Welcome to the July/August edition of e-law. The theme for this edition is sustainable cities which ties in with the UKELA 2017 annual conference theme: cities of the future.

I am sure those of you that were able to attend the annual conference this year at the University of Nottingham from 7th-9th July will agree that it was really thought provoking. We heard all about the challenges facing our cities as the world’s population continues to expand, putting more pressure on the urban spaces that 60% of us will be living in by 2030.

More people sharing the same spaces is causing a number of environmental impacts including waste management issues, water scarcity but also flooding events, increased greenhouse gas emissions from our ageing building stock, poor air quality stemming from our transport networks, as well as decreasing urban biodiversity.

And the case for sustainable cities isn’t just based on environmental factors. There are strong economic and human factors at play as well; to build sustainable, strong economies for greater social cohesion.

Speakers and delegates at the conference evaluated some of the existing tools and frameworks in place to support the sustainable development of cities ranging from energy efficiency regulations, compulsory purchase and regeneration powers, the role of the planning system, to engineering and technological innovations, such as green roofs, e-mobility and waste management solutions.

Thinking about system level solutions, beyond the point solutions being developed, we explored what sustainable cities of the future might be like and how getting the balance of people, planet and places right will be key.

There won’t be a one size fits all answer, as there will be a huge degree of variation depending on the location of the city and its needs. However, it seems that successful sustainable cities of the future will need to be resilient, adaptable and human-centred places that people will want to live in.

In this edition of e-law we have themed articles that consider sustainable cities from different perspectives:

- Richard Honey’s, Where will the ClientEarth litigation lead? focuses on air pollution, a major problem in our cities, and the ClientEarth litigation.
Emma Lui’s, Heralding the ‘New Urban Agenda’—what could it mean for sustainable cities of the future? discusses the UN Habitat’s New Urban Agenda.

For more information on the 2017 annual conference, see Merrow Golden’s conference report.

Also included in this edition of e-law is our new Chair, Anne Johnstone’s first words from the Chair.

In addition, we have included the Andrew Lees prize winning essay entry from Ciju Puthuppally on ‘Brexit – threat or opportunity for the environment?’ Judges of the Andrew Lees prize were very impressed with the high quality of entries and also noted highly commended entries by Ryan Colgan, Peter Cruickshank, Joseph Meethan and Ketan Jha.

Finally, I’d like to welcome Hayley Tam back from maternity leave for the September/October 2017 edition. This will be my last edition as editor of e-law and I wanted to say how much I’ve enjoyed the opportunity to support UKELA’s important work.

Best wishes,

Simone Davidson
Acting editor

E-law editorial team

Simone Davidson, Acting Editor – Simone is Head of Environment at LexisPSL and was at Clyde & Co for 8 years prior to joining LexisNexis. Simone is covering Hayley Tam’s maternity leave.

Jessica Allen, Assistant Editor – Jessica is currently studying Law with French and French Law at the University of Nottingham, expecting to graduate in 2017.

Ben Christman, Assistant Editor – Ben is a final year PhD candidate in the School of Law at Queen’s University Belfast.

Lewis Hadler, Assistant Editor – Lewis currently studies the BPTC at the University of the West of England, having previously worked as a paralegal with Richard Buxton Environmental & Public law. He graduated in 2015 after completing his LLB at Anglia Ruskin University Cambridge.
I am truly honoured to be writing my first message to you as Chair of UKELA. I have been involved in the organisation for more than 10 years and have benefitted hugely from my membership. I hope to play a part in encouraging many of you to actively engage in UKELA’s activities during my next two years as Chair.

What can you expect from me as your Chair?
Well, stating the most obvious fact first, I’m a woman, so I want to raise the profile of women in the organisation and encourage our female members, particularly young ones, to step forward. Volunteer to speak, to write a piece for e-law, or to apply for the moot or the Andrew Lees prize. UKELA’s membership is relatively balanced from a gender perspective, but women are disproportionately under-represented when it comes to our speakers and competitions. We are trying to address this, and for the second year in a row our Garner speaker will be a woman, Julie Hirigoyen, CEO of the UK Green Building Council. The lecture will even be chaired by UKELA Patron, Maria Adebowale-Schwarte.

Secondly, I’m not a lawyer. UKELA is the UK Environmental Law Association, not Lawyers’ Association, and although we all know how open and accessible an organisation we are, it may not appear like that from the outside. One of our new Trustees, Veneta Cooney, is a doctor and occupational medicine specialist. Environmental law is critical to her field, looking at the interplay between public health and the environment. But we have little or no visibility in that sphere and many others like it. I am hopeful that during my tenure we can broaden UKELA’s membership base and I am excited about the opportunities for learning, debate and work that this will generate for our members.

Finally, I’m not based in London. A criticism that I have often heard levelled at UKELA is that it is too London-centric. The reality is that UKELA depends a great deal on the engagement and activity of our members and a very significant number of them are based in London. But that doesn’t preclude anyone else from getting involved and again I hope to be a very visible, and vocal, champion of UKELA’s inclusivity.

UKELA annual conference in Nottingham
This brings me to our recent conference in Nottingham, which was enjoyed hugely by everyone there. My sincere thanks go to the conference organiser Ned Westaway and his team, the UKELA staff, and our events company Red Pepper.

I had the pleasure of meeting several of the student delegates and, from what I could see, they were doing some stellar networking. Students and our young UKELA members are very important to us and you can look forward to seeing some exciting engagement initiatives over the coming months. We also had a good few international visitors, including the current Chair of the American Bar Association’s Section of Environment, Energy and Resources, Seth Davies. Seth was telling me how important it is to the ABA to strengthen the relationship with UKELA, and I will be continuing the excellent work of my predecessor Stephen Sykes in building our international ties.

A fundamental idea that will underpin everything I do as UKELA Chair is the message that caring about, and protecting, the environment is not at odds with economic prosperity. Yes, it matters that we care about the environment for its own sake, and we may wish that caring were enough to motivate people to change their behaviour, but we have to realise that often it’s self-interest. Many major corporations have invested heavily in ‘greening’ because they have realised that it has tangible economic benefits, be it in reducing waste, increasing energy efficiency or cutting costs by more efficient use of raw materials. We need regulations and enforcement regimes that not only reduce environmental damage but encourage preservation, create jobs and improve quality of life.

Brexit
All of this leads me inevitably to Brexit. One of Stephen’s greatest achievements was establishing our Brexit Task Force, co-chaired by Richard Macrory and Andrew Bryce and supported by Rosie Oliver and Joe Newbiggin. As e-law goes to press, the BTF will have published two of an initial series of five reports on Brexit and environmental law. We will also be publishing a series of ‘myth-busting’ fact sheets. UKELA’s position on Brexit is set out clearly on our website, but the key messages are that there should be no diminution in environmental protection and that any changes should be subject to proper scrutiny.

So that’s what you can expect from me. What I expect from you is to share your ideas, thoughts and suggestions by getting in touch. Let’s all work together.

Regards,

Anne Johnstone
UKELA Chair
UKELA news

Welcome to our new trustees

We have been delighted to welcome four new trustees over the past couple of months. Read more about them below.

Veneta Cooney
Veneta is a Consultant Physician, specialising in occupational medicine, and provides advice to both the public and private sectors on how the work environment impacts on both physical and mental well-being. Of particular interest to her is the link between public health and environmental protection.

Philip Hunter
Phil is a Partner and Head of Environmental Law at leading Scottish law firm Brodies LLP. He advises on a broad range of environmental matters including management of environmental risks and liabilities. He takes over the National Council member for Scotland role from his former colleague, Kenneth Ross, who has recently retired.

Christian Jowett
Christian is a barrister at 30 Park Place, Cardiff and door-tenant at Foundry Chambers, London. His environmental law practice focuses on waste law and its interaction with other areas of law. He is a member of the Attorney General’s Regional Panel of Junior Counsel to the Crown (Wales).

Warren Percival
Warren is a Director at RSK Group Plc and has over sixteen years’ experience in environmental consultancy. Warren previously managed RSK’s Northern EHS business, and is now the Group Director responsible for due diligence, ESG and expert witness services to the legal and financial sectors.

UKELA’s 30th anniversary next year!

Were you in Cambridge in 2013? For those of you who were around for our 25th anniversary, it must seem incredible that 5 years will have flown by once we enter 2018 and celebrate our 30th birthday. Although this year’s conference is barely over, we are already planning how we will celebrate next year. Our trustee team for 2018, led by Simon Tilling of Burges Salmon, welcome any ideas that you may have to mark our anniversary in appropriate style, either at the 2018 conference or during the year. We’ll be talking about this more over the coming months, but please feel free to get in touch with your thoughts in the meantime. We look forward to hearing from you!

UKELA wildlife law bursary 2017

The wildlife law course arranged under the auspices of UKELA’s nature conservation working party makes a small surplus due to the generosity of the tutors and Browne Jacobson LLP. The working party thus decided that the surplus be used to fund an annual bursary of £1,000 to support a post graduate research project addressing wildlife law.

Applications are invited to be submitted to the convenor of the nature conservation working party by 29 September briefly setting out the proposed research project (no more than one A4 page). The project must address a legal issue or issues for effecting nature conservation in the UK or within the UK’s overseas territories. Applications will be considered by the chairman and convenor of the working party together with at least two of the wildlife law course tutors. The award will be made by 30 October.

The successful candidate will produce a paper and be required to give a presentation on the project and the conclusions reached at a meeting of the nature conservation working party, either at the UKELA annual conference or in September 2018. The paper will also be published in UKELA’s e-law journal.

For further information, please contact Wyn Jones, convenor of the nature conservation working party.
Membership subscriptions

Our trustees have agreed that an increase of 4% in annual subscriptions will be implemented across the board from January 2018, with the exception of those on the lowest membership tiers and those paying the international rate. This small increase has been agreed to help with the increasing costs across the organisation.

UKELA’s subscription rates continue to offer excellent value for money, comparing well with other membership organisations in the sector. Membership benefits continue to be valuable, with reduced entry to our wide range of events including the leading annual conference in the environmental law field. Members also benefit from our members’ only area on the website, which gives exclusive access to speaker presentations and up-to-date editions of e-law.

The increase will be reflected in your January renewal. Details are in the table below:

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Direct debits

Have you considered paying your membership subscription by direct debit? It is really straightforward to set up and takes all the hassle out of renewal. It also helps UKELA to save admin costs and time, meaning we can put more effort into other areas to benefit members. If you would like to sign up for a direct debit, please contact Alison Boyd for a form.
A UKELA workshop on the impact of Brexit on Northern Ireland took place in the offices of Cleaver Fulton Rankin on 23 May 2017. Participants included members from the Department of Agriculture, Environment and Rural Affairs; Cleaver Fulton Rankin; the Planning Appeals Commission; Arc 21; and Queen’s University.

The workshop began with a presentation from Andrew Bryce, Co-chair of UKELA’s Brexit Task Force. Andrew spoke about UKELA’s position on Brexit and the work currently being undertaken by UKELA’s Brexit Task Force, noting that the main focus for the Task Force were the issues likely to arise out of the Great Repeal Bill. Andrew also spoke about the research being undertaken by a number of working parties who were considering the impact of the Great Repeal Bill on waste, climate change and water (amongst others). Consideration was also being given to the Conventions and Protocols which would continue to take effect post Brexit.

Discussion ensued on the emerging issues in the United Kingdom and whether (and how) these issues would apply to Northern Ireland. The following concerns were identified:

- **Enforcement**: The European Commission is a key player in the current enforcement of environmental legislation. The Commission shares information, monitors progress, and reports on Member State compliance. It can bring infraction proceedings against governments that fail to comply with their obligations. The possibility of being on the receiving end of infraction proceedings provides a major incentive to comply with EU-derived environmental law. As the host of one of the biggest illegal landfill sites in Europe this issue is pertinent to Northern Ireland.

- **Political accountability**: There is not an overriding obligation on EU Member States to report to the European Commission on compliance with EU environmental law. However, individual Directives and Conventions, for example the Aarhus Convention, often include requirements to report. Reporting increases transparency and the accountability of Member States.

- **Need for certainty**: EU regulation plays an essential role in the UK domestic framework. EU standards help companies in sectors such as energy, manufacturing, transport, distribution and logistics to practically implement some areas of this regulation. UK industry needs to know whether these standards will continue to apply. One solution may be for an ‘environmental standards commission’ to be established to act as a forum for detailed consultation with the government, regulators and industry to address the divergence of standards across the UK.

- **Cross border**: There are already legislative measures in place for cross-border co-operation, for example, in respect of the movement of waste and cross-border sites. There is a need to retain common standards for cross-border sites in order to regulate them meaningfully. This is an argument for keeping pace with standards at EU level. Should this not happen protocols or special legislation will need to be put in place.

Post Brexit could the Planning Appeals Commission, a fully independent body, takeover the Commission’s supervisory role in Northern Ireland?

Post Brexit what should be the approach to setting future and revising current standards?

- **Cross border**: There are already legislative measures in place for cross-border co-operation, for example, in respect of the movement of waste and cross-border sites. There is a need to retain common standards for cross-border sites in order to regulate them meaningfully. This is an argument for keeping pace with standards at EU level. Should this not happen protocols or special legislation will need to be put in place.

Post Brexit what approach should be taken?

It is too early at this stage to know what Brexit will or will not include. If the outcome of the negotiations is that the UK is required to continue to comply with some EU environmental legislation, then it may be required to report on this to the Commission and to retain certain standards. The workshop identified that, should the outcome of negotiations be a ‘hard Brexit’, there is a very real risk that environmental law will operate in a vacuum in terms of enforcement, reporting and standards unless the government addresses these issues and implements a new regime.
Regional news

Both our North West and North East regions have been busy drawing up events for the autumn. Look out for details coming soon of a fracking seminar in Manchester, run jointly with the Society of Legal Scholars and hosted by Weightmans, taking place on the afternoon of 1 November.

In Leeds, the North East region is planning a seminar on enforcement undertakings at Irwin Mitchell’s offices, with speakers from the Environment Agency, taking place on the evening of 12 October.

Find out more via our events page.
With the Repeal Bill expected in mid-July, we’ve been working hard to prepare to respond on the key issues for environmental law after Brexit.

We held a press event on 28 June 2017 at the offices of E3G to introduce the work of the Brexit Task Force to a full house of journalists and contacts in professional organisations, NGOs, and Parliamentary staff. The event was chaired by Tom Burke, UKELA Patron and Chair of E3G, with presentation by Brexit Task Force Co-Chairs Professor Richard Macrory and Andrew Bryce. It has already produced some high-profile media coverage, including a piece on the front page of the Guardian’s online environment section.

The event trailed five reports on Brexit and environmental law that we are producing in the period up to October 2017. The first two reports have been published. They cover:

- Exit from the Euratom Treaty and its Environmental Implications (available [here](#))
- Enforcement and Political Accountability Issues (available [here](#))

Three further reports will be released on the [website](#) later this year, probably in September, on:

- The UK and International Environmental Law after Brexit
- Environmental Standard Setting outside the EU
- The UK and European Environmental Bodies

Working with UKELA’s working parties, we plan to produce additional papers on specific environmental topic areas. These include a ‘myth-busting’ fact-sheet about habitats regulation to address popular perceptions of it as an unjustified barrier to housing expansion and economic growth.

We are also holding a half-day conference on ‘Brexit and environmental law’ on 13 October. This will be an opportunity to present the reports and discuss the key challenges and opportunities for rolling over the law after Brexit.

We are in touch with other organisations working on Brexit and the environment in order to share information about what we are doing, and to try and avoid duplication of effort.

To keep up-to-date with our work, visit our Brexit blog where we have been reporting on our work and exploring Brexit-related issues.
Student news

UKELA annual careers evening

Every autumn we hold a careers evening and social which is open to students and anyone else interested in a career in environmental law. This year we are once again meeting in London at Francis Taylor Building, a leading chambers that has kindly hosted the event since 2013. A variety of professionals will be on hand for informal chats and careers advice to help you make the most out of your CV, including private practice solicitors, barristers, the Environment Agency, DEFRA, environmental consultants and various NGOs. The event will take place on 8 November. More details can be found on our website.

Bookings are now being taken for this free event, so please email Elly-Mae to secure your place. Please also spread the word amongst your fellow students and colleagues as this event is open to all (UKELA members will receive priority if numbers are exceeded).

Andrews Lees prize article competition 2017

We are delighted to announce that the winner of the Andrews Lees prize article competition 2017 is Ciju Puthuppally. Ciju is a law graduate from Downing College, Cambridge, who will be starting a paralegal post at Mishcon de Reya in July before he commences pupillage with Three Raymond Buildings in 2018. In addition to winning a sponsored place at the annual conference in Nottingham, we are pleased to publish his winning entry on ‘Brexit – threat or opportunity for the environment?’. Well done also to the four highly commended entrants: Ryan Colgan, Peter Cruickshank, Joseph Meethan and Ketan Jha.

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 Mark Davies or Rosie McLeod, our student advisors. If selected, the Editorial Board will endeavour to pair students with a supervising practitioner in that field. Articles can be on the e-law issue theme or on any topic related to environmental law. The theme of the next issue is ‘Brexit’, expected to be published in the week commencing 25 September.
UKELA events

UKELA London meeting – The new EIA Regulations 2017: adapting to the changes – 25 September
Please join us for this early evening session on EIA. On 16 May 2017 the EIA Regulations 2017 came into force, transposing the 2014 amended EIA Directive into UK law. The regulations bring a number of important changes to the EIA regime which our three speakers and chair are uniquely well placed to explain and elucidate. More details can be found on our website.

Nature conservation working party meeting – 27 September
Join the NCWP for their next meeting in London. To attend, please contact the convenor. More details can be found on our website.

UKELA Scotland annual conference: access to environmental justice – 5 October
Join us in Edinburgh for our annual conference on the theme of access to environmental justice & other issues. Access to environmental justice is a key issue in Scotland with renewable energy developments and the possibility of the moratorium on fracking being eased and the proposals for more infrastructure developments. The conference addresses the impact of environmental decisions on communities and the key issues for members of the public seeking to challenge such developments, arguing for an environmental court. In addition the conference programme covers regulation, environmental crime and the changing enforcement landscape; sustainable housing development; the key environmental topics of 2017; and a case law update. The conference is an essential networking opportunity for all those involved in environmental law in Scotland with 6 hours CPD. More details, including how to book, can be found on our website.

Brexit, the Repeal Bill and the environment conference – 13 October
Join us on 13 October at a half-day conference to consider the environmental law challenges in the run up to Brexit. Hear from Defra’s legal directors about the Repeal Bill, and find out about challenges in areas such as nature conservation and waste. The event will include discussion of how to ensure the law is properly enforced, and special issues for the devolved jurisdictions. Chaired by Lord Carnwath and featuring a keynote address on the environmental politics of Brexit by Chair of E3G Tom Burke, this conference is a must for anyone seeking a better understanding of the challenges ahead, and how environmental lawyers and practitioners can get involved. More details, including how to book, can be found on our website.

East Midlands regional group seminar – 24 October
This October, Tom Huggon will be presenting a seminar on the topic of ‘The legal framework for protecting and improving urban rights of way’. Tom is a consultant at Browne Jacobson and leading member of the Nottingham Civic Society. More details can be found on our website.

London meeting on Aarhus – 6 November
Chaired by Lord Carnwath, this update on access to justice and Aarhus is not to be missed! More details can be found on our website.

Student careers evening – 8 November
Join us for our annual careers evening, once again kindly hosted by Francis Taylor Building in Inner Temple. Meet a wide range of professionals from across the entire field of environmental law in an informal setting. Drinks and light refreshments are provided and the event is free to attend, but you must book. More details can be found on our website.

Wildlife law course – 8 to 10 November
The nature conservation working party has arranged an introductory course on wildlife law again this year; this course is designed for those whose jobs require them to understand the practical impact of the legislation surrounding wildlife. It will concentrate on enabling participants to make the best use of the law on the ground and to avoid the pitfalls that accompany such a technical subject as the law. More details can be found on our website.

UKELA diary dates

20 September – CCEWP seminar on Emissions Reduction Plan at Simmons & Simmons, London
12 October – North East region seminar on enforcement undertakings at Irwin Mitchell, Leeds
1 November – North West region seminar on fracking in partnership with Society of Legal Scholars at Weightmans, Manchester
29 November – annual Garner lecture with Julie Hirigoyen, CEO of Green Building Council at Freshfields, London (and via videolink)

For more details about these and our whole events programme see our website.
Conference report
UKELA annual conference – Nottingham

Merrow Golden, Pupil at Francis Taylor Building and conference newcomer

What better place to hold this year’s UKELA conference, entitled ‘cities of the future’, than in Nottingham – a city dating back to Anglo-Saxon times, whose previous inhabitants had lived in sandstone caves, but which in 2017 transported eager conference attendees to the sign-in desks by public trams and biogas buses. In light of the world’s growing city-based populations, the conference attempted to tackle the key challenges facing modern-day cities, not least the challenge of sustainable living.

Activities began with a welcome by the outgoing Chair, Stephen Sykes, who introduced and congratulated incoming Chair, Anne Johnstone, before handing over to the two keynote speakers, Dr Alfonso Vegara (via video-address) and Dr Richard Miller, both of whom suggested a number of innovative approaches to sustainable urban living in the modern world.

The insight continued into the first plenary session, chaired by Maria Adebowale-Schwarte, (Director of the Living Space Project). Discussion ranged from tackling air quality in London (Shirley Rodrigues, Deputy Mayor on Climate Change, London) to new ways of combining flood-risk management with open spaces and making the impossible possible (one can now swim in the Copenhagen harbour!) (Christian Nerup Nielsen, Director, Ramboll Water); and, from the complications of planning controls around the world (Robert Lewis-Lettington, UN-HABITAT) to the cities of the future (Professor Peter Sharratt, University of Westminster and WSP).

Attendees were then treated to updates, both at home and abroad, chaired by the Rt. Hon Lord Carnwath of Notting Hill. Brexit first, and here we were guided by Professor Richard Macrory and Andrew Bryce who gave an overview of the impressive and crucial work ongoing by the UKELA Brexit Task Force. Next, the US and a window into what the Trump administration could mean for sustainable cities, chaired by Anne Johnstone. Mike Barlow (Burges Salmon) addressed the carrots and sticks being used to achieve energy efficiency in building design and David Elvin QC (Landmark Chambers) considered the scope for use of compulsory purchase powers in regeneration projects.

What can be achieved in practice through thoughtful design and planning of sustainable places was highlighted by Philip Villars (Managing Director, Indigo Planning) but, crucially, we were reminded of what can, and has, gone wrong with bad planning and inadequate resources by Hugh Ellis (Town and Country Planning Association).

A detailed, yet wide-ranging, case law update was provided by Richard Honey (Francis Taylor Building) before we turned our attention to the future with the final plenary discussion chaired by David Hart QC (1 Crown Office Row). Attendees were treated to insights into current hot topics of air quality and transport (Ravi Mehta, Blackstone Chambers, and Mark Daly, Nottingham City Council) and flooding and drainage (Estelle Palin, Environment Agency, and James Dodds, Managing Director, Envireau), picking up on lessons learnt and ideas for moving forward.

The afternoon was filled with engaging working party sessions, covering an array of subjects from wild law to climate change and energy and followed by a choice of local activities in and around Nottingham.

Finally, the event drew to a close in style with a beautiful gala dinner held at Nottingham Castle on a warm summer’s evening. Built in 1068, and still going strong, the Castle provided a perfect location to reflect on the weekend’s discussions for future city-planning, and to top it off John Henry Looney (Founder and Managing Director, Sustainable Direction Ltd) gave a thought-provoking speech in which he challenged us all to challenge ourselves and the extent to which our own lives are sustainable.

Merrow Golden is a Pupil at Francis Taylor Building.

Ned Westaway, conference team Chair (Francis Taylor Building) added:
Many thanks to all who attended UKELA’s 29th Conference in Nottingham, which turned out to be a surprisingly apt location in which to consider future cities – with its trams, air quality strategy and ample green space. I would like to reiterate my thanks to all those involved for making it a success, especially the speakers, the chairs and the sponsors – Landmark Chambers, 39 Essex Chambers and others – without which the event simply could not happen. In particular, because of generous sponsorship this year we were able to make the event more accessible to students and lower income delegates. I look forward to seeing many of you in 2018.
23 members of UKELA converged on Fort William at the end of May for the annual wild law weekend. For some it was a happy reunion with friends made on previous weekends, for others their first experience of a unique mix of fresh air, exercise and stimulating discussion in a wonderful wild location. We were incredibly lucky to enjoy good weather for most of the three days and stayed at the Youth Hostel in Glen Nevis at the foot of ‘The Ben’.

On Friday we drove to the head of the Glen and then walked through a spectacular wooded gorge to the famous Steall Falls, at 120 metres the second highest waterfall in Scotland. The woodland is mainly broadleaved but includes a fragment of the ancient Scots pine forest which was once so extensive in the Highlands. Some brave spirits crossed the River Nevis on a steel rope bridge or swam in the river.

On Saturday we moved down to Glen Coe in the minibus to enjoy its dramatic landscape and climbed up to the Lost Valley which was cut off from the main Glen by a huge rock fall 2000 years ago. A golden eagle was glimpsed and mountain flowers enjoyed. The birch woodland here is of high conservation value but is not regenerating because of browsing by too many red deer. Deer management was an issue which came up throughout the weekend – one which has proved intractable for a long time and may need new legislation.

That evening we were the guests of John Muir Trust (JMT) at their AGM. JMT is a charity concerned with the protection and enhancement of wild land and they own most of Ben Nevis. We heard about the conservation work being carried out which includes looking for rare montane plants on the 2000 foot north face plus a great deal of footpath repair.
On the Sunday the lure of Britain’s highest mountain and the fine weather was too much for most of the group. Some joined the Bank Holiday crowds on the tourist path and others took a longer classic route to the summit. Happily, we all made it to the top and returned in good shape. The rest of the party walked to Kinlochleven along a 12 km stretch of the West Highland Way, the most popular long distance route in Scotland.

On the final evening we still had enough energy left to tackle the controversial topic of rewilding. The potential environmental benefits were discussed as well as the practical and political difficulties involved with re-introducing long lost species such as lynx and wolf. It was recognised that local community support would be necessary and achieving that in the Highlands could take a long time.

Many thanks to Simon Boyle and Crispin Agnew for conceiving what everyone agreed was a great weekend and to Alison Boyd for dealing so efficiently with the all-important organisation. Early booking for next year’s wild law weekend to the Lake District is advised.

John Hunt has worked for over 40 years in the field of nature conservation in Scotland – now retired but still doing voluntary work. He is not a lawyer but has had a lot to do with the acquisition and management of land of conservation value which frequently raises legal, planning and policy matters.
At the Legal Sustainability Alliance (LSA) we are delighted to be celebrating our 10th anniversary this year. A decade ago a group of leading law firms (DLA Piper, Slaughter and May, Norton Rose Fulbright, Linklaters and others) responded to a challenge set by HRH The Prince of Wales in his May Day Summit to come together and work collaboratively to reduce their carbon footprint. 10 years on and we now have over 130 active and committed member firms, all striving for improved environmental practice and sustainable working.

It has been an interesting journey with some notable successes – not least a significant year-on-year reduction in carbon emissions from across the membership. In 2009, the first year of carbon reporting, 26 firms representing 27,589 employees reported an average per capita emission of 4.9tCO2e. By 2015 we had 57 firms representing over 54000 employees reporting and achieving a cut in average per capita emissions to 4.2tCO2e. Such sustained reduction only results from commitment and hard work. Over the last ten years LSA members have addressed the easy challenges, from cutting back on unnecessary taxi journeys and energy use through more efficient lighting and heating systems, to encouraging staff to recycle at work and to generally reduce paper use and waste.

Still, the task becomes ever more difficult. The challenge many of our members now face is how to sustain those reductions and tackle the most difficult problem of all: how to reduce business travel emissions. This is in essence a cultural challenge as well as a practical one, and one that is not unique to the legal sector – all client-driven professional services firms face similar challenges. The LSA is taking a leading role on helping firms to adopt new working practices to reduce the need to hop into taxis and onto planes just to have client conversations. Agile working, high tech teleconferencing suites, business Skype/internet enabled conferences and webinars, and sometimes even a simple phone call, are vital to reducing the business miles travelled.

David Rifkin, the former President of the International Bar Association, reminded us of all our responsibilities when he said that ‘the legal profession has a critical role to play in the fight to combat climate change which I believe to be the greatest challenge of our time’. He called on lawyers to be not just technical advisors but also aspire to be ‘lawyer-statespersons who ask both is it legal and is it right’. Our research has shown that sustainability is increasingly an issue that matters to our clients, as well as our staff, and it is also vital for recruitment and retention. It matters to millennials and generation Z; such that a firm’s appeal is greatly enhanced if they can demonstrate their sustainability credentials. A recent Deloitte Millennial Survey showed that 80% of almost 8000 millennials questioned felt that the success of a business should be measured in terms of more than just its financial performance; while 65% agreed that businesses should behave in an ethical manner.

The LSA, like UKELA, believes that practical action and support are the best ways to help organisations and individuals to do the right thing. We provide a wealth of information and resources, from case studies to guides, as well as a free to use Carbon Reporting Tool designed exclusively for law firms of all sizes to use on an annual basis. While the problem for a large international practice might be how to sustain its carbon reduction year-on-year, for many small and medium sized practices the issue is how to get started, especially if they lack resources and staff. The LSA is an inclusive movement, welcoming firms of all sizes across the UK and this year we have joined forces with the Planet Mark™ team to develop a practical guide on The Business Case for Sustainability supported by a series of workshops offering advice and tools to kick start or reinvigorate a sustainability programme in your firm. Currently there are workshops scheduled for Newcastle on 22 September and Manchester on 5 October. The guide and the workshops are free to attend. For more information and to book a place, please refer to the LSA website.

Sustainability isn’t rocket science and doesn’t have to be difficult. Small practical actions have significant benefits and, as our 10 years of experience has shown, measuring and managing carbon leads to financial savings as well. The LSA is a free network and open to any UK based law firm and we look forward to welcoming UKELA members as we enter our second decade.

Copies of the LSA 10th Anniversary Report are available to download from the LSA website. Alternatively, for a hard copy, please don’t hesitate to get in touch.
Ratification of the Minamata Convention on mercury
LexisPSL Environment

The entry into force of a global treaty initiated by the EU, aimed at reducing exposure to mercury, was triggered on 18 May 2017.

The key provisions of the Minamata Convention (the Convention) are aimed at banning, phasing out or controlling various aspects of the use of mercury. The Convention bans primary mining for mercury, so no new mining for mercury can take place and mercury mines already in operation will be banned after 15 years. The Convention also imposes a number of bans on the use of mercury in products, which will take effect in 2020.

Disappointingly, two of the key areas of mercury exposure, dental amalgam and use of mercury in artisanal and small-scale gold mining, are not subject to a ban.

The Convention also requires states to control mercury air emissions from coal-fired power plants, coal-fired industrial boilers, certain non-ferrous metals production operations, waste incineration and cement production. The use of mercury in manufacturing processes such as chlor-alkali production, vinyl chloride monomer production, and acetaldehyde production must also be reduced or phased out.

Internationally, the Convention will enter into force on 16 August 2017. The first meeting of the Conference of the Parties to the Minamata Convention (COP1) will take place from 24 to 29 September 2017 in Geneva.

The new EU Regulation 2017/852 on mercury was published in the Official Journal of the European Union and will be applicable from 1 January 2018.

For more information, see Heavy metal—exploring measures to reduce exposure to mercury.

ECJ rules on commencement of the application of the Environmental Liability Directive 2004 in relation to damage caused under an earlier national authorisation
Practical Law Environment

The Environmental Liability Directive 2004/35/EC (ELD 2004) is aimed at the prevention and remediation of environmental damage and is based on the ‘polluter pays’ principle. In other words, it aims to ensure that the burden of paying for the prevention and remediation of damage is borne by the polluter, not the taxpayer.

An Austrian court asked the Court of Justice (ECJ) to give a preliminary ruling concerning the interpretation of the ELD 2004 and the Water Framework Directive 2000/60/EC (WFD 2000).

The request was made in proceedings between the competent authorities and the holder of fishing rights (Dr Folk) for a river downstream from a hydroelectric power plant. The competent authorities rejected Dr Folk’s complaint that the power plant caused environmental damage on the basis that the operation of the power plant was covered by an authorisation.

On 1 June 2017, the ECJ decided that:

• ‘Damage’ under Article 17 of the ELD 2004 means damage that occurred after 30 April 2007, when the ELD 2004 came into force, but includes damage that was caused by the operation of a facility authorised before that date.
• The ELD 2004 precludes any national law provision that excludes damage that causes a significant adverse effect on water, merely because the activity is regulated by an authorisation granted under that national law.

For more information, see Case C-529/15, Gert Folk v Landesverwaltungsgericht Steiermark (2017) EUJC and Legal update, Ruling on commencement of the application of the Environmental Liability Directive 2004 in relation to damage caused under an earlier national authorisation (ECJ).
Court interprets statutory requirements in granting marine licence (Powell v Marine Management Organisation)

LexisPSL Environment
In Powell v Marine Management Organisation [2017] EWHC 1491 (Admin), the court confirmed the approach which licensing authorities should take in determining an application for a marine licence under section 69(1) of the Marine and Coastal Access Act 2009 (MCAA 2009). The decision establishes that the ‘need to prevent interference’ with legitimate uses of the sea is not an absolute requirement, and must be weighed against other statutory requirements, such as protection of human health and the environment, according to the particular circumstances.

For more information, see News Analysis, Court interprets statutory requirements in granting marine licence (Powell v Marine Management Organisation).

ECJ rules on biogas trade between Member States and sustainability standards

Practical Law Environment

Article 18 of RED 2009 provides for a mass balance system that allows consignments of raw material or biofuel with differing sustainability characteristics to be mixed. The mass balance system means a system in which ‘sustainability characteristics’ remain assigned to ‘consignments’ of biofuel. A ‘mixture’ can have any form where consignments would normally be in contact, such as in a container, processing or logistical facility or site (defined as a geographical location with precise boundaries within which products can be mixed).

During an action before the Swedish court seeking the annulment of an order requiring certification of sustainability of biogas (a mass balance system) to be carried out in a location defined by clear boundaries, the Swedish court referred the case to the Court of Justice (ECJ) for a preliminary ruling.

On 22 June 2017, the ECJ decided that the Swedish order was in breach of Article 34 of the Treaty of the Functioning of the European Union (TFEU). This was because the effect of the order was that biogas transported through gas interconnectors from Germany to Sweden could not maintain its sustainability certification, lost its eligibility for certain tax reductions, and therefore restricted trade between Member States.

For more information, see Case C-549/15 E.ON Biofor Sverige AB v Statens energimyndighet [2017] EUECJ and Legal update, Court rules on biogas trade between member states and sustainability standards (ECJ).

Paris Agreement – US withdrawal

LexisPSL Environment
Following President Donald Trump’s announcement that the US will withdraw from the Paris Agreement, the United Nations Environment Programme has stated that the decision will not bring to an end the ‘unstoppable effort’. The President’s decision has raised condemnation from both environmental bodies and governments.

Following debate on the US withdrawal, Members of the European Parliament (MEPs) issued a press release on 14 June backing plans for compulsory greenhouse gas cuts under the Paris Agreement. MEPs believe the cuts will help deliver on the EU’s overall target for 2030 on all policies: a 40% cut from 1990 levels.

MEPs say the legislation will make it possible to break down the EU targets into binding, national ones for sectors not covered by the EU carbon market. These include agriculture, transport, building and waste which account for around 60% of the EU’s greenhouse gas emissions. For more information, see MEPs back compulsory greenhouse gas cuts under Paris Agreement.

In a further press release on 23 June, EU leaders have promised to continue the fight against climate change, and have stressed that the Paris Agreement remains the best tool for achieving lasting change. EU leaders also agreed that the deal cannot be renegotiated. For more information, see EU reaffirms commitment to Paris climate deal.

For previous analysis of the US decision and its ramifications, see News Analysis, President Trump and the future of the Paris Agreement.

No recoverable loss resulting from breach of a supply contract for ‘qualifying measures’ under Community Energy Saving Programme (CESP)

Practical Law Environment
In 2009, the government created the Community Energy Saving Programme (CESP) to target households, in specific areas across Great Britain, to improve energy efficiency standards and reduce fuel bills.

CESP required electricity generators to reduce carbon emissions by installing ‘qualifying energy efficiency measures’ in certain households, and it required them to meet reduction targets, expressed in terms of a points score. It also allowed generators to trade points between themselves, so that those on track to meet their targets could transfer points, for consideration, to those who needed them.

On 13 June 2017, the High Court (Commercial Court) decided that IPM Energy Trading Ltd (IPM), an electricity generating company, did not establish any
recoverable loss as a result of the breach of a contract by Carillion Energy Services Ltd (Carillion). Carillion had entered into the contract for the supply of ‘qualifying measures’ to enable IPM to meet its carbon emissions reduction obligations under the Electricity and Gas (Community Energy Saving Programme) Order 2009, SI 2009/1905 (CESP Order). Notwithstanding its admitted breach, there was no deliberate refusal to perform the contract on the part of Carillion.

For more information, see IPM Energy Trading Ltd v Carillion Energy Services Ltd [2017] EWHC 1399 and Legal update, No recoverable loss resulting from breach of a supply contract for “qualifying measures” under Community Energy Saving Programme (CESP) (High Court).

Proposals for sustainable management of Welsh resources published
LexisPSL Environment
The Welsh Government has published a consultation on proposed new regulatory approaches to the sustainable management of the country’s natural resources. Proposals include nature-based solutions and a promotion of the Circular Economy. The deadline for responses on these proposals is 13 September 2017.

For more information, see Proposals for sustainable management of Welsh resources published and News Analysis, Natural resources regulation in Wales—a transformed approach.

Environmental Information Regulations (EIR): name of company prosecuted for pollution incident constitutes environmental information
Practical Law Environment
Yorkshire Water announced that it was prosecuting a company in connection with a water quality and alleged pollution incident at a forthcoming court hearing. The requester asked Yorkshire Water for the company’s name. It refused the request on the basis that the company’s name was not environmental information under the Environmental Information Regulations 2004, SI 2004/3391 (EIR) and, therefore, that the EIR did not place it under a duty to disclose this.

On 9 May 2017, the Information Commissioner (IC) issued a decision notice finding that the name of a company alleged to have been responsible for a water pollution incident was environmental information under the EIR. The IC considered that company’s name was intrinsic to Yorkshire Water’s belief as to who was responsible for the incident so it fell within the definition of ‘environmental information’ in regulation 2(1) of the EIR.

For more information, see Legal update, EIR: Name of company prosecuted for pollution incident constitutes environmental information (IC).

Court considers scope of prior approval where scheme is not ‘permitted development’ (Keenan v Woking BC)
LexisPSL Environment
In Keenan v Woking Borough Council [2017] EWCA Civ 438, the Court of Appeal confirmed the basic principle that development which is not ‘permitted development’ cannot become permitted by default, if the local planning authority does not make a determination on a prior approval application within the relevant 28-day period. The decision is a useful reminder of the purpose and scope of the prior approval provisions in the Town and Country Planning (General Permitted Development) (England) Order 2015, SI 2015/596 (the GPDO 2015). In summary, the principle of whether the development should be permitted is not for consideration in the prior approval procedure.

For more information, see News Analysis, Court considers scope of prior approval where scheme is not ‘permitted development’ (Keenan v Woking BC).
Birdsong has given way to the warning wail of the sirens. Or is it the other way around? Brexit was cast, before the referendum, as the Yeatsian Second Coming of the ‘dirty man of Europe’,1 threatening the EU’s rescue of our birds and our trees. It is now heralded as a ‘once-in-a-generation opportunity’ to make the UK the greenest country.2

Paradoxically, one should agree with both these narratives. No doubt the UK’s tectonic departure from the EU signifies an earthquake for the edifices of environmental protection. However, that brings the hope of ‘building back better’. Three limbs of our environmental health fall to be examined in the post-Brexit prognosis: substantive standards and policies, the governance framework supporting them, and the impact on important environmental actors.

‘Damming’ deregulation
As regards substantive standards and policies, the outlook is grim but uncertain. The foundations of most of our environmental laws have been laid by the EU, and their sturdy footing in EU law has anchored them against unilateral repeal by the UK. Whilst two-thirds3 of these protections are set to survive the initial tremor of Brexit, courtesy of the Great Repeal Bill, hard Brexit means not only that a source of new protections will be lost, but that existing regulations will be shaken from their sure foundations and left exposed to domestic political currents.

However, pre-Brexit environmental law is far from perfect; accordingly, opportunities arise from the occasion and the freedom that Brexit brings to rebuild and renovate. Firstly, under the EU’s Common Agricultural Policy (CAP), subsidies for land kept in an ‘agricultural condition’ provide a €55bn billion perverse incentive for habitat destruction.4 Through its funding for otherwise unviable hill farming, CAP also provides life support for highly destructive practices. Per Monbiot, ‘[a]ll the good things the EU has done for nature are more than counteracted by this bureaucratic perversity.’5 Thus Brexit enables a 180-degree shift from incentivising environmental harm to supporting sustainable farming through better-targeted subsidies.

Even beyond CAP, it should not be assumed that the EU will invariably represent the gold standard for environmental protection. There is scope for the UK to raise the bar. Firstly, the need to secure wide agreement between states can limit the EU’s ambition. Outside the EU, then, the UK will be free to set progressive standards that, in areas subject to harmonisation, would otherwise have been blocked by the vested interests of other Member States. For example, whereas the UK Government aims for all new cars to be electric by 2040, Germany and its auto industry have obstructed the bid to raise vehicle efficiency standards.6 Similarly, the UK will retrieve control over tools like VAT policy that may be deployed to promote sustainable consumerism.

Secondly, even where agreement can be reached between Member States, the myriad legislative participants on the European level means that the EU is slow-moving. Acting unilaterally, the UK will be able to respond more promptly to emerging environmental concerns. Thirdly, even if the EU is an environmental leader today, its future seems less rosy. EU expansion through new, environmentally laggard members is likely to drive standards downwards. Furthermore, under ‘REFIT’, the EU is headed towards deregulation, and Cameron’s ‘new settlement’ for the UK had demanded the removal of red tape. Far from running into the tides of deregulation, the UK might just have escaped them.

In addition, opportunities arise from the fact that Brexit forces a confrontation with the state of the laws it will affect. Firstly, this can catalyse a salutary stock-take of UK environmental protections, revealing areas in need of a re-think. Eloise Scotford, for example, notes opportunities for the exploration of different regulatory models in addressing the notorious failings of air quality regulations.7 With the return of competences from the EU, a reassessment may also stimulate more joined-up approaches to environmental policy. Secondly, from the rubbles of the myriad treaty provisions, regulations, directives and judicial decisions from home and abroad, there is a chance to simplify and consolidate our patchwork of environmental law into a more coherent and accessible whole. Indeed the campaign has already begun for a proud and seminal new ‘Environment Act’.8 Thirdly, such an exercise provides the opportunity to provoke public dialogue about UK
environmental policy, to consolidate in the nation’s culture its commitment to the environment, and lend its corpus of environmental regulations a new degree of public ownership and legitimacy. Therefore, Brexit does dangle numerous conceivable opportunities.

The crux, of course, lies in the gap between conceivable and realistic opportunities. How likely is it that future UK governments will retain existing standards and seize the opportunities for improvement? The odds are distinctly unfavourable. It is improbable that in all the post-Brexit commotion, precious parliamentary time will be spared for environmental improvement. Rather, governments will be keen to save and seduce business in their bid to ‘make a success of Brexit’, with ‘green crap’ making good sacrificial offerings. Outside devolved administrations, those likely to wield the reins seem only too willing. To George Eustice, the Agriculture and Fisheries Minister, the birds and habitats directives are ‘spirit-crushing’. Andrea Leadsom has only too willing. To George Eustice, the Agriculture just make governments more amenable to green improvements. Yet great as the threat is, the environmentalist’s plight is not hopeless. Notwithstanding a hard Brexit, in areas like products regulation, EU standards are likely to be retained since British exporters to the EU will need to meet them anyway. Even beyond internal market matters, the same international law obligations that underlie most EU protections will continue to bind the UK. Even if those obligations are less exacting and easily breached, the UK has more often than not been a leader on environmental matters in the EU. It helped drive the reforms to CAP subsidies and fisheries policy, set the precedent on which the IPPC Directive is based, and has famously outshone EU standards with its 2008 Climate Change Act. Moreover, even among Brexit voters, the polls show healthy public support for strong environmental protections, including the conservation laws that so oppress George Eustice. In fact, he himself has waxed lyrical about the British public’s passion for nature. That, combined with the interest in retaining the UK’s soft power influence post-Brexit and in flaunting examples of what can be done outside the EU, might just make governments more amenable to green dreams and bring some of those theoretical opportunities into play.

**The rubbles of Berlaymont**

Even if the substantive buildings of the environmental acquis will remain standing after the Brexit quake, the roads and power lines that make them so viable – the governance framework that underpins the laws – will most certainly lie in ruins. Firstly, the threat of heavy fines and reputational damage from infraction proceedings operated by the European Commission and the ECJ has been key to enforcing environmental laws against recalcitrant UK governments. In the infamous air quality saga, the Government specifically noted the threat of such proceedings, rather than simply the domestic Supreme Court judgment, as a key driver for reform. Indeed, compliance was planned according to when the Commission might pursue fines. Similar tales of reform spurred by EU enforcement – again tailored to expected timelines for Commission enforcement action – may be told of the UK’s recycling targets, the Bathing Water Directive, and the Aarhus costs regime. The enforcement of targets or ‘outcome duties’ outside the EU poses particular problems, their domestic justiciability being doubtful.

Secondly, EU law also supports the proper application of substantive standards through a broader infrastructure of accountability measures. Member States are widely required to report publicly to the Commission and each other on implementation, to justify failures to comply, and to explain how compliance will be achieved going forwards. The Commission also acts as an integrated check against the improper exploitation of exceptions and derogations from environmental protections, e.g. through the requirement to obtain a Commission opinion prior to undertaking projects in priority conservation areas. These lines of external scrutiny will be blocked by Brexit. Thus ‘taking back control’ also means taking away controls.

Thirdly, the Commission provides access to pooled expertise and spurs implementation through informal ‘networks’ with national regulatory agencies. It uses its standing as a knowledgeable and credible body to persuade national officials into particular actions. Brexit will see these bridges collapse. Therefore, even if most substantive standards are retained, Brexit threatens their practical effectiveness. Faced with the rubbles of this Commission-based governance infrastructure, even the most optimistic environmentalist must feel moved to mourning.

Even here, however, two slices of salve may be found. First, the UK has shown itself capable of constructing similar accountability infrastructure of its own initiative. The ambitious targets of the Climate Change Act 2008 are built on just such foundations. The Act established an independent Committee on Climate Change to report to Parliament on the government’s progress. Section 8 requires detailed annual statements from the government to Parliament.
Moreover, where a carbon budget is not met, the government must report that failure to Parliament, together with proposed compensating measures (section 19). Pulled by the power of precedent, similar frameworks involving Parliament and specialised monitoring bodies may be built in the chasm left by the Commission.

Second, the numerous administrative decisions previously taken by Brussels and so subject to legal challenge only by a highly restricted class of litigants under EU law (generally excluding environmental NGOs) will now be repatriated and thereby opened up to challenge under the more liberal, NGO-friendly domestic rules of standing. Such decisions cover, for example, pesticide approvals and infrastructure funding decisions. If some channels of scrutiny will become blocked, some walls will also be shook down.

Further casualties
The tremors of Brexit will also be felt by particular groups contributing to the environmental effort. The first casualties are eco-friendly businesses and investors. Policy stability is crucial to foster the confidence necessary for long-term business changes and investments. Whereas the size of the EU and its consequent immunity from sudden shifts has provided such stability, environmental policies post-Brexit will again become dependent on the fluctuating preferences of the government of the day. Moreover, the UK is among the largest recipients of EU research funding. Given the Leave campaign’s spending promises, it is unlikely that savings from Brexit will be earmarked for such purposes. Similar resource concerns threaten the capacity of domestic regulatory bodies to fill the boots of the Commission.

Conclusion
It is clear, then, that the Brexit earthquake is a grave threat for the environment. The high standards set by the EU will be uprooted and exposed to the sweep of domestic deregulatory currents. The supporting governance infrastructure provided by EU-level monitoring and enforcement will be reduced to rubble, diluting the practical impact of surviving standards.

Yet it also clear that the quake will not unearth the ‘dirty man’ of Europe from his grave. Even if any grand ambitions of a shining new Environment Act defy the realities of post-Brexit politics, the UK has become in many respects a progressive green voice. The future, then, lies somewhere between Brexitiocene extinction and Brexitopia. Brexit is both threat and opportunity.

Nevertheless, the prognosis resoundingly justifies the environmental sector’s largely anti-Brexit campaign in the referendum. The inclinations of the leading contenders for government and the post-Brexit pressures to prioritise the economy make it most probable that there will be significant environmental casualties, and that the imaginable opportunities will not, at least in the short-term, cross the cleft between theory and reality.

However, the very prospects of crossing that divide may turn on painting a different picture. The hard lesson of climate change communications – and indeed the Brexit referendum – is that doomsday nightmares are less compelling in moving the masses than positive dreams. Moreover, if the expectation is that Brexit means deregulation, future moves to unpick particular protections will pass by as ‘business as usual’, as a fait accompli in light of the referendum, instead of provoking indignation. Indeed, the negative narrative plays into the suggestion that the referendum has given the mandate for such deregulation. Furthermore, people – and so presumably nations – often act according to their sense of identity. They who are told they are generous are likely to donate more. The siren warnings of the ‘dirty man’ may therefore be counterproductive, and frighten off the birds.

It is convenient, then, that Brexit is a unique moment to redefine ourselves as a nation, to forge a new green British identity. Moreover, whatever the realistic prognosis for the future, from the legacy of the Climate Change Act and the polls of public support for nature protections, the environmentalist has the building blocks for a compelling alternative narrative of British leadership on the environment. Therefore, a story of Brexit as opportunity may just become a truthful lie. As they say, ‘never let a good crisis go to waste.’

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Endnotes
1 John Vidal, ‘Brexit would return Britain to being ‘dirty man of Europe’”, The Guardian (3 February 2016).
2 Ian Johnston, ‘145 MPs pledge to make UK greenest country in world after Brexit; The Independent, (8 December 2016).
3 ‘Government may not transpose third of EU environmental law’, Environment Analyst (26 October 2016).
4 George Monbiot, Written Evidence to Parliament’s inquiry on ‘The Future of the Natural Environment after the EU Referendum’ (September 2016).
5 Ibid.
8 Greener UK Coalition Manifesto 2017.
14 IEEP, *The potential policy and environmental consequences for the UK*, IEEP 2016, pp. 82, 86.
18 HL (n 11), [68]-[71].
19 Ibid.
20 Ibid.
23 Habitats Directive Art.6(4).
27 HL (n 11), [31]-[36].
28 CIWEM (n 13), p.7.
At a glance:
- The UK government failed to comply with nitrogen dioxide levels set in the Air Quality Directive 2008/50/EC and ClientEarth brought a claim, ending in 2015 with rulings that an air quality plan (AQP) must contain effective, proportionate and scientifically feasible measures to address specific emissions problems.
- In further litigation, ClientEarth then challenged the lawfulness of the AQP stating that it did not comply with EU or domestic legislation.
- In April 2017, the government applied to postpone the date for publishing the AQP on account of Purdah restrictions, but this application was refused.
- At the end of May 2017, ClientEarth challenged the government’s consultation on the AQP but this claim was rejected by the courts as being premature.
- The conclusions reached by the courts in the ClientEarth cases are more wide-ranging than would traditionally be expected in judicial review litigation, throwing into sharp focus the limits EU law imposes on action that can be taken by the UK government.

The ClientEarth litigation arises out of the admitted and continuing failure by the United Kingdom since 2010 to secure compliance in certain zones with the limits for nitrogen dioxide levels set by European law, under Directive 2008/50/EC on air quality (the Directive). The Directive sets legally binding limit values for nitrogen dioxide emissions and requires that, when limits are exceeded, air quality plans are published aimed at reducing such emissions to achieve the limit values.

Article 23 of the Directive provides that ‘in the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible.’

This is echoed in Regulation 26 of the Air Quality Standards Regulations 2010, which provides that ‘the air quality plan must include measures intended to ensure compliance with any relevant limit value within the shortest possible time’.

The first round of the litigation ended in 2015 with rulings that the air quality plan must contain effective, proportionate and scientifically feasible measures to address the specific emissions problems as swiftly as possible, subject to judicial review by the domestic courts. A failure by a Member State to do so would result in the infringement also of Article 23(1) of the Directive, alongside Article 4(3) TEU. The Supreme Court ordered that the Secretary of State had to prepare new air quality plans under Article 23(1), in accordance with a defined timetable, to end with delivery of the revised plans to the Commission not later than 31 December 2015, and that there should be provision for liberty to apply to the Administrative Court for variation of the timetable, or for determination of any other legal issues which may arise between the parties in the course of preparation of the plans.

In R (ClientEarth (No 2)) v SSEFRA [2016] EWHC 2740 (Admin), the 2015 Air Quality Plan (AQP), which followed the Supreme Court’s decision, was challenged. Relying on EU law, and the domestic regulations which give effect to it, ClientEarth challenged the lawfulness of the AQP, seeking a declaration that it failed to comply with Article 23(1) of the Directive, and Regulation 26(2) of the Air Quality Standards Regulations 2010, and an order quashing the AQP.

There were essentially two points advanced. First, that it was unlawful to publish a plan which did not keep periods of exceedance as short as possible. Secondly, that considerations of cost, political sensitivity and administrative difficulties should be secondary considerations. ClientEarth argued that the Directive and regulations required the Secretary of State to adopt measures which maximise the prospect of achieving compliance by the soonest possible date. Garnham J held that the Government’s discretion under Article 23 was narrow and greatly constrained. He held that the Government was obliged to ensure that the plans are devised in such a way as to meet the limit value in the shortest possible time and that it must select measures which will be effective in achieving that object.

On cost, Garnham J said:

‘In my judgement, there can be no objection to a Member State having regard to cost when choosing between two equally effective measures, or when deciding which organ of government...’
(whether a department of central government or a local government authority) should pay. But I reject any suggestion that the state can have any regard to cost in fixing the target date for compliance or in determining the route by which the compliance can be achieved where one route produces results quicker than another. In those respects the determining consideration has to be the efficacy of the measure in question and not their cost. That, it seems to me, flows inevitably from the requirements in the Article to keep the exceedance period as short as possible.’

In short, it was held that, on its proper construction, Article 23 of the Directive meant that the Secretary of State was required to seek to achieve compliance of the Directive by the soonest date possible, that she must choose a route to that objective which reduced nitrogen dioxide as quickly as possible, and that she must take steps which meant meeting the values prescribed by the Directive were not just possible but likely.

As to the contents of the plan, the Judge concluded that measures could be introduced sooner than was being proposed and that the plan should have been aimed at achieving compliance in the shortest possible time, regardless of administrative inconvenience or the costs of making the necessary investigations. He said:

‘the Secretary of State fell into error in fixing, for what was little more than administrative convenience, on a projected compliance date of 2020 (and 2025 for London) and thereby deprived herself of the opportunity to discover what was necessary to effect compliance by some earlier date and whether a faster route to lower emissions might be devised’.

On criticisms of the modelling, Garnham J concluded:

‘by the time the plan was introduced the assumptions underlying the Secretary of State’s assessment of the extent of likely future noncompliance had already been shown to be markedly optimistic. In my judgement, the AQP did not identify measures which would ensure that the exceedance period would be kept as short as possible; instead it identified measures which, if very optimistic forecasts happened to be proved right and emerging data happened to be wrong, might achieve compliance.’

In a subsequent judgment dealing with relief, Garnham J ordered that the draft modified AQP, accompanied by the relevant technical information, including details of the modelling techniques and assumptions employed, should be published by 24 April 2017. The Judge said that although consultation is important, where public health is at stake it may be necessary to shorten substantially the period for such consultation. He concluded that the date by which the final plan should be published should deliberately be made demanding, given that the need for an early report is paramount.

On the degree of oversight that the court should retain over the process, Garnham J accepted that it is normally not part of the function of the Administrative Court to monitor, regulate or police the performance of statutory functions on a continuing basis. He went on, however, to say that the particular nature of this case, the fact that it turns on a European Directive, and the precedent set by the Supreme Court in the first ClientEarth case, lead him to conclude that there should be liberty to apply on notice for further or additional relief for determination of any other legal issues which may arise in the course of preparation of a modified plan.

The Judge rejected the suggestion by ClientEarth that the liberty to apply provision should encompass permission to challenge a new plan. He said that, if there were further complaints about a new plan, resolution of that issue would plainly be a matter of great urgency, but that it would not be appropriate to evade, by means of an extended liberty to apply, the usual and entirely healthy discipline that is provided by the Administrative Court procedures in managing and regulating the grant of judicial review.

In April 2017, the SSEFRA applied to postpone the date for publishing the draft plan from 24 April to 9 May 2017 on account of Purdah restrictions in place as a result of the forthcoming local elections. Following the announcement of the general election, a fresh application was made to postpone the date to 30 June 2017. ClientEarth did not oppose the former postponement, on the basis that local authorities were important consultees on the draft and the consultation should not commence until new councillors were in post. It did, however, oppose the postponement for the general election period.

Purdah was described by the Judge – Garnham J again – as the period before an election in which controversial decisions should not be taken, which serves an important function in protecting the electoral process from interference, intended or accidental, by those holding elected public office. He noted, however, that it was not a principle of law, does not affect the legal duties of Ministers and does not provide a defence for a failure to comply with an order of the court.

Garnham J accepted that the publication of the draft AQP would risk influencing the general election because, in the constituencies where the proposals might bite, the AQP will inevitably be controversial.
also accepted that the general principles set out in the Cabinet Office Guidance did apply in the present case and in general terms did support the Secretary of State’s application. The Judge concluded, however, that there were exceptional circumstances in this case, including that there was a subsisting duty under both domestic and EU law to achieve compliance with the law by the soonest possible date and that the steps were necessary in order to safeguard public health:

‘For the reasons given in my November judgment, the continued failure of the government to comply with the Directive and the Regulations constitutes a significant threat to public health. According to an analysis conducted by the Department itself, the effects of exposure to nitrogen dioxide on mortality is equivalent to 23,500 deaths annually in the United Kingdom. That is, on average, more than 64 deaths each day of the year. Other studies suggest even higher figures but I am content to work for present purposes on Defra’s own figures. That alone can properly be said to constitute circumstances which are wholly exceptional and make immediate publication of the plan essential.’

At the end of May 2017, it was announced that ClientEarth was challenging the consultation on the draft plan on the basis that the consultation does not include measures which the Government’s technical data shows are the best way to bring down air pollution as soon as possible. Judgment was given on this by Garnham J on 5 July 2017, rejecting the claim as being premature. The final air quality plan is due to be published at the end of July 2017, and it is likely that ClientEarth will challenge that as well. Seen in light of the outcome of the preceding litigation, that challenge might well succeed.

The question arises, however, where this litigation will ultimately lead. The conclusions reached by the courts in the ClientEarth cases are in some senses somewhat surprising. The effects of the judgments are more wide-ranging than would traditionally be expected in judicial review litigation. They throw into sharp focus the limits EU law imposes on action that can be taken by the UK government. They arguably play into the hands of those who argued for Brexit in order to ‘take back control’. Indeed, the absolute nature of the courts’ approach to the Directive, and the virtual exclusion of policy and financial constraints, provides an illustration of why some people voted for Brexit and to ‘take back control’.

The Department for Exiting the European Union recently published a factsheet on environmental protections, which said that leaving the EU would enable the government to ‘take control of our environmental legislation again’. After the Repeal Bill is enacted, there will be a process of setting policies to provide environmental protection ‘tailored to the needs of our country’, which support a ‘strong economy’. It seems possible that, by drawing attention to how strict and inflexible the air quality regime derived from EU law is, the litigation will in the longer-term lead to changes in the law which reduce air quality protections.

Richard Honey practises as a barrister at Francis Taylor Building in the fields of public law and environmental law. He is called to the Bars of England and Wales and Northern Ireland and is a member of the Attorney General’s A Panel of junior counsel to the Crown.

Endnotes
2 R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs, [2015] UKSC 28
4 See: [2017] EWHC B12 (Admin), 27.4.17, Garnham J.
Sustainable cities
Heralding the ‘New Urban Agenda’ – what could it mean for sustainable cities of the future?

Emma Lui, Lexis Nexis.

At a glance:
• Outlines the UN Habitat’s ‘New Urban Agenda’ (NUA).
• Argues why its soft law status benefits what it aims to achieve.
• Briefly explores its relationship to the Sustainable Development Goals (SDGs) and climate change targets.
• Examines how the NUA can help shape sustainable cities of the future.

Let’s begin with some big numbers. According to recent data from the United Nations (UN), around 54% of the world’s 7.3 billion people now reside in urban areas. This is projected to increase to 66% by 2050.1 Taking into consideration that the world population is anticipated to reach 9.8 billion in 2050, this means that by the midpoint of this century nearly 6.5 billion of us will be city dwellers.2

Such numbers will clearly put unprecedented pressures upon our cities. Social infrastructure utilities and amenities will need to adapt to meet these growing needs. This will in turn have knock-on impacts upon our energy demands and food supply chains. Add into the equation international climate change targets to hold global warming to ‘well below’ 2°C and to ‘pursue efforts’ to limit the increase to 1.5°C before the end of this century,3 as well as regional decarbonisation goals, and it is undeniable that cities will need to comprehensively embed sustainability into all considerations of their design, construction and everyday usage to address these complex challenges.

This is where the NUA could play a potentially significant role.

What is the NUA?
The NUA was formally adopted on 20 October 2016 at the conclusion of the UN Conference on Housing and Sustainable Urban Development (also known as Habitat III) in Quito, Ecuador, and endorsed by the UN General Assembly (UNGA) later that year.4 Over 30,000 people from 167 countries participated in Habitat III and in shaping the final NUA. It is an ‘action-oriented document which sets global standards of achievement in sustainable urban development, rethinking the way we build, manage, and live in cities’.5 It falls within the UN-Habitats programme whose mandate is to address the issues of urban growth and promote socially and environmentally sustainable human settlements development.

The NUA consists of three interlinked underpinning broad principles for the planning, construction, development, management and improvement of urban areas:
• Leave no one behind, ensure urban equity and eradicate poverty.
• Ensure sustainable and inclusive urban prosperity and opportunities for all.
• Ensure environmental sustainability, ecological protection and urban resilience to climate change.

The accompanying Quito Implementation Plan also outlines a range of voluntary commitments by stakeholder and partner groups (e.g. national and local governments, civil society organisations and businesses) that aim to aid and strengthen implementation of the outcomes of Habitat III and the NUA.

The Habitat III website explains that initiatives under the Quito Implementation Plan:
• should be specific, replicable, action-oriented, funded and innovative;
• must be monitored and subject to reporting on a regular basis;
• should demonstrate the capacity to deliver;
• should be led by partners able to showcase implementation of existing commitments (sufficient level of maturity);
• for co-operative international initiatives, they must observe inclusiveness (e.g. balance regional representation).

Notwithstanding that these pledges are not enforceable; the Quito Implementation Platform set up as a result of Habitat III is a welcome development. It provides an online platform where stakeholders and partners can submit or join voluntary commitments, be linked up with those demonstrating the same interests, and thus buttress the values of collaboration, participation and inclusivity which were present throughout Habitat III and the NUA itself. Furthermore, it can serve as a digital tool to monitor the implementation of the NUA by allowing members of
the international community to scrutinise whether those who volunteer commitments actually go on to carry them out.

**Does the NUA matter?**

Although neither the NUA nor the Quito Implementation Plan is legally binding, its ‘soft law’ status could actually prove beneficial to what it embodies and strives to achieve. Birnie, Boyle and Redgwell point out that it is notable that many UN Environmental Programme (UNEP) non-binding principles and codes form the genuses of new regulatory treaties. Additionally, Scotford notes that one of the most appealing characteristics of ‘soft’ law instruments containing environmental principles appealing for asserting the fundamental, global legal importance of environmental principles are the perceived ethical values they reflect.7

By recognising that cities can also be a source of sustainable solutions, instead of simply being the cause of unsustainable problems, the NUA offers a positive blueprint for action and hope. It enmeshes combatting climate change and evolving environmental threats with the economic benefits and civic functions of a city, positioning itself as an ‘urban paradigm shift’ grounded in the integrated and indivisible dimensions of sustainable development.8 This is a bold statement to make but one that is made possible by being soft law.

**1 Evolution of the international community’s approach**

Firstly, the NUA marks another progression in the international community’s position on sustainable development and its actualisation. Sustainable development is a concept involving social, economic, environmental and intergenerational interests9 which has long had a widespread endorsement among the international community as chronicled by the Stockholm Declaration 1972,10 the Rio Declaration 199211, the 2002 Johannesburg Declaration,12 the World Summit Outcome 2005,13 and the Rio+20 ‘The Future We Want’ Outcome 2012.14 By containing explicit references to sustainable development, the NUA illustrates the international community’s willingness to go beyond simply restating support for the concept on a macro-level to driving advancements on attaining it on meso- and micro-levels.

Additionally, there is a shift in attitude toward timescales in the NUA. 2050 is not that far away in terms of infrastructure financing, planning, and adapting cities to provide for the world citizens of the future. Intergenerational equity, one of the threads of sustainable development, demands the international community to consider realistically how these future citizens will thrive and survive. The NUA therefore can be seen as a measure through which the international community is taking a collective stance on responding to intergenerational equity issues.

**2 Agreement of agreements**

Secondly, the NUA is undoubtedly a compromise between the many different countries involved in its negotiation, and accommodates a spectrum of political views and financial resources. One of the benefits of soft law is that in situations where there is a cauldron of dissent, it reduces the possibility of discord bubbling over the process and ending up with an unhelpful ‘agreement to disagree’. This is because soft law guidelines ‘manifest general consent to certain basic principles and detailed standards that are acceptable and practicable for both developed and developing countries’.15 By omitting the prospect of setting inflexible targets or ‘hard law’ enforcement mechanisms, it avoids the potentially contentious discussions in setting them, thus ensuring the focus of the parties and discussions are on reaching agreement on what the important outcomes and goals even are.

Reaching an agreement is an achievement in itself when there are a multitude of groups and complex agendas at stake, as shown in the Paris Agreement negotiations.16 In the NUA, it is a cause for cheer that the parties involved acknowledge and endorse the multifaceted potential of cities to solve the challenges of an increasing population, pressure on natural resources and climate change impacts. It is further cause for cheer that those parties recognise the urgency in taking steps to act now.

**3 Informing, not compelling**

Thirdly, the NUA acknowledges its limitations arising from its soft law status. In the foreword to the printed NUA, the Secretary-General of Habitat III articulates the document as being a ‘resource for every level of government, from national to local; for civil society organizations; the private sector; constituent groups; and for all who call the urban spaces of the world “home”’.17 The NUA is therefore meant as a reference document, an adaptable exemplar of sustainable urbanisation principles and not as a rigid black letter scheme. In the context of city planning and design where there are various factors, (e.g. geographical location, climate, cultural heritage etc), it is more sensible to view the NUA as an accessible aid in assessing and responding to those factors, rather than being an unwieldy mass of obligations needing to be met.

There is self-awareness as to who the true protagonists are in delivering the NUA’s aims: governments. The Habitat III website caveats that commitments made under the Quito Implementation Plan are not a substitute for government responsibilities and inter-governmentally agreed commitments.18 The NUA is meant as an
and Singh argue that ‘the urban transition must be inclusive’ to fully realise the potential of sustainable urbanisation.20 This refers to drawing strongly on the NUA is specifically linked to the 11th SDG on economic growth, industry, innovation and infrastructure, and responsible consumption and production. It is therefore clear that the SDGs cannot be delivered without successful sustainable urban development.

Although urbanisation is increasingly recognised as a promising vehicle through which to achieve major aspects of the 2030 Agenda; McGranahan, Schensul and Singh argue that ‘the urban transition must be inclusive’ to fully realise the potential of sustainable urbanisation.20 This refers to drawing strongly on human rights-based approaches to engage a balance of stakeholders, for example, welcoming migrants and accommodating disadvantaged inhabitants, so as to help realise the 10th SDG of reducing inequality. Integrating inclusivity through the NUA may therefore have governance implications. Localism and public participation are essential to nurture a sense of rights-ownership and responsibility toward the communities and structures in which we live, and in turn, to better care for those people and places in the present and the longer-term.

On a domestic aside, a recent House of Commons Environmental Audit Committee report criticised the government’s approach in failing to set out a clear plan in implementing or promoting the SDGs.21 There is still much to be done in promoting the SDGs into public awareness or private sector practice, but the NUA could provide a useful gateway into starting the conversation and demonstrating the tangible benefits of sustainable development in an urban environment.

Another keystone in tackling climate change
The Quito Implementation Plan declares the commitment of the parties to promoting international, national, subnational and local climate action, particularly supporting building resilience and greenhouse gas (GHG) emissions reduction measures ‘consistent with the goals of the Paris Agreement.’22

As cities expand and pursue economic growth, GHG emissions produced will also invariably increase. Actions to tackle emissions have already been devised in strategies such as the regional EU 2030 energy strategy which aims for 40% cut in GHG emissions compared to 1990 levels by 2030, and the domestic Climate Change Act 2008 to reduce GHGs by at least 80% of 1990 levels by 2050.

However the NUA focusses on more than emissions in the role of cities in tackling climate change. It is unequivocal in communicating that the way cities are planned, financed, developed, built, governed and managed has a direct impact on sustainability and resilience well beyond urban boundaries.23 It supports the medium to long-term adaptation planning process, as well as city-level assessments of climate vulnerability and impact, to inform adaptation plans, policies, programmes and actions that build the resilience of urban inhabitants. This includes the use of ecosystem-based adaptation.24 Furthermore, it strongly advocates integrating disaster risk reduction and climate change adaptation and mitigation considerations and measures into a wider inclusive age and gender-responsive urban and territorial development and planning processes.25 Thus, the NUA carefully threads climate action with societal equality, social inclusion, economic effectiveness and environmental protection, and thereby fleshes out the practicalities of what sustainable urbanisation really means.

Conclusion
The NUA could be easily dismissed as an instrument with a benevolent bark but no legal bite. However its strong overt ties to binding goals in the SDGs and the Paris Agreement heavily underscore its significance, despite the lack of practical advice about how the NUA should be carried out and who should oversee its implementation.26 Its holistic approach to sustainability, especially in urban planning, could help shape sustainable cities and societies of the future in becoming more inclusive, equitable, and resilient.

There is a critical finite time period in which to deliver the SDGs, as well as to prepare for the consequences of rapid urbanisation and climate change impacts. The NUA is a timely illustration that these interconnected challenges are not just for politicians, scientists and lawyers to solve, but those involved in urban development also have a crucial role to play. The NUA provides all these stakeholders with a positive plan –

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they simply need to muster the conviction to work together to put it into action, and soon.

Endnotes
4 UNGA Res 71/256 (23 December 2016) UN Doc A/RES/71/256.
7 E Scotford, Environmental Principles and the Evolution of Environmental Law (Hart Publishing 2017) 75.
8 (n 4) para 24.
10 UN Doc A/CONF. 48/14
12 UN Doc A/CONF.199/20.
13 UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1.
15 (n 6) 37.
At a glance

- UKELA has a Wild Law Special Interest Group that meets regularly.
- A wild law view on law and governance is holistic and based on principles of ecology.
- Nature is placed at the centre of law-making with enforceable rights and an identity in law.
- The 2010 Universal Declaration project proposes a list of rights for all beings.
- Wild law forms part of the United Nations Programme on Harmony with Nature.

One of the leading lawyers’ organisations in the UK on matters relating to environmental law is the United Kingdom Environmental Law Association, or UKELA for short. It is a registered charity and limited company whose objects include ‘promoting, for the benefit of the public generally, the enhancement and conservation of the environment in the UK and advancing the education of the public in all matters relating to the development, teaching, application and practice of law relating to the environment’.1

UKELA takes an interest in all aspects of environmental law, and it has working parties on many topics, as well as regional groups and special interest groups. Among these is the Wild Law Special Interest Group.2 It is a group that has been in existence for over a decade and it comprises lawyers, but also non-lawyers, who take an interest in the outdoors, nature, wilderness and wild land management. The term ‘wild law’ derives from a book written by Cormac Cullinan, entitled Wild Law: A Manifesto for Earth Justice (2002, 2011). It seeks to describe an approach to law and governance that is holistic and based on principles of ecology, on the view that all life is interconnected, and human beings are part of a greater whole regulated by nature. The role of law should be to adapt and fit in within this greater whole. Current systems of law and governance place human beings at the centre, and nature is treated as a form of property for exploitation. The wild law view is that nature should not only be placed at the centre of law-making and governance, but should also have enforceable rights and an identity in law.

Over the years the members of the Wild Law Special Interest Group have met together for a weekend of discussions, site-visits and networking. The meetings are held annually in late May over a holiday weekend and in different locations, generally alternating between England and Scotland, at a youth hostel that can be reasonably accessed by train from any part of the UK. In 2016 the meeting took place at the youth hostel at Honister Pass in the Lake District. It was a location that provided direct experience of wilder land on foot and in a visit to learn about the rewilding work of the Wild Ennerdale Partnership.3 If John Muir Trust (JMT) takes on management at Helvellyn, their work nearby will be of undoubted interest.

In 2017 the Wild Law Special Interest Group chose to meet at the youth hostel in Glen Nevis, located beside the start of the footpath up Ben Nevis. The meeting was planned to coincide with the Annual General Meeting of the JMT in Fort William and to permit the members of the Wild Law Special Interest Group to be present and meet with JMT members. The plan worked well, and in addition to tramping the hills and valleys under benevolent weather conditions, the Wild Law Special Interest Group passed a very enjoyable and successful Saturday evening networking with JMT members and learning about Ben Nevis first hand from the dedicated persons of JMT and the Nevis Landscape Partnership4 who work on the mountain and gave an excellent presentation on it to the assembly. The evening concluded with questions and answers. The wild lawyers were asked about their views on legal aspects, and in reply they asked a simple question: does Ben Nevis have personality? This was linked to a lawyerly reflection that the group were pondering on the merits of legal personality for aspects of nature. What about Ben Nevis as candidate?

On the question of whether Ben Nevis had personality, the answer given by those working closely with the mountain was eloquently affirmative, and a deep sympathy and understanding of the mountain was again demonstrated. The massive features of the mountain, its weather conditions, its steep inaccessible northern corries that had earlier been described so well in speech and film, and the rare plants growing in the crevices, testified to personality. The wild lawyers as a group came away with the feeling that the question of personality had been answered to our satisfaction. Like a physical person the mountain has mass, indeed huge mass. It has moods, as all those who live with it know, usually linked to season and weather. It gives freely and...
generously, as walkers to the summit can attest, but the gifts come at a price for the careless, inattentive or merely unfortunate when accidents happen.

Yet there is another side that is rarely asked or thought about by the public: does the mountain have needs? Is it dependent on others? Here, those who live and work with the mountain know that it does. Many feet wear down the hillside, tread down on plants, create erosion, and cause damage. Too many visitors can frighten away wild animals whose home is the mountain. Leaving litter can kill animals that think it food. These needs are recognised by JMT and Nevis Landscape Partnership who are active in addressing them.

The question of needs is one that agitates at the consciousness of wild lawyers, concerned with the damage we have wreaked on so many habitats. Nature in all its forms has needs, and the Wild Lawyers feel that these needs are not receiving enough attention. We read the statistics of decline in species, loss of wilderness, loss of biodiversity, climate change, acidification of the seas, flooding, etc., and we ask ourselves whether this is all inevitable. The annual weekends allow us to meet, exchange information and see for ourselves what is happening in some of the wildest parts of the country, together with ways to restore damaged ecosystems and bring back lost life.

In the course of our discussions, we wild lawyers ask ourselves about the role of law and the rules and methods that have been invented with respect to nature. We ask ourselves whether nature is just an object to be used and abused as part of property law, or whether it has inherent rights, an inherent dignity, an inherent personality, and whether it should have legal personality: nature as subject and not solely as object. We learn about the many activities to conserve and protect that have been undertaken for decades by many groups, bodies and organisations, but we feel that more is needed. We feel that basic assumptions and attitudes throughout our society need to be rethought. What if we imagine nature as being placed at the centre of law-making?

In 2010, on 22 April, the day designated by the United Nations as ‘International Mother Earth Day’ the World People’s Conference on Climate Change and the Rights of Mother Earth in Cochabamba in Bolivia made a ‘Peoples Agreement’. In this agreement they proposed a project for a Universal Declaration of the Rights of Mother Earth. The text proposes for Mother Earth and all beings of which she is composed the following rights: to life and to exist, to be respected, to regenerate and continue vital cycles, to regenerate bio-capacity, to maintain identity and integrity, water as a source of life, clean air, integral health, free from contamination, pollution and toxic or radioactive waste, and more… And there are corresponding duties for us humans. The People’s Agreement is one dimension of activity underway. Another is the United Nations Programme on Harmony with Nature with a network of experts and an Interactive Dialogue of the General Assembly, held most recently on 21 April 2017. Thus, it is not just with respect to climate change that the United Nations is active: the picture goes much wider. These actions are all grounds for optimism, but what matters is what happens on the ground, in the water and in the air. In that respect it is very important to consider the rules of law and practice that influence the day-to-day decisions that are made in the management of land, water and air.

The concept of legal personality is an old and well-established one in our legal systems. A physical person is a subject of law, with rights and duties, able to act and organise his or her affairs in ways that suit. Through the law we protect and defend our interests, and we are limited from encroaching on the rights of others. However, rights and duties attaching to physical persons have been extended to entities that do not have a physical existence as such. These are ‘legal persons’, created by rules of law and given their own rights and duties. The concept of legal personality allows an organisation to own land and buildings, have a bank account and undertake all sorts of activities. As a legal person it is different from the persons who manage and operate it. It acts through authorised representatives who are given the powers to act on its behalf.

However, if we turn to nature, we find that it has no ‘money’. It has no ‘personality’ in law and so cannot go to court to defend its interests. Nature is something that is owned, leased, and used (or abused) by physical and legal persons. Are its interests respected? Are its needs respected? Wild lawyers talk about law as being ‘anthropocentric’, human-centred. They talk about the ‘anthroposphere’. We wonder what things might be like if nature was made a subject of law and given rights, like a corporate legal person. Could the idea be practical? How might it work? Recently precedents have been set as regards conferring rights on an aspect of nature. In New Zealand an agreement has been entered into to recognise the Whanganui River as a person in law, by means of a legislative act, the ‘Te Awa Tupua (Whanganui River Claims Settlement) Act 2017’. Other rivers have been linked to the concept of granting legal rights as human beings, notably the Ganges and Yamuna rivers, mainly because of the intensity of pollution problems and failure to resolve them. The idea is being explored by wild lawyers within the context of the UK, but it is too early to offer any views as regards the practicability.

So what about Ben Nevis as a legal person? Let us imagine a scenario. A legal document is created that recognises and gives voice to its personality. It appoints a group of humans to represent its interests.
and act on its behalf as legal guardians, just as unborn children, very young children, sick and mentally incapacitated persons unable to manage their affairs may have persons to act for them. The needs of the mountain to a healthy ecology can be defended. Such a scenario does imply new relationships between owners, leaseholders and users of the mountain, and these need to be negotiated, but there is a change in the balance of power in favour of the needs and interests of the mountain. It is this shift in the balance which might open new possibilities for looking afresh at the whole ecology, and for rethinking strategies in respect of our human relationships with our natural surroundings. But it is important to emphasise that the concept of legal personality for an ecosystem must also include within it the existence and lives of human beings who have contributed so actively to it in the past. For we humans are also part of ‘wildness’. The concept of ‘legal personality’ for nature thus reflects ‘evolution’ rather than ‘revolution’, to provide another tool for fine-tuning the ways we work towards long-term harmony with nature, working with, and involving, local communities.

So, these are some of the things that we wild lawyers think and talk about at our weekend meetings. We are not dogmatic, deterministic or fanatic, despite the name we give ourselves. We are searching for new paths, founded in ecological principles. We are searching for a new and more sustainable relationship with nature expressed through law. Our meeting with the members of the JMT and the Nevis Landscape Partnership helped us to move our thinking a notch further on. We will continue to collaborate and exchange ideas. We thank both organisations for a wonderful evening and for the friendship and sympathy of a shared cause.

And lastly, because this report is after all written by a lawyer, it is necessary to add the requisite clause of disclaimer that this article is purely personal and engages the liability of no one other than its author.

Colin Robertson studied law at Aberdeen University, graduating in 1975, where he became interested in environmental law. He apprenticed as solicitor in private practice and has been a member of the Law Society of Scotland since then. Between 1979 and 1991 he was in Scottish government legal service, undertaking a wide range of legal work, which included two years’ detachment to the European Commission Legal Service, a spell in Treasury Solicitors in London on EU-related work and participation in the Hague Conference on Private International Law on Succession law. In 1990 he passed the EU Court of Justice legal translator competition, and after a couple of years as legal translator at the Court moved to Brussels and the Legal Service of the Council of the EU as legal-linguistic reviser, from 1993 to 2013. There he worked on EU treaties, regulations, directives, etc in relation to English-language texts. He participated in providing training and guidance on EU legislative drafting. He has published numerous articles on EU legal language, as well as a book: Multilingual Law. A Framework for Analysis and Understanding (2016, Routledge). Since retiring, he has revived his interest in environmental law and with his spouse Michèle is currently researching the language of wildlaw, earthlaw and rights of nature as concepts for law-making. In 2016 he was nominated as expert with the United Nations Harmony with Nature Programme.

Endnotes
1 UKELA, <www.ukela.org>
2 UKELA, wild law, <www.ukela.org/wild-law>
3 Wild Ennerdale, <www.wildennerdale.co.uk>
4 Nevis Landscape, <www.nevislandscape.co.uk>
6 World People’s Conference on Climate Change and the Rights of Mother Earth, <https://pwccc.wordpress.com/support>
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