Welcome to the first edition of elaw for 2016.

This issue contains exciting news about UKELA’s re-branding, important news about work on UKELA’s revised strategy for 2016 to 2020, and details of this year’s focus on international issues. So don’t miss our news section or Stephen Sykes’ Words from the Chair.

I would also like to welcome to UKELA’s elaw Executive Editorial Board, three new Editorial Assistants:

- Jessica Allen, Law with French and French Law student at the University of Nottingham;
- Ben Christman, PhD candidate at Queen’s University Belfast, School of Law; and
- Lewis Hadler, LLB Graduate, and Paralegal at Richard Buxton.

Jessica, Ben and Lewis have kindly volunteered to help deliver elaw. They will assist with managing the elaw email account, liaising with contributors, pulling together the initial draft of elaw, and doing some initial editing. We are very grateful for their time.

For those of you who missed last year’s Garner Lecture, with thanks to Lawtext, we have reproduced James Thornton’s inspiring lecture “Can we catch up? How the UK is falling behind on environmental law”.

We have also reproduced, with thanks to Robert McCracken QC, his opinion on “Clean Air in London: Air Quality Directive 2008/50/EC and Planning Opinion of Robert McCracken QC”.

Finally, for an insider’s view into the process and outcomes of COP21, don’t miss the editorial piece Paris: the City of Light.

Best wishes,

Hayley Tam
UKELA Trustee & elaw editor
elaw@ukela.org
Words from the Chair
2016 – Our International Year

UKELA’s activities – 30-plus lectures and seminars held annually – always centre around the needs and interests of our 1,400 members. This year, some of our activities will have a strong international dimension.

International environmental issues are, of course, never far from our sights at UKELA. We know pollution does not respect international borders. It has been estimated that a third of the UK’s air pollution – responsible for 50,000 early deaths a year in the UK1 – comes from the emissions of other countries. Some 1.2m early deaths in China2 are caused by air pollution.

We only have to consider the vital significance of the Paris Protocol3, to appreciate the importance of the global context. As I write this, the BBC is reporting that 2015 was the warmest year on record for our planet – 0.75 degrees centigrade higher than the long-term average4. With the Paris Protocol setting a target of limiting the increase to 1.5°C “so as to significantly reduce risks and the impacts of climate change”, the 2015 temperature hike has come as a shock to many climate scientists, policymakers and indeed lawyers working in this field.

Over the years, UKELA has invited prominent speakers from other parts of the world to share their insights and experiences with us. If I just look back to UKELA’s activities in December 2015, the international element was very prominent:

- On December 1st, our President, Lord Carnwath, James Maurici QC and UKELA staff organised a joint seminar with ALBA5 and PEBA6 looking at climate change and the courts, considering the future role of national courts, lawyers and the rule of law in dealing with climate change issues. The event was kindly hosted by Mishcon de Reya. UKELA patrons Professor Richard Macrory and Tom Burke also gave presentations, alongside Lord Carnwath and Sarah Cole of DECC. Seminal climate cases (including Urgenda (Holland)7 and Leghari8 (Pakistan)) were discussed. These cases involve citizens taken legal action to ensure their governments mitigate the climate threat;
- On December 2nd, we held our annual fundraising lunch, kindly supported by Latham & Watkins. We were treated to a brilliant talk by acclaimed TV presenter, author and priest, Peter Owen Jones. Peter spoke to us about his insights into environmental protection learned both at home on the Sussex Downs and abroad in fragile places like Vanuatu in the South Pacific;
- On December 15th, we joined many other organisations in signing up to the “Paris Pledge for Action”, launched in Paris as part of the COP21 programme. This confirms our commitment to a safe and stable climate and to take steps to build resilience and awareness in the environmental law sector. We already have green housekeeping policies and operating as a “virtual” organisation reduces our operational emissions. Your Trustees and UKELA staff will be looking at what else we can do to meet the Pledge in our plans for 2016.
- On December 18th, UKELA appeared before the House of Commons to consider the implications for environmental law of Brexit – the very subject of a UKELA seminar in Bristol on November 18th. Angus Evers, ably supported by my fellow UKELA trustee, Penny Latorre, spoke on behalf of UKELA9.

December was a busy month, but then most months are for UKELA!

Looking forward to 2016 we will:

- Launch a new international category of UKELA membership. This is aimed at stimulating and increasing the exchange of ideas between environmental and other professionals based around the world;
- Our Annual Conference in Brighton will have an international theme, albeit linked very strongly to issues of importance to members working in the UK’s environmental and professional sectors;
• **E-Law**, wonderfully edited by Hayley Tam, will include articles with an international / comparative law and practice flavour.

• In **February** we will be meeting with the former Justice Minister of South Korea, Ms Kang Keunsil. She is visiting the UK to learn more about the role of the legal community in climate change mitigation\textsuperscript{10}.

I am sure it will be another great year for UKELA. Before the year gets too far under way, may I encourage everyone to make a New Year resolution for UKELA – do continue your active support because it makes a difference; do come along to our events and attend the conference if you can, and just get involved as much as you can.

If you would like to discuss how you can help to make a positive difference to UKELA, you can contact me at: **Stephen@ukela.org** or call 07899 843248.

**Regards,**

*Stephen Sykes*

**Stephen Sykes**

UKELA Chair

**Endnotes**

5. See: [http://www.adminlaw.org.uk](http://www.adminlaw.org.uk)
UKELA Membership Renewal

Thank you everyone who has renewed their membership for 2016 – your continued support is much appreciated. If you have yet to renew, you can do so in just a few minutes on our website. To remind you, the annual subscription fee for 2016 is frozen at 2015 rates.

New UKELA brand

We have been busy in 2015 reviewing UKELA’s communications and deciding what needs refreshing.

From an initial survey, it was clear we needed to update our image and the way we communicate with members. We have a strong offer and members seem generally satisfied with the quality of events, CPD, Young UKELA and student programme. Our annual conference has been given consistently strong support and e-law also received a clear “thumbs up”. Our image though was seen as outdated and a bit “fusty” with our main website, ukela.org, badly in need of a fresh look and easier user interface.

As a result of this feedback, we ran a procurement exercise and appointed Oxford-based design outfit, Archetype, to come up with ideas for our new look. UKELA Executive Director, Linda Farrow has led the project and procurement. “We wanted our communications to reflect UKELA’s inclusiveness, authority and professionalism“ says Linda, “and chose the distinctive circular logo from a range of options presented. We then moved on to think about website design from first principles and Archetype came up with a lighter, brighter look for the site. Our web hosts, Smart Media, then took the design concept and are turning it into a fully operational website.”

Alison Boyd, Events and Membership Manager, has done much of the thinking on the site map, drawing on her extensive knowledge of what members want. “The new website will be easier to navigate, with clearer signposting to find items of interest. We will also be strengthening member-only content to enhance your membership experience” said Alison.

UKELA will be progressively applying the new brand – including a simpler strapline, “law for a better environment” – in quarter 1 of 2016, as the first major action in our revised strategy for 2016 to 2020.

Strategy for Success

UKELA works to a strategy agreed by Trustees that is then translated into the organisation’s annual work plan. Our current strategy from 2012 to 2016 has provided a framework within which we have:

- continued to provide members with a high quality and continually renewed programme of topical events;
- developed new approaches to reach as wide an audience as possible, through our webinar programme and video link-ups to remote sites for key events such as the annual Garner lecture;
- delivered annual conferences on important topics that keep our community engaged and well-informed;
- used our Working Parties’ specialist knowledge to good effect in responding to consultations and exercising positive influence in key areas such as sentencing guidelines;
- maintained our focus on providing accessible information on environmental rights and responsibilities through our Law and Your Environment website;
- used a substantial grant from the Esmee Fairbairn Foundation to fund our policy and membership development work in Wales and inform our strategy for all
three devolved administrations; and
• celebrated our 25th anniversary by raising **funds that we are now investing** in a new website.

In the last quarter of 2015, we have been working on our revised strategy for the period 2016 to 2020. The process started with a workshop for Trustees and other key stakeholders in late September 2015, with members, Working Parties and Regional Groups also canvassed for contributions in the run-up to Christmas.

Executive Committee and Council have reviewed our strategic aims, objectives and resources at their Autumn meetings and a draft strategy will now be discussed at January’s Executive Committee prior to sign-off by Trustees.

“The thrust of our new strategy is all to do with measured ambition” says UKELA Chair, Stephen Sykes. “UKELA achieves great things for its members, students and the wider public with very limited resources, so while we can’t change the world, we can build consistently on an already strong foundation.”

What we plan in this next strategy period is to target steady growth in our membership, diversify our funding strategy so we are more resilient and improve our marketing and communication with members. Our new corporate identity and website, to be progressively implemented in quarter 1 of 2016, is the first and most visible element of our revised strategy.

If you would like to see the draft document and comment on it, please contact Executive Director Linda Farrow (linda@ukela.org), check ukela.org for details in the coming weeks or sign up to our Twitter feed for updates.

**New QCs appointed**

We are delighted to share the news that 2 of our distinguished and longstanding members are to be appointed Her Majesty’s Queens Counsel. Richard Kimblin is our most recent past Chair and was a trustee for 10 years. He was also Convenor of the Environmental Litigation Working Party for a number of years. Justine Thornton has been an active member for many years, speaking regularly at annual conferences and other key events, as well as being involved in working parties. Our hearty congratulations go to them both, as well as to others appointed Queens Counsel.
Wales

Wales’ Working Party sub-committee met on the 19th November and agreed a programme of events for 2016. This includes a seminar on Brexit and the implications for environmental law in Wales (details available shortly). The Committee meets again on the 21st January.

In the meantime, Wales Convenor, Dr. Victoria Jenkins, has been appointed to The Future Landscapes Wales Working Group to represent the Wales Working Party. The Future Landscapes Wales initiative was commissioned by the Minister for Natural Resources in response to the publication of the independent Review of Designated Landscapes in Wales, chaired by Professor Terry Marsden of Cardiff University. “The Future Landscapes Wales Working Group, of which I am a member, will work alongside a Future Landscapes Development Programme which is made up of those working at the operational level in the governance of designated landscapes” said Victoria.

The aim of the process is to consider the recommendations of the Marsden report, in conjunction with new and innovative thinking from these groups, to advise on the way forward for protected landscapes in Wales. The Group’s first meeting took place on 13 January 2016 and it aims to report in the summer of 2016.

Wales Co-Convenor, Dr. Haydn Davies, and Victoria have also been asked to contribute to a legacy workshop on Nature Conservation, Access to Land and Marine and Fisheries to be held by the Environment and Sustainability Committee of the Welsh Assembly.

Scotland

Scotland held a well-attended AGM on 14 January, including welcome input from Georgette Herd by video link from Orkney. The sub-committee reformed with Richard Leslie remaining as convenor. Anne Johnstone, Jamie Whittle, Joanna Waddell and Bridget Marshall all agreed to stand on the sub-committee.

The AGM discussed consultation responses but also a programme of events for 2016. A further meeting of the sub-committee will be held to put dates and venues to the events. Environmental topics to be covered at these events could include a seminar on Brexit; decommissioning of oil rigs; wildlife management, including the re-introduction of species; and the private law aspects of flooding.

Trustee Anne Johnstone met with SEPA Chief Executive, Terry A'Hearn, in January to discuss the new Statutory Purpose for SEPA and the ambitious regulatory reform agenda. SEPA wishes UKELA to be actively engaged in this programme and the Scotland Committee will be taking this area of work forward over the coming months.
By Rosie Oliver, UKELA’s Working Party Adviser

UKELA’s working parties are currently planning a lively programme of events for 2016 on topics including the 2015 Paris Climate Conference, flooding and environmental constraints on housing growth.

On the influencing side, environmental costs, fines and Brexit have been of particular interest. The environmental litigation working party responded in December to the Ministry of Justice’s consultation on changes to the cost-capping regime for environmental cases. The proposals overall would restrict the level of costs protection available to claimants. The group’s response raised concerns, amongst other things, that the proposals would create uncertainty for all parties, cause delays and satellite litigation, and risk putting the UK in breach of the Aarhus Convention. For more detail and background to the consultation, see Jill Crawford’s piece.

Fines under the new Sentencing Guideline continue to soar, with Thames Water fined a record £1 million in January, for environmental permitting offences caused by sewage discharges to the Grand Union Canal. UKELA’s waste, water and environmental litigation working parties are collating information about fines imposed under the Environmental Offences Guideline, to inform a review of the Guideline.

The working parties continue to take an active interest in Brexit and its implications for environmental policy and legislation. Angus Evers (King & Wood Mallesons, and co-convenor of UKELA’s waste working party) and Penelope Latorre (Waterman, and UKELA’s working party co-ordinator) gave evidence in December and January to the Environmental Audit Committee’s inquiry into EU/UK environmental policy. The working parties are mapping the broad implications of Brexit for different topic areas (nature conservation, waste, water and climate change). This work – which was proposed at the November conference on Brexit at Bristol University – is intended to inform the wider debate on Brexit, including a possible hustings. See: Poulyan’s piece about the Bristol conference on Brexit.

New Noise working party

We’re delighted to announce the creation of a working party on noise.

The group will consider noise issues across the UK. Its’ remit includes reviewing the regulation of noise at local and central government levels; implementation of the European Environmental Noise Directive (END); ambient and neighbourhood noise; the protection afforded to those who are affected by noise under the common law or other systems of law which are applicable in the UK; compliance with noise legislation; and the enforcement of noise law.

The group is in the process of planning activities and priorities for the year ahead. We’re keen to recruit new members. If you would like to join the working party, contact the group’s convenor Francis McManus on f.mcmanus1@btinternet.com.

Jonathan Church appointed co-convenor of the Climate change and Energy Working Party

Jonathan Church (Client Earth) has agreed to be co-convenor of the CCEWP to replace Tom Bainbridge. Jonathan is a lawyer in the Climate and Energy team at ClientEarth. Jonathan works on climate governance at the UK, EU and international levels, with a particular focus on the UK Climate Change Act. We look forward to working with Jonathan in this new role.
Star Member: Tom Bainbridge

Tom Bainbridge, Partner and Founder of Lux Nova Partners has been a co-convenor of the Climate Change and Energy Working Party (CCEWP) for 9 years. His hard work and drive to have climate change and energy issues put on the ‘UKELA map’ resulted in the creation of the CCEWP and he has successfully chaired the Working Party from when it was a handful of individuals to a group that now represents a wide range of members and interests. Under his chairmanship, the Working Party has commented on a number of key consultations, given evidence at Parliamentary Select Committees and held a number of training events for members.

We want thank Tom for all his hard work and commitment to UKELA and the CCEWP in particular, and to wish him well in his new venture. We are delighted that Tom will remain both a member of, and consultant to, the CCEWP so that his expertise on climate change and energy issues will still be available to the group.
New Student Adviser

After completing his successful two years as Student Adviser to UKELA, we send our warmest wishes to Joe Newbigin who moves on to undertake his pupillage at Francis Taylor Building.

We also take great pleasure in welcoming Mark Davies as a new Student Adviser. Mark will be working alongside Emma Lui to bring you UKELA student updates and careers events.

Mark is currently studying the Bar Professional Training Course at the University of Law in London, having completed the Graduate Diploma in Law in Plymouth. He undertook his first degree at Warwick University reading Philosophy with Classical Civilisation. Before starting the Bar course Mark worked as a paralegal for Holman Fenwick Willan in Geneva and Bond Dickinson in Plymouth. His email is m.a.davies@hotmail.co.uk

Dates for the Diary

9 February 2016 – short-listed candidates notified for both UKELA moots
15 February 2016 – deadline for submission of 500 word abstracts for e-law article on the next issue theme topic of ‘Brexit’
8 March 2016 – semi-final and final of the UKELA moot (to be held at the Supreme Court)
11 April 2016 – 4pm deadline for submission of entries to the Andrew Lees essay competition
18 April 2016 – deadline for submission of UKELA bursary entries
1-3 July 2016 – UKELA Annual Conference (to be held at the Brighton Falmer Campus of the University of Sussex)

The Andrew Lees Essay Prize

Entrants are invited for this year's Andrew Lees essay competition. This year's question is:

“The Paris Climate Agreement is based on what countries say they will do, and not on what they must do, to avoid catastrophic climate change. It is too little, too late?” OR a topic of your choice that is relevant to UK Environmental Law.

Please note that if you choose to submit an article not on the set question it must have been written and researched after 1 January 2016. Evidence may be required.

The prizes are:

- a free place at the UKELA Annual Conference (including travel expenses from within the UK); and
- publication of the winning essay in UKELA’s e-law journal and also on the website.

Further details may be found online.
The Student Bursary

The UKELA Vocational Bursary Fund is intended to enable students to undertake a period of vocational placement (such as an internship or externship) in the field of environmental law.

To apply, please provide the following:

- a completed application form from our website
- further background information on the placement
- a short letter of commitment from the placement organisation (Note: an application may be submitted without having received a letter of commitment, but funding will not be given until one is submitted)
- a CV (max 2 sides A4), including details of university result to date

Your completed application form and accompanying documents should be submitted by email to alisonboyd.ukela@ntlbusiness.com to be received no later than 3 pm on 18 April 2016. All applications will be promptly acknowledged. Decisions will be announced by the end of May 2016.

If you have any questions about any of the above, please do not hesitate to contact either of our Student Advisers, their email addresses are: emma_lui@hotmail.com and m_a_davies@hotmail.co.uk
UKELA events

After a very busy end to the year, we have a bit of breathing space to plan our 2016 programme. We have lots of events coming up so do keep an eye on our website for booking details coming soon.

Waste Working Party Meeting: 3 February

The Waste Working Party’s first meeting of 2016 is taking place from 4.00pm to 6.00pm on Wednesday 3 February at King & Wood Mallesons’ offices, 10 Queen Street Place, London EC4R 1BE. Please email Angus Evers to let him know if you are attending in person or if you will be dialling in.

The main purpose of the meeting is to discuss the issues raised in the convenors’ email of 6 January, but they will also be discussing other topical issues such as fire prevention plans and changes to the Hazardous Waste Regulations in England.

London meeting on Industrial Emissions Directive: 8 February

Please join us for this seminar examining the implementation of the Industrial Emissions Directive (IED) in the UK. Videolink options available across the UK.

The meeting, to be chaired by Paul Davies of Latham & Watkins, will hear from Duncan Mitchell of the Environment Agency, Fiona Ross of Pinsent Masons and Malcolm Sangster of Ramboll Environ. They will examine progress with the process of implementing the IED in the UK and the challenges this has created for both the regulators, the sites required to modify their existing permitting arrangements and their legal and technical advisers. The speakers will reveal the lessons that have already been learned and discuss what sites yet to go through permit modifications can do to prepare and how much certainty they bring to their business planning processes. The session will also aim to bring some analysis on the state of progress in other European states. For more information, visit our website.

Shale gas – Environment Agency consultation on the environmental regulation of onshore oil and gas: presentation and Q&A for working party members: 9 February, 4–6pm

The Environment Agency is currently consulting on its draft guidance for the onshore oil and gas sector, including shale gas and hydraulic fracturing. Mark Ellis-Jones from the Environment Agency will give a presentation on the Agency’s approach to regulation (including groundwater, mining waste, industrial emissions directive) as well as their role in planning.

This event is a great opportunity to find out about the draft guidance ahead of the consultation deadline of 3 March 2016. There will be a chance to share views and raise questions about the approach and the standards proposed.

The event is open to members of UKELA’s climate change and energy, waste, water, planning and sustainable development and environmental litigation working parties. Places are limited. Members wishing to attend should notify rosie@ukela.org

The event is kindly hosted by King & Wood Mallesons London Offices, 10 Queen Street Place, London EC4R 1BE (on the north end of Southwark Bridge). For further directions, please see the attached Map and directions.
East Region Seminar and AGM: Solar Power, the legal issues: 1 March 2016

Join us for this early evening seminar, hosted by UKELA’s East regional group which will provide an update on the legal issues of Solar Power. Hear expert speaker Jon Darby, from 39 Essex Chambers provide an update on Solar Power, the legal issues, followed by a question and answer session. The regional group will also be holding their AGM prior to Jon's presentation. For more information, see our website.
Non-UKELA events

Castle Debates

9 February – How to Meet the Need for More Housing Without Environmental Damage
15 March – Government Environmental Policy, Opportunities and Threats

For more information, visit the castle debates website.

Diary Dates

21 March – Joint seminar with GLS on COP21, implications for practitioners
25 April – London meeting on Green Transport
27-30 May – Wild Law weekend, Lake District
1-3 July – Annual Conference, Brighton
Jessica Allen, Student Member

What is your current role?

Since 2013, I have been studying for an undergraduate degree in Law with French and French Law at the University of Nottingham; I am currently spending my third year as an exchange student at Université Toulouse Capitole 1 in France. As well as being one of the new Editorial Assistants for e-law, I am Co-Founder of a local group of the European Law Student Association (ELSA) in Nottingham and I am on the Editorial Board of the ELSA Law Review. In July 2015, I attended a summer law school in Italy as a UKELA Student Vocational Bursary Recipient which has led to my participation in the ELSA Working Group on the new International Focus Programme (Environmental law). In my free time, I play the piano and violin. Mostly I yearn to be outdoors – whether that’s running, kayaking, hiking or mountain biking. A new passion of mine is climbing though and I am itching to transition from the bouldering centre to real rocks!

How did you get into environmental law?

As my degree programme includes French modules, I don’t have enough credits to choose optional law modules through my law school. This is something that I was conscious of from the start of my first year, though, so I was keen to do some self-study in order to gauge my preferred practice area. Environmental law popped up on my radar after a UKELA circular was sent out to the law mailing lists at my university, inviting students to enter the Andrew Lees Prize 2014 and/or submit a student proposal for e-law. Noticing how the subject tied neatly with my Public law studies, I seized both opportunities and was lucky enough to win the essay competition as well as write an article with editorial assistance from Mukhtiar Singh of 6 Pump Court. Since then, I have written further articles and attended numerous UKELA events in 2014 such as the Annual Conference in Edinburgh and the Careers Evening hosted by Francis Taylor Building.

What are the main challenges in your work?

As a student, I’m not sure how best to answer this question… One thing I have noticed is that environmental law is rarely taught at an undergraduate level such that few students are aware of or as engaged with the area.

What environmental issue keeps you awake at night?

It may be quite a common response, but I really do worry about climate change. It concerned me recently that a number of floods happened in the North-West region around my hometown, on Boxing Day no less, which is an area that has seldom been touched by floods in the past. Though it was quite reassuring to catch up on the outcomes of COP 21, the UNEP Conference in Paris held in early December, climate change is a global issue that is going to be difficult and time-consuming to counteract. It is also a motivation behind the ongoing political race to find alternative fuel sources, though unfortunately sustainable sources haven’t been the fashion to date.

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

The depoliticisation of environmental policy together with wider societal awareness of key environmental issues.

What’s your UKELA working party of choice and why?

Based on my personal principal environmental concern, I would have to say the Climate Change and Energy working party.

What’s the biggest benefit to you of UKELA membership?

The host of opportunities, vast network of practitioners and incredible support structure open to students of all study levels!
The Environmental Law and Policy Implications of Brexit
UKELA Conference at the University of Bristol

Pouyan Maleki-Dizaji

At a glance:

- EU law significantly influences UK Environmental law.
- Environmental academics and practitioners are highly concerned about the future of environmental law and policy in a post-Brexit UK.
- It is too early to predict the nature of the UK’s relationship with the EU and its environmental provisions if Britain votes to leave, but it is certainly not a simple process to enter a trade agreement.
- Referendum campaigns must also seek to inform the electorate about environmental implications of Brexit, and make the environment part of the in-out debate.

The forthcoming referendum on the UK’s membership of the European Union has quite rightly been labelled as the ‘most important vote in a generation’ (David Cameron, November 2015). The prospect of a vote for Brexit would have significant consequences for the UK, particularly on environmental law and policy. The conference was therefore organised with the objective of exploring and discussing such possible consequences. Speakers included leading environmental law academics and practitioners from both the public and private sector.

EU influence on UK Environmental Law and Policy

Almost every reader of this article will be aware that UK Environmental law and EU law are firmly intertwined. Monday morning at the University of Bristol consists of an advanced EU law lecture proceeded by an environmental law lecture. One would certainly be forgiven if they fell asleep in the first, and woke up in the second and thought that they were still in the former. The intertwined relationship was again illustrated when Peter Kellett from the Environment Agency estimated that 90% of their prosecutions are based on EU regulations, and that 90% of their permits are granted on the basis of EU regulations. Brexit would mean that EU environmental law would no longer be legally binding in the UK, it is therefore startlingly clear that a vote to leave would have such a great impact on the current environmental law regime in the UK. Simply passing a blanket ‘adoption’ measure would certainly not begin to sort out the issues.

Environmental Arguments For and Against Brexit

Although the objective of this report is not to provide an in depth analysis of the arguments for and against staying in the EU, it is worth reflecting on some of the key arguments that were put forward at the conference. David Baldock, Executive Director for European Environmental Policy delivered an insightful talk about the policy challenges a choice for Brexit would create, and highlighted that those advocating Brexit on environmental grounds do so to promote national competences in areas such as land-use and planning. David Cameron himself advocates the pursuit of better regulation and less regulation in order for the UK to become more competitive.

On the other hand, the overwhelming feeling at the conference was that Brexit is a threat to UK environmental law, largely caused by the legal and political uncertainty of a post-Brexit UK. Professor Collin Reid stated that EU law with no binding force would leave chunks of UK law with major holes, and would create a legal vacuum on matters where the substantive rules are dealt with by EU measures. Moreover Professor Robin Churchill predicted that Brexit would allow the UK to water down its environmental legislation. Jill Crawford from BLM, speaking on behalf of UKELA’s Nature Conservation Working Party, described the current situation as a “perilous and uncertain time for nature conservation” and expressed the group’s view that an adequate process and framework for leaving the EU would be essential. Furthermore, David Baldock expressed his concerns about the future of air quality standards, something he believes the UK is already finding difficult to keep up with and would be keen to disregard if it left the EU.
Practical Implications of Brexit

The conference also aimed to inform attendees about the procedural and practical implications of Brexit. Jacqueline Minor, Head of the European Commission’s Representation in the UK, drew our attention to Article 50 of the Treaty on the European Union. The provision sets out the procedure for a member state to withdraw from the Union. However it is yet to be put into use, and its implications are unclear. For instance Art 50(2) sets out a two year time-frame for negation of withdrawal, however considering that accession has been known to take seven years in some cases, this arguably appears optimistic. There would undoubtedly be adverse consequences if there were to be such a long time frame of transition and uncertainty.

Moreover speakers explored the issue of what would happen if voters opted for Brexit. It became apparent that there is no straightforward explanation for such a scenario. The panel discussed the potential relationship between environmental obligations of a post-Brexit UK and the EU, something that would certainly require a great deal of negotiation. Would we join Norway in the European Economic Area (EEA)? Or follow the Swiss model in the European Free Trade Area (EFTA)? Otherwise would the UK carve out its own path? The EEA scenario would envisage an acceptance of the majority of EU environmental legislation in order to allow greater participation in the internal market; however there would be no say or voting rights on the legislation that would subsequently have to be implemented. Under the EFTA scenario, limited EU measures would be accepted in order to satisfy the requirements for single market access, but again with no role in the decision marking process. Moreover the possibility of a unique ‘British Deal’ was also contemplated among the panelists. Reflecting on the discussion as a whole, it would seem the time is not yet ripe for anyone to accurately predict the future of the UK’s relationship with Europe. Further negotiation with EU institutions and member states, along with more detailed policy directions from the government and other political parties are evidently required.

Future Action

The final session of the day was arguably the most important from the perspective of a student activist. Having been enlightened about the prospect of Brexit, participants of the Conference were invited to take part in a workshop to discuss how we could utilise our newfound knowledge on the effects of Brexit in our various networks and stimulate ideas for action to be taken in the run-up to the referendum. It was agreed that there is a need to raise public awareness about EU Environmental law and its universal benefits, such as ensuring clean beaches and clean drinking water. This would ensure that the impacts of Brexit on environmental law were made part of the referendum debate, which to date is primarily focused on migration. Importantly, this would enable the electorate to become more informed about the EU before voting.

Conclusion

The conference most certainly lived up to expectations. Each of the speakers provided fruitful impetus in creating a picture of what UK environmental law and policy might look like if Brexit occurred. However, a famous quote Donald Rumsfeld – US Secretary of Defense 2001 to 2006 – accurately summarises the general consensus of what lies ahead:

“There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don’t know. But there are also unknown unknowns. There are things we don’t know we don’t know.”

Pouyan is a Final year Law student at the University of Bristol. He spent a year abroad in Belgium specialising in European Law and is particularly interested in the forthcoming EU referendum. Pouyan is Chair of the Bristol European Referendum Network, a staff-student group with the objective of enabling students to make an informed vote later this year.
Paris: the City of Light

Questions as to the nature and meaning of the outcome of COP21 – the Paris climate conference. All too often I am asked ‘is it really going to get us on the right track?’ or even sometimes told ‘well, it might be more ambitious than we ever imagined, but it is still way below what we need.’ Of course history will tell what the final deliberations in Paris resulted in and with a topic like climate change ultimate judgment of our actions today will not be given until much further into the future. So, what now? What now for 2016 and day-to-day task at hand; and how do we grapple with this shifting landscape in a way that serves people and planet?

It was a rather dreary Saturday in one of the most bustling cities in the world and yet the emotions in the room were palpable. There had already been a one day extension of COP21 and the expectation was that the gavel would come down in the early evening. We had been assembled in the plenary hall for over an hour and the whispering was growing restless as the room tried to identify the hold-up based on the shuttle diplomacy that was unfolding before its eyes: who was talking to whom and about what? Every person was anxious to know.

A couple of hours before the final draft of the text had been issued for translation and nations had been given time to read it through before reassembling in plenary to adopt its contents. It looked good, many of us thought. This could be it! The press statements were already being issued from campaign groups, policy think-tanks and others and it looked like many stakeholders were welcoming the draft ahead of adoption: this was something Greenpeace and Avaaz (two of the most influential campaign NGOs globally) were supporting, and that meant something.

So how could it be that there was still an issue that was delaying matters – the theories were flying about and the room was kept waiting to discover just what it was that was preventing that block of wood from resounding with the longed-for ‘stamp!’ of approval.

But more on that later. First, perhaps, it would make sense to grasp a little sense of how it came to pass that the gavel was expected to come down with such excitement.

Paris: the beginning of the end; or the end of the beginning?

For those who have worked in the international climate policy ‘space’ for some time, the Paris climate conference (COP 21 as it is more formally known) represented something a lot more symbolic than we even dared to realise at the time: it really was the last attempt to prove to the world that a global issue such as climate change (and its related ramifications) could be addressed by the world’s nations. And not just a two thirds majority, but a global consensus on the approach required. When this was previously attempted the world witnessed a breakdown in global politics that undermined the role of institutions such as the United Nations to tackle these serious issues. In 2009 the Copenhagen COP19 didn’t quite live up to the expectations that we had all laid at the door of the negotiating centre; and for the subsequent six years there was a hesitation surrounding any ambition or feeling of building up expectations once more to achieve what seemed almost impossible.

The incoming Executive Secretary, the former negotiator for Costa Rica Christiana Figueres, needed to develop a strategy for how to ensure the next attempt at achieving global consensus and building on the 2 degrees threshold commitment was achieved. Remarkably her vision and its subsequent implementation for those six years, combined with the excellent diplomatic skills of the French COP21 Presidency during 2015, ensured that Paris did exactly that. So what was the vision and why was it different?

Bottom up meets top down

The UN climate change negotiations have typically focused on achieving a top-down approach to be agreed at the highest level and then filtered down to national level policies. In principle this can – and has – worked for many other related issues (the Montreal Protocol being an outstanding example). However, the Executive Secretary was convinced that a different approach was needed to ensure that all countries could produce plans that would meet
both the requirement to achieve a global aim (i.e. keeping temperatures below 2 degrees) and match their development and economic capacities. Thus, the concept of the INDCs was born.

These intended Nationally Determined Contributions would be submitted ahead of COP21 and not be included in the formal negotiations; but would complement the Agreement. It was a strategy that worked tremendously well and by the time we reached the close of the conference, 160 submissions had been made, reflecting 187 countries (including the European Union member states), and covering around 95% of global emissions in 2010 (excluding LULUCF) and 98% of global population (and more have filtered in since). A further 3% of global emissions are coming from international aviation and maritime transport. Almost 1% of global emissions are covered by countries that are not Parties to the UNFCCC.

Rather than globally thrash out what each country should commit to, the INDCs enabled them to make that determination based on their own capacity and capabilities. It is the case that many countries will now revisit their INDC in light of the outcome (but note they can only be increased, they cannot backslide) with a full review of them scheduled for 2018.

**Long-term element**

Of course the INDC process is not perfect and some criticisms came in throughout 2015 suggesting that certain countries had not made strong enough commitments; and when early analysis of the submitted INDCs was undertaken, it suggested that collectively the commitments would not achieve the 2 degree binding goal, but put the world on a 2.7 degrees C trajectory. To counteract this, there needed to be some kind of ‘long-term’ element included in the Agreement that would state what the overall goal for achieving 2 degrees (or below) would be. By the close of COP, the agreed language on this element was:

“In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.”

You will see that this long-term goal as it is colloquially known complements the short-term ambition of the INDCs, which will come into force in 2020 and most of which are set for a five year period.

Mirroring the UK Climate Act, the Paris Agreement has outlined the first global carbon budget that will go a long way to achieving the final goal. Further five-year country plans will need to be submitted and implemented in order to continue to bend the emission curve down and keep us on track and the Paris Agreement also outlines plans for that (review) mechanism.

**Engaging other relevant actors**

Another key factor that contributed to the overall success of Paris was the engagement of key players such as cities, sub-national regions, investors, and businesses who were calling for a strong Agreement to give them the clarity and confidence to align their strategies with the international policy framework. Many of these actors throughout 2015 made bold and strong commitments themselves, demonstrating that they were willing and able to step up to the challenge and they communicated this clearly to their own governmental leaders to give them confidence to be bold in Paris.

The UNFCCC secretariat developed an online platform (a climate action platform called ‘Nazca’ after the lines in Peru where the previous COP20 had been hosted) to showcase these commitments and to give a sense of the sheer volume of action that was already being taken ‘on the ground’. Action ranging from cities committing to going 100% renewable; businesses commitment to implementing 2 degree business models; and investors committing to either engage with their companies to asses carbon asset risk or where the risk was deemed too high, decarbonizing their portfolios.
Myriad events, summits, and conferences were held in the name of COP21 bringing together these diverse actors to collectively use their voice to offer support and to urge their governments to know that they would be applauded if a strong agreement was reached. But it went beyond that: the Pope issued a Papal Encyclical\(^4\) putting the conservation of nature and the need to address climate change at the heart of his writing, which sent a signal to not only the Catholic community but others that this was the most important moral issue of our time; the Lancet Commission issued its special report on health and climate change\(^5\) demonstrating that a global Agreement in Paris would mean better health for the planet; the Governor of the Bank of England, Mark Carney, issued a ground-breaking speech entitled ‘Breaking the tragedy of the horizon – climate and financial stability\(^6\)’ saying that stranded assets were a serious concern for the global economy and would need to be addressed; and various NGOs continued their excellent work engaging their membership bases to also advocate for a strong Agreement.

Back to the Plenary Hall

The echo chamber in 2015 was filled with so many positive news stories that it was very difficult to imagine an Agreement would not be reached, which is why, on that final Saturday after over two weeks of intense negotiations that plenary hall was nervous: how could they have been so wrong? All the signal were there? 2015 was The Year for climate change and yet, the stage was still empty and the gavel was nowhere to be seen.

Eventually, of course as you now know, the COP President Minister Fabius, accompanied by the Executive Secretary and others took their seats on that global stage. There were some technical errors to be dealt with, a typo here and there, paragraphs replicated. These had to be read through to ensure all Parties were satisfied that the errors would be amended accordingly. Sounding like the roll-call in a classroom the UNFCCC official read through the list before the Minister held the gavel triumphantly up declaring that ‘the Paris Climate Agreement [was] accepted!’

The room erupted. A standing ovation of at least 15 minutes followed. Relief, celebration, joy, and the odd tear signaled the end of a long process to achieve the historic outcome. But, as they say, the hard work doesn’t stop there. It is just beginning. Implementation is now key and this is where UKELA members will play such a crucial role: in advising on how it should be implemented at the national level. We may have achieved base camp on the journey; but the Summit still calls us to action.

Endnotes

1 See carbon Tracker for a full and comprehensive analysis of INDCs: [http://climateactiontracker.org/indcs.html](http://climateactiontracker.org/indcs.html)
3 To see the climate actions from cities, businesses, investors and more see: [http://climateaction.unfccc.int](http://climateaction.unfccc.int)
5 Lancet Commission, Health and climate change: policy responses to protect public health (23 June 2015), see: [http://www.thelancet.com/commissions климат и здоровье](http://www.thelancet.com/commissions климат и здоровье)
6 Mark Carney, Breaking the tragedy of the horizon – climate change and financial stability (29 September 2015), see: [http://www.bankofengland.co.uk/publications/Pages/speeches/2015/644.aspx](http://www.bankofengland.co.uk/publications/Pages/speeches/2015/644.aspx)
UNFCCC climate change negotiations: outcome of 2015 Paris Conference

The most significant outcome of the UN Framework Convention on Climate Change (UNFCCC) Paris conference (held from 30 November to 12 December 2015) was that 195 countries adopted the Paris Agreement. Key elements include agreement to:

• drive efforts to limit the global increase in temperature to 1.5 degrees Celsius above pre-industrial levels;
• achieve peak greenhouse gas emissions as soon as possible and reduce them thereafter, in order to achieve zero net emissions in the second half of this century;
• submit nationally determined contributions (NDCs) from each party country, setting out national climate action plans. These must be as ambitious as possible, and reviewed and tightened every five years.

Importantly, the countries that agreed to the Paris Agreement text include the US, which is not a signatory to the Kyoto Protocol. Other key major GHG emitters have also agreed to it, notably India and China.

For more information, see Practical Law Legal update, UNFCCC climate change negotiations: outcome of 2015 Paris Conference.

Measures to tackle over-allocation of renewable energy subsidies

New measures to deal with the projected over-allocation of renewable energy subsidies were announced by the Department of Energy and Climate Change (DECC) in December 2015. These announcements came in the form of responses to consultations on amendments to the Feed-in-tariff (FIT) and Renewables Obligation (RO) schemes.

FIT Review

In the FIT Review consultation, which opened in August 2015, the government proposed that if new measures couldn’t put the scheme on an affordable and sustainable footing then there should be an end to generation tariffs for new applicants as soon as legislatively possible. In their consultation response in December 2015, however, the government recognised the significant role the FIT scheme has made in engaging non-energy professionals in the electricity market and the role small-scale generation can play in the future on a path to subsidy-free deployment. They have therefore decided to keep the FIT scheme open and their response sets out that this is only feasible because of the new cost control measures introduced, such as new rates, including a new tariff for domestic-scale solar of 4.39p/kwh.
Additional FIT scheme changes include:

- setting deployment caps to limit new spending on the scheme to £100m up to the end of 2018/19
- the reintroduction of pre-accreditation (after they were removed following a specific consultation on pre-accreditation) for solar PV and wind generators over 50kW and all hydro and anaerobic digestion generators
- measures to pause new applications to the FIT scheme from 15 January to 8 February 2016 to allow time for the implementation of cost control measures

Renewables Obligation

New measures have also been introduced for the RO, following a July-September 2015 consultation on ways to cost effectively manage the deployment of solar PV of 5MW and below within the RO. The government has announced that it will:

- close the RO across Great Britain to new solar PV capacity at 5MW and below from 1 April 2016
- introduce grace period arrangements to protect developers who made a significant financial commitment on or before 22 July 2015 and developers who experience grid delay beyond their control
- provide clarification of the planning evidence for the significant financial commitment grace period to exclude incomplete or invalid applications
- remove ‘grandfathering’ (a fixed rate of support from the date of accreditation) from 22 July 2015 for solar projects in England and Wales with an exception for those which meet the significant financial commitment criteria as of 22 July 2015
- hold a solar-specific banding review in England and Wales and consult on new bands for 2016/17
- consult on an exception designed to provide projects with protection against the proposed reduction in support where they qualify for the grandfathering exception

For more information, see LexisNexis Practice Note: Feed-in Tariff Scheme – Key features.

European Commission publishes revised circular economy package including four draft waste Directives

Practical Law Environment

On 2 December 2015, the European Commission, as part of its revised circular economy and green employment initiative adopted a Communication: Closing the loop – An EU action plan for the circular economy. The Communication sets out a range of revised policy measures and actions to move the EU towards a circular economy that aims to keep the added value in products for as long as possible, eliminate waste and achieve sustainable growth.

The package includes four draft Directives that will amend the key EU waste legislation, including the Waste Framework Directive 2008 (2008/98/EC). The four draft Directives are interconnected and set out complex amendments to EU waste legislation, including proposals to increase:

- municipal waste recycling targets to 65% by 2030;
- packaging waste recycling targets to 75% by 2030.

However these targets are less ambitious than the Commission’s withdrawn 2014 circular economy package.

For more information, see Practical Law Legal update, European Commission adopts revised circular economy Communication and publishes four draft Directives to amend six waste Directives.
High Court rules on the scope of environmental damage

On 17 December 2015, the High Court of Justice, in R (on the application of Seiont, Gwyrfa and Lllyfni Anglers’ Society) v Natural Resources Wales [2015] All ER (D) 178 (Dec), ruled on the scope of ‘damage’ as defined in article 2(2) of the Environmental Liability Directive 2004/35/EC. This is the first time the High Court has considered the environmental damage regime in detail.

The case raised a number of interesting definitional and practical points about the application of the environmental damage regime (EDR), the protection afforded to sites of special scientific interest (SSSIs) under EDR, and the notification process of environmental damage by interested third parties.

However, the key issue was whether ‘damage’ includes not only deterioration of the environmental condition, but preventing, limiting, decelerating or otherwise impairing the progression of any relevant element to the environment. Natural Resources Wales (NRW) had limited its decision to a consideration of environmental damage in the sense of some worsening of the environmental situation.

The Court held that ‘damage’ was restricted to deterioration in the environmental situation and did not include the prevention of an existing, already damaged environmental state from achieving a level which was acceptable in environmental terms or a deceleration in such achievement. The Court confirmed that ‘baseline condition’ does not mean ‘good condition’. Rather, it is the environmental condition immediately prior to the deterioration in that condition caused by the relevant operator’s activity.

Interestingly, in its initial grounds of claim, the Claimant argued that NRW had incorrectly considered only damage that occurred after [6] May 2009,¹ in accordance with regulation 8. The Regulations came into effect on 6 May 2009; however, Member States were required to implement the Environmental Liability Directive by 30 April 2007. As a result, NRW conceded that it would also take into account all environmental damage caused by an omission, event or incident taking place after 30 April 2007 if it derives from an activity which started before that date but which was not finished before then.

The Claimant has applied for permission to appeal to Court of Appeal.

Government publishes air quality plans to control nitrogen dioxide levels

On 17 December 2015, the Department for Environment, Food and Rural Affairs (Defra) published an overview document setting out how the UK will improve air quality and achieve the nitrogen dioxide limit values required by the EU Air Quality Directive 2008 (Directive 2008/50/EC). It also published 38 individual air quality plans for different areas of the UK.

This is in response to the Supreme Court’s decision in April 2015 in R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs [2015] UKSC 28, which ordered the government to prepare new air quality plans by 31 December 2015.

The government intends to introduce legislation requiring five cities to implement clean air zones (Birmingham, Leeds, Nottingham, Derby and Southampton) by 2020. It will consult on its proposals in 2016. Polluting vehicles will have to pay a charge to access clean air zones.

The government will also expect all local authorities with areas currently exceeding the required levels of nitrogen dioxide to consider putting in place a low emission strategy setting out actions to reduce pollution.

For more information, see Practical Law Legal update, Government publishes air quality plans to control nitrogen dioxide levels.
High Court decides that planning permission issued without EIA before positive screening direction is unlawful

Practical Law Environment

On 18 December 2015, the High Court decided, in R (Roskilly) v Cornwall Council and others [2015] EWHC 3711 (Admin), that a planning permission granted for development that was the subject of a subsequent positive screening direction from the Secretary of State was unlawful because the planning application was not accompanied by an environmental impact assessment (EIA).

The court emphasised that a screening direction from the Secretary of State is conclusive in determining whether an EIA is required, even where (as in this case) the Secretary of State issues the screening direction after the local authority has granted planning permission.

For more information, see Practical Law Legal update, Planning permission issued without EIA before positive screening direction is unlawful (High Court).

Consultation on changes to national planning policy

LexisPSL Environment

The government published a consultation setting out proposals to change the National Planning Policy Framework (NPPF), which closed on 25 January 2016. The proposals include:

- expanding the definition of affordable housing to include a broader range of low cost housing opportunities
- clarifying the requirement to plan for the housing needs of aspiring home owners alongside those in the rental sector
- increasing residential density around commuter hub to make better use of sustainable land
- supporting housing development on brownfield land and small sites
- widening the scope of the Starter Homes initiative

For further information, see LexisNexis News Analysis: Implications of the changes to the NPPF.

Endnotes

1 The judgment incorrectly refers to the date as ‘9 May 2009’.
Clean Air in London; Air Quality Directive 2008/50/EC and Planning Opinion of Robert McCracken QC, Frances Taylor Building

* Opinion produced on the instructions of Harrison Grant for Clean Air London

Introduction

I am asked to advise Clean Air in London on the approach which planning authorities should take to the Air Quality Directive 2008/50/EC and the extent to which they should take into account in their decision making present or future breaches thereof, and in particular:

(a) whether it is lawful to grant consent for a development which would result in a breach of limit values in the immediate area
(b) whether it would be lawful to grant consent for a development which would worsen air quality in an area which is already in breach of limit values
(c) whether, in an area where limit values are not exceeded, a lawful grant of consent which worsened air quality would be restricted to circumstances where the development was in accordance with the principle of sustainable development and project related mitigation was included in the scheme.

Synopsis

1 Because of the admitted, serious, and ongoing breaches by the UK of the limit values of the Air Quality Directive 2008/50/EC planning authorities have a duty in their decision making to seek to achieve compliance with the Directive’s limit values.
2 Where a development would cause a breach in the locality of the development they must refuse permission.
3 Where a development would in the locality either make significantly worse an existing breach or significantly delay the achievement of compliance with limit values it must be refused.
4 Where limit values are not exceeded in the locality planning authorities must try to prevent developments from worsening air quality and to achieve best air quality, only permitting the former if the development can be justified by the principle of sustainable development as understood in a European Union (not English) sense. Project related mitigation included in the scheme may be material to this assessment. Any action which significantly increases risk to the health of the present generation, especially the poor who are often those most directly affected by poor air quality, would not be compatible with the concept, as health is plainly a need for every generation.

Analysis

Some General Principles of European Union law:

5 The following general principles apply to public law and the interpretation of domestic law deriving from EU environmental law. Thus they apply to those operating the planning system.
6 The EU constitution provides for a high level of protection and enhancement of the environment and the application of the preventative, precautionary and polluter pays principles (Art 3(3) Treaty on European Union ‘TEU’ and Art 191 Treaty on the Functioning of the European Union ‘TFEU’, ex Art 174 EC). The protection and improvement of public health is one of its objectives (Art 6(1) TFEU).
7 The Court of Justice at Luxembourg regards these principles as critical to the interpretation and application of EU legislation (see eg Case C-127/02 Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij [2005] Env LR 14 at [44] (‘Waddenzee’).
8 A purposive approach is taken to EU legislation (C-567/10 Inter Environnement Brusssel v Region de Bruxelles [2012] Env LR 30). Exceptions are to be interpreted restrictively. (C-287/98 Luxembourg v Linster [2000] ECR I 6917)

9 Directives impose obligations on Member States to achieve particular results (TFEU 288). How member states go about that is for them. But they must achieve the required results.

‘To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. (my emphasis)’

10 An important, but sometimes neglected obligation, deriving from the last part of TEU 4(3) is that to refrain from action which would prejudice fulfilment of EU law obligations (see Case C-126/96 Inter Environnement Wallonie v Regione Wallonie [1996] Env LR 625)

‘... The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives’ (my emphasis)

11 Article 4(3) TEU (ex Art 10 EC) and Article 288 TFEU (ex Art 249 EC) have the following effects in combination. National legislation must so far as possible be interpreted so as to be consistent with EU law and its obligations: Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-4135 at [13]. Insofar as domestic legislation cannot be so interpreted it must be disapplied: Case C-106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR. 629 at [24].

12 All emanations of the state, such as the courts, and local and national planning authorities (for example PINS Inspectors), have a duty to use their powers to secure the implementation of EU law Case C-103/88 Costanzo [1989] ECR 1839. Domestic courts must enforce the obligations on members states deriving from directives: Case C-72/95 Kraaijeveld v Netherlands [1997] Env LR 265 at [55-61]; Case C-435/97 World Wildlife Fund (WWF) v Autonome Provinz Bozen [1999] ECR I-5613 at [68]-[71]. Lord Toulson and Lord Reed observed in Lumsdon [2015] UKSC 41 at [31]

‘... as is sometimes said, the national judge is also a European judge’.

13 Directives, if unconditional and precise, are enforceable by individuals against emanations of the state, such as planning authorities, when they have not been fully and properly transposed into domestic law (R v Durham CC ex p Huddleston [2000] 1 WLR 1484 and C-201/02 Delena Wells v SSE [2004] ECR 1723).

14 The courts have a duty to nullify the unlawful consequences of a breach of EU law: Case C-6/90 Francovich v. Italy [1991] ECR I-5357 at [36]. Case C 201/02 Wells v SSE [2004] ECR 1723.

15 Article 19(1) TEU requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

16 The importance of the principle that courts should ensure the effectiveness of EU law was illustrated in Case 253/00 Antonio Munoz v Frumar [2003] Ch 328 at [28] and [30-31]. The Court of Justice held that individuals should be able to bring
civil actions in respect of breaches of an EU regulation governing description of grapes. The method of implementing the regulation in the UK had been by way of domestic regulations backed by criminal sanctions. Where the domestic regulators had failed to enforce the regulation the individual had to be able to bring a civil action.

17 This suggests that where a Directive has been transposed into domestic law but the implementation is nonetheless failing to achieve the result required by the Directive courts and other emanations of the state should use their powers to remedy the default.

18 The Court of Justice has specifically observed in C 404/13 R (Client Earth v SSEFRA) in relation to the Air Quality Directive 2008/50/EC.

   [52] As regards Article 4 TEU, it should be recalled that according to settled caselaw, under the principle of sincere cooperation laid down in paragraph 3 of that article, it is for the Member States to ensure judicial protection of an individual's rights under EU law.

   [55] ‘... That consideration [of the possibility of enforcement by individuals] applies particularly in respect of a directive whose objective is to control and reduce atmospheric pollution and which is designed, therefore, to protect public health. (my emphasis)

19 The above approach has been consistently taken by the Court of Justice (see for example Case C 237/07 Janecek).

Some General Principles of English Planning Law

20 A statutory obligation of planning authorities in making planning decisions is that they should take account of the development plan and any other ‘material considerations’ (s70 Town and Country Planning Act 1990). They must decide in accordance with the development plan unless other material considerations indicate otherwise (s 38 (6)) Planning and Compulsory Purchase Act 2004). The courts have given a very wide interpretation to the phrase ‘material considerations’. As Mr Justice Cooke said in Stringer v MHLG [1970]1 WLR 1281:

'any consideration which relates to the use and development of land is capable of being a planning consideration'

The House of Lords endorsed a broad approach in Great Portland Estates v Westminster City Council [1985] AC 661.

21 The potential of a development to cause ill effects off site such as traffic congestion is accepted to be a material, and is in fact a commonplace, consideration in planning decisions.

22 Both the ultimate national planning authority, the Secretary of State whose policies direct PINS, and the courts, attach importance to the principles of specialisation and deference whereby planning decision makers leave decisions about pollution control to the Environment Agency and other specialists.

23 The Court of Appeal in Gateshead MBC v SSE (1996) 71 P & CR 350 held that the potential of a development to cause pollution was a material consideration but that a planning authority could defer to specialist pollution controllers (such as the EA under EPR). It was entitled to assume that they would do their job properly. Lord Justice Glidewell, with whom Lords Justice Hoffman and Hobhouse agreed, observed:

'...the extent to which discharges from a proposed plant will necessarily, or probably, pollute the atmosphere and/or create an unacceptable risk of harm to human beings, animals or other organisms, is a material consideration to be taken into account when deciding to grant planning permission... Just as the environmental impact of such emissions is a material planning consideration, so also is the existence of a stringent regime under the EPA [Environmental Protection Act 1990] for preventing or mitigating that impact for rendering any emissions harmless. It is too
simplistic to say, ‘The Secretary of State cannot leave the question of pollution to the E.P.A’ (my emphasis).’

However it might be appropriate to refuse permission if it was inevitable that the only proper pollution control decision was to refuse a permit under the relevant pollution control regime:

‘... If it had become clear at the inquiry that some of the discharges were bound to be unacceptable so that a refusal by H.M.I.P. to grant an authorisation would be the only proper course, the Secretary of State following his own express policy should have refused planning permission ...’

24 The Court of Appeal recently affirmed this approach in Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government [2012] EWCA Civ 379 where Lord Justice Carnwath, with whom Lords Justice Moore Bick and Arden agreed, observed:

‘[The Appellants submitted that] the inspector was not saying that the emissions were irrelevant to the planning decision, but was simply following the well-established principle, approved by this court in Gateshead MBC v Secretary of State (1971) 71 P & C.R. 350 (citing the then current policy guidance, which is reflected in similar guidance today) that:

“It is not the job of the planning system to duplicate controls which are the statutory responsibility of other bodies ... Nor should planning authorities substitute their own judgment on pollution control issues for that of the bodies with the relevant expertise and the responsibility for statutory control over those matters”.

...... [The Inspector] observed correctly that the control of such emissions in this case was one for the Secretary of State, he was entitled to be guided on this issue by the agreed position of the two specialist agencies. That was entirely consistent with the familiar approach approved in cases such as Gateshead...’ (my emphasis in bold; note: the indented quotation includes a sub indented quotation)

25 It is important to distinguish between the absence of an obligation to refuse permission for pollution emission reasons and the absence of a power to decide so to do. Thus the Court of Appeal simply held in Cornwall St Dennis that the SSE was entitled to defer to the specialist decision makers. It does not follow that he would have been acting unlawfully if he had in fact decided to come to his own view on the potential pollution problems.

The London Context:

26 Many important sources of the air pollution in London are diffuse sources such as motor vehicles and domestic space heating. They are not subject to specialist pollution control regimes. Thus the principles of specialisation and deference do not on first consideration seem to exonerate planning authorities from an EU obligation to use their powers to achieve the objectives of the Air Quality Directive 2008/50/EC.

27 Insofar as other sources of air pollution in London are subject to specialist regimes it is clear (see below) that such regimes are not in fact in relation to the requirements of the Air Quality Directive effective, still less ‘stringent’.

28 Thus Gateshead abstinence by planning authorities from pollution judgements is inapplicable in places with such serious non compliance.

Transposition of Air Quality Limit Values into Domestic Law

30 The primary responsibility for compliance with the Directive falls therefore on the SoS. But he has failed so to do in respect of nitrogen dioxide (‘N02’) despite the passage of 12 years since the Regulations were issued.

31 The lamentable failure of the 2003 regulations to achieve the results required by the Directive are clear from the opening words of the judgement of Lord Carnwath of Notting Hill JSC in R Client Earth v SSEFRA [2015] UKSC 28

‘These proceedings arise 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. The legal and factual background is set out in the judgment of this court dated 1 May 2013 [2013] UKSC 25...’

The specific and limited questions referred to the Court of Justice were answered in its Judgement of November 2014 in Case 404/13. The Supreme Court has now ordered the Government to produce a new air quality plan by the end of the year 2015. True it is that the Court of Justice in its judgement referred simply to the duty to produce a plan (see for example [50]). That was, however, in the context of a reference from the Supreme Court in a dispute which related to the extent of the duty to produce such plans.

Does the Directive Merely Require Air Quality Plans?

32 Is the production of an Air Quality Plans enough? In my opinion the answer must be in the negative.

First such plans must be capable of achieving compliance with the Directive or remediying non compliance ‘as soon as possible’. (art 23)

Second they must capable of, and subject to, robust enforcement. No doubt many of the measures which would naturally be part of achieving the result required by the Directive would be measures such as regulations directly controlling potentially polluting activities (such as rules affecting individuals and companies such as controls on type of vehicles, engines or boilers). Hence the Directive requires that national penalties for non compliance with implementing regulations must be ‘effective, proportionate and dissuasive’ (art 30)

This does not mean that less direct measures such as controls over the amount of, and conditions for, development cannot appropriately be included as part of the overall plan or sometimes be a necessary part of compliance with the Directive.

33 In view of the failure of the organ of state with responsibility in the UK under the transposing legislation to achieve the result required by the Directive other organs of state must use their powers to achieve it if their decisions are capable of having a significant effect in relation thereto. Planning authorities may, in my opinion, be in that position in relation to many development proposals.

34 My view is supported by the approach of the Court of Justice to the water quality requirements of the Water Framework Directive which can be viewed in this respect as to some extent analogous. The Court in the Weser case C 461/13 Naturschutz Deutschland v Germany rejected the proposition that the Directive merely required the establishment of plans. It held that it might be necessary to refuse consent for projects. It is worth noting in particular the Opinion of Jaaskinenc AG at [78-80] and the Judgm ent of the Court at [3233] and [42], [47]) and

[50] ‘....... unless a derogation is granted, any deterioration of the status of a body of water must be prevented, irrespective of the longer term planning provided for by management plans and programmes of measures. The obligation to prevent deterioration of the status of bodies of surface water
remains binding at each stage of implementation of Directive 2000/60 and is applicable to every surface water body type and status for which a management plan has or should have been adopted. The Member State concerned is consequently required to refuse authorisation for a project where it is such as to result in deterioration of the status of the body of water concerned or to jeopardise the attainment of good surface water status, unless the view is taken that the project is covered by a derogation under Article 4(7) of the directive.’ (my emphasis)

This suggests that the absence of an adequate air quality plan, or inadequate implementation or enforcement of an adequate, may lead to a duty to refuse consent for projects on the basis of their effect on compliance with the Air Quality Directive.

Significance of the Air Quality Directive 2008/50/EC for the Planning System

35 EPUK and IAQM have asked the DEFRA what implications the Air Quality Directive has for the approach which planning authorities should take. No answer has yet been received. Does this mean that planning authorities can just ignore the problem?

36 My view is that a lawful answer must be that planning authorities must seek in their decision making, insofar as it can have a significant effect, to prevent or reduce the extent of breaches of EU law including the Air Quality Directive. This approach appears to be supported by the National Planning Policy Framework (‘NPPF’) and the national Planning Practice Guidance (‘PPG’).

37 A core principle of the NPPF is that the planning system should

‘contribute to conserving and enhancing the natural environment and reducing pollution’

38 The PPG 2015 (revision 6.03.14), a ‘web based resource’ states

‘Whether or not air quality is relevant to a planning decision will depend on the proposed development and its location. Concerns could arise if the development is likely to generate air quality impact in an area where air quality is known to be poor. They could also arise where the development is likely to adversely impact upon the implementation of air quality strategies and action plans and/or, in particular, lead to a breach of EU legislation (including that applicable to wildlife). The steps a local planning authority might take in considering air quality are set out here. When deciding whether air quality is relevant to a planning application, considerations could include whether the development would:

Significantly affect traffic in the immediate vicinity of the proposed development site or further afield ...

Introduce new point sources of air pollution...

Expose people to existing sources of air pollutants.

Give rise to potentially unacceptable impact (such as dust) during construction for nearby sensitive locations.

Affect biodiversity. In particular, is it likely to result in deposition or concentration of pollutants that significantly affect a European-designated wildlife site, and is not directly connected with or necessary to the management of the site, or does it otherwise affect biodiversity, particularly designated wildlife sites.’ (my emphasis)

The Limit Values of the Directive

39 The Directive has more than one type of quantitative standard. A key type is that which constitutes a ‘limit value’. These impose obligations of result. Absent a specific exception or exemption member states must achieve the result. Excuses
based on the difficulty of achievement are not admissible. Thus in the Case C-56/90 Commission v UK [1993] ECR I-4109 the Court of Justice rejected the UK’s arguments that it was virtually impossible to comply with the mandatory quantitative standards of Bathing Waters Directive 76/160/EEC. The Court of Justice has observed in C-404/13 R Client Earth v SSE in relation to London’s air quality and the Air Quality Directive:

‘30 However, it should be noted that while, as regards sulphur dioxide, PM10, lead and carbon monoxide, the first subparagraph of Article 13(1) of Directive 2008/50 provides that Member States are to ‘ensure’ that the limit values are not exceeded, the second subparagraph of Article 13(1) states that, as regards nitrogen dioxide and benzene, the limit values ‘may not be exceeded’ after the specified deadline, which amounts to an obligation to achieve a certain result.

34 As regards the question of whether certain circumstances may nevertheless justify a failure to comply with that obligation, it suffices to observe that Directive 2008/50 does not contain any exception to the obligation flowing from Article 22(1).’

[41] [the AQD Art 23] plan must set out appropriate measures so that the period during which the limit values are exceeded can be kept as short as possible’ (my emphasis)

40 Such standards may be contrasted with others such as ‘target value[s], Art 2 (9) or ‘national exposure reduction target[s]’ Art 2 (22) which are to be achieved:

‘where possible’ (Art 2(9)) or ‘where not entailing disproportionate costs’ (Art 15(1))

41 If a planning authority were to grant permission for a development which would cause emissions which would lead to a breach of the limit values in the area of the development that would be to take, rather than refrain from, a measure jeopardising the fulfilment of the UK’s obligations under the Directive. It would in my view be unlawful unless the principle ‘de minimis non curat lex’ applied.

The Relevant Areas for Compliance with Limit Values

42 Article 13 (1) states that its limit values apply to member states

‘throughout their zones’

This must in my view, as the European Commission opine in its letter in response to one of 14th October 2013, be interpreted to mean in every part of the zones rather than in all zones. This is the natural meaning of the quoted words. The purpose of these limit values is to protect human health (see for example Preamble Recitals 1 and 2 and the heading of Article 13). It would not be consistent with that purpose simply to average out levels of pollution within the zones. Very heavy, life threatening pollution could then be tolerated in particular unfortunate localities.

43 The Directive sets out methodologies for assessment of air pollution. These involve the designation by member states of zones. Zones are defined in Art 2(16) as parts of territory delimited by member states for the purposes of air quality

‘assessment and management’

The designation of zones for assessment and management purposes does not imply that the limit values only apply to the average air quality over such areas. That would be inconsistent with the purpose of protecting public health. Individual human beings do not generally spend their lives spread evenly over air quality zones. A high quality of environmental and public health protection requires such standards to apply throughout the member states of the Union.

44 Any other approach would be inconsistent with the objectives of the Directive, construed in accordance with the fundamental principles of the Treaties.
45 Article 13 requires measurement in accordance with Annex III. Annex III(B)(1)(a) expressly directs that sampling points be placed both in representative locations and in areas where the highest concentrations occur to which the population is exposed for significant periods. This is directed towards ensuring that both the general and most serious risks to groups of people are actually noted. It does not state or imply that other locations which are not sampling points do not have to comply with the limit value.

46 Annex III(B)(1)(g) speaks of the need to locate sampling points on islands. Manifestly such sampling points are directed towards the specific populations of those islands rather than the effects on the zone as a whole.

47 Annex XI sets out the quantitative limit values. The limit values and footnotes explain how measurements are to be assessed in the locations chosen under Annex III. The assessment involves taking measurements over a period of time. It is expressly acknowledged that some of the assessments require averaging over defined periods of time. This is the averaging over time of quantities at particular sampling points. It does not expressly state nor does it imply that compliance with the Directive is a matter of achieving a certain average air quality over different sampling points within a zone.

**A Common Sense Limitation**

48 Three types of location may not be chosen for sampling in respect of human health limit values. They are set out in Annex III(A)(2). They are

(a) uninhabited areas to which the public have no access  
(b) under Article 2(1) installations where health and safety at work provisions apply  
(c) road carriageways and central reservations not used by pedestrians.

Sampling there would not produce information relevant to the achievement of the objectives of the Directive. They might in the context of the purpose of the Directive either be falsely reassuring or disturbing.

49 A common sense interpretation of the Directive in accordance with its purpose suggests that in such locations the limit values do not apply. A common sense approach must also be taken to the other macro scale sampling location provisions. They make clear that sampling points must be useful as such. They must be representative. It does not follow that the limit values only apply to the identified sampling points.

**Worsening of Air in an Area Already in Breach such as London**

50 Unless there are already measures in place which will lead to compliance with the Directive before the development is undertaken then any permission for new development which would significantly increase noncompliance with a limit value would in my view be in breach of the obligation to refrain measures which jeopardize the attainment of the EU objectives.

51 The UK Government has admitted that the air quality in London is in breach of the Directive. It concedes that unless some unexpected change of circumstance occurs this will continue for a long time. The air in London, the West Yorkshire Urban Area and the West Midlands Urban Area zones will still be in breach after 2030 (see Supreme Court judgement in Client Earth v SSEFRA [2015] UKSC 28 at [20].)

52 This is no mere technical breach. A substantial number of premature deaths are estimated to be caused in London from poor air quality. Walton et al (KCL 2015) estimate that each year London suffers 5,879 additional deaths from NO₂, and 3,537 from PM 2.5. That is a total of 9,416 additional deaths each year.

53 In these circumstances there is no basis for planning authorities to assume that the SoS or other regulatory bodies can be left to deal with air pollution.
Example: Greenwich Cruiser Terminal Development

54 An example of a development proposal in respect of which the above considerations would apply is the proposal for a cruise liner terminal at Greenwich. Such a development would, I am instructed, be likely to lead to significant emissions of air pollutants and make worse existing breaches of NO₂ limit values in the surrounding area. The local planning authority would in my view have a duty to consider the effects of the development on both London wide and local air quality.

55 The probability is that the only decision on such a proposal which would be consistent with the obligations on all organs of state to take any appropriate measure to achieve compliance with the Directive would be simple refusal of permission.

56 It might be possible to permit the physical works and change of use subject to Grampian condition that no vessel could be accepted until air quality was, and would remain after operations began, compliant with the Directive. This would only be reasonable and compliant with the duty of restraint in TEU 4(3) if measures were in place which could confidently be expected to lead to compliance in a reasonable time scale in the future. (Such a time scale would not extend to ‘after 2030’). That might well not be commercially attractive to the developer. But there is no ‘commercial attractiveness’ derogation provision in the Directive. Nor does a Grampian condition have, as a matter of domestic law, to lead to a commercially attractive outcome.

57 It is also, at least in theory, possible that local site specific compensatory measures could be taken which would lead to a neutral net effect on air quality. Such measures would have to be ones which would not otherwise be undertaken or form part of any Air Quality Plan intended to achieve reduce air pollution to lawful levels.

The Davies Commission and Heathrow Expansion

58 The Davies Commission into London Airport capacity makes some ambiguous remarks at [26-27] about the relevance of the Directive. There are two points to make.

59 First, if the Davies Commission is suggesting that the only relevant requirement is that additional runway capacity should not delay in time average compliance throughout the London zone, then it has misdirected itself on the law. For example:

(i) The limit values must be met throughout each zone (save in the specifically excepted circumstances).
(ii) Air quality must not be made even less compliant in areas where it is already in breach

60 Second; any suggestion that the additional capacity could be constructed but on the basis that it would not be brought into operation until air quality was, and would remain compliant, with the Directive would, in present circumstances, be inconsistent with the duty of restraint in the last part of TEU 4(3). Unless a robust, realisable, and enforceable Air Quality plan is in place which can demonstrably ensure compliance after such additional capacity comes into operation then the duty of cooperation under TEU 4(3) requires the UK to refrain from constructing such additional capacity. (see my [11] above)

Where Air Quality is Compliant

61 Article 12 provides that compliance with the limit values is not enough. Where there is such compliance then such values shall be maintained and the member states have a duty to ‘....endeavour to preserve the best ambient air quality, compatible with sustainable development’

62 The aim is ‘best ambient air quality’. This does not mean mere compliance with limit values. It means what it says. The standard is higher than that of non deterioration (compare the Water Framework Directive 2000/60/EC as discussed in the Weser case C 461/13 for example at [55] and [70]).
But the obligation is not one of result. It is to try.

Planning authorities must try to prevent deterioration and to improve in air quality and only permit the former if the development is in an EU sense sustainable development. Sustainable development, insofar as it must be understood as a qualification, is a limited qualification. The concept of sustainable development is, however, a protean one. It is therefore difficult to say with precision what compromises with best ambient air quality are justified by the implied qualification for sustainable development. The latter concept must be understood in an EU sense (not the English one). It broadly involves meeting the needs of the present, especially those of the world’s poor, without preventing the meeting of the needs of future generations (see for example the Opinion of the Advocate General Jaaskinen in the Weser case C 461/13 at [6]). Various formal definitions have been put forward but the most frequently quoted definition is from ‘Our Common Future’, also known as the Brundtland Report:

‘Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

the concept of needs, in particular the essential needs of the world’s poor, to which overriding priority should be given; and

the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs’

Thus any action which significantly increases risk to the health of the present generation, especially the poor who are, I understand, often those most directly affected by poor air quality, would not be compatible with the concept, as health is plainly a need for every generation.

Conclusions:

Because of the admitted, serious, and ongoing breaches by the UK of the limit values of the Air Quality Directive 2008/50/EC planning authorities have a duty in their decision making to seek to achieve compliance with the Directive’s limit values.

Where a development would cause a breach in the locality of the development they must refuse permission.

Where a development would in the locality either make significantly worse an existing breach or significantly delay the achievement of compliance with limit values it must be refused.

Where limit values are not exceeded in the locality planning authorities must try to prevent developments from worsening air quality and to achieve best air quality, only permitting the former if the development can be justified by the principle of sustainable development as understood in a European Union (not English) sense. Project related mitigation included in the scheme may be material to this assessment. Any action which significantly increases risk to the health of the present generation, especially the poor who are often those most directly affected by poor air quality, would not be compatible with the concept as health is plainly a need for every generation.

Robert McCracken QC is a leading public, planning and environmental lawyer. He appears at all levels from the European Court of Justice to magistrates courts and planning inquiries. His wide experience includes the petrochemical industry, renewable and conventional power, water, retail and transport sectors, waste and contaminated land and statutory nuisance. He represents a wide range of clients including multinationals, utilities, regulators, planning authorities, community groups and individual citizens. He is recognised as a leading silk by Planning Magazine and by Chambers Directory in the fields of Environment and Planning.
Endnotes

1 subject to paragraphs 49 & 50 below
2 see footnote 1
3 see footnote 1
4 See footnote 1
5 See footnote 1
6 See footnote 1
Further changes to judicial review

Jill Crawford, UKELA Convener of the Environmental Litigation Working Party

At a glance

- The political drive to restrict our ability to challenge the government’s decisions and those of other public bodies through the courts remains undiminished.
- The snowballing effect of these changes and previous changes will not only deter claimants but will also:
  - create uncertainty;
  - restrict who can bring a claim;
  - subject claimants to unnecessary and intrusive investigation of their finances; and
  - potentially place the UK in further breach of the Aarhus Convention.

The government is seeking to make yet more radical changes to judicial review, this time in relation to costs for claims involving environmental judicial review. On 9 December 2015, the Environmental Litigation WP submitted its response to the MOJ’s latest consultation on Judicial Review ‘Costs Protection in Environmental Claims’. The consultation opened on 15 September and closed on 10 December and contained proposals to revise the costs capping scheme for eligible environmental challenges.

What was surprising was that on the day that this consultation opened another consultation entitled ‘Reform of Judicial Review: Proposals for the provision and use of financial information’ had just closed. In that consultation, the government stated its intention to have greater transparency on how judicial reviews are funded, limit the potential for third party funders to avoid their appropriate liability for litigation costs and make sure that when costs capping orders are made – limiting or extinguishing a party’s costs liability – they are made in appropriate cases.

It appears that these ‘intentions’ are now being applied to environmental judicial review claims. The main areas of focus of the latest proposals for changes to environmental claims are:

- the types of cases that are eligible for costs protection and whether it should be extended to apply to certain reviews under statute;
- the types of claimant eligible for costs protection;
- the levels of costs protection available and whether they should remain fixed or should be varied; and
- factors the courts should consider when deciding whether to require the parties to give cross-undertakings in damages for interim injunctions

Further tightening of the noose

When preparing our response and analysing the government’s proposed changes it became clear that this was a further tightening of the noose on the ability to bring a claim for judicial review and a further ‘watering down’ of our judicial review system.

The latest proposals combined with the previous restrictions on judicial review will have a snowballing effect of deterring claimants. This appears to be the government’s aim.

The proposed changes are heavily weighted in favour of the defendant. If implemented, the effects will be profound as they seek to:

- exclude NGO’s and Community Groups by changing the definition of a claimant to a member of the public;
- create uncertainty and make bringing a claim prohibitively expensive by raising
the threshold on the current level of costs that an unsuccessful claimant will have to pay to a
defendant and restrict when a claimant can be granted a Protected Costs Order to after
permission is granted;
• require a claimant, including members of NGO’s/Community Groups, to undergo intrusive
examination and disclosure of their finances.

Further breach of Aarhus?

In addition the proposals have great potential to put the UK in further breach of the Aarhus
Convention. Article 9(4) of the convention refers to the need for procedures not to be prohibitively
expensive and Article 3(8) makes specific reference to the awarding of reasonable costs in judicial
proceedings. The proposed changes will deter claimants as they will create uncertainty and
substantially increase the costs of such claims. The UK has already been subject to infraction
proceedings by the European Commission in respect of prohibitively expensive provisions. Perhaps
the government takes the view that due to the length of time it takes for these proceedings to come
to fruition, it is worth taking the risk.

In proposing such fundamental changes and the potential consequences that flow from putting the
UK in breach of the Aarhus Convention one would expect the government to have produced realistic
first hand evidence that supports the need for change.

Instead, the government relies on its own interpretation of the following judgements:

• Court of Justice of the European Union in case c-260/11 Edwards v Environment Agency
  [2013] 1 W.L.R. 2914
• The subsequent judgment in the Supreme Court in the same case R (Edwards) v Environment
  Agency (No 2) [2014] 1 W.L.R. 55; and
• The judgment of the CJEU in case C-530/11 European Commission v. UK [2014] 3 WLR 853

The government’s interpretation of these judgments is one sided and certainly does not justify the
need for such radical changes. It is disquieting that these judgments on their own were the only
reason cited for the proposals for change.

Systemic attack on judicial review

One possible reason for this systemic attack on Judicial Review is that the government simply does
not like being challenged on any of its polices and decisions and takes an egotistical view that, as it
has been democratically elected, it should be able to make decisions unfettered without being
challenged by mere members of the public who think the government may have got it wrong!

In my previous article for e-law on Judicial Review I quoted from the speech David Cameron made to
the CBI Conference “Getting Britain Moving” on 19 November
2012. Although this speech was made as long ago as 2012 it makes compelling reading when
considering what is behind the government’s aim to restrict our ability to challenge decisions of
government and public bodies.

Here are some further comments from his speech:

...“We urgently need to get a grip on this (Judicial Review). So here’s what we’re going to do:
reduce the time limit when people can bring cases, charge more for [judicial] reviews so people
think twice about time-wasting, and instead of giving hopeless cases up to four bites of the
cherry to appeal, we will halve that to two.”

...“Consultations, impact assessments, audits, reviews ......this is not how we became one of the
most powerful, prosperous nations on earth.... So I am determined to change this.
Here’s how:
Cutting back on Judicial Review
Reducing government consultations.............”
These comments highlight the view of this government that its decisions are not to be challenged and that despite the rhetoric that it respects the rule of the law, it does not want the judiciary interfering in its decisions and will do its utmost to ensure that that does not happen.

Also worthy of note are the comments of Chris Grayling, former Lord Chancellor and Secretary of State for Justice when he highlighted further views of this government on Judicial Review in his article in the Daily Mail in September 2013

“Britain cannot afford to allow a culture of Left-wing-dominated, single-issue activism to hold back our country from investing in infrastructure and new sources of energy and from bringing down the cost of our welfare state. We need to make decisions quicker and respond to issues more quickly in what is a true global race”

“Of course, the judicial review system is an important way to right wrongs, but it is not a promotional tool for countless Left-wing campaigners.”

“One essential part of the campaigner’s armory is the judicial review, through which it is possible for them to challenge decisions of government and public bodies in the courts. As a result, they hire teams of lawyers who have turned such legal challenges into a lucrative industry.”

But where is the evidence to substantiate such claims? Who are these “left wingers” holding back our country and making unmeritorious claims for judicial review? Does he mean for example the Association of Plumbing Contracts, Scottish Whiskey Association, Federation of Tour Operators, British Beer and Public Association? Or perhaps the Daily Mail over the Leveson inquiry or the Countryside Alliance in relation to fox hunting? All have made claims for Judicial Review. I suspect that none would class themselves as “left wingers”.

Although the current Lord Chancellor and Secretary of State for Justice Michael Gove has refrained from making such sweeping statements we should not be fooled into thinking that his views are any different to his predecessor.

These latest proposals for changes to the Protected Costs Regime in environmental judicial review cases have been played down by government as changes that need to be made following the judgements of the recent cases that I have cited above. However the timing of these proposals has been recently brought into question by The Campaign for the Protection of Rural England “Green organisations could face steep rises in the cost of legal challenges to Heathrow’s expansion, or air quality policies, under reforms that the government is contemplating. But the Ministry of Justice denies proposals for higher cost caps are timed to coincide with HS2 and Heathrow.”

The government should take heed of Lord Pannick QC and his address to the Bar Conference on November 2013

“Any attempt by Government itself, the defendant in so many of these cases, to restrict the efficacy of judicial review must be very carefully scrutinised to ensure that the changes are being proposed in the public interest and not in the interest of Ministers and their supporters.

The policies of this Government are damaging the reputation which this country rightly enjoys throughout the world for the quality of its legal system. It is our task as advocates to present that case as clearly as we can, not in our interest, but in the public interest”

And finally, Lord Deben, a former Tory cabinet minister, who said “It is unacceptable if we have a system whereby if the Government has acted illegally it can’t be brought to account in the courts”.

Jill Crawford is an Associate at BLM solicitors where she works in the Environment team. Jill specialises in environmental regulation and environmental risk and advises businesses on a wide range of environmental issues. Jill was a former prosecutor at the Environment Agency and is an experienced court advocate.
Can we catch up? How the UK is falling behind on environmental law

The United Kingdom Environmental Law Association Annual Garner Lecture 2015*
James Thornton, Chief Executive Officer, ClientEarth**


Introduction

This is a lecture that has been given by the most senior judges and some of the finest legal minds from Brussels and London. And today it is my turn, as a former aggressive American litigator from New York who ended up in Hackney, as a solicitor no less, to deliver it to you! My working life has largely been dedicated to starting a project, then an office and now a global organisation, which practises public interest environmental law. It started when as a young lawyer – a much younger lawyer – I noticed that Ronald Reagan had decided to stop enforcing environmental laws. I was a lawyer at the Natural Resources Defense Council (NRDC) and we decided to see if citizens could make a difference.

We looked at the Clean Water Act. Before Reagan’s administration, the government brought about 350 prosecutions a year under this law but under him it fell to zero. We did systematic research and brought 60 cases in six months in federal court, winning all of them, getting court orders to clean up the pollution, penalties that went to other charities and fees to bring more cases. We went on to bring scores more cases, again winning them, and embarrassing the government to get into the enforcement business again. In California we protected 350,000 acres of unspoilt country by threatening to sue on behalf of a little bird called a gnatcatcher, which risked being destroyed if developers built on swathes of coastal land. The threat of litigation started a negotiation that created the model for multi-species protection plans in the United States. And much else.

However, when I came to Europe almost 15 years ago I found there was no pan-European organisation of lawyers dedicated to protecting the environment. An academic did a study comparing the number of practising lawyers inside environmental groups in the US and Europe. He counted around 500 in the US and only around two dozen in Europe. It seemed obvious there was a niche to fill – let us call it an eco-niche – and so I started up ClientEarth with the help of the McIntosh Foundation.

We are an organisation that has grown from the corner of my bedroom to one with a staff of 80 people working across Europe, Africa and – soon – Asia. We see ourselves as lawyers who work together with scientists and policy experts to create practical solutions to key environmental challenges. We believe in the equal right of all to live and work in a healthy environment. We work to enforce laws when governments fail to do so and we will use the law in a diligent way to enforce environmental rights. Importantly, we aim to use the power of the law strategically, to achieve systemic change.

Before starting ClientEarth, I talked to many lawyers and activists in Europe. I heard a number of things repeatedly. There was a view that aggressive litigation was not needed to protect the environment. There was a view that more conciliatory means were better. Several UK lawyers told me to trust the common law and to wait for cases to percolate up, so that effective environmental law would eventually arise.

* Professor Jack Garner was a leading environmental lawyer and one of the founders of the UK Environmental Law Association (UKELA). He gave one of two introductory addresses (with the late Andrew Lees) at the opening conference of UKELA in September 1986. He is remembered every year at UKELA’s Garner Lecture. The 2015 lecture was held on 11 November 2015 and kindly hosted at the offices of Freshfields Bruckhaus Deringer, London.

However, I believe these views are wrong. I believe the law can be and should be used in a strategic way to make big structural changes. I would like to make the case that legal strategies to prevent the dying of the planet are not only of value but are vital and compelling because of our present circumstances. I would like to do this by sharing a perspective on what public interest environmental law does, how it is moving from the USA to the EU to China, and point out some further changes in our UK system that need to be made to bring it up to global standards and allow public interest environmental law to flourish.

Let me start by saying this. I believe when you pass an environmental law – indeed, when you pass any law – and you do not enforce it, then in effect you authorise the conduct you originally sought to prohibit. You permit something by turning a blind eye to laws that ban it.

In the EU there has been a history of scoffing at laws. There is a modern Italian proverb which says: '[o]ne goes to Brussels to make the law and one comes home to find a way around it'. In France it was regarded as a badge of national pride to ignore EU law. However, before we think we in the UK are so much better, let us pause and think again.

Our European case

This year ClientEarth took the UK Government to the Supreme Court over air pollution laws. The government’s view was very clear. It recognised there was a European law which said that air pollution had to be cut to levels suitable for the protection of human health by 1 January 2010. However, the argument put to the Supreme Court was that domestic courts should not sanction the UK Government for non-compliance. In response, the UK Government said – and remember this was not decades ago but this year, in 2015 – that no action by the court was – and I quote – ‘necessary or appropriate’. Clearly, the government wanted to be left alone to its own plans and devices.

We knew of no details of the planned government action. We had no evidence it would be effective. We were simply told that action to enforce the current law was unnecessary because our executive would take care of it in its own sweet time, 2030 at the earliest.

Forget for a moment the impact on human health of air pollution remaining at dangerously high levels for decades after the deadline. Forget for a moment this was environmental law. This could be securities law, or contract law, public or private law. Think of the consequences of a government picking and choosing what laws it should comply with and what laws not to. Think of the consequences of a government deciding when it has to comply with the laws and when it does not.

I would suggest that is not a democracy; neither is it government under the rule of law. Happily, however, we won. On 29 April 2015 the UK Supreme Court ordered the government to take ‘immediate action’ on air pollution. The Supreme Court Justices were unanimous in their decision, saying: ‘The new government, whatever its political complexion, should be left in no doubt as to the need for immediate action to address this issue’. It was an historic ruling, which was the culmination of a five-year legal battle fought by ClientEarth for the right of the British people to breathe clean air.

There is a good, non-environmental reason for supporting the result. It should be welcomed by anyone who believes in the rule of law as opposed to the arbitrary exercise of power. If we are to protect and embellish democracy, power must be governed by law. The corollary of that is that the courts are the final arbiter of what the law says.

Going back in time and across the pond to the US case of *Marbury v Madison*, decided in 1803, it was established that it was the Supreme Court, not another branch of government, which has the power ultimately to decide what the law is and, in turn, to enforce it. For what was a relatively new American Supreme Court, this decision was pivotal. If the other branches accepted the judgment, the inter-governmental relations would be clear going forward. In the event, the US Supreme Court did establish itself as the ultimate authority. The case is known by every American lawyer as a foundation stone of the rule of law in the United States.

Here in the UK, *ClientEarth v Defra* has some of the quality of *Marbury v Madison*. Here, too, the Supreme Court is a new institution, which grew out of the House of
Lords. It is still defining its powers, especially in relation to the European Commission and the Human Rights Act. It is doing so in a legal system in which we all recall the dictum ‘the Queen can do no wrong’. In our legal system courts do not lightly write injunctions against the government. However, in *ClientEarth v Defra*, the Supreme Court has asserted its authority to order the government to comply with its legal duty, and created a kind of continuing *mandamus*, fashioning a role for the courts to supervise compliance with the court’s order.

The second good reason to support this result is because we need to protect the environment and human health. The healthy functioning of natural systems is a public good. So there were two solid strategic gains from this case and the citizen – the citizen in this case in the form of *ClientEarth* – was vital for this process. This is important. I want to argue that in each strategic success – making democracy work and protecting our ecosystems – the role of the citizens was crucial.

In the past, and still today, governments too often see industry as clients, whom the government must serve. This is often because of so-called ‘regulatory capture’, where powerful industries, because of their huge financial stakes in an outcome, can control a regulator, whilst members of the public with only a tiny financial stake cannot or do not. There are, for instance, an estimated 30,000 business lobbyists in Brussels, backed by billions of Euros, working on behalf of their industries and organisations. There are perhaps 700 environmental lobbyists. There are obviously very few – if any – ordinary citizens who can use their spare time and money lobbying for environmental causes in Brussels. It would be a strange pastime.

However, the real clients of government should be the people they govern. Their clients should be the citizens who have put them in power for the common good. For that common good to flourish, it requires citizen participation and citizen supervision.

**Access to justice**

Let me explain what I mean by using environmental law. Environmental law starts with science. It develops policy that captures what science says, before proceeding to legislation, implementation and enforcement. All five stages are vital to protect the environment. At *ClientEarth* we work at all five of these stages. However, it is in enforcement where the citizen has an especially visible role and it is in enforcement where there has been a gap in the UK and the EU.

Citizens must be able to enforce the law. Our air pollution case was an example. We originally took this case to court in December 2011 to stop the government breaking air quality laws. However, the High Court and later the Court of Appeal refused to take action. We appealed to the Supreme Court to show that citizens could and should act and to show that when there is a breach of EU law it cannot be left solely to the European Commission to deal with it.

However, significant barriers remain for citizens seeking to gain access to justice. Let me start with the barriers that exist in Brussels. Europe has shown a complete disregard for democracy and the rule of law by consistently failing to respect the right of people to bring its institutions to court. The treaty allows it; the Aarhus Convention, which the EU signed, requires it. *ClientEarth* has brought the European Commission before the Aarhus Convention Compliance Committee, the UN committee charged with upholding the Aarhus Convention.

The point is simple: when EU institutions violate EU environmental laws, citizens may not sue the EU for such violations anywhere. They may not sue it in Member State Courts because the EU will not condescend to such jurisdiction. Nor can citizens sue the EU in EU Courts because the EU Courts will not acknowledge their standing. The only exception is that you can sue for access to information. In reply, the European Commission has been arguing that EU citizens have access to justice because people can indirectly question the validity of EU actions through their national courts, which can pass the questions on to the EU Court. However, there is no guarantee that a national court will refer a question. The EU simply refuses to ensure access to justice in environmental matters when the EU violates its own laws.

Frustratingly, the Commission adopted a proposal for a directive to guarantee this access in 2003 but the process stalled in the European Council because of a lack of
political will. Under pressure from national governments the proposal was withdrawn in 2014. We believe the European Union is clearly and flagrantly breaking its treaty obligations and we are now waiting for the Aarhus Compliance Committee to decide whether it agrees with us. We do not expect the EU to welcome a decision which puts it in the wrong. However, ironically, such a decision would prove we live in a democratic Europe, which brings me on to the barriers in the UK.

In Britain we have treasured a rule since the 13th century, which says that if a person goes to court and loses, that person has to pay all of the costs of the defendant. That could mean, even in a relatively simple case, costs running into the hundreds of thousands of pounds, or more. Unsurprisingly, that meant even big environmental groups could rarely bring cases.

This rule had to be challenged and ClientEarth did so, again by way of the Aarhus Compliance Committee in Geneva. We won and, partly as a result of that win, the rule was changed. Adverse costs in England and Wales in environmental cases are now capped at first instance at £5000, where the claimant is an individual. For other claimants, they are capped at £10,000.

This was a small victory – but only a small one. The government’s liability to pay costs is capped at £35,000. Lest you think this reasonable, consider the following: you bring a clean air case against the government, and after five years you win a Supreme Court injunction. Even with much of the work done by in-house lawyers on charity wages, the case costs you several hundred thousand pounds. It establishes that the government is violating its mandatory duty, with some 50,000 citizens a year dying as a result. Losing, the government is protected from paying the actual costs. What is more, the £10,000 cost cap for a charity applies only in the first instance. So if you go to the appeals court, or to the Supreme Court, you must request cost caps. You may get them or you may not; the only limits are at the discretion of the court.

On top of all this, the government has failed to put any caps on environmental cases against companies and other private parties. Claimants bringing environmental cases against such parties still face unlimited liability. So some small improvements have been made, but it is important to understand that this costs system we have is still by far the most punitive of any country in the EU.

Unfortunately, it is also moving in the wrong direction. In revisions pushed through this year to the Criminal Justice and Courts Act 2015, the UK Government introduced deterrents to judicial review (JR). Lord Woolf has written that the changes were unnecessary and ill-drafted. He has expressed his fear that the changes may impede JR in a way that damages the rule of law in our country.

Under the changes, any claimant that is a corporate body – and that would include ClientEarth and other environmental organisations – pursuing JR and seeking the cost protection provided for in the Aarhus Convention – will have to disclose the names, addresses and interest in the charity of all their members. If the charity has received – or is likely to receive – more than £1500 from an individual or funder to cover the legal costs of a case, then those contributors and the size of their contribution must also be declared to the court. The members and funders could then be called upon to pay the court costs should the charity lose its case – judges are directed that they must consider this option.

The charity leaders’ network ACEVO (the Association of Chief Executives of Voluntary Organisations) has said the ‘overwhelming effect of the reforms [will be to introduce a massive chilling effect on charities’ ability or willingness to seek judicial review’ and that the reforms will ‘severely damage the confidence of individuals and organisations in becoming members or donating funds in the first place’. I agree.

The government, having succeeded in this mischief, is working along another parallel track to increase costs for claimants in environmental cases. In a consultation open until 10 December 2015, the government is considering raising the cost caps. Exposure will double for claimants. Again, a new cap must be requested at each level. If there are multiple claimants, each is exposed to the full amount. Meanwhile, the government’s liability goes down. It will drop to £25,000. Even worse is this: the government proposes letting the defendant ask the court to remove all cost protection, exposing the claimant, just like in the good old days, to unlimited cost liability.

Why is the government working so hard to prevent citizens from using the courts? Our country has no written constitution. In our system, JR is the main check on government
abuse of power. But what is the government so afraid of? Why does the rule of law seem so threatening? Why must citizens be prevented from talking to judges?

I hope to have clearly made the point that in the UK and Europe access to justice is not what it should be.

The cost of access to justice

Compare this to the situation in the US. In the 1970s, the United States introduced a series of environmental laws that have served as the foundation of modern environmental regulation. A number of these laws, such as the Clean Air and Clean Water Acts, have what is known as a ‘private attorney general’ provision. Citizens can go to court to enforce the law, standing in the shoes of the attorney general, once they have met certain criteria. The notion is that enforcement of the law is a public good, and enforcing environmental laws is in the public interest.

Here it is important to understand what a public interest case is: a public interest case is one in which the interest the claimant asserts is not the claimant’s personal interest but, rather, that of the public. The successful claimant in a public interest case does not benefit from her victory any more than another member of the public. The cleaner air or water that results from a victory is broadly shared.

To encourage such public-spirited litigation, these laws have a fee structure which assists claimants to bring cases to court. If a citizen brings a case and wins, she recovers all her costs and fees. If she loses, she pays no costs or fees to the defendant. There are over 200 such federal laws in areas including environment, civil rights and consumer protection. These laws allow true one-way cost shifting. This approach to fee recovery has led to greater citizen involvement in enforcing the law, when the government fails to enforce it against companies, or where the government fails in its own duties under the law.

True one-way cost shifting of this kind had a moment in the sun in the UK. In 2009, Lord Justice Jackson published his ‘Preliminary Review of Civil Litigation Costs in the UK’. He said that, and I use his words, ‘radical reform’ would be needed if the UK were to meet its Aarhus obligations. One of the options he examined was true one-way cost shifting. His 23-page learned analysis of the virtues of the US system made my heart sing. I still remember thinking that radical reform might happen here upon reading Lord Justice Jackson’s Preliminary Review. However, by 2010, when the Final Review was published, the sunny spell was over. The American rule of one-way cost shifting as an appropriate – if radical – reform had been dropped.

Access to justice in China

Lest I be accused of typical American arrogance and a lack of understanding of the quieter and more nuanced customs of my UK brethren, let us also compare the UK situation with that in China. There has been a sea change in the attitude to environmental laws and enforcement in Beijing. Whilst China has had environmental law for decades, there has been weak and ineffective enforcement.

That is changing for three reasons. First, the problems are manifest – the equivalent of the smog in London in the 1950s. As recently as September 2015 a group called Berkeley Earth released a study based on data collected by a network of sensors across China, which said that more than 80 per cent of Chinese people are regularly exposed to pollution that far exceeds levels deemed safe by the US Environmental Protection Agency. The report said that air pollution in China kills about 4000 people – not every year or every month – but every day.

The second reason is that the pollution is so severe that it will affect the economic sustainability of the country. A recent assessment carried out by the Chinese Academy of Science took account not only of air and water pollution, but also of resource consumption and ecological degradation. The estimated total resource and environmental costs amounted to 13.5 per cent of GDP in 2005. The figure is considerably higher than that of the United States, the United Kingdom, Germany, Japan and other developed economies and on a par with countries such as Mexico, Ghana and Pakistan.
The third reason is that people are taking to the streets on the issue. There are an estimated 8000–10,000 demonstrations a year in China about environmental problems. In April 2015 thousands of people in China’s southern Guangdong province protested against the expansion of a coal-fired power plant.

The Communist Party knows it must tackle the issue. It must deliver a public good. The harmony of the country, to use the Chinese phrase, depends on cleaning up the environment. So the Communist Part is tightening laws and improving enforcement. The Chinese Government has made real time emissions data from polluting factories available online to the public. The desire to tackle the problem goes to the top of the Chinese Communist Party. Premier Li Keqiang has pledged to wage a ‘war on pollution’. Around Beijing, where air pollution is famously bad, all major coal-fired power stations will be closed down by the end of next year.

However, most importantly, Chinese citizens are being enlisted into the war on pollution. A law came into effect in January of this year, the Environmental Protection Law 2015, which allows non-governmental organisations to bring cases against polluting companies for the first time. Premier Li Keqiang described China’s new law as a secret weapon in the war against pollution.

Around 500 Chinese environmental groups have the power to act, and more groups gain standing each year. Several have quickly taken action – we know of 36 enforcement actions that have already been filed, with more on the way. The Chinese authorities have taken the situation so seriously that they invited an American litigator living in London – me, together with several other European experts – to advise the Chinese Supreme People’s Court on how to make the new law allowing citizen enforcement work. They want us to help draft better laws and regulations. They want us to train the judges who will be deciding these cases. They recognise the need to build the capacity of the NGOs to bring cases against polluting companies.

This is a real game changer where citizens can sue companies in Chinese courts. It is an amazing change for China and we have much to learn from the new Chinese attitude. The Chinese Government is trialling seven versions of an emissions trading scheme in seven provinces, with the intention of crafting the best system for national use. The Chinese Government has data openness and environmental panels on all courts from the Supreme Court on down.

I should also mention three other ways in which the new Chinese environmental legal regime has now moved ahead of ours here in the UK. First, Chinese NGOs are now able to sue polluters directly. In the UK we cannot challenge corporate polluters unless they break laws that lead to criminal offences or private law claims.

Secondly, returning to costs in environmental cases, the Chinese are a practical people. The Chinese Government now wants to encourage citizens to bring enforcement cases. That brief ray of sunshine brought to us by Lord Justice Jackson’s Preliminary Report on the UK cost regime, recognising the value of the US system, has blazed in China. Chinese courts have adopted the American rule on true one-way cost shifting. If a Chinese NGO wins its case against a polluter, it gets all its costs and fees, and if it loses, it pays the other side nothing. The first of these 36 citizen cases I mentioned reached judgment several weeks ago. Not only did the court impose significant fines on the defendant; it also awarded the claimants all their costs and fees.

I hope we will be able to help empower Chinese NGOs to use their Environmental Protection Law well.

Thirdly, the Chinese courts now have very broad remedial powers to enjoin pollution, to shut facilities, to write and implement detailed environmental remediation plans, and so on. They are asking for advice on using these powers wisely. They want to understand the best global models for court-ordered compliance and remediation. I plan to assist them. Where there is such a strong desire to use the courts’ powers in the best way for protecting the environment and human health, there is much to hope for.

So let us pause here and reflect on how the situation in Britain compares with those in the US and China. We have a tendency as UK lawyers to look to our own national traditions and see how far we have come. It is true: we have made progress in Britain in environmental law. However, it is also important to look to the best examples globally and see how we compare with the rest of the world.
This is my principal concern. Whilst we have moved slowly, others like the US have moved far ahead of us. Also, to be frank, the Chinese have overtaken us in terms of making it easier for citizens to use the courts to redress environmental harms by polluting companies.

We led the way in establishing the rights of citizens through the Magna Carta. We were an example to the world in the abolition of slavery and extending suffrage to women. The British Isles were the first to develop common law, including the system of binding precedent, parliamentary sovereignty, habeas corpus, the first trial of a monarch. As humbly as an ex-American litigator can, who has shifted perspective by becoming a solicitor in England and Wales, I would suggest that the British people would not want us playing catch-up when it comes to protecting the planet: they would want us to lead.

Remedies

So what do we need to do to meet the standards of our Chinese colleagues? First, there must be further reform of costs. True one-way cost shifting dropped between the first and second drafts of Lord Justice Jackson’s review of civil costs. Secondly, we must be able to sue polluting companies, similar to the right that already exists in the USA, China and our EU allies. I personally have seen how beneficial this is, particularly if a government tilts too far away from its responsibilities, as Ronald Reagan did.

The one action the Chinese have not yet introduced is a JR where the government has an environmental duty. However, it is on their radar. I met not long ago with Chinese academics, judges and officials. They are now discussing the need for such remedies. On our side in the UK, as I pointed out earlier, this most important remedy for government abuse of power is under increasing threat.

As we speak of remedies, let us consider how we could use injunctions differently. Entertain a hypothetical case for a moment. In our UK Supreme Court air case the Court took the important steps, and perhaps historically important steps, as I noted earlier, of enjoining the government to comply with the law, and extending a kind of continuing mandamus, to supervise the lawfulness of the government’s compliance.

What happens, however, if the government does not take the Supreme Court’s order seriously? The government told the Court that, although the law required compliance with NO2 limitations by 2010, it had no intention of complying with it any time soon. The Court, referring to the statutory language, ordered the government to write a plan that will bring it into compliance ‘as soon as possible’. The government’s draft plan, written under the injunction, still says it will not comply before 2025, which is exactly what it said to the Supreme Court before the injunction was granted. This raises the question of whether the government accepts the power of the Court to enjoin it to comply with what are, after all, mandatory duties.

Let us reason together. The duty is mandatory. The Court has enjoined compliance. The government itself publishes statistics showing that the period of non-compliance between 2010 and 2025 means that tens of thousands of people in the UK will die of air pollution because they are forced to breathe dirty air. What can a court do when a government is recalcitrant? One obvious answer is to hold the government in contempt. However, where the recalcitrance is hardened and systematic, courts in other jurisdictions have been creative about crafting effective remedies.

In India, for example, the Supreme Court has become famous for its specific and detailed environmental injunctions. In the United States, the so-called ‘structural injunction’ has been developed. It came into being in the civil rights arena, where state and local governments had entrenched themselves in a position of non-compliance, and were willing to ignore orders of the court. What the American courts did was to write highly detailed injunctions, requiring precise actions to bus school children and so on. In some cases, US courts assumed the administration of prisons until they met appropriate standards.

In Pakistan recently, a very interesting injunction was issued by the High Court in Lahore. The national law required formation of a climate change commission made up of representatives of various ministries, with the obligation of making policy
recommendations on climate change. A claimant alleged that the government had failed in its duty to create such a commission. The court in Lahore called in the ministries, which indeed had done nothing, and intended to do nothing. The court then got the job done. It wrote an injunction which created the commission, appointed its members and set out the timeline for their recommendations to be published.

I would like to draw a general rule about the specificity of injunctions against governments. It runs this way: the specificity of an injunction is directly proportional to the recalcitrance of the government actor. That is to say that the need for the court to enjoin specific remedial steps increases to the same degree as the government's refusal to fulfil its mandatory duty. Looking at it this way, the government's bad faith authorises the court's remedy.

However, someone has to protect the public interest, and when the government abdicates a mandatory duty, only the court can bring about compliance with the law. What happens if the Government of the UK insists, while its citizens are dying, that 2025 is 'as soon as possible' for it to clean up the air? We know the claim would be factually false. Paris showed in October 2015 that a mandated reduction in traffic dramatically reduces air pollution – literally overnight. Were the government to commit itself to a hard-nosed confrontation with the Court, taking a position that it has the right to let its own citizens die until it is convenient to comply with the law – a proposition many governments around the world would agree with, but in whose jurisdiction many people might not want to raise their children – would it be appropriate for the Court to learn from the experience of other courts facing hostile central authorities? Could our courts write a more specific injunction requiring action to clean up the air? For me the answer is a resounding yes.

So that courts can have the right pleadings before them, let me ask for help from all the lawyers here today. We need to be more creative, more focused and more demanding in the remedies we seek from our courts. Our environmental problems will get worse before they get better.

Let us not fall into our cultural default mode of being afraid to ask the courts for novel remedies. We are, after all, dealing with novel problems. If our intention is to use the law to improve things, we need to be strategic. So, for example, in order to address climate change, biodiversity loss, air quality and so on, using existing law will require us to assist the courts in moving further more quickly.

By way of my own example, I picked air quality as an area that would be impossible to lose as a case if it is argued well and the EU environmental law regime worked at all. It appears to be working.

It was not difficult. It is just like planning sixty chess moves ahead along whatever dimension of the law you are using to serve the common good. It is a matter of being thoughtful: what do the courts need from lawyers to be able to deliver the right result? How many cases between here and there need to be envisaged, brought and won so that the ultimate decision in a domain is ineluctable? Armed with the answers to those questions, then the cases can be designed and won, thereby building a series of judgments and a body of new case law enabling the benefits to be implemented in the real world.

**The way forward**

I recently spent an inspiring two days in a meeting in London with Supreme Court judges from around the world, including from our own local jurisdiction. It was clear that judges are eager to do justice in environmental cases. Let us promise to bring them the right facts and demands for them to be able to grant us new and powerful remedies. The courts are open for business. They will respond if asked. They will go further if the case demands it of them. If we do not ask we will not receive and the losers will be people and the natural world.

Taking a broad assessment of the legal climate, I have come to the belief that piecemeal improvements to environment law are not enough. What I would like to see is the evolution of a new generation of environmental laws, which can comprehensively protect our planet and all the plants and animals living upon it. That would include keeping climate change within smart limits and reversing biodiversity loss. For, consider this: if all the laws to protect the environment we now have at international, national and local level were enforced –
and that is a big if – we would still not stop global warming, biodiversity loss or the rest of it.

I call this next stage in the evolution of environmental law, which we need more than ever, Environment Law 2.0. It will mean working on the legislation as well as the litigation to get things right. It is a long-term goal but one which is definitely within our sights. While we are building this new system of law, I and my colleagues at ClientEarth will keep enforcing the laws we have and keep working with legislators to get the new laws right, because if we fail to enforce what we now have, new laws will be meaningless. Unless we enforce the laws we have, governments will stand up in Supreme Courts and say they can pick and choose.

I remain a huge optimist. We have made vast strides, positive strides. Our success in the air quality case put a requirement on the government to act. It created a space for our policy-makers to come up with clean, sustainable transport solutions which protect our health. We hope to match our success in tackling air pollution in the UK courts in courts across Europe.

We have successfully challenged the right of energy companies to build highly-polluting coal power stations in Poland. We are reducing deforestation in Africa by helping countries to develop their forest laws and ensuring that legally-harvested timber has a market in Europe.

Conclusion

Finally, speaking as a former aggressive American litigator who came from New York and ended up in Hackney as an English activist lawyer working on behalf of the planet, I am going to leave you with these thoughts:

- It is time to realise that getting citizens enforcing environmental law is a hugely positive act.
- It is a positive act to remove the barriers to going to court.
- It is a positive act to see who in the world is in the lead and then working to match the best of our international colleagues.
- It is a positive act to grow the rule of law because it protects the environment and protects the planet and protects all those people who live upon it.

In that spirit of positivity, I thank you for your patience in listening to me.

James Thornton is the founding CEO of ClientEarth. He is an environmental lawyer and social entrepreneur. He is a member of the bars of New York, California and the Supreme Court of the United States, and a solicitor of England and Wales. The New Statesman has named him as one of 10 people who could change the world, while The Lawyer has picked him as one of the top 100 lawyers in the UK.

Endnotes

1 5 US 137, 1 Cranch 137, 2 L Ed 60 (1803).
3 See http://berkeleyearth.org.
4 http://switchboard.nrdc.org/blogs/kareer/china_fights_back_against_airpocalypse_embarking_on_a_new_air_pollution_initiative_that_just_might_work.html.
5 http://www.reuters.com/article/2015/03/20/us-china-pollution-beijing-idUSKBN0MG1D120150320.
Books Offer

Free to a good home:

- Journal of Environmental Law – full set from Vol 4.2 (1992) to Vol 27.4 (2015) – in vg condition (a few have been annotated)

Ring: 01694 722466 or Email: pj.howsam@btinternet.com to arrange collection/delivery. Peter Howsam.

Shale World UK Conference: 18-19 May 2016

ILEC Conference Centre, London, UK

Where the UK’s unconventional pioneers

Shale World UK returns for its 4th year on May 18-19 at London’s ILEC Conference Centre in Earl’s Court. The event is all about business strategy and engagement for the UK shale and onshore oil and gas industry, and is the largest and most highly regarded conference and expo for the sector.

Over 400 operators, existing and prospective UK license holders, local and national government, planning authorities, service companies and industry experts will attend, in what will be a pivotal year for the industry.

Speakers include:

- Francis Egan, CEO, Cuadrilla Resources
- Stephen Bowler, CEO, IGas Energy
- Colette Cohen, SVP UK & NL, Centrica
- Gunnar Olsen, Director Business Development, Total E&P UK
- Tom Pickering, Operations Director, INEOS Shale
- John Dewar, Operations Director, Third Energy
- Stephen Sanderson, CEO, UK Oil & Gas Investments
- Gary Stringer, Head of Sustainability, IGas Energy
- Mark Lappin, Director of UK-NL – E&P Subsurface, Centrica
- Ken Cronin, Chief Executive, UKOOG
- Graham Dean, Managing Director, Reach Exploration
- Chris Faulkner, CEO, Breitling Energy Corporation
- Nick Grealy, Director, London Local Energy
- Corin Taylor, Director, UKOOG
- Simon Durk, Gas Manager – Energy Strategy & Policy, National Grid
- Dan Sadler, Head of Energy Futures, Northern Gas Networks
- John Chisolm, CEO, Flotek Industries
- Sarah Scott, Sr. Tech. Specialist Hydrogeology, Environment Agency
- Rob Ward, Director of Science, British Geological Survey
- Tony Almond, Oil and Gas Policy Team, Health and Safety Executive

UKELA members can get an extra 15% off the conference using the code EFG or this link.

For more information on the conference, see Shaleworld UK. See online for early booking options.
International Conference in Moscow and St Petersburg: 10-15 April 2016

This conference is specifically designed for attorneys and corporate lawyers who assist clients in energy and natural resource law. The Russian energy sector is undoubtedly attractive for foreign companies, so this tailored course will provide you with an opportunity to consult your clients on a very promising area.

A discount for UKELA members is offered: The discount would be equal to that for young professionals as specified on our website, i.e. 2655 + VAT until February 15. For more details and to book visit the CECJ website.
The editorial team is looking for quality articles, news and views for the next edition due out in March-April. If you would like to make a contribution, please email elaw@ukela.org by 16 March 2016.

Letters to the editor will be published, space permitting.

© United Kingdom Environmental Law Association and Contributors 2016

All rights reserved. No parts of this publication may be reproduced or transmitted in any form or by any means or stored in any retrieval system of any nature without prior written permission except for permitted fair dealing under the Copyright Designs and Patents Act 1988 or in accordance with the terms of a licence issued by the Copyright Licensing Agency in respect of photocopying or and reprographic reproduction. Applications for permission for other use of copyright material including permission to reproduce extracts in other published works should be made to the Editor. Full acknowledgement of author, publisher and source must be given. E-Law aims to update readers on UKELA news and to provide information on new developments. It is not intended to be a comprehensive updating service. It should not be construed as advising on any specific factual situation. E-Law is issued free electronically to UKELA members. An additional charge is made for paper copies. The views expressed in E-Law are not necessarily those of UKELA.