



e-law

Better law for the environment

March/April 2016 | Issue 93



Welcome to the March/April edition of elaw.

This year is proving to be an exciting one for UKELA, with so much happening on the international front. Developing our relationships with international associations, and sharing experiences on environmental law and regulation is critical given the transboundary nature of many environmental issues. Find out more about what UKELA has been up to in Stephen Sykes' [Words from the Chair](#).

The theme for this edition is '[Brexit](#)'. Most of the debate about whether to leave or remain in the EU has so far centred on the economy, trade, and free movement. Unfortunately, but not surprisingly, little has been said in the media about the impact Brexit would have on environmental quality in the UK. With the referendum date set for 23 June, the clock is ticking...

More than 90% of environmental legislation in the UK is derived from EU law. Thus, the implications of a Brexit scenario are significant. UKELA, and in particular UKELA's working parties, have been working hard to raise awareness and inform the debate on the potential consequences should the UK leave the EU.

Although the precise impacts would depend on the details of the agreement negotiated with the EU, it is clear that: during its transition, environmental legislation would be in a state of flux; some areas of environmental protection (such as air quality, habitats and waste) would suffer without EU regulation; and the UK would no longer be in a position to directly negotiate and influence the development of EU legislation, despite being required to comply with it to some extent for trade purposes.

We are fortunate to have received a number of informative articles on the topic, and I would encourage you to read them all.

Finally, you will have noticed this is the first edition of elaw with UKELA's new branding. We hope you like it.

Best wishes,

Hayley Tam

Hayley Tam
elaw@ukela.org

In this issue

Words from the Chair	2
News	4
News from the devolved administrations	5
Student news	6
UKELA events	7
Non-UKELA events	8
Life as a Vice-Chair	9
60 second interview	10
Environmental law headlines	11
Brexit	13
Hot topics	28
Advertisements	32
About UKELA & elaw	33

Words from the Chair

Spreading our wings – UKELA's International year



UKELA's international year continues to gather significant pace. It may be interesting for our members to hear that UKELA was approached by the Foreign Office to meet with international delegations of visiting lawyers and advisors. We have met two delegations so far in 2016 –

events that mark the internationalisation of UKELA as we spread our wings.

The Foreign Office

UKELA Vice-Chair, Ben Stansfield, and I will be meeting with environmental representatives from the Foreign Office in the coming weeks to signal our interest in welcoming other international delegations who are keen to learn about the UK's environmental laws and how they operate. UKELA has limited resources and we are ever mindful that we cannot stretch these too thinly. However, this is our international year and we are keen to reach out to the international community, both sharing our expertise and experiences and learning from others. If any members are interested in potentially hosting such events and participating in them, please do let me know.

South Korea, February 2016

Wholehearted thanks for hosting several meetings with the former judge and former Justice Minister of South Korea, Miss Kumsil Kang extend to our President, Lord Carnwath, Professor Richard Macrory (also see below), Latham and Watkins (Paul Davies and Michael Green), Norton Rose Fulbright (Caroline May), Client Earth (James Thornton) and Carbon Tracker (Anthony Hopley).

It was most interesting for us to learn from the delegation that until recently South Korea did not have a forum for environmental law professionals similar to UKELA. Miss Kang is determined to address the deficit and so in November 2015 she set up and is now the Executive Director of the 'People for Earth Forum' – an organisation which aims to facilitate better environmental regulation.

Currently the Forum has 50 members drawn from law practitioners and academics, which is roughly where UKELA was when we were starting out back in 1987. Going forward we will do what we can to help this initiative by sharing our valuable experiences of how to make a positive contribution.

Miss Kang has written to us to say:

"One of our biggest achievements from this visit has been getting to know UKELA better and for us to become friends. Thanks to your outstanding leadership and network, we were able to meet with many other organisations. We are very happy to hear that we have your support and look forward to a future that holds many possibilities".

Brazil, March 2016

Equally whole-hearted thanks go to Eloise Scotford of King's College, Hilary Stone of Imperial College, and Haydn Davies of Birmingham City University and Assistant Chair of UKELA, for their brilliant summaries of UK environmental law for the benefit of a delegation of seven advisors, including environmental lawyers, from the Brazilian Government.

The task set was to summarise UK environmental law in under an hour! The papers and presentations prepared by Eloise, Hilary and Haydn on the general approach to environmental legislation in the UK, climate change and energy regulation and the UK's devolved administrations – including innovative approaches in Wales – made me proud to be the Chair of our highly professional association.

There was a rich exchange of insights and experiences and we were interested to hear how environmental laws are developed and implemented in Brazil. Lawyers collaborate very closely with scientists when new environmental laws are drafted which makes a great deal of sense. We also learnt that environmental laws vary across the numerous states that make up this federal state, but that there is also much variation within states as municipalities have law-making powers and there are almost 6,000 municipalities.

Many thanks also to Rosie Oliver for pulling the event together – these events take a lot more time and effort than one might anticipate.

Professor Richard Macrory, UKELA Patron

I was delighted to meet up with Richard in February – I am sure that all members will know about the enormous contribution that he makes to our environmental laws. He is also our founding Chair and a UKELA Patron.

Richard has asked me to consider whether there is

more that UKELA can do for some of our constituencies: in-house environmental lawyers and local authority lawyers. I am developing plans to progress this and if anyone wishes to find out more and/or to help to make something happen, please contact me at: stephen@ukela.org

Richard also asked me to ensure that members know about our connections with the Journal of Environmental Law, and we have a feature about this very matter in the [advertisements](#) section of elaw.

I am always very keen to hear from anyone who has ideas which can help us to further strengthen our association so do please drop me a line if you have any questions or suggestions.

Regards,

Stephen Sykes

Stephen Sykes

South Korean delegation visiting the UK Supreme Court, 1 February 2016. From left to right: Stephen Sykes, Chair, UKELA; Ms Choi, Eun Soon, lawyer, People for Earth Forum; Mr. Jisseok Kim, Senior Climate Change Officer, British Embassy, Seoul; Ms Kang Kumsil, former Justice Minister of South Korea and Executive Director, People for Earth Forum; and Ms Jung, Hye Jin, lawyer, People for Earth Forum.



News

Graham Machin – Retirement

At the January meeting of the nature conservation working party, a presentation was made to Graham in celebration of his retirement from Ropewalk Chambers after 50 years as a barrister and in recognition of his considerable contribution to both wildlife law and UKELA.

Graham was a member of the solicitor's ecology group, which later became the lawyer's ecology group, and a founding member of UKELA. He was also the first chairman of the nature conservation working group, whose first challenge was to address the split of the Nature Conservancy Council in the late 1980s. Graham took planning qualifications and helped establish the environmental information centre at Nottingham, becoming its first chairman, and he has provided invaluable assistance, support and advice to the Nottinghamshire Wildlife Trust over many years. Graham's philosophical commitment to Rudolph Steiner resulted in his involvement with cases on natural medicines and the freedom of choice. He remains an active member of the working party.

Robert McCracken QC, a fellow member of the working party, describes Graham thus:

"As dangerous an opponent as he is delightful as a human being. No one in my experience better exemplifies the traditional virtues of the bar – independence, learning, courage and courtesy."

Graham was presented with a print by Carry Akroyd of a meadow, and a book on grasslands entitled 'Jewels beyond the plough' written by Richard Jefferson and illustrated by John Davis.



Charles Smith – Obituary

Members of UKELA, especially those in Scotland, will be saddened by news of the untimely death of Charles Smith, an environmental and energy lawyer with Brodies LLP in Edinburgh. Charles was at the forefront of environmental law and was the Scottish editor of *Garners Environmental Law*.

Richard Leslie, Shepherd and Wedderburn LLP, recalls:

"Charles attended a number of UKELA conferences, and along with council member, Professor Kenneth Ross, he was a well-known face on the Scottish Environmental Law lecture circuit. I can remember well attending one of his environmental law courses in 1997."

One of his many virtues was to encourage and foster younger lawyers to become involved in environmental law, even if they did not work in his firm. He was responsible for raising an awareness of environmental law across a generation of Scottish lawyers.

Charles was instrumental in organising the Brodies sponsored series of annual environmental law lectures at Edinburgh University, stretching back to 1993. Whilst work commitments did not allow Charles to be as engaged with UKELA latterly as much as he would have liked, he was still a regular attendee at seminars and conferences. His deep understanding of environmental law and his contribution to the development of this practice area will be sorely missed.

Charles passed away in January 2016 aged 55.

Membership

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

News from the devolved administrations

Wales

The Environment (Wales) Act completed its passage through the Welsh Assembly on 2 February 2016 and received royal assent on 21 March 2016. UKELA Wales Working Party has been closely monitoring the development of the Act since the green paper stage. The working party contributed to the various stages of consultation and provided written and oral evidence to the Assembly Environment and Sustainability Committee as well as suggested amendments in the third scrutiny stage. UKELA congratulates the Welsh Government on its achievement in passing another landmark Act which continues the innovative trend set by the Well-being of Future Generations Act 2015.

The Act is quite wide-ranging and covers sustainable management of natural resources (Part 1), climate change (Part 2), charges for carrier bags (Part 3), collection and disposal of waste (Part 4), fisheries for shellfish (Part 5), marine licensing (Part 6) and some miscellaneous provisions (Part 7). UKELA concentrated only on Part 1 which includes a redefinition of the primary statutory purpose of National Resources Wales and a biodiversity duty imposed on all public authorities operating in Wales. We took the view that this was potentially the most far-reaching set of provisions and those which we were best qualified to comment on. Also, other NGOs in Wales addressed the remaining parts of the bill in considerable detail.

Among UKELA's recommendations was the need for public participation to have a higher profile in Part 1, which it now does by virtue of the addition of s 4(d). We also had some reservations about the redrafting of the statutory purpose of NRW in s 5 of the bill and we recommended the continuance of the rather wider purpose in the original establishment order for NRW which included a wider 'environmental' remit as opposed to the narrower 'sustainable management of natural resources' approach. The final version retains the narrower approach and hence our reservations remain.

Concerns were also raised about compliance issues in relation to the new duty on public authorities to 'seek to maintain and enhance biodiversity' in s 6 of the bill. Originally there were no requirements on public authorities in terms of reporting on their compliance with the duty. We are pleased to note that s 6(5)-(8) now addresses this omission. We also welcome the strengthening of the duty on Welsh Ministers (s 7(3)(a)) in respect of taking 'all reasonable steps to maintain and enhance living organisms and ... habitat ...' in order to maintain and enhance biodiversity. Our most serious reservation relates to the power which s 22 confers on the Welsh Ministers 'to suspend statutory requirements for experimental schemes'. UKELA views this as a disproportionate provision which is not necessary to achieve the stated objective.

Student news

UKELA Moot 2016 results

The 2016 Moot finals were held on 8 March, once again kindly hosted by Kings College London and sponsored by No5 Chambers. The winners of the Senior Competition were Joe Newbiggin and Charles Forrest, pupils from Francis Taylor Building; while the Junior Competition was won by Gayatri Parthasarathy and Caspar Bartscherer, students from Oxford University. Congratulations to the winning teams! Once again, the standard of entry was high, with all entrants commended on their entries. Thank you to Lawtext and No5 Chambers for providing the prizes, and to all the practitioners who kindly gave up their time to judge the competition.

Andrew Lees Essay 2016 competition

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

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

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

The prizes are:

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

Further details may be found online here on our newly revamped website.

Dates for the Diary

- **11 April 2016** – 4pm – Deadline for submission of entries to the Andrew Lees essay competition
- **12 April 2016** – Young UKELA: The Basics seminar on Air Quality
- **15 April 2016** – Public Interest Environmental Law (PIEL) UK 10th Annual Conference
- **18 April 2016** – Deadline for submission of UKELA bursary entries
- **1-3 July 2016** – UKELA Annual Conference (to be held at the Brighton Falmer Campus of the University of Sussex)

The Student Bursary

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

To apply, please provide the following:

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

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

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

Public Interest Environmental Law (PIEL) UK 10th Annual Conference

PIEL UK is a student-led unincorporated association which organises an annual conference to raise awareness of and champion environmental justice issues. On its special 10th anniversary, the conference will explore the theme of "Climate Talks After Paris: Beyond The Pledges". This will be held on Friday 15 April 2016 at Cass Business School. For more information on the day's programme, speakers and ticket information, see [PIEL's website](#).

UKELA events

We have a busy programme this spring. Why not take a breather with a coffee to plan your diary?

Environmental Litigation Working Party meeting (Manchester): 7 April

The meeting will include a presentation by the National Measurement and Regulation Office (regulators of WEEE and RoHS amongst other things) about their work, expanding remit and some case studies. For more information, please visit our [website](#).

West Midlands regional group: Environmental Judicial Review – 11 April Birmingham

Join the West Midlands group for an early evening seminar on Environmental JR. Jenny Wigley, a barrister from No 5 Chambers who specialises in environmental judicial review cases, will speak on this topical matter. For more information, please visit our [website](#).

Young UKELA the Basics – Air Quality (London): 12 April

We are delighted to welcome expert speakers, including Alan Andrews of ClientEarth and Finn Coyle of Transport for London. Find out the issues surrounding legal matters relating to Air Quality. For more information, please visit our [website](#).

London meeting on Green Transport (London): 25 April

Speakers from Sustrans and the Department for Transport will provide an update on the latest issues relating to Green Transport in the UK. For more information, please visit our [website](#).

Scottish Waste Topic Group meeting (Edinburgh): 27 April

Our next meeting is kindly hosted by Changeworks Recycling, and will include a site visit at the Edinburgh recycling facility. For more information, please visit our [website](#).

Waste Working Party meeting (Bristol): 27 April

The next meeting is kindly being hosted by the Environment Agency at their offices at Horizon House in Bristol. There will also be a tour of the building. For more information, please visit our [website](#).

UKELA Wales seminar on the Implications of Brexit on Environmental Law in Wales (Cardiff): 28 April

Join us for a seminar looking at the implications of Brexit on environmental law in Wales. Speakers include Keith Bush QC, Swansea University, Jane Collier, Blackstone Chambers, and Richard Barlow, Browne Jacobson. For more information, please visit our [website](#).

Noise Working Party inaugural meeting (London): 29 April

We will hear from John Stewart (Chair of UK Noise Action and HACAN ClearSkies) about noise issues related to the expansion of Heathrow airport. We will also discuss plans and priorities for the group, and its organisational structure (for example, whether to elect co-convenors or a Panel to assist the convenor). For more information, please visit our [website](#).

Nature Conservation Working Party meeting (Nottingham): 21 May

The next meeting will be held at the offices of Browne Jacobson in Nottingham. If you would like to attend, please contact Wyn Jones the convenor. For more information, please visit our [website](#).

Wild Law weekend (Lake District, near Keswick): 27-30 May

This year we are delighted to be in the Lake District at the Honister House Youth Hostel, Keswick. The weekend will focus on Wild Ennerdale and how management of the valley has changed over the decades from upland sheep pasture, then traditional 1920s forestry to the current wild land project. Issues that will be considered include rewilding, sustainable farming and ecosystem services. For more information, please visit our [website](#).

Annual Conference 2016 (Brighton): 1-3 July

'From Global to Local' – how international environmental law affects UK practice in energy, infrastructure, nature conservation, planning, marine and regulation. For more information, please visit our [website](#).

Non-UKELA events

The EU Referendum: Risks and Opportunities for the UK Environment (London): 11 April

The EU has had a profound impact upon UK environmental policy and 'Brexit' raises the prospect of considerable change in the future. The ESRC funded report addresses the need for clear, balanced and systematic evidence on the implications of EU membership for the UK's environment. This event, hosted by the ESRC's The UK in a Changing Europe (UKiCE) Initiative, brings together leading experts in the field to debate the findings of the report on the implications of a Brexit for the UK's environment. Attendance is free, but registration is essential. For more information, please visit [Eventbrite](#).

PIEL Conference 2016: Climate Talks after Paris – Beyond the Pledges (London): 15 April

The ongoing climate talks in Paris (COP21) will impact the future of environmental law and policy not only for the UK, but also for the world. On its 10th Anniversary, PIEL UK chose to focus on the outcome of this important event, and the impacts of the pledges on the energy sector, carbon markets, and the role of public participation. For more information, please visit [PIEL's website](#).

Castle Debate: Natural Capital – the Economic Need for Biodiversity (London): 10 May

For more information, please visit the [Castle Debates website](#).

Castle Debate: Farming and Climate Change – Impacts and Solutions (London): 10 June

For more information, please visit the [Castle Debates website](#).

UKELA Diary Dates

- **10 May** – Symposium on Standards in Environmental Rights – joint event with the University of Lincoln (Lincoln)
- **18 May** – Water Working Party seminar on Flooding (London)

Thankyou

UKELA would like to take this opportunity to thank the generous supporters of our recent activities and projects, without whom many events would be impossible to organise.

Life as a Vice-Chair

Life as a V-C in UKELA



In 2015 after completing my first term as a Council member, as part of the transition into my second, I was nominated and elected to be one of three Vice-Chairs of the organisation. This little column is a quick overview of what life is like as a V-C and offers a bit of an illustration into the more behind-

the scenes nature of our work for UKELA.

So, I hear you cry! What on earth do the Vice Chairs of UKELA *actually* do?

Part of our role is to support our well-known and loved Chair(man) Stephen Sykes as he leads the motley crew of able-bodied Council members in pursuit of environmental justice.

Gallantly stepping up to the UKELA challenge, Chair(man) Sykes decided to convene a little group of minions (i.e. myself and other V-C colleagues) to aide and assist him in taking the organisation forward and responding to the growing needs of our membership. Monthly pow-wows ensure we are all kept up to speed with UKELA developments, and can share our thoughts and ideas for the organisation's focus for the coming month. I personally find this a very helpful 'touch-base' for team V-C to engage in regularly, in addition to the quarterly Executive and Council meetings.

This year UKELA has undergone a transformation in image and improvement of website 'user-experience' which has been the culmination of many month's planning since the idea was first conceived. I was delighted that a colleague of mine, Matthew Phillips, was engaged on a pro-bono basis to undertake a "communications and branding review" of the organisation and offered recommendations for the refresh having surveyed members of UKELA at the Annual Conference in Edinburgh in 2014 and presenting his findings to Council shortly thereafter.

UKELA then worked with its designers to bring these recommendations to life *et voila!* The new logo, website, and branding has been born!

For my part, I wear a 'communications' hat as V-C and firmly believe that the way in which UKELA's material is presented is key to it achieving its overall objectives in terms of communicating to its membership and the wider public on environmental law matters. This is not limited to emails and the newsletter e-law; but includes UKELA's general online presence.

We hope that you like the updated website both in terms of presentation and functionality, and would of course be delighted to receive your feedback on how you are finding it. The communications 'refresh' is not limited to this one website overhaul – it will be an ongoing process – and we hope to be able to tailor it to your needs and expectations.

Stay tuned for the next V-C update in e-law, and in the meantime, feel free to email me with thoughts and ideas (perhaps you also have a comms skill lurking in your repertoire that you might wish to lend?):

Kirsty.schneeberger@gmail.com

The e-law 60 second interview

Chris Willmore, UKELA Committee Member of South West Regional Group



What is your current role?

Senior Academic Fellow at Bristol University.

How did you get into environmental law?

Blame 'Limits to Growth' and 'Only One Earth' – hugely influential books published in my teens. We

read them and they were utterly convincing. Growing up in an increasingly over-developed London fostered a passion for saving open spaces and built environments, but planning/environmental law were not even options at University, so I did not see how that fitted my legal career. After qualifying as a barrister, I rapidly moved back into academia which gave space to develop a practical and academic interest in planning, environmental and sustainable development law. In the early 1990s, we developed undergraduate and postgraduate courses in environmental law and planning law. Now, however, my focus is on the wider sustainability agenda and how law can influence that – an area underdeveloped in the UK compared to many countries.

What are the main challenges in your work?

Most academics and lawyers are committed to sustainability in their own lives, but do not necessarily bring it into their teaching, research or work. Law curricula still tend to put environmental law in a corner in an optional unit and may not even mention sustainability. I am just finalising a special issue of the Association of Law Teacher's journal bringing together innovative ideas on how we can bring environmental law and sustainability out of the 'optional unit' corner and see it as something that pervades the law curriculum. In other professions, such as management, the European professional qualifications framework has added sustainability – and that has had a massive impact on curricula. But that is a long way off in terms of the legal professions here.

What environmental issue keeps you awake at night?

Normally, I would say the causes and consequences of climate change – and what it requires of me and of society. But right now BREXIT is trumping that. Almost all of the strongest environmental protections we have come from Europe. It is easy to assume it would be 'business as usual' environmentally, but we cannot risk that. The work UKELA is doing is really important in mapping the issues and implications to inform the debate. Ensuring people understand the environmental issues at risk in BREXIT is our most important work right now.

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

For people to stop waiting for the government to do something. Bristol has just completed a year as the UK's first European Green Capital (itself an EU initiative) and co-hosted the cities pavilion at COP21 with Paris. The clear message was that cities are fed up with waiting for governments to deliver change and are doing it themselves through a global network focused on sustainable cities. As part of the year, university students in Bristol delivered over 100,000 hours volunteering on sustainability projects across the city – designed to show what happens when we start acting ourselves.

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

I'm currently working on a new edition of Cameron Blackhall Planning Law and Practice, so the planning and sustainable development working party. But all of the working parties have such fascinating people contributing to them...

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

The vast and diverse network of practitioners, all bringing different perspectives, which constantly refresh my thinking and provide access to the leading experts on just about any environmental law and policy issue.

Environmental law headlines

January-March 2016

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

Defra issues the revised Code of Practice on waste duty of care requirements

LexisPSL Environment

On 11 March 2016, the Department for Environment, Food and Rural Affairs (Defra) issued the final version of the long-awaited revised '[Waste Duty of Care: Code of Practice](#)'. It is a much shorter document than the former version.

The Code of Practice represents statutory guidance issued under section 34 of the Environmental Protection Act 1990. It sets out guidance on how to meet the waste duty of care requirements which apply to anyone who produces, carries, keeps, disposes of, treats, imports or controls controlled waste in England or Wales. It does not apply to the duty of care for extractive waste. The Code covers:

- the scope of the duty of care;
- the waste duty of care requirements for householders and waste holders;
- other waste laws for waste holders.

RHI: domestic and non-domestic amending Regulations 2016 and consultation on reform

Practical Law Environment

On 1 March 2016, the Renewable Heat Incentive Scheme and Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2016 (*SI 2016/257*) were made. The amending regulations introduce various changes to both the domestic and non-domestic Renewable Heat Incentive (RHI) schemes, including:

- on sustainability criteria for biomass;
- removing the requirement for future applicants to obtain a Green Deal Assessment report as an eligibility requirement for the domestic RHI.

On 3 March 2016, the government consulted on further reform of the RHI in two stages:

- in the 2016-17 financial year, by the amending Regulations and introduction of a new budget cap mechanism;
- in the 2017-18 financial year and beyond, including proposals to withdraw support for solar thermal, encourage larger systems and allow the right to domestic RHI payments to be assigned to third parties.

For more information, see [Legal update, RHI: domestic and non-domestic amending Regulations 2016 made and consultation on reform launched](#).

Appeal fails for judicial review of early closure of Renewables Obligation to large solar PV

Practical Law Environment

On 1 March 2016, in *Solar Century Holdings Limited and others v Secretary of State for Energy and Climate Change [2016] EWCA Civ 117*, the Court of Appeal rejected an appeal against refusal by the High Court to judicially review the decision of the Secretary of State to close the Renewables Obligation (RO) to new solar photovoltaic (PV) capacity above 5 megawatts (MW) in March 2015. This was two years earlier than the government had previously indicated.

The court rejected arguments that a legitimate expectation had been created that the Levy Control Framework (LCF) cap on expenditure on renewables subsidies might be lifted for solar PV projects in the pipeline that had not achieved accreditation by March 2015.

For more information, see [Legal update, Appeal fails for judicial review of early closure of Renewables Obligation to large solar PV \(Court of Appeal\)](#).

ICAO makes progress on a global standard for aviation emissions

LexisPSL Environment

On 8 February 2016, the International Civil Aviation Organisation (ICAO) finalised details of the proposal for a global standard for carbon dioxide emissions from aircraft. The proposed global standard will apply to:

- new aircraft designs from 2020;
- new deliveries of current in-production aircraft types from 2023; and
- current production aircraft that do not comply with the standard—ie those currently in use by 2028.

It is anticipated that the standard will be ratified by the ICAO Council in June 2016, endorsed in September/October 2016 at the ICAO 39th General Assembly in Montreal, and formally adopted by the ICAO in early 2017. For further information on the ICAO standard, see LexisPSL Environment News Analysis: [Aviation emissions standard ready for take-off](#).

On 7 March 2016, the European Commission launched a consultation on market-based measures to reduce the climate change impact from international aviation emissions. In particular, the consultation seeks input on policy options being developed at the ICAO and in relation to the EU emissions trading system (EU ETS). The [consultation](#) closes on 30 May 2016.

Water abstraction regime consultations and responses

Practical Law Environment

On 15 January 2016, the government published its response to its December 2013 consultation on a new regime for water abstraction in the early 2020s. The government intends to combine reform with moving the abstraction licensing regime into the Environmental Permitting regime. Key features of the new regime include:

- standard rules for different catchment areas;
- easier water trading, in particular in catchments where water is scarce;
- permitted volumes of water for abstraction that reflect actual business use.

The government also published:

- its response to its 2009 consultation on implementing the abstraction elements of the Water Act 2003, relating to changes to the exemptions from water abstraction controls;
- a further consultation on removing most exemptions from water abstraction licensing and bringing these abstractions under licensing control. The consultation closes on 8 April 2016.

For more information, see [Legal update, Government publishes response to consultation on water abstraction reform](#) and [Legal update, Government publishes response and further consultation on changing water abstraction licensing exemptions](#).

High Court considers breach of statutory duty for water abstraction

Practical Law Environment

On 4 February 2016, in *Chetwynd and another v Tunmore and another* [2016] EWHC 156 (QB), the High Court decided that there is no requirement for foreseeability in a claim for breach of statutory duty under section 48A of the Water Resources Act 1991 (which deals with loss resulting from water abstraction). The abstraction of water might well cause loss or damage and so section 48A places the risk on the abstractor. If the abstraction causes any loss or damage, the abstractor will be strictly liable for all loss and damage caused, whether it could have been foreseen or not.

The court also confirmed that the “but for” test is the correct test for causation under section 48A, and for claims under negligence or nuisance in cases such as this.

The case concerned owners of fishing ponds in Norfolk who claimed that their neighbours had caused water levels to fall by constructing lakes themselves, leading to the claimants’ loss of fish and income.

For more information, see [Legal update, Interpretation of breach of statutory duty for water abstraction under section 48A of the Water Resources Act 1991 \(High Court\)](#).

Law Society and Environment Agency flood risk updates

LexisPSL Environment

On 10 February 2016, the Law Society updated its [practice note on flood risk](#) in preparation for the Flood Re insurance scheme commencing in April 2016, and to account for changes to the Council of Mortgage Lenders (CML) handbook. See LexisPSL Environment News Analysis: [Law Society updates its practice note on flood risk](#).

On 19 February 2016, the Environment Agency (EA) updated its guidance on the climate change allowance for 2016. The [new guidance](#) features, among other things, temporary exceptions for transitional arrangements which apply from 19 February 2016. The guidance is designed to help find out when and how to use climate change allowances in flood risk assessments and strategic flood risk assessments.

New Environmental Impact Assessment Regulations in Wales

LexisPSL Environment

The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2016 came into force on 1 March 2016. They revoke and replace the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, SI 1999/293 and related amending regulations, as well as certain provisions in other regulations.

The Regulations are amended to, among other things:

- clarify that any person may ask the Welsh Ministers to exercise the power of direction
- limit the requirement for subsequent applications to be subject to the screening process to those cases where the development in question is likely to have significant effects on the environment which were not identified at the time that the initial planning permission was granted
- require a local planning authority who proposes to make a local development order or a modification order to decide whether development is Environmental Impact Assessment development, and if it is, to take certain steps to enable them to take the environmental information into consideration before making the order

Brexit

UK-EU environmental relations: what happens after 23 June?

Viviane Gravey and Andy Jordan, University of East Anglia



The date for the referendum has been set – the UK will vote to Leave or Remain in a ‘reformed’ European Union on 23 June. The campaign is focusing on a handful of issues (future trading opportunities, sovereignty, freedom of movement and red tape). Yet after 40 years of active membership most, if not all, sectors of policy and of the economy will be impacted by the outcome of the vote.



The environment in particular is a sector in which UK and EU rules and practices have become very deeply entangled. EU

environmental policies now cover a variety of issues such as biodiversity loss, industrial pollution and climate change; mobilising diverse instruments from voluntary labels, Emissions Trading Systems to pollution standards. UK politicians – whether they be ministers sitting in the Council of the European Union or Members of the European Parliament – participate in EU decision-making. Both central government and devolved authorities have to implement EU environmental legislation and enforce it throughout the UK.

As the campaign heats up attention is naturally turning away from the details of the renegotiation package to what Leave and Remain will actually look like. Will policies become stronger or weaker? Who will be in charge of negotiating them and what will be the level of democratic scrutiny?

A first step to discuss these potential futures is to assess the current UK-EU relationship in the environmental sphere. Crucially, this relationship has to be evaluated from both the UK and EU sides – influence goes both ways. While engaging in the EU may have had profound effects on how the UK addresses environmental problems, the UK has been a key player in influencing the development of EU environmental policies. The subtleties of what is in effect a two-way relationship tend to get lost in the binary debate between Leave and Remain.

The last few years have seen a growing interest in gathering evidence on how the EU has impacted the

UK. The previous UK government launched a detailed inquiry into UK-EU relationships – the ‘Balance of Competences’ report – whose [environment and climate change chapter](#) alone runs up to 100 pages. Leading think tanks such as the IEEP have produced a wealth of expertise on both the impact of EU membership up to date, and the [likely impacts of a Brexit](#). The House of Commons Environment Audit Committee is publishing a [report on UK-EU relationships](#) before the vote, and an [ESRC-funded expert review](#) which we are leading is launched on April 11. Together these reports document the complex interactions between the UK, the EU and the environment. And, crucially, they allow some predictions to be made about life after 23 June.

Implications for the UK

Starting from a UK perspective, a central issue is of course environmental quality. Have EU policies delivered higher environmental quality? Answering this question requires unpicking different European policies – for example the Common Agricultural Policy on the one hand, and the Birds and Habitats directives on the other – which may have had contradictory impacts on ecosystems. It further raises questions of causality, i.e. how much is actually down to the EU compared to other factors (economic growth, globalisation, technological changes etc.). These are tough questions to address, which makes it difficult to assess impacts on environmental quality across the board. But the reports mentioned above identify a number of cases in which EU action has been critical in delivering higher environmental quality, such as cleaner beaches and bathing water, protection of certain species of birds (while farmland birds population continue to decline), tougher chemical regulation (REACH), and finally the massive surge in recycling rates in the UK over the last 10 years.

We must also understand the impact of EU policies – both environmental policy and sectoral policies, such as the Common Agricultural Policy or the Common Fisheries Policy. Raising environmental taxes, setting planning rules or determining the UK’s energy mix remain national policy domains – but most environmental policies are decided at the EU level. The EU law-making process is consensual in nature, requiring large majorities in both the Council of the EU and the European Parliament to agree new pieces of legislation. Achieving consensus requires time, broad consultation of interested parties and coalitions often

cutting across political parties. This means that EU policies, in addition to applying across 28 member states, tend to be more stable than national policies.

Another issue, familiar to readers of *elaw*, concerns the implementation and enforcement of EU law – the crucial link between policies on the one hand and their impacts on environmental quality on the other. How does implementation of EU environmental legislation differ from the implementation of national or international rules? EU membership not only produced a number of policies, but also principles – such as the precautionary principle, the polluter pays principle, the pursuit of sustainable development – enshrined in the EU treaties and which guide implementation. It also produced new avenues for legal challenges, increasing access to justice in environmental matters for individuals – famously illustrated in the last few years by various [Client Earth campaigns](#).

Finally, there are of course the UK actors themselves – politicians, civil servants, campaigners – and how EU membership has changed their daily lives. The EU has offered a new arena for lobbying, another entry point in the decision-making process. Environmental NGOs have provided critical information about non-compliance with EU law to the European Commission, while NGOs and Think Tanks have greatly contributed to debates about how to make the Common Agricultural Policy and the Common Fisheries Policy more sustainable. Civil servants – especially those in EU-facing departments such as Defra or DECC – have had to learn to play the ‘Brussels game’, judging when to make their points and how best to shape EU policies. Devolution required another level of coordination, between negotiators (usually Whitehall) and actors responsible for implementation (devolved in environmental and agricultural matters).

Implications for the EU

Alternatively, when adopting a broader EU perspective, the key question is not so much how the EU impacted the UK, but how the UK help shaped the EU and EU environmental policies in particular. Skilled playing of the ‘Brussels game’ and ability to influence legislation is shaped by a range of factors. [Recent data](#) from The UK in a Changing Europe initiative and [Votewatch.eu](#) showed that the recent UK Coalition government found itself in a minority within the Council of the EU to a much higher degree than its Labour predecessors. But when considering the environment, there is a broad consensus that UK governments and civil society organisations have been instrumental in pushing for the adoption of key internal EU policies – such as Industrial Pollution Prevention and Control, the REACH regulation on chemicals, or agri-environment schemes within the CAP. The UK’s influence has also been felt keenly in the EU’s external environmental policy, most notably in

encouraging the EU to become a leader in international negotiations on climate change.

Brexit or Bremain?

What of the future? The referendum vote will influence not only UK environmental quality, policy style and enforcement capacity, but also the UK’s influence abroad and its ability to contribute to EU policy developments.

When considering the ‘reformed’ EU in which the UK may choose to remain, we need to adopt a longer view – the official renegotiation effort is only the tip of the iceberg. During his campaign to become Commission President in 2014, Jean-Claude Juncker made solving the British question one of his five priorities. Building on David Cameron’s 2013 demands to ‘cut EU red tape’, the Juncker Commission operated a series of major shifts: downgrading environment and climate change portfolios (now shared with fisheries and energy respectively), asking the new environment Commissioner to focus on implementation and ensuring existing rules were revised to conform to a [‘least burdensome approach’](#) and giving his first Vice President an over-arching mission to achieve better regulation in the EU. Hence the EU has already started reforming – removing ‘regulatory burdens’, giving a lower priority to the environment – in order to [appease the UK government](#). David Cameron’s official renegotiation focused on only four items – economic governance, competitiveness, sovereignty and intra-EU migration. Out of these, his call for the reduction of regulatory burdens echoed and reinforced on-going pressure to deregulate at EU level. Crucially, these reforms have proven contentious with environmentalists in the UK and across Europe more broadly – illustrating how continued EU environmental leadership should not be considered a given.

When considering ‘Leave’, scenarios abound. Among these multiple options, it is particularly helpful to consider options of minimal and maximal changes – with European Economic Area membership on the one hand and the UK negotiating trading relationships on a case by case basis within the rules of the World Trade Organisation on the other. In the first option, most EU environmental policies would continue to apply apart from flagship policies on bathing water, birds and habitats and certain climate policies. The UK would moreover have to develop its own agriculture and fisheries policies. In the second option only product standards needed to trade with the EU Single Market would need to be kept – other policies would be up for grabs.

In both cases the UK would lose influence over the content and style of future EU environmental policies – both internal and external. In both cases UK governments could decide to raise UK environmental

standards – an opportunity already offered yet rarely seized under EU membership. Conversely, UK governments could decide to reduce environmental standards – something currently impossible when it concerns standards agreed in the EU. A vote to ‘Leave’ would also impact the remaining 27 member states: the EU would lose a net contributor to its budget (which may undermine the future of the CAP and regional development policies), a central advocate for the reduction of regulatory burdens as well as a leader on Climate Change ambition. Under these scenarios the direction of both UK and EU environmental policies are uncertain.

Voters, especially undecided ones, are looking for evidence, facts and figures to inform what the Prime Minister has described as a ‘once in a generation’ decision. Environmental issues have tended to take a back seat in the referendum discussions thus far. With UK voters uncharacteristically curious about the finer points of law and policy, the referendum is a critical opportunity for academics and practitioners to explain what they do and why it matters so much to the UK.

Viviane Gravey is a PhD student, and Andy Jordan is Professor of Environmental Policy in the School of Environmental Sciences, University of East Anglia. Together with Dr Charlotte Burns (University of York), they are leading an ESRC review of the impact of EU membership on the UK environment. More information is available on their [blog](#).

Brexit

Exploring the possible implications of Brexit on UK domestic environmental law

Rosie Oliver, UKELA's Working Party Adviser



Over the past few years UKELA has been exploring the possible implications for national environmental law and policy of the UK withdrawing from the EU (or 'Brexit'). Our prime motivation for this work has been to inform the debate on Brexit, which to date has focused

on the economy, immigration and national security with the environment conspicuous in its absence.

UKELA's work in this area began with our response to the [Government's Balance of Competences Review](#) in August 2013. In that document our Working Parties considered the impacts, advantages and disadvantages of EU competence on climate change and energy, nature conservation, waste and water. In the course of winter 2015/16 UKELA provided written and oral evidence to the Environmental Audit Committee's inquiry on a similar theme: 'the extent to which EU environmental objectives and policies have succeeded in tackling environmental issues in the UK'.

The embedded nature of EU law means that the vast majority of the UK's current environmental laws and policies derive from Europe. Two UKELA events last year – an evening seminar in February at King & Wood Malesons and a conference in November at Bristol University – sought to understand the implications for those laws and policies of a withdrawal. There were no easy answers. Rather, the speakers – academics, practitioners, a policy expert, a regulator and a representative of the European Commission – identified some critically important questions around the nature of a post-Brexit settlement, as well as a raft of issues that policy-makers and legislators would need to address.

Following those events, our working parties have been taking a closer look at the issues as they relate to different environmental topic areas. The three papers that follow consider the possible implications of Brexit for climate change and energy, nature conservation and waste.

A key issue to emerge from these papers and from the 2015 events is uncertainty. Very different possibilities arise depending on whether the UK successfully negotiates a post-Brexit relationship with Europe in which it remains bound to implement EU

environmental law (for example as a member of the European Economic Area). If it does not, there is the question of whether the UK might decide to continue to implement EU environmental laws for other reasons. For example, the Climate Change and Energy Working Party paper suggests that the UK is likely to want to continue being able to trade within the EU emissions trading scheme in order to meet its emissions targets under international treaties and agreements. The Waste Working Party paper refers to the continued need for those who export waste to EU countries to comply with EU waste management law.

Another major issue is complexity. As is clear from the Nature Conservation Working Party paper, EU environmental law is implemented by a vast array of legislation and measures including management agreements, notices, consents and plans. Each of these instruments and measures would need to be reviewed and decisions taken about whether and how to preserve or unpick them. Some knotty legal issues would arise, such as how to interpret and deal with legislation like the Environmental Permitting Regulations that adopts a referential drafting style, placing requirements on regulators and others to act 'in accordance with Article X of Directive Y'. The Nature Conservation and the Waste Working Party papers note that this review process is likely to be enormously resource and time intensive. Perhaps the only thing that can be said with certainty is that Brexit means plenty of work for lawyers!

Brexit

Implications of the UK leaving the European Union: Waste Management

Article on behalf of UKELA's Waste Working Party

Introduction and background to UK waste management law

The policy and legal frameworks for waste and resource management in the UK have over the past 40 years largely been driven by European Union (EU) law. In the waste management sector, EU law has provided a momentum for long term vision (e.g. recycling policy and targets, and the development of the waste hierarchy in the Waste Framework Directives), as well as requiring a step change in the management of environmental risk (e.g. the Groundwater Directives and Landfill Directive). In more recent times its overarching framework has assisted in allowing for the devolved nations of the UK to adopt different waste management strategies. So, although Scotland, Wales and Northern Ireland may have slightly different waste management laws, they still have to comply with the standards and requirements of EU law.

According to the UK Government's Balance of Competencies Review report of February 2014,¹ the prevailing views expressed by the waste management sector were that EU waste management legislation had significantly changed the UK's approach to waste management, reducing landfill and increasing recycling, and that EU law and targets had been responsible for increasing the level of ambition within the sector and had been a driver for changed working practices to a greater extent than if targets and goals had been set at the national level.² The report noted that not only had this improved environmental standards, but also that "EU targets on waste... were seen by many as providing greater certainty for investors and an important spur for growth"³

A contrary view in the Balance of Competencies Review report, however, questioned the impact of regulatory burdens of EU waste management law on Small and Medium-sized Enterprises (SMEs). The report cited the complexity of the European Waste Catalogue and the burden of waste carrier registration requirements and waste transfer notes as placing a high level of compliance burden on small firms which is disproportionate to the environmental risk they pose.

In its response to the European Commission's consultations on the Circular Economy and on the functioning of waste markets,⁴ Defra has expressed a willingness to assist SMEs. Defra has suggested introducing limited exemptions for SMEs from some

waste management regulation.⁵ Overall, these would not seem to constitute significant changes, nor to signal any substantive move away from the existing legislative regime. The European Commission in its latest EU Action Plan for a Circular Economy has also recognised the difficulties that some SMEs face and has included both R&D investment and deregulation proposals to assist them.⁶ The Action Plan states:

SMEs, including social enterprises, will make a key contribution to the circular economy: they are particularly active in fields such as recycling, repair, and innovation. However, they also face specific challenges, such as access to funding, and the difficulty of taking account of the circular economy if it is not their core business. As set out in the 2014 Green Action Plan for SMEs, the Commission is acting to support these companies, analyse the barriers they encounter to a better use of resources and waste management, and to encourage innovation and cooperation across sectors and regions. The Commission also provides access to finance for social enterprises.⁷

Following the publication of the EU Better Regulation Initiative,⁸ BIS launched a Cutting Red Tape programme in July 2015 for 5 key industry sectors, including the waste management sector.⁹ The remit of this review was wider than the Red Tape Challenge, which the Government launched in 2011, in that it also sought views on cutting red tape on enforcement and the activities of the regulators. The Government's report on the review was published in March 2016.¹⁰ One of the key actions is to amend domestic guidance to revise and clarify the definition of 'waste' and 'by-products'.

Context of withdrawal (and uncertainty)

Waste management law and policy set environmental standards, but compliance with such standards impacts upon and is fundamental to the ability of the waste management sector to trade in what is increasingly an international market. This differentiates waste management law from other areas of UK environmental law. In 2014, 2.37 million tonnes of refuse derived fuel (RDF)¹¹ were exported from England and Wales to 12 EU Member States.¹² Although the figures for 2015 are still awaited, they are expected to exceed those of 2014 and may even reach 3.3 million tonnes.¹³

There are several reasons for the levels of exports of RDF and recyclates from the UK, but one reason is the shortage of facilities to treat such waste. This shortage is partly due to uncertainties involved in UK planning law and process, rather than uncertainties around EU waste management law. The Member States to which the RDF is exported (such as Germany and the Netherlands) have managed to build facilities under the same framework of EU waste management law and policy that applies to the UK.

Uncertainty regarding the legal and policy framework around waste, as well as around individual judicial, regulatory and planning decisions, deters investment and delays decision making. In 2013 the Environmental Services Association (a trade association for the waste management industry), in giving evidence to the House of Commons for its research paper on leaving the EU¹⁴, said that an EU exit:

... would leave a huge void for the industry as it would be unclear to what degree we would retain any elements of the European path towards the higher levels of environmental sustainability [and] billions of pounds of fresh investment in green jobs and growth [could dry] up overnight.¹⁵

It seems to be generally accepted that considerable uncertainty would prevail over the outcome of the UK leaving the EU. The process of withdrawal set out in Article 50 TFEU is untried and untested, but provides for a 2 year process to negotiate the terms of exit (i.e. the decoupling of existing arrangements with the EU). At the same time, separate negotiations and decisions would need to be made by the UK as to its ongoing trading relationship with the EU Member States. This needs to be seen in the context that over 50% of UK total exports (not just waste-related exports) are to EU Member States.

Goods traded into the EU Member States would need to comply with EU standards. Would the UK seek to join EFTA (whose members are Iceland, Switzerland and Norway) or the EEA (the latter being closer to the EU, whose membership comprises the EU and EFTA members but excludes Switzerland)? This assumes that EFTA or the EEA would want the UK to join. Alternatively, if the UK were not to seek membership of EFTA or EEA it could negotiate and enter into a separate Association Agreement with the EU, similar to that entered into with Ukraine. Article 290 of the Ukraine Association Agreement states that although Ukraine can maintain its own legislation, such legislation must provide a high level of environmental protection and strive to continue to improve. The polluter pays principle must apply and there is an obligation not to weaken environmental laws as a way of encouraging trade or investment.

What if the UK looked to new trading partners elsewhere in the world? What regulation would govern such trade? In the waste management sector, the UK currently trades heavily in recyclables with India and China. It would be likely that such trading arrangements would have to be based on international treaty arrangements or the World Trade Organisation, none of which have such well-developed legal enforcement mechanisms or courts compared to those within the EU.

On the day the UK were to finalise its exit from the EU, given the embedded nature of EU law in environmental law,¹⁶ existing legislation would need to remain in force for a transitional period pending a review of what might subsequently be amended or repealed. Such a review would be time consuming, lengthy and complex. During the review period there would be continued uncertainty which would adversely impact on investment in the waste management sector and delivery of sustainable waste management solutions. Who would be deployed to undertake the legislative review? With the present Government's desire for a smaller Civil Service, would there be the necessary expertise and manpower available to conduct the review? If, for example, resources were allocated from the Environment Agency, how might this impact on enforcement of existing waste management laws pending any review? It should be noted that waste crime (e.g. fly-tipping, poor management of waste facilities) has a direct impact on the well-being of the public as well as on the environment.

Waste management legislation which might be subject to review

It is pure speculation as to the extent of likely legislative reform of waste management law following Brexit. Some believe that little would in fact change based on views and evidence to date as to its effectiveness. In contrast, David Baldock said at a UKELA seminar on UK withdrawal from the EU that there would clearly be a temptation to revoke and amend some legislation, otherwise what would be the point of leaving the EU in the first place.¹⁷

Those calling for greater national competence in environmental law have identified REACH, land use planning, noise, soil protection, flooding, environmental crime and environmental justice as possible areas of reform. Reforms in these areas would have knock-on effects for the waste management sector – some positive, others negative. For example, a resolution of the question of what substances and materials REACH applies to and its application once end of waste status is achieved may be possible. Delivery of waste management infrastructure may be easier without having to deal with the EIA and the Birds and Habitats Directives. However, given public opinion and the general lack of public understanding

as to the operation of waste management facilities, any changes are unlikely to improve the public perception of the sector.

There could be some other changes in England as a result of the Government's deregulation initiative (and a similar initiative is also being undertaken at EU level), as outlined above, but Defra has indicated this would only happen if it is demonstrated to aid enforcement and did not detract from environmental performance standards.¹⁸

There is a view within some larger companies in the waste management industry that sound environmental performance, the market and the ability to trade are all linked. A group of 6 representative bodies¹⁹ has recently lobbied the European Commission, in the context of the revised Circular Economy Package, stating the need for sound regulation to drive the markets.²⁰

More specifically, following a UK exit from the EU there would be a need to consider some key pieces of waste management legislation and the potential for change. However, in so doing the overriding question in each instance would be to measure the effect any reform might have on the ability of the waste management industry to continue to trade with the EU.

Alternatively, if an argument could be pursued for creating a solely UK market for waste management,²¹ what legislative and policy reforms would be required to deliver this? What would be the implications if Scotland were to secede and perhaps remain in the EU?

a. The Waste Framework Directive²²

As a general comment, reform of this legislation within English law would be complex. Most of the Directive's requirements, and those of daughter directives, are imported into English legislation by referential drafting in the Environmental Permitting (England and Wales) Regulations 2010 (as amended). Once reformed, there could be issues of interpretation in terms of established jurisprudence based on EU law up to the date of the UK's leaving the EU. To what extent would the English courts be able to refer to this and what about any changes to EU law thereafter which might happen between the leaving date and the establishment of new national legislation?

Would the UK seek to revise the definition of "waste"?²³ It could, in theory, be possible to have one definition for waste that was traded only nationally within England and Wales while still applying the EU and Basel Convention definitions for waste exports. Would this result in a greater or lesser regulatory burden to industry?

What would happen to the "waste hierarchy"?²⁴ It could be applied more flexibly, or even abandoned.

Should waste management practice be governed by voluntary agreements and the market rather than hard law? Voluntary agreements have had mixed success. The Courtauld Commitment²⁵ has been successful at reducing food waste within the grocery sector, but a voluntary agreement in the aggregates sector on the increased use of secondary aggregates proved ineffective, as a result of which the Aggregates Levy was introduced.

Would the UK follow the Waste Framework Directive's proposals and requirements towards the Circular Economy? Would there be the same or better leadership on the policy direction and drivers for such policies at national level than at EU level?

b. Producer responsibility legislation (for example, the WEEE, Batteries and the Packaging Waste Directives)²⁶

UK retailers have found the Waste Electrical and Electronic Equipment (WEEE) Directive challenging. Targets for the collection of WEEE by Member States are both ambitious and prescriptive. The obligation to take back in Article 5(2)(b) causes retailers concern as to space required, cost, planning issues, health and safety, permitting complications and reverse logistics. Neither should it be overlooked that WEEE is regarded as waste²⁷ and waste management legislation will apply to its carriage, storage and treatment. A relaxation of such rules would be welcomed by UK retailers, but that said, any changes to producer responsibility legislation at national level might impact on the ability of those businesses to undertake trade within the EU, if revised UK standards varied from those adopted in the EU.

It is noteworthy that the EU Circular Economy Action Plan refers to introducing better eco-design requirements on "reparability, durability, upgradability [and] recyclability".²⁸ Proposals are expected from the European Commission for Member States to have mandatory product design and marking requirements to make it easier and safer to dismantle, reuse and recycle electronic goods such as flat screen TVs and computer screens. The Commission is also "proposing to encourage better product design by differentiating the financial contribution paid by producers under extended producer responsibility schemes on the basis of the end-of-life costs of their products. This should create a direct economic incentive to design products that can be more easily recycled or reused."²⁹

c. Industrial Emissions Directive³⁰

It would seem unlikely that much amendment would be required to this legislation, except perhaps (so as to avoid confusion in the planning process) to take gasification and pyrolysis out of the definition of incineration and have a separate definition of incineration.

d. The Landfill Directive³¹

There is a view in the UK waste management industry that the EU has never fully accepted that, for geological reasons, well-managed landfill within the UK continues to be a sustainable waste disposal option. Would the UK be able to turn back the clock and amend or repeal domestic laws implementing the Landfill Directive? This is an area of waste management and disposal where EU policy has significantly changed national public opinion in the UK. The recycling drive has consistently been promoted by reference to the quantities of waste diverted from landfill. There is a public perception that landfill is bad. It would therefore be unlikely that there would be the political will to bring about the necessary legislative changes to reintroduce more landfill; equally in practical terms there are decreasing numbers of possible landfill sites in the UK. Even if landfill might be considered as a restoration solution for present and future quarry workings, to what extent would there be the political will or local support for the restoration of such quarries to a landfill use?

e. Transfrontier Shipment of Waste Regulations 2007³²

These Regulations provide the basis for the trade of waste to and from the UK. Given the extent of the UK's export of waste into the EU and, more importantly, the fact that the Regulations also implement the UK's obligations as a signatory to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, it is unlikely that following an exit from the EU there could logically be any changes to the Regulations. The EU Action Plan refers to the illegal transport of waste (both within the EU and to non-EU countries) as being a barrier to higher recycling rates. The EU 2014 revised Regulation on Waste Shipments³³ introduced greater enforcement powers to detect illegal shipments and the Action Plan states that "the Commission will take further measures to help ensure it is properly implemented"³⁴.

Conclusions

EU policy and legislation have brought about sea changes in UK waste management practices. The certainty and long-term targets they provide have promoted investment in waste management infrastructure. Against this background, the unpredictability of planning application outcomes for waste infrastructure in the UK, the policy uncertainty surrounding the production of renewable energy from waste and the time taken to achieve outcomes has resulted in a significant waste export market (although such factors are not directly related to the UK's membership of the EU). To the extent that waste exports to and trade with the EU continued following an exit from the EU, there would be a need to comply with EU waste management law and EU definitions of waste/by-products etc.

With world population anticipated to rise, resource security and waste prevention will be increasingly important. It is unclear how effective the UK would be in driving its own waste management policies if it left the EU. Would it be able to develop its own policies and laws to deliver effective and sustainable waste management internally? What approaches would the devolved administrations adopt?

The UKELA Nature Conservation Working Party has said that "it will be a perilous and uncertain time for nature conservation" following a UK exit from the EU.³⁵ For the waste management sector, which could be described as the UK's fourth utility, the uncertainty during the transition to a new regulatory and legal framework could potentially stifle investment into the sector and delay decision making on waste management solutions and the delivery of waste management infrastructure. Changes in waste management law away from the EU model would not necessarily produce less regulation, but rather different regulation.

The Waste Working Party is led by co-convenors Angus Evers, Partner and Head of the EUME Environment, King & Wood Mallesons and Peter Harvey, Editor, Practical Law Environment. More information is available on the [Waste Working Party's website](#).

Endnotes

- 1 Launched by the FCO in 2012.
- 2 HM Government, 'Balance of Competencies Review Report: Environment and Climate Change', February 2014.
- 3 Ibid.
- 4 UK response to European Commission public consultations on the circular economy and on the functioning of waste markets, October 2015.
- 5 Exemption for some SMEs from waste carrier registration for transporting small quantities of their own non-hazardous waste; removing the need to apply for environmental permitting exemptions for low risk activities (e.g. small scale composting by schools); exempting companies which collect smaller quantities of batteries from paying for battery recycling.
- 6 Closing the loop – An EU action plan for the Circular Economy COM(2015)614/2 final.
- 7 Ibid, p.19.
- 8 EU Better Regulation Initiative, May 2015.
- 9 The review looked at "the impact of regulations across the industry – from production to processing to collection, disposal and treatment... to identify and remove barriers to advancing the sector while ensuring human health and the environment remain protected."
<https://www.gov.uk/government/news/review-into-regulation-and-enforcement-in-waste-sector-launches>.

- 10 <http://cutting-red-tape.cabinetoffice.gov.uk/wp-content/uploads/2016/03/Waste-Findings.pdf>.
- 11 RDF is a fuel made by shredding and dehydrating solid waste. It consists primarily of combustible materials in municipal waste, such as plastics and biodegradable waste.
- 12 <http://www.letsrecycle.com/news/latest-news/rdf-exports-hit-2-37m-tonnes-2014/>.
- 13 <http://www.letsrecycle.com/news/latest-news/uk-exports-of-rdf-in-2015-expected-to-reach-3-3m-tonnes/>.
- 14 Leaving the EU: Research Paper 13/42, House of Commons Library, 1 July 2013.
- 15 Ibid, p.61
- 16 ~80% of EU environmental law is imbedded in UK law and ~90% of Environment Agency prosecutions are based on EU law.
- 17 David Baldock Executive Director Institute for European Environmental Policy: UKELA conference 18 November 2015.
- 18 Defra: UK views on the Commission's public consultation on the functioning of waste markets, October 2015.
- 19 Anaerobic Digestion and Bioresources Association, Environmental Services Association, Chartered Institution of Wastes Management, Institution of Civil Engineers, Renewable Energy Association and Resource Association.
- 20 Extract from letter dated 9 November 2015: "the application of intelligent and proportionate regulation to boost demand for recycled materials ... should be seen as a noble exception to the Commission's general rule [of lighter touch regulation] ... because to deliver the strong environmental and economic benefits of a circular economy requires a long term regulatory framework and market interventions that will stabilise and enhance the viability of increased recycling", https://www.esauk.org/TAG_letter_CE_Package_Timermans_NOV_2015.pdf.
- 21 For example, if this arose as a result of the UK's definition of waste not matching that of EU legislation and hence the export of waste to the EU was no longer feasible.
- 22 2008/98/EC.
- 23 The most talked about definition is "material that is only fit for final disposal", but who would decide on what is final? What about materials which, whilst not yet only fit for final disposal, need some regulation to govern their holding or use due to inherent constituents of such materials?
- 24 The hierarchy to be applied as a priority order in waste prevention and management legislation and policy: prevention; preparing for re-use; recycling; other recovery, e.g. energy recovery; and disposal. See Article 4 of the Waste Framework Directive.
- 25 The Courtauld Commitment is a voluntary agreement aimed at improving resource efficiency and reducing waste within the UK grocery sector. For more information, see: <http://www.wrap.org.uk/content/what-is-courtauld>.
- 26 Directives 2012/19/EU, 2006/66/EC and 94/62/EC respectively.
- 27 But see the proposed amendment to the Waste Directive in the EU Circular Economy Action Plan and the proposed changed definition of "preparing for reuse", which in addition to referring to waste which has been collected also refers to "products or components of products which have been collected by a recognised preparation for re-use operator".
- 28 Closing the loop – An EU action plan for the Circular Economy COM(2015) 614, p.4.
- 29 Ibid.
- 30 2010/75/EU.
- 31 1999/31/EC.
- 32 Based on Regulation (EC) No 1013/2006 on shipments of waste.
- 33 Regulation(EU) No 660/2014.
- 34 Closing the loop – An EU action plan for the Circular Economy COM(2015) 614, p.10.
- 35 Wyn Jones: Convenor, UKELA Nature Conservation Working Party, 26 October 2015.

Brexit

Implications of the UK Leaving the EU on Climate Change and Energy Law

Stephen Hockman QC and Benjamin Haseldine, Climate Change and Energy Working Group

Introductory Comments

This article charts the possible implications of the United Kingdom exiting the European Union on Climate Change and Energy Law. It is of paramount importance to recognise that much of this evaluation is made against a backdrop of uncertainty: the terms, time-scale, and process of 'Brexit' are, as yet, largely unknown. The value of this evaluation comes from setting out the likely affected areas, and in raising awareness of the complexity which Brexit will yield.

Context

It is trite to say that environmental concerns (which are addressed by environmental legislation) are international concerns which generally do not respect national boundaries. For this reason, it has often been recited that environmental concerns need to be addressed at an international level: it is nonsensical to legislate on a national basis when the source or nature of the matter at hand cannot thereby be appropriately or meaningfully managed.

This international characteristic of environmental law is perhaps all the greater in the context of climate change. When we speak of climate change, we are not discussing specific climates or biomes, but rather changes to the *global* climate. The global climate can be understood as a closed system where cause and effect operates on a global scale. Consequently, the EU, as a community of nations, has understandably considered itself competent and justified to legislate on climate change issues.

This global awareness of climate issues can be very clearly seen through the negotiations of COP21 UN Climate Change Conference in Paris, which resulted in the ambition of "[h]olding the increase in global temperatures to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C...recognising that this would significantly reduce the risks and impacts of climate change".¹

Energy law similarly has an international flavour. Bradbrook defines energy law as "the allocation of rights and duties concerning the exploitation of all energy resources between individuals, between individuals and the government, between governments and between states."²

With the benefit of hindsight, it is perhaps somewhat surprising that EU energy policy and regulation has not always engaged with its environmental characteristics. As Bell, McGillivray, and Pedersen suggest, "[h]istorically, EU environmental policy has had little to say about energy, and equally EU energy policy has had little impact on its environmental policy."³ Energy law incorporates issues to do with competition, intellectual property, tax, and free movement more generally. Whilst this article does not suggest that this position is now entirely reversed – certainly these aspects of energy law remain – we believe that there is an increased awareness of the environmental impact of energy use and production. This awareness is shared by producers, distributors, and consumers, and so it is now inevitable that environmental concerns (with all their associated international facets) will influence energy law and policy.

In any event, for the purpose of this article, it is worth highlighting the inherent link between the energy sector and climate change. Indeed, the energy sector is the most significant source of carbon emissions in the EU, amounting to around one-third of total emissions.

Impacted Legislation

Due to the various recognised causes of climate change (which is to say, due to the numerous sources of greenhouse gas emissions) the EU legislative portfolio seeking to address climate change is broad and engages with various different issues. Often, these legislative measures impact on the European energy sector, and so it is useful to deal with these two topics together.

a. EU Climate Legislation

Perhaps the most well-known EU legislative measure addressing climate change is Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community. This Directive endeavoured to facilitate Member States in fulfilling their commitments under the Kyoto Protocol to reduce the aggregate emissions of greenhouse gases. This Directive has been supplemented by Directive 2009/29/EC, which extends the commitment to reduce emissions. The position under the most recent Directive is much in line with the '20-20-20 targets': aiming towards at least a 20 percent reduction in greenhouse gas emissions in the EU by 2020 compared to 1990 levels.

These Directives go on to set out details of how the emission allowance trading market should operate. The 2009 Directive explains that installations which carry out stipulated activities resulting in emissions must hold a permit. Member States are required to submit their proposed allocation plans to the European Commission. The objective of the EU is the efficient but proactive reduction in emissions, and to this end it is stated that the number of allowances shall be decreased year-on-year.

Subsequent legislative measures, such as Regulation 1031/2010, have been enacted to facilitate the effective operation of the emission allowance trading scheme. This Regulation explains how the auctioning process of allowances which are not allocated "free of charge" should be administered and operated. Similarly, Regulation 920/2010 has been implemented to establish a system of standardised registries and electronic databases which oversee and monitor how allowances are issued, held, transferred, and cancelled within the scheme.

In an attempt to highlight the economic basis of the emissions allowance trading scheme, whilst also demonstrating the global concern which climate change poses, Directive 2004/101/EC establishes that joint implementation and clean development mechanisms may be used within the scheme.

In order to work progressively toward these legislated objectives, a number of ancillary measures have been adopted. For example, Decision 280/2004/EC, implemented by Commission Decision 2005/166 establishes a mechanism for monitoring EU greenhouse gas emissions. This mechanism is devised and implemented by national and Community programmes, with Member States then being required to present annual reports to the Commission of their emissions. Much of the rationale behind this Decision was to enable the EU to comply with its commitments under the Kyoto Protocol.

As mentioned above, the link between the environment and energy policy has become more pronounced in the minds of the EU legislature, and this can be seen through another aspect of the 20-20-20 package: a 20% share for renewables in EU energy production, and a 20% improvement in energy efficiency from 2007 levels.

b. EU Energy Legislation

The link between energy and climate change is most clearly demonstrated through Directive 2009/28/EC which seeks to promote the use of energy from renewable sources. Across the EU, it requires that 20% of energy consumed must be derived from renewable sources. Obviously, the basis for this Directive is not simply to reduce the emissions of greenhouse gases: there are "many benefits, including the utilisation of

local energy sources, increased local security of energy supply, shorter transport distances, and reduced energy transmission losses. Such decentralisation also fosters community development and cohesion by providing income sources and creating jobs locally."⁴

For the purposes of this article, this 2009 Directive is particularly interesting because it advocates establishing mandatory national targets for the contributions of energy from renewable sources. In the case of the UK, the national overall target for the share of energy from renewable sources by 2020 is 15% (as compared with the 1.3% share which existed in 2005). A point of contention amongst environmental lawyers is that this target, whilst it is characterised as 'binding', does not attract sanctions or infringement proceedings should the Member State fail to reach it. Therefore, an interesting question may be raised by Brexit: would the UK nevertheless be bound to fulfil its quasi-contractual obligations, and if so, how 'binding' is that target in any event.

The EU has recognised that another significant source of emissions which may be regulated on a pan-European level is transportation. Regulation (EC) No 443/2009 sets out emission performance standards for new passenger cars as part of the Community's broader approach to reduce CO₂ emissions from vehicles. Directive 2009/30/EC seeks to monitor and reduce greenhouse gas emissions through establishing environmental standards for fuel.

This theme of the EU legislating and thus impacting on individual consumers is also evident in various Directives relating to energy usage. Directive 2012/27/EU – the Energy Efficiency Directive – for example, establishes a framework for labelling and consumer information regarding energy consumption for energy-related (including household) products. This Directive also requests that energy companies make reductions in their sales to customers by 1.5% every year. Directive 2010/31/EU seeks to improve the energy performance and efficiency of buildings.

c. EU Air Quality Legislation

It makes sense, as part of this note, to mention the central pieces of European legislation concerned with air quality: CO₂ is not the only emission which has an environmental impact.

Directive 2001/81/EC sets the upper limits for Member States' emissions of certain atmospheric pollutants (including sulphur dioxide, nitrogen oxides, and volatile organic compounds). This Directive is supplemented by Directive 2010/75/EU which seeks to control and reduce the emissions from large combustion plants. This Industrial Emissions Directive, in much the same way as Directive 2009/29/EC (the emission reduction Directive outlined above), requires various installations undertaking specified industrial

activities to operate in accordance with a permit which is issued by the Member State authorities.

The general health impacts, as well as the environmental impacts, of improved air quality are clearly considered in Directive 2008/50/EC on ambient air quality and clear air for Europe. This 2008 Directive imposes limits for Member States for various pollutants and particulates in outdoor air. This Directive has self-evident implications on the UK, and it is well-publicised – for example in the ClientEarth judgment of the Supreme Court⁵ – that in many urban areas these targets are not being met.

Implications of the UK's Exit from the EU

Turning now to the implications for the UK of leaving the EU, it is again necessary to restate that much of what follows is unavoidably generalised. It is perhaps also prudent to bear in mind that we are likely to be equally unclear as to what the UK remaining in the EU would look like if David Cameron is able to successfully negotiate a new relationship with the EU.

There is the very obvious detriment to the UK that if it were to leave the EU, then it would equally be unable to negotiate and seek to influence the EU's approach to environmental regulation. This disadvantage is magnified when one considers that the UK will (perhaps) nevertheless remain obliged to meet certain targets established by the EU or by international treaties, such as the Kyoto Protocol. It would be a regrettable situation for the UK to be bound to meet various objectives but have no influence in the process determining how those targets should be achieved. It is also the case that the UK may be less inclined to adopt stringent and taxing targets for itself if there were not European pressures to do so.

On the other side of the coin, if the UK were to leave the EU, then there is an argument that the EU's climate change and energy policies would suffer. The UK has had a recognised positive impact in steering EU policy in a more demanding, conscientious and sustainable direction. There is a worry that if the UK were to leave the negotiating table, then Member States for whom environmental concerns are subordinate to economic prosperity may come to the fore. This point is likely to be borne out in the context of UNFCCC negotiations: without the UK, the EU may be inclined to adopt a weakened stance, and similarly, the UK's position is likely to be diminished. One of the defining justifications for the EU is that it is greater than the sum of its parts, and that argument is particularly prevalent on the global stage. This position may be questioned, however, in light of the disappointing lack of commitment the Conservative government has shown to progressing environmental sustainability (particularly when environmental 'red tape' may stand in the way of business development).

It is submitted here that the UK is likely to want to continue being able to trade within the EU emissions trading scheme so as to attain its obligations imposed by international treaties and agreements. For example, if the Paris Agreement is ratified, then the ambitious global targets will require exactly such an international response.

There is a suggestion that if the UK were to leave the EU, it could nevertheless opt-in to the emissions trading scheme. Iceland, Norway and Lichtenstein have each signed up to the scheme, and the suggestion is that the UK could do the same, thus preserving the commercial impetus underpinning continued climate change action in industry. This said, there is still the potential concern relating to how influential the UK would be in formulating EU ETS policy if it were no longer an EU Member State.

Much the same argument can be raised with regard to the 2009 Directive promoting the use of renewable energy sources. This Directive envisages joint projects, with the common objective of increasing proportional energy production from renewable sources. These projects may be between Member States or entered into with third countries. Obviously, this latter point is worth noting because it could mitigate any disruptive effects arising from Brexit on long-term international projects. So long as the conditions for third party joint projects would be met, the Member States of the EU may not be deterred from entering into joint projects with the UK.

There are a number of arguments which suggest that Brexit might not be as damaging to the UK's climate change and energy policies as is feared. The Climate Change Act 2008 is the flagship piece of national legislation on this issue, most significantly setting out a duty "to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline."⁶ This legislated target is remarkably ambitious, and indicates that the UK's national (and, therefore, individual) commitment to sustainable development is genuine and proactive.

Further, Simon Moore raises the interesting argument that the UK, through being compelled to meet EU targets on investment in renewable energy sources, may in fact struggle to meet the decarbonisation target.⁷ Meeting the renewable energy target *may* have a deleterious effect on the UK's prospects to reduce its carbon account because it commits the bulk of the UK's efforts and resources in one specific way, at the expense of encouraging broader innovation and investment in low-carbon alternatives.

Concluding Remarks

It is important to be wary of making suggestions about the implications of Brexit when the actual terms and general outcomes are unknown. The overwhelming

majority (between 80-90%) of the UK's environmental legislation is derived from EU legislation, and so the potential impact of Brexit on climate change and energy policy in the UK is huge. If the UK were to leave the EU there would be a resulting legislative lacuna, and at present we do not know how that would be filled: we could repeal all EU measures, or keep them, or adopt an awkward hybrid legislative regime, each option carrying with it obvious problems.

This article has mapped the major pieces of EU legislation which concern specifically climate change and energy, and suggested potential (if chiefly generalised) impacts should a no-vote be delivered in the referendum. The main impact of Brexit will be confusion, and whilst it will be possible to resolve much of this uncertainty over the course of time through a combination of legislating and negotiating, this article questions whether any potential outcomes would be worth that confusion from a sustainability perspective. When considering climate change policy and energy policy, it seems that there are far more advantages to remaining within the EU.

One cannot escape the fact that climate change and the finite nature of non-renewable energy sources are (at least) a pan-European problem. Further, it is true that acting on climate change, and the move toward sustainable energy sourcing, demand a holistic and collaborative approach, and for this reason the arguments for the UK staying in the EU are very strong. Indeed, in the context of the environment as a whole, the disbenefits of Brexit are writ large.

Endnotes

- 1 Article 2(1)(a), Paris Agreement (2015, COP21 UNFCCC).
- 2 AJ Bradbrook, 'Energy Law as an Academic Discipline' (1996) 14: 2 JERL 194.
- 3 S Bell, D McGillivray, and O Pedersen, *Environmental Law* (8th ed, OUP 2013) 554.
- 4 Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources [2009] OJ L140/16, para (6).
- 5 *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28.
- 6 Section 1, Climate Change Act 2008.
- 7 S Moore, '2020 Hindsight: Does the renewable energy target help the UK decarbonise?' *Policy Exchange* (2011, London).

Brexit

Implications of the UK leaving the European Union – Nature Conservation

Article by UKELA's Nature Conservation Working Party

Introduction

Members of the UKELA nature conservation working party have considered this issue for some time. However, we still do not have a clear picture of how, should the UK leave the European Union, the process would be undertaken and the time frame for such a process. The potential impacts on legislation for and affecting wildlife are considerable. Given the uncertainties, all that is possible is to list the potential issues. The following is far from complete but provides an indication of the range of issues and complexities to be addressed.

Legislation Affecting Wildlife

The key wildlife directives are the Birds Directive (79/409/EEC) (codified 2009/147/EC) and the Habitats Directive (92/43/EEC). The former is transposed by means of the Habitats Regulations and Part I Wildlife Countryside Act 1981 as amended, the Nature Conservation (Scotland) Act 2004 and the Wildlife (Northern Ireland) Order 1985 as amended. The latter is transposed by means of Habitats Regulations.

Other critical directives are the Environmental Impact Directive (2011/92/EU as amended by 2014/52/EU), the Strategic Environmental Directive (2001/42/EC) and the Environmental Information Directive (2003/4/EC) which are transposed into national legislation by means of Regulations.

Overlapping complementary directives are the Water Framework Directive (92/43/EEC), the Marine Strategy Framework Directive (2008/56/EC) and the Environmental Liability Directive (2004/35/EC).

Some Issues and Questions

a. European Sites

Most terrestrial sites have been notified as Sites of Special Scientific Interest (SSSI) (Areas of Special Scientific Interest in Northern Ireland (ASSI)) and will be afforded a measure of protection but not as robust as that provided by the precautionary principle set out in the Habitats Directive. The description of such sites as 'European' may need to be changed to a term such as 'International' but the level of protection should continue. The implications for land transfer and registration of any substantive changes need to be addressed.

b. Management Agreements

The implications for management agreements

between the statutory nature conservation bodies and the relevant owners and occupiers to secure and maintain European sites will need to be considered. The European interest features will be of national importance and therefore the agreement could be re-assigned to section 15 of the Countryside Act 1968 to protect and manage SSSIs. Such an arrangement would need to be formalised through appropriate legislation.

c. Notice and Consents

Consents with or without conditions, given by the statutory nature conservation bodies under the Regulations to owners and occupiers who have given notice to undertake operations likely to damage European interest features could be revoked or re-assigned to the underpinning SSSI/ASSI legislation where possible.

d. Special Nature Conservation Orders

Orders made by the Secretary of State to provide protection where a European site is under threat would ultimately need to be renamed, as would any measures made in association with individual orders. All relevant owners and occupiers would need to be given notice of the changes.

e. Byelaws

I am not aware of byelaws being made by means of the Regulations but if any are in force they would need to be renamed and appropriate notices etc. made to publicise changes.

f. European Marine Sites

European marine sites (SPAs and SACs) are not necessarily underpinned by national legislation provided by their declaration as Marine Nature Reserves at Lundy, Skomer and Strangford Lough and/or designation as Marine Conservation Zones (MCZs) under the Marine and Coastal Access Act 2009. However, those European sites that are not already MCZs could be designated with minimum administrative burden.

g. Protection of European Species

European protected species listed in the Schedules to the Regulations are also listed in the relevant Schedules of the Wildlife and Countryside Act 1981 as amended. In Northern Ireland and Scotland, European protected species are only listed in the Regulations. This anomaly would need to be addressed.

The protection afforded by the Wildlife and Countryside Act (Part 1) in the main mirrors the directives (intentional/reckless v deliberate). The one major difference is the strict liability offence under Article 12(1)(d) of the Habitats Directive which could be incorporated into domestic law.

Protection would be substantially weakened if there were a loss of the tests of no alternatives and action not detrimental to the maintenance of the population(s) of species at favourable conservation status (Article 16).

The power under the Regulations to issue licences for preserving public health and safety or other imperative reasons of overriding public interest including those of a social or economic nature is not available under national legislation.

h. Assessment of Plans and Projects

In the case of plans and projects where it cannot be ascertained that they would have no adverse effect on a European site, it would be important to ensure that where these have been approved that the compensation secured for the impact identified in the assessment and the relevant agreements underpinning these measures are retained.

It is important to ensure that where plans and projects have been reviewed under Regulations and amended or revoked, the reviews and consequent changes are not nullified. A large exercise was carried out by the nature conservation bodies and the then Environment Agency/SEPA to review consents.

Conclusions

We have to accept that Brexit may occur and suggest measures to minimise harm in such an event.

All domestic secondary transposing measures will remain in force unless and until specifically repealed. The need for owners' and occupiers' consent for reclassification of conditions and agreements under domestic legislation should be avoided. All the above are likely to place a considerable administrative burden on governments and their agencies, and will have practical implications as to the management and protection of natural habitats and wild fauna and flora.

To quote Donald Rumsfeld:

There are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don't know we don't know.

We are at the 'known unknowns' stage, gathering information and listing issues to be addressed. We

have no idea of the consequences and of the unknown unknowns. It will be a perilous and uncertain time for nature conservation in the UK.

Wyn Jones is the Convenor of UKELA's Nature Conservation Working Party. Wyn retired from the Joint Nature Conservation Committee after nearly 30 years working for the statutory nature conservation agencies, where he headed the Habitats advice team and was the lead on the implementation of the EC wildlife Directives in the UK. For more information on the Nature Conservation Working Party, visit their [website](#).

Hot topics

Environmental Justice in Scotland

Professor Colin T. Reid, School of Law, University of Dundee

**This article was first published in Scottish Planning and Environmental Law*



In March, the Scottish Government published a consultation paper *Developments in Environmental Justice in Scotland*,¹ seeking views on the need for further change in relation to the handling of environmental disputes. This fulfils a

commitment in the 2011 SNP manifesto and subsequent programme for government and asks broad questions rather than putting forward specific proposals.

The paper explains the major changes which have taken place in the courts and other aspects of the justice system in recent years and their significance for environmental matters. On the civil side, these changes include the introduction of the Sheriff Appeal Court, reforms to judicial review, the introduction of protective expenses orders and the potential for judicial specialisation, at sheriff court level and above. This “significant programme of reform” aims to make the court system “more efficient and more accessible” and by easing the rules on standing for judicial review and providing protected expenses order “has contributed to Scotland’s ongoing compliance with ... the Aarhus Convention.”

On criminal matters, an Environmental Crime Taskforce has been created, reforms to penalties for wildlife crime are proposed, the Crown Office and Procurator Fiscal Service has established a specialist unit to handle environmental and wildlife crime and there is a new offence of causing significant environmental harm. Meanwhile the Regulatory Reform (Scotland) Act 2014 has given SEPA new enforcement and investigatory powers and the recently established Scottish Sentencing Council may select environmental cases as an area where guidelines on sentencing should be provided.

Against this background, the paper asks questions in three areas. The first is to identify what respondents consider as “environmental cases”, how these are currently handled and whether these processes are adequate. The second asks for reasoned views on whether the recent changes have improved how civil and criminal environmental cases are dealt with. The final question asks for further ways in which the justice system, civil and criminal, should be adjusted

to handle environmental cases, noting that any changes need to be “proportionate, cost-effective and compatible with legal requirements”. In particular, views are sought on the desirability of a specialist forum (court or tribunal) to hear environmental cases.

The consultation paper thus considers a broad sweep of matters across the civil and criminal justice systems, providing a useful reminder of all the changes which have taken place in recent years. However, the coverage is not comprehensive in terms of environmental cases since first instance decision-making and regulatory appeals to Ministers and other statutory bodies are not included. This is regrettable since these are important components of how the overall system operates, both for those undertaking activities with environmental impacts and for those seeking to protect the environment. For example, it excludes the possibility of integrating most planning matters with other environmental issues. Without this component only part of the picture is being considered. Moreover the very concept of “environmental justice” discussed here is the narrow one based on the handling of disputes, as opposed to considering wider issues of substantive justice and the fair distribution of environmental benefits and burdens.

Environmental cases do not sit easily within the standard justice system because of their demand for a mix of scientific and legal expertise, their legal complexity and the many private and public interests involved. There have been calls for reform since at least the early 1990s when Prof. Jeremy Rowan Robinson produced proposals for an environmental tribunal in Scotland and it is undeniable that environmental matters are now treated more seriously and with more regard to access to justice than in past decades.

Given the scale of recent change (much of it having an incidental impact on environmental matters, rather than being shaped to deliver environmental justice) and the potential for further developments (such as sentencing guidelines) it may be difficult to assess the adequacy of the system as it stands now. Whether enough has been done to improve the position for environmental cases is exactly what this exercise aims to examine and the broad invitation to submit views should be accepted by all those who come into contact with the justice system in an

environmental context. The consultation deadline is 10 June.

Prof. Reid is Professor of Environmental Law at the University of Dundee and has published widely on many environmental topics including three editions of his book Nature Conservation Law. He was a founder member of UKELA, served on its initial Council and is active in the Nature Conservation and Scottish groups.

Endnotes

- 1 <https://consult.scotland.gov.uk/courts-judicial-appointments-policy-unit/environmental-justice>

The solicitor, the client and floods

Alec Samuels

A client seeks advice and assistance from her solicitor about flooding or possible flooding. They perhaps own, or are thinking of buying or selling, property, or are applying for planning permission for development. The damage, cost, and inconvenience – trauma even – in being a victim of flooding can be enormous.

Naturally the usual enquiries and investigations will be carried out with regards to flood risk? The obvious would include whether the property is in a flood risk zone, or if there any history of flooding: is there any reason to suspect flooding?

Other considerations may include whether:

- there is a river or stream or inland waterway in the vicinity;
- there are any flooding conditions in any relevant planning permissions;
- any surveys have been done, or whether an expert survey should be commissioned;
- any flood protection measures have been carried out;
- the emergency services have ever been called; and
- perhaps most importantly, there is insurance cover, or whether any insurance claim been made in the past; or made and refused

Legal duty of the solicitor

The legal duty of the solicitor is to act as a reasonably competent professional following the standards normally adopted in the profession; though the judge could objectively set higher standards if cogent evidence so dictated. Following instructions, the solicitor must in non-technical language and in a measured non-perfunctory manner inform the client so that the client knows what he is doing. The solicitor does not tell the client what to do or what not to do but to understand the nature, effect and potential and practical consequences of a course of action or transaction. The choice lies with the client, whether to go ahead or not. Most importantly, what are the risks involved, how serious are they or might they be, what choices are open to the client? The solicitor should obtain vital or important or significant information for the client, or advise the client how to obtain that information.¹

Problems

Flooding problems arise in many ways,² for example:

- storm and surface water;
- sewage overflow;
- groundwater;

- coastal surge;
- rivers, streams and inland waterways overflowing;
- reservoirs leaking and overflowing.

Another particular problem is that a local planning authority does not have control over developers' automatic right to connect new developments to the system, overload of which can easily lead to flood.

In the countryside, run-off from the farmers' fields in the low-lying vulnerable areas has seriously damaged nearby residential properties, such as the flooding of the Somerset Levels in winter 2013-14 – ditching, dredging, barriers, sluices, tree planting and general maintenance may be necessary.

Confusing picture

The relevant governmental, local, political and legal regimes in respect of flooding can only be described as confusing. At the national level there are Defra, DECC and DCLG; the Environment Agency (EA) is the principal agency. About one third of Defra's budget goes on flood work, often by way of partnership funding. Under the 2015 Spending Review Defra received a £2.3b six year capital investment programme for 1,500 schemes to better protect 300,000 homes. At the local level there are the drainage boards, local authorities and the water companies. The Somerset experience showed that public bodies, private bodies and individuals are willing to work together and raise extra funds for flood protection.

However, the numerous other bodies involved at varying levels build a confusing picture, and include:

- the Flood Forecasting Centre, a body involving the EA, the Met Office and the local authorities, forecasting and warning;
- the Local Drainage Boards;
- the Association of Drainage Authorities (ADA);
- the local lead flood authorities;
- the regional flood and coastal committees;
- the National Flood Forum;
- the Flood Advisory Service, a not-for-profit organisation offering advice to local communities, and the Flood Protection Society.

Planning permission for development in a flood risk area will quite likely be refused; or if granted then subject to tough protection conditions and considerable developer contributions. The design will need to be as near flood-proof as possible. An existing property owner in the flood risk area wishing to sell her property will need to be

exceedingly persuasive, and willing to lower the asking price. The prospective buyer will need a lot of persuasion, and a favourable price.

Depending very much on local circumstances there may be local or area strategic flood risk assessments and management plans, or flood action plans based on:

- specific local conditions;
- the catchment;
- the river basin;
- a managed coastal withdrawal plan; or
- a beach protection scheme for the benefit of coastal property.

Areas of serious flooding in recent years include Somerset, Sandwich, Lowestoft, Morpeth, Belford, Carlisle, Cumbria and York. In Carlisle and Cumbria, the Government is providing £5,000 per household, and council tax and business rates relief is expected.

Legal regime

Legislation deals with the regulation of the water environment, securing the drainage of land, the management of flood risk,³ the lead local flood authority, internal drainage boards, flood risk management strategies, regional flood and coastal committees, river maps, the duty to act consistently with national strategies, the duty to investigate and to maintain a register, ensuring progress, designation of third party assets, sustainable drainage systems ("SuDS"),⁴ sewerage, sustainable development duties, environmental works levies and funding, abstraction, and much else besides.⁵

Nuisance and negligence

There is a delicate balance to be drawn between self-protection and not harming a neighbour, and the property owner should endeavour to protect herself from possible claims in negligence and nuisance. For example, flood water collecting on her land, perhaps flowing from a neighbour higher up, may flow down on to neighbouring land lower down, causing damage. The property owner may take reasonable steps to protect herself against the "common enemy" but she may not direct or divert flood water from her land on to the land of a neighbour. The property owner should therefore take reasonable steps, such as ditching, piping, drainage, bunds or walls, to prevent or minimise any foreseeable flow on to the lower neighbour.⁶

Reservoirs carry a low risk of water escape but a high risk of serious injury and damage if an escape were to occur.⁷

Insurance

Insurance cover is important to most property owners, indeed essential for those with mortgages. In flood risk areas the cost of insurance has proved to be prohibitive, even if obtainable. The new Re Flood scheme⁸ applies to residential or household properties only, not second homes, not business, not landlords, and not residential properties built after 1 January 2009. The property owner and the insurer negotiate the contract in the normal way, the insurer offers affordable terms, the premiums capped between £200 and £1,200 according to council tax range, though likely to be subject to tough property protection measures, such as wall plug sockets, wall cladding, dehumidifiers, defence walls, pumps. In the event of flood damage the insurer pays out, and recovers from the Flood Re fund, a reinsurance scheme. The risk is pooled. The fund of £180m per year will be raised through a national levy on all insurers, and no doubt passed on to all consumers based on council tax bands. The reinsurance scheme is run by the industry, subject to the financial regulators. Some 350,000 properties are expected to be covered.⁹

Alec Samuels is a barrister, BA (Cantab), formerly Reader in Law at the University of Southampton

Endnotes

- 1 Lord Neuberger MR, Padden v Bevan Ashford (a firm) [2011] EWCA Civ 1616, [2012] 1 WLR 1759, [2012] 2 All ER 718, paras 26-30 and 42.
- 2 Learning lessons from the 2007 floods, Sir Michael Pitt. For expertise on flooding see Professor David Balmforth and colleagues in the Institution of Civil Engineers.
- 3 Water Act 2014 s 61.
- 4 Flood and Water Management Act 2010 s 32 and schedule 3.
- 5 Flood and Water Management Act 2010. DEFRA Guidance 3 June 2014. Land Drainage Act 1991. Water Act 2014. The Flood Risk Regulations 2009 SI 3042 implement the EU Floods Directive 2007/60/EC. Flooding and the law, Alec Samuels [2015] JPL 133.
- 6 Lawrence v Fen Tigers Ltd [2014] UKSC 13. Cambridge Water Co v Eastern Counties Leather plc [1994] 2 AC 264. Flooding and the Law, Alec Samuels [2015] JPL 133.
- 7 R (Heath and Hampstead Society) v City of London [2014] EWHC 3868, [2015] Env LR 11. Reservoirs Act 1975. Flood and Water Management Act 2010 s 33 and schedule 4.
- 8 Water Act 2014 part 4 ss 64-84 came into force 1 April 2016. The Flood Reinsurance (Scheme and Scheme Administrator Designation) Regulations 2015 SI 1875 and the Flood Reinsurance (Scheme Funding and Administration) Regulations 2015 SI 1902.
- 9 For research work on the scheme see linda.greaves@ouce.ox.ac.uk.

Advertisements

The Journal of Environmental Law and UKELA – Membership Benefits: Reduced Subscription Rates

This short feature has kindly been written by Emma C. Thomas, Senior Publisher, Academic Law Journals at Oxford University Press to remind Members of the important and long-standing relationship between UKELA and The Journal of Environmental Law. Authoritative legal commentary is available in the JEL. It is also worth bearing in mind in 2016, as UKELA focusses on the international dimension of environmental laws, that OUP publish the Yearbook of International Environmental Law. Stephen Sykes, Chair, UKELA

The Journal of Environmental Law, edited by Professor Liz Fisher, is now in its 27th year, and has become an authoritative source of informed analysis for all those who have any dealings in this vital field of legal study. It exists primarily for academics and legal practitioners, but should also prove accessible for all other groups concerned with the environment, from scientists to planners. The journal offers major articles on a wide variety of topics, refereed and written to the highest standards, providing innovative and authoritative appraisals of current and emerging concepts, policies, and practice.

Alongside academic article, it includes analysis pieces, providing detailed analysis of current case law and legislative and policy developments; an annual review of significant UK, European Court of Justice, and international law cases; and a substantial book reviews section.

Each year the JEL awards the Richard Macrory Prize for best paper. [The 2015 prize winning article is free to access here.](#)

[The Journal also holds regular events and lectures, many of which have audio or video.](#)

UKELA members are entitled to a reduced rate subscription to the Journal (£77 for 3 print issues per year, plus online access to the archives, [see here for details](#)), but you can also read a free collection of articles on [Specialist Environmental and Planning Courts here.](#)

To read more about submitting an article for publication, please visit our [instructions for authors page](#).

OUP also publishes the Yearbook of International Environmental Law. Its 25th Volume, focusing on the Anthropocene, has just published [here](#) and further details on the Call for Papers for Vol 26 [can be found here](#).

For further information, please contact: Emma.c.thomas@oup.com.

UK Environmental Law Association

elaw

The editorial team is looking for quality articles, news and views for the next edition due out in May/June 2016. If you would like to make a contribution, please email elaw@ukela.org by 11 May 2016.

Letters to the editor will be published, space permitting.

© United Kingdom Environmental Law Association and Contributors 2015

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

Registered Charity number:
299498 (Registered in England
and Wales), Company limited by
guarantee: 2133283 (Registered
in England and Wales)

For information about working
parties and events, including
copies of all recent submissions
contact:

UKELA, PO Box 487, Dorking,
Surrey RH4 9BH or visit
www.ukela.org
Linda Farrow
Executive Director
Linda@ukela.org
07970 956 171