readers can write in responding to pieces in the previous edition or raising any other topical issues and thoughts, so please do get in touch,

Best wishes

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

As I write to you on this rather warm and sunny August morning I am fondly reflecting on how much it lifted my spirits to see so many of you at the UKELA AGM via Zoom. Whilst the conference 'webinar' format limited our ability to see all participants, switching to the 'meeting' format for the formal business of the organisation was really rather enjoyable. Like UKELA's own version of the 'Brady Bunch for Lawyers', it was wonderful to see your familiar faces in the now-so-normal electronic tile pattern, like an abstract Chuck Close painting. Whilst of course nothing could replace actually being with you in person (cue reminiscences of AGMs held in rather muggy windowless lecture halls on the hottest days of the year!); being able to still connect with you was cheering and captured the wonderful spirit of UKELA's vibe.

Casting my mind back to the beginning of lockdown, when we had to make the decision to move the Annual Conference to a digital variation, I could not have imagined then that we would have over 500 delegates sign-up to participate; that we would have such interesting Q&A sessions as part of the panels; that the speakers and Chairs would so obligingly support the switch; nor that it would actually be as fun as it was! The social elements of the conference added flare to the programme and I thoroughly enjoyed myself singing in the choir, trying to outsmart the quizmaster, and doing yoga in my work-from-home office!

This is testament to the absolute dedication, commitment, and hard work of the UKELA staff team, as well as the conference committee. I thanked you all in my closing remarks of the conference, but it bears repeating – you have shown resilience, adaptability, creativity, and excellence in all of your hard work and endeavours to put on an exceptional conference for us all. Alison, Elly-Mae, Louise, and Paul, thank you for responding to the challenge with such enthusiasm and gusto, and for ensuring all the technological infrastructure worked smoothly for each and every session. This has really stood us in great stead for future online conferences and events that we will continue to deliver, not only because the current context means we are not able to put on physical events yet; but also because we can increase the participation of so many members who would not normally be able to join by offering an online programme. As conference Chair, Sarah delivered a remarkably interesting and topical programme so thank you again to you and your committee for making our first online annual conference so memorable.

Our sponsors are thanked formally below also, but I would like to add a personal note to them all for sticking with us through such a difficult time. Your financial support has really helped to plug some of the funding gap we are facing, but it also is a recognition of how much UKELA means to you, and this is in many ways worth a lot more. Stephan Tromans QC deserves an extra special mention for being so generous (and artistically talented!) with his art exhibition. I myself have bought one of his paintings and it is stunning. When I frame and hang the painting it will be a forever reminder of your generosity of spirit and will encourage me to look for ways to be just as generous. It is beautiful, thank you.

To those of you who have all offered personal donations – thank you. We have raised over £5,500 from your support, and every penny is going towards the good cause of keeping the UKELA ship afloat during this, unfortunately, still uncertain time.

As you will have heard from the AGM if you were able to join, UKELA has for these last four months or so been holding weekly 'COVID-19 crisis committee' calls. We are shifting these to monthly now; but continue to keep a very close eye on the wider context and how UKELA might be impacted by external changing context. You will have been following avidly, I am sure, the 'in conversation with' series, which I have to say I have been thoroughly enjoying doing! A wonderful way to get to know our membership better, and be a bit nosy about their lives in lockdown. Whilst initially this was planned to be a short-term project, we have had some great feedback and requests to participate, so we will keep it going for a while longer. Please do write in if you would like to put yourself in the hot seat.

Our next edition of e-law is going to run the theme of 'diversity and inclusion'. With the Black Lives Matter protests calling for us all to do more, we are looking at what we can do as an organisation to strengthen our commitment to diversity and inclusion. We welcome your contributions to this edition and invite you to please write in with your ideas and suggestions for articles to be included. As part of our commitment to this important issue we are also instigating a number of changes within UKELA. For example, we have created specific diversity and inclusion roles on Council to ensure Trustees have oversight and engagement on this issue (three have taken on this role already); producing a dedicated Diversity and Inclusion Policy that will outline our commitments to this movement as well as frame and inform our approach to putting it into practice; updating our events policy to make clearer our expectations on diversity and inclusion, particularly for speaker panels; and it is now integrated more fully in our Strategic Plan that we are finalising.

We will continue to review and consider what further measures may be taken to address diversity and inclusion across all of our activities. We recognise that words on their own are not enough. We must act upon those words and also ensure we embed our approach across all aspects of our organisation.

Some of you have written-in to us, or shared feedback via the form, to reflect your disappointment at the way in which the Mayflower was referred to as part of the 'Plymouth theme' at our annual conference, as you felt these failed to acknowledge the context in which the Mayflower's pilgrims were operating and were insensitive, especially in light of the Black Lives Matter movement. It is regrettable that in changing the format of the conference to a shorter online event we limited the space and time available to discuss more fully the wider issues relating to the Mayflower400 commemorations. The original intention was for delegates to have the opportunity to benefit from the Mayflower400 exhibition to set the legacy in its appropriate historical context. Unfortunately, we were not able to provide this to conference attendees and only part of the Mayflower story was shared; for this I can only apologise and hope that our strengthened commitment to diversity and inclusion is manifest in the aforementioned actions and of course how we apply it in practice.

Looking ahead, by applying our learning from this experience as well as gaining insights and expertise from you all, I hope that we can work collectively to strengthen our approach and commitment to diversity and inclusion and I do look forward to your contributions for our dedicated e-law on this topic.

Finally, I mentioned earlier the UKELA Strategic Plan, which after a slight pause in the process to focus on COVID-19 responses and delivering our online Annual Conference, is back on track to being finalised and ready for presentation at the Garner lecture later this year. I am very excited to be sharing this with you soon, especially after so many of you provided such valuable and useful feedback.

I do hope that you are enjoying the August sunshine (when it appears) and that you have taken on board some of the staycation top tips shared by 'in conversation with' interviewees! Wherever you are, I wish you and yours well and look forward to seeing you all again, even if it might only be electronically, soon.

Kirsty Schneeberger MBE
UKELA Chair

UKELA news

Annual Conference 2020

We held our first ever online Annual Conference on 25 and 26 June, which we were pleased to offer free of charge to our members. We were delighted to host over 500 people. Whilst we were not able to be in Plymouth this year, the spirit of the Ocean City was retained throughout, with lovely images on the conference website.

Included in the itinerary were lively plenary sessions, which were expertly chaired and our distinguished panelists coped admirably with the technology. Our social events included a quiz, a choir session, early morning yoga and sponsors' bars which were all well attended and added a sense of the "usual" conference atmosphere.

Thanks to our Conference chair, Sarah Holmes (Womble Bond Dickinson) and her committee and to all those who gave their time to chair or speak on a panel. Thanks also to our keynote speaker, Lord Carnwath, our after dinner speaker Paul Rose, to Stephen Tromans QC for so generously donating his artwork to be sold for fundraising (catalogue still available to view on our donations page). Thank you also to our working party convenors for putting on the traditional sessions over lunchtime.

A special thank you to our sponsors – 39 Essex Chambers, Francis Taylor Building, Landmark Chambers, Ramboll and Six Pump Court for their support.

We are very grateful to our participants for taking the time to provide valuable feedback that we shall take forward into future conferences. Please see the members' only section on the website to catch up with any of the sessions you may have missed.

Finally, we would like to thank all of those who joined us at the conference and for your kind donations at this time. Your support is key to enabling us to carry out our core objectives as a charity, and is very much appreciated. If you are able to make a donation please see our fundraising page on the website. Thank you!

Council Elections

We are very pleased to welcome our newly elected Council members James Adler (Surrey Wildlife Trust) and Juliet Munn (Town Legal LLP) and would like to thank our outgoing Trustees, Charles Banner QC (Landmark Chambers, now at Keating Chambers) and James Burton (39 Essex Chambers) for their time and work on Council.

Website assistance for members

Would you like to know how to update your details on our website? Or do you have any questions regarding how to navigate your account and the rest of the site? We are running a few sessions where we will show you how to amend your email address if you move organisation, add detail to your biography, set your mailing preferences and see if you have any outstanding invoices. We have slots available for small groups on 5 August and 12 August from 2pm until 3pm. Please contact our Senior Administrator, Elly-Mae Gadsby, for more information and to book your place. There will be more slots available in September so please do let us know if you wish to reserve a place.

Events Programme

Annual Scottish Conference – bookings now open! See later in the edition for details and how to book your FREE place.

Look out for details of events coming up in the autumn – see the events page for details. We will continue to run our events programme online until the end of the year (at least) and hope you will be able to join us. From September, we are introducing a modest charge to book of just £10 for members for the majority of events, to help support our continued work. A limited number of free student places will continue to be available as usual.

UKELA working party news

The nature conservation working party held its May meeting via Zoom – a first for the group and the format proved very successful. There were 28 people on the call, and the main item on the agenda was an excellent presentation by Tom Mosedale from Defra's legal team, on the Environment Bill and nature recovery. His talk generated an interesting Q&A session via Zoom's Chat function, with questions ranging from net gain, to the links with the Agriculture Bill and the Environment Bill's beefed up biodiversity duty.

Our next meeting was one of the virtual lunchtime sessions at the UKELA conference in June. The discussion centred around a working paper by Christina Cork, Graham Machin and Richard Barlow on the 'Restoration and Enhancement of Wildlife' which assessed how far the site-based legal rules that protect valued habitats and species accommodate or encourage their enhancement. The paper also examined the major changes in the legal and political landscape which have the potential to significantly affect the extent to which biodiversity in the UK is protected or increased. The main drivers identified are Brexit and its associated legislation, but climate change and the coronavirus pandemic would clearly also have major implications. This stimulated an excellent debate on environmental principles, the proposed Office for Environmental Protection, the impacts of climate change on biodiversity, target setting, deregulation and more.

The autumn meeting will be held at 17.30 on Monday 5 October (again by Zoom) and the main focus will be a talk by Ned Westaway on protected landscapes.

Working parties can have access to the Zoom platform to facilitate meetings.

Students news

Careers events

We are in the process of working on a series of online careers events. These will take a similar form to our careers evenings where a couple of advisers from the field of environmental law will be on hand at each session to answer any of your questions and to impart their wisdom. Keep an eye on the student pages for more information!

UKELA student members' Facebook group

Want to link up with fellow UKELA student members to share your views and have discussions during this time of social distancing? If so, please join our UKELA Student members' Facebook group!

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 or Beatrice Petrescu, our student advisors. If selected, the Editorial Board will aim 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 diversity and inclusion in environmental law, expected to be published in October 2020.

UKELA events

Annual Scottish Conference: 24 September 2020

This year's annual Scottish conference will take place online. Join us for a half day seminar looking at the hot topics across Scotland.

Hear from our Patron, Professor Colin Reid, as well as representatives from SEPA, the Scottish Government and Scottish NGOs.

Themes covered will include Environmental Standards and Governance, including the proposed new body, Environmental Standards Scotland; a look at Climate Change litigation issues, particularly in the extended run up to COP26 and the impact of the delay; and a round up of conservation and marine issues across Scotland.

Please register to ensure you place.

Waste law after Brexit: 29 September 2020

UKELA is delighted to be teaming up with ESA and CIWM for our third joint seminar on waste law after Brexit. We have an exceptional line up of speakers on this key subject which is open to all. Particularly, the seminar will be of interest to anyone who deals with waste and resources in a legal, consultancy or technical capacity. The event will provide you with a detailed understanding of the potential impact of Brexit on the UK waste management and export industry. We look forward to welcoming you to this webinar, starting promptly at 3.30pm on 29 September. Please register to ensure your place.

The e-law 60 second interview

Richard Broadbent, Head of Legal Services, Natural England

What is your current role?
Head of Legal Services, Natural England.

How did you get into environmental law?
Through studying part-time for an LLM in environmental law at UCL. I immediately fell for it.

What are the main challenges in your work?
Conservation law is largely about land management. Challenges form when there is a tension between the public interest in conserving and enhancing the environment and private property rights. Finding ways to rise above that tension is difficult, but when it is achieved is very rewarding.

What environmental issue keeps you awake at night?
That 12% of children in the UK do not visit the natural environment each year and that UK children score well below other European countries (such as Germany, Italy, Ireland, the Netherlands, Greece, France, Spain and Portugal) for connectedness with nature and personal well-being. That is not good enough, both in terms of its social justice implications, as well as hindering the development of a genuine sense of environmental citizenship.

What's the biggest single thing that would make a difference to environmental protection and well-being?
There is already a growing awareness of environmental issues. It would be good for that to mature into a real collective sense of environmental citizenship so that the requirements of conservation law (conserve and enhance habitats, gather environmental information, carefully analyse that information to test for environmental risks, proactively seek to mitigate ecological harm and, where that is not possible, compensate for the harm caused) becomes habitual and instinctive rather than forced or, at times, evaded.

What's your UKELA working party of choice and why?
The nature conservation working party as they get to grips with the detail of the issues we work with at Natural England and are a great sounding board for new ideas of approaches.

What's the biggest benefit to you of UKELA membership?
Training opportunities and networking with fellow environmental lawyers.

Environmental law headlines

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

Response to future of carbon pricing consultation

Lexis®PSL Environment

On 1 June 2020, the UK government and devolved administrations (DAs) announced their plans to set up a UK Emissions Trading System (UK ETS) in response to the consultation on the future of carbon pricing in the UK.

The consultation ran from 2 May to 12 July 2019 and sought stakeholder views on proposed carbon pricing policies after the end of the Brexit transition period. During this period UK companies continue to be subject to obligations under the EU Emissions Trading System (EU ETS).

In the consultation paper, the government set out its preference for a post-Brexit UK ETS system that would be linked to the EU carbon market, though this linkage remains contingent on the UK and EU reaching an agreement to avoid a 'no-deal' scenario at the end of the year. If this is not achieved, the consultation offers as alternatives either a standalone UK ETS, the option to participate in Phase IV of the EU ETS from 2021 to 2030, or the introduction of a tax on carbon, though the latter is not addressed in detail (a targeted consultation has since been published).

The consultation also confirmed the government's ambition that a future approach would be 'at least as ambitious' as the EU ETS in encouraging decarbonisation in a way consistent with the UK's commitment to reach net-zero emissions by 2050 and would ensure a smooth transition for relevant sectors after leaving the EU carbon market.

In its consultation response, the UK government and DAs confirmed that the UK ETS would continue to cover the same industries and would broadly mirror Phase IV EU ETS in its design. However, under the new system businesses would see a cap on emissions that is 5 per cent below the share that would be attributed to the UK under the EU ETS from 2021. To assist the UK in reaching its 2050 Net-Zero emissions target, this cap will also be tightened by January 2024.

For more information, see: LNB News 02/06/2020 27—Government responds to future UK carbon pricing consultation outcome and our News Analysis: Heavy industries, airlines see UK proposal for national Emissions Trading System.

Government consults on detail of carbon emissions tax option after Brexit transition period

Practical Law Environment

The UK government is developing carbon pricing policies to replace the EU ETS after the end of the post-Brexit transition period on 31 December 2020. The government would be open to setting up a UK ETS that is linked to the EU ETS. This is subject to negotiations on the UK's future relationship with the EU. If a linked UK ETS cannot be agreed, the government will introduce either a stand-alone UK ETS or a new carbon emissions tax, to ensure a carbon price remains in place in all scenarios.

On 21 July 2020, HMRC and HM Treasury published a consultation on how HMRC proposes to operate the new carbon emissions tax and how it could develop in future. Part A of Chapter 2 of the consultation explains the aspects of the carbon tax that have already been set out in legislation.

Part B of Chapter 2 seeks views on various proposals for HMRC's operation of the new carbon emissions tax, including:

- Setting, adjusting and calculating the tax emission allowance for installations. This is the amount of carbon dioxide equivalent that an installation can emit without being taxed. Emissions above the allowance will be liable to the tax.
- A payments system that would reward main scheme installations that reduced their emissions beneath their tax emission allowance where that was as a result of genuine steps to decarbonise (as opposed to a reduction in activity).
- Setting the carbon emissions tax rate using EU ETS price data and adjusting the rate down if it turns out to be higher than the average EU ETS auction clearing prices in 2021 and 2022, by £1 or more.

Chapter 3 of the consultation invites views on how the tax might evolve. Consultation proposals include:

- Broadening the scope of the tax after 2021 to include other sectors of the economy (for example, shipping and aviation).
- Incentivising negative emissions in the longer term by supporting new negative technologies (for example, direct air capture or bioenergy with carbon capture and storage).

The government will need to introduce secondary legislation to provide for the detailed operation of the tax

and further amendments to the Finance Act 2019 through a Finance Bill in autumn 2020, including to set the rate for 2021 and to provide for the rate to be adjusted.

The consultation closes on **29 September 2020**. For more details on the consultation, see *Legal update, Government consults on detail of carbon emissions tax option after Brexit transition period*.

Draft Greenhouse Gas Emissions Trading Scheme Order 2020 published for UK Emissions Trading System (UK ETS)

Practical Law Environment

On 14 July 2020, the government published the draft Greenhouse Gas Emissions Trading Scheme Order 2020, which sets out the framework for the UK ETS. The Order will come into force on the day after it is made, to allow regulators to prepare for the transition from the EU ETS to the UK ETS at the beginning of 2021. Requirements on UK ETS participants will take effect from 1 January 2021 (the beginning of the UK ETS's first trading period).

The government's preferred policy is to link the UK ETS to the EU ETS, but this depends on the negotiations on the future relationship between the UK and the EU.

The UK ETS will cover the same greenhouse gases (GHGs) and sectors as the EU ETS. Schedule 2 defines installations and regulated activities, and sets out exclusions. It also sets out which GHGs are regulated from which type of activity. The UK ETS will include aviation emissions from UK domestic flights, flights between the UK and Gibraltar, and flights from the UK to the EEA.

The UK ETS is divided into phases. The first phase, or 'allocation period', will run from 2021-25. The second phase will run from 2026-30. Each UK ETS scheme year runs from 1 January to 31 December.

In addition, the cap on UK ETS allowances allocated each year will initially be set at 5% below the UK's expected notional share of the EU ETS cap for Phase IV of the EU ETS. This includes aviation emissions. The cap will be roughly 156 million allowances in 2021. The initial cap will be reduced annually by a little over 4.2 million allowances, so that it remains 5% below what the UK's notional share of the Phase IV EU ETS cap could have been expected to be year on year.

The draft Order also covers provisions on:

- Monitoring and reporting requirements.
- The role of the regulators in monitoring and enforcing the UK ETS.
- Enforcement (including civil penalties) and appeals.

For more information, see *Legal update, Draft Greenhouse Gas Emissions Trading Scheme Order 2020 published for UK Emissions Trading System (UK ETS)*.

The Committee on Climate Change annual report

Lexis®PSL Environment

In its annual report to Parliament, published on 25 June 2020, the Committee on Climate Change (CCC) called on the government to turn the coronavirus (COVID-19) pandemic into a 'defining moment in the fight against climate change', by using the economic recovery as an opportunity to accelerate the transition to a successful, low-carbon economy and improve the country's climate resilience.

The CCC also encourages the UK to show international leadership in the run up to the Presidency of COP26, now delayed to 2021, and provides suggestions for how the government can 'bolster the UK's leadership credentials'.

The specific recommendations are organised by government department, an approach which differs from previous CCC reports to Parliament. This new approach aims to improve clarity and emphasise the shared responsibility of working towards net zero emissions.

The analysis expands on the CCC's May 2020 advice to the UK Prime Minister in which it set out the principles for building a resilient recovery. In the new report, the CCC highlights five clear investment priorities for the months ahead:

- Low-carbon retrofits and buildings that are fit for the future.
- Tree planting, peatland restoration, and green infrastructure.
- Strengthening energy networks.
- Infrastructure to make it easy for people to walk, cycle, and work remotely.
- Moving towards a circular economy.

The report emphasises the benefits of investing in these types of projects to support a resilient recovery, citing evidence that their delivery would have a 'significant multiplier effect' on jobs and economic growth. These investment streams would also ensure the government does not implement policies to tackle short-term unemployment and inequality which have the effect of 'locking-in' emissions in the long term.

The Secretary of State must lay before Parliament a response to the points made in the CCC's 2020 progress report no later than 15 October 2020, after first having consulted the devolved administrations on a draft of the response.

For more information, see: Committee calls on ministers to make coronavirus (COVID-19) recovery a green one—LNB News 25/06/2020 48.

EIA screening decision quashed for unlawfully assuming mitigation measures would be successful (High Court)

Practical Law Environment

In *R (Swire) v Secretary of State for Housing, Communities and Local Government [2020] EWHC 1298 (Admin)*, the High Court granted an application for judicial review and quashed the Secretary of State's screening decision that an environmental impact assessment (EIA) was not required, on the basis that the Secretary of State had insufficient evidence for deciding that the mitigation measures would be successful.

In 2018, outline planning permission was granted for a residential development on a site within an Area of Outstanding Natural Beauty (AONB) that had previously been used as an animal carcass rendering facility. The planning permission was subject to conditions including implementing a scheme to deal with the potential land and groundwater contamination.

The Secretary of State's screening decision determined that, while the proposed development amounted to an urban development project within a sensitive area (an AONB) within Schedule 2 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (*SI 2017/571*), the proposed measures to mitigate the environmental impact meant that it was unlikely to have significant effects on the environment. In consequence, he concluded that an EIA was not required. A local resident subsequently applied for judicial review against the Secretary of State's decision.

The High Court (Lang J) granted the local resident's application for judicial review and quashed the Secretary of State's screening decision as unlawful. The court held that EIA screening decision-makers could take account of measures intended to mitigate the environmental impact of the development. However, a screening authority had to have sufficient evidence of the potential adverse environmental impacts and the availability and effectiveness, of the proposed remedial measures in order to make an informed judgment that a development would not be likely to have significant effects on the environment, and that therefore no EIA was required. The Secretary of State had erred in assuming that mitigation measures would be successful without having sufficient information on contamination at the site to support that assumption.

This case follows existing case law that mitigation measures can be taken into account in EIA screening decisions. However, here the Secretary of State's decision was unlawful as he did not have sufficient evidence to decide that the development would not be likely to have significant effects on the environment, and that an EIA was not required.

For a full analysis of the decision, see *Legal update, EIA screening decision quashed for unlawfully assuming mitigation measures would be successful (High Court)*.

Aarhus costs cap case – R (Bertoncini) v London Borough of Hammersmith and Fulham

Lexis®PSL Environment

On 2 June 2020, His Honour Judge Bird handed down judgment in the Planning Court case of *R (Bertoncini) v London Borough of Hammersmith and Fulham*, concerning whether interested parties to a proceeding can apply to vary or remove an Aarhus costs cap.

The Aarhus cost cap, set out in CPR 45.41-CPR 45.45, permits claimants to apply for a cap limiting costs they must pay following an unsuccessful claim for judicial or statutory review. However, the CPR also allows defendants to apply to have cost caps increased in size or removed where doing so would not make the costs of proceedings prohibitively expensive – the purpose of the cap being to ensure access to justice for claimants in environmental cases.

While it was previously unclear whether such applications were only open to defendants, HHJ Bird decisively confirmed that interested parties could also apply to have price caps increased or removed. The judge considered the benefit of the input provided by interested parties in judicial and statutory reviews, and thus the importance of encouraging their participation, in light of the overriding objective of the Aarhus cost cap. He concluded that it would be 'unjust (and contrary to principle)' to deny interested parties standing under CPR 45.44.

For more information, see News Analysis: Can interested parties apply to increase the size of an Aarhus costs cap? (R (Bertoncini) v London Borough of Hammersmith and Fulham).

Meaning of 'resting place' for European species protected under Habitats Directive clarified (ECJ)

Practical Law Environment

On 2 July 2020, the Court of Justice of the European Union (ECJ) delivered its preliminary ruling in *IE v Magistrat der Stadt Wien (Case C-477/19) EU:C:2020:517* on Article 12(1)(d) of the Habitats Directive (*92/43/ECC*). The Article obliges member states to prohibit the deterioration or destruction of breeding sites or resting places of 'European species', listed in Annex IV(a) to the Habitats Directive, in their natural range to protect against deliberate killing and disturbance.

The request for a preliminary ruling was made in proceedings between IE, an employee of a property developer, and Vienna City Council, Austria, concerning a fine imposed on IE by the Vienna City Council for having caused the deterioration or destruction of resting places or breeding sites of the Cricetus cricetus (European hamster) species in the course of a property redevelopment project. The European hamster is a European species protected under the Habitats Directive. Failure to pay the fine was punishable with a custodial sentence.

IE challenged the fine in the Austrian court on the grounds that the European hamster burrows were not being used by the hamsters when the harmful measures were undertaken and those measures did not lead to the deterioration or destruction of resting places or breeding sites of that animal species. The Austrian court asked the ECJ to give a preliminary ruling concerning the interpretation of Article 12(1)(d), requesting clarification on how the terms such as 'resting places', 'breeding sites', 'deterioration' and 'destruction' should be interpreted.

The court concluded that 'resting places' include resting places that are no longer occupied by one of the European species, such as the European hamster, where there is a sufficiently high probability that the species will return to such places. It followed that the aim of the strict protection offered by Article 12(1)(d) was to ensure that significant parts of the habitats of European species were preserved so that those species could enjoy the conditions essential for, among others, resting in those habitats. The same conclusion followed from the European Commission guidance document, which stated that resting places also needed to be protected when they were not being used when there was a reasonably high probability that the species concerned would return. This was in keeping with the objective of the Habitats Directive to provide strict protection for animal species. It would not be compatible with that objective to deny protection for resting places of a protected animal species where they were no longer occupied but where the animals may return.

Furthermore, the court considered that it was for the referring court to determine whether there was a reasonably high probability that the species would return to the sites concerned.

For more information about the case, see *Legal update, Meaning of "resting place" for European species protected under Habitats Directive clarified (ECJ)*.

Food, farming, land use and net zero

New agricultural policy for old

Richard Byrne

- The Agriculture Bill and Environmental Land Management scheme (ELMs) are the replacement for the EU Common Agricultural Policy.
- ELMs is based on delivering 'public goods' through long term, landscape-scale environmental interventions.
- The Agriculture Bill is wide-ranging seeking not only to improve the ecological environment but promote sustainable agriculture, improve and sustain soil systems, enhance animal welfare and improve rural livelihoods.

EU agricultural support and Brexit

The Common Agricultural Policy (CAP) has dominated UK farming since 1973. This monolith of policy and regulation has been variously supported and vilified by governments, farmers and consumers alike over the last few decades. Notoriously expensive and bureaucratic, the CAP has undergone many changes as the EU enlarged and the environment became more important to politicians and EU citizens. The prospect of an end to the CAP regime was one of the reasons that many farmers supported Brexit[1], as they felt it restricted their flexibility to farm and forced upon them burdensome and costly regulation. The 2016 Brexit vote meant not only the end of CAP for UK farmers but also CAP payments, which for many especially in marginal productivity areas can form the mainstay of farm income.

Whilst CAP can be criticized for many things in the past (wine lakes, butter mountains, etc.), the post 2000s CAP moved in a very different direction with de-coupling of payments from production meaning that farmers were no longer paid to produce commodities and a move into agri-environmental payments. These had been developed in the UK under the 1986 Agriculture Act and gave farmers the option to be paid to do conservation work, or more controversially paid not to do certain activities like increasing stocking density. As these schemes were rolled out into the EU, the schemes which in the UK are known as 'Stewardship' became more positively focused on conservation for species, habitats and landscapes. The final morphing of the EU's agricultural policy, which by the early 2000s was increasingly focused on conservation, was the inclusion of rural development. The creation of the CAP dual Pillar System with pillar one delivering the Basic Payment Scheme (BPS) – the replacement for subsidies which paid farmers as long as they complied with various production and environmental rules and pillar two which focused on enhancing the environment and rural economic development.

Policy choices

It was in an environment reflecting on this choice architecture that the post-Brexit agriculture policy was developed. Many farmers looked to a return to policy as developed in 1947. The UK's first post-war agricultural policy had ambitions echoed later in the CAP and spoke of social and economic objectives underpinning the home production of produce, largely through guaranteed produce prices. In today's world of global trade, governed not only by bilateral trade deals but by the rules of the World Trade Organisation (WTO), a policy which required the subsidy of commodities was never going to be considered.

Under CAP it had long been argued by politicians and economists that subsidies not only distort the market, they inhibit innovation and place a burden on the consumer, who in effect pay for products twice.[2] Once through subsidy support and secondly through the purchase of a product. The new Agriculture Bill[3] took the opportunity to address this by ending direct support payments, to the surprise of many in the farming community. The BPS will now be phased out in 2021 over seven years, giving time for a new environmentally based payment structure to come in. The end of the link between land ownership and payments has been a key move to ensure that public money is funding public benefit. It also allows the UK to meet the WTO Agreement on Agriculture, which sets limits on trade-distorting support. However, given that much public landscape (e.g. national parks) is derived from private land this is a contentious move as it is likely to place smaller farm units in financial peril and may lead to farm amalgamations or changes to promote efficiency to the detriment of the landscape and environment.

At the heart of the 'Ag Bill' (as it has become known) are measures to address the fundamental relationship between the producer, the environment and the consumer. In general, farmers will be paid for producing 'public goods' and improving animal welfare. The delivery of 'public goods' will be the main route by which farmers will receive public funds. The

continuation of payment for 'public goods' has been a positive move by the government and an acknowledgement of the contribution that agriculture makes to the maintenance of conservation and cultural landscapes. The definition of 'public goods' has by necessity developed over the consultation process. For many 'consumers' of the countryside 'public goods' may be quite narrowly defined in such terms as conservation areas and access. However, under the Ag Bill the definition is much broader and seeks to contribute to addressing the climate and ecological crisis. This is further re-enforced by a commitment to sustainability. Whilst this word is often misused, within the Bill it clearly links to organic farming and agro-ecology. Agro-ecology being the application of ecological processes to agriculture in order to build on beneficial relationships and interactions to enhance ecosystems, as well as delivering livelihoods and resilience. As a result, the Ag Bill has (unlike traditional agricultural policy) shifted from a production focus with conservation overlaid to a foundational approach of interconnected soil, water and ecosystems.

Land management at the core

The Ag Bill puts land management first and foremost and a welcome inclusion are measures on soil management and soil health. Soil is not only the key growing medium, but its loss leads to flooding, damage to habitats and the release of carbon. Whether or not the public see this as something of value may be debatable but the measures to monitor and research soil to promote effective decision making is a much-welcomed move. It also fits into the wider agenda of long term and landscape-wide change. Soil management is integral to water management and the Ag Bill offers a real opportunity for landscape-scale change. Also, it raises the prospect of real integrated land management whereby flood control can be promoted by re-engineering river and stream systems, creating flood plains and wetlands, in doing so capturing carbon in soil and vegetation and enhancing ecosystems. While many conservationists have become encouraged by this move, it has not been universally welcomed by farmers. The main concerns hinge on funding (given the removal of BPS) and the ability to produce food if land (at scale) is dedicated to long term environmental works. Added into this is increasing concern about how the 'conserved' land will be managed with numerous conservation groups talking of reintroducing beavers, bison and even European Lynx as methods of promoting long term integrated environmental gain. Rewilding is a controversial topic, which has become more mainstream in the last three years, but with it brings uncertainty over its defined outcomes and concern over the spread of animal disease.

The Environmental Land Management scheme (ELMs)

The Ag Bill's ambitious aims will be delivered through the new 'Environmental Land Management scheme' (ELMs)[4] The ELMs has been designed to fit into the wider policy area of the 25 Year Environment Plan.[5] The ELMs will operate under three tiers.[6] Tier 1 has a focus on sustainable farming and forestry and seeks to deliver benefits at scale. Tier 2 has a more local focus and incentivises environmental works. As with the current stewardship programme, it will focus on delivering public benefit, including access and conservation and will encourage farmers to collaborate to extend benefit. Tier 3 will support large scale land-use change such as rehabilitation of peatlands, catchment management to tackle climate change and ecosystem decline.

The overall message of the ELMs is innovation not only in delivery but in how payments will be calculated. Under previous agri-environmental schemes payments were often based on physical elements and labour costs. However, ELMs is not all about creating physical 'public goods' such as footpaths, some of the public goods are intangible such as carbon storage. Other 'public goods' such as flood control or water attenuation may take years to be fully realised. This means a whole new way of costing projects is required. For Tier 1 and 2, the present systems of payment will most likely be adapted, however, for Tier 3, the large-scale land management approaches, there will need to be a different method or set of methods. This will require a new approach to metrics. For example, what happens if a project fails to meet metrics because of external influences, for example, a moorland fire destroys areas of rehabilitating peatland. The process is high in risk and depends upon developing a market for 'public goods' which delivers a robust price setting. Currently, there are several ELMs trials across the country exploring operational practices, with a national ELMs pilot beginning in 2021 with the idea that the programme goes fully live in 2024.

Brexit, public goods and farm viability

While the mechanisms for costing the 'public goods' need development, many wider concerns are shadowing the rollout of the ELMs programme. It is a hugely ambitious programme potentially covering 70% of the UK and is being implemented at a period of great economic uncertainty. The evidence is that farmers if incentivised can deliver conservation and wider benefit. However, this is wholly dependent on them having a viable business model. Given the pressures on farming with COVID-19 and Brexit uncertainty, there is concern that shifting economic fortunes of agriculture could result in land management changes. For many in the agricultural industry, the missing element in the Ag Bill is the

protection of UK agricultural products from imports produced to a lower environmental or animal welfare standard, from the US in particular.[7] Importation of genetically modified (GM) or hormone produced meat, would not only impact the UK producers directly as the cost bases are incomparable, but would also damage the value chain. Exports to the EU would have to guarantee non-GM ingredients and add to an already complex post-Brexit export system. Brexit also brings uncertainty. The potential loss of market access for sheep exports[8] to the EU coupled with the loss of BPS would make much of upland agriculture unviable, and while the land would still exist, it may be managed by new owners with a different interpretation of how land should be managed. This, in turn, could lead to a dramatic change in landscapes as sheep are lost and land is afforested or re-wilded. How the public would react to this is an unknown quantity.

Summary

The Ag Bill is more revolution than evolution, not because of its content, but because of the context it is being implemented in. Its timing alongside Brexit is most worrying. Without a viable agricultural industry, and a profitable value chain to sell into, there is a fundamental concern that the pattern of landscape and ecological interest managed by small and medium-sized enterprises could be lost, either in the pursuit of efficiency through amalgamation or a radical shift in vision. COVID-19 and potential trade deals with countries with different standards add to this uncertainty. What is certain is that for agricultural policy 'ELMs' type programmes are the way forward. Public funding demands 'public goods', however, the form and payment for those public goods are complex and not always as visible as traditional agri-environmental schemes. Buy-in is important at all levels, and the public must not be forgotten in the discourse on public goods so that they understand where funding is going and what is happening. If ELMs is successful (depending on the metrics employed) it could be world-leading in shifting agriculture to a more sustainable basis. There are however many uncertainties and at present few clear answers.

Richard Byrne is currently a senior lecturer in land management at Harper Adams University, he has a background in environmental management and agricultural policy.

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The Agriculture (Retained EU Law and Data) (Scotland) Bill and Scottish agricultural policy

Ryan Bowie

At a Glance

- The Agriculture (Retained EU Law and Data) (Scotland) Bill allows the existing Common Agricultural Policy to apply in Scotland.
- The Bill has passed Stage 2 and should become law prior to the end of the transition period on 31st December 2020.
- Scotland, unlike England, has not yet set out a future direction for agricultural policy but all indicators point towards the policy contributing to the Scottish Government's net zero emissions target.

What is CAP?

The Common Agricultural Policy (CAP) was launched in 1962. The purposes of the CAP include providing support to farmers and improving agricultural productivity in order to ensure a stable supply of affordable food; combatting climate change; and promoting employment in the agricultural sector. CAP applies across all EU Member States and is managed and funded at European level.

How does CAP apply in the UK?

The UK formally left the EU on 31 January 2020 and is currently in the transition period provided for in Article 126 of the Withdrawal Agreement. The transition period expires on 31 December 2020. EU law will continue to apply in UK law as if the UK remained an EU Member State until the expiry of the transition period (this includes the CAP rules and regulations). The Withdrawal Agreement, as an international treaty, is given domestic legal effect by the European Union (Withdrawal Agreement) Act 2020. The 2020 Act also amends the European Union (Withdrawal) Act 2018, providing for the retention of EU law as it stands on 'Implementation period completion day', currently 31 December 2020. This new body of UK law, called 'retained EU law', will continue in domestic law until repealed or amended.

Agriculture is a devolved area of policy in Scotland with many decisions being made by the Scottish Government, including those implementing the CAP. The Agriculture (Retained EU Law and Data) (Scotland) Bill (the Bill) was introduced to the Scottish Parliament on 6 November 2019 and has completed Stage 2, following a meeting of the lead committee on proposed amendments on 17 June 2020. The Bill will provide Scottish Ministers with the necessary powers to make changes in relation to the CAP, which will become 'retained EU law' at the end of the transition period, and for it to continue to apply in Scotland, allowing subsidies to continue to be paid to eligible landowners and occupiers.

What does the Bill do?

The Bill seeks to provide Scottish Ministers with the power to simplify and improve the CAP following the UK's departure from the EU. In addition to permitting the existing CAP to apply in Scotland, there are new aspects introduced by the Bill, such as:

1 The power to modify financial provision in existing CAP legislation including setting a ceiling for the amount of any agricultural support payment;
2 The power to regulate marketing standards in relation to agricultural products and the classification of carcasses; and
3 The power to regulate the collection and processing of information connected with food supply chains and agricultural activities.

The primary objective of the Bill is simplification of the CAP. One example is in relation to the current support for Less Favoured Area (LFA). Under the CAP, support available for farmers in the 2020 year under the LFA Support Scheme is to be substantially reduced and then replaced with a new scheme in 2021. The Bill will allow Scottish Ministers to intervene and to direct support as they deem necessary.

Stage 2 changes to the Bill

Section 9 of the Bill has been replaced by amendment at Stage 2. The new section defines products and sectors for which marketing standards can be set and aligned with those in the UK Agriculture Bill.

Rather than the Bill referring to a high-level description of the sector, the amended section provides more comprehensive detail on the products covered by the Bill by reference to European regulations under which current marketing standards are set.

How does the Bill shape policy for the future?

There are several areas where the Bill provides for Scotland to diverge from the current position. If passed in its current form, Scottish Ministers will be able to make changes to aspects of the CAP such as the level of payments, the legislation on public intervention and private storage aid (support schemes to stabilise the price of products), the classifications for pig, beef and sheep carcasses, and amend the definition of 'agricultural activity'.

The Bill permits existing support to continue to apply in Scotland but does not set out the future direction of policy or support. Following its Stage 1 consideration of the Bill, the Rural Economy and Connectivity Committee stated that it lacked direction for future policy. The Scottish Government's response was that the purpose of the Bill is to address process and so it seems unlikely that we will see radical policy changes in the near future.

UK Agriculture Bill in Scotland

The UK Agriculture Bill is more advanced in terms of policy setting for England than the Agriculture (Retained EU Law and Data) (Scotland) Bill. For example, the UK Bill establishes a framework for phasing out direct payments over a seven-year transition period. In addition to the headline policy changes set out in the UK Bill, the Department for Environment, Food & Rural Affairs (Defra) has issued a policy statement covering a wide range of aspects relating to the future agricultural policy in England.

Although agriculture is a devolved policy area, some aspects of the UK Agriculture Bill apply to Scotland including food security, fair dealing obligations, producer organisations, fertilisers, identification and traceability of animals, the red meat levy, organic products and the World Trade Organisation agreement on agriculture.

The introduction of measures to focus on food security has been welcomed by sector bodies, with new measures to impose a statistical analysis on UK food security and a reporting requirement.

Both the UK and Scottish Governments have stated their intention to create common frameworks where UK wide cooperation is deemed necessary. However, the divergence in financial agricultural support in the UK Agriculture Bill suggests that a common framework on agricultural policy may not emerge.

Scottish policy

In June 2018 the Scottish Government published its report entitled 'Stability and simplicity: proposals for a rural funding transition period' which indicates Scotland's path to maintain the current agricultural financial assistance until 2024. Whilst the Bill came under criticism for providing a lack of future policy direction, it has been in line with proposals previously set out by the Scottish Government to maintain stability, and simplify elements of the operation of the CAP.

Defra has set out its focus on improving the health of the environment and at a lower cost. Whilst the Scottish Government has called for the budget which it currently receives under the CAP to be maintained, it is not clear whether, with the reduced costs being sought in England, the budget for Scotland may also be reduced.

In Scotland, we await the report of the Farming and Food Production Future Policy Group. Established by the Scottish Parliament in 2019, the remit of the group is to explore and make recommendations during 2020 on future farming and food production policy. Whilst the remit of the group is to focus on practical suggestions that can support farming and food production, the group is also tasked with taking account of wider policy priorities such as the global climate emergency and moving to net zero emissions and a low carbon economy. The group includes government officials, trade bodies, landowners and rural entrepreneurs. Minutes from the group's meetings show a focus on the environment and, taking account of Scotland's ambitious net zero emissions target, a Scottish agricultural policy in which environmental concerns are prominent seems likely.

The COVID-19 pandemic has also brought into focus the need for changes to food security as many of Scotland's local producers and processors stepped up to meet demand.

At a time when future Scottish agricultural policy is being formed, there is an opportunity for policy makers to ensure that the agricultural sector is developed to further meet existing standards as well as wider policy objectives.

What next?

At Stage 2, the Bill has undergone more detailed scrutiny and amendments have been made. The Bill, as amended, will now be considered by Parliament with further amendments possible at Stage 3. The Scottish Parliament has not yet determined when Stage 3 will take place, but it is open to members to lodge further amendments. As the UK transition period is currently scheduled to end on 31 December 2020, we expect the Bill to be passed at Stage 3 and receive Royal Assent in the second half of this year.

The report from the Farming and Food Production Future Policy Group is expected in 2020 and its recommendations, whilst not definitive, will provide an indication of the shape and direction of future policy in Scotland.

The question remains to what extent divergence in UK agriculture will continue and whether there will become a growing need to create a common framework for the UK.

Ryan Bowie is a senior associate at Brodies. He advises on contentious and non-contentious agricultural matters, as well as high profile cases in the Scottish Land Court and Court of Session. He acts in the sale and purchase of estates, farms, country houses and forestry, and represents landowners and developers in renewable transactions. He also advises on succession planning, including the use of farming structures.

Wetlands

What would the world be, once bereft
Of wet and wildness? Let them be left
Gerald Manley-Hopkins

John Hunt

At a Glance

- There has been a huge loss of wetland habitats in the UK, largely caused by subsidised drainage.
- This had led to a major decline in biodiversity and the valuable ecosystem services provided by wetlands.
- Wetland habitats have the advantage that they can be restored or created relatively easily.
- Brexit provides the opportunity to encourage more environmentally friendly farming with priority given to wetland restoration.
- Practical suggestions are made for restoring wetlands which would help mitigate climate change, reduce flooding problems and increase biodiversity.

We hear a great deal about the clearance of the rain forests and rightly bemoan the loss of biodiversity and the impact on the climate this is having. Yet curiously we hear very little about the loss of wetlands which is taking place around the world at an even greater rate, though the different wetland habitats support just as much wildlife and store greater amounts of carbon. Shallow marshy wetlands are some of the most productive habitats on earth as seen in their plant and animal populations, but a third of the world's wetlands have been destroyed over the last 50 years and this loss continues apace.

In the UK, wetland habitats such as wet grassland, peatlands, marshes, wet woodland, lakes and rivers support almost half our wildlife species and contain vast amounts of carbon as well as being able to provide ecosystem services such as water storage and purification, flood prevention, reduced soil erosion and of course economic and recreational benefits.

For centuries we have waged war on our wetlands. It is hard to appreciate now in our tamed landscape how much of the countryside was once waterlogged, with huge areas impassable in winter and very limited ground dry enough for cultivation. Not surprisingly, wet places were regarded as a problem and a barrier to progress. Drainage has been remarkably effective and over the years 90% of the original natural wetlands in England are thought to have been removed.

Since the last war, the draining of farmland has continued, helped by improved technology and driven by public money in the form of grants and direct funding of regional drainage schemes. In England and Wales, Internal Drainage Boards embarked on massive schemes to drain the remaining substantial areas of wet grassland, all of which were of high conservation value and most designated as Sites of Special Scientific Interest. This was done at public expense but only benefited the various farmers concerned who were able to switch from pasture to more profitable arable. As a result about 90% of all wet grassland in lowland Britain was lost over a 30 year period up to 1990.

Drainage is now effectively complete so that wet areas are almost entirely absent from lowland farmland. Even farm ponds which were once ubiquitous have largely disappeared while those remaining have become overgrown or polluted. These changes have mostly gone unnoticed by the general public but they have been very significant because drainage has been the key step enabling large areas of traditional grassland to be brought into intensive agriculture with all its consequent environmental impacts.

In the uplands, drainage has also taken place on a large scale. Fields traditionally used for pasture and hay have been drained with grant aid and then ploughed, fertilised and reseeded with more productive grass varieties, replacing most of the indigenous vegetation. This has increased grass yields and livestock production but at the expense of biodiversity, particularly breeding birds. Drainage ditches through moorland (grips) were encouraged and grant aided until the 1980s in the mistaken belief that this was beneficial to sheep and grouse shooting. Now it is appreciated that this led instead to soil erosion and more rapid run-off of rainfall with increased risk of flooding on lower ground.

Wetlands that remain are often in poor condition because of diffuse pollution from a cocktail of fertilisers and pesticides running off farmland. As a result, fish and other aquatic life have been eliminated from many ponds and streams since the 1960s. While pollution from industry and sewage has been much reduced in recent years, progress dealing with that from agrochemicals has been very slow. They continue to contaminate watercourses and estuaries with serious impacts on wildlife and large amounts have to be spent removing these chemicals from drinking water.

Rivers have been canalised, destroying many important natural features and separating the river from its floodplain with the loss of wetland habitat

and storage areas for water in times of flood. Some streams have even suffered the ultimate indignity of being piped underground. As a result, only 14% of rivers in the UK are in good ecological condition. With the loss of wetlands and the poor quality of those remaining, once common birds, mammals, amphibians, insects and plants dependent on wet places have disappeared from much of the lowlands.

All this is a familiar story for conservationists but it is not one the wider public and our politicians seem to be aware of since it receives little media attention. Old prejudices against wetlands still surface each time we have flooding problems – with demands for even more land drainage rather than the opposite which is often what is needed.

However, on the plus side, wetlands do have the great advantage that they can often be restored or created relatively easily and quickly. To restore an oak wood will take a lifetime or longer but wet grassland or a marsh can be brought back in a year or two – often at little cost, perhaps using a sluice in a ditch or by impeding existing drainage. Conservation bodies have considerable experience of doing this on nature reserves where they have created wetland habitats such as reed beds and wet grassland. These have rapidly attracted wildlife with the added bonus of providing enjoyment for visitors and educational use. The many sand and gravel pits excavated since the war have provided valuable substitute wetlands in some areas. A good example is the Cotswold Water Park where conservation and water-based recreation co-exist well with mineral extraction.

Some good work is being done restoring damaged peatlands in various locations and there is huge scope for more of that. Considering that they hold 30 times as much carbon as our woodlands, restoring peatlands should surely be given greater priority than tree planting. With the lengths now taken to reducing carbon footprints it is extraordinary that we have still not banned the commercial extraction and sale of peat.

These days the Government does appear to recognise the value of wetlands and there are grants available under the Countryside Stewardship and other schemes to encourage these. However they suffer from the problems of other environmental grant options in that they are of short duration (five years maximum) with very limited funding and are highly bureaucratic – so much so that many farmers have to employ consultants to complete an application. Not surprisingly the uptake has been low. While welcome, these options are too transitory and small in scale to make any significant difference to continuing biodiversity decline. Farmers tend to go for the easy grant options to do with access or field boundaries which interfere least with their farming operations and are not keen on losing any land to wetlands. We must hope that the new Environment Land Schemes which are due to come into effect in 2021 will be an improvement, though as always the devil will be in the detail.

Re-wilding enthusiasts are keen to restore beavers which were driven to extinction in the UK in the 16th Century. They have been reintroduced to much of Europe in recent years with few problems and many benefits. Beavers are now present in small numbers in Scotland and last year the Scottish Government decided that they should be protected in view of their rarity and the many benefits they bring to the natural environment. Remarkably, Scottish Natural Heritage then issued 40 licences to farmers in Tayside allowing them to legally kill beavers to protect against agricultural damage. Lethal control was only supposed to be used as a last resort but surprise, surprise, 87 beavers were shot. This may represent more than a quarter of the Scottish population and makes a nonsense of their protected status. Beavers could have a valuable role to play in restoring wetlands in many areas but a more enlightened attitude will be needed from farmers.

Brexit will at last mean that the UK is no longer bound by the discredited EU Common Agricultural Policy and will, for the first time for many years, regain full control of agriculture. It provides a rare opportunity to develop policies which encourage and support sustainable farming in ways which are no longer damaging to the natural environment and deliver a wide range of public benefits. These policies need to address all farming activities but there is a good case for giving the restoration of wetlands a high priority. This is not just because of their conservation importance, scarcity and value to society but above all because it is possible to restore them relatively quickly unlike many other natural habitats. Following are just three suggestions which should be in line with current Government thinking but may require legislative change.

If we are serious about reducing carbon emissions then we should be doing far more to restore the huge areas of degraded peatlands. Peatlands cover almost 10% of the UK but less than a quarter are in good condition with the rest suffering from overgrazing, burning, forestry, drainage and peat extraction. The damaged areas continue to erode and are estimated to be losing 10 million tonnes of carbon dioxide each year or nearly 3% of the UK's total carbon emissions. We know how to successfully restore these areas following the experience of the RSPB in the Flow Country removing conifers and blocking drains as well as work by others in the Peak District and elsewhere repairing eroding peat bogs. 850,000 ha of damaged peatland were identified for treatment more than a decade ago but only very limited progress has been made to date. Yes it would be expensive, but nothing compared with the billions of pounds spent each year subsidising windfarms – and unlike the latter the gains

made would be permanent without any harm to birds and bats.

Climate change is predicted to bring increased winter rainfall and more damaging flood events which can be traumatic for those affected, as well as being politically very sensitive. It is now recognised that long term solutions to flooding must include addressing the river catchments which have been drained and mismanaged in the past so that flood waters run off too quickly. A strategic approach is needed involving a thorough survey of the key catchments to identify what areas can be best used for water storage. This may well mean reversing many of the drainage schemes of the past, and could also involve other changes to land use such as farming. These works will require careful planning to ensure that they also achieve as much as possible for biodiversity.

To help restore wetland habitats to the wider countryside it is suggested that any farms receiving public money should set aside part of the farm (say 10%) for nature conservation and this should include at least some wetland restoration. This would help to restore connectivity between wetlands which at present is lacking and preventing species, such as water voles, from returning naturally to areas where they were once common. With careful design these restored habitats could help to filter out some of the fertilisers and pesticides before they leave the farm – reducing pollution of downstream water courses. If nothing else a farm pond would be well worth having and if farmers were lucky beavers might make one for them!

The author, John Hunt, has worked for various nature conservation bodies since 1974, mainly in Scotland, with particular emphasis on the management of land for wildlife.

Matters in practice

Science, values and environmental standards

Richard Macrory, Barrister, Emeritus Professor of Environmental Law, UCL

At a Glance

- Government responses stated to be based on 'sound science' or 'guided by the scientists' have been a core feature during the coronavirus crisis. But there remains confusion as to what this really means.
- Twenty years ago the Royal Commission on Environmental Pollution (RCEP) examined this very question, and considered in detail the relationship of scientific assessment and policy responses in its report on Setting Environmental Standards (the Report).
- The RCEP emphasized that science was not a matter of certainties. While scientific assessment was a core element in setting standards, 'sound science' involved transparent procedures acknowledging inherent uncertainties.
- Post-Brexit, government and devolved administrations will have more discretion in how they go about setting new environmental standards. The Report should now be revisited to provide a template for the processes to be adopted.

In the last edition of e-law, Stephen Tromans made a compelling case for revisiting some of the early reports of the RCEP as we begin to think about the principles that should shape environmental policies and regulations in a post-coronavirus world.[1] I want to argue that one of its later reports perhaps has even more contemporary relevance. In dealing with the coronavirus, we continually hear talk of government policy being guided by science, or based on 'sound science', and lead experts such as the Government's chief scientist and medical officer stand alongside the politicians. At the same time the uncertainties of scientific knowledge and differing views of epidemiologists and public health scientists are becoming increasingly apparent, causing confusion and unease. No doubt any inquiry into how the coronavirus crisis was handled in this country will have to wrestle with the issues of the interaction between scientific advice and political decision-making. Yet these were the very questions addressed in great detail by the RCEP just over twenty years ago.

Some of the RCEP reports had an immediate impact in changing law and policy, while others such as the Transport Report[2] made headlines in press and television news. However, some reports, though not the focus of immediate media attention, contain a profound and long-lasting analysis of a complex subject and stand the test of time. The Report[3], running at over 200 pages, was, I think, one of these. By the time the RCEP studied the subject, many environmental standards such as those relating to air pollution or water quality were expressed in detailed scientific terms in the relevant legislation, largely as a result of the influence of EU environmental law. The old days when the main standard expressed in the law for drinking water was simply 'wholesome water' were long gone.[4] In tackling the subject, the RCEP took the view that standards were not just those that appeared in legislation but could also encompass guidelines, codes of practice – indeed any official criteria that help to determine and guide individual decision-making.

The RCEP accepted that scientific understanding must remain as one of the essential elements in determining environmental standards, and the Report started with a detailed examination of how scientific assessment should be carried out. The RCEP made a number of general conclusions which might seem obvious in retrospect but had not been expressed so forcefully before in an official report. The majority of the RCEP members were eminent scientists, and emphasized that while there often seemed to be expectations that scientists could provide the answers to problems, 'science is not a matter of certainties but of hypotheses and experiments. It advances by examining alternative explanations for phenomena and by abandoning superseded views.'[5] There were bound to be uncertainties and limitations, especially when dealing with complex issues such as environmental or health impacts, and 'sound science' was not a requirement for certainty and should not be interpreted as such: 'Rather than give the impression that scientific evidence can and does resolve all uncertainties its limitations should be made explicit'.[6] A sound scientific assessment was one that indicated clearly where the boundaries of knowledge lie, what was considered to be indisputable and what was considered to be speculative. Transparency was a key element of the process and assessment should be explicit about uncertainties in the evidence, the rationale for dealing with such uncertainties (such as introducing safety factors), and the assumptions underlying their use. Furthermore, before scientific assessment is carried out, the RCEP considered that there normally needed to be a more explicit prior stage of defining what the problem is, framing questions and formulating policy aims – 'This will

determine the relative emphasis to be placed on different types of scientific assessment a given case or even which types of scientific assessment should be carried out'.[7]

At the time of the Report there were a number of specialist scientific committees advising the Government on environmental issues, and the use of such expert committees such as the Committee on Medical Effects on Air Pollutants (and of course the SAGE committee in the context of Coronavirus) continues today. But the RCEP stressed that the role of scientific expertise was to provide advice on the current state of knowledge about environmental impacts, but not to stray into the actual setting of standards. A standard implied a choice as to the acceptability of a particular impact. For instance, was the goal of an air pollution standard to protect all trees or all humans from a particular health risk, or perhaps only a proportion? The RCEP had evidence that some committees were clearly making their own judgments as to the acceptability of risks, and it felt strongly that this was not the role of scientific assessment, but essentially a political judgment involving other factors. In simple terms, scientific advice should describe a dose-effect curve – and in doing so make explicit any uncertainties that existed – but where the standard was actually drawn on that curve was not a scientific decision in itself. As the Report noted, 'A clear dividing line should be drawn between analysis of scientific evidence and consideration of ethical and social issues which are outside the scope of a scientific assessment'.[8]

The Report considered the significance of the precautionary principle in the process whilst acknowledging the principle had given rise to controversy and confusion as to its precise meaning. Some seemed to consider the principle reflected moral values concerning the environment and was in some ways anti-science or anti-rationality, but the RCEP rejected that characterisation. It considered the precautionary principle as 'a rational response to uncertainties in the scientific evidence relevant to environmental issues and uncertainties about the consequence of action or inaction'.[9] What was critical to the decision-maker was to have advice on the likely time-scales for resolving knowledge uncertainties – if this was a short period, it might be rational to defer a decision rather than apply the precautionary principle. On the other hand, if possible effects in continuing a current policy were to be likely to be serious and irreversible, and especially where it might be years before the state of scientific knowledge on the issue in question could provide some degree of certainty, precautionary action would be rational and justified.

The Report went on to examine the role of technological options, risk evaluation, and economic appraisal as additional key elements in the setting of standards. But it was the role of economics that gave rise to the most intense arguments amongst RCEP members. Although dominated by scientists, the RCEP at the time included two economists, a moral philosopher, and one lawyer (myself). We had accepted that the actual choice of particular standard involves a value judgement as to what is acceptable, but were concerned that the decision-maker (which might be a Government Minister, the Environment Agency or whatever body has been given the responsibility to set any particular standard) did not always have access to rigorous data concerning public values concerning what was acceptable or not. It was too glib to say this was simply a political decision, and the RCEP felt that decision-makers would benefit from better knowledge on the values held by the public before making their choice.

The economists argued that their well-developed techniques of cost-benefit analysis were designed precisely to perform that function – to provide a decision-maker with information on how the public weighed different advantages and disadvantages against each other. The moral philosopher countered that cost-benefit analysis was concerned with preferences rather than values. Values were more deeply held than preferences, but were not discoverable by the types of questionnaire and willingness to pay surveys conducted in cost-benefit analysis. People often did not know their true values unless exposed to argument and debate. The economists countered that values were no more than strong preferences. The argument went on at high level for over six months with both sides submitting papers and counter papers. The scientists meanwhile looked on with some bafflement, while the chair hoped there could be a compromise. I felt this simply was not possible – these were two completely different views on how people viewed the world. Eventually, the Report argued that if decision-makers did not accept that cost-benefit analysis could reflects values, then other methods of exploring public values needed to be developed: 'To the extent that people's values (as expressions of fundamental commitments to the environment or to equity, whether within society or between present and future generations are regarded as not answerable to economic appraisal, the question then arises whether there is any other approach that could provide additional assistance to decision making in that respect.'[10] These core arguments and the very differing underlying perspectives as to how society should treat the environment still remain, and the RCEP's analysis provides much needed intellectual clarity – though no final resolution – on the issues involved and why there is often dispute and confusion.

As I have argued, the Report is worth re-reading in light of the responses to coronavirus. Furthermore, it may be of even more importance post-Brexit as the

United Kingdom – and the devolved administrations – begin to develop procedures for setting new environmental standards. In one of UKELA's Brexit and Environmental Law papers[11] we argued that for all its complex bureaucracy, EU procedures such as the Seville process for developing BAT reference notes (BREF) under the Industrial Emissions Directive[12] had the advantages of a great deal of transparency. It would be retrogressive to revert to former practices where government often commissioned consultants to propose a standard which was then sent out for consultation. The Report demonstrated that far more nuanced and transparent processes were required, and its proposals could provide a powerful template for the future.

Richard Macrory is a barrister and Emeritus Professor of Environmental Law at University College London. Richard was the first chair of UKELA and was the sole legal member of the Royal Commission on Environmental Pollution between 1991 and 2003.

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4 S 155 Public Health Act 1936
5 Standards Report para 2.66
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8 Standards Report para 2.69
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10 Standards report, para 5.48. In Chapter 7 of the Report, the Commission explored both existing and emerging procedures such as Citizen's Juries that could be employed in this context though accepted that no method could provide a guaranteed solution.
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Is it the right time for the UK to adopt mandatory environmental and human rights due diligence for business?

Niall Watson

At a glance

- This article discusses the call for the UK to legislate for mandatory environmental and human rights due diligence (EHRDD) obligations on business.
- It looks at the issue through the need to address the UK's global footprint and, in particular, the impact of its consumption of 'forest-risk' commodities such as soy and palm oil.
- It notes that the failure of voluntary initiatives has led to increasing impetus for mandatory EHRDD, culminating in the European Commission announcing its intention to introduce such legislation.
- What is striking is the increasing level of support from leading businesses and investors for legislation.
- Despite the economic damage caused by COVID-19, there remains a strong case for pursuing such legislation, not least as a means of reducing the risk of future outbreaks and helping companies to be more resilient and better prepared for future risks and opportunities.

Nestled amongst the tabled amendments to the Environment Bill is one put forward by Kerry McCarthy MP which calls on the government to publish a draft Bill on mandatory (EHRDD) for businessES within six months of the Environment Bill being enacted.

The impetus for this amendment comes from two distinct quarters: first, concerns that the Environment Bill does not currently adequately address the UK's global footprint and the impact on deforestation of so-called 'forest risk' commodities such as soy and palm oil more specifically – the amendment highlights this in particular; and second, the rapidly developing momentum for countries such as the UK to provide legislation requiring businesses to undertake general human rights due diligence – now generally understood to include environmental due diligence as well – as part of its commitment to implement the UN Guiding Principles on Business and Human Rights (UNGPs).

The country is experiencing significant hardship because of the COVID-19 pandemic, requiring the government to focus on economic recovery, and businesses to focus on mere survivability. Many would argue that now is not the time for increased business regulation.

But the COVID-19 pandemic has demonstrated how our negative impact on the natural world can make us vulnerable to deadly pandemics, which in turn can shut down the global economy at enormous cost. Research shows that large-scale conversion and degradation of ecosystems for agriculture is increasing interactions between wildlife, livestock and humans, resulting in new zoonotic diseases like COVID-19, HIV/AIDS or Severe Acute Respiratory Syndrome (SARS) emerging at an alarming rate. COVID-19 has also demonstrated the need for more humane and resilient supply chains. It has exposed structural injustices in our society and economy and a lack of transparency and accountability on the part of some businesses.

The challenge for the government is not just to respond to present needs but to address the future health of British society as well. Rebooting the economy should be done in a way that doesn't ignore these issues – nor exacerbate the environmental and climate emergencies more generally.

Far from being competing aspirations, effectively managing environmental and social issues is key to the long-term sustainability of both business and society. There is increasing evidence that a strong corporate due diligence strategy taking greater heed of social and environmental concerns can help companies to be more resilient and better prepare for future risks and opportunities. Transparency coupled with accountability will require better planning and management of natural, social and human capital and will drive innovation, both of which are key to resilience and will attract investment.

What is mandatory EHRDD?

The process of due diligence is already well understood by many businesses, and forms of legislated due diligence obligation already exist in the UK such as the Timber and Timber Products (Placing on the Market) Regulations 2013 and section 54 of the Modern Slavery Act 2015 and the Bribery Act 2010.

More broadly based due diligence is already a requirement of the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises, which have a quasi-legal status through the enforceability mechanism of the UK National Contact Point. The OECD's Due Diligence Guidance for Responsible Business Conduct was

issued in 2018. Seeking to reflect the UNGPs, the Guidance sets out in detail the requirements and procedure for implementing due diligence.

The OECD guidance describes the due diligence process as a cycle comprising four steps; the identification and assessment or adverse impacts; the cessation, prevention or mitigation of those impacts; tracking of those actions and communication of success or failure.

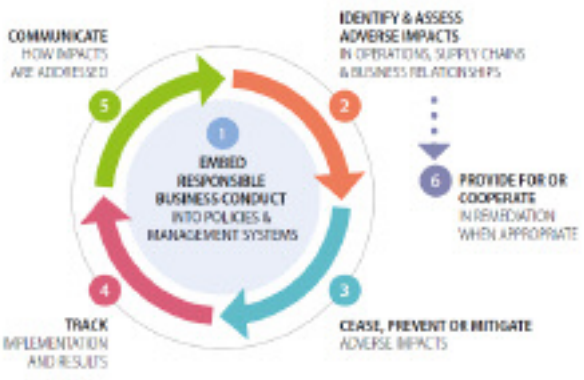

Figure: The Due Diligence Process. Reproduced from OECD Due Diligence Guidance, 2018

A Global Witness/ClientEarth report sets out in further detail what might be expected of an EHRDD legal obligation. In essence, it would be based on the OECD guidance and be intended as a flexible, proportionate, forward-looking risk-based approach to the management of environmental and human rights issues arising from businesses' domestic and international operations and supply chains. It would require British companies and financial institutions to:

- identify and assess environmental and human rights risks and impacts across their supply chains and operations;
- develop, publish and implement a plan for preventing or mitigating those risks and impacts; and
- report on progress in implementing the plan.

The obligation would need to be accompanied by an enforcement mechanism capable of ensuring compliance. Guidance would need to be published to provide support to businesses in fulfilling their obligations, particularly to set expectations of which sectors and regions are considered high risk and what good standards of environmental and human rights care look like.

The rationale

As demonstrated by WWF and RSPB's recent 'Riskier Business' report, there are large environmental impacts embedded in UK supply chains. Many of the products we consume on the UK market – particularly the soya used by the meat and dairy industry, as well as palm oil, cocoa, pulp and paper – are directly or indirectly connected through the supply chain to deforestation, climate change and human rights abuses in some of the most precious and biodiverse ecosystems in the world, such as the Amazon.

Despite voluntary commitments from the business and finance sector to address these issues, environmental destruction continues to increase. For example, significant commitments were made to ending deforestation by multinational businesses in the New York Declaration on Forests in 2014, yet deforestation has continued at an unsustainable pace, and in many regions even accelerated.

Voluntary due diligence also seems to be failing. A 2019 analysis of supply chain practices found that less than half of businesses surveyed assess their forest-related risks with similarly poor results on other issues. The Corporate Human Rights Benchmark 2019 results observed that 49% of the 200 largest global companies in four high-risk sectors scored 0 across all human rights process indicators.

The UK's 25-Year Environment Plan includes commitments to address supply chain issues. Last July it set up the Global Resource Initiative, a taskforce of leading businesses and environmental groups, to consider how to reduce the climate and environment impacts of UK supply chains. In March this year, it recommended inter alia that the government should introduce a mandatory due diligence obligation on companies that sell commodities linked to deforestation but with the scope to extend beyond this to other commodities in the future and to ensure that similar principles are applied to the finance industry,

The GRI recommendations come at a time when there is a growing momentum worldwide, especially in Europe, for mandatory EHRDD. Legislative examples already exist in the French corporate duty of vigilance law and the Dutch child labour due diligence law which the Dutch government has indicated is to be expanded to encompass broader EHRDD. But there are legislative initiatives and campaigns underway in many other European states as well as key UK trading partners, such as Japan and the United States.

Perhaps most significantly, on 29 April 2020 the European Commissioner for Justice in 2021, acknowledging this as a necessary means to address recovery from COVID-19 and to bring in the EU's 'green deal' plans. Public consultation will take place before its introduction next year.

The proposal comes after the release of the 600 page European Commission study on EHRDD in supply chains, led by the British Institute of International and Comparative Law, in February 2020. The European

Commission study concludes that an EHRDD obligation could lead to increased competitiveness and demand for products of European business.

Interestingly, what has emerged from the GRI, the European Commission study and a further UK focused study also undertaken by BIICL is the increasing support from leading businesses and investors for such legislation. A significant majority of business respondents agree that legislation could be beneficial: through providing legal certainty; levelling the playing field between a small proportion of high-performing companies and the rest; consolidating the plethora of existing reporting obligations; reducing the financial and reputational costs to businesses associated with poor practice and by facilitating leverage with suppliers. The report also includes detailed analysis that suggests the financial cost to businesses would be relatively low. The potential benefits to business are also to be examined in detail in a forthcoming report by WWF-UK.

In 2021, the eyes of the world will be firmly fixed on the UK's positioning in the world after Brexit and its environmental leadership in the run up to its hosting of the UNFCCC Conference of Parties in Glasgow. The UK has already shown leadership with the supply chain reporting requirement in the Modern Slavery Act. By introducing legislation on mandatory EHRDD, the UK has an opportunity to retain that leadership and help develop the worldwide adoption of better business practice.

Niall Watson is a former sustainability lawyer at WWF-UK and is currently a freelance environmental legal policy consultant

Rights of Nature – Standing – Universal Declaration of Rights of Mother Earth – Covid 19 conundrum

Sir Crispin Agnew of Lochnaw Bt, QC

At a glance

- 'The recognition and protection of "rights of nature" represents a new approach in the field of environmental law'[1].
- It is an internationally developing area of law with a change from the anthropocentric approach, which seeks to protect the human environment including property rights, to a 'rights of nature' approach.
- This article examines the development of the concept of rights of nature in legal theory and then examines the conundrum presented by a 'being'[2] such as Covid-19, when it conflicts with the human rights of people.

Historical background

Traditionally, individuals did not have standing to defend the environment unless the individual had a right of property in the issue or would suffer economic injury by the proposed activity. There were no rights of nature and the law considered that natural objects including species, habitats, and natural features, such as rivers, were rightless[3].

The concept of the rights of nature is often attributed to the dissenting judgement of Mr Justice William O. Douglas (US Supreme Court) in *Sierra Club v Morton*[4]. The majority decision held that the Sierra Club did not have standing to challenge the approval of an extensive skiing development in the Sequoia National Forest because they could not demonstrate that the Club had 'suffered or will suffer injury, whether economic or otherwise' which reflected the traditional approach to standing.

Douglas JSC dissented, delivering the seminal opinion. Douglas was a well-known environmentalist and was a Director of the Sierra Club from 1960 to 1962[5]. He wrote prolifically on his love of the outdoors.[6] The crucial part of his dissenting judgement states:

> 'The critical question of "standing" would be simplified and also put neatly in focus if we fashioned a federal rule that allowed **environmental issues to be litigated** before federal agencies or federal courts **in the name of the inanimate object about to be despoiled**, defaced, or invaded by roads and bulldozers, and where injury is the subject of public outrage.' [Emphasis added]

Douglas JSC went on to recognise that 'inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. …' and then said:

> 'So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes — fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. **Those people who have a meaningful relation to that body of water — whether it be a fisherman, a canoeist, a zoologist, or a logger — must be able to speak for the values which the river represents, and which are threatened with destruction.'** [Emphasis added]

Douglas JSC referred to Professor Stone's Article *Should Trees have standing? -Towards Legal Rights for Natural Objects*[7] which noted (page 459) '*The Rightlessness of Natural Objects at Common Law*' and went on to argue (page 464) that 'we should have a system in which, when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship'. This is similar to Douglas JSC's suggestion that it is the 'people who have a meaningful relationship' with the environmental body who should have standing to sue to protect it.

UK standing in environmental litigation

Douglas SJC's approach to standing in the *Sierra Club* case in litigation is now established in the UK. That a member of the public can litigate on behalf of nature was recently confirmed by Lord Hope of Craighead in *Walton v Scottish Ministers*[8], overturning a Court of Session decision, where he said:

> 'Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to

> challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.'

This right of standing is also enshrined in the Aarhus Convention[9] to which the UK is a signatory[10]. Thus, NGOs individuals can now act as guardians of the environment in litigation.

Rights for natural features

This guardianship of natural features has been taken further by some states in, for example, New Zealand which passed the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017[11]. The Act recognised that the river 'is a legal person' and gave to the 'office of Te Pou Tupua' the right to act in the name of the river.[12] Similarly, in Victoria, Australia, The Yarra River Protection (Wilip-gin Birrarung murron) Act 2017[13] 'recognises the intrinsic connection of the traditional owners to the Yarra River and its Country and further recognises them as the custodians of the land and waterway which they call Birrarung' with 'the purpose of protecting it as one living and integrated natural entity'. Both these Acts were passed to recognise the indigenous peoples' connection with the rivers and to give them a say in the protection and management.

In the UK there were proposals in 2017 to give Ben Nevis a personality[14] and in 2016 the Frome Town Council's proposed a bye-law to protect the town's ecosystems in Rodden Meadow and the River Frome[15].

Rights of nature

However, the rights of nature movement seek to take matters further by giving enhanced rights to nature. The aspiration is set out in the Universal Declaration of Rights of Mother Earth[16] (DRME), which calls for the General Assembly of the United Nations to adopt the declaration. The preamble sets out that:

> 'We, the peoples and nations of Earth: considering that we are all part of Mother Earth, an indivisible, living community of interrelated and interdependent beings with a common destiny'

Article 4(1) defines 'being' to include 'ecosystems, natural communities, species and all other natural entities which exist as part of Mother Earth.' An 'entity' is a 'thing that has a real existence'[17]. The author suggests that 'being' can include a virus or a bacterium.

Mother Earth and 'all beings' are then given rights in Article 2 which include:

'Article 2. Inherent Rights of Mother Earth

(1) Mother Earth and all beings of which she is composed have the following inherent rights:

> (a) the right to life and to exist;
> (b) the right to be respected;
> (c) the right to regenerate its bio-capacity and to continue its vital cycles and processes free from human disruptions;
> (d) the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being;
> …
> (i) the right to not have its genetic structure modified or disrupted in a manner that threatens its integrity or vital and healthy functioning;
> (j) the right to full and prompt restoration for violations of the rights recognized in this Declaration caused by human activities;

(2) Each being has the right to a place and to play its role in Mother Earth for her harmonious functioning.
(3) Every being has the right to wellbeing and to live free from torture or cruel treatment by human beings.'

Article 3 sets out the obligations of human beings to Mother Earth which include '(1) Every human being is responsible for respecting and living in harmony with Mother Earth.'

The only state constitution that goes someway to towards incorporating rights of nature is the Constitution of the Republic of Ecuador 2008[18]. Article 71 provides that:

> "*Article 71*. Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.
>
> All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature..."

Rights of nature and Covid-19

Covid-19 raises an extreme example of the conundrum where rights of nature and human rights clash, if it is accepted that the Covid-19 virus is a 'being' under the DRME. It appears to qualify as a natural entity, which exists as part of Mother Earth particularly when considering that there are also good viruses[19]. As a being, the Covid-19 virus has the right (1)(a) to life and to exist; (1)(c) to regenerate its bio-capacity and to continue its vital cycles; (1)(d) to maintain its identity and integrity as a distinct, self-regulating and interrelated being, (i) not have its genetic structure modified or disrupted; (2) to a place and to play its role in Mother Earth for her harmonious functioning; and (3) to wellbeing and to live free from torture or cruel treatment by human beings. These rights are equally applicable to human beings as one

of the other beings of Mother Earth so how is this conflict resolved within the terms of the DRME?

The solution lies in Article 1(7) which provides:

> '*(7)* The rights of each being are limited by the rights of other beings and any conflict between their rights must be resolved in a way that maintains the integrity, balance and health of Mother Earth.'

If Covid-19 plays a part in the integrity, balance and health of Mother Earth where is the conflict to be resolved? How do we know the role that Covid-19 plays within Mother Earth when the DRME considers that 'we are all part of Mother Earth'? It is argued that Covid-19 and other plagues and pandemics over the centuries were, or are, part of Mother Earth's balancing by controlling the human population[20].

It is clear that nature recognises the right of self-preservation and that animals often live in groups to afford protection against predators either through direct defensive action or by decreasing the probability that a particular individual will be eaten[21]. If this is part of the natural order then, in the context Article 7(1), self-preservation by controlling or eliminating Covid-19 or any other damaging virus like HIV or smallpox could be viewed as part of the 'integrity, balance and health of Mother Earth'.

Thus, even if the DRME was adopted, environmental law is back to the position it is in now, that it is the human decision makers who decide what weight is to be given to the respective rights of any being under Article 7(1). The article is vague as to the way that any conflict is to be resolved that any balancing decision will be difficult to challenge. Davies 2011[22] recognises that '[w]hether it is possible for the environment to have locus standi, while recognising the unique interests and needs of mankind, is more problematic'. If judicial review is the only method of review then the decisions will be virtually unchallengeable raising the question of whether or not judicial review provides the necessary remedies to protect the environment[23]. This is the conundrum raised by rights of nature.

Sir Crispin Agnew of Lochnaw QC (non practising), was in practice at the Scottish Bar specialising in environmental law. He is now an Honorary Research Fellow, University of Dundee. Correspondence: CAgnew001@dundee.ac.uk

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Student submission

A critical analysis of whether anthropocentric notions of the value of nature at the heart of environmental law have failed to stem biodiversity loss

Mateusz Slowik

At a glance

- This article will critically evaluate whether human-centred notions within international environmental legal instruments have prevented biodiversity loss.
- Firstly, it will analyse the anthropocentric notions contained within Stockholm and Rio Declarations, before considering the eco-centric approach of the World Charter for Nature and the United Nations Convention on Biological Diversity.
- Such an examination will conclude that the most effective way of securing and enforcing environmental protection will always be human led. Therefore, what is most critical is that humankind acknowledges that it has self-interest in protecting biodiversity.

Introduction

From the initial emergence of hard-shelled animals 542 million years ago, Earth has experienced five mass extinction events resulting in catastrophic losses to biodiversity.[1] Since the last extinction, Cretaceous-Tertiary, which saw the extinction of dinosaurs, the natural world has experienced yet another 'biological annihilation'[2] of wildlife at an unprecedented scale. In recent times, the global biomass of wild animals has fallen by 82%, and 25% of plant and animal species are threatened with extinction.[3] We, humanity, are the sixth extinction-level event: the Anthropocene.[4] This epoch is marked by a species chauvinistic approach, where protection of nature is subordinate to the interests of humankind and characterised by the instrumentalisation of the natural world.[5] Legal instruments it seems, 'remain frozen in time, like an insect in amber or, more appropriately, a Chalcolithic (Copper Age) human in ice'.[6]

The value of nature

We begin not long ago – as only a few international environmental agreements were concluded before 1972 – with the development of the basic framework of environmental protection as a result of the Stockholm Declaration and subsequently, Rio Declaration (together, the Declarations). Central to their focus is the prevention of environmental harm. However, the value of nature is defined through highly anthropocentric notions, which in a way, was inevitable as only humans can formulate and enforce environmental laws and decisions.[7] Principle One of the Rio Declaration leaves no doubt that humankind is the measure for the level of environmental protection as it proclaims that 'human beings are at the centre of concerns for sustainable development.'[8] To this effect, both Declarations employ utilitarian terminology such as 'environment' and 'exploit'. In doing so, they dismiss nature's value as of itself, as something that is only intended for human survival and uses, instead of being worthy of protection because of its intrinsic value. As Weiss notes, 'the core terminology adopted by international environmental law is predominantly based on a green-washed neoliberal anthropocentric ethic, devoid of a deeper sense of ecological obligation'.[9] The preamble of the Stockholm Declaration makes this clear, as it justifies the instrumentalisation of nature by stating that humankind is a 'creature and moulder of his environment.'[10] It is obvious that the approach to environmental protection, and thus prevention of biodiversity loss, is subordinated to the interest of humankind.

Despite their apparent human centredness, both instruments have been highly influential in the development of international environmental protection, symbolising the modernisation of environmental law. In the two decades that followed the Declarations, the former set the stage for rapid expansion in international environmental law, whilst the latter has been hailed as 'a major environmental legal landmark'.[11] It would not be an exaggeration to say, that despite being anthropocentric, these legal instruments have greatly contributed to the prevention of biodiversity loss by enlarging the scope of environmental protection both internationally and domestically.

Paradigm shift

As our understanding of other life forms grows, and scientists continue to call for the recognition that certain species, such as cetaceans[12] and chimpanzees,[13] deserve some of the same rights

enjoyed by humans, the strong human-centric focus evidenced in the Declarations 'looks somewhat outdated'.[14] A paradigm shift can be evidenced in the subsequent soft law instruments,[15] such as the World Charter for Nature (WCN) and the United Nations Convention on Biological Diversity (CBD). They transcend the previous anthropocentric notions in favour of a deep ecological approach[16] which recognises that 'every form of life is unique … regardless of its worth to man'.[17] To this effect, the Charter and the Convention systematically replace the instrumental language of the two declarations. For instance, they employ the term 'nature' instead of the utilitarian phrase, 'environment'. However, despite recognising that nature has an intrinsic value independent of human interest, their influence on the prevention of biodiversity loss is questionable.

In 1982, the WCN was overwhelmingly endorsed by the United Nations member states and hailed as an 'avowedly ecological instrument, which emphasises the protection of nature as an end in itself'.[18] This is inherent from the title, which 'employs the altogether more ecologically inclined notion of "nature" instead of the predominantly utilitarian term "environment"'.[19] In addition, it proclaims that it is 'for nature', thus alluding that the instrument is for its benefit rather than the previous utilitarian purpose-orientated anthropocentric notions that framed it as 'human environment'.[20] Furthermore, it displaces 'environment and development' for the notion of 'sustainable development' which goes beyond the immediate interest of humankind and is conservation led. However, it is important to note that from the outset the Charter was only ever intended 'to exert political and moral, but not legal, force on member states'.[21] Nonetheless, it is disappointing that it has not featured more prominently in the shaping of the development of international environmental law. As Grear convincingly argues, 'much of Western law and culture … seems committed to maintaining "business as usual"- a reductive set of capitalist globalised practises directly linked to climate destruction.'[22] The effect of the Charter on biodiversity loss prevention has therefore been minimal; arguably none. It is clear that environmental protection is subordinated to the interests of humankind, and, where the value of nature is independent of the human factor, the instrument serves only as a moral or political tool rather than a hard law instrument.

At an international level, there is also the CBD, which established the Aichi Targets which provide 20 'ambitious conservation goals to safeguard global biodiversity'.[23] The recent 20 targets were set to be achieved by the member states by 2020. However, at the reporting stage in 2019, the United Kingdom's Environmental Audit Committee (EAC) noted that 'progress towards meeting the Aichi targets by 2020 falls woefully short.'[24] As the Aichi Targets are exactly that – targets – there is no duty on the member states to deliver on the aspirations. The EAC concluded that 14 out of 19 targets were 'progressing at an insufficient rate and meeting only five of them will not protect the UK's precious wildlife and fragile habitats'.[25]

One of the successfully integrated targets by the UK is target two, which sets out that 'biodiversity should be incorporated into national and local planning processes'.[26] The governmental report on the UK's progress states that biodiversity values have been implemented into a range of planning systems including 'planning policies at the national and local level',[27] such as the National Planning Policy Framework (NPPF). The NPPF was first published in 2012 and set out 'how the planning system can contribute to the achievement of sustainable development and the restrictions to development regarding designated sites across various legislation.'[28] In 2018, the NPPF was revisited and amended to 'strengthen both the protection for irreplaceable habitats – such as ancient woodlands, ancient and veteran trees – and to make clear that developments should provide biodiversity net gain.'[29]

The changes to the enhancement of biodiversity in Chapter 15 of the NPPF encourages 'developers to look beyond maintaining existing biodiversity value'.[30] This includes the new aspiration of 'minimising impacts and providing net gains for biodiversity',[31] which goes further than the previous reference to 'avoiding net loss of biodiversity'. However, the precise definition for biodiversity net gains is not provided, nor are they mandatory.[32] There is also a reference to 'natural capital'[33] which indicates that ideas about the value of nature do remain frozen in time,[34] as similar instrumentalisation of nature occurs in the aforementioned declarations. Economic analysis in the context of biodiversity may be a useful incentive to protect biodiversity as there is a value attached to it, however, it is extremely difficult to quantify the value of nature, especially when living organisms are concerned. Furthermore, there is a risk that reliance on economic analysis of the value of nature may lead to weaker biodiversity protection as there is 'a danger of only protecting biodiversity when there is an economic benefit associated with it and that benefit outweighs the economic cost'.[35] The shift from preservation to conservation'[36] displaces the wholly anthropic notions prevalent in the previous environmental instruments in favour of a non-anthropocentric intergenerational approach to biodiversity protection, albeit in the form of a policy framework instead of hard law. Nonetheless, this approach is species chauvinistic as humankind remains the yardstick for environmental protection and biodiversity loss prevention.

Conclusion

On the one hand, there are legal instruments that are entirely anthropocentric and view nature as a resource only worth protecting because it can be exploited and has an economic value. And on the other hand, there are those that display deeply ecological notions about the value of nature and recognise its intrinsic value. Counterintuitively, it is the former set of instruments that have been more effective at preventing biodiversity loss, albeit with varying degrees of success, whilst the latter have been systematically sidelined and treated as mere political or moral tools. Despite the prevailing human-centred notions, instruments like the Declarations have been extremely influential in raising awareness and mobilising the international effort to environmental protection. Consequently, since only humans can formulate and enforce environmental laws and decisions, even those instruments which are inherently ecological remain species chauvinistic. Ultimately, the most effective way of securing and enforcing environmental protection will always be human led. Therefore, what is most critical is that humankind acknowledges that it has self-interest in protecting biodiversity.

Mateusz Slowik is a penultimate year law student at the University of Leicester.

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Alison Boyd
Operations Director
Alison@ukela.org
01306 500090