



e-law

Better law for the environment

March/April 2017 | Issue 99



Welcome to the March/April 2017 edition of e-law. The theme for this issue is climate change and energy.

The entry into force of the [Paris Agreement](#) in November 2016 was a significant step forward in global action to tackle climate change. It means that there is a further legal instrument available for addressing global climate change objectives when the second commitment period of the Kyoto Protocol

comes to an end in 2020.

The Paris Agreement commits ratifying Parties to hold increases in temperature to 'well below 2°C' and 'pursue efforts to limit temperature increases to 1.5°C above pre-industrial levels', in recognition that this would significantly reduce the risks and impacts of climate change. It also obliges countries to adapt to the effects of climate change and foster climate resilience and low greenhouse gas (GHG) emissions development, as well as making finance flows consistent with these commitments.

The United Kingdom (UK) ratified the Paris Agreement in November 2016 but in addition to these international obligations, the UK also has national legally binding GHG emissions reduction targets and indeed was the first country in the world to set such targets. The UK domestic targets, set by the Climate Change Act 2008, commit to an at least 80% reduction in GHG by 2050, relative to 1990 levels, consistent with keeping the global average temperature rise to as little as possible above 2°C.

Factor in the European climate change commitments under the [2020 climate and energy package](#) and the [2030 climate and energy framework](#) and we are dealing with many different but linked obligations, from cutting GHG emissions, to increasing renewables and improving energy efficiency.

So how do we reconcile all these obligations? The Committee on Climate Change report on [UK climate action following the Paris Agreement](#) examines the emissions targets set by the Paris Agreement and the UK's climate change policy and explores the feasibility of the UK incorporating and achieving an emissions target, in line with the Paris Agreement. The report comments that the UK meeting its existing national targets would be an important contribution to global climate action but that it is still too early to refocus targets in line with the Paris Agreement's more ambitious approach. Instead, vigorously pursuing the measures required to deliver on existing UK commitments and maintaining flexibility will go further.

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This raises many questions about how we are going to deliver on these targets and what progress has been made to date:

- With the disbanding of the Department for Energy and Climate Change (DECC) last year to become part of the Department for Business Energy and Industrial Strategy (BEIS) has climate change been deprioritised or is this a step towards necessary policy integration?
- Do current policies provide a suitable framework for the development and deployment of low carbon technologies and other GHG emission reduction measures?
- Are future policies, such as those outlined in the [Green paper on the modern industrial strategy](#), going to be sufficient to support the 'exceptional' low carbon transition needed to slow climate change recently highlighted by the International Energy Agency's report, [Perspectives for the energy transition](#)?
- Can we use Brexit as an opportunity to strengthen the UK's progress towards meeting climate change reduction targets?

Despite the UK's commitments and the majority of the international community's collective will to transition to a lower global carbon economy, things look quite different on the other side of the Atlantic under the Trump administration. Here we've seen all mention of climate change removed from the White House website, witnessed the slashing of US climate science funding and heard that Trump intends to deregulate the fossil fuel power sector.

Given all these ongoing developments, it couldn't be more appropriate timing to have an e-law edition dedicated to a discussion of climate change and energy, exploring some of these global issues. Themed contributions in this edition include:

- [Trump's climate and energy policies](#) by Sebastien Korwin.
- [Incendiary developments: Northern Ireland's Renewable Heat Incentive, and the collapse of the devolved government](#) by Dr Thomas L Muinzer.
- [Solar energy's contribution to biodiversity](#) by John Feltwell.
- [Success in South Africa's first climate change case](#) by Nicole Loser and Ruchir Naidoo.

We also have our first [Brexit Task Force \(BTF\) update](#) in this edition, as well as matters in practice pieces covering:

- [The Public Trust Doctrine's role in post-Brexit Britain](#) by Emily Shirley and Marc Willers QC.
- [The battle to save the Eastbourne downland](#) by Simon Boyle.

Best wishes,

Simone Davidson

Simone Davidson
E-law Acting Editor

E-law editorial team

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

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

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

Lewis Hadler, Assistant Editor – Lewis currently studies the BPTC at the University of the West of England, having previously worked as a paralegal with Richard Buxton Environmental & Public law. He graduated in 2015 after completing his LLB at Anglia Ruskin University Cambridge.

Words from the Chair



This edition of e-law finds your Chair, Janus-like, looking backward to the achievements of the past 20 months, and looking forward to the summer when I will transition to 'Past Chair'; Anne Johnstone will become our new Chair and I know that she will do a wonderful job for UKELA.

Brexit Task Force

I continue to work closely with our Brexit Task Force (BTF) Co-Chairs, Richard Macrory and Andrew Bryce, who are doing a splendid job for us. I am also in regular contact with Rosie Oliver and our new Brexit researcher, Joe Newbiggin, to discuss priorities for research. Barely a week goes by without the publication of yet another report, from government or from policy groups, which is relevant to our framework of EU-derived environmental laws. We keep track of these developments with regular phone calls.

At the time of writing the third meeting of the BTF is imminent (Monday 13 March). We have a full agenda, including measures we can take to ensure that members are kept up-to-date with what we are doing in relation to Brexit. In addition to our dedicated and regularly updated Brexit [webpage](#), we will be including a regular feature in e-law about UKELA's Brexit-related work. We will also consider more closely whether we can also promote our work via Press Releases so as to reach a wider audience.

We are most grateful to University College London (UCL) for providing a Central London base for Joe and Rosie – I have written to the Dean of Laws at UCL, Professor Dame Hazel Genn, to express our gratitude.

International update

Few people can begin to contemplate what life must be like beside a country like North Korea. With personal security as the overriding issue, it is commendable that there are citizens in South Korea who have still found time to attend to their environmental rights and responsibilities.

A year ago a delegation from the Seoul based 'People for Earth Forum' visited the UK and met some members of UKELA. From that meeting firm friendships were borne. We have struck up a rapport with certain delegates and we were delighted to recently receive the following message and photo from the Forum's Executive Director:

'Dear Stephen,
We are well into the New Year and Korea is on the brink of some very big changes here. Despite all the astonishing things that are going on in Korea and around the world for that matter, our Forum has been keeping its place in its corner of the Earth and progressing quite steadily.

Last December, we held our second annual conference under the title "People of Today, The Earth of Tomorrow" and just last month, the general meeting for 2017.

I have been told by Professor Park Si-won that Stephen Tromans and you have been exchanging correspondence and I am very pleased at the news. Thank you for your kind interest and friendship. Attached is a picture from our conference last year. Although you have not met most of them, they all take delight in hearing news from your side of the world and take comfort in the fact that there are



kindred spirits all over the world. We all send you our warmest regards and look forward to many wonderful things.

Kumsil Kang,
Executive Director, People for Earth Forum'

Eastbourne downland – battle of the South Down farms

Over the past three months an environmental battle has been waged in a most unlikely place. Eastbourne is usually associated with sunshine, deckchairs and retirement, but a plan by the local Council to sell off 3,000 acres of prime Sussex downland – all within the boundaries of the magnificent South Downs National Park – stirred local people into action.

My great friend and fellow environmental lawyer, Simon Boyle, was at the centre of events as he led a victorious campaign to overturn the Council's plans. Law was at the centre of the campaign as Simon picked apart the Council's arguments that various restrictive covenants were sufficient to protect the area from development and deleterious future farming practices. A [behind-the-scenes story](#) of the campaign is told for the first time in e-law – something of a journalistic scoop! I am sure Simon's story will inspire other members to use their expertise to good effect if and when the occasion arises in their own neighbourhoods.

Incidentally, to appreciate why the South Downs is such a treasured landscape, consider watching the recent BBC4 [programme](#) 'England's Mountains Green' presented by the ever insightful and entertaining Peter Owen Jones – it is an absolute treat.

Frances Patterson Shield

I am very pleased to inform members that we have found a suitable way to commemorate the wonderful contribution of our late patron, The Hon. Mrs Justice Patterson. I am grateful to my predecessor as Chair, Richard Kimblin QC, for liaising with Frances' family to suggest we name our Junior Moot competition in her honour. The suggestion was very warmly received and the Frances Patterson Shield was duly awarded at the Junior Moot Finals at King's College London earlier this month.

Elections

UKELA relies on staff and volunteers to get things done. It is very rewarding to be involved with UKELA activities. With our Brexit work in full flow and much to do to implement our Strategic Plan for UKELA, these are particularly busy times for our volunteers.

With this in mind, I wanted to flag up the annual opportunity for you to join UKELA's Council as one of our 22 trustees. This year there will be 8 vacancies, with 3 trustees having served their full term and 5

trustees up for re-election. I very much hope that, as happened last year, the opportunity to join Council will appeal to you.

The process for joining Council is set out below:

- Invitation to members to put themselves forward for election to Council – Monday 1 May.
- Deadline for candidates' manifestos – Friday 19 May.
- Elections to be held if the total number of candidates exceeds the number of vacancies.
- If required, election details with candidates' details and how to vote to be sent to members – Friday 26 May.
- Voting closes – Friday 23 June.
- New trustees announced at UKELA's AGM – Friday 7 July.

I would encourage members to consider standing for Council. I have served on Council as a conference organising trustee, Vice Chair and now Chair, and I can thoroughly recommend it. You will be with like-minded people who share a common goal to further the best interests of our wonderful association. Otherwise, if we have an election, please do cast your vote.

UKELA annual conference 2017

I would like to thank the Organising Committee of our annual conference for the hard work that is going in to make our gathering at Nottingham a success in the summer. The event is essentially about the legal challenges and opportunities arising from sustainable urban development and living. More than [80%](#) of us live in urban areas of the UK, so the topic could hardly be more relevant to the way we live now. Bookings are now open [online](#).

I shall look forward to seeing you there.

Regards,



Stephen Sykes
UKELA Chair

UKELA news

Membership renewals

Is your annual membership for 2017 still outstanding? If so, do take a moment to renew now on our [website](#). As a reminder, membership gives you access to the members-only areas on our website, delivery of e-law to your inbox every 2 months, discounted rates at our events including the annual conference, and much more. Don't let this be the last edition of e-law you receive!

Annual conference 2017

Bookings are open for the annual conference, which will be held in Nottingham this summer. The theme is 'Cities of the future – legal challenges & opportunities for more sustainable living.' More details including how to book on our [events page](#) further on in this edition.

Student competitions

Read about our moot winners further on in this edition. Meanwhile, the Andrew Lees Prize article competition is now open for entries: win a free place at our annual conference! More details can be found on the [student page](#) later in this edition.

Working party news

Climate change and energy working party

By Jonathan Church, co-convenor of the climate change and energy working party and lawyer at ClientEarth

The climate change and energy working party have been considering the UK carbon budget and requirement for a suitable emission reduction plan.

Under the 2008 Climate Change Act, the UK government has a legal duty to set a new carbon budget every five years.

Last June, amongst the tumult of the Brexit vote and the Conservative Party's leadership contest, the fifth carbon budget was set. It limits UK emissions in the period 2028-2032 to a level 57% below 1990 levels. That limit is as legally-binding as the 80% target 2050 target.

To ensure these limits are not exceeded, the government must publish its detailed plan on how it expects to meet its new carbon budget. This plan must map out clearly how the transition will take place, and in so doing it will guide policy-makers, reassure industry and investors, facilitate political accountability and motivate public interest and buy-in. That, at least, is the idea.

Five years ago, after setting the fourth carbon budget (requiring a 40% reduction in emissions by 2023-2027) the government's plan – 'the carbon plan' – failed to meet this statutory duty. It did not set out how the new carbon budget would be met. Back then, in 2011, the government was content to publish a plan that it thought would see the UK exceed its new carbon budget by 181 Mt CO₂e.

Granted, 2027 looks quite a long way off from 2011, though the legal duty to close that emissions gap in the plan was nonetheless clear. Long-term planning is mandated in the Climate Change Act 2008 for good reasons. You wouldn't want to find yourself approaching an emissions target without the time or the means to meet it.

There is nothing to prevent the government refining its plan once it is published. Indeed, things change, and it is hard to imagine how a plan could retain its value if it couldn't be adapted.

What became of the carbon plan? By 2013, the House of Commons Environmental Audit Committee concluded that it had become 'out of date and

requires revision'. The government didn't dispute that at the time, and it had said earlier that updates should be annual. Yet it has published nothing since.

In effect, there has been no operational plan since 2013. The result? That 181 Mt CO₂e hole in the fourth carbon budget is now, five years later, a 187 Mt CO₂e hole. This is not the kind of progress that is going to deliver the emissions reductions we need and it is not the climate change leadership that campaigners had hoped for from the UK. It's no surprise that climate policy-making has become erratic and investor confidence in renewables has fallen.

Back to today. If the government's new plan – its 'emissions reduction plan' – repeats the mistakes of its predecessor we will find ourselves, in 2021, two years away from the start of the fourth carbon budget period not knowing how to meet it. At that stage, getting the UK back on track would be difficult and expensive. To ensure we remain on the right track now would make for a smoother and more cost-effective transition to a low carbon economy.

The emissions reduction plan must show clearly how the fourth and fifth carbon budgets will be met. The government must then ensure that the plan remains relevant in the years ahead - so updating annually is a necessity.

There's one more concern: the emissions reduction plan is now very delayed. Legally, it must be published 'as soon as is reasonably practicable' after the new carbon budget is set. In 2011, the government published its emissions reduction plan months after the carbon budget was set. When the fifth carbon budget was set last year, the government initially said it would publish the emissions reduction plan by December 2016. Government has since pushed this back to 'February', then 'Q1', and most recently, '2017'.

In the coming weeks we will get a good idea whether the government's expressed commitment to the Climate Change Act 2008 is real or for publicity purposes only. Now that the UK is forging its own path without European legislation to drive environmental protection, the government will need to step up to the plate and deliver robust climate change and other environmental policy and law in a timely way if the UK wants to remain ahead of the curve in the low carbon sector.

UKELA Brexit Task Force

Rosie Oliver, UKELA working party Advisor.

This year we have been stepping up our efforts to research the implications of Brexit for environmental law. We have recruited a research assistant, Joe Newbigin, who has been working with me since February based at UCL's Law Faculty.

Joe and I have been working with UKELA's working parties to map the ways that EU environmental law is currently reflected in domestic law across the UK and devolved administrations, and to identify 'pinch-point' issues that may need addressing to ensure the law can be rolled-over smoothly under the Great Repeal Bill and related measures.

These 'pinch-point' issues include the use of referential drafting, where domestic legislation expressly refers to directive provisions. Thought will need to be given as to how to interpret and apply the legislation once the directive ceases to be binding, particularly if in the future the directive provision itself is amended or the meaning is elucidated in ECJ judgments or EU-level guidance.

We are also looking at activities such as the production and use of chemicals currently regulated under directly applicable EU regulations, with domestic legislation limited to dealing with matters of enforcement. How can we ensure regulatory stability when the EU regulations cease to apply?

A third key issue is identifying where regulatory functions are currently carried out by EU-level bodies such as the European Commission and the European Chemicals Agency. How should these functions be repatriated to UK bodies? The loss of the Commission's role bringing infractions proceedings will lead to a major enforcement gap that cannot be filled by judicial review alone. We are looking at possible measures and domestic models for ensuring UK authorities properly implement and enforce environmental law after Brexit.

We have also been building our understanding of the international law context (more from Joe, below), and of topics including nuclear safety and environmental risk after the UK withdraws from Euratom.

We are using the research to inform submissions to parliamentary committees and government. We will also be producing and publishing papers on different issues. You'll find an overview of UKELA's work on Brexit on the [website](#). We are also building a collection of [further reading](#).

Brexit research update

Joe Newbigin, Research Assistant to the Brexit Task Force.

As part of the foundation to our sectoral work we have undertaken a comprehensive review on the UK's international environmental obligations, which will be published shortly.

Beginning with a list of environmental conventions and treaties we expanded the scope of this project to include relevant agreements and protocols. We sought to identify how the UK is bound by each instrument: distinguishing between conventions which were entered into under the EU's exclusive competency; mixed agreement where competency is shared between the EU and Member States; and those which UK entered into alone. We are now able to accurately map the international environmental obligations which the UK will continue to be party to post-Brexit.

We then explored how each instrument has been implemented in the UK. This revealed the diverse measures giving effect to the UK's ongoing treaty obligations, including a myriad of domestic and EU legislation, policy documents and statutory instruments. This exercise has raised further questions about which implementing measures can be rolled over smoothly and satisfactorily. Finally, we outlined the relevant enforcement mechanisms applicable to each instrument.

This is becoming a valuable reference point to check whether an individual international obligation will continue to be effective when the UK withdraws from the EU. Once it has been reviewed by the Task Force it will be published alongside a short report on the key findings and other issues raised.

Student news

Andrews Lees Prize article competition 2017

UKELA is pleased to launch its annual article competition, the Andrew Lees Prize.

This year, the article can address either of the following questions:

- 'Brexit – threat or opportunity for the environment?'
- A topic of your choice that is relevant to UK environmental law.

If you choose to submit an article on the topic of your choice, you may have prepared this, or a version of this, for another purpose, but it must have been researched and written after 1st January 2017. Entries must be submitted between 14 March 2017 and midday on 26 April 2017.

The winner will receive a free place at UKELA's annual conference at the University of Nottingham from 7-9 July 2017, including travel expenses from within the UK. The winner will also have their article published in e-law and on the UKELA website.

UKELA vocational bursary fund

This 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. Our 2016 recipient was Navida Quadi. Navida graduated in law at London Southbank University and undertook an LLM in 'Human Rights, Conflict and Justice' at the School of Oriental and African Studies (SOAS). She was offered an internship abroad by the Bangladesh Environmental Lawyers Association (BELA) who work to promote environmental justice and sound environmental jurisprudence. This was made possible by the award she received from UKELA.

Here is an excerpt from her report of her time in Bangladesh:

'Bangladesh has been ranked as the most vulnerable country to global climate change in the world. Reasons for this are inevitably complex and intertwined, however, among other reasons, ineffective local governance is a serious issue. BELA has been instrumental in driving the issue of

environmental justice into the public sphere and facilitating a growing public voice against the government's lack of action in upholding and striving for environmental justice. Issues range from river and industrial pollution to farmers' rights, ship breaking and prevention of hill cutting.

My work at BELA included legal analysis and assisting the team at public hearings and field investigations. I stayed in Dhaka city for most of my internship and travelled to Sylhet and Chittagong on two occasions to observe public hearings and a field trip. My experience with BELA has been enriching, eye-opening and inspiring. Learning about ground-breaking developments in environmental law in recent years, meeting local people at public hearings and seeing real grass roots activism at play has been an instructive experience in terms of my personal career aspirations.

My advice to other students/colleagues who may be considering a similar experience is to pursue opportunities at organisations that will offer "hands on" experience in areas that will develop legal and professional skill, such as research and communication. In addition, where opportunities in other countries are sought, it is definitely helpful to know the language! I know that if I could not speak, read or write Bengali, I would have been very confused! My Bengali speaking, reading and writing skills also improved significantly through this experience. I would also advise on being very, very clear about costs. Ask questions to clarify all the detail before travelling. I am very grateful to UKELA for facilitating this opportunity.'

If you would like to know more about the student bursary from UKELA, please see our [website](#) for details. We will soon be accepting applications for 2017, please check our website regularly.

Student publication opportunity

Interested in co-authoring a hot topic article with an environmental professional? UKELA provides an opportunity for students to publish their work in e-law, our members' journal which is circulated to over 1400 practitioners. Students are invited to email a short abstract of up to 500 words to [Mark Davies](#) or [Rosie McLeod](#), our student advisors.

If selected, the Editorial Board will endeavour to pair students with a supervising practitioner in that field. Articles can be on the e-law issue theme or on any topic related to environmental law. The theme of the next issue is 'Access to justice', expected to be published in the week commencing 5 June.

UKELA events

Young UKELA: The Basics – REACH – 4 May, London

Join us for our next in the popular 'The Basics' series. Our speakers are Haydn Davies (Birmingham City University), Simon Tilling (Burgess Salmon) and a speaker from Ramboll Environ (tbc). [More details and book.](#)

Nature conservation working party meeting – 20 May, Nottingham

To attend, please [contact](#) the convenor.

Wild law weekend, Glen Nevis hostel – 26-29 May, Fort William

Limited female places remain for this popular weekend. Book now to be sure of joining us in the beautiful surroundings of Fort William. [More details and book.](#)

Annual conference 2017 – 7-9 July, University of Nottingham

Join us at the University of Nottingham for our annual conference on the theme of 'Cities of the future'. More than half the world's population now lives in towns and cities, and this figure is growing inexorably. Living sustainably in cities is therefore a key challenge for politicians, planners, engineers, architects and lawyers. The conference will cast light on the role of lawyers and regulators in making cities more sustainable, sharing knowledge and best practice relevant to the UK context. Booking details can be found on our [website](#).

London meeting on environmental social governance (ESG) and reporting, the new corporate drivers- Tuesday 9 May 2017

Join us at Herbert Smith Freehills for this early evening seminar, chaired by Paul Davies of Latham & Watkins LLP and with expert speakers from Travers Smith LLP and Ramboll Environ. Booking details coming very soon, in the meantime please note the date in your diary.

The e-law 60 second interview

Jonathan Church, lawyer at ClientEarth



What is your current role?

I'm a lawyer at ClientEarth, working mainly on the UK Climate Change Act – trying to help ensure that the UK not only has ambitious emissions targets, but that it meets them too.

How did you get into environmental law?

A bit of a round-about route. I'm a scientist by background, so had a natural concern about climate change. Following university I worked for a small political think tank, before training as a lawyer. Private practice wasn't really for me, so I fairly soon looked to find something which brought together my interests in science, politics and law. After studying environmental law at UCL – which was a wonderful experience – I fell on my feet. I've been really lucky to end up working where I do on what I do.

What are the main challenges in your work?

Choosing where to focus my efforts. Getting the balance right in advocating for change: being ambitious but realistic; assertive but constructive.

What environmental issue keeps you awake at night?

To be honest, I tend to sleep well. Burn-out can be a problem for people working in fields concerning existential threats, but fortunately I'm fairly good at focusing on the task in front of me and not getting emotionally affected. That said, I didn't sleep too well on November 9th (or 10th) last year.

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

It's not very imaginative, but I'd have to say an effective, global, universal carbon price.

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

Climate change and energy of course!

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

I'm happy to support a really important organisation that fills a really important niche in civil society.

Environmental law headlines

February 2017 – March 2017

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

House of Lords energy and environment sub-committee publishes Brexit report

Practical Law Environment

On 14 February 2017, the House of Lords energy and environment sub-committee published its report on Brexit, the environment and climate change, which details the actions that will be needed to ensure environmental protections are not eroded as a result of the UK's decision to leave the EU.

One of the key recommendations of the report was that an independent domestic enforcement mechanism needs to be established post-Brexit to fill the vacuum left by the European Commission and ensure that the government and public authorities comply with their environmental obligations.

The report states that the government needs to clarify what will happen to EU legislation that is transposed into UK law through the Great Repeal Bill and how subsequent changes to the underlying EU legislation will be dealt with. The report also queries how, and to what extent, European Court of Justice of the European Union (ECJ) judgments and soft law, such as Commission guidance notes (which are key to interpreting and implementing environmental law) will be transposed into UK law.

The Committee noted that the Department for Environment, Food and Rural Affairs (DEFRA) and the Department for Business, Energy and Industrial Strategy (BEIS) will need to ensure that UK and EU policy developments that occur outside the Brexit process receive the necessary attention. The Committee recommends that DEFRA, in particular, will need a very substantial increase in resources in order to tackle these challenges.

For more information, see [Legal update, House of Lords energy and environment sub-committee publishes Brexit report](#).

Resurrection of the Green Deal

LexisPSL Environment

On 16 January 2017 Greenstone Finance (Greenstone) and Aurium Capital Markets (Aurium) announced the acquisition of the business and assets of the Green Deal Finance Company (GDFC), as well as its existing loan book, with a principal value in excess of £40 million. The acquisition is being supported by Honeycomb Investment Trust.

Greenstone says the new ownership will continue to service the existing Green Deal loans, and will commence financing of new Green Deal loans in Q1, 2017. The news effectively means that the scheme, which was axed 18 months ago shortly after the General Election due to low take-up and concerns over industry standards, is resurrected.

The Green Deal was originally launched in 2013 and enabled customers to borrow money for energy efficiency improvements and then repay the loan using the savings from future energy bills. The loan is tied to the property, so that payment is made by whoever is benefitting from the energy saving measures.

The resurrection comes at a time when the home energy efficiency market is preparing for an upsurge as the Minimum Energy Efficiency Standards (MEES) come into force in April 2018. After this date, it will be unlawful for landlords to grant a new lease for properties that have an energy performance rating below E.

For more information, see [Environment Analysis, The New Green Deal](#).

Government consults on Airports National Policy Statement (NPS) for Heathrow expansion

Practical Law Company

On 2 February 2017, the Department for Transport (DfT) published a draft Airports National Policy Statement (NPS) for consultation, following the government's October 2016 announcement that it supported the extension of Heathrow Airport by a third runway to the north-west.

The consultation highlights the key requirements of the NPS, including air quality, noise mitigation and community compensation.

The draft Airports NPS sets out (amongst other things):

- The principles against which the Secretary of State will assess Heathrow Airport's development consent application.
- Supporting measures to mitigate the key impacts of expansion, including air quality, noise and carbon.
- The consultation closes on 25 May 2017. Following the consultation, the government expects to lay a final Airports NPS before Parliament by winter 2017-18.

For more information, see [Legal update, Government consults on Airports National Policy Statement \(NPS\) for Heathrow expansion](#).

Use of enforcement undertaking for water pollution offences

LexisPSL Environment

A recent press release from the Environment Agency (EA) has noted that its enforcement action has led to charities receiving over £1.5 million for various environmental projects.

The EA has used its powers under the Environmental Permitting (England and Wales) Regulations 2016 to issue enforcement undertakings in respect of a number of water pollution offences. Enforcement undertakings are one of the available civil sanctions and can include payment of a sum of money to benefit any party affected by the offence.

The enforcement undertakings include:

- Northumbrian Water Limited agreed to make a financial contribution of £375,000 shared between Tune Rivers Trust, Northumberland Rivers Trust, Wears Rivers Trust and British Zoological Society.
- Filippo Berio UK Limited agreed to make a financial contribution of £253,906.91 to Herts & Middlesex Wildlife Trust.
- Heineken UK Limited agreed to make a financial contribution of £160,000 shared between the Wye and Usk Foundation and 'Bugs and Beasties'.

Enforcement undertakings provide an alternative route for resolving environmental offences, which can often be in the interests of environmental charities and the offender by avoiding a criminal conviction. The chances of an enforcement undertaking being agreed are higher the earlier the offer is made.

For more information, see [Environment Analysis, Environmental charities benefit from regulatory action](#).

No joint regulation of the same activity by Environment Agency and local authority

Practical Law Company

On 24 February 2017, in *R v Recycled Materials Supplies Ltd* [2017] EWCA Crim 58, the Court of Appeal clarified the provisions of the Environmental Permitting (EP) regime on the regulatory responsibilities of the Environment Agency (EA) and local authorities.

In this case, both the EA and the local authority had issued an environmental permit to the operator. The court decided that the EA was the relevant regulator of the large waste operation that included, but went beyond, some Part B activities.

The court therefore allowed the appeal against conviction for offences of breach of the permit granted by the local authority on the basis that activities at the site were regulated by the EA permit and not, in fact, by the local authority permit. The appellant therefore could not be in breach of that permit.

For more information, see [Legal update, No joint regulation of the same activity by EA and local authority \(Court of Appeal\)](#).

Brexit will include Euratom withdrawal

LexisPSL Environment

Explanatory notes to the European Union (Notification of Withdrawal) Bill confirm that the UK's withdrawal from the EU includes leaving the European Atomic Energy Community (Euratom).

If the UK does exit Euratom the options for nuclear co-operation include continued collaboration with Euratom and making standalone agreements with other states, which could take some time due to the UK's system of nuclear safeguards. The UK is a party to a number of international nuclear conventions applying basic standards to the nuclear industry, and these will continue to apply.

Critics have warned of the possibility of current new build projects having to be placed on hold during negotiations for new standalone nuclear co-operation treaties.

For more information, see [Environment Analysis, Brexit and Euratom](#).

ECHA can publish authorisation documents on endocrine disruptors

Practical Law Company

On 13 January 2017, in *Deza v ECHA* [2017] EUECJ T-189/14, the General Court (EU) upheld the European Chemicals Agency's (ECHA's) decision to disclose documents relating to an application for authorisation of DEHP (an endocrine disruptor) under the EU REACH Regulation 2006 (Regulation (EC) No 1907/2006).

The court held that:

- Disclosure of information on the risk characterisation of DEHP (including chemical safety reports, full exposure scenarios and the analysis of alternatives) was essential to allow the public to understand the risks of using DEHP.
- Although the information was commercially valuable to the applicant for authorisation, that did not automatically mean it would also be considered as confidential information.

For more information, see [Legal update, REACH: ECHA can publish authorisation documents on endocrine disruptors \(General Court \(EU\)\)](#).

Housing White Paper published

LexisPSL Environment

On 7 February 2017, the government published the much-anticipated Housing White Paper, outlining a range of measures intended to speed up the delivery of housing, including policy amendments to the National Planning Policy Framework (NPPF). The government is consulting until 2 May 2017 on how to implement some of the measures announced.

Key proposals for increasing housing delivery include: ensuring local planning authorities (LPAs) have up-to-date local plans in place which meet projected growth; making enough land available in the right places; strengthening planning and design and using land more efficiently; increasing certainty and transparency; introducing the housing delivery test; and changes to broaden the definition of affordable housing in the NPPF to include a range of low cost housing opportunities.

For more information, see [Planning Analysis, Housing White Paper published](#).

Climate change and energy

Trump's climate and energy policies



Sebastien Korwin, Senior Legal and Policy Advisor for Climate Law and Policy.

At a glance

- Much of President Trump's campaign trail rhetoric on the environment, and more specifically, on environmental governance and regulation is fast becoming policy, from his selection of a pro-fossil fuel cabinet and administration, to his efforts to shackle the EPA and repeal and replace key environmental legislation.
- Despite the absence of a clear official position on climate change, the Trump administration has moved to drastically reduce the US's engagement with international organisations, including the United Nations, fuelling fear of a US withdrawal from the Paris Agreement.
- While some of Trump's more drastic campaign declarations (such as a pledge to dissolve the EPA) are unlikely to succeed despite Republican majorities in both houses, the White House is determined to push through a deregulation agenda that will sorely test the US's procedural (legal) and democratic checks and balances.

Introduction

Throughout his election campaign, Donald Trump made numerous statements regarding his views on how the US should deal with environmental issues. This included climate change, which he famously claimed is [not happening](#) and/or is a [hoax perpetrated by China](#). Trump even went as far as declaring that, if elected, he would [withdraw from the United Nations Framework Convention on Climate Change \(UNFCCC\) Paris Agreement](#).

In his [contract with the American voter](#), a key element of his election campaign, Trump outlined some of his policy priorities, including the future of US energy and environmental policy under a Trump administration. In the document, Trump pledged to 'lift the restrictions' on the production of shale, oil, natural gas and coal as well as on the development of infrastructure projects 'like the Keystone Pipeline'. He also pledged to 'cancel billions in payments to UN climate change programs and use the money to fix America's water and environmental infrastructure'. Such declarations are consistent with Trump's oft-stated desire for the US to play a lesser role on the world stage, instead focusing more on its domestic affairs.

Since his inauguration on the 20th January, Trump's actions have given a clearer picture of where his

allegiances lie, from a cabinet filled with billionaires and representatives of oil and gas companies, to the flurry of executive orders designed to prop up a declining fossil fuel industry. President Trump [also pledged](#) to eliminate all 'regulations' by up to 75%. It is however, still unclear to what extent he will succeed in achieving this. This article analyses the steps taken by Trump on climate change, energy and environmental regulation, the potential impacts of these steps, and the likelihood of them succeeding.

Climate change and the Paris Agreement

Consistent with his campaign rhetoric, it has been reported that President Trump [is preparing](#) to sign two executive orders to drastically reduce the US's role in the United Nations. One executive order, entitled 'Moratorium on New Multilateral Treaties', will require a review of all current and pending multilateral treaties with a view to identifying which ones the US should leave. The scope of the order is intended to include all multilateral treaties that are not 'directly related to national security, extradition or international trade', which will likely include the Paris Agreement.

However, President Trump has recently stated that he now has an [open mind](#) with regard to US involvement in the Paris Agreement and Secretary of State Rex Tillerson [told the Senate Committee on Foreign Relations](#) during his confirmation hearing that the US should 'maintain its seat at the table' in the climate negotiations. He also said that the threat of global warming was real, that it 'requires a global response' and that 'no one country is going to solve this on its own'. The result of this lack of a clear or consistent White House position on the Paris Agreement means that it is not yet certain whether President Trump will take the lead on a withdrawal.

This lack of consistency is not matched by the Republican Party, which, following the November 2016 elections, has acquired majorities in both Congress and Senate. The Party [has regularly voiced](#) its opposition to the Paris Agreement, and could be instrumental in nudging the Trump White House away from the multilateral process. The degree of congressional opposition to an attempt by the Trump administration to withdraw from the Paris Agreement would therefore depend on the Democrats.

Though it [has been argued](#) that leaving the Paris Agreement will be simple because it hasn't been ratified by the Senate, the reality is not so clear-cut. The Paris Agreement [officially entered into force](#) on 4th November, which means that (according to [Article 28](#) of the Paris Agreement) any Party seeking to withdraw from it must wait three years following its entry into force to communicate their intention to withdraw. Even then, the withdrawal would only take effect one year after that (for a total of four years).

One way to circumvent this procedural obstacle would be for the US to simply withdraw from the UNFCCC altogether, which would only take one year according to [Article 25 of the Convention](#). As the UNFCCC is the parent treaty, of which the Paris Agreement is considered a Protocol, withdrawing from the Convention would automatically result in a withdrawal from the Paris Agreement. While legally possible, the likely diplomatic repercussions of such a withdrawal could be severe, and could lead to an erosion of the US's role as the leading force in international relations. This is supported by the [stated intention](#) of major players such as China and the European Union to drive coordinated climate action forward in the absence of the US.

Despite [recent news](#) of the US state department's refusal to meet with UNFCCC executive secretary Patricia Espinosa suggesting a shift away from US diplomatic leadership on climate change, continued membership of the Paris Agreement and even of the UNFCCC is still on the cards.

A pro-fossil fuel extraction administration

Domestically, with the support of Republican majorities in both houses, Trump has been less ambiguous regarding his environmental and energy priorities. His [cabinet nominations](#), represent a clear positioning on the side of the fossil fuel industry, and against environmental regulation.

His picks (all since confirmed by Congress and the Senate) include Rex Tillerson, CEO of ExxonMobil for Secretary of State, and climate change deniers [Rick Perry](#) for Department of Energy and [Ryan Zinke](#) for Department of the Interior. His proposed attorney general, Senator Jeff Sessions has come under scrutiny for failing to disclose that he [leases land to an oil company](#), while Scott Pruitt, Trump's pick for administrator of the EPA (a key sub-cabinet position), has been involved in [14 lawsuits](#) against the Environment Protection Agency (EPA) during his time as Attorney General of Oklahoma, including an attempt to revoke the Clean Power Plan. Not only that, since his confirmation as head of the EPA, Pruitt has [denied the link](#) between carbon dioxide and climate change, a position that is clearly at odds with that of the EPA he is now running.

Finally, Trump's likely pick for science advisor (not yet confirmed), Princeton Physicist, William Harper, is also a notorious climate change denier with [suspected links](#) to the fossil fuel industry.

An 'America first' energy plan

President Trump has also released his '[America First energy plan](#)', which commits to eliminating 'harmful and unnecessary policies such as the Climate Action Plan and the Waters of the US rule'.

The [2013 Climate Action Plan](#), introduced by President Barack Obama, presents a three-pronged approach to tackling the climate challenge, namely:

- **Reducing carbon pollution in the US** through measures including: the development of pollution standards for power plants and fuel economy standards for heavy goods vehicles; stimulating investment in energy efficiency projects and support for research and development in low-carbon technologies; increasing the number of renewable energy installations on public land and military bases and improving the energy efficiency of buildings. The plan also created a mandate to develop strategies to tackle highly potent greenhouse gases (GHG), including methane, and to protect forests and critical landscapes.
- **Preparing the US for the impacts of climate change** through measures including: supporting climate-resilient investment; developing flood-risk reduction standards; improving the climate resilience of agriculture through additional research and by expanding and prioritising forest and rangeland restoration efforts.
- **International efforts to address climate change.** The final component of the Climate Action Plan calls for the United States to lead in addressing global climate change internationally, including by: expanding major new and existing international initiatives, including bilateral initiatives and leading global sector public financing towards cleaner energy.

President Trump has yet to repeal the Climate Action Plan, but has acted on the second pledge of his energy plan, signing [an executive order](#) to begin the repeal of the Clean Water Rule. The order itself does not repeal the regulation, but it instructs the EPA to reconsider the rule, also known as Waters of the United States. The [rule](#) defines which rivers, streams, lakes and marshes fall under the jurisdiction of the EPA and the Army Corps of Engineers, a definition which was sorely needed as the [Clean Water Act](#) only mentions that the jurisdiction applies to 'waters of the United States.' When the rule [was published](#) in June 2015, it was [strongly contested](#) by farm and industry groups, who have labelled it a power grab by Washington, expanding the EPA's jurisdiction to 'swoop in and penalize landowners.' The rule however,

has not taken effect yet and is still [subject to court proceedings](#).

Given that this rule has been in place since 2015 it will not be considered 'recently finalized', and therefore cannot be repealed under the [1996 Congressional Review Act](#), a law that allows the House and Senate to overturn any 'recently finalized' regulation with simple majority votes in both chambers, provided the president agrees. In the absence of such an option, the process to replace the Clean Water Rule could take months if not years, given its highly technical nature and the [federal rulemaking process](#).

Although President Trump's energy plan notes that satisfying the need for energy 'must go hand-in-hand with responsible stewardship of the environment' and that 'protecting clean air and clean water, conserving our natural habitats, and preserving our natural reserves and resources will remain a high priority', his actions suggest otherwise. Recently signed executive orders to '[facilitate the expeditious review](#)' of the permit application for the Keystone XL and [Dakota Access](#) pipelines, (which had previously been put on hold by the Obama administration following major public protests) are major concerns, not only in terms of CO2 emissions, but also for the future of the US environment as a whole, as [7 million gallons of crude oil were spilled](#) in more than 1,000 pipeline leaks between 2010 and 2015 alone.

The Trump administration has also committed to 'reviving America's coal industry' which includes a commitment to 'clean coal technology'. Apart from the disputes over whether coal can ever be [truly clean](#), according to a [2016 report](#) by Case Western Reserve University, the US coal industry's decline can be attributed to the recent abundance of cheap natural gas, a product of the US hydraulic fracturing boom (a process for extracting previously inaccessible natural gas from underground shale formations, also known as fracking), rather than excessive regulation by the EPA. Thanks to the abundance and low price of natural gas, electric power companies (major clients of the coal industry) are using more of it to generate electricity.

Trump's support for the coal industry is further evidenced by [his plan](#) to end the moratorium on new coal mining on federal land, in place since early 2016 and his support for the repeal of the '[Stream Protection Rule](#)' in February. This rule increased the procedural requirements that should be met to obtain permits for the development of new coal mines. The intention behind the rule was to ensure that the 'hydrological balance' of local waterways would not be affected by new coal mine developments. The Stream Protection Rule was only finalised in late 2016, making it eligible for repeal under the Congressional Review Act.

Shackling the EPA

Another sign of Trump's commitment to the coal and fossil fuel industry is his attack on the EPA. During a Fox News debate, Trump declared: 'Department of Environmental Protection [*sic*]—we're going to get rid of it in almost every form.' However, President Trump cannot eliminate the EPA on his own—he needs Congress both to introduce and pass legislation. Even with Republicans in control of the House and Senate, he [likely would not have enough](#) votes to survive a filibuster.

In addition to his appointment of a vocal opponent of the EPA as its head, the Trump administration has:

- [Stated](#) that all future studies or data from scientists at the EPA must undergo review by political appointees before they can be released to the public.
- Imposed [a media blackout](#) on EPA staff.
- [Temporarily suspended](#) all new business activities at the department, including the provision of grants (such as those that support environmental testing and innovation projects) and contracts (including hazardous waste handling and drinking water quality testing).
- [Declared](#) that the EPA will start operating in a way more favourable to the agricultural industry and the business community as a whole.

Trump is also planning to [significantly cut](#) the EPA's budget, with cuts to programmes such as grants for clean-up work at industrial waste sites, the Energy Star energy efficiency programme, climate change efforts and funding for Alaskan native villages. Unfortunately, while Trump may not be able to dissolve the EPA outright, he can significantly affect its ability to fulfil its mandate by cutting its budget with the support of Congress.

The Clean Power Plan

While not a foregone conclusion, many observers fear that the Republican congressional majority will assist the White House in pushing these measures through. Republicans in Congress are famously hostile to environmental regulation, particularly attempts to limit GHG emissions. Republicans have for instance introduced [a bill to rewrite the Clean Air Act](#), which if passed, would seriously constrain the EPA's ability to regulate carbon pollution, a key component of the Clean Power Plan. This measure aligns with Trump's [intention to sign](#) an executive order to repeal the Clean Power Plan.

The controversial element of the Clean Air Act is the lack of clarity surrounding the term 'air pollutant', whose regulation is part of the EPA's mandate. In 2007, 12 states, led by Massachusetts, sued the (Bush-era) EPA for its failure to act to mitigate the effects of climate change. The Supreme Court ruled that the EPA

had to determine whether GHG emissions endanger public health and welfare. In the event of a positive finding (of endangerment), carbon dioxide and other GHG would qualify as 'air pollutants' and must be regulated according to the Clean Air Act. In 2009, the (Obama-era) EPA issued an [endangerment finding](#) that GHG do pose a threat to the public via climate change.

The current Republican proposal is to explicitly define the term 'air pollutant' to exclude carbon dioxide, water vapour, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, or sulphur hexafluoride. The bill also explicitly excludes action on climate change or global warming from the scope of the Clean Air Act 'or any other law,' effectively blocking any and all action on climate change if passed. So far, this bill has been assigned to four House committees, and [at least three of those have no plans to take up the bill](#). In general, this bill is likely to be almost unanimously rejected by Democrats, with even some moderate Republicans potentially also opposing it.

Conclusion

So far, less than two months into his term, President Trump has backed up much of his anti-environmental regulation campaign rhetoric. The biggest immediate threat to US action on the environment is that Trump, supported by Congress, will refuse to take the lead or even attempt to undermine the international climate regime. While the withdrawal of US support (particularly funding to poor and vulnerable countries to mitigate, and adapt to climate change), would hinder efforts to implement the Paris Agreement, the willingness of major players such as China and the EU to collaborate to drive coordinated climate action forward means that it will not suffice to kill the Paris Agreement entirely, nor is it likely to cause a domino effect of withdrawals.

At home, despite enjoying Republican majorities in Congress and Senate, attempts to repeal or replace primary environmental legislation such as the Clean Air Act, are likely to be [strongly contested](#) by the Democrats and are far from guaranteed. Regarding secondary legislation, apart from those regulations that fall under the scope of the Congressional Review Act, rescinding and replacing EPA rules and regulations is a lengthy process, which will include public consultations and is likely to be further delayed by litigation.

Both at home and abroad, Trump faces significant procedural, judicial and diplomatic challenges to his agenda of total deregulation of environmental rules. It will take sustained opposition both within Congress and from civil society, but the full implementation of the Trump agenda is not inevitable.

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Climate change and energy

Incendiary developments: Northern Ireland's Renewable Heat Incentive, and the collapse of the devolved government



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At a glance

- A complex heating scandal has recently resulted in the collapse of Northern Ireland's devolved government.
- The heating scheme at issue is the Renewable Heat Incentive, which is intended to stimulate the increased derivation of heat from renewable sources.
- Northern Ireland retains a greater degree of devolved energy competence than the UK's other subnational jurisdictions. An equivalent Renewable Heat Incentive scheme has been rolled out across Great Britain, but officials in the Northern Ireland Executive have used their powers to adjust the scheme's financial mechanisms in a detrimental way.
- The cost to the Northern Irish taxpayer of the consequent design faults is estimated at £490m.
- These flaws came to light in conjunction with allegations of extreme mismanagement, faulty governance and fraud. A variety of allegations and revelations ran to the heart of the devolved administration, and the Northern Irish government presently collapsed under these pressures.

This article considers the development and application of the Renewable Heat Incentive (RHI) scheme in Northern Ireland, and addresses the major scandal that arose as a consequence of the scheme's design and implementation, ultimately resulting in the collapse of the Northern Irish government and significantly threatening the future of devolution in the jurisdiction.

Devolution and energy in Northern Ireland

Northern Ireland's current devolved arrangements were established in the late 1990s after a long period of Direct Rule from Westminster (largely since 1972, subject to some generally unsuccessful efforts to restore devolution). The Northern Ireland Act 1998 (NIA 1998) established the primary governance architecture, and included the creation of a Northern Ireland Assembly that can legislate on devolved matters, and a Northern Ireland Executive. It is well known that life in Northern Ireland has been subject

over modern times to violent conflict – an era often euphemistically described as 'The Troubles' – and that the jurisdiction is presently undergoing a post-Troubles transition. As such, it is unsurprising to find that Northern Ireland's devolved institutions have rested on shaky social-political foundations since their recent inception. The institutions have been suspended temporarily in 2000,¹ and again over 2002-2007.²

As a measure to incentivise the sourcing of heat energy from renewable means, the RHI scheme is an energy-specific matter. The present author, working with Professor Geraint Ellis of Queen's University Belfast, has recently 'mapped' the allocation of low carbon energy-specific powers across the UK's national and devolved jurisdictions.³ In the case of Northern Ireland, the research outputs show that energy competence is largely devolved to Northern Ireland under the terms of the devolving legislation,⁴ but that this understanding must be qualified by energy's cross-cutting nature, which engages with governance in a range of broader competence areas including planning, housing (domestic heat and electricity consumption), etc. Certain nuanced governance features unique to Northern Ireland also impact the practical use of allocated powers, including a Single Electricity Market that operates across the island of Ireland, which is operated by Northern Ireland and the Republic of Ireland.⁵

In other words, while the major devolving legislation ostensibly asserts that energy is a 'devolved' competence, it is the case that the assumption that 'energy is "Fully Devolved"... substantially overlooks the contingent nature of the Devolved Administration's responsibilities and the complex way in which the scope to act, or not act, is underpinned by a broad range of conditions and qualifications.⁶ Nonetheless, it is clear that Northern Ireland has a breadth of devolved energy competence that exceeds the powers that have been legislatively devolved to Scotland and Wales.⁷ The manner in which constitutional law frames legislatively and executively devolved energy controls forms an essential backdrop to the RHI scandal: it has been alleged that the Northern Irish department holding primary

responsibility for energy governance has misused its capacity for action in this area to absorb, adjust and implement a flawed incentive scheme that has otherwise worked across the rest of the UK without major issue.

The RHI scheme

The Northern Ireland Executive established the RHI scheme in November 2012. The department with energy responsibility at this time was the Department of Enterprise, Trade and Investment (DETI; the department no longer exists due to governance restructuring). The Minister at the head of that department, Arlene Foster of the Democratic Unionist Party (DUP), oversaw the scheme's development and signed off on it. Foster went on to become First Minister of Northern Ireland, and was in that position when the devolved government recently collapsed.

As noted, the scheme's purpose is to stimulate increased deployment of renewably-sourced heat. Although Northern Ireland is some way off the national pace in the sphere of climate governance,⁸ the RHI is part of a progressive effort to work towards a target of 10% heat to be derived from renewable sources by 2020.⁹ Its design is intended to provide a financial incentive to install renewable heat systems, and it has been targeted at non-domestic users, including businesses (although a domestic version has been phased in subsequently). While these systems include solar thermal and heat pumps, the systems at the centre of the scandal involve biomass boilers that mostly work by burning wood pellets. The RHI incentivises the use of these boilers by providing users with a large subsidy payment at a flat rate that extends over 20 years.

Much could be said about the scheme's design flaws, but to summarise the essential issues in concise terms for the purposes of this article, the crucial issue is that DETI in effect took the 'national' version of RHI that was to be applied across Great Britain – which has worked fine – and applied it Northern Ireland, but after having used its constitutional space in the sphere of energy to adjust financial aspects of the scheme in a detrimental way. Most particularly, these adjustments mean that the Northern Irish version pays out more in subsidies than the cost of the fuel at issue. Consequently, this incentivises RHI beneficiaries to burn more and more fuel in order to accrue more and more profit. Further, the Northern Irish adjustments dictate that approved applications are to continue to receive these payouts for the duration of a locked-in 20 year period (unlike the Great Britain version, which employs sophisticated tariff controls). As noted, the estimated and unforeseen cost to the Northern Irish taxpayer of the botched scheme is £490m. At present, discussions about how to change the locked-in design in order to mitigate these costs are ongoing; however, any substantial changes made by the Assembly or

Executive will likely raise complex legal problems that potentially include issues concerning the enactment of retrospective legislation, breach of contract, etc.

Problematic aspects of the RHI design can be usefully viewed across a series of periods. The first period concerns the years running from the scheme's inception up to April 2015. Over 2011-2015, £25m was budgeted to cover the scheme, but over 2014 – 2015 a lack of uptake saw a departmental underspend of £15m. The next period concerns April 2015 to February 2016. Here, from April, RHI applications began to increase dramatically. The BBC has noted that '[s]ome 984 applications were received in just three months – September, October and November 2015 – after officials announced plans to cut the subsidy but before the change took effect.'¹⁰ Thus, '[o]ut of a total of almost 2,000 RHI applications, just under half were made in the space of seven weeks, and it was that flurry of applications which pushed the RHI budget beyond its limits, leaving taxpayers with an unexpected bill.'¹¹ The next period concerns February 2016 onward. In February 2016, DETI Minister Jonathan Bell of the DUP, who by this time had stepped into Foster's role, announced that he intended to close the scheme to new applications. Bell was presently ejected from the party after giving an in-depth interview to the media on RHI matters (see below).

As noted, the responsible DETI Minister over the period of the RHI's inception, design and early extended implementation was Arlene Foster (DUP leader since December 2015). Departmental changes mean that DETI no longer exists, with primary authority over energy governance now resting with the Department for the Economy. This department is headed by Economy Minister Simon Hamilton, a DUP member and close political ally of Foster's. Foster went on to become First Minister of Northern Ireland, and was in that position as the RHI scandal developed and became public knowledge. Her persistent efforts to deflect responsibility for the scheme and to resist calls from unionist and nationalist parties across the Northern Irish political spectrum to step aside while a substantial independent inquiry into the RHI could be undertaken, or to step down altogether, permitted the narrower crisis around the scheme to culminate in a much broader crisis of governance. This resulted ultimately in the resignation of Northern Ireland's Deputy First Minister Martin McGuinness and the collapse of the entire government.

Fire and brimstone: the collapse of the devolved administration

An investigation into the RHI scheme commenced in February 2016. It was galvanised by both the irregular spike in applications noted above (over September-November 2015), and by the testimony of a whistleblower, who contacted the Northern Ireland Executive in January 2016 stating that 'an empty farm

shed was being heated for the subsidy and factories which did not need the heat were running large boilers 24 hours a day to earn money.¹² The investigation uncovered evidence of significant fraudulent behaviour. It also emerged that another whistleblower – a woman who runs a heating company – had been pressing DETI for action to be taken in relation to the scheme for some time. She contacted Foster initially in August 2013, and was in touch again with her department in 2014 and 2015, but, she said, '[i]t felt like I was hitting a brick wall'.¹³ It also emerged that the Ulster Farmers Union, possessed of specialised knowledge of farmers' investment practices, had met with Stormont officials in July 2015 and 'warned of an imminent spike in demand'; officials did not apply this knowledge in order to avert the uptake either.¹⁴

On the BBC's Stephen Nolan Show, the DUP's Jonathan Bell gave an in-depth, emotional interview, claiming that he had endeavoured to wind down the scheme prior to the crucial flood of applications, but had been obstructed in doing so by DUP special advisors and Foster. Foster was interviewed separately on the programme, denying any wrongdoing.¹⁵ The BBC summarises that, amongst other things, 'Mr Bell claimed that two senior DUP advisers "were not allowing the scheme to be closed" at the point when costs were spiralling out of control in autumn 2015'.¹⁶ The advisers he identified were Timothy Johnston and Dr Andrew Crawford. Crawford was at that time an aide within DETI. It presently came to light that Crawford's brother was director of a company that was receiving the RHI subsidies. When pressed before Northern Ireland's Public Accounts Committee to name an advisor of Foster's who he believed to be exerting influence over the RHI scheme, senior civil servant Dr Andrew McCormick named Crawford.¹⁷ Bell also claimed that a DUP special adviser to Foster, Stephen Brimstone, had been present at a confrontational meeting with Foster where Bell was trying to secure the closure of the scheme. Brimstone quit his job as adviser to Foster (November 2016), and it emerged in the month following this that he was an RHI claimant (December 2016). Investigative reporting from the *Irish News* further revealed that a business run by his brother, the husband of former DUP councillor Alison Brimstone, was also claiming the subsidies.¹⁸

Space precludes elaboration of the significant amount of additional alleged conflicts of interest and associated revelations that have recently emerged. These developments united all major unionist, nationalist and other parties across the Northern Irish political spectrum (apart from Foster's own DUP) in calling for Foster to step aside either temporarily or permanently so that a fully independent public inquiry could be conducted. Foster has persistently refused to do so. Under the Northern Irish

constitutional arrangements Foster of the DUP and Martin McGuinness of Sinn Fein had been holding joint office as first minister and deputy first minister respectively.¹⁹ With Foster refusing to move, McGuinness ultimately resigned, collapsing the government and triggering fresh elections.²⁰ It is now agreed that a public inquiry into the RHI will be undertaken, chaired by retired appeal court Judge Sir Patrick Coghlin.

Voters in Northern Ireland still largely vote along ethno-religious lines, with the two major parties, the DUP and Sinn Fein, absorbing the significant majority of the votes falling within the extremes of loyalism-unionism and republicanism-nationalism respectively. As such, large numbers of votes for these parties are virtually assured, given present voting biases. Nonetheless, in the recent elections triggered by the government's collapse (2 March 2017) the DUP's vote has contracted (and nationalist votes have expanded), with the DUP remaining the largest party by only one Assembly seat over Sinn Fein. At the time of writing, politicians are endeavouring to restore and sustain a renewed devolved government, with Foster and the DUP insisting that Foster must remain in power. The BBC's political editor Mark Devenport has commented that '[w]e have all been burned, some heads must surely roll, but Stormont needs to act swiftly to put out this impossibly expensive fire'.²¹ The problem is, given Northern Ireland's complex constitutional arrangements, no heads have rolled.

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Endnotes

- 1 Northern Ireland Act 2000.
- 2 On the legislative dimensions of the 2006 – 2007 phase where the restoration of devolution was being established, see particularly: Northern Ireland Act 2006; Northern Ireland (St Andrews Agreement) Act 2006, giving effect to the St Andrews Agreement; Northern Ireland (St Andrews Agreement) Act 2007.
- 3 Thomas Muinzer and Geraint Ellis, 'Subnational Governance for the Low Carbon Energy Transition: Mapping the UK's "Energy Constitution"' *Environment and Planning C: Government and Policy* 2 February 2017.
- 4 'Energy' competence is excluded from Schedules 2 and 3 to the NIA 1998, meaning that it is to be construed as a 'transferred' (ie, devolved) competence, in accordance with NIA 1998 s.4.
- 5 See further *Single Electricity Market Operator: SEMO Home*, <http://www.sem-o.com/Pages/default.aspx>.
- 6 Muinzer and Ellis, *supra* n. 3, 9.

- 7 Muinzer and Ellis, 'The UK's "Energy Constitution": Mapping the Powers', in *supra* n.iii, pp.5-11.
- 8 See Thomas Muinzer, 'Warming UP: Northern Ireland's Developing Response to Climate Change in the Context of UK Devolution', *UKELA E-Law* (September/October, 2016) (96): 19-22.
- 9 See further the *UK Renewable Energy Roadmap* (UK: DECC, 2011), 9.
- 10 BBC News Q&A: What is the Renewable Heat Incentive (RHI) Scheme? 13 December 2016; see the sub-heading 'What was the Uptake Like?'
- 11 Enda McClafferty (for BBC News), 'RHI Scandal: Ulster Farmers' Union "Warned of Spike in Applications' 3 January 2017.
- 12 Conor Macauley (for BBC News), 'Renewable Heat Incentive scheme: Whistleblower "Ignored" after Reporting Abuse Claims' 9 November 2016.
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- 15 BBC 1 (television), Nolan Show Investigation Broadcast 15 December 2016 at 22:40.
- 16 BBC News 'RHI Scandal: Advisers "Pressurised Jonathan Bell"' 16 December 2016.
- 17 BBC News, 'As it Happened: Stormont's RHI Inquiry' 18 Jan 2017 (see subheading 'I believe Foster's Adviser was exerting RHI Influence').
- 18 'Brother of Stephen Brimstone has also been RHI Claimant', *Irish News* 15 December 2016.
- 19 See NIA 1998, s.16A.
- 20 Where one of the first ministers resigns, the joint nature of the role means that the other shall cease to hold office: NIA 1998 16B(2).
- 21 Mark Devenport (for BBC News), 'We've all been Burned by Heating Scandal' 16 December 2016.

Climate change and energy

Solar energy's contribution to biodiversity



John Feltwell, consultant Ecologist for Wildlife Matters.

At a glance

- There are over 1,000 solar farms in the UK where biodiversity is blossoming.
- The industry has quadrupled in the last three years.
- A raft of legal instruments have assisted in making solar farms biodiverse.
- From birds to bats; badgers and butterflies – wildlife is thriving.
- Enjoy the biodiversity of solar farms while you can, as they are all meant to be gone in twenty-five years' time.

Introduction

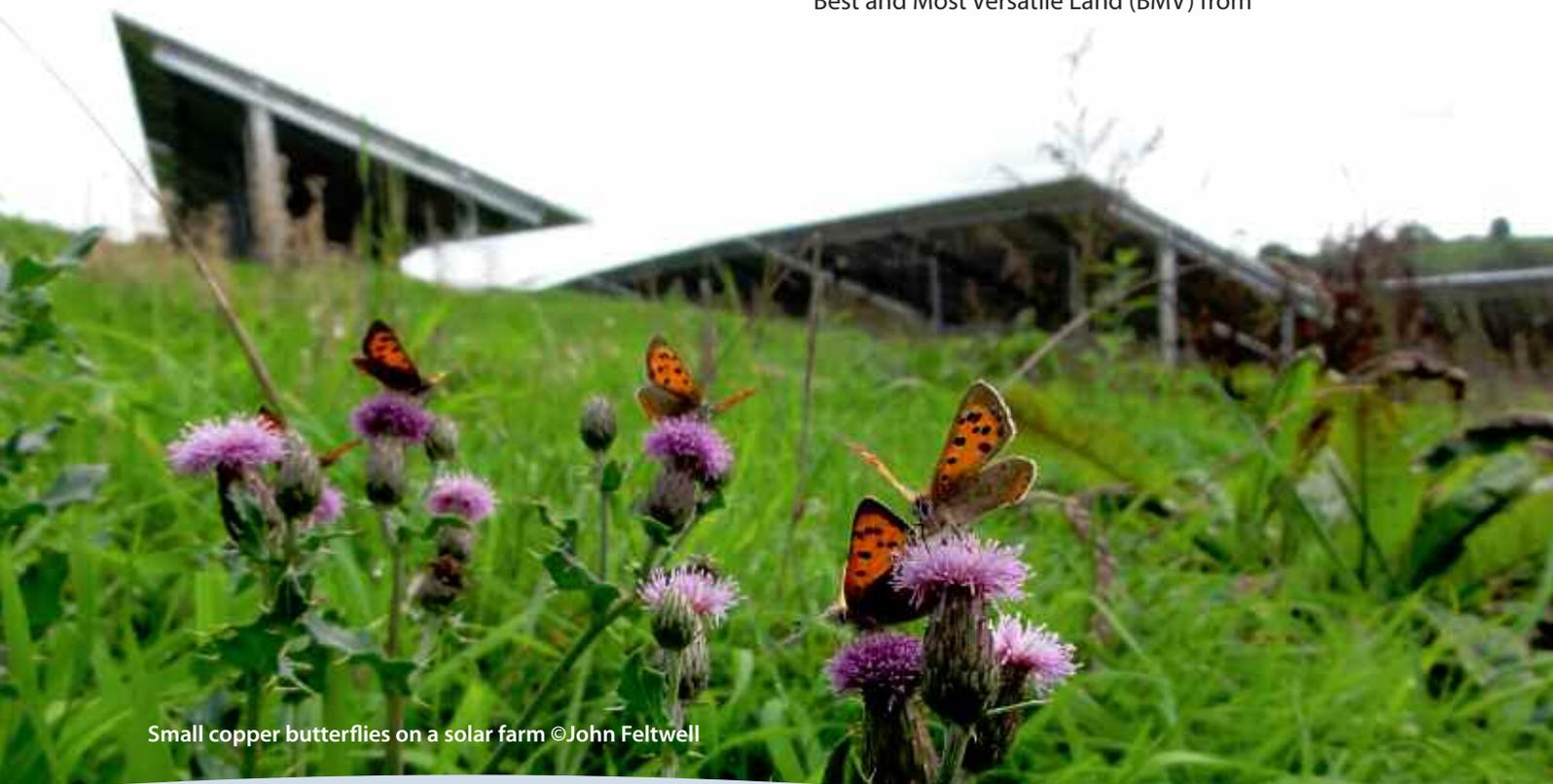
There are currently over 1,000 solar farms in England and Wales¹, all large-scale (on average 30ac (12ha)). That equates to 12,000ha of land producing power from the sun, representing 10GW so far installed. This huge area has produced a significant biodiversity benefit. Solar panels on factories and residential buildings are another matter (albeit a large area) and are not considered here. All this has come about following the rapid growth of solar farms from the late 2000s until 2015 creating an unexpected new habitat for wildlife.

Where are solar farms located?

Solar farms are scattered about the countryside from Angus in Scotland to the southwest of England and south Wales, all harvesting the sun's energy – which is strongest in the southwest. Many solar farms are tucked away in the countryside, in deliberately selected out of sight locations such as valleys and behind hedgerows and woodlands. Others are regularly seen along motorways since placing them beside infrastructure has been a policy adopted by some councils.

Most have been erected on farmland, particularly on large open fields that once supported field beans, maize or oilseed rape. These monocultures were species-poor in terms of biodiversity and were of little importance for wildlife. Particular attention was made in selecting land which was Grade 2 or below (Grade 1 being the most productive of soils), so it was argued that national production of food was not compromised. The benefit was biodiversity. Wildflowers do best on poor soils in any case.

Local planning authorities (LPAs) sought to protect the Best and Most Versatile Land (BMV) from



Small copper butterflies on a solar farm ©John Feltwell

developments via Technical Information Notes such as TIN049.² Soil conservation is also supported in the National Planning Policy Framework (NPPF) where the message is to 'protect and enhance valued landscapes, geological conservation interests and soils.'³ There is a biodiversity element to BMV land as it is an aim of Defra to deliver sustainability and biodiversity targets on poorer quality land grades.⁴

The reality is that solar farms conserve whatever soil they are on. No soil is lost in the long term and what was there before is what is there at the end – a completely sustainable scenario with incremental biodiversity benefit during the lifetime of the project.

Old redundant airports and runways were also covered in solar panels using up brownfield land which remains a government policy. Not all solar farms are land-based, one of the first floating solar farms was on a reservoir that serves London west of Heathrow.

The starting point for solar farm biodiversity is generally an arable field which is a greenfield site. The solar farm is literally plugged into the soil and is then ready to go.

How was biodiversity enhanced?

The moment intensive agriculture ceases, wildflowers start to germinate – emerging from their viable gene bank locked in the soil. Without any help the biodiversity starts to increase. However, enhancement measures were obligatory on virtually all solar farms, and this involved sowing wildflower seeds to create wildflower meadows, making beetle banks, and erecting bird, bat and hedgehog homes.

Where European Protected Species (EPS) were present, such as great crested newts (GCNs), otters or hazel dormice, their habitats were enhanced, and with GCNs extra ponds were created. Where streams run between solar farms water voles have continued to live side by side with panels. EPS species were encouraged and left to increase their populations. Without agriculture's destructive plough twice a year, wildlife is almost guaranteed to prosper.

Hedgerows were replaced where they had been grubbed out, or replanted where gaps existed always with native species to boost biodiversity. There were many cases where hedgerows were put in to link in with adjacent hedgerows; thus creating green corridors for wildlife and addressing the nationwide B-Lines initiative.⁵

All these enhancements would not have been possible without a raft of other initiatives from government and NGOs, such as the RSPB and the National Trust. Most solar farms followed advice from Natural England's Technical Information Note TIN101⁶

which advised to use sites with 'low wildlife value, for example, intensive arable or grassland fields' – this turned out to be excellent biodiversity advice. The Solar Trade Association (STA) produced an excellent document on how to improve biodiversity on solar farms and this was adopted widely.⁷

Biodiversity studies

Empirical evidence is essential to support the above assertions. It is still early days and the first field studies have not finally reported. However, there are a number of field observations.

It was originally thought that birds such as swans would confuse the glass expanses of solar farms for water bodies and accidentally land on them. This was disproved after a year-long field study was made on the first large scale solar farm in Kent at Ebbsfleet, near Sandwich. No environmental impact was found on avifauna,⁸ or invertebrates.⁹ Mortalities of avifauna is a different matter in the USA where solar energy collection can differ.¹⁰

With 32,000 terrestrial invertebrate species in the UK and 1,150 Priority Biodiversity Action Plan (BAP) species in Britain¹¹ solar farms are important places where colonisation is occurring, despite nationwide declines.

Several Biodiversity Action Plan (BAP) animals have been seen on solar farms, such as brown hares, linnets, skylarks, kestrel and yellowhammer. Skylarks have received a lot of attention concerning their conservation on solar farms as they like large open fields; in many cases their needs have been addressed by the provision of large open patches of grassland (called 'skylark plots') within the sea of solar panels for them to come and go and to breed.

Solar farms have been hailed as excellent places for pollinators. An increase in pollinators is expected on solar farms because of the increase in wildflower biodiversity. Local beekeepers have been encouraged to put their apiaries on solar farms to the benefit of the local community. There are about 500 species of bees and wasps in the UK and they all have a chance to prosper. The British Bumblebee Conservation Society assisted in the plans for many solar farms to improve the populations of bumblebees which are particularly in decline. Solar farms are bee-friendly places from where pollinators reach out to neighbouring properties on pollination duty.

Initial results from field studies into how biodiversity is progressing carried out by this consultant for a site in East Kent¹² and West Sussex¹³, and by Guy Parker¹⁴ for a site in Wiltshire, show promising results in favour of solar farms increasing the biodiversity quantum.

Whilst the natural history is being monitored and

mapped by local schools, who are often the beneficiaries of local solar plants in the community, a new accreditation agency launched in March 2017 called 'Wild Power'.¹⁵ Wild Power is a voluntary certification scheme for biodiversity at renewable energy plants. Its goal is to encourage biodiversity through assessment and recognition of responsible land management. Its criteria and standards are presently being established and it will be marketed shortly. People and corporates may wish to pay extra for their electricity knowing it has come from a greener power plant.

The energy end game – a temporary measure

The general public have been slow to assimilate or acknowledge the biodiversity gains of solar farms, often because they never see them, or do not have access to them. There are a few solar farms with footpaths through or beside, and with interpretive boards to explain the biodiversity. There are open days, and children visit to learn about energy and biodiversity. To the disbelief of many of the public, sheep are used as part of the management process to clear the site of plant debris so that wildflowers prosper each year; sometimes geese and chickens are used. This is a double-cropping regime at its best: cropping energy and meat from the same field.

Solar farms are one of the most innocuous of energy production facilities, each solar farm is in fact a very efficient power station, which can also be very beautiful due to biodiversity.

Biodiversity Management Plans (BMPs) are used on most solar farms as a means of keeping the biodiversity going for the lifetime of the solar farm.

There is however, a potential problem looming at the end of the determined life of each solar farm from the mid-2030s, and that is that the site has to be returned to what it was originally. Having encouraged EPS and BAP species to colonise the farms it will be a challenge to undo all the biodiversity accrued; even to rip out hedgerows that have been deliberately planted. The species-poor arable field may have turned into a biodiversity hot-spot full of legally protected species. However, other more efficient solar technologies may have evolved by then and it may just be a case of swapping out the old and fitting the new to the site instead, in a process of re-powering with more efficient panels.

After all solar farms are a temporary feature in the landscape. The feature that makes solar farms different from other energy production models is that there is no land take, no loss of greenfield land, no loss of soils and it gives back many biodiversity credits in the process.

Summary

Planning regulations, legal instruments, guidance and recommendations from NGOs have produced a wide variety of ecological gains on solar farms that boosted biodiversity in the countryside. These temporary structures have taken nothing away from the fabric of the British countryside and have only given new habitats and shelter for flora and fauna to the benefit of biodiversity.

Dr John Feltwell of Wildlife Matters is a consultant Ecologist specialising in EC law who has assisted with the development of over sixty solar farms across England and Wales.

Endnotes

- 1 The solar farm industry has quadrupled since this was discussed in e-law in 2014 when there were less than 200 large-scale solar farms: Feltwell, J. 2014, legal review by John Arthur LLP. Solar farms and eco-law. e-law, Issue 84 (September-October 2014) pp.27-30.
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- 3 National Planning Policy Framework, Communities and Local Government (2012), para 109.
- 4 Effect of BMV on planning decisions, LE0217. (<http://randd.defra.gov.uk/Default.aspx?Module=More&Location=None&ProjectID=12800>)
- 5 As promoted by Buglife – The Invertebrate Conservation Trust. (www.buglife.co.uk)
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- 7 Buildings Research Establishment (BRE) Biodiversity Guidance for Solar Developments. Eds G.E. Parker and L. Greene. pp.9. 2012.
- 8 Feltwell, J. 2013. Are photovoltaic solar arrays an influencing factor in avian mortality? The Newsletter of The Kent Field Club. Number 77, p.18-27. February 2013.
- 9 Feltwell, J. 2014. Observations on the effects of photovoltaic solar panels on invertebrates at Ebbsfleet Farm, Sandwich, Kent 2010-2012. The Newsletter of The Kent Field Club. Number 79. February 2014. p.4-17.
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- 12 Feltwell, J. Are photovoltaic solar arrays an influencing factor in avian mortality? The Newsletter of The Kent Field Club. February 2013. Number 77, p.18-27. 2013.
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- 14 Parker, G. & McQueen, C., Can Solar Farms Deliver Significant Benefits to Biodiversity? Preliminary Study July-August 2013. Unpublished Report, Wychwood Biodiversity Limited. 2013. Monag, H., Parker, G. & Clarkson, T., 2016. Effects of Solar Farms on Local Biodiversity; A Comparative Study. Clarkson and Woods and Wychwood Biodiversity. (<http://www.solar-trade.org.uk/wp-content/uploads/2016/04/The-effects-of-solar-farms-on-local-biodiversity-study.pdf>)
- 15 Wild Power CIC (launched on 16 March 2017) is a Community Interest Company (an initiative of Avocet Holding, an environmental financial company and Klimafa, an ecosystem-based project developer, and supported in the UK by Wychwood Biodiversity a British ecological consultancy).

Climate change and energy

Success in South Africa's first climate change case



Nicole Loser and Ruchir Naidoo, Centre for Environmental Rights.

At a glance

- Analysis of a landmark South African climate litigation judgment – *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others*.
- Legal challenge of the government's decision to uphold an environmental authorisation for a coal-fired power station without giving adequate consideration to its climate impact.
- This is the first time that South Africa's judiciary had been called upon to consider the need to assess the impacts of climate change as part of an environmental impact assessment.
- The court confirmed that South Africa's environmental impact assessment laws require decision-makers to consider the climate change impacts for a proposed development that would have significant climate change impacts, such as a coal-fired power station.
- The Minister of Environmental Affairs has been ordered to consider the power station's climate change impact assessment report before making a decision on whether the power station can proceed.
- Projects with potential significant climate change impacts must now fully assess these impacts – and decision-makers must consider them – before a decision can be made to authorise such projects.
- A climate change impact assessment must consider the broader impacts of climate change (eg on water availability) and how the project might exacerbate and itself be affected by those impacts.
- This should make it more difficult for these projects to obtain environmental authorisation, given that many of these impacts cannot be substantively mitigated.

Introduction

South Africa's North Gauteng High Court recently (8 March 2017) handed down a landmark ruling confirming that climate change impacts must be comprehensively assessed as part of an environmental impact assessment (EIA) for proposed developments with potentially significant climate change impacts.

This case entailed a legal challenge by environmental justice organisation [Earthlife Africa Johannesburg](#) (Earthlife), represented by the [Centre for Environmental Rights](#) (CER), to the South African government's decisions to grant and uphold an

environmental authorisation for a proposed coal-fired power station (Thabametsi) without adequate consideration being given to the climate change impacts of the power station.

At the heart of this case lies the question of whether climate change impacts need to be considered before granting an environmental authorisation.

Case overview: factual background

The proposed Thabametsi power station would be located near the town of Lephalale in the Limpopo Province of South Africa – an area which is notoriously water-scarce. The area where the power station will be based, also known as the Waterberg region, is important for South Africa's agricultural and tourism sector – being an area with vast natural beauty – but also is known to be rich in coal. It has been earmarked for development by the South African government, which intends to 'unlock the northern mineral belt with Waterberg as a catalyst', as a strategic development priority. Numerous applications for mines, power stations and other industrial developments have been brought to the area in recent years, all of which pose a threat to the vulnerable Waterberg ecosystems and communities. A key issue with this area is that there may not be enough water to meet the demands of the existing and proposed developments, as well as those of existing farms, communities and the environment.

The area where the Thabametsi power station will be based already hosts 2 coal-fired power stations – Matimba and Medupi (Medupi is still under construction and set to be one of the largest power stations in the world at 4800MW) – as well as Exxaro's Grootegeeluk coal mine, which will supply the Thabametsi power station with coal, in addition to a new coal mine proposed and currently being developed by Exxaro, the Thabametsi mine.

As a result, the Waterberg area has now become: (i) environmentally-stressed and water-scarce; (ii) exposed to adverse environmental impacts, particularly diminished air and water quality; and (iii) a cause for health risks amongst the resident communities. Unsurprisingly, the significant health and environmental impacts of these industrial

developments are disproportionately borne by the already vulnerable and marginalised residents of these areas.

Thabametsi Power Company (Pty) Limited obtained an environmental authorisation for the proposed 1200MW coal-fired power station in February 2015. Earthlife, with the assistance of the CER, lodged an internal appeal of the environmental authorisation with the Minister of Environmental Affairs. One of the grounds of appeal was that the power station's climate change impacts had not been adequately assessed and the Department of Environmental Affairs (DEA) had not given adequate consideration to such impacts in making a decision to authorise the power station.

In March 2016, the Minister issued a surprising decision, one which simultaneously supported and dismissed Earthlife's internal appeal insofar as it related to the climate change impacts of the power station. In her decision, the Minister agreed that the climate change impacts had not been adequately considered prior to the issuance of the authorisation and she inserted an additional condition in the authorisation, ordering Thabametsi to conduct a full climate change impact assessment within six months and before commencement of the project. Despite this, however, the Minister proceeded to uphold the environmental authorisation and dismissed Earthlife's appeal.

Although Earthlife had no objection to the order for Thabametsi to conduct a climate change impact assessment, legally she was *functus officio* (the decision was final and binding), and there was no mechanism available to her or the DEA to set aside the authorisation in the event that the climate change impact assessment showed the impacts to be so significant and incapable of mitigation that the power station should not go ahead. This effectively would render the climate change impact assessment, and any public participation thereon, a redundant tick-box exercise.

Earthlife instituted review proceedings in the High Court in August 2016, to challenge both the DEA's decision to grant the environmental authorisation and the Minister's appeal decision.

Earthlife's argument essentially centred on the fact that South Africa's environmental legislation (the National Environmental Management Act and the Environmental Impact Assessment (EIA) Regulations) require an EIA to identify and assess all potentially significant environmental impacts, and a decision-maker evaluating an application for environmental authorisation is required to take into account all relevant considerations, including pollution and environmental degradation. Earthlife argued that, because coal-fired power stations are the single largest source of greenhouse gas (GHG) emissions

(which cause climate change) in South Africa and because South Africa's own national policy confirms that the country is extremely vulnerable to the impacts of climate change, climate change impacts are indeed relevant considerations that needed to be taken into account by the DEA and Minister before a decision could have been made to authorise and uphold the authorisation for the power station.

The Minister, the DEA and Thabametsi, argued, *inter alia*, that the EIA had, in fact, considered the power station's climate change impacts, and that, in any event, because climate change impacts are not yet expressly regulated in South Africa, there was no legal obligation to consider these.

The DEA also argued that because national policy calls for electricity to be derived from new independent coal-fired power stations, such as Thabametsi, the DEA and the Minister were bound to follow policy and could not ignore the important role that coal-fired power stations have to play in South Africa's economy and in meeting the country's energy needs.

In complying with the Minister's appeal decision calling for a climate change impact assessment, Thabametsi's consultants published a [draft climate change impact assessment report](#) for public comment in January 2017. The report confirms that:

- The magnitude of the power station's emissions (8.2 million tons of CO₂ equivalent per year) is 'very large', based on a GHG magnitude scale drawing from various international lender organisation standard.
- The plant does not represent an improvement on the emissions intensity of South Africa's grid, but only represents an improvement (from a GHG emissions perspective) on South Africa's three oldest coal-fired power plants – Camden, Hendrina and Arnot – all of which are well over 40 years old.
- The impacts of climate change – particularly on water availability, water quality and temperature increases – are likely to pose a high risk to the power station in the short to long-term future.
- Drought conditions have historically negatively impacted local communities, including farmers and other rural residents directly dependent on water supplies for cattle farming and other agriculture in the Lephalale region. Additional water stress may bring about increased community concerns and tension, and the increased dry spells/drought events will affect communities and may threaten Thabametsi's 'social licence to operate'.

Earthlife filed supplementary papers to bring Thabametsi's draft climate change impact assessment report to the court's attention. The State and Thabametsi, however, objected to the admissibility of the report, arguing that it was not relevant to the matter.

The case was argued in the North Gauteng High Court before Judge John Murphy on 2 and 3 March 2017.

Judgment

Judgment was handed down on 8 March 2017. The order set aside the Minister's appeal decision (pertaining specifically to the climate change ground of appeal) and remitted the appeal back to the Minister for reconsideration. The Minister has now been ordered to consider Thabametsi's climate change impact assessment report, once finalised, and publicly comment thereon, in making a decision on the appeal. Until such time as a decision is made by the Minister, the environmental authorisation is suspended.

The judgment examines the integrity of the Chief Director and Minister's decisions, and calls into question the lawfulness of the decision-making process they followed.

Judge Murphy considered whether climate change impacts should have been, and if so, were, adequately considered before the issuance of an environmental authorisation. The court accepted Thabametsi's recent draft climate change impact report, and held that it showed the inadequacy of the initial climate change impact assessment, which Thabametsi purportedly had done, and the conclusions of 'low significance' in Thabametsi's EIA report. It also found that the Chief Director failed to apply his mind to the climate change impacts in deciding whether to authorise the power station.

The court confirmed that:

'...climate change poses a substantial risk to sustainable development in South Africa. The effects of climate change, in the form of rising temperatures, greater water scarcity, and the increasing frequency of natural disasters pose substantial risks. Sustainable development is at the same time integrally linked with the principle of intergenerational justice requiring the state to take reasonable measures to protect the environment "for the benefit of present and future generations" and hence adequate consideration of climate change. Short term needs must be evaluated and weighed against long-term consequences.'¹ (Author's emphasis)

Recognising climate change's detrimental impacts, this confirms that climate change deserves adequate consideration and is, in fact, quite clearly a relevant issue to consider in deciding whether to grant an environmental authorisation. The judgment reads:

'... (a) plain reading of Section 240 (1) of NEMA confirms that climate change impacts are indeed relevant factors that must be considered. The injunction to consider any pollution,

environmental impacts or environmental degradation logically expects consideration of climate change. All the parties accepted in argument that the emission of GHG's from a coal-fired power station is pollution that brings about a change in the environment with adverse effects and will have such an effect in the future'²

and that

'[t]he absence of express provision in the statute requiring a climate change impact assessment does not entail that there is no legal duty to consider climate change as a relevant consideration...The respondents' complaint that without explicit guidance in the law on climate change impact assessments Thabametsi could not be required to conduct a climate change impact assessment, as there is no clarity on what is required, is unconvincing.'³ (Author's emphasis)

Significantly, the court acknowledged that a climate change impact assessment requires more than a mere quantification of projected GHG emissions, it also requires an assessment of the broader climate change impacts. In this regard, the court acknowledged the relevance of the fact that the power station will be based in a water-stressed region, thereby 'aggravating the impact of climate change in the region by contributing to water scarcity, raising in turn questions about the viability of the power station over its lifetime.'⁴

Judge Murphy stated that he:

'... [accepted] fully that the decision to grant the authorisation without proper prior consideration of the climate change impacts is prejudicial in that the permission has been granted to build a coal-fired power station which will emit substantial GHG's in an ecologically vulnerable area for 40 years without properly researching the climate change impacts for the area and the country as a whole before granting authorisation.'⁵ (Author's emphasis)

The judgment further confirmed that the existence of policy which calls for the establishment of new coal-fired power cannot serve as a bar to an adequate assessment of the project's climate change impacts. South Africa's environmental law does require a balancing of environmental versus economic interests. However, this balancing exercise cannot occur unless the climate change impacts have been fully assessed. It was held that:

'[t]he policy instruments naturally will inform a competent authority assessing the environmental impact of a proposed coal-fired power station. But the respondents' assertion that the instruments

constitute binding administrative decisions not to be circumvented to frustrate the establishment of authorised coal-fired power stations is unsustainable, as is the notion that their mere existence precludes the need for a climate change impact assessment in the environmental authorisation process. Policy instruments developed by the Department of Energy cannot alter the requirements of environmental legislation for relevant climate change factors to be considered.⁶

The impact of the judgment – what it means for South Africa and internationally

In an effort to confirm that government and industry are obliged to fully assess the climate change impacts of a proposed coal-fired power station before authorisation can be issued, this case has created a welcome basis for confirming that such obligations already exist under South Africa's environmental law regime.

It further confirms that a mere quantification of GHG emissions and conclusions that these impacts will not be significant in the 'global context' can no longer be accepted. A climate change impact assessment requires a much broader analysis of, not only GHG emissions, but also broader climate change impacts (such as water scarcity); the social and environmental cost of those impacts; and how the proposed project would exacerbate those impacts; for example, increasing the vulnerability of communities and the environment to climate change by utilising and polluting the limited water available. The assessment must also consider the extent to which the viability of the project itself will be affected by those climate change impacts and it must propose mitigation measures, to the extent possible.

Now all proposed coal plants, and any industrial developments with significant climate change impacts, must fully assess climate change impacts in an EIA before a decision can be made to authorise such a project. Many of these impacts are extensive and cannot be substantially mitigated, which should make it more difficult for projects such as coal-fired power stations to obtain environmental authorisations.

This judgment therefore has significant implications for future fossil fuel and other large infrastructure developments proposed for South Africa.

The judgment should also pave the way for better policy decisions which include consideration of climate change impacts, especially because South Africa is extremely vulnerable to the effects of climate change and has committed, under the Paris Agreement, to pursue efforts to limit the global

temperature increase to 1.5 degrees Celsius and to reduce GHG emissions from the year 2035.

Insofar as proposed coal-fired power stations are concerned, it is time to face the facts: the climate impacts of coal power plants cannot substantially be avoided or reduced. For that reason, it is extremely difficult for them to meet the requirements of the Constitution and of environmental laws to ensure that the environment is protected and is not harmful to health or wellbeing. Clean, cheap renewable energy sources like solar and wind do not suffer from this legal constraint and should be preferred.

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Ruchir Naidoo is a candidate attorney at the Centre for Environmental Rights.

Endnotes

- 1 Judgment of 8 March 2017, Murphy J, [Earthlife Africa Johannesburg v the Minister of Environmental Affairs and 4 others \(NGHC\), case number: 65662/16](#), Paragraph 82.
- 2 Ibid, Paragraph 78.
- 3 Ibid, Paragraph 88.
- 4 Ibid, Paragraph 44.
- 5 Ibid, Paragraph 119
- 6 Ibid, Paragraphs 96.

Matters in practice

The Public Trust Doctrine's role in post-Brexit Britain



Emily Shirley, UK Representative of Our Children's Trust.
Marc Willers QC, Barrister at Garden Court Chambers.

At a glance

- With Brexit, environmental law will likely weaken with the loss of supervision from the Court of the European Union (CJEU) and the cessation of the application of developing European environmental jurisprudence.
- This is an opportunity for UK Judges and lawyers to seal the gap by the re-application of an old but not extinct common law legal doctrine known as the Public Trust Doctrine (PTD).
- The PTD, like Magna Carta, is arguably part of the UK Constitution and will permit judges to scrutinise the government's failure to properly safeguard the environment for current and future generations.

Leaving the European Union and the supervision of the Court of the European Union (CJEU) is likely to lead to a weakening of environmental protection in the UK. However, it is possible that the ancient common law principle known as the Public Trust Doctrine (PTD) could be revived by our domestic Courts and used to hold the UK government to account. This article argues that now is the time for lawyers and judges to revitalise the PTD so that there is proper oversight and supervision of decisions taken by the UK government which affect the environment as well as its environmental policy and legislation.

The PTD originates from Justinian law. Air, running water, the sea and seashore were incapable of ownership but open to public use.¹ The State was understood as holding these vital resources on trust for its citizens. Certain natural and cultural resources were considered to be preserved for public use, and the government was charged with protecting and maintaining these resources for that purpose.

It seems that variants of the PTD resurfaced in the 12th Century when a more centralised legal system was developed. However, the PTD was not then referred to as Roman law *per se* but as part of common law. One of the earliest PTD cases of note is that of *Juliana the Washerwoman* 1299² concerning a humble Wintonian washerwoman who successfully challenged her powerful neighbour, John de Tytyng, the mayor of Winchester, from cutting off her use of the watercourse. When giving judgment for Juliana, King Edward I, a great believer in the common law, held that water had always been available for use by all;

and significantly also decreed that it was unlawful to pollute it with a number of pollutants, including animal blood and human excrement.³

However, over time the UK courts restricted the scope of the PTD and it is now considered by many to do no more than give rise to a rebuttable presumption that the public has the right to fish, navigate and access the sea and tidal waterways. To date, these presumptions have not been found to impose a positive obligation on the state to actively take steps to protect the public rights.⁴ However, the UK courts have not expressly overruled the *Juliana the Washerwoman* case and there may be good reason to resurrect the PTD.

As result of Brexit, one question arises forcefully and that is: 'who now will be responsible for protecting our air, water and other resources for current and future generations in place of the CJEU?' Our long-term survival will require compliance with stricter, more effective and enforceable environmental laws but who ultimately will oversee and enforce the protection of our air, water and other resources for current and future generations, when our government fails to do so? Judges must step in and provide this vital constitutional role as they once did by invoking the PTD.

In the USA, the PTD is recognised as emanating from English common law⁵ with roots in Magna Carta, and it has retained much of its original *raison d'être*. By a strange quirk of fate, the PTD has recently been deployed in a significant climate change case brought against the President of the USA by another claimant named *Juliana*.⁶ On 10 November 2016, a US District Judge gave a preliminary judgment in the case and ruled: 'Exercising my reasoned judgment, I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society'. The *Juliana* case will now proceed to trial and the court will consider, amongst other points, whether the US government has breached the PTD.

What scope therefore has the PTD in framing what comprises our messy and often misunderstood British Constitution? Can parliamentary supremacy be restrained by the PTD when the protections afforded to crested newts for example, are removed and/or weakened? Can the UK government be held to account for failing to implement measures to avoid

dangerous climate change in line with the Paris Agreement? Whatever form Brexit takes it seems clear that the UK will still be subject to the European Convention on Human Rights (ECHR).

In the absence of any supervision by the CJEU our courts will need to use what tools it has at their disposal to scrutinise and enforce environmental law and to right environmental wrongs. No doubt there will be cases where the courts will be able to utilise the ECHR but their ability to carry out this function will be greatly enhanced if the PTD is resurrected.

Emily Shirley is the UK representative of Our Children's Trust. Our Children's Trust is a US based NGO responsible for the ongoing climate litigation in the US based on US Constitutional law and the PTD. Emily is working on bringing climate change related and other environmental cases in the UK in order to better protect the environment.

Marc Willers QC is the Joint Head of Chambers at Garden Court Chambers. He specialises in environmental law, planning law and human rights, with a particular emphasis on the representation of Gypsies and Travellers. Marc was named Legal Aid Lawyer of the Year in 2011 and he is the co-editor of Gypsy and Traveller Law, (Legal Action Group) and the editor of the Council of Europe's handbook 'Ensuring access to rights for Roma and Travellers: The role of the European Court of Human Rights'. Marc regularly writes for Legal Action and other legal publications and presents seminars on human rights and other issues both in the UK and abroad.

Endnotes

- 1 Tim Bonyhady, *The Law of the Countryside The Rights of the Public* Professional Books Ltd, 1987 p.3.
- 2 Hampshire Record Office, Winchester City Archives, Borough Court Roll.
- 3 Journal of Planning and Environmental Law Issue 8 2014, *England and the Public Trust Doctrine* Freedman & Shirley p 848.
- 4 Legal research undertaken by Sophie Marjanac of ClientEarth.
- 5 *Corvallis Sand & Gravel Co. v. State*, 250 Or 319, 335,439 P2d 575, 582 (1967).
- 6 *Kelsey Cascadia Rose Juliana, et al., Plaintiffs, v. United States of America, et al, Defendants*. Aiken, Judge: 1 Case No. 6:15-cv-01517-TC <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5824e85e6a49638292ddd1c9/1478813795912/Order+MTD.Aiken.pdf>

Matters in practice

The battle to save the Eastbourne downland



Simon Boyle, Environmental Law Director at Landmark Information Group.

I should preface this by saying that this is a personal perspective of a very intense three-month period. Everyone involved will have their own story: this very briefly is mine.

Background

The South Downs run from Winchester in the west to Eastbourne in the East. The quintessential rolling open downland is a result of hundreds of years of sheep farming. The close cropping of the grasses by the sheep resulted in one of the most biologically diverse habitats in the British Isles with up to 40 species per square metre.

In the 1920s the downland came under attack, especially along the coast where property speculators brought up large areas of downland. There was of course no planning legislation then and cheap housing was constructed, the development at Peacehaven being the most notorious example. Alarmed by this the Mayor and Aldermen of Eastbourne decided to take action. They had a private Act of Parliament passed, the Eastbourne Corporation Act 1926 that would allow them to compulsorily purchase 4,200 acres of downland just above Eastbourne.

After financial and legal issues were settled, the downland was purchased in 1929 (principally from the Chatsworth Estate and the Gilbert Estate) and a ceremony was held at Beachy Head attended by the

Duke and Duchess of York. A memorial plaque states that the land is to be held 'to secure the free and open use of the Downs in perpetuity'. The land runs from Beachy Head up to Willingdon 4.7 miles to the north and has an outer fringe of public access land (comprising about 1,000 acres) whilst the remaining 3,000 comprises the four farms: Chalk Farm, Bullock Down Farm, Black Robin Farm and Cornish Farm.

During the Second World War much of the rich chalk grassland of the South Downs was ploughed up in an effort to increase food production. Although the South Downs was one of 12 areas proposed for National Park status after the war, it was not pursued, partly because so much of the distinctive chalk grassland had been lost that it was felt that the landscape did not merit National Park status. Sussex Downs was designated as an AONB in 1966 and from the late 1980s things started to improve and, largely as a result of EU funding, much of the arable land started to return to sheep farming. This was true of the four Eastbourne downland farms which returned to sheep farming from around 1990 and today they are predominately grazed by sheep.

In 2003, following a review several years earlier, a proposal to designate the South Downs as a National Park was proposed, partly as a result of improvements to the landscape through more sensitive agricultural practices. Following years of consultation and legal



wrangling over boundaries, the order confirming the designation was signed in 2009, with the South Downs National Park Authority becoming operational in 2011. The whole of the 4,200 acres of the Eastbourne downland was now within the National Park and the planning functions moved from Eastbourne Borough Council (as the local planning authority) to the new National Park Authority.

Meanwhile the Council was still the freeholder owner of the downland estate that it ran under a Downland Management Plan, the current version running from 2012- 2017. The four farms were subject to agricultural tenancies. The public did not have access to these farms except by an extensive network of public footpaths.

Like all local authorities, Eastbourne had had its budget reduced over the years and this led to its officers assessing the Borough's capital assets. When it came to the downland farms, the return was poor amounting to a net income of around £60,000. Discussions then began on whether the downland could be sold to raise money that could then be used to invest in higher returning assets. Exactly when these discussions took place is not known (except by those involved), but we do know that in October 2015 the Council's Cabinet met and made a decision to start the process to sell the downland farms. The Cabinet comprises of 6 Councillors (all Liberal Democrats) and no one else other than officers are present.

Then on 21 October 2015 a Full Council meeting was held (with all Eastbourne Councillors) and the Full Council informed of the decision in principle to sell the downland farms. This was not a matter where there were any votes taken; the decision by the Cabinet to start the process to sell the downland was effectively a 'done deal'. One Conservative Councillor, Barry Taylor raised an objection to the sale, but before the matter was discussed the Leader of the Council and the appropriate officer required the public gallery to be cleared. The matter was discussed but Councillors were told that due to the confidential nature of the matter (particularly due to the tenant farmers) the matter should be kept confidential.

Case

How the public came to hear about the proposal to sell the downland farms is still unclear. There is a widespread belief in the campaigners that there was a leak to the press. The existence of a plan to sell the downland only emerged publicly through a short statement by Cllr David Tutt to the Eastbourne Herald



in February 2016, with no confirmation of the plan on the Council's website, digital channels or in its official publications. Only a few organisations, such as CPRE Sussex and the South Downs Society picked up on the news and started discussions with the Council to try and persuade them not to sell the downland, with no success.

It was only when some campaigners with deep knowledge of the issue attended a meeting of Eastbourne Friends of the Earth (FoE) and revealed the full implications of the planned sale that some members of Eastbourne FoE organised public protests, which began within weeks, coupled with an intense campaign to get the plan aired in local and national media. These campaigners then quickly built a large coalition of local community groups and conservation organisations to help scale up the campaign as well as gather the resources and expertise needed to effectively influence local Councillors and Council officers.

Therefore it was not until November 2016, once Eastbourne FoE became aware of the proposal to sell the downland farms, that the first public demonstration took place. That was on 3 December 2016 up on the top of Beachy Head and my first involvement with the matter. About 150 of us took part on the first march and we walked along the top of the cliffs. The main point I picked up was how angry people were that the Council were selling off 'the people's downs' without the people having a say. There was a strong consensus that the Council had been doing this 'in secret.'

The main argument that the Council used was that the selling off of the freehold would not make any discernible difference to the public since there were covenants in place that would protect the downland farms from development. At a meeting with the

public, David Tutt the Leader of the Council said that there were '140 pages of covenants' that protected the downland farms.

Working with my father, a retired solicitor, and Chris Walsh, a barrister, we started to look at these covenants. At that time (January-February 2017) they were not on the Council's website and we therefore submitted a Freedom of Information request for these '140 pages of covenants.' The eventual response received was that they were legally privileged. The Council did state on its website and in a newspaper article that the covenants were available from the Land Registry and we therefore obtained an office copy of one of these from Bullock Down Farm at a cost of £25. However, the other farms were more complex and Cornish Farm for example was made up of seven separate titles and to obtain office copies for all of those would have cost over £170.

On 10 February, I attended a meeting with three other Keep Our Downs Public campaigners with Cllr David Tutt, and two Council officers. The meeting was chaired by Caroline Ansell MP. I asked Cllr Tutt about the '140 pages of covenants' that we had been told were privileged. How could it be said that covenants *per se* were legally privileged? He told me that what he had been referring to was in fact a 140-page legal review prepared by the Council's lawyers. Therefore, in my view, the claim that there were '140 pages of covenants' protecting the downland was a misrepresentation to the public.

We did agree at the meeting that the existing covenants (based on my assessment of those for Bullock Down Farm) gave very little real protection from change of use or other development. However, Cllr Tutt said that they proposed to draft new statutory covenants using its powers under the Local Government Act 1982. We did not discuss this question at the meeting, but the immediate question was whether the Council could in fact do this. The matter was complex because of the pre-emption rights enjoyed by the Chatsworth and Gilbert Estates that allowed them to buy back their estates 'free from restrictions.' A great deal of research was carried out by Chris Walsh on this point and a whole article could be written. But the upshot was that the statutory authority of the Council, which was not a duty, could not be used over the rights of the Estates.

Going back to the meeting on 10 February we had a surprise in store. We were shown a glimpse of the Eastbourne Review (newly printed) that we were told would be delivered to every house in Eastbourne (around 50,000). This ran to 11 pages and included a page entitled 'Myth v Reality'. It ended by giving the residents of Eastbourne a vote with two choices:

1. Sell the Downland Farms with an estimated capital value of £15-£30 million.
- OR
2. Have various cuts to services totalling £1.1 million.

We were not given a copy of this Review at the meeting and consequently did not get one to properly scrutinise until the following Monday, 13 February. Cllr Robert Smart (Conservative) subsequently told us that there was initially a third option 'Changes to the Capital Programme' but this was removed by a Council Officer before publication.

The Council was rightly criticised by Conservative Councillors and Caroline Ansell, Eastbourne's MP, for not engaging with Keep Our Downs Public and the various environmental organisations who could have given the Council expert advice. The Review was (I was given to understand) written by Council Officers and was riddled with errors and inconsistencies. For example, in the 'Myths v Reality' section it stated that the farms were 'extensively protected by restrictive covenants' even though the Council knew (as they told me at the meeting on 10 February) that the existing covenants provided very little protection at all. 'Myths v Reality' also said that 'we will be undertaking an Environmental Impact Assessment (EIA) prior to any future decision to sell the working farms'. This did not make much sense since the Council was claiming that there would be no change after the sale, and the working farms would continue in the same way.

On 22 February, there was a Full Council meeting where the downland farms were on the agenda. The public gallery was packed and seven of us were allowed to speak with a time limit of three minutes each. I made the point that it made no sense to do an EIA since there was no project to assess but what they should do was an Ecosystems Services Assessment so that they would understand the real value that the downland provided. In particular, the majority of the town's drinking water was from the chalk aquifer underneath the downland farms and this would be at risk if the downland was sold and the use changed to arable with inevitable use of pesticides such as metaldehyde.

There was also a political dimension to this. Eastbourne has a Conservative MP but the Council is run by a Liberal Democrat cabinet. In essence, the Liberal Democrats were for selling the downland and the Conservative councillors against it. I was in fact a member of the Liberal Democrat party and considered making a complaint to the party as I did not think the Council was following Lib-Dem principles of openness and fairness. But this would have taken more time and I decided it was simpler to leave the Lib-Dem party and join the Conservatives as they were the only party with representation on the Council who were trying to prevent the sale of the downland. It was also my aim

to try to unite on this issue the Conservative group and the Keep Our Downs Public campaigners.

The other critical issue was the press. I was contacted by the BBC South East on 26 Jan for an interview on the top of Beachy Head on an extremely cold day. I was to be followed by an interview with the Council but they would not arrive until I had left the scene! The subsequent broadcast included short pieces by Andy Durling, Eastbourne FoE, and Phil Belden, former Director of Operations of the South Downs National Park. We worked closely with the local press, Eastbourne Herald and Eastbourne Buzz, and a number of us became 'regulars' giving interviews and sending in articles.

All this publicity resulted in a mass rally through the town on 25 February in which 1,000 people attended and we marched to Eastbourne Bandstand to hear speeches by David Johnson from CPRE and Paul de Zylva of FoE and then sing, ending with 'Jerusalem'; I think Kipling would have approved!

I gave another BBC South East interview on 3 March in which I said that the Council had tried to blackmail the people of Eastbourne, 'If you don't let us sell the downs we will cut your services'. That particular clip was shown on the Sunday Politics South East. Those were strong words to use (and I had thought about it carefully before), but I felt that that was right and it expressed the view of many people I had spoken to.

The voting ended on Friday 3 March and the results announced about 4.30 pm on Monday 6 March. The results were: 2632 voting in favour of the service cuts and 858 voting to sell the farms. The Council immediately stated that it would call off the sale of the downland farms. Although they did not count there was also an online petition, endorsed by Chris Packham, where over 10,000 registered against the sale of the downland.

We have won a very important victory against a Council who were determined to push through with the sale. The Council attempted to load the dice in their favour and I think that they thought they were bound to win. But they went too far and the Review was biased to an absurd extent. No one could possibly see it as fair. It was rightly ridiculed by Richard Morrison in the Times as a 'propaganda freesheet'. This infuriated many Eastbourne people and led to the charge of 'blackmail'.

Where next?

A group of us went on a walk through the downland farms today and we started thinking about a vision for the downland. What we have is good for wildlife, but it could be even better. We could have open meadows of wild flowers and the downland teeming with wildlife. We should have regular trips with school children so they can hear the skylarks and see the butterflies. It could be a real national treasure that can be enjoyed by everyone.

And finally, although this has been an exhausting experience it has been a hugely rewarding one. My brothers and sisters in arms have especially included Catherine Tonge, Sally Boys, Brenda Pollack, Lyn Core, Andy Durling, Phil Belden, Phil Lakka, Chris Walsh, Caroline Tradewell, Penny Shearer, Robert Smart and Derek Read. Together their knowledge covers just about every aspect of the South Downs, natural history, water, planning, cultural history, politics and policy. It has been an excellent way to increase one's knowledge of the South Downs and make many new friends.

Simon Boyle was the convenor of the wild law working party for many years. He still plays an active role in the group and assists with the running of the London meetings. Simon's son, Matthew (aged 14), also made a [short film](#) on the Eastbourne downland, for which he composed and played the accompanying music. Matthew will be joining us on the Wild Law weekend at Glen Nevis in May where he will be taking his camera to make a short film for the UKELA conference.

Book review

'EU Environmental Policy: Its journey to centre stage' by Nigel Haigh (2016)

Grant Lawrence, Former Director of the Environment Directorate-General of the European Commission.

Nigel Haigh begins his book with the modest words 'This book is not a history, nor am I a historian'. Perhaps; but his book covers one of the most important phases in the development of European (and global) environmental policy. In pure date terms that means from approximately 1972 (the year of the Stockholm Conference and the Stockholm Declaration) to the present day (although the book was written and published before the vote in the United Kingdom to leave the European Union). In environmental policy terms, it covers the period when European (and other) governments began to realise that they were faced with environmental problems which could no longer be solved by action at purely national level. The approaches taken to deal with litter or smog in large cities, for example, were no longer suited to deal with questions like acid rain or the depletion of the ozone layer.

Haigh is ideally suited to tell the story of that period. He was the first Director of the London Office of the Institute for European Environmental Policy (IEEP) which had been set up, first in Germany, by the late and much lamented Konrad von Moltke. These two quiet but intellectually rigorous men were to be crucial in developing the framework for a European environmental policy. There were two parliamentary committees in the EU (as Haigh points out, the name of the organisation has changed over time) whose deliberations influenced the first steps of the environmental policy. They were the Environment Committee of the Danish Parliament, the Folketing, and the Environment Select Committee of the British House of Lords. The irony that the latter was the only non-elected Chamber in the EU was not lost on European officials who were bemused that they were working with people whose names they had read in the history books! That bemusement soon turned to respect for the thoroughness of their opinions – a thoroughness which was largely due to the fact that the committee had had the foresight to appoint Haigh as its advisor.

The book brings together, in 14 Chapters, many of Haigh's earlier writings which have never been available previously in one volume. The structure of all the chapters (with the exception of those on 'From Waste to Resources' and 'Volume Control for Sustainability') is the same. The centrepiece is a piece of Haigh's writing contemporary with the issue being looked at. Each piece is introduced and put in context by Haigh and then brought up to date in concluding

remarks. The chapters cover virtually every aspect of European environmental policy. There are chapters on the various problems affecting the environment such as acid rain, air, water, chemicals and climate change and there are also chapters on other important questions such as the legal basis for an EU environmental policy, the concepts of sustainability and subsidiarity and science and policy.

Because Haigh was close to the decision-makers, both at national and European level, he can give insights into the 'why' of the shaping of policy. Why was such and such a course followed and not a different, but perhaps equally valid, course? Sometimes this is the result of different approaches which were traditionally followed in different Member States of the EU. The traditional British approach to water pollution was to use water quality standards thus looking at the overall quality of the receiving waters. Germany had traditionally used emission standards based on best available technology. If there was to be overarching European water quality legislation (and demands for this began to emerge in the 1990s, not least from the European Parliament) these two approaches would clearly have to be reconciled. A similar dichotomy existed in the sphere of air quality with the same two Member States taking opposing positions. Of course, it is to over simplify to say that this was a straight British-German clash since the other Member States were lined up on one side or the other of the debate depending on the various degrees of closeness of their national systems to one or the other of the approaches. The degree of suspicion between the two sides of the discussion seems amazing to us now and in the light of what has actually been achieved in the two areas. Haigh details the evolution of the discussions and underlines some of the factors which made finding an effective compromise so very complicated. He rightly emphasises the German approach to environmental regulation where much of the power is delegated to the Federal States (and not held by the central Federal Government in Bonn and later Berlin) and jealously guarded by them.

Haigh also writes interestingly of the evolution of the legal basis in the EU treaties for an environmental policy and not surprisingly since the IEEP was amongst the first to call for a specific article in the treaties to cover environmental policy. The original Treaty of Rome never once used the word 'environment' which reflected the economic and social times in which it was drafted and signed. The first steps of an EU environmental policy were therefore taken on the basis of the powers for the harmonisation of national legislation (Article 100) or the reserve powers of Article 235. Fast forward to 2017 and not only is there a firm foundation for the

environmental policy but the Union is committed to sustainable development (with perhaps a hint of sustainable growth)! Haigh charts the development from the Treaty of Rome via the Single European Act, Maastricht and Amsterdam to today's treaties.

The last chapter of the book is written not by Haigh but by David Baldock, his successor and present incumbent as Director of the IEEP. It is entitled 'Retaining the centre stage'. The problem of the success of a policy, such as that achieved by the EU environmental policy, is that it becomes the subject of austerity cuts and (sometimes bogus) 'health checks' which are run by economists whose tools for assessing environmental benefit in economic terms are, to say the least, underdeveloped. (Yannis Paleokrassas, former EU Environment Commissioner and an LSE-trained economist, used to rail against the fact that economists only saw value in a tree when it was felled since only then did it fall into the calculation of a nation's GDP!) Despite acknowledging the forming clouds, Baldock remains optimistic for an EU environmental policy which is more than a climate change policy.

This book needs to be on the shelves or Kindles of everyone interested in any aspect of the development of EU environmental policy. Readers will find themselves constantly returning to check this or that detail, highlighting important elements on virtually every page. Haigh is to be congratulated – and thanked.

Grant Lawrence MA (Oxon), FRSA studied law at University College, Oxford and the University of Aix-en-Provence in France. He was called to the English Bar in 1974 and in 1975 went to Brussels to work for the EU Institutions. He spent his whole working life there. At various times he worked as a lawyer in DGXI (Environment) in the European Commission and he was a member of the Legal Service of the Commission. He served in the Cabinets (Private Offices) of two European Commissioners for the Environment – Carlo Ripa di Meana from Italy and Yannis Paleokrassas from Greece. He retired from the European Commission in 2008 as Director in the Environment Directorate-General of the European Commission (having previously been Head of the Unit responsible for the reform of the EU's water legislation) and lives in his native Aberdeenshire.

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Gregory Jones QC is a barrister practising at Francis Taylor Building, Temple, London.

Eloise Scotford is a Senior Lecturer in Law at The Dickson Poon School of Law, King's College London.

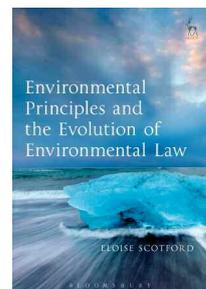
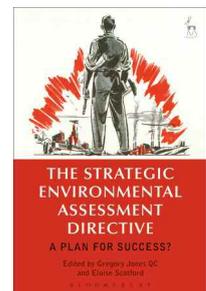
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The editorial team is looking for quality articles, news and views for the next edition due out in June 2017. If you would like to make a contribution, please email elaw@ukela.org by 17 May 2017.

Letters to the editor will be published, space permitting.

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