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Jon Freeman
Assistant Secretary
Royal Commission on Environmental Pollution
5-8 The Sanctuary
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Dear Mr Freeman

Re: Study on Adaptation to Climate Change

Thank you for letting us know that you chose the Climate Change adaptation topic for your study – a decision we welcome.

The UK Environmental Law Association (UKELA) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the relevant working parties.

UKELA's current priorities include:

- Informing and actively influencing the broad law and policy debate on climate change including the measures to reduce greenhouse gas emissions and manage their impacts at the international, EU and domestic level
- Helping deliver more effective and efficient environmental regulation including enforcement at the EU and UK level, not lower standards nor less regulation unless the same or better outcomes will be achieved

UKELA works on a UK basis and seeks to ensure that best legislation and practice are achieved across the devolved jurisdictions.

You asked for some views on the key issues to assist with your scoping study. Overall, from a legal/environment law perspective, the UK Environmental Law Association (UKELA) suggests that the scoping study needs to take into account the extent to which the current legal system provides sufficient flexibility to allow both reactive and proactive measures to cope with climate change, as illustrated by the broad issues referred to below. If changes are required to legislation then the emphasis should be on proactive measures but with sufficient flexibility to deal with what are likely to be unpredictable effects of climate change.

The study should look to Europe and any recent or planned Directives or other legislation that may impact upon climate change adaptation measures, such as the recent Floods Directive.

The Royal Commission should also consider whether questions should be asked as to what role civil law might play in climate change adaptation. If active measures are taken (or not taken) to adapt to climate change, what are the risks that this could lead to civil action (e.g. compensation claims for failure to act)?

UKELA has the following suggestions from an environmental law perspective:

1. Environmental Impact Assessment

The role of environmental impact assessment (EIA) in reaching decisions about adaptation should be part of the study. For example, in deciding to allow nature to take its course in flood management there could be environmental losses – e.g. freshwater into saltwater habitats – in circumstances where individual projects are not of sufficient magnitude to require formal environmental impact assessment. The cumulative impact of a number of smaller scale and seemingly unrelated developments can be significant even though no single development itself requires EIA. We would welcome research into the extent to which developments that individually fall below the EIA thresholds may, by their combined effects, still have a significant impact on the environment. Also, should Schedule 2 to the relevant UK EIA Regulations be amended to specifically include managed retreat or other climate change adaptation projects? This may be an issue to address at EU level.

An important element in EIA is the role that consultation takes - to what extent will consultation need to be made for example in managed retreat/flood management schemes? Even where EIA is not required public consultation must be robust to ensure compliance with the Åarhus Convention¹.

¹ The Aarhus Convention is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, and came into force in 2001. It grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice. It links environmental rights and human rights. It acknowledges that we owe an obligation to future generations. It establishes that sustainable development can be achieved

The role of strategic environmental assessment is also important. If, for example, a flood management plan or water catchment plan for a wide area was being drawn up, SEA would be a useful tool but again, may not be required by law in relation to specific plans or programmes. The implications of the limits on requirements to EIA/SEA should be included in the study. This is a cross cutting theme that would apply to many of the key issues you identify and for which the legal framework is important.

2. Wildlife and habitats legislation; Soil

The framework for protection of wildlife and habitats under international conventions, European and UK national legislation (with differences in the different UK jurisdictions) might be affected by any decisions that prioritise climate change adaptation. For example, it might be preferable in adapting to climate change to have more woodland in place of heathland, yet heathland and many species dependent on it may be legally protected. Similarly, sea level rise caused by climate change may sweep away huge areas of land that enjoy the highest standards of protection (e.g. the area covered by the Broads Authority), and it will be important to identify methodology for establishing a line between the need for protection, the cost and inevitable losses. Habitat connectivity will also be vital to the long-term survival of some species and this has implications not just for management resources but also for biodiversity legislation and also for planning, because it may require creating habitat corridors and connections where they do not currently exist.

The EU Habitats Directive is a potentially significant constraining factor on climate change adaptation projects - particularly the "Appropriate Assessment" procedure set out in Article 6 that effectively prohibits any project that may have negative impacts on the integrity of the protected site. Exceptions are only permitted where there is an overriding public interest in favour of such projects and their impacts. Again this is an issue that may need to be addressed at EU level e.g. for guidelines to be established as to what conditions in relation to climate change adaptation would constitute "overriding public interest" without allowing abuse of this provision.

Consideration may be required as to the possible impacts of the Environmental Liability Directive and its provisions regarding damage to protected habitats and species and how this would interact with any measures undertaken to adapt to climate change.

Soil protection is developing as a critical climate change issue with increased compaction due to farming practices, more wet weather, more run off, soil erosion, pollution of water courses and so on. With the proposed EU Soil Directive (which aims to establish common principles for the protection and sustainable use of soils)

only through the involvement of all stakeholders, and it links government accountability and environmental protection (<http://www.unece.org/env/pp/>)

now effectively stalled at EU level, will national strategies/legislation be required to improve soil protection in the face of climate change? The study will want to consider how landscape scale approaches that seek to address these issues can be found which secure public support and are capable of being implemented.

3. Planning legislation

Within the UK, the response to avoid the worse effects of climate change is likely to require major investment in new and the relocation of existing infrastructure, including:

- the construction of more reservoirs, potentially in protected landscapes, and possibly small scale ones on farms;
- the need for large scale engineering for sea and coastal defences
- the relocation of vulnerable transport routes away from areas at risk of flooding;
- the relocation of vulnerable nationally and regionally significant developments (e.g. power generation facilities, hospitals, waste treatment and disposal facilities) away from areas at risk of flooding; and
- the provision of more large scale agricultural buildings in response to the demand to house livestock (e.g. if water shortages mean that feeding and watering need to be supplied more centrally and if protection is needed against new diseases associated with climate change, e.g. blue tongue);

These sorts of changes, which could emerge wearing a “climate change adaptation badge”, are likely to stress the planning regime further, as they will be urgently required and important to resolve, and should be included in your study.

Changes in land use in terms of the types of agricultural crops grown and how the land is managed are also likely to be a consequence of adapting to climate change. Research is likely to be needed into what types of pest and diseases may become prevalent in the UK and consideration will need to be given to the sorts of contingency measures that will need to be put in place to manage outbreaks in an effective and proportionate manner.

A critical aspect of climate adaptation in planning policy, particularly in Northern Ireland – which is predicted to become wetter over the winter months – will be in relation to flood prevention. Policies promoting investment in the provision of sustainable drainage systems and the like will become increasingly important.

The contribution of building regulations and its cross-over with planning will also be of considerable importance. Currently the focus in new build is on reduction of CO₂ emissions, but climate change adaptation will become a more critical factor - e.g. passive cooling, improved flood protection measures in buildings, SUDS, etc.

4. Water Management

The methodology by which available water resources are calculated may be affected by climate change. For example, the prediction of wetter winters and drier summers may mean that the recent historic records of rainfall patterns, on which water companies and regulatory authorities rely in their assumptions, may no longer be reliable. We would recommend research is carried out into how the predictions of wetter winters and drier summers affect the accuracy or otherwise of forward planning for water companies and regulatory authorities, and whether sufficient flexibility is available within water resource planning legislation to allow such bodies to adapt to changes arising out of climate change.

As well as better calculation of available resources, adapting to climate change involves a more efficient use of water. We would recommend research is carried out to ensure that assumptions made, which underscore the direction of policy, have evidence to back them up; and that such evidence is based upon a consistent method of calculation. For example, OFWAT states on its website that it does not advocate universal compulsory metering, as the extra capital and operating costs of metering might outweigh the benefits in water savings. Examination could be made of how benefits in water saving are calculated, whether such a method of calculation is consistent with an approach which takes climate change into account, and thus whether in fact the costs of metering does outweigh the benefits.

Legislation before Parliament requires a “Regulatory Impact Assessment” to be carried out, part of which considers the costs and benefits of such legislation. The scoping study could consider what would be the best approach for such assessments to take into account (if not doing so already) the costs and benefits of climate change adaptation.

Adapting to climate change should mean a more responsible use of water resources by large users of such resources. Measures could be taken in relation to improving efficient use of water resources similar to the measures taken to increasing the efficiency of the use of energy resources. EIA requires applicants of developments of certain magnitude to assess the impacts of that development on the environment. Making available the necessary water resources for such a development by a water company has an impact on the environment and it may be that there would be benefits in requiring applicants seeking permission for such significant projects to assess the water resource requirements, as part of the planning application. We would also recommend research is carried out into the respective advantages and disadvantages of developers of large scale developments being required at the planning permission stage to quantify their projected use of water resources during the operational phase of the development and to propose measures and schemes to ensure water is used as sustainably as possible, as part of an EIA or similar process.

The type of planning conditions that can be attached to a planning permission are regulated by legislation, and usually run with the land and bind successors in title unless the planning permission states otherwise. A wider and more flexible use of

planning conditions should be considered, with a view to improving water management at the user end. We would recommend research be carried out into the extent to which a more considered application of planning conditions could assist in adapting to climate change and water management.

I hope these comments are helpful. Please let us know if you would like further input from UKELA.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Daniel Lawrence', with a long horizontal flourish extending to the right.

Daniel Lawrence
Chairman, UK Environmental Law Association