



# e-law

Better law for the environment

March/April 2021 | Issue 123



## Welcome to the March/April edition of e-law.

The focus of this issue is the Agriculture Act 2020 and farming reform.

Some of the key issues in the post-Brexit world centre on agriculture and how the new UK system will deliver following exit from the EU Common Agricultural Policy and I am happy to say that we have a great selection of articles for you on this theme from a

broad range of authors.

Firstly, Mike Holland of the Agricultural Law Association has provided a very useful summary of the new Agriculture Act 2020: [An Overview of the Agriculture Act 2020](#).

Secondly, Vicki Hird, Head of Farming at Sustain, has written an excellent piece [A new era for farming support – the Agricultural Act 2020 and farming reform](#) which sets out both what the Act has delivered and the gaps in the Act.

We are also grateful to David Baldock of the Institute for European Environmental Policy for his piece: [The Agriculture Act 2020: a new dawn?](#) which concludes that foundations laid in the Agriculture Act represent a significant departure from the current model of the CAP, commenting that many of the most critical decisions lie ahead as principles are converted into concrete policies.

Finally our thanks go to Will Simonson of the Organic Research Centre for writing [The organic route to a resilient future](#). This article notes the important role that organic farming has to play in transitioning to more sustainable food production and discusses the challenges for the sector arising from post-Brexit policy in the UK, concluding that there is a real need for more investment into research and development of organic techniques to capitalise on their potential to improve resilience across the whole agricultural sector.

We are also lucky this edition to have received an extremely interesting student submission from Margaux Contant: [The need for a new international humanitarian law convention on environmental warfare and the protection of the environment in times of armed conflict](#). This article examines the legal regime regulating environmental warfare and the protection of the environment in times of armed conflict and argues for a new convention dedicated to the exclusive protection of the environment during armed conflict. Many thanks Margaux!

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Best wishes

*Sophie Wilkinson*

Sophie Wilkinson  
E-law Editor

## E-law editorial team

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**Laura Hildt** is an Associate Policy Officer for Biodiversity and EU Affairs at the



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**Violet O'Gorman** previously worked as an editor at LexisNexis, and is currently undertaking the Post Graduate Diploma in Law (PGDL).



# Words from the Chair



I do hope that you have enjoyed a lovely long-weekend break and following the Spring Equinox are enjoying the longer, brighter days. This edition of e-law is packed full of some very interesting contributions from our members and it is great to see such a breadth and depth of expertise

being shared. Our legislative framework continues to evolve following our exit from the EU, and the pieces on the Agriculture Act and related farming reforms will be of interest to many of you I am sure.

The way in which we interact with and make use of our land has been brought into much sharper focus this last year with the outbreak of COVID-19, itself a consequence of our broken relationship with nature, causing us to really reconsider how we interact with our natural world and how we can contribute to planetary health rather than deplete it. Coinciding with this, we have seen momentum around acting on climate change pick up as COP26 has been catapulted to the forefront of our minds with all eyes on the government's ability to show real leadership and deliver the ambitious outcomes required.

A crucial component to achieving such ambitious outcomes lies in the land – in using the land in a way that brings balance to our ecosystems, restores biodiversity, and increases the land's ability (through soil in particular) to sequester carbon. The contributions you will read in this e-law look at how the Agriculture Act intersects with the Environment Bill and considers other wider-ranging impacts of agricultural practices on the natural world. Beyond this reading you might be interested more generally in agro-ecology – the practice of sustainable farming that works with nature – which is gaining traction globally, and organisations such as Project Drawdown that are doing some much needed research and analysis into the role the land will play in drawing down carbon to support our efforts to achieve net-zero.

You might also have read recently the Dasgupta Review, published earlier this year, which focuses on the value (intrinsic and economic) of biodiversity in our world and how we can and ought to do more to protect, restore, and enhance biodiversity to achieve multiple benefits. Biodiversity on land as well as in the water (freshwater and oceans) is vital to all of our earth's systems and the Dasgupta Review highlights the critical role institutions will play in achieving both biodiversity and climate goals.

Closer to home, I am really pleased and excited to announce the upcoming UKELA elections. As you will see in the notice, there are quite a few on Council this year whose terms have come to an end and will be standing down. This means that there are quite a few spots up for grabs and opportunities for many of you to participate in shaping the way in which UKELA delivers its Five Year Strategy and continues to do its great work. I really hope lots of you will consider running in the election and please do get in touch if you have any questions or queries about what it might entail.

Some of you have recently remarked at how positive it is that UKELA has been so active in responding to consultations and are pleased to see this strand of work grow stronger. Thanks to all of you who play a role in participating in drafting consultation responses and lend your knowledge and expertise to the process. Thanks especially also to Paul Stookes for coordinating these – it is really great that we are so active in this area.

Finally, UKELA has been offered a fantastic opportunity to participate in the 'Big Give Match Fund' fundraising campaign. Thanks to the hard work of Alison and the team, UKELA has earned the chance to secure up to £2,500 in matched funding via the funding platform. Look out for more information about how to participate in the week-long fundraising drive that will run from Earth Day (22 April). A great opportunity to have donations matched and for UKELA to secure funding to update its websites as part of the Strategic Plan.

I wish you all well and hope that as the restrictions start lifting you have the opportunity to meet up with friends, family, and one another. I myself look forward to the chance to see you all again in person (and not just on the screen!).

All the very best

A handwritten signature in blue ink that reads "Kirsty Schneeberger". The signature is written in a cursive, flowing style.

**Kirsty Schneeberger MBE**  
UKELA Chair

# UKELA news

## Annual General Meeting – Thursday 17 June 2021

The AGM of the Association will be held on Thursday 17 June 2021 during the Annual Conference. Details on attending and the agenda will be circulated to all members shortly. In the meantime, please note the date in your diary.

## Elections to Council

Details of this year's Council elections will be circulated to all members shortly. For 2021, we have a number of vacancies, so we invite you to consider whether you would be interested in putting your name forward. We are keen to increase the diversity and inclusivity of UKELA's board, so please do consider standing. Further details will be circulated soon. If you are interested, but not sure what it is like being a trustee and Council member, please get in touch with any of the Chair or Vice Chair team for an informal chat. You can find their details on the website: [UKELA Council – United Kingdom Environmental Law Association Council members](#).

## Equality, Diversity and Inclusion (EDI) Members' Forum

To support the "Equalities, Diversity and Inclusion team", a separate independent group of volunteers have also formed the "EDI Members' Forum". The remit of this group will be to ensure that the actions and decisions of the equalities, diversity and inclusion team are scrutinised by a representative body of UKELA members, who have a lived experience of diversity and inclusion issues. Due to the sensitive nature of EDI issues, the forum is happy to bring any anonymous comments or problems to the attention of the EDI team. Please feel free to contact us on [edimembersforum@ukela.org](mailto:edimembersforum@ukela.org) to discuss any issues which you'd like to raise. You can read more about UKELA's EDI work on the website: [Diversity and Inclusion \(ukela.org\)](#).

## Law Commission's 14th programme of law reform

Following early discussions with stakeholders, including UKELA, the Law Commission has launched a consultation in respect of the 14th programme of law reform. As part of that, it has published a [document](#) that gives some background to the programme, some ideas for projects, and what it hopes to achieve through the consultation. In its [kite-flying](#) document, it has suggested legal protection for our environment as a general topic of interest. UKELA encourages members to respond to the consultation in their own right. UKELA will also be formulating its own response and is likely to have further discussions with the Law Commissioners and their staff. If you would like to contribute any thoughts to that response please email them and/or your interest to [info@ukela.org](mailto:info@ukela.org).

# UKELA working party news

## Climate change and energy working party

The climate change and energy working party has had a busy start to 2021. There was a well-attended session hosted by UKELA and All-Party Parliamentary Group on: *What net zero means for the legal profession*. The event was chaired by Lord Carnwath with speakers Caroline Lucas MP (Green Party UK), Chris Stark (from the Climate Change Committee), Ellie Mulholland (from the Commonwealth Climate Law Initiative) and Kat Kramer (Co-convenor for the climate change and energy working party and Christian Aid). A recording of this event is available on UKELA's website. In addition the working party has recently submitted a response to the consultation on a Northern Ireland Climate Change Bill, focusing on increasing the level of ambition of such legislation in line with Climate Change Committee advice.

## Nature conservation working party

The nature conservation working party had a well-attended meeting on 23 January 2021, with a lively discussion following the presentation on reaching agreement in complex environmental cases by Dr Andy Clements (Natural England board member and former Chief Executive of the British Trust for Ornithology). The next NCWP meeting is scheduled for Saturday 8 May 2021, and will consider international nature conservation commitments under the Bern Convention and feature a presentation from their Wildlife Law Bursary Award winner.

The working party has also submitted a letter to the Secretary of State for the Environment, Food and Rural Affairs in response to the Glover Landscapes Review, setting out concerns about the poor condition of SSSIs in national parks and calling for a renewed emphasis on nature conservation. The government response recognises the poor condition of SSSIs in upland national parks and points to the policies which should lead to improvement in protected sites' condition, in line with 25 Year Environment Plan commitments. These include such sites being a core component of the Nature Recovery Network and from continued agri-environment funding for positive management of SSSIs, with new schemes being developed that will reward farmers for producing public goods such as thriving plants and wildlife.

The annual wildlife law course will be held in November and offers from potential course contributors are most welcome.

## Planning and sustainable development working party

The planning and sustainable development working party recently made submissions on the National Planning Policy Framework (NPPF) update consultation. The submissions are available on the UKELA website.

## Wales working party

The Wales working party held a successful event in January on environmental governance and principles in Wales and another in March on the Agriculture White Paper in Wales, in collaboration with the Agricultural Law Association (ALA). There was a regular working party meeting on Wednesday 17 March 2021. They plan to hold an event in May on sustainable land management in Wales also with the ALA.

## Waste working party

The waste working party held a recent event focusing on the import and export of waste from the UK. There are further events planned for April and October 2021

## UKELA Governance and Devolution Group (GDG)

The GDG submitted a response to the House of Lords EU Environment Sub-Committee's call for evidence on the EU-UK Trade and Cooperation Agreement. UKELA's submissions have now been published by the sub-committee and are available to members on the UKELA website. GDG is now preparing responses to Defra's consultation on environmental principles. The next GDG meeting is being fixed for mid-late May 2021. This will be the last meeting at which Begonia Filgueira and Angus Evers will be GDG co-chairs and they will step down at the Annual Conference. Professor Eloise Scotford and Professor Colin Reid will take over as the new GDG co-chairs with Angus and Begonia remaining as GDG members.

## EIA working party?

Finally, there has been interest among UKELA members in setting up an EIA working party, perhaps on a temporary basis, and while there are no express changes currently proposed to the EIA legislative provisions a few members are starting to draw ideas together on this. If you are interested in getting involved in the EIA working party then please contact Paul Stookes at [paul@ukela.org](mailto:paul@ukela.org).

# Students news

## Public Interest Environmental Law Conference

UKELA is proud to be sponsoring this year's Public Interest Environmental Law (PIEL) UK conference, which will be taking place online on the 13 and 14 April 2021.

PIEL UK is a student-led organisation and was established in 2006 as one of the first intercollegiate environmental law conferences in the UK. Under the theme 'After the Storm: Environmental Law in 2021 and Beyond,' this year's event will focus on the legal, political, social and environmental impact of issues such as Brexit, Covid-19 and the Black Lives Matter movement – and will explore how individuals, organisations, institutions, and society as a whole can create meaningful environmental protections and better champion equality in future.

The conference is open to all students, with tickets available [here](#) on a 'pay what you want' basis. To find out more information, please check out: [www.piel.org.uk](http://www.piel.org.uk) or [@pieluk](#) on Instagram.

## Updates: mooting competitions, Student Committee & student Instagram account

We are pleased to report that work is now underway on this year's junior and senior mooting competitions! The problem will be announced at the beginning of September and we hope to hold both the semi finals and finals on the 3 December 2021. Please keep an eye on the mooting competition tab on the website for more details and look out for our mailings nearer the time!

We are also excited to announce two new projects, with more information on both to follow soon. The first is the introduction of a Student Committee; the second is the introduction of student specific UKELA social media accounts. The first of these accounts – [@ukela.students](#) on Instagram – is already up and running – so feel free to drop us a follow!

If you would be interested in joining a Student Committee alongside the student advisers, please reach out to either [Charlotte or Tristan](#) to let us know to aid in organisation.

## Andrews Lees Prize: article competition

UKELA is pleased to announce that entries are now being accepted for this year's Andrew Lees Prize article competition, which will be dealing with the question of how anthropocentric notions of the value of nature have failed to stem biodiversity loss.

Entries must be received by midday on the 26 April 2021. Full details and rules are available on the [website](#) and the prize is the opportunity to make a short presentation at our Annual Conference being held virtually from 14-18 June 2021, as well as have your submission published in elaw. Good luck!

## BPP University – Professional Development Partnership Opportunities

BPP University are supporting a high volume of business management students (MSc level) who are looking to secure professional development opportunities to complement their academic studies. We are looking to build partnerships with a number of different organisations to develop a wide range of opportunities; for example, mentorship programmes, work placements, internships (paid or unpaid) or a specific consultancy project. To register your interest or to simply to find out more, please submit your details to this enquiry form. Please note that being in partnership with BPP University does not come with a cost.

## 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 our [student advisers](#). 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. All upcoming themes are available on the [website](#).

# UKELA events

## **UKELA East Region webinar: 13 April 2021**

UKELA East Region is pleased to announce a Webinar on Planning Reform and Conservation Covenants. Speakers are Celina Colquhoun and Juan Lopez both from 39 Essex Chambers. Please book your place via the website

## **UKELA SW Lunchtime Legal Update: Biodiversity net gain – a focus on offsite gain: 28 April 2021**

Please join the UKELA South West Committee for a short talk on a topical area of environmental interest, intended to fit neatly into your lunch hour.

Arthur Hopkinson, a second year trainee at Osborne Clarke, will be giving a talk on biodiversity net gain, setting the context of the regime to be introduced by the Environment Bill before focusing on the concept of offsite gain and conservation covenants.

The talk is free for UKELA members (Non-members £5) and will be held by Zoom. Bookings are now open.

## **UKELA Annual Conference 2021: 14-18 June 2021**

For 2021, we will once again be running the Annual Conference online. It will take place over the week of 14-18 June 2021, with different sessions running every day. We are confident that there is something for everyone. Find out more and book your place on our website: [Annual Conference information \(ukela.org\)](https://www.ukela.org/annual-conference). Watch out for more details coming to you in regular bulletins as we build up to Conference Week 2021!

## **Save the date**

### **Not the wild law weekend seminar: 23 October 2021**

Join us for a day of discussion and debate, following on from our April seminar. More details to come, so please keep an eye on mailings and the [website](#); bookings open later in the year.

# Non-UKELA events

## **Brownfield summit 2021 – groundwater: 20 – 21 April 2021**

This online summit is brought to you by Environment Analyst's Brownfield Intelligence Network, a thriving membership of brownfield professionals who come together for networking and learning opportunities to get the latest insights on industry trends. The event has been designed for a broad range of brownfield professionals, including business leaders and early career professionals.

For more information, full programme and to book your place, please visit the [website](#).

UKELA members receive a 10% discount when using the code: UKELA10

# The e-law 60 second interview



## Melanie Baines

I grew up on the edge of the Lake District and graduated in Geography (with French) from Manchester University in 1981. After a brief, ill-fated attempt at chartered accountancy (I did pass the law exam!) I completed a PGCE at Lancaster University. I taught Geography, English and Drama for twenty-five years before completing my LLM in Environmental Law and Management at Aberystwyth (by distance learning) in 2019.

### What is your current role?

I am a trustee of Skye and Lochalsh Environment Forum (SLEF), a member of both SLEF's South Skye Seas Initiative (SSSI) and the Friends of Loch Hourn (FoLH), the latter two being 'communities of place' initiatives under the Coastal Communities Network (CCN). I provide advice on habitats, EIA and planning and contribute to community objections on a range of local environmental issues. Away from the desk, SSSI maps seagrass beds with our underwater remotely operated underwater vehicle with the aim of protecting PMFs. A colleague in FoLH has just suggested that I buy a wetsuit and snorkel...

### How did you get into environmental law?

It was something of an obstacle course! Environmental law had not been 'invented' in 1981 so it was difficult to imagine a career pathway in law, which would complement my degree and my interest in nature conservation. In any case, Cumbria CC did not fund the law conversion course or 'Part 2'. I even considered doing the M.E.L in Sydney, but eventually opted for distance, rather than distant learning.

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

Standing up for the rights of small, west coast communities, their values and their well being, in the face of multinational companies, which are taking up more and more sea space. This often involves using our own ingenuity and citizen science to provide evidence to oppose developments such as fish farm expansions and electricity transmission infrastructure, which have the potential to harm designated habitats, species and landscapes on which we depend.

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

Apart from envisioning giant pylons marching across peatlands on Skye, the way we deprive animals of their natural behaviour in industrial farming systems in both marine and terrestrial environments and the shrinking of wild animal habitats and migratory space. In the sea, the level of noise, vibration and pollution is already so ecologically damaging and yet more and more development is planned.

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

Reforming the international finance and tax law regimes to curb the structural power of multinationals.

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

I can't choose between the nature conservation and public health and environmental law working parties, as they are so closely linked. The inter-relationships between animal welfare, human well being and environmental health should be considered holistically, so it makes sense to be a member of both working parties.

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

The opportunity to meet and learn from people from a wide variety of fields, who have much greater experience than I have is so personally and professionally rewarding. It has also given me the confidence to try to make a greater contribution to the nature conservation and public health and environmental law working parties.

# Environmental law headlines

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

## Government consults on draft environmental principles policy statement under Environment Bill 2019-21

[Practical Law Environment](#)

On 10 March 2021, the Department for Environment, Food and Rural Affairs (Defra) published a consultation on the draft legally-binding environmental principles policy statement under the Environment Bill 2019-21. The Bill will enshrine the environmental principles and will require ministers to have due regard to the environmental principles policy statement when making policy. The Bill is expected to receive Royal Assent in autumn 2021.

Defra's proposals include the following five internationally-recognised environmental principles:

- Integration principle, requiring policy makers to embed environmental protection in other fields of policy that have impacts on the environment.
- Prevention principle, meaning that government policy should aim to prevent, reduce or mitigate harm.
- Rectification at source principle, meaning that if damage to the environment cannot be prevented it should be tackled at its origin.
- Polluter pays principle that those who cause pollution or damage to the environment should be responsible for mitigation or compensation.
- Precautionary principle that where there are threats of serious or irreversible environmental damage, a lack of scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The consultation closes on 2 June 2021.

For more information, see [Legal update, Government consults on draft environmental principles policy statement under Environment Bill 2019-21](#).

## Spring Budget – environmental announcements

[Lexis®PSL Environment](#)

On 3 March 2021, HM Treasury published the [Spring Budget 2021](#). The parts of the Budget that are relevant to environmental lawyers include the following key announcements:

- The UK's first sovereign green bond, or 'green gilt', will be issued in the summer of 2021, with further issuance to follow later in 2021. The issuance for 2021-2022 will total at least £15bn (more information is expected in the green gilt framework to be published in June 2021).
- A new carbon markets working group is to be established for the purpose of positioning the UK and the City of London as the 'leading global market for high quality voluntary carbon offsets'.
- A new UK Infrastructure Bank is to be created, to provide financing support to private sector and local authority infrastructure projects to help fight climate change and support economic growth.
- A £1 billion Net Zero Innovation Portfolio was launched, to support green energy innovation schemes and accelerate 'near-to-market low-carbon energy innovation'.
- A hydrogen hub will be developed in Holyhead, Anglesey. The hub will pilot the creation of hydrogen using renewable energy and its use as a zero-emission fuel in heavy goods, and support up to 500 high-skilled green jobs in the area.
- The current freeze on Carbon price support rates will be maintained at the £18 per tonne of carbon dioxide level for 2022–23; and
- (As confirmed in the 2020 Budget) a new plastic packaging tax will be introduced from 1 April 2022 through the Finance Bill, to encourage the use of recycled plastic in packaging.

On the same day as the Spring Budget, the Bank of England also published its [monetary policy remit](#) for 2021, which incorporates sustainability in light of the UK government's prioritisation of green finance and climate action.

For more information, see: [Spring Budget 2021—key Environment announcements—LNB News 03/03/2021 97](#).

## UK breached nitrogen dioxide limits under Air Quality Directive (ECJ)

[Practical Law Environment](#)

In *European Commission v United Kingdom (C-664/18)* EU:C:2021:171, the Court of Justice (ECJ) held that the UK had consistently exceeded legal limits for nitrogen dioxide (NO<sub>2</sub>) pollution since 2010 and had failed to take appropriate action to ensure that limit values were exceeded for the shortest period possible.

The Air Quality Directive (2008/50/EC) seeks to regulate ambient air quality. It requires member states to ensure that the levels of certain pollutants in the ambient air do not exceed defined limits. Member states must draw up air quality plans setting out measures for meeting limit values or target values in areas where the ambient air does not comply with those values.

The UK has struggled to achieve compliance with the ambient air quality limits of the Air Quality Directive. Since 2011, it has applied for time extensions for compliance and submitted several sets of air quality plans to the European Commission. NGO ClientEarth brought successful judicial review challenges to the UK's 2011 and 2015 air quality plans. The UK submitted its latest air quality plans to the Commission in 2017. In May 2018, the Commission announced that it was referring the UK to the ECJ for breaches of the Air Quality Directive's limits on ambient NO<sub>2</sub> in 16 zones.

The ECJ concluded that the UK had failed to adopt in good time appropriate measures to ensure that the time period during which NO<sub>2</sub> limit values were exceeded was kept as short as possible. The exceedance of those limit values had therefore remained systematic and persistent for at least seven years in those zones.

For more information, see [Legal update, UK breached nitrogen dioxide limits under Air Quality Directive \(ECJ\)](#).

## Dasgupta review final report calls for fundamental change in economics to reverse biodiversity loss

[Practical Law Environment](#)

On 2 February 2021, the independent review of the economics of biodiversity, commissioned by HM Treasury and led by Professor Sir Partha Dasgupta, published its final report. The review proposes a new framework to account for nature in economics and decision-making to reverse biodiversity loss.

The key findings of the review include that humans have collectively failed to engage sustainably with nature, so that our demands far exceed its capacity to supply us with the goods and services we rely on. This is endangering the prosperity of current and future generations. The heart of the problem is deep-rooted and there is widespread institutional failure. Nature's worth to society is not reflected in market prices because much of it is open to everyone at no monetary charge.

To put the world back on a sustainable path, large scale changes underpinned by levels of ambition, coordination and political will are needed, akin to those of the Second World War Marshall Plan. The report recommends:

- Ensuring that demands on nature do not exceed its supply, and that nature's supply is increased from its current level.
- Changing the primary measure of economic success away from gross domestic product to 'inclusive wealth' and introducing natural capital into national accounting systems.
- Expanding and improving the management of protected areas and large-scale investment in nature-based solutions (NBS) to address biodiversity loss and significantly contribute to climate change mitigation and adaptation. This could include paying nations for protecting the ecosystems within national boundaries on which the world relies and imposing charges for the use of ecosystems that lie outside national boundaries.

The report comes ahead of the 15th meeting of the Conference of the Parties (COP15) to the UN Convention on Biological Diversity (CBD), which is expected to set new long-term international targets for addressing biodiversity loss.

For more information, see [Legal update, Dasgupta review final report calls for fundamental change in economics to reverse biodiversity loss](#).

## Jalla and others v Shell International Trading and Shipping Co and another [2021] EWCA Civ 63

[Lexis®PSL Environment](#)

The background to this case centres on a large oil spill off the coast of Nigeria. The appellants comprised of individuals who lived and worked in and around the vicinity of the Nigerian coast where the spill occurred. The appellants claimed that the respondent companies were responsible for the spillage and brought claims for, amongst other things, nuisance.

The oil spill took place in December 2011, and the first instance judge found that oil would have washed up on the appellants' land within weeks thereafter. The primary limitation period for nuisance claims under the Limitation Act 1980 was six years, meaning this period had expired sometime in early 2018. However, the appellants' appeal argued that the alleged failure to clean up an oil spill amounted to a 'continuing nuisance', and therefore their claims were not statute-barred.

In its judgment delivered on 27 January 2021, the Court of Appeal unanimously upheld the lower court judge's finding that the appellants claim could not amount to a 'continuing nuisance' because the confined escape of oil was a one-off event. The court's decision reaffirms that, in order to establish a claim in 'continuing' nuisance, it is the commission of the tort that must 'continue', and a claimant cannot establish 'continuity' simply by alleging that the damaging/harmful substance persists after the commission of the tort.

For more information, see our case analysis: [Oil spill found not to be a continuing nuisance \(Jalla v Shell International Trading and Shipping Co\)](#).

## Okpabi and others v Royal Dutch Shell plc and another [2021] UKSC 3

[Lexis®PSL Environment](#)

The appellants in this case were inhabitants of two Nigerian villages. They sought damages arising out of numerous alleged oil spills that were alleged to have caused widespread environmental damage. The villagers further claimed that the oil spills were caused by the negligence of the pipeline operator, a subsidiary company of Royal Dutch Shell (RDS) registered in Nigeria.

In the appeal, the Supreme Court was asked to consider whether the Nigerian villagers had an arguable case that RDS, a UK domiciled company, owed them a common law duty of care such that the court could properly establish jurisdiction against a foreign subsidiary company of RDS as a necessary and

proper party to the proceeding. The appellants further had to establish that their claims against RDS stood a real prospect of success. On 12 February 2021, the court allowed their appeal.

The court held that the lower court had inappropriately conducted a 'mini-trial' when deciding whether or not, for the purposes of establishing jurisdiction, there was a real prospect of a claim succeeding. Where jurisdiction is in issue, parties are discouraged from providing voluminous evidence and the question of whether there is a real prospect of success is better answered by reference to the facts as pleaded in the particulars of claim.

The court further held that the liability of a parent company for tortious acts or omissions of a subsidiary is not to be analysed by reference to the three-stage test in *Caparo Industries plc v Dickman*. Instead, the analysis of whether a duty of care arises in the context of a parent/subsidiary relationship depends on the extent to which and the way in which the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations of the subsidiary.

For more information, see case analysis: [Establishing jurisdiction for claims in tort—when is a parent company liable for its subsidiary? \(Okpabi v Royal Dutch Shell\)](#).

## Interim OEP to be launched in July 2021

[Lexis®PSL Environment](#)

On 1 March 2021, the Department for Environment, Food & Rural Affairs (Defra) announced that an Interim Office for Environmental Protection is to be launched in July 2021, ahead of its formal establishment as a legal body under the Environment Bill.

Defra's [announcement](#) lays out the following tasks that the new environmental watchdog for England and Northern Ireland will be able to perform:

- Produce and publish an independent assessment of progress in relation to the implementation of the government's 25 Year Environment Plan.
- Develop the Office for Environmental Protection's strategy, including its enforcement policy.
- Receive complaints from members of the public about failures of public authorities to comply with environmental law.
- Take decisions on operational matters such as staff recruitment, accommodation and facilities and
- Determine approaches for how the Office for Environmental Protection will form and operate, establishing its character, ways of working and voice.

The Environment Bill is currently expected to receive Royal Assent in the autumn.

A separate environmental watchdog, Environmental Standards Scotland (ESS), has also been created in Scotland under the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 which received Royal Assent in January 2021. Like the Office for Environmental protection, the ESS' role is to oversee the effectiveness of and compliance with environmental law in the country. The ESS does however have more direct enforcement power than is proposed for the Office for Environmental Protection.

For more information, see: [Interim Office for Environmental Protection to be launched in July 2021—LNB News 01/03/2021 80](#) and News Analysis: [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021—a new framework for environmental governance in Scotland](#).

## **NSIP decision-maker does not have discretion to defer EIA consideration of substantial effects from cumulation until subsequent application (High Court)**

[Practical Law Environment](#)

In *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 326, the High Court (Holgate J) quashed the Secretary of State's decision to grant a development consent order for the Vanguard project, which is a large offshore windfarm in Norfolk.

The Vanguard project was closely related to a proposal for a second wind farm project in the area (Boreas), and it was proposed that they share onshore infrastructure. The application for development consent for the Vanguard project included an environmental statement that assessed the cumulative landscape and visual impacts arising from both projects and concluded that there were likely to be significant adverse environmental effects. The interested party subsequently submitted its application for development consent in respect of Boreas. When determining the Vanguard application, the Secretary of State decided that the information about the Boreas project was 'limited' and that it should be considered as part of the subsequent examination of the Boreas application for development consent. The Secretary of State made a development consent order for the Vanguard project.

The claimant, Mr Pearce, applied by way of judicial review challenge for an order to quash the Secretary of State's decision. The court upheld the challenge. The court confirmed that the Secretary of State, as the decision-maker, was required to consider whether

they had sufficient information to enable them to evaluate and weigh the likely significant environmental effects of the proposal and then to make that evaluation. They had no discretion to defer consideration of substantial effects until a subsequent application.

For more information, see [Legal update, NSIP decision-maker does not have discretion to defer EIA consideration of substantial effects from cumulation until subsequent application \(High Court\)](#).

# The Agriculture Act 2020 and farming reform

## An overview of the Agriculture Act 2020

Mike Holland MRICS

### At a glance

- The Agriculture Act, a landmark piece of legislation, received Royal Assent on 11 November 2020 with a wave of detailed secondary legislation anticipated during 2021.
- The Act aims to balance improving productivity and safeguarding the environment.
- This article provides an overview of the main elements of the Act.

### New powers for financial assistance in Part 1

In Part 1 of the Act, the Secretary of State has been given new powers to provide financial assistance for a variety of 'public goods'. This is a list consistent with Defra's [Health and Harmony consultation](#) (2018), with financial assistance to be targeted at the protection and improvement of the environment, public access, cultural and natural heritage, environmental hazard protections, livestock health and welfare, native genetics conservation, soil health, productivity and ancillary activities.

New powers enable the Secretary of State to make regulations regarding inspections and monitoring, which are anticipated to be similar to current Basic Payment Scheme (BPS) inspection powers; at least in the short term with anticipated regulatory reform and efforts to simplify the regulatory framework to come during the agricultural transition period (2021-2027). This would include a more proportionate approach to enforcement.

Defra published its ['The Path to Sustainable Farming: An Agricultural Transition Plan 2021 to 2024'](#) on 30 November 2020.

The Secretary of State is required to produce a multi-annual plan with information on how financial assistance powers will be used. The first plan will cover the period 1 January 2021 to 31 December 2027 (the Government has to date only committed to spend 2019 levels in England (£2.4bn p.a.) for the period 2021/22 to 2024/25) and subsequent plans must be for minimum five-year periods. This is a positive requirement, promoting much needed certainty as agriculture requires longer term planning. The Act also

requires annual reporting on the level of spending on agricultural financial assistance.

There will be an agricultural transition period from January 2021 to December 2027, moving away from the BPS under the EU Common Agricultural Policy (CAP) and running in parallel to the introduction of the new Environmental Land Management Scheme (ELMS).

The details of these schemes have been subject to a [policy discussion document](#) in 2020 and pilot schemes will be ongoing through to 2024 when ELMs will be fully rolled out. The ELM scheme will comprise three elements: the Sustainable Farming Incentive, Local Nature Recovery and Landscape Recovery. The Government published [its response](#) to the ELMS Policy Discussion Document on 10 February 2021.

The key stakeholder responses to the discussion document can be summarised as requests to:

- Be more ambitious.
- Ensure ELMS is universal and accessible to all land managers.
- Provide a detailed route map for transition with thorough piloting.
- Only reward activities that are above and beyond the regulatory baseline.
- Move towards whole-farm and whole-systems approach.
- Move towards natural capital approaches.

There was also concern regarding inclusion of income forgone payment calculations.

An initial roll-out of some elements of the ELMS is proposed under the Sustainable Farming Incentive (SFI). Defra published further information on piloting and launching the [SFI](#) on 10 March 2021.

The [Ten Point Plan for a Green Industrial Revolution](#) was published on 18 November 2020. It provides an indication of how multiple policies are likely to work together to achieve environmental targets under the Environment Bill. The Ten Point Plan highlights the use of ELM to deliver landscape recovery projects and the ELM policy proposals are consistent with a three-tier system with the highest tier focussed on landscape level environmental aims. Here, we can see the financial assistance schemes under the Agriculture Act

2020 working collaboratively with the Ten Point Plan to provide a mechanism for delivery of the 25 Year Environment Plan targets under the Environment Bill.

Payments will continue under the BPS scheme until 2022, which is the earliest time delinking can be introduced. Delinked payments will no longer be connected to the area of land farmed but will instead be based on land previously farmed during a 'reference period' to encourage restructuring in the industry.

Parliamentary discussions in preparing the Agriculture Act suggest that there will be no restrictions on use for delinked payments. Instead, land managers will have the choice to use them in a bespoke manner to adapt their business during the transition period as appropriate to their specific needs. It is anticipated that some will invest, some will diversify, and some will exit.

The Secretary of State has also been given power to provide lump sum payments instead of delinked payments. This lump sum option can be based on either BPS or delinked payments, so delinking does not need to have been introduced for the lump sum to be available. This could create its own challenges and Defra's [Farming for the future: policy and progress update](#) progress report suggests lump sum payments may be subject to specific eligibility restrictions.

A consultation on delinking and lump sum payments (potentially contributing to the retirement fund of some farmers) is expected imminently at the time of writing.

The Act also entails the power to extend the agricultural transition period, as well as power to modify BPS to simplify the scheme and reduce administrative burdens in England. Powers are also granted to allow financial assistance for continuing EU rural development programmes, retaining funding for projects in the transition.

## Food and agricultural markets in Part 2

The Act sets out a duty for the Government to report to Parliament on food security at least once every three years (the first Report is due by 25 December 2021). Guidelines are given as to what factors the report may include, such as supply chain consumer confidence.

The House of Commons rejected an amendment tabled by the House of Lords requiring the Secretary of State to develop a national food strategy within 12 months of royal assent. However, the [first part of an independent review on a National Food Strategy](#) matter has been published, suggesting the matter is

likely to be an ongoing policy consideration with a second part expected later this year.

The Secretary of State also has power to declare 'exceptional market conditions' if there is a severe disturbance or threat of a disturbance that is likely to adversely affect prices of agricultural products. If this happens, further financial assistance can be given.

## Transparency and fairness in the agri-food supply chain in Part 3

If requested, those in or closely connected to the supply chain must provide data to the Secretary of State regarding their supply chain. This includes not only producers, but anyone involved between producers and the ultimate consumer.

Under the fair dealing provisions, the Secretary of State may regulate to impose contractual obligations on business purchasers of agricultural products. Such obligations might include requiring contracts to be made in writing, the inclusion or exclusion of certain terms, pricing mechanisms and timings, or requirements to comply with certain practices. Producer organisations must apply to the Secretary of State to become recognised.

## Fertilisers and traceability in Part 4 on matters relating to farming and the countryside

Section 33 in Part 4 on matters relating to farming and the countryside amends the Agriculture Act 1970, improving the definition of fertilisers. Previously, fertiliser was defined as 'fertiliser used for cultivation of crops or plants of any description, including trees'.

Fertilisers will now be defined as 'any material which, for the purpose of cultivation of plants or fungi, is intended to supply ...[them]... with nutrients or improve nutritional efficiency'. Additionally, powers will be given to the Secretary of State to make regulations on fertilisers.

Regarding traceability, the Secretary of State has been given power to establish a specific body to monitor and regulate the labelling and marketing of animal food products.

## Agricultural tenancies in Part 4 on matters relating to farming and the countryside

The details relating to agricultural tenancies are contained in Schedule 3 and seek to reflect the principal drivers for tenancy reform by:

- Providing a policy framework for agricultural tenancies to be fit for the future.
- Providing an enabling environment for sustainable productivity improvements and investment.
- Facilitating structural change and supporting new entrants/the next generation.
- Enabling tenants to access new agricultural and land management schemes.

Under the Agricultural Holdings Act (AHA) 1986 and the Agricultural Tenancies Act 1995, parties involved in rent review disputes will now be able to apply for an arbitrator or for expert determination from the Agricultural Law Association (ALA), the Royal Institution of Chartered Surveyors (RICS) and the Central Association of Agricultural Valuers (CAAV), rather than just the RICS.

The ALA dispute resolution panel has now been established to administer this statutory role on behalf of the ALA.

For AHA 1986 tenancies only, some of the provisions proposed by the Tenancy Reform Industry Group (TRIG) and subsequent Defra and Welsh Government tenancy reform consultations have been enacted. Firstly, arbitration can be used for disputes over requirements for landlord consent or for a variation of terms. Appointment of arbitrators will again be from the extended list of professional bodies, including the ALA. Secondly, Case A notices to quit cannot be served before the tenant reaches pensionable age, where previously this was age 65. Thirdly, the minimum age for succession applications on retirement has been removed and is no longer restricted to when the outgoing tenant reaches 65. Lastly, changes to the tests to be met under succession applications are to be introduced in secondary legislation – expected in Spring/Summer this year.

## Agricultural products in Part 5

In Part 5 of the Act, power is given to the Secretary of State to make regulations regarding marketing standards of agricultural products. These regulations may cover a number of matters, such as age, weight, species, breed, type of production method (organic, grass-fed etc.) and country of origin.

Power is also given to regulate organic produce and its certification, as well as carcass classifications.

## WTO agreement on agriculture in Part 6

Part 6 gives the Secretary of State power to make regulations in order to comply with the World Trade

Organisation (WTO) rules. Additionally, the limit on domestic support can be made lower than the UK's WTO limit.

There is no requirement for the Secretary of State to consult devolved nations when creating such regulations to comply with WTO rules, an issue debated in the House of Lords before Royal Assent.

## Wales and Northern Ireland in Part 7

Schedule 5 relates to Wales and allows for the BPS to be continued there until 31 December 2024 (the sunset clause), after which Wales will develop its own policy on financial assistance. The Welsh Government published its [Agriculture \(Wales\) White Paper](#) on 16 December 2020 and targets Summer 2022 for the publication of their Agriculture (Wales) Bill.

Schedule 6 has a similar effect for Northern Ireland, however, there is no sunset clause. This was justified in the discussions because the Northern Ireland Assembly had very little time to consider the Bill, as it did not sit from January 2017 to January 2020 and policy development in Northern Ireland is behind that of England and Wales.

## Thoughts going forward

The Agriculture Act 2020 is a landmark piece of legislation, an enabling act giving numerous powers to the Government. As we are beginning to see, the detailed policies that will imminently emerge will put flesh on the bones and work collaboratively to facilitate major reform of the agricultural sector.

But for those who are not planning for change, that change is here, and it is happening.

*Mike Holland is the Secretary and Adviser of the Agricultural Law Association.*

*The Agricultural Law Association (the ALA) was formed in 1976 and is the UK's largest inter-professional organisation devoted to the law and business of the countryside. The Association has over 1500 members from the legal, surveying, accountancy, farm business consultancy professions who advise rural businesses together with academia and members with specific expertise in international trade and investment.*

# A new era for farming support – the Agricultural Act 2020 and farming reform



Vicki Hird

## At a glance

- After three years of parliamentary process, the [new UK Agriculture Act 2020](#) legislates for financial support for farming that will be based largely on delivering ‘public goods’ like nature protection and also contains new rules for supply chain transparency and fairness.
- However, the Act lacks strong duties, contains no clear environmental regulatory baseline and also fails to deliver on public health goals and the protection of high food standards in trade deals.
- Three new farm financial support schemes have been developed and the first, the Sustainable Farming Incentive, is now being piloted but so far, whole farm agro-ecological options are missing.
- A wider set of farming initiatives are being developed for the transition including for enhancing productivity, R&D and animal health and welfare.
- Overall, we still lack a clear vision for farming and food and given the many demands and challenges ahead, including climate change, this is an omission.

Farming policy in the UK took a major step forward into the post-EU, post-Common Agriculture Policy (CAP) era in November 2020 with the royal assent of the Agriculture Bill. Now an Act of Parliament, it represents a new approach to farm support – paying farmers for the public goods or benefits they provide. What will the measures emerging from it look like and how could it affect land use, the environment and our wellbeing over the next decades?

The hopes of those working on farming policy for many years were high for this legislation. We would finally be able to design a bespoke policy which fits our farming, landscapes, culture and the needs of the environment and nature as well as food needs, after decades fixed to an EU-wide framework. The Common Agricultural Policy – giving £3.5 billion of support to UK farmers annually – has been useful in some ways over the past decades, keeping farmers in businesses against an ever bigger squeeze from the supply chains. Yet, overall it has not been judged a great tool to ensure sustainable farming or a protected environment.<sup>1</sup> It has also been very hard to change with 28 Member States vying for the money involved.

In England, the process of designing a new legislative

framework started with the detailed ‘[Health and Harmony](#)’ consultation in 2018. This suggested the government was looking to undertake a big shift in emphasis, away from basic payments toward a policy based on public goods. They undertook regional and sectoral meetings, with farmers and other stakeholders, and Sustain hosted one of these in London with Michael Gove MP, then Defra Secretary of State, speaking. Each UK nation has taken a different approach to developing their farming support and is at different stages of finalising the legal and policy frameworks. This article focuses on the English developments but will also touch on other nations’ approaches.

Back in 2017, when it was clear that we would get new agricultural legislation, our [goals](#) in the Sustain alliance were many but primarily to:

- Ensure a shift to support based largely on public money for public goods – to pay for what the market will not provide with a focus on reversing negative trends in agricultural areas, such as nature recovery, water protection and soil health. Critically, the support system should also ensure different kinds of farmers can survive and thrive as the evidence is clear that [farm diversity](#) is key for nature, landscapes, rural cohesion and jobs, as well as for new entrants.
- Secure a major uptake of agro-ecological farming, with new support for whole-farm systems, such as organic and fully pasture based approaches, and the integration of [agroforestry](#) that can deliver on multiple and integrated environmental, social and animal welfare benefits.
- See a strong emphasis on support for farming methods that promote public health, such as low antibiotic and pesticide use, and the promotion of more domestic sustainable fruit and vegetable production.
- Ensure better trading practices throughout the food supply chain through new transparency rules and statutory Codes of Practice to protect livelihoods. We already have some regulation of the top 12 retailers, but not the rest of the supply chain and this has an enormous impact on farmers’ ability to adopt more environmentally friendly systems.
- Reinstatement of an agricultural wages board for England to ensure better pay and conditions for farm workers, as they are a key part of future farm

systems who are too often neglected.

- Ensure that imports of agri-food products meet the same standards expected of British farmers, to prevent unfair competition.

In addition, we also lobbied for multi-annual budgets, a regulatory baseline, targets on climate change and pesticide impacts, recognition of soil conservation and soil health, amendments to ensure higher animal welfare outcomes and better labelling, protection of the county farms network, measures to boost new entrants, and for improvements in farmer training and skills.

We had big and broad demands and only some of them have been met. The intervening years, as the Bill progressed, involved significant work to present the evidence base for what we were proposing, building new networks and alliances, creating innovative campaign tools, and an extensive lobbying programme in both houses of Parliament. All this was to deliver an Agriculture Act that could create, alongside other legislation, the tools for sustainable food and farming.

## What the Act delivered

The [Act](#) now lays out how England and, to some extent the devolved administrations, will transfer existing farming policies and regulations from the EU. It changes the way farming is supported and markets are managed.

Right up front, the Act identifies a dizzying array of objectives – from soil health and climate mitigation to nature protection and public access to the countryside – that taxpayer support could now pay for through finance measures. They are largely based on achieving the government's [25 Year Environment Plan targets](#). This is good news. It also includes financial support for productivity and 'ancillary' needs. If the latter can pay for infrastructure enabling local and regional food systems to grow – like abattoirs, hubs and milling capacity – that would significantly help farmers to develop the more diverse and sustainable cropping systems needed. [Farmer focused supply chains](#) and trading are key.

The government had already started the preparation for new measures well before the Act was passed. The support schemes envisaged in the Act have been developed by Defra for the past three years and they involved stakeholders in co-creating the schemes' design from the start – an admirable approach. Tests and trials began in 2018 to try out elements of a new scheme on real farms. The working titles for such schemes were e.g. English Environmental Land Management Scheme (ELMS) and other nations have been developing their own versions, such as a

Sustainable Farming Scheme in Wales. I have been involved in the stakeholder engagement group and it has been rather a [long](#) process, not helped by changes in Ministerial leadership, or by Brexit and the Covid-19 crises taking away key staff. There have also been concerns about attempts to change the emphasis of the schemes and to lower the ambition. There are now three components of ELMS – a Sustainable Farm Incentive (SFI), the Local Nature Recovery and the Landscape Recovery Scheme.

The government announced a [New Agriculture Transition Plan](#) (ATP) not long after the Act's passing which gave some details for these new schemes and also other schemes to help farmers in the transition to the new era and with changing demands.

During this period, farmers and land managers have been frustrated by the lack of detail and the uncertainty ahead. We do not want to see a mass exodus and further farm amalgamations, but rather ensure that all farmers can be supported for generating food and public goods. There are now some details on what the first of three components of the ELMS will look like. Details on the SFI design and payments have been published now and [farmers are encouraged to apply to be part of a major series of pilots](#) with the first one starting this year. The other two components, the Local Nature Recovery Scheme involving greater ambition and farmers working together, and the larger Landscape Recovery Scheme for large scale nature restoration and recreation, are being developed and will be launched later. All three components should be fully available from 2024 and existing schemes like the Countryside Stewardship scheme will run concurrently until it is fully replaced by ELMS.

The wider package of schemes announced in the ATP include an Animal Health and Welfare Pathway to improve livestock farming, a slurry investment scheme to reduce pollution, a Farming in Protected Landscapes support scheme, a Farming Investment Fund to improve productivity and new initiatives on research and innovation, skills and new entrants.

Looking again at the Act itself, after considerable pressure from civil society, the law now also includes measures for a more transparent and fairer supply chain. This is [critical](#) as farmers receive so little of the value of food (they get an average of 9% of total food spend), take many of the risks and can be abused by those beyond the farm gate. We hope Defra will now consult on and finalise sector-based statutory codes of practice and an enforcement body. Defra has started to work on a dairy code of practice that will ideally complement the work of the existing Groceries Code Adjudicator. All this [echoes some of the measures](#) in the [European Unfair Trading Practices Directive](#) which we had hoped to see implemented in the UK. The Act

also includes measures on setting a multiannual budget, marketing standards, carcass classification and new measures to report on the impact of new trade deals in the agri-food sector.

## The gaps in the Act

It was not all good news. On food standards and trade there were some government concessions, but overall there is no protection for our relatively high standards, such as on animal welfare or pesticides, from damage by new trade deals, including with the US or Australia, and lower standard imports. We are particularly concerned about the use of [pesticides](#)<sup>2</sup> and [antibiotics](#),<sup>3</sup> as well as significantly lower or absent animal welfare rules. Despite a [huge collective effort](#) by the public, farmers and civil society organisations, there are no red lines. We will have a [more detailed scrutiny](#) processes, including a new statutory Trade and Agriculture Commission, but parliamentarians are unlikely to be able to block deals.

Many of the good measures in the Act are *powers*, not duties so Ministers do not actually have to act on any of them. Accountability is sadly lacking. On funds, there is a measure in the Act to look at long term budgets – but no sure way to measure and secure what is needed. And we know we need a lot of funds to help farmers in the transition, provide independent advice and reverse years of bad practice and policy. Nature, livestock and farming communities need it and we cannot protect the environment and ensure a resilient farming future cheaply.

Almost all stakeholders were hoping for a clear and strong regulatory baseline in the legislation. But it is absent. Without this, how will we know that what we are paying for is more than legal compliance? And how will we measure success? Our monitoring and environmental bodies are badly weakened by years of cuts. A new Office for Environmental Protection – heralded in the much-delayed Environment Bill alongside environmental targets – will have huge hopes riding on it.

But overall, we also lack a true vision for a good food and farming system and for wider [land use](#). Despite the Environment Plan and the [Agriculture Transition Plan](#), it is still hard to determine what Ministers do want to see in terms of changes to land use, production and intensity. There are two possible directions – one highly intensive, monoculture farming system, leaving a bit more land set aside for nature or trees and the other based on using natural systems in and around fields to deliver food and climate mitigation i.e. farming agroecologically on all land. We may need a mix, but we know that a fully intensified, input- or technologically-led approach is not a good fit for nature overall. The Defra narrative on

their recent [consultation](#) on deregulation of gene editing suggests the former is favoured.

The European [Farm to Fork Strategy](#) provides an inspirational set of objectives and ambition. Yet, whether the CAP reforms will deliver is another question. We need such a vision here in the UK, championing whole-farm agro-ecological farming, integrated pest management and healthy food provision, targeting big reductions in harmful processes. A new National Food Strategy is being developed independently by a team led by the restaurateur and Defra non-executive director Henry Dimbleby and is due in the summer. This will be followed by a government white paper. Sustain hopes that this will fill some of the gaps and help to secure healthy and diverse food production and drive healthier diets, reflecting the actions needed to address nature and climate emergencies whilst promoting good management and a fairer food trading regime.

Farmers and other stakeholders will need to learn about the new schemes and measures, get involved in pilots and be ready to show what public benefits they can deliver with some good business planning. This is an exciting new era for farm and food policy but it needs to be driven by all those involved to ensure positive outcomes.

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## Endnotes

- 1 Pe'er, G, Bonn, A, Bruelheide, H, et al, 'Action needed for the EU Common Agricultural Policy to address sustainability challenge' *People Nat.* 2020; 2: 305– 316. <https://doi.org/10.1002/pan3.10080>.
- 2 PAN/Sustain (2020) *Toxic Trade: How trade deals threaten to weaken UK pesticide standards* 2020 [https://www.sustainweb.org/publications/toxic\\_trade](https://www.sustainweb.org/publications/toxic_trade).
- 3 Alliance to save our antibiotics (2020) *Farm Antibiotics and trade Deals – could UK standards be undermined?* <https://www.sustainweb.org/news/nov20-antibiotics-future-trade-deals-us-australia-canada-nz>.

# The Agriculture Act 2020: a new dawn?

David Baldock



## At a glance

- A new interface between agricultural and environmental policy is emerging as a result of the Agriculture Act 2020 and the provisions of the Environment Bill, still in passage.
- Notwithstanding the decisive departure from the fundamentals of the Common Agriculture Policy (CAP), some parallels with the EU policy debate remain instructive.
- Tailoring farm payment schemes to strategic environmental objectives is proving politically challenging under the CAP and will require determined policy choices in England.
- The application of environmental regulations to agriculture is not addressed in either the Agriculture Act 2020 or Environment Bill but reform will be a critical step, not least because of the ending of cross-compliance.

The [Agriculture Act 2020](#) is one of the first major pieces of domestic legislation to be adopted in the post Brexit era. It sets out a distinctive new approach to agricultural policy in England, as well as establishing essential enabling powers to replace those embodied in the much-criticised CAP. Providing funding for farmers and other land managers is at the heart of agricultural policy and the Act is notable for setting a new and predominantly environmental set of purposes for such financial assistance in the future. In principle, the capacity to deliver better environmental outcomes with the aid of agricultural policy has increased.

Objectives for environmental policy also are due to change. Running about a year behind schedule, the Environment Bill is new primary legislation on the environment. The Environment Bill 2020, still at the Report stage in the House of Commons but due to be adopted by the end of 2021, also applies primarily to England. Amongst other things, the Bill includes provisions to set binding long-term environmental targets, including for biodiversity, and introduces specific measures on nature conservation which will have implications for the countryside. There is therefore a second interface for changes in the relationship between agricultural and environmental law and related policy.

This was the frame for a UKELA/Agricultural Law Association seminar in early February in which both legislative texts were discussed in detail prior to a panel exchange on how the two might work together and the policy issues that might arise. It was the kind of debate that previously would have had a strongly European flavour, with so much of agricultural funding

determined by the CAP, but one that now looks forward to the post Brexit landscape. Thus far, new legislative foundations for agricultural policy have been laid, a host of pilot schemes and studies have been initiated and an outline of new support schemes has been announced by Defra. However, as the panel discussion illustrated, uncertainties remain about the environmental ambition of the policies that are now emerging, how political priorities will evolve, how agriculture and land management budgets will fare and how far policy will diverge in the four countries of the UK.

Some of the issues raised in navigating the strategic departure from the CAP are not entirely new.

## The comparison with the CAP

In terms of core objectives, the Agriculture Act 2020 has a much stronger emphasis on the environment than the CAP, but also not an exclusive focus. The purposes for which financial support can be given, as listed in section 1 of the Act, are predominantly environmental. They are supplemented by support for animal and plant health, animal welfare and the conservation of native breeds, as well as support for public access to and better understanding of the environment. References to agriculture itself are more limited but do include powers to assist agricultural productivity and ancillary activity, as well as a requirement for the Secretary of State to 'have regard to the need to encourage the production of food by producers in England and its production by them in an environmentally sustainable way' when framing future support policies (section 1(4)).

The current [CAP proposal](#), by contrast, has nine 'specific' but actually rather broadly framed objectives for the period running to 2027, three of which are environmental. These include: 'contribute to the protection of biodiversity, enhance ecosystem services and preserve habitats and landscapes' and 'contribute to climate change mitigation and adaptation as well as sustainable energy'.<sup>1</sup> Other objectives are more traditionally agricultural, referring, for example, to a fair income for farmers as well as to themes similar to those arising in the Agriculture Act, such as rebalancing power dynamics in the food chain. Member States have considerable flexibility in the weighting they give to different objectives within the body of rules they have to comply with. At present, this is a challenge since Member States as a whole are demonstrating considerable reluctance to align the

still to be agreed detailed policy components of the CAP for the forthcoming period to 2027 to the increased environmental ambition set out in the European Green Deal and associated strategies.<sup>2</sup> Both Member States and the European Parliament are advocating only limited changes to the CAP, whereas the European Commission is trying to increase the emphasis on the environment to ensure that the Farm to Fork and biodiversity strategies can be delivered in practice. Yet the Commission has dismissed the argument by environmental NGOs that it should use its powers to withdraw the current CAP proposals, which predate the Green Deal, and start afresh with more tailored proposals. The lack of a formal requirement to help deliver the goals of the European Green Deal via the CAP, instead of actively undermining them, is proving problematic.

This gap should not arise in England where the government is responsible for meeting both agricultural and environmental objectives. However, the turmoil with the CAP does highlight the lack of any requirement for the government to develop agricultural policies that align with the goals set out in environmental strategies, notably the 25 Year Environment Plan and greenhouse gas (GHG) emission reduction plans under the Climate Change Act 2008. Political temptations to temper the rate of change in agricultural policy to reduce tensions with the agricultural community will arise, with some apparent already. There is no guarantee that policies under the Agriculture Act 2020 will focus on the critical environmental targets, rather than the broad suite of purposes that are stipulated. Consequently, there will need to be continuous scrutiny of the alignment between agricultural incentive schemes under the Act and the progress in meeting environmental targets. The importance of this will increase when the new long-term, legally binding environmental targets are set under the provisions of the Environment Bill. These are due to be brought forward by October 2022.

A second important difference is at the policy level. The system of direct payments to farmers, familiar as the Basic Payment Scheme (BPS) in the UK, continues to be a central instrument of the CAP, dominating the agricultural budget. Farmers with eligible land receive an annual payment per hectare, subject to certain conditions which have become more complex over time. They include keeping land in 'Good Agricultural and Environmental Condition' and other forms of cross-compliance. No food production is required. Under the current version of the CAP, certain additional environmental rules have to be met in order to receive the full payment, for example following basic crop diversification requirements on arable land. This requirement is the unambitious and unpopular 'greening' element of the CAP direct payments, which is to be phased out. The process of trying to lever more environmental requirements into

an entrenched direct payment model is proving to be painful in the CAP.

By contrast, under the Agriculture Act 2020, the direct payment system is decisively phased out in England. The Act enters into detail on this strand of policy, although it leaves open the design of future support schemes, including the pivotal set of Environmental Land Management schemes (ELMs), which are currently emerging in pilot schemes. Direct payments will be removed by 2027 and prior to this there will be a de-linking of payments from land. The termination of direct payments will release funds for ELMs and other schemes and will further remove the entitlement to support that has been embedded in the BPS. However, the de facto environmental baseline embodied in the cross-compliance mechanism will also be removed as part of the transition.

The environmental benefits of the CAP greening payments have proved very limited, especially in relation to the scale of payments made to farmers.<sup>3</sup> Starting afresh in England with an explicitly environmental set of schemes, rather than trying to build environmental requirements into the BPS through increasingly complex adjustments, is clearly preferable. However, BPS has had a very wide reach because nearly all farmers signed up for the payments and need to accept the attached cross-compliance conditions. Achieving the wide uptake of an environmentally more ambitious new English scheme will require a well-considered design and sufficiently high payments to induce farmers to enroll and take on substantive environmental commitments. A pilot version of such a scheme, the 'Sustainable Farming Incentive' was launched by Defra in March but was criticised by environmental NGOs for being too close to paying for business as usual, rather than real environmental improvement. Indeed, the actions required of beneficiaries entering the pilot include some that had to be met under cross-compliance without any special payment. For example, the arable soils standard in the pilot seems largely identical to the previous cross-compliance requirement to maintain a minimum soil cover on arable land. There is a danger of depleting the funds required to raise environmental standards by paying farmers to meet well-established existing practice.

## The regulatory baseline

This raises another question about future policy not addressed either in the Agriculture Act 2020 or the Environment Bill. The system, whereby environmental and other regulations are applied to agriculture, is widely agreed to require an overhaul, not least because of the UK's departure from the EU and the low levels of enforcement in several areas.<sup>4</sup> Michael Gove commissioned an independent review led by

Dame Glynis Stacey on the topic, which presented a number of proposals in 2018,<sup>5</sup> yet, without a government response so far. Since future payment schemes are intended to embody the approach of public payments for public goods, it is particularly important to define and enforce a regulatory baseline and to focus payments on actions which are over and above the set of standards flowing from these regulations. Otherwise it will be difficult to describe the actions taken on farms as providing public goods.

## In conclusion

The foundations laid in the Agriculture Act 2020 represent a significant departure from the current model of the CAP but many of the most critical decisions lie ahead as principles are converted into concrete policies. Goals for biodiversity, water, soil, air pollution and climate mitigation cannot be met without a significant contribution from agriculture. Well-judged and properly funded incentive schemes, matched with an effective regulatory system, will be indispensable to the effort required.

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# The organic route to a resilient future

Will Simonson



## At a glance

- As an agro-ecological approach with clear environmental and social benefits, organic farming has an important role to play in transitioning to more sustainable food production.
- Organic farming has a long history of strong regulation and policy support in Europe, but the post-Brexit policy environment in the UK presents specific challenges.
- There must be more investment in research and development of organic techniques to capitalise on their potential to improve resilience across the whole of the agricultural sector.

## Introduction

There is a growing realisation that farming must move on from its current unsustainable model. From a global perspective, the farming and food system has contributed to transgressing the planetary boundaries of land conversion, nitrogen and phosphorus loading, biodiversity loss and climate change, creating dangerous levels of environmental degradation.<sup>1</sup> Food production is the dominant driver of habitat and biodiversity loss and accounts for approximately one quarter of greenhouse gas emissions. These issues will come under the spotlight at this year's Conference of the Parties (COP) meetings of the biodiversity and climate change conventions in Kunming (China) and Glasgow respectively. While the Green Revolution in the 1950s and 1960s achieved spectacular success in driving up agricultural production to meet the food demands of a burgeoning world population, a new greener revolution is now urgently needed to bring our food production within an 'environmentally-safe and socially-just space'.<sup>2</sup>

## Organic farming and its benefits

Organic farming, as the most well-defined, established and regulated of all the so-called 'agro-ecological' farming approaches that have come to the fore, has an important catalytic role in this transition. With its roots in the early 1900s and Rudolph Steiner's development of the biodynamic agriculture concept, organic farming has evolved with the help of subsequent influential advocates in the US, Britain and Europe, as a response to growing concerns about the industrialisation of agriculture and over-consumption of finite resources. The [Organic Research Centre](#) has been an important part of this history. Founded 40 years ago as the Elm Farm Research Centre, it was

then, and continues to be today, the UK's only research organisation dedicated to the research of organic agriculture.

'Organic' describes a farming system working in harmony with nature. It relies on ecological processes, biodiversity and cycles adapted to local conditions, rather than the use of inputs with adverse effects.<sup>3</sup> Organic practices are circumscribed by the four principles of health, ecology, fairness and care.<sup>4</sup> By adhering to them, a number of benefits to nature and society have been characterised, including [by our own research](#). They include improved soil, water and air quality, flood mitigation, climate change mitigation and adaptation, reduced environmental pollution, animal health and welfare, habitat and biodiversity, landscape values and our engagement with them. Some criticise organic farming because of its relative inefficiency and therefore greater equivalent land demands, compared to conventional production.<sup>5</sup> Others, however, demonstrate that global food security can be achieved more sustainably under organic management if consumption and waste issues are addressed simultaneously.<sup>6</sup> The yield gap can also be expected to reduce as conventional production is impacted by soil exhaustion, as crop varieties that perform better under organic conditions are identified, and as the resilience benefits of organic farming are realised with increasingly unpredictable weather patterns.

## Organic farming in practice

What does organic farming mean in practice? With weedkillers and all but the most restricted use of certain naturally-derived pesticides being avoided, pests and diseases are controlled through encouraging natural predators (beneficial insects and birds), use of crop rotations and diversity, mechanical weed control, and natural ways of suppressing weeds, for example using living mulches. Building and maintaining soil health is at the heart of the agricultural operation and instead of chemical fertilisers, the fertility and health of soils is nurtured by bringing nitrogen-fixing leguminous plants into the rotation, as well as by using composts and animal and green manures. Organic livestock farming respects high animal welfare standards that meet species-specific behavioural needs. There is no preventative use of antibiotics and wormers since animal health management is based on disease prevention using appropriate breeds, production goals, housing conditions, husbandry practices and stocking

densities. Genetic modification does not have a place on an organic farm, where animal diets are based on natural, organic and non-GM feed. Finally, trees may be intentionally integrated into the farm system for enhanced economic but also agronomic benefits. Whilst this 'agroforestry' is not an organic practice by definition, it finds its natural home on an organic farm with its heightened attention to plant-plant and plant-animal inter-connections. Agroforestry, other mixed and organic systems are for this reason considered knowledge-intensive, rather than input-intensive, ways to farm.

## Regulatory control

The long-standing success of organic farming partly owes itself to strong legislative and regulatory control. Organic minimum standards are strictly set down in law and in Britain this means an organic farmer must be certified by a certification body according to a scheme following standards set by the UK Register of Organic Food Standards (UKROFS), those standards in turn complying with European and international standards. Becoming an organic farm is a rigorous process in the first place, requiring a two-year monitored conversion period. Strong regulation extends to food processing, labelling and retailing (by law, products labelled as organic must display a certification number or symbol), ensuring that customers can buy organic food with confidence in its integrity. At the EU level, and especially after the implementation of Council Regulation (EEC) No. 2092/91 in 1993, recent decades have seen organic agriculture being strongly supported through regulation and agri-environmental financial support for conversion and maintenance. The latter continues to be applied in the UK, for example through Countryside Stewardship agreements in England.

## Current status and future challenges

With clearly evidenced environmental and social benefits of organic farming, EU policy continues to drive the expansion of this sector; its Farm to Fork and Biodiversity Strategies include a non-binding target for 25% of farmland to be organic by 2030. In this respect, the UK is in danger of falling further behind in the absence of an equivalent ambition in the UK. At the end of 2019 there were 300,600 ha of organically farmed land, managed by 3,788 organic farmers and growers and representing 3.3 % of the UK total agricultural area.<sup>7</sup> The English Organic Forum has quantified the environmental benefits of increasing this to 1 m ha or 10% of agricultural area. The benefits would include a reduction of greenhouse gas emissions of more than 9.4 Mt CO<sub>2</sub> equivalent, a 50 Kt reduction in nitrogen surpluses, a 5% reduction in total antibiotic use, a 1.7 Kt reduction in active

pesticide ingredient applications, and a 25% increase in biodiversity on the organically farmed land.<sup>8</sup> The Soil Association has criticised the 'passive role of successive UK governments' in supporting the organic market in their report, 'The Lazy Man of Europe'.<sup>9</sup> The Government's diffidence is despite a growing organic market; the year-on-year increase in sales of organic products in 2020 was 12.6% with an organic market value of £12.79m.<sup>10</sup>

A shifting policy environment in the UK poses two specific threats to the future of organic agriculture post-Brexit. On the face of it, the replacement of agricultural production systems by paying farmers for 'public goods' through the forthcoming Environmental Land Management scheme, a key policy scheme of the Agriculture Act 2020, speaks to the strengths of organic production. Yet, organic farming, as a bundle of inter-related practices that work at the whole-farm level and over a long period of time, is not easily accommodated within the current design for the entry-level 'Sustainable Farming Incentive' component: a menu-based selection of narrow options or 'standards'. Current support for organic farming risks being undermined as a result.<sup>11</sup> The second threat is posed by the government's proposals to deregulate gene editing, based on the premise that it is not fundamentally different to traditional breeding and therefore should not be subject to GMO regulation. This contravenes a Court of Justice of the European Union (CJEU) ruling in 2018,<sup>12</sup> and significantly risks the integrity and therefore viability of organic food production, both on farms through potential transgenic pollution, but also in the supply chain through product cross contamination.<sup>13</sup>

## Conclusions

Investment in research and development of organic and agro-ecological techniques has been historically low compared to non-organic and biotechnological approaches, such as gene editing. At the same time, for decades organic farmers and growers have been a testbed and source of innovation for systems and techniques that have more relevance than ever across the whole of the agricultural sector, especially in the context of environmental change.

The current pandemic has tested and arguably increased the resilience of society and demonstrated the speed at which systems can undergo revolutionary change if the drivers are strong enough. Some argue that lessons need to be learnt about action to deal with other pan-global and complex problems, such as climate change and unsustainable food production. In our unpredictable and rapidly changing world, organic techniques offer possibilities for enhancing the resilience and sustainability of food

production and our own research at the Organic Research Centre is contributing to a greater understanding of that. No one farming system alone will safely feed the planet,<sup>14</sup> but organic farming must be properly supported in policy and research investment to realise its full potential in helping to meet this goal.

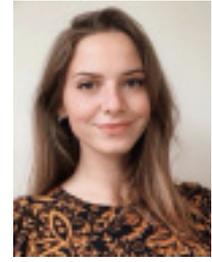
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# Student submission

## The need for a new international humanitarian law convention on environmental warfare and the protection of the environment in times of armed conflict



Margaux Contant

### At a glance

- During international armed conflict the environment is one of the main casualties and can also be used as a weapon of warfare.
- The legal regime regulating environmental warfare and the protection of the environment only started to develop during the second half of the twentieth century.
- The treaty law regulating the environment in times of war has proven to be ineffective in practice.
- A new convention dedicated to the exclusive protection of the environment during armed conflict is therefore necessary.

### Brief introduction of the environment's status in international humanitarian law

International humanitarian law (IHL) mainly focuses on human beings. The environment is generally not considered a high priority during armed conflict, which explains the lack of suitable legal instruments regulating and protecting it.<sup>1</sup> During warfare, the biotope can have two antithetical roles: it can either be a victim of the means and methods of warfare, or it can be used as a weapon of warfare against an adversary. This latter notion is what scholars have labeled 'environmental warfare'. It connotes a type of warfare in which the environment is manipulated for hostile military purposes.<sup>2</sup> In such cases, environmental destruction is not merely a consequence of other military objectives, it is a military objective in its own right.<sup>3</sup> The notion of environmental warfare is the source of numerous conspiracy theories, however, this article will solely focus on the known cases of environmental warfare and on the legal and political features of those cases.

### Historical examples of the use of environmental warfare

Environmental modification and destruction have

caused problems throughout the history of warfare.<sup>4</sup> From the Punic wars,<sup>5</sup> to the Vietnam War and the Gulf War, the environment has been manipulated and destroyed in order to annihilate or to hinder an enemy from conquering territory. The Second Indochina War provides two distinct examples of hostile manipulations of the environment that rely upon modern technology. In the first of these manipulations, Operation Ranch Hand (1962-1971), the biotic component of the regional environment was disrupted through the application of plant poisons, herbicides and by other means.<sup>6</sup> This became one of the most devastating uses of environmental warfare. In the second manipulation, Operation Popeye (1967-1972), attempts were made to disturb the regional weather pattern through cloud seeding<sup>7</sup> to slow guerilla actions and to impede the supply maneuvers of the North Vietnamese Army.<sup>8</sup>

### The legal regime regulating environmental warfare and the protection of the environment in times of armed conflict

Rules of IHL aimed at the regulation of environmental warfare and the protection of the environment in times of war began to develop in the second half of the 20th century as a result of US practice during the Vietnam War, where the environment was deliberately targeted and utilised as a weapon of warfare.<sup>9</sup> In 1976, after a long period of negotiation between the USSR and the USA, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)<sup>10</sup> was adopted, marking the beginning of a new era in IHL. Indeed, before the 1970s, the environment was not recognised as a distinct entity, and the protection afforded to it was incidental, mainly through actions aiming to limit human suffering. With the ENMOD, the environment became a subject of IHL protection on its own.<sup>11</sup> The aim of the Convention is to stop belligerents using cataclysmic environmental changes as a means or method of war during hostility.<sup>12</sup> The trend towards the general protection of the environment in times of armed conflict continued with the adoption in 1977 of

the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (API)<sup>13</sup> aiming to prohibit a certain degree of environmental destruction in times of warfare.<sup>14</sup> Articles 35(3) and 55(1) are the first internationally adopted binding rules that confer direct environmental protections by expressly excluding the environment from being a specific and direct military target by combatants during hostility.<sup>15</sup> As well as those two instruments granting direct protection and regulation to the environment, there are also a number of indirect provisions contained in the UN General Assembly Resolution on the Protection of the Environment During Armed Conflict,<sup>16</sup> in the law on targeting<sup>[1]</sup> and additionally in the Rome Statute.<sup>17</sup>

## **The lack of effectiveness of existing treaty law governing the use of environmental warfare and the protection of the environment in times of armed conflict highlighting the need for a new IHL convention**

Yet, despite the two conventions being innovative, time has shown that their provisions are largely ineffective or have proved inadequate in practice.<sup>18</sup> As only a few IHL provisions explicitly address environmental warfare and the protection of the environment during armed conflict, a legal gap is created. Focusing on the limits of the ENMOD and the API:

### **The ENMOD Convention: futuristic and unclear**

The ENMOD has been subjected to much criticism and has been the centre of many controversies. The principal complaints are that the convention is too futuristic and unclear. Article II of the treaty catalogues a number of scenarios that would fall within the scope of the ENMOD.<sup>19</sup> Such scenarios, however, [2] can only be accomplished with some unconventional, futuristic weapons and for the most part do not reflect existing military capabilities.<sup>20</sup> Thus, the ENMOD gained a controversial reputation due to its futuristic approach to environmental warfare.<sup>21</sup> It also negatively distorted the credibility of environmental protection, with a multitude of conspiracy theories emerging from the content of the convention itself.<sup>22</sup>

The lack of clarity of the language of the ENMOD generated much criticism in 1991, against the background of the Iraqi conduct in the Gulf War. Nevertheless, proposals to revise the text were not adopted in a Review Conference convened in 1992.<sup>23</sup> The last point to highlight regarding the limits of the ENMOD is the lack of clarity concerning what type of reprimands or sanctions would be imposed for a breach of the Convention. This can be explained by two factors. Firstly, no State Party has ever brought a

violation of this treaty to the attention of the United Nations,<sup>24</sup> therefore, there is no precedent on dispute resolution or implementation of sanctions against any party alleged to have violated the ENMOD.<sup>25</sup> Secondly, the Convention itself only loosely describes the procedure for lodging a complaint and merely states that an investigation may follow.<sup>26</sup>

### **Additional Protocol I: lack of contextual harmonization, anthropocentric perspectives and high threshold**

Focusing now on the API, three flaws need to be highlighted. First, there is a lack of contextual harmonization. Articles 35(3) and 55(1) seem to be in contradiction with each other concerning their central aims, showing two different ideological perspectives. While Art. 35(3) advocates for unconditional and absolute environmental protection during warfare, Art. 55(1) expressly mentions that environmental protection should be considered with the aspiration to guarantee human health or survival.<sup>27</sup> Second, the API has an anthropocentric perspective. Art. 55(1) highlights the anthropocentrism, even within provisions supposedly aiming at the protection of the environment. Another concrete example of the anthropocentric nature of the API is the fact that out of 102 articles, only one is exclusively dedicated to the protection of the environment, Article 35(3). Third, the API has a high threshold. For an action to be prohibited under the Protocol, it must result in 'widespread, long-term and severe' damage to the environment.<sup>28</sup> These three pre-conditions narrow the application and the effectiveness of the API dramatically.<sup>29</sup> Some environmentalists have since argued that these three pre-conditions may never be fulfilled during a conventional armed conflict.<sup>30</sup>

Thus, even though the ENMOD and the API represented innovative advances, their use in practice is highly limited as they contain numerous ambiguities and confusions. The existence of important limitations to the application of these two treaties to situations of environmental warfare, as well as the current environmental crisis, highlight the need to design and introduce a new IHL Convention that would efficiently cover the notions of environmental warfare and the protection of the environment in times of armed conflict.

## **The absence of customary international humanitarian law for the protection of the environment in times of warfare**

There is no officially recognised Customary International Humanitarian Law (CIHL) regulating those two notions. Neither the ENMOD nor the API's Articles 35(3) and 55(1) are crystallised as CIHL.<sup>31</sup> The non-customary status of the API was highlighted by

the ICJ enunciating that the latter's provisions 'provide additional protection for the environment' and '[t]hese are powerful constraints for all the States having subscribed to these provisions'.<sup>32</sup> In 2005, the International Committee of the Red Cross (ICRC) presented a Study on Customary International Humanitarian Law<sup>33</sup> which lists numerous customary rules, including some concerning the environment in times of warfare.<sup>34</sup> This study, however, has been subject to many criticisms from various scholars, hindering its customary status. Dinstein has noted that;

as regards international armed conflicts, the Study clearly suffers from an unrealistic desire to show that controversial provisions of API are declaratory of customary international law... By overreaching, I think that the Study has failed its mission.<sup>35</sup>

Thus, this text, as well as being an undeniable innovation in the realm of IHL, is also not completely reliable as to what constitutes customary IHL. Therefore, the absence of customary status is another element advocating for the need to adopt a new IHL treaty solely focusing on the environment.

## Some possible arguments against the adoption of a new convention

There are arguments against the introduction of a new binding IHL treaty. First, some would argue that it would be difficult for the states to reach a consensus concerning the obligations that any convention or treaty would contain. Yet, this position can be challenged as even the USA and the USSR have managed to draft such international conventions jointly, even while being belligerents and rivals during the Cold War (1947-1991). Today the notion of environmental protection constitutes a global concern amongst the international community. Thus, in this context, states would more likely accept such obligations and reach a consensus concerning the adoption of a new convention.

Another argument against the introduction of a new IHL Convention is that there are already a number of legal instruments, mainly treaty law, directly regulating environmental protection in times of warfare. Indeed, both the API and the ENMOD *prima facie* seem to provide an effective shield against environmental destruction in times of armed conflict.

One might also argue that there is already a multitude of treaty provisions that indirectly protect the environment in times of warfare, by limiting the means and methods of warfare,<sup>36</sup> by protecting civilian objects, property,<sup>37</sup> cultural objects,<sup>38</sup> and finally by limiting targeted areas.<sup>39</sup> The issue is that each of those various treaties have to be ratified by

states to be legally binding on them and to be applied in 'live' situations where environmental destruction is occurring. The large majority of treaties have not even achieved customary status, and therefore cannot apply to states that did not ratify them.

This is a significant problem as it creates a discriminative protection of the environment in times of warfare. This again highlights the need to develop a new legal instrument, a 'fifth Geneva Convention' that would gather all the existing direct and indirect legal instruments for the protection of the environment in times of warfare and that would be applied efficiently.

## The introduction of a new convention gathering all the provisions relating to environmental warfare and the protection of the environment in times of armed conflict

The idea of introducing a new IHL Convention, dedicated to the exclusive protection of the environment during armed conflict, is not new. Such an idea was discussed, with the contribution of many academics,<sup>40</sup> during the round table conference held in London in 1991 just after the environmental damage that took place in Kuwait during the first Gulf War. More precisely, Plant drafted an introductory paper, describing his 'Fifth Geneva' Convention would contain.<sup>41</sup> Nonetheless, no Convention was created as a result of the London Conference. The main reason for this failure in the 1990s, was the unwillingness of states to submit themselves to more stringent limitations than those that already existed.<sup>42</sup>

The current international environmental crisis,<sup>43</sup> and the development of the public and scientific concern,<sup>44</sup> however, have made the environment the epicenter of international concern.

Therefore, is now perhaps the time to introduce a new IHL Convention, as the logical duty of the international community, to attempt to prevent environmental disaster during times of warfare?

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# Adverts, jobs and tender opportunities

## Defra: roles of roles within the Interim Office for Environmental Protection (OEP)

Defra is starting recruitment to a range of roles within the Interim Office for Environmental Protection (OEP).

### What is the Interim OEP?

The Interim Office for Environmental Protection is the non-statutory form of the Office for Environmental Protection which is being established by the Environment Bill later this year. It will provide independent oversight of the Government's environmental progress and accelerate the foundation of the full body.

The Interim OEP will be set up as a division within Defra, although operating as independently as possible. We intend for staff working in the Interim OEP to transfer employment to the statutory OEP once it is legally established. More details on this are in the candidate packs for the individual roles.

The OEP headquarters will be based in Worcester, although a range of flexible working options will be supported.

### The roles

The OEP will be the cornerstone of our environmental governance system now we have left the EU. We are keen to recruit the best people, from any background, to help grow the organisation from the ground up, influencing how the OEP will operate in its crucial early years of existence.

### Below are links to the Interim OEP live vacancies and candidate packs.

[Executive Support Officer](#) – Vacancy closes 12th April at 11:56 pm

The following vacancies close on 19th April 2021 11:56pm:

[Principal Environmental Analyst](#)  
[Monitoring Environmental Law Officer](#)  
[Environmental Lawyer](#)  
[Complaints Officer](#)  
[Senior Complaints Officer](#)

Defra will be holding the following OEP Recruitment Information Webinars:

[08th April 2021 at 12:30 – Principal Environmental Analyst](#)

[14th April 2021 at 12:30 – Complaints Roles](#)

Defra is committed to recruiting a diverse workforce. Read more about [Defra's Equality and Diversity commitments](#).

If you would like any additional information, please get in contact [OEP.Recruitment@defra.gov.uk](mailto:OEP.Recruitment@defra.gov.uk).

## Book reviews

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

# UK Environmental Law Association

## elaw

The editorial team is looking for quality articles, news and views for the next edition due out in June 2021. If you would like to make a contribution, please email [elaw@ukela.org](mailto:elaw@ukela.org) by 12 May 2021.

Letters to the editor will be published, space permitting.

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