



e-law

Better law for the environment

January/February 2017 | Issue 98



Welcome to the first issue of e-law for 2017.
The theme for this edition is biodiversity.

This month the Environmental Audit Committee (EAC) has advised, in their report [The future of the natural environment after the EU referendum](#), that environmental protections must not be weakened during the Brexit process. The report looks at issues at stake during a withdrawal from the EU in terms of

biodiversity and environmental protection challenges related to land management and agriculture.

The findings are particularly pertinent now we know that Theresa May is likely to lead us to a hard Brexit. From a biodiversity perspective, consideration needs to be given to the fact that the Birds Directive 2009/147/EC and the Habitats Directive 92/43/EEC do not form part of even the European Economic Area regime, so unless specific domestic legislation is passed, these protections will be lost.

Alongside six further suggestions of steps to take before Article 50 is triggered, the EAC recommends the introduction of a new Environmental Protection Act to help find a way to afford the strength and range of environmental protection currently given, such as through the EU network of protected wildlife areas under the Birds and Habitats Directives.

In [Words from the Chair](#), we hear all about the UKELA Brexit Task Force (BTF) and their ongoing progress considering these sorts of issues. It remains to be seen what the government will propose in any Brexit plans, before parliament vote on triggering Article 50.

On an international level, the [UN Biodiversity Conference](#), COP 13 in December 2016, agreed on encouraging measures to integrate biodiversity in forestry, fisheries, agriculture and tourism and one can be hopeful that the Parties to the Convention on Biological Diversity will take their obligations seriously. But with the USA absent from the list of countries that have ratified this Convention and with Trump in the White House, certain key players are noticeably absent.

Despite the political turbulence at national and international levels, it is heartening to read about local projects invested in supporting biodiversity. The [City of Trees](#) project in Greater Manchester, alongside similar schemes in other regions in the UK, focuses on planting trees, bringing unmanaged woodlands back into production and supporting the natural world.

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In this edition of e-law we have a fantastic selection of articles which discuss biodiversity from some of these perspectives, including articles from:

- Alistair Taylor on [EU nature laws—fit for purpose](#);
- Dr Paul Stookes and Matthew McFeeley on [Reversing the decline of nature in the UK](#); and
- Dr Nick Atkinson, Wyn Jones and Tom Huggon on [The ash dieback crisis](#).

Find out more about Wyn Jones in our [60 second interview](#).

We are also lucky to have two really interesting pieces in [matters in practice](#):

- [The enforcement of environmental law: challenges and opportunities](#) by Professor Richard Macrory; and
- [Highlights from the meeting with Turkish officials](#) by Jill Crawford.

Best wishes,

Simone Davidson

Simone Davidson
E-law Acting Editor

E-law editorial team

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

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

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

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

Words from the Chair



New year news and resolutions

New theme for UKELA in 2017

I send my warmest regards to UKELA's growing membership in the UK and abroad.

As you may know, each year we set a key theme for UKELA's activities. In 2016 it was the international dimension of environmental law – rather prescient of us bearing in mind the tectonic shifts in the EU and US! Our work last year raised our international profile and encouraged members to help environmental law associations elsewhere in the world. We hosted important meetings with international judges and legislators. We ran a successful conference on the international theme. We founded UKELA's International Ambassador network. In the years ahead, we will continue to spread our wings internationally.

Our theme for 2017 is promoting environmental law in a changing, less-certain world. Change of course causes real disquiet for many people. Change is not always for the better. That said, fear of change can become self-fulfilling and a positive outlook is to be encouraged. Speaking personally, I have learnt to live with (if not to relish) change, risk and uncertainty in my professional career. I have developed environmental ventures, such as Argyll Environmental and The Ashfield Group of businesses, where we have embraced the business opportunities arising from a changing world with technological change and new laws.

It seems likely if not inevitable that Brexit will drive changes to the framework of environmental law around the UK. Yes, this is a cause for concern, but it is also an opportunity. The challenge for UKELA – I believe we are meeting it – is to make a measured and effective contribution so that the law continues to work for the environment.

With this in mind, I am delighted to report the following progress on the Brexit front:

- Two esteemed former Chairs of UKELA – founding Chair, Professor Richard Macrory, and highly experienced practitioner, Andrew Bryce – have been appointed as Co-Chairs of our 27-strong Brexit Task Force (BTF). I am very grateful to them for stepping forward. We could not be in better hands for this most important of responsibilities.

- UKELA's Council has approved the release of some of our financial reserves to fund a Research Assistant to support the BTF. There is a great deal of interest in this position. We will make an appointment as soon as we can.
- My fabulous UKELA colleague, Rosie Oliver, has committed more time to work with our BTF Co-Chairs and assist the BTF. Rosie used to work for the Government's Legal Service and is ideally placed to help UKELA make an effective contribution.
- At the second meeting of the BTF we were joined by [Stanley Johnson](#) at my invitation. One of the UK's top nature conservationists, pioneer of EU environmental legislation during his time at the European Commission, and former MEP, Stanley recently joined UKELA. He is a real asset for us and we are most grateful to Stanley for the energy and expertise he is contributing.
- My thanks go to the working parties – especially 'nature conservation' and 'waste' – for supporting the BTF with helpful contributions which map the extent to which our environmental laws are derived from the EU.

Meantime, the BTF is actively reaching out to government to make our resources available when the environmental aspects of Brexit come to be negotiated.

Patron news

We are most fortunate for the help and guidance which our patrons provide and I would like to thank our patrons for their ongoing support.

On a positive note, I am delighted to report that one of our newly appointed patrons, Bishop James Jones, was appointed Knight Commander of the Order of the British Empire (KBE) in the 2017 New Year's Honours List for services to bereaved families and justice. Bishop James chaired our 2016 Garner Lecture with great skill and charm.

However, on 20 December, it was with great sadness that we received the news of the loss of our kind and generous patron, The Hon Mrs Justice Patterson. Appointed to the High Court Bench in 2013, Frances was lead judge in the Planning Court. She was a committed patron, who judged our mooted competitions in addition to other contributions, and we will miss her enormously. We extend our condolences to Frances's family.

Tempus inreparabile fugit

When I took up the reins at UKELA some 18 months ago, I promised to be ambitious and to make this a vintage period for UKELA. Well, *tempus* does indeed *fugit* – I have just six months to go now as Chair. That

said, please be assured that I will continue to work unrelentingly hard with Linda, Alison, Rosie, Elly-Mae, my Vice Chairs and my fellow Trustees to further strengthen our association.

Here are some of the highlights (to date!) of my time as Chair:

- Greatly enhancing the role for women:
 - Two of my Vice Chairs are women.
 - UKELA's first female Garner lecturer was my great friend, Pamela Castle OBE.
 - The wonderful Anne Johnstone has just been appointed as Chair Elect. Anne will be a terrific Chair for UKELA – only our second female Chair, she will undoubtedly be a trailblazer for other women to take up this role in the future.
- Increase in membership.
- Gearing up for [Brexit](#).
- Internationalising UKELA.

The benefits to our environment and our citizens of having an independent expert environmental law association like UKELA have never been more important or more necessary. We have a vital contribution to make to the future of environmental law across the UK. Rest assured that we will step up to the mark.

Regards,

Stephen Sykes

Stephen Sykes
UKELA Chair

News

The Hon Mrs Justice Patterson DBE

In December, we were saddened to learn of the death of our Patron, Mrs Justice Frances Patterson. Frances was a much valued member of our organisation, lending support and expertise in a generous manner. She will be greatly missed by all of us at UKELA. A fund in her memory has been set up by her family. If you would like to make a donation, please visit the [fundraising page](#).

Wildlife law bursary 2016

The wildlife law course arranged every November under the auspices of UKELA's [nature conservation](#) working party makes a little profit due to the generosity of the tutors and Browne Jacobson solicitors. The working party decided that the profit be used to fund an annual bursary of £1,000 to support a post graduate research project addressing wildlife law.

We are delighted to announce the recipient for 2016 is [Joanna Miller Smallwood](#). Joanna completed a BSc Hons in Tropical Environmental Science and a LLM in Environmental Law at Aberdeen University. Her BSc dissertation was published. She worked at Friends of the Earth UK head offices in the parliamentary and in the legal department where she was involved in public interest cases including those concerning genetically modified organisms. Inspired by the work at Friends of the Earth she then went on to qualify as a lawyer (PGDL and LPC; The London College of Law). She completed her training contract and then practiced as a solicitor at Leigh, Day & Co. in London, with a particular interest in environmental law multi-party actions. She was involved in a group litigation against BP representing Columbian peasant farmers which was successfully resolved.



Following some time out to look after her two children she returned to university in 2014 and completed an MSc in Social Research Methods at Sussex University. She is currently in the second year of an ESRC funded socio-legal PhD at Sussex University. The title of her PhD is: 'The Convention on Biological Diversity's objectives include conservation of biological diversity at a global level, but has it become another victim of extinction as a result of its text and strategic plan?'

Membership renewals

Your membership renewal for 2017 was sent in December, with a reminder sent recently. Many thanks to those of you who have renewed already – it is much appreciated. If you do not think that you have received your renewal information, please [get in touch](#). You can also renew on our website via the '[Join Us](#)' link.

Annual conference 2017

Bookings are now open for the annual conference, which will be hosted in Nottingham this year. The theme is 'Cities of the Future: legal challenges and opportunities for more sustainable living'. More details, including how to book, can be found on our [events page](#) further on in this edition.

Student competitions 2017

The moot competition shortlisting starts shortly and the essay competition is now open! The winner gets a free place at our annual conference. Find out more on the [student pages](#) later on in this edition.

Student news

Andrews Lees Prize article competition 2017

UKELA is pleased to announce the launch of its annual article competition, The Andrew Lees Prize. This year, students are invited to write an article addressing one of the following:

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

If you choose to submit an article on the topic of your choice, you may submit an article that you have prepared for another purpose. However, it must have been researched and written after 1 January 2017. We may ask to see evidence of this. Entries must be submitted between 14 March and midday on 19 April.

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

Student Advisor changes

We are delighted to welcome Rosie McLeod as our new student advisor. Rosie will be working alongside Mark Davies, taking over from Emma Lui. Rosie is currently undertaking an internship within the policy team of the International Chamber of Commerce UK. She recently graduated from the University of Amsterdam with a LLM in International and European Law in 2016, after completing her LLB at the University of Durham in 2015. Whilst at University, Rosie was Chief Editor of the University's Pro Bono blog and hosted student radio shows discussing environmental issues.



This means we are saying goodbye to Emma Lui, who has been our student advisor for the past 2 years. Emma will be continuing her role as a paralegal in the LexisPSL Environment and Construction teams at LexisNexis, and assisting as Senior Advisor at this year's Public Interest Environmental Law (PIEL) UK conference. We wish her the best in her pupillage applications, and look forward to seeing her again at upcoming UKELA seminars and events.



Student publication opportunity

Interested in co-authoring a hot topic article with an environmental professional? UKELA provides an opportunity for students to publish their work in e-law, our members' journal which is circulated to over 1400 practitioners. Students are invited to email a short abstract of up to 500 words to [Mark Davies](#) or [Rosie McLeod](#), our student advisors. If selected, the editorial board will endeavour to pair students with a supervising practitioner in that field. Articles can be on the e-law issue theme or on any topic related to environmental law. The theme of the next issue is 'Energy/climate change', expected to be published on 27 March.

UKELA events

UKELA Scotland AGM – 23 February, Shepperd and Wedderburn, Edinburgh

Save the date – details to follow very soon.

London meeting: wildlife law – 28 February, London (and various UK venues)

Please join us for a seminar entitled 'Where the wild things are: A discussion on the value of wild places and how to find and protect them'. We are pleased to offer the opportunity to attend in London and a number of venues around the UK, including Bristol, Birmingham, Newcastle and Nottingham. More details on our [website](#).

Moot competitions finals day – 6 March, London

Join us as our finalists battle it out to become the junior and senior moot champions. Pick up valuable tips on how to argue for both the respondent and the appellant. The final round of each competition will be presided over by a senior member of the bar. As limited places are available, please [get in touch](#) to book.

South West regional group seminar – Dirty air, science, consequences and law – 16 March, Bristol

Join us for seminar on air quality. Our speakers are Dr Enda Hayes, Associate Professor – Air Quality and Carbon Management University of West England; Dr Katharina Janke, Lecturer in Health Economics Modelling – University of Lancaster and James Thornton, Founding CEO of ClientEarth, environmental lawyer behind the most significant challenges brought in the UK in relation to clean air.

Save the date – bookings opening very soon.

Nature conservation working party meeting – 20 May, Nottingham

More details are available [online](#). To attend, please contact the convenor.

Wild law weekend – 26-29 May, Fort William

Bookings will open soon! Make sure to keep the weekend free.

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

Join us at the University of Nottingham for our annual conference on the theme of 'Cities of the Future'. More than half of the world's population now live in towns and cities, and this number is growing inexorably. Living sustainably in cities is therefore a key challenge for politicians, planners, engineers, architects and lawyers. UKELA's 2017 conference will cast light on the role of lawyers and regulators in making cities more sustainable, sharing knowledge and best practice relevant to the UK context. For more details, please visit our [website](#).

The e-law 60 second interview

Wyn Jones, convenor of nature conservation working party



What is your current role?

I am the convenor of the nature conservation working party. I retired 8 years ago after nearly 30 years working for one or other of the statutory nature conservation agencies.

How did you get into environmental law?

Through my work. I have had a variety of posts most of which addressed legal or quasi legal issues including the site safeguard officer for the Nature Conservancy Council during the 1980's, head of designated areas at English Nature and head of habitats advice at the Joint Nature Conservation Committee, being the UK Government representative on the EC Habitats Directive and its scientific working group for 8 years.

What are the main challenges in your work?

Being 'retired', the challenge is keeping up to date with issues.

What environmental issue keeps you awake at night?
Brexit.

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

The retention of as much of EU law as possible after Brexit.

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

Self-explanatory!

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

Being able to make a difference in furthering nature conservation.

Conference report



The 10th annual European Pro Bono Forum

Jessica Allen, UKELA e-law Editorial Assistant and Law with French and French Law Student at the University of Nottingham

About the Forum

Each year, [PILnet](#) organises the annual European Pro Bono Forum in order to bring together the various stakeholders that are engaged in public interest law and proactive pro bono work; from law firms and bar associations, to NGOs and charities, the event facilitates an invaluable opportunity for collaborative and interdisciplinary discourse. Although there are now Pro Bono Forums held across the globe, the European Pro Bono Forum remains the most vibrant and the most diverse in terms of participation – with delegates attending from as far as the United States, Malaysia, and Australia. All attendees are invited to forge international alliances and to work together to strengthen existing initiatives, or pioneer new ones.

When selecting a host destination, PILnet adopts a considerate approach and assesses the pro bono attitude that exists among the legal community of each prospective country. Part of the aim of the Forum is to bring good practice to locations where professional development is needed, with the immediate years after the event showing a remarkable growth in local pro bono practice. The [2016 Forum](#) took place from 16-18 November in Amsterdam, the Netherlands, and was hosted in the beautiful Beurs van Berlage building, directly down the road from the Central Station. The schedule comprised a myriad of workshops on critical issues of social justice, as well as various social events and structured networking opportunities.

Environmental pro bono practice

My session

As an undergraduate Law with French and French Law student, I was surprised and honoured to be invited by PILnet representatives to attend the Forum and to speak as a [panellist](#) on the topic of 'Legal careers with purpose: the perspective of young lawyers'. My personal involvement in pro bono work stems primarily from my role as Vice President for Academic Activities for the European Law Students' Association (ELSA) UK, and my role as an Editorial Assistant for UKELA. However, to avoid overlapping with my ELSA colleague Anastasia Kalinina, my [presentation](#) focused on the pro bono atmosphere fostered by professional law associations.

Following guidance offered to me by UKELA's Director Linda Farrow, I introduced the delegates to our regional groups, our working parties, our e-law journal, and our new Brexit Task Force. As a student member, I also discussed the way in which the association works hard to engage students. After all, I am lucky to have personally benefitted from the Student Vocational Bursary scheme, and the Student Submission Scheme with e-law, and even the Andrew Lees Prize essay competition. All of these projects received warm and encouraging comments from the audience.

Other sessions

Once our session was over I attended the session on 'Harnessing the power of law to restore our climate'. The discussion was led by Gillian Lobo from ClientEarth, with Michelle Jonker-Argueta from Greenpeace International, Dennis van Berkel from the Climate Litigation Network, and Elizabeth Brown from Our Children's Trust. The speakers delivered an incredibly insightful presentation on their current

Jessica (fourth from left) speaking at the European Pro Bono Forum in Amsterdam, the Netherlands. (© Lorna Kralik)



efforts to combat climate change and the problems that undermine their work.

However, I was disappointed to notice such a poor turnout. It became increasingly obvious to me that other causes being discussed in other sessions, such as human rights, were deemed to be more pertinent, more accessible and more attractive. 'But surely', I thought, 'we shouldn't forget that a safe and sustainable environment is a precondition to many of our human rights!' After the presentations ended, I was determined to voice my concern to the panel.

The remark provoked a response from a lawyer in the audience, who commented on the difficulties faced by law firms whose clients have competing interests in related commercial industries. Though somewhat disheartened by this comment, I was enthused to hear a subsequent exchange between legal and charitable stakeholders on ways in which this hurdle might be overcome – this same obstacle was highlighted time and time again in the panel sessions.

Together, we considered that asking the opinion of clients outright might be an effective way for law firms to allay their worry that clients may take offence to a firm's environmental pro bono practice. After all, engaging in pro bono environmental work will equip lawyers with a better understanding of current issues and legal trends, enabling them to advise their clients of ways to adapt their practices accordingly.

Final thoughts

Update from Sierra Leone

Stumbling across the presentation of Richard Honey, a fellow UKELA member and Barrister at Francis Taylor Building, further rekindled my faith in environmental law pro bono practice on the final day of the Forum. A previous attendee at the Forum, Richard's proposal to schedule a panel on the topic of 'How can solo practitioners do pro bono effectively?' was wholeheartedly approved by PILnet. I was pleasantly surprised to see that another UKELA member was among the panelists in Amsterdam and it was inspiring to hear about his own experiences as a pro bono practitioner.

Knowing we had published an article by Richard in a previous edition of e-law, I made sure to introduce myself to him at the end of the session. Richard had spent time in Sierra Leone in September 2016, along with John Jolliffe of Francis Taylor Building and Oliver Al Falah of the S&O Partnership, providing training to the Sierra Leone Environmental Protection Agency and specialist police officers. This focused on the highly contentious topic of the regulation of mineral extraction in Sierra Leone, including environmental impact assessment, licensing and enforcement, but also covered criminal, tort and public law subjects.

UKELA is keen to help in Sierra Leone as part of its international work, providing advice and assistance to the Environmental Protection Agency remotely and perhaps also in country. Richard advised me that a group to do this is being formed and that anyone interested in getting involved should contact him directly at Francis Taylor Building.

The year ahead

What we can all take from this, I think, is a sense of pride in the reputation that our association is developing overseas and the wider impact of our practices and initiatives. At the end of UKELA's international year, and the start of a year focusing on environmental law in a changing world, the Forum provides the perfect opportunity for us to reflect on our own involvement in the network and to praise the work of our peers.

For me, this January also marks the end of my first year as a member of the e-law Editorial Board and the start of my second year in this role. As a young, self-taught environmental lawyer, I would not have this position if not for UKELA's pro bono projects (particularly those that engage students), so it was a privilege to be able to represent the network at the Forum. Each of you inspire me every time I read an article submission, and at each UKELA event I attend – I want to thank you for that.

Here's to 2017!

Jessica Allen is currently completing her Law with French and French Law degree at the University of Nottingham. As well as being an Editorial Assistant for UKELA (2016-18), she is the incumbent Vice President for Academic Activities of the European Law Students' Association (ELSA) United Kingdom (2016-17). Her research interests focus upon national and international public law, writing various articles and winning several essay competitions in the areas of environmental law and human rights law in particular. After graduating this summer, Jessica hopes to pursue postgraduate study, undertake the BPTC, and intern with international environmental law organisations (not necessarily in that order!).

Environmental law headlines

December 2016 – January 2017

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

Environmental Permitting Regulations 2016 enter into force

LexisPSL Environment

The Environmental Permitting (England and Wales) Regulations 2016, SI 2016/1154 (2016 Regulations) came into force on 1 January 2017. The 2016 Regulations consolidate all of the amendments to the Environmental Permitting (England and Wales) Regulations 2010, SI 2010/675 (2010 Regulations). The explanatory memorandum to the 2016 Regulations includes a correlation table at Annex A which sets out where provisions of the 2010 Regulations may be found in the 2016 Regulations.

As well as consolidating and updating the legislation, there is a set of amendments which revise the rules for mobile crushing of lamps that contain mercury (the T17 exemption). This will restrict those who are able to crush lamps under the T17 exemption and reduce the number of lamps which can be crushed without a permit.

For administrative reasons, the 2016 Regulations provide that the registrations of the T17 exemption under the 2010 Regulations will cease to have effect. Anyone wishing to operate under the new rules, as set out in the 2016 Regulations, will have to register to use the new T17 exemption.

There is also a correction to allow the Canal and Rivers Trust, and other statutory undertakers, to be able to dredge without the need for a permit under a flood risk activity scheme in England.

Brexit: Environmental Audit Committee calls for new Environmental Protection Act

Practical Law Environment

On 4 January 2017, the House of Commons Environmental Audit Committee published its report on the future of the natural environment, following the EU referendum.

The report warns of the potential loss of habitats, species and biodiversity protection legislation and that there is a risk of 'zombie legislation', where existing EU legislation transposed into UK legislation is no longer being updated or subject to proper governance and can be eroded through statutory instruments without full parliamentary scrutiny.

The report calls on the government to introduce a new Environmental Protection Act before the UK

leaves the EU. The new Environmental Protection Act would be necessary to maintain and enforce environmental standards after the UK leaves the EU.

For more information, see [Legal update](#), [Environmental Audit Committee publishes report on future of natural environment following Brexit](#).

ECJ decisions on the concept of 'emissions into the environment'

LexisPSL Environment

The European Court of Justice (ECJ) in *Commission v Stichting Greenpeace Nederland and PAN Europe* (C-673/13) and *Bayer CropScience and Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden* (C-442/14) has given guidance on the concept of 'information on emissions into the environment', confirming that the concept is not to be interpreted narrowly.

Both cases, although different in terms of facts, address the right of access to environmental documents—in *Stichting Greenpeace Nederland* under Regulation (EU) 1367/2006 and in *Bayer CropScience* under Directive 2003/4/EC.

In both judgments, the ECJ found that the concept of 'emissions into the environment' includes the release into the environment of products or substances, such as plant protection products or biocides or active substances contained in those products, to the extent that the release is actual or foreseeable under normal or realistic conditions of use of the product or substance.

The concept cannot be restricted to emissions from industrial installations but also covers emissions resulting from the spraying of a product, such as a plant protection product or biocide, into the air or its use on plants, in water or on soil.

The ECJ also confirmed that Regulation (EU) 1367/2006 and Directive 2003/4/EC cover not only information relating to actual emissions, but also information on foreseeable emissions from that product into the environment. However, information relating to purely hypothetical emissions would not be covered.

In addition, the concept of 'information on emissions into the environment' must be interpreted as covering not only information on emissions as such, but also information enabling the public to check whether the

assessment of actual or foreseeable emissions is correct, as well as the data relating to the medium or long-term effects of those emissions on the environment.

For more information, see [Environment Analysis, European court addresses right of access to environmental documents.](#)

Renewable Heat Incentive (RHI): reforms to be introduced in spring 2017

Practical Law Environment

On 14 December 2016, the Department for Business, Energy and Industrial Strategy (BEIS) published the government response to its March 2016 consultation on reform of the Renewable Heat Incentive (RHI).

The response document explains the reforms to the domestic and non-domestic RHI that the government intends to introduce in spring 2017, mainly to the arrangements for biomass, biogas, biomethane and heat pump technologies.

Importantly, the government has decided not to introduce amendments to:

- Withdraw support for solar thermal.
- Allow domestic RHI payments to be assigned to third parties. This change will be made at a later date.

For more information, see [Legal update, RHI: Government response to consultation on reforms for 2017.](#)

Revised National Emissions Ceiling Directive enters into force

LexisPSL Environment

A new National Emissions Ceilings Directive (EU) 2016/2284 (NEC Directive), entered into force on 31 December 2016.

The new NEC Directive establishes national emission ceilings for 2030 for all Member States covering five main air pollutants, which include sulphur dioxide, ammonia, volatile organic compounds, nitrogen oxides and fine particulate matter. It replaces Directive 2001/81/EC, which set caps on Member States' total annual emissions from 2010 onwards.

The NEC Directive also requires that national air pollution control programmes be drawn up, adopted and implemented and that emissions of the five main pollutants and other listed pollutants, as well as their impacts, be monitored and reported.

The revised NEC Directive is designed to reduce, by almost 50%, the negative health impacts of air pollution, such as respiratory diseases and premature

death, by 2030. It will also help address the impacts of harmful particles, such as black carbon, on climate change.

Member States must implement the NEC Directive into national law by 30 June 2018.

For more information, see [LNB News 14/12/2016 168](#), [LNB News 19/12/2016 42](#) and [Environment Analysis, The new EU air quality package—a breath of fresh air?](#)

Landfill tax: draft Finance Bill 2017 clarifies the definition of a taxable disposal

Practical Law Environment

On 5 December 2016, HM Revenue & Customs (HMRC) published the draft Finance Bill 2017, which includes a clause clarifying the definition of a taxable disposal for landfill tax, but without changing the scope of the tax. Clause 47 redefines a taxable disposal for landfill tax purposes so that any material disposed of at a landfill site will be taxable unless expressly exempt. Exemptions will be set out in secondary legislation.

HMRC also published its response to its May 2016 consultation on proposals to clarify the definition, and a tax information and impact note for landfill site operators.

The ambiguity in the landfill tax treatment of certain materials disposed of at landfill sites has been problematic since the decision of the Court of Appeal in *HMRC v Waste Recycling Group Ltd* [2008] EWCA Civ 849. It has created uncertainty for taxpayers and led to a great deal of litigation.

For more information, see [Legal update, Landfill tax: HMRC responds to 2016 consultation on definition of taxable disposal, publishes clause in draft Finance Bill 2017 and tax information for landfill site operators.](#)

Landfill tax decision – liability for tax where biodegradable material is used to generate methane

LexisPSL Environment

In the case of *Patersons of Greenoakhill Limited v The Commissioners for Her Majesty's Revenue & Customs* [2016] All ER(D) 63 (Dec) the Court of Appeal has considered liability to pay landfill tax where a deposit of biodegradable material produced methane, later extracted to generate electricity.

The landfill tax operator, Patersons, sought a repayment of landfill tax paid for the biodegradable material.

The Court of Appeal held that the question of whether the material was disposed of as waste for the purpose of s40(2) Finance Act 1996, had to be decided at the date of the deposit by reference to the material in the

form that it was at that date. The court reasoned that if 'material' meant material in the form it may exist at any time, it would be uncertain, and if parliament had this intention it could have included suitable wording in the legislation.

At the time of the deposit there was no methane and Patersons' appeal was therefore dismissed.

For more information, see [Patersons of Greenoakhill Limited v The Commissioners for Her Majesty's Revenue & Customs](#) and [Environment Analysis, Landfill tax and biodegradable materials \(Patersons of Greenoakhill Ltd v Revenue and Customs Commissioners\)](#).

High Court refuses permission for judicial review of fracking minerals permission

Practical Law Environment

On 20 December 2016, the High Court rejected the application by Friends of the Earth for judicial review of the minerals permission for shale gas (fracking) to be carried out in Ryedale, North Yorkshire.

In May 2016, North Yorkshire County Council (NYCC) granted a minerals permission for fracking by Third Energy at a site in Ryedale.

The court found that, on the facts, NYCC had properly considered climate change impacts when considering the environmental impacts of the proposed fracking. It also found that NYCC acted lawfully in exercising its discretion in imposing restoration and aftercare conditions and deciding not to seek a financial bond.

The court therefore refused permission for the judicial review application.

For more information, see [Legal update, Judicial review application of fracking permission in North Yorkshire rejected \(High Court\)](#).

Consultation on EIA regulations to implement amended EIA Directive

LexisPSL Environment

The government is consulting on proposals for implementing the environmental impact assessment Directive 2014/52/EU (EIA Directive) insofar as it applies to the town and country planning system in England and the nationally significant infrastructure planning regime established by the Planning Act 2008. Although the proposals aim to minimise changes to existing regulations, developers will have to familiarise themselves with the changes before they come into force in May 2017.

The new provisions will not apply where a screening or scoping opinion, or an actual application, have been applied for before 16 May 2017. Developers may therefore try to submit such requests just before this date, to avoid being subject to the new rules. However, it may be safest to start complying with the revised EIA regulations soon, as there are additional, rather than different requirements. One of the most significant changes to be aware of is the extension of the consultation period, which developers will need to factor into their application procedures.

The consultation closes on 1 February 2017. See [Planning Analysis, Consultation on EIA Regulations to implement amended EU Directive](#).

Biodiversity

EU nature laws – fit for purpose



Alistair Taylor, Senior Policy Officer at the Royal Society for the Protection of Birds.

At a glance

- The Fitness Check of the Birds and Habitats Directives¹ has concluded that these two laws are fit for purpose, and that nature in the UK and across Europe is better off as a result of them.
- EU-level findings confirm the industry-supported findings of the Habitats Regulations Review in England, that the Birds and Habitats Directives do not impose unnecessary burdens on business, and that they guarantee regulatory certainty and consistency across jurisdictional boundaries between the UK and its European neighbours, and within the UK across the four devolved administrations.
- Challenges for nature conservation in the UK include completing the designation of marine Natura 2000 sites, effectively managing sites, implementing the recommendations of the Habitats Regulations Review, and securing sufficient resources.
- Brexit poses significant challenges going forwards, but the Fitness Check confirms the legal framework created by the Birds and Habitats Directives continues to be a crucial tool for achieving UK and international biodiversity conservation objectives.

Introduction

In the July/August 2016 UKELA E-Newsletter I outlined the politics around the Fitness Check of the Birds Directive (79/409/EEC) (codified 2009/147/EC) and the Habitats Directive (92/43/EEC)². The Fitness Check has now concluded, with publication by the Commission of a Commission Staff Working Document³ setting out official conclusions and outlining next steps, alongside the Fitness Check consultants' final report.⁴ These findings have some significant implications for UK biodiversity conservation efforts, but also pose some challenging questions about UK's relationship with its European neighbours, and how it protects nature in the context of Brexit.

The Birds Directive and Habitats Directive are fit for purpose

'Within the framework of broader biodiversity policy the Nature Directives are fit for purpose but fully achieving their objectives and realising their full potential will depend on substantial improvement in their implementation in relation to both effectiveness and efficiency, working in partnership with different stakeholder communities in the Member States and across the EU, to deliver practical results on the ground.'⁵

The findings of the Fitness Check confirm that the Birds Directive and the Habitats Directive (the Nature Directives) are making a positive difference to the status of Europe's wildlife, and that the status of species and habitats protected by the Nature Directives would be significantly worse in their absence. These findings are based on a comprehensive policy evaluation that brings together a substantial body of evidence, including over 1,800 legal and policy documents, studies, reports, datasets and other pieces of written evidence.

The Fitness Check also demonstrates continued strong public support for nature conservation. The online public consultation, launched as part of the Fitness Check, received over 550,000 responses, breaking previous records for EC public consultations by a significant margin.

The findings of the Fitness Check support the findings of the 2012 DEFRA review of implementation of the Nature Directives in England, which concluded that 'in the large majority of cases the implementation of the Directives is working well, allowing both development of key infrastructure and ensuring that a high level of environmental protection is maintained'.

The results of the Fitness Check have finally laid to rest a number of persistent myths around the Nature Directives that had been cited in support of calls to revise them, including the following three chief myths:

1) The Nature Directives do not hold back economic development

The Fitness Check, and the 2012 Review, both support the view that Natura 2000 does not act as a blanket ban on developments within these sites. Evidence submitted to the Fitness Check by UK stakeholders backs this up. Of the 19000 planning projects that Natural England deals with each year, 2200 relate to advice on potential impacts on European sites, of which only 500 require appropriate assessment (AA) under the Habitats Directive.⁶ In the calendar year leading up to the Fitness Check, the UK's Department for Energy and Climate Change (DECC) received 270 applications for overhead electricity line works (applied for under s37 of the Electricity Act 1989). None of these applications required an appropriate assessment to be undertaken.⁷

2) The Nature Directives do not cause an excessive administrative burden

The evidence also demonstrates that the Nature Directives are not responsible for delays, excessive cost and administrative burden. Evidence for this comes from government, NGO and industry stakeholders from across the 28 Member States. The evidence submission from DECC states:

‘...we believe that the Nature Directives have played a key role in delivering sustainable development, ensuring that the biophysical aspects of sustainability are fully considered, and in the vast majority of cases this happens in a manner proportionate to the level of environmental risk. The preparation of a shadow HRA is now a standard part of a Developer’s application for consent and a key part of the decision maker’s considerations.’⁸

3) The Nature Directives are consistent with other EU policies and legislation

Finally the evidence confirms that the Nature Directives are coherent with other EU legislation, such as the Water Framework Directive, Marine Strategy Framework Directive and Environmental Impact Assessment Directive. Defra’s submission to the Fitness Check highlights that implementation of Article 4 of the EU Water Framework Directive will assist in the delivery of favourable condition of water-dependent Natura 2000 sites, and the EU Environmental Liability Directive furthers the protection of protected species and natural habitats through the prevention and remedying of environmental damage and the polluter pays principle.⁹

The evidence compiled for the Fitness Check should serve as a first stop for any policymaker or practitioner interested in how EU nature conservation policy is working, and how conservation is being delivered on the ground across the 28 EU Member States.

Next steps

The Commission has confirmed that it will develop an action plan to correct the deficiencies in implementation of the Birds and Habitats Directives identified by the Fitness Check. It has stated that the action plan will contain a series of concrete measures such as holding regular meetings with mayors and other local authorities to assess implementation challenges and help Member States take the necessary corrective action. Moreover, the Commission has proposed that the plan will, ‘design, in partnership with Member States and relevant stakeholders, appropriate implementation guidelines for regional actors, reducing unnecessary burdens and litigation, and incentivising national and regional investment in biodiversity.’ The Commission has also proposed that the Committee of the Regions is closely involved in these actions.

Good news for nature and achieving UK and EU nature conservation objectives?

The Fitness Check has confirmed that the legal tools developed by the EU for halting and reversing biodiversity loss are effective where properly implemented, and that a protected areas based approach, coupled with targeted interventions for the conservation of species and habitats across the wider landscape, are effective.

Indeed the approach adopted under the Nature Directives is not just effective for target species. Evidence gathered for the Fitness Check confirms that many non-target species across all taxa are also protected indirectly by the Nature Directives, in particular via the protection offered by the Natura 2000 network of protected sites.

The evidence also confirms the importance of the Nature Directives for delivering on international nature conservation obligations under the Convention on Biological Diversity, the Convention on Migratory Species, the Bern Convention, and other multilateral environmental agreements to which the UK and other EU Member States are signatories.

The message is clear: in the legal frameworks established by the Nature Directives, governments have effective and efficient tools that enable them to deliver on national and international nature conservation commitments.

Nevertheless nature remains in trouble, and the Fitness Check further confirms the need for all European countries to do more for nature.

Challenges for the UK

The Fitness Check has identified conservation challenges that must be addressed if EU and international nature conservation targets are to be achieved. In the context of UK nature conservation, these challenges include:

1) Completing designation of sites in the marine environment

Although the terrestrial part of the Natura 2000 protected areas network is now largely established at EU level, substantial gaps remain in the marine environment, both in terms of the designation of sites and our knowledge of the distribution and status of marine protected species. Although progress has recently been made in the UK in identifying and designating new marine sites, the UK’s network of marine Sites of Community Importance (SCI) is insufficient for around 25% of the habitat types and species for which sites must be designated.¹⁰

2) Effectively managing UK Natura 2000 sites

According to the EU 2015 State of Nature assessment,

only 50% of Natura 2000 sites are reported as having comprehensive management plans.¹¹ The UK has management plans for 6% by area of its 'Special Protection Areas' designated under the Birds Directive, and 13.7% by area of its 'Special Areas of Conservation' designated under the Habitats Directive.¹² The 2012 Habitats Regulations Review in England found that conservation objectives are not always readily accessible for Natura 2000 sites. This can make it difficult for developers to assess the impacts of their planned development, and can add to uncertainty in terms of defining and assessing data requirements.

The Fitness Check also points out that smaller sites are more likely to be vulnerable to outside pressures. In Member States like the UK where a very restrictive approach to the definition of site boundaries has been taken, so that only the protected habitat is included with no buffer area around it, greater efforts will be required to address outside pressures (e.g. pesticide drift).

This echoes the Lawton Report (2010)¹³ recommendation that critical areas should be buffered from the effects of potentially damaging external activities. The evidence compiled for the Fitness Check confirms that the Habitats Directive provides the flexibility to include buffer zones when designating sites.

3) Implementing the findings of the Habitats Regulations review

The 2012 DEFRA review of implementation of the Nature Directives in England¹⁴ and EU-wide studies of permitting procedures¹⁵ have identified implementation problems relating to:

- Poor quality of the AA undertaken.
- Lack of skills/ knowledge /capacity in the Article 6(3) procedure.
- An inadequate knowledge base on which to assess impacts.
- Inconsistent screening of plans and projects.
- Lack of understanding of key concepts and legal terms.
- Persistent lack of assessment of cumulative effects.
- Confusion with the EIA/SEA procedure.
- Lack of early dialogue.
- Lack of effectiveness of AA in plans.
- Problems during public consultation.¹⁶

The UK review identified a number of initiatives to address some of these problems, including through streamlined processes for assessment and permitting, advance collection of data and early identification of any issues relevant to the Nature Directives for nationally important infrastructure projects. However, in its evidence to the Fitness Check, Energy UK points out, 'We consider that the recommendations which came out of the 2012 review of the Birds and Habitats Directives are significant and many are yet to be fully implemented.'¹⁷

4) Addressing funding shortfalls

Funding shortages have been highlighted across all Member States by all groups of stakeholders, particularly relating to the ongoing management and monitoring of the Natura 2000 network. The Fitness Check found that the availability or lack of funding is likely to have had the most influence on the implementation of the Nature Directives, not just limiting progress, but also impacting implementation due to delays in site designation, management planning and permitting.

Defra's submission to the Fitness Check¹⁸, states;

'the availability and access to funding is both a support and a constraint to the implementation of the Directives. As resources are not infinite there will always be a need to maximise the benefits delivered by what resources are available. This is especially true in the current economic climate.'

The challenge of Brexit

The present government pledged in its election manifesto 'to leave the natural environment of England in a better state than that in which we found it'.¹⁹ The Fitness Check confirms that the standards and legal frameworks established by the EU Nature Directives are effective and efficient tools for delivering on this commitment. Maintaining these standards is therefore crucial to achieving the government's objective.

The aim of the Great Repeal Bill is to convert all the provisions of EU law into British law on the day the UK exits the EU.²⁰ At face value this implies maintaining the conservation standards established by the Nature Directives, but leaving the EU is still likely to result in a weakening of levels of protection.

Currently UK citizens and businesses can complain to the European Commission and take the UK government to the European Court of Justice for breaches of EU law, including not just the lawfulness of a decision, but the implications of the decision itself. Once the UK has left the EU, this avenue for redress will no longer be available. National mechanisms, including ultimately judicial review, are significantly more burdensome, and generally consider only the lawfulness of a decision, not the merits of the decision itself.

EU nature laws have provided a framework for cooperation between the UK and our European neighbours. They are part of a coherent legislative framework, linked to funding, cooperation and enforcement mechanisms, and have demonstrably delivered benefits for conservation. The challenge posed to the UK government by Brexit is not just to retain the level of protection provided by EU nature laws, but also to put in place mechanisms for cooperation that are at least as effective as those that currently exist.

The UK's departure from the EU also raises the possibility of a parting of the ways in terms of approaches to permitting and standard-setting. During the negotiation period the UK government is likely to want to maintain equivalence between UK and EU law to strengthen its position. Once the negotiations are over this imperative goes away, subject to the UK's future relationship with the EU. If UK and EU law deviate, UK businesses working on pan-European projects, or involved in trade with EU countries, could potentially be required to comply with two different sets of standards, reporting obligations, and permitting procedures.

Within the UK where environment is a devolved responsibility, EU laws have helped ensure coordination of environmental policy between the devolved administrations. With the UK's departure from the EU there is a risk that different parts of the UK could choose their own direction in terms of standard-setting. This could result in a disparity not just between environmental rules in the UK and in other European countries, but also across the different devolved administrations within the UK.

Alistair Taylor is a Senior Policy Officer at the Royal Society for the Protection of Birds where he has been leading policy advocacy targeting the Fitness Check of the Birds and Habitats Directives for RSPB in the UK and for the BirdLife Europe Partnership at EU level. He has played a leading role in influencing EU legislative and policy instruments including Regulation 1143/2014 on Invasive Alien Species and the EU Biodiversity Strategy to 2020. Alistair started the LPC in September 2016, and is still enjoying it.

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Biodiversity

Reversing the decline of nature in the UK

*Dr Paul Stookes, Solicitor-advocate at Richard Buxton.
Matthew McFeeley, Lawyer and Public Policy Analyst.*

At a glance

- The State of Nature 2016 report highlights that there continues to be considerable species loss in the UK with over 40% of species showing strong or moderate declines since 1970.
- While current regulatory provisions in the UK may be adequate, the implementation of those provisions is often poor, with key regulators failing to acknowledge the continuing decline in nature and wildlife in the UK or to take a holistic approach to nature and wildlife.
- It is crucial that legislators and decision-makers recognise the central role of regulation in promoting conservation and biodiversity and take responsibility to ensure that the environment and nature are central to decisions taken.
- The cumulative effect of many environmental decisions (including those relating to land use planning) whereby impacts are not regarded as 'significant' is likely to be exacerbating widespread loss of wildlife and nature.
- Clear guidance by national governments, including on the value of nature and how this should be taken into account in decision-making, could put a halt to the continuing decline in nature and wildlife (see for example the advances being made by the Welsh government in this regard).

The decline of nature in the UK

A report published in September 2016 found that over half (56%) of UK species have declined since 1970, with 15% of species thought to be extinct or threatened with extinction.¹ Average species abundance or occupancy (a measure similar to abundance for species too tricky to count) has fallen by 16% since 1970.

The latest [State of Nature report](#) was produced by a wide-ranging partnership of over 50 organisations involved in the research, recording and conservation of nature in the UK and its overseas territories. It included input from the Bat Conservation Trust, Buglife and Froglife, as well as more well-known partners such as the Royal Society for the Protection of Birds and the World Wide Fund for Nature. It builds upon the [State of Nature Report 2013](#), which highlighted a severe loss of nature in the UK since the 1960s.

The report finds that there continues to be considerable species loss in the UK with over 40% of species showing strong and moderate declines. It

notes that the UK is one of the most nature-depleted countries in the world and that of the 8,000 species assessed as high risk, 15% of these threatened species (those listed on the international red list of endangered species) are either extinct or threatened with extinction from Great Britain.

It is alarming to note that the UK has lost significantly more nature than the global average. The report explains that there are many factors responsible for the changes but that UK agricultural policy as well as climate change are key aspects in the long-term decline.

The role of regulation in protecting nature

The report argues that well-planned conservation projects can turn around the fortunes of nature and wildlife in the UK. This may be so. However, it is also crucial that legislators and decision-makers recognise the central role of regulation in promoting and enhancing conservation and biodiversity and take responsibility to ensure that the environment and nature are central to the decisions taken. There are some encouraging signs, the Welsh government appears to be pursuing an important and robust approach to environmental protection through, for instance, a commitment to genuine and effective sustainable development.

By contrast, the approach in England to sustainable development is often vague and uncertain, with decisions seen as promoting economic growth being taken without any consideration for the environmental damage that may result.

UK law contains protections for nature. There is a range of legislative measures in place that should be adequate to protect nature and biodiversity including, for instance, the Conservation of Habitats and Species Regulations 2010, SI 2010/490, the various environmental impact assessment provisions and the range of Town and Country Planning provisions. The National Policy Planning Framework states that it is meant to 'contribute to and enhance the local and natural environment by ... minimising impacts on biodiversity and providing net gains in biodiversity where possible [and] contributing to the Government's commitment to halt the overall decline in biodiversity.'² There is also responsive legislation such as the Wildlife and Countryside Act 1981 which creates specific offences of harming or destroying

wildlife. In combination, these should ensure a precautionary and preventative approach to environmental harm is taken, whereby the impact on nature and wildlife should be considered before damaging decisions are taken. However, all too often, this promise is not fulfilled.

Other efforts to protect nature in the UK

Regulation is not the sole solution. There are a large number of local conservation projects run by non-governmental organisations and with the support of volunteers, e.g. the network of wildlife trusts and both local and national volunteer-based ecology groups. Indeed, many of these were instrumental in building up the body of evidence for the State of Nature report 2016. However, these invaluable efforts will continue to be undermined if local and national governments continue to permit environmentally harmful development proposals and encourage agricultural intensification and monocultural practices (including the increased use of pesticides, herbicides, and synthetic fertilisers) rather than more sustainable farming practices.

Adequate enforcement of current protections is needed

The findings of the State of Nature report 2016 make it clear that the current protections are simply not working and the primary responsibility for this is with decision-makers and regulators – both at the national and local level.

At the national level, government agencies such as Natural England and the Environment Agency frequently avoid involvement in local, but nevertheless important, decision-making where their input and expertise may be needed. Often, this is justified on the basis that local decision-making is regarded as a matter of 'judgement'. These government bodies can and should play a more proactive role in stemming the decline of nature across the UK.

Unfortunately, if anything, the direction of travel seems to be in the other direction. For instance, Natural England recently announced [changes to the licensing system](#) designed to 'safeguard protected species'.³ The changes are intended to increase flexibility for developers, but risk contributing to further declines among some of the most vulnerable species. For instance, the new policies would allow a developer to engage in activities that eradicate the local population of a protected species at a site as long as the developer enhances habitat elsewhere, relying on the hope that the species would one day occupy the new habitat and the overall population would increase (the old policies would have required the members of the species at a site to be captured and relocated). For instance, one firm, touting the

license they obtained for a developer at a site where Great Crested Newts were potentially present after relying on this approach (albeit in a pilot-program capacity before the new policies were instituted), [stated that](#) "[t]here is clear recognition now that 'every newt is not sacred' and [it] is now believed that, with the right arguments and submissions, the door is now open to push harder for less onerous EPS licences'.

On the local level, there is sometimes tacit acceptance of environmentally-damaging decisions where council officers either do not comment or recommend approving decisions, for example because they are taken in isolation, or a specific project may not have a nationally significant impact. The cumulative effect of this is that a series of decisions, that may not be nationally significant in themselves, may well lead to widespread losses of wildlife and nature. Those individual decisions should, in fact, be regarded as important in biodiversity terms if we are ever going to reverse the decline in nature.

Put simply, decision-makers are ignoring the 'bigger picture' which is now present in the State of Nature 2016. Thus, while the current regulatory provisions may be adequate in many cases – it is the application or implementation of those provisions that is frankly poor.

The 'significance' of environmental harm

Also alarming is the persistent undervaluing of nature and environmental concerns by decision-makers, in particular with regard to the question of whether environmental harm is 'significant' for the purpose of environmental impact assessment (EIA).

One recent example demonstrates how far the pendulum has swung towards the view that serious environmental concerns should not present an impediment to development. In December 2016, the Secretary of State for Communities and Local Government issued a screening direction determining that a proposed development of over 150 houses on a problematic and contaminated site in Hemsworth, West Yorkshire was 'not significant' and therefore did not require EIA.⁴ This decision was made despite the fact that planning permission for this development has already been quashed on two separate occasions because of failures to consider environmental impacts. The site was formerly used as a quarry and later as a landfill. The developer's own consultant found multiple sources of contamination present at the site. Moreover, numerous concerns were raised by local residents, Sports England, and the Local Lead Flood Authority, regarding increased flood risk and loss of open space, woodlands and wildlife, and sports provision. Yet none of these concerns appeared to be mentioned by the Secretary of State in reaching his decision. Rather, he simply referred to the Council's statement that it did not believe that EIA was required.

The way forward

Very simple measures can be taken by national governments to address the existing problems and consequential harm to wildlife and nature. They can provide clear guidance on the true value of the environment and show how this must be taken into account instead of relying upon overarching and vague policy guidance such as the National Planning Policy Framework now provides. See, by contrast, the detailed explanation of sustainable development in [Chapter 4: Planning for Sustainability](#), Planning Policy Wales 9th ed (2016). Similarly, the courts can acknowledge the present crisis and also that public sector decision-making is failing the environment. Once government and the judiciary recognise the true value of biodiversity in society, the continuing and serious decline in nature and wildlife may be halted and the UK may be able to improve the quality of the environment for all.

Dr. Paul Stookes is a solicitor-advocate who has worked in the environmental field since 1995. He joined Richard Buxton 10 years ago, having previously worked in regional law firms, local government, and as the Chief Executive of the Environmental Law Foundation. Paul has written a number of books, articles and research papers including: Nature & Law in The Habitats Directive (2012); Planning & the Localism Act 2011: a guide to the new law (Law Society, 2012) (co-author with Pat Thomas OBE); and A Practical Approach to Environmental Law 2/e (2009).

Matthew McFeeley is a U.S.-qualified lawyer and public policy analyst. Before moving to the UK in 2015, he worked in Washington DC on a range of issues including the protection of nature and wildlife for the Natural Resources Defense Council, one of the United States' leading non-partisan environmental law organisations.

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Biodiversity

The ash dieback crisis

Dr Nick Atkinson, Senior Conservation Advisor at the Woodland Trust.

Wyn Jones, convenor of the UKELA nature conservation working party.

Tom Huggon, past Chairman of the UKELA nature conservation working party.

At a glance

- The UK's 130 million ash trees are at risk from ash dieback, prompting concern over the impact of the disease at a landscape scale. The greatest ecological impact will be through the loss of individual, non-woodland trees.
- The importance of the road network in providing ecological connectivity is currently underestimated: roadside ash trees will be a particular management target for local authorities and their replacement is not guaranteed.
- Landowner responses will be critical to both the management of ash dieback and the subsequent process of recovery, if current canopy levels are to be maintained or enhanced.
- Legislation is largely designed to protect individual trees and is poorly suited to protect populations of trees, which are currently under threat from several major diseases.
- There is an urgent need to produce a national strategy for the management of ash dieback, which must include the provision of adequately resourced bodies to monitor and enforce the relevant provisions

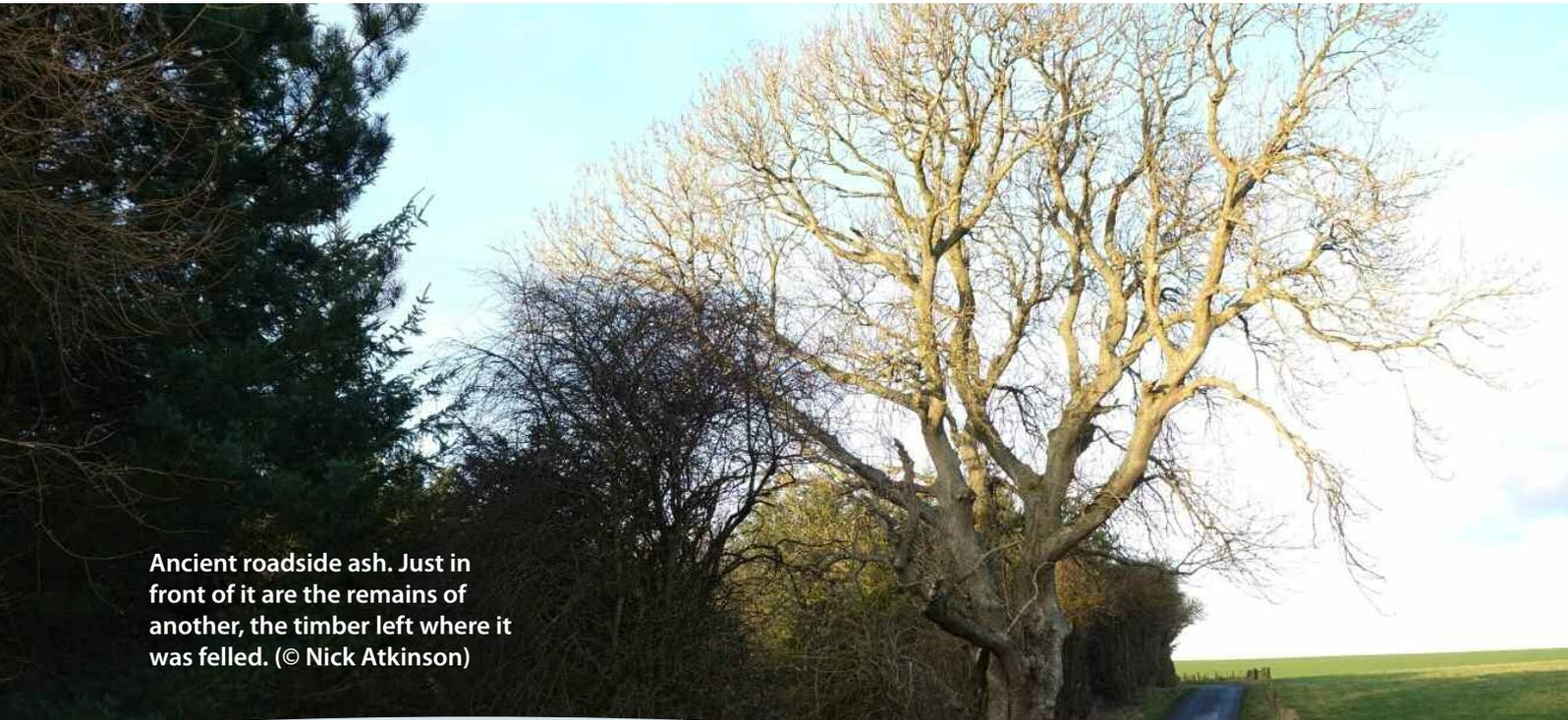
The pathogen and its prognosis

Ash dieback (ADB) is the common name for the fungal pathogen *Hymenoscyphus fraxineus*, which attacks and

kills European ash (*Fraxinus excelsior*) trees. It was first identified in the UK in 2012 and has since spread rapidly, being known to be present in every county in England and Wales, and currently in Scotland as far north as the Great Glen, and recently discovered in Northern Ireland. The pathogen originates from Asia¹ and appears to have arrived in Europe first in Poland, from where it spread naturally via windblown spores, assisted by the trade in nursery trees.²

Ash is a common tree across the UK; there are an estimated 120 million mature trees outside woodland in Great Britain,³ and it is a major species in Northern Ireland and Eire. It is a dominant landscape tree, occurring as individual specimens in fields and as hedgerow standards. The European experience suggests that anything up to 95% of the population is susceptible to ADB, although recent genetic evidence hints that the lineage in the Southwest might be more tolerant. Tolerant trees do not appear to be able to resist infection but seem able to recover from one year to the next, whilst still being infectious to surrounding trees.

The expectation is for the widespread loss of ash in much the same way as elm in the 1970s and 80s as a result of Dutch elm disease⁴. In woodlands where there is a seed bank and natural generation is possible (i.e.



Ancient roadside ash. Just in front of it are the remains of another, the timber left where it was felled. (© Nick Atkinson)

where factors such as grazing pressure from deer are under control), other species are expected to take advantage of the decline of ash.⁵ The resulting potential increase in the availability of deadwood, both standing and fallen, will be ecologically beneficial to saproxylic species (organisms dependent on dead or decaying wood) and the communities they support. Some woodlands are at particular risk, however, such as the ash-dominated ravine woods in the Peak District National Park. These will require active intervention to enable the species mix to be reconfigured over a relatively short period: the National Park authority is poorly resourced to do so at present.

Although ash is known to support over a thousand species,⁶ relatively few are obligates (species that depend exclusively on ash for habitat or food). Nevertheless, the dominance of ash as a major species within the UK's limited tree biota means that the cumulative impact of ADB is likely to be profound in terms of ecological connectivity across landscapes. This spatiotemporal impact has yet to be fully recognised, especially as an acute shock against a background of chronic decline in the UK's treescape.

The linear forest

Mature infected ash trees have a tendency to become unstable: ash is a tree known for its tendency to shed limbs in any case, and opportunistic secondary infections by species such as honey fungus (*Armillaria* spp.) compound the risks, in some cases increasing the likelihood of complete collapse. The prospect of trees falling onto public highways is a serious cause for concern among Local Authorities.

Ash is a particularly common roadside tree. Local Authorities carrying out survey work in anticipation of ADB-related work are finding tens if not hundreds of thousands of large trees capable of falling onto the public highway.⁷ The overwhelming majority of roadside trees are privately owned, meaning responsibility for the safety of road users rests with the individual landowner (or homeowner, as many rural properties have the odd ash tree in the garden). Roadside trees are often also within close proximity to utilities, power lines and telephone cables, making their safe management even more complicated. Ash trees are notoriously difficult to work⁸ and arboricultural services will be expensive, with costs of road closures, specialist felling equipment and even potentially night time work being required.

The sheer number of roadside ash trees presents local authorities with a looming issue. They share a common interest with landowners in achieving economies of scale, so if a road needs to be closed to attend to one ailing tree should its healthy neighbours also be felled at the same time? Precautionary government advice is for trees to be allowed to remain standing for as long as possible: indeed, the felling

licence regulations allow emergency felling only when a tree presents an immediate danger.⁹ This raises the prospect of the same stretch of road being closed on multiple occasions as needs require, clearly not in the best financial interests of the landowner, although perhaps falling to the favour of the arborist.

Under the current regulations, any pre-emptive felling would require a felling licence. However, the increasingly limited resources of the Forestry Commission suggest difficulty in processing large numbers of felling licence applications, not to mention an inability to police against widespread illegal felling. Where trees are felled outside a felling licence there will be no compulsion to restock and it is not unreasonable to assume that will result in a net reduction in tree numbers.

The road network provides an increasingly important refuge for landscape trees against a backdrop of ever larger agricultural fields, the expansion of which has always come at the expense of trees and hedgerows. Roads do act as both ecological barriers and corridors, but the loss of roadside trees will enhance the former function whilst diminishing the latter.

The social dimension

If we accept that large numbers of ash trees will die over the coming years, and that their removal will be at the expense of the person on whose land they are, there is another question concerning the potential recovery post-ADB. Having paid thousands of pounds to remove a roadside tree many landowners would likely not be well disposed to replanting in the same location. This is not to say that landowners dislike trees in any way, just that they understandably do not want to bear such a costly future risk.

The issue throws light on a fundamental fact about natural capital and the provision of ecosystem services. Trees provide largely public goods, yet the overhead for their maintenance is privatised. Given that the establishment of ADB in the UK happened at least in part due to government policy on the international free trading of biological material it seems unfair to burden private landowners with the costs, especially if we hope they will then act to recover lost ecological connectivity. Work is needed to understand the 'cost sharing' balance between the provision of public goods by trees and their management overheads, which arguably should be met in part from the public purse.

Protection measures

There are many and varied mechanisms by which trees may be protected by law or policy.¹⁰ They are administered by a number of different statutory bodies at local and national levels, each of which have limited resources and expertise with which to administer, monitor and enforce the relevant provisions and policies.

The mechanisms include:

- **Tree Preservation Orders (TPOs)** may be made by local authorities for individual trees, groups of trees or woodlands. A tree subject to a TPO may only be felled with the approval of the relevant local authority but replacement planting is discretionary.
- Under the **Hedgerows Regulations 1997** most hedgerows (including trees within the hedgerows) in England and Wales are protected. There is no specific legislation for the protection of hedgerows in Scotland.
- **Ancient Woodlands** are centuries' old native woodland habitats that are listed by the relevant statutory agencies but are not afforded special protection. The woodlands should be managed in accordance with the UK Forestry standard.
- **Veteran Trees** are those of a great age, size or condition which are of exceptional value culturally in the landscape or for wildlife. Such trees are not afforded special protection but guidance is available regarding their management.
- A tree **felling licence** is required from the Forestry Commission unless it is exempted. The exemptions include situations where trees are dangerous or are a nuisance, terms that lack a robust definition.
- Under Part 1 of the **Wildlife and Countryside Act 1981** as amended and the equivalent legislation in Northern Ireland, there are provisions for the protection of birds, their nests and eggs during the breeding season. In addition under the same Act, protection is provided for the places or structures used by other listed mammals for shelter or protection. This includes all species of bat found naturally in the UK and the dormouse.
- Trees within designated areas notified as a **Site of Special Scientific Interest (SSSI)** under section 28 of the Wildlife and Countryside Act 1981 (as amended) may have a measure of protection if felling is listed as an operation likely to damage the special interest(s). The legislative framework in Scotland for SSSIs and in Northern Ireland for Areas of Special Scientific Interest is the same. There are provisions that allow damaging activities to be undertaken without consultation/consent where emergency situations arise and the relevant statutory nature conservation body must be notified as soon as practicable.
- Most international terrestrial wildlife designations in the UK are underpinned by SSSI designation. **Natura 2000 sites** comprising **Special Protection Areas (SPAs)** under the EC Birds Directive and **Special Areas of Conservation (SACs)** designated under the Conservation of Habitats and Species Regulations 2010 (the Regulations) as amended, which transpose the EC Habitats Directive (92/43/EEC) into national law, are afforded strict protection. The felling of trees within such areas may be afforded protection if the activity is listed

as being potentially damaging to the site interest features. Trees may be important in terms of providing habitat for a species or routes to key phases in its life cycle or feeding areas. Many bat SACs comprise the roost alone and do not include routes to and from feeding areas. The felling of trees on such routes may affect the site's interest feature (i.e. the bat population for which the SAC has been designated) and is therefore subject to strict protection measures set out in the regulations.

- In the UK, **Ramsar sites** under the Ramsar Convention are treated as Natura 2000 sites as a matter of government policy.
- Trees may also host **European protected species** such as bat or dormouse, which are afforded strict protection under the species provisions of the regulations.
- Under the regulations, government endeavours to take measures to improve the ecological coherence of the Natura 2000 network, including the identification of **wildlife corridors** in support of the network. Such areas have already been identified by the statutory nature conservation bodies.
- Also under the regulations public bodies have wider obligations with regards to **wild bird habitat** – to use all reasonable endeavors to avoid any pollution or deterioration of habitats of wild birds.
- **Landscape designations** (National Parks and Areas of Outstanding Beauty) are designated for their natural beauty and are afforded a measure of protection driven by policies administered by National Park authorities and local planning authorities.

Conclusion

There are many and varied potential measures to trigger the protection of trees by means of law and policy, but none specifically to address the threat and impact of disease epidemics in trees. The lack of a clear mechanism and therefore responsibility, results in the fragmented and ineffective situation.

In much of the legislation and policy the emphasis is for the protection of individual trees with various exemptions to allow for unregulated management if the tree is diseased, dying or presents a public danger. These same exemptions mean that in the case of a highly infectious pathogen such as ADB the tree population as a whole has little protection. Furthermore, the lack of requirement to replace lost ash trees is a very real threat to the ecological connectivity of the landscape.

The statutory bodies responsible for implementing the many and varied pieces of legislation and policies have been subject to cuts in their resources in recent years. This has resulted in the reduction of necessary pool of expertise with which to identify, monitor and

address diseased trees thereby detrimentally affecting their effectiveness to undertake their statutory functions. This further exacerbates the fragmented legal and policy framework with which to address diseased trees.

A national strategy is required for the management of ADB and addressing other and future threats of disease in trees. This must include the identification of adequately resourced bodies with the responsibilities to manage, monitor and enforce the relevant provisions. The current evidence is strongly suggestive of a future net reduction in canopy, which as one of the least wooded countries in Europe the UK can ill afford. The case for landscape trees and roadside trees in particular needs to be strongly communicated and the right support identified to enable landowners to willingly replace lost trees. Ash dieback is merely a test run: acute oak decline, oak processionary moth, phytophthora and dothistroma are already affecting other native species and a host of other pathogens have the potential to wreak havoc upon our treescape.

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Wyn Jones is the convenor of the UKELA nature conservation working party. He is retired having spent nearly 30 years working for one or other of the statutory nature conservation agencies.

Tom Huggon is a past chairman of the UKELA nature conservation working party. He is a retired partner at Browne Jacobson LLP and is currently retained by them as a consultant.

Endnotes

- 1 There is a closely related fungal species, *Chalara pseudoalbidus*, which is native to the UK and non-fatal to ash.
- 2 Since 2007 over one and a half million ash trees were imported to the UK from European countries in which ADB was known to be present.
- 3 Kirby, K. Potential conservation implications of ash dieback (*Chalara fraxinea*) in Britain (accessed online at http://dps.plants.ox.ac.uk/plants/Content/KeithKirby/PotentialConservationImplicationsOfAshDieback_11_16.pdf on 25/01/2017).
- 4 That wave of the disease wiped out an estimated 26 million elm trees and continues today: apart from a handful of refugia, such as the city of Brighton, mature elms are a rare sight.
- 5 Lawrence, R. & Cheffings, C.M. (2014) A summary of the impacts of ash dieback on UK biodiversity, including the potential for long-term monitoring and further research on management scenarios. *JNCC Report No. 501*.
- 6 Mitchell, R.J., Bailey, S., Beaton, J.K., Bellamy, P.E., Brooker, R.W., Broome, A., Chetcuti, J., Eaton, S., Ellis, C.J., Farren, J., Gimona, A., Goldberg, E., Hall, J., Harmer, R., Hester, A.J., Hewison, R.L., Hodgetts, N.G., Hooper, R.J., Howe, L., Iason, G.R., Kerr, G., Littlewood, N.A., Morgan, V., Newey, S., Potts, J.M., Pozsgai, G., Ray, D., Sim, D.A., Stoclan, J.A., Taylor, A.F.S. & Woodward, S. (2014) The potential ecological impact of ash dieback in the UK. *JNCC Report No. 483*.
- 7 A survey conducted in the summer of 2016 by Norfolk County Council resulted in an estimated 200,000 ash trees (pole stage or larger) capable of falling onto the county's public highways.
- 8 The ash is colloquially known as the 'widowmaker' because of the unpredictable way in which it can split when being felled.
- 9 See <http://www.forestry.gov.uk/forestry/infd-6dfkw6>. There is no definition for what constitutes a dangerous tree.
- 10 Mynors, C. (2002) *The Law of Trees, Forests and Hedgerows*: Sweet & Maxwell.

Matters in practice

The enforcement of environmental law: challenges and opportunities



Professor Richard Macrory, UKELA patron.

This article was first featured as an editorial in a recent report on 'Environmental compliance assurance and combatting environmental crime' published in a thematic issue of Science for Environment Policy 56 (2016) by the European Commission. The full report is available [online](#).

At a glance

- Recent developments in EU environmental law are considered.
- The value of emerging environmental enforcement networks is also discussed.
- Regulators and enforcement agencies need to exploit new technologies and strategies.
- More research is needed to ascertain the effectiveness of sanctions for environmental crime.

Implementation and enforcement

The development of detailed, often ambitious laws designed to protect the environment over the past 30 years has been a striking phenomenon of our age. Laws in the statute book may provide some comfort but without effective implementation and enforcement they are meaningless. A Member of the European Parliament once remarked 'We are good midwives but bad mothers' — implying that legislators often pay more attention to passing new laws than considering the equally challenging issues of implementation, and what happens after the law has come into force.

The potential gap between the formal law and its enforcement is seen in many fields of law, but it raises particular challenges in the field of environmental protection. In areas of law such as competition, social security, or consumer protections there are clearly defined victims with legal interests who can and will ensure that the law is enforced. In contrast, the environment is often unowned in legal terms — with the consequence that the environment dies in silence, it has been said. The responsibility for its legal protection lies largely on public authorities — the police, local authorities, or specialised regulatory agencies — often under competing policy priorities and severe resource constraints.

Yet, as this thematic issue demonstrates, in recent years far greater attention is being paid to the question of enforcement of environmental law — how it should most effectively be implemented, how best to ensure compliance, and how best to deal with breaches of environmental law where they occur.

These issues can raise delicate political issues at both

national and regional levels. Deciding how to employ resources and respond to breaches of environmental law often involves considerable discretion amongst enforcement authorities, and national and local administrations have their own traditions and culture in which they operate. Imposing over-elaborate, top-down solutions may therefore be inappropriate. Within the European Union, environmental legislation has generally left the question of enforcement to the discretion of Member States, and it is rare for EU regulations or directives to specify the type of sanction that must be employed. The Court of Justice of the European Union has been equally reticent to trespass on the discretion of national authorities in this context, and simply relied upon the general principle that any sanctions employed must be effective, proportionate, and dissuasive.

An important exception to this picture was the passing of the [EU Environmental Crime Directive](#) in 2008, requiring that certain types of conduct in relation to EU environmental law must at least be defined as a crime by Member States. The proposal to do so was the subject of legal challenge before the Court of Justice on the grounds that there was no legal competence under the environmental provisions of the European Treaty to do so. Eventually the Court held that if there was a genuine problem of enforcement, this was the proper subject of a European directive, but recognised the sensitivities of Member States by holding that the question of the size of penalties was a matter of national not European Union law.

Another very important legal development was the decision of the European Court in 2005 in a case taken by the European Commission against Ireland in respect of illegally operated and unlicensed waste sites. Until then enforcement actions concerning the failure by a Member State to implement EU environmental obligations in practice had been confined to specific examples. Here the Court held for the first time that the numerous cases of illegally operated sites represented a systematic failure in the administrative system for enforcement, and that this represented a breach of its obligations under EU law by the Member State.

EU environmental law, such as the [2010 Industrial Emissions Directive](#), is beginning to contain requirements concerning inspection and enforcement, though still couched in carefully drafted language so as not to over-intrude on areas thought appropriate for national or local discretion. The [Make It Work](#) programme, initiated in 2015 by Germany, the Netherlands and the United Kingdom has now drafted common principles on issues of inspection and enforcement which are recommended to be included in future environmental legislation.

Against this background, the papers highlighted in this thematic issue provide important insights for policymakers and enforcement, and reflect the contribution of recent research in this area. Four particular themes emerge — the value of emerging networks of enforcement bodies, the need to exploit new technologies and strategies, the use of appropriate sanctions and the added value of a compliance assurance conceptual framework reflecting the interaction between three main functions — compliance promotion, compliance monitoring (inspections/surveillance) and enforcement.

Environmental networks

We have seen in recent years the growing development of various networks of enforcement agencies, at local, national, regional and international levels. Cross-border cooperation may be essential for issues such as transboundary pollution, the illegal transport of waste, and the illegal trade in endangered species. But the exchange of views and experience at national level where authorities may handle similar problems in different ways may also provide an invaluable learning experience.

Research is now beginning to attempt to evaluate the effectiveness of these networks, and how they might be improved in the future. Contacts, the development of good relationships, sharing best practice, and access to information can provide real benefits, but there are also challenges in funding, participation, and effective administration of the networks. The 2011 survey by one of the earliest such networks, INECE ([International Network on Environment Compliance and Enforcement](#)), covered some 10 networks around the world and highlighted a number of critical factors to ensure success. These include the need to prioritise, ensure adequate funding and the translation of key materials. Effective communication and the continuing evaluation of the performance network were equally vital. Ireland has provided a useful example of a national network — [the Network for Ireland's Environmental Compliance and Enforcement \(NIECE\)](#) established in 2004, operating in the field of waste disposal and involving a national regulator and 34 local authorities. This helped to provide guidance and training for local enforcement officers, improving

coordination and consistency in approach. The NIECE appeared to lead to a dramatic improvement in the quality of local authority inspection plans in a short space of time — in 2007 less than a quarter of such plans were given an 'A' rating but, by 2009, 85% received such a rating.

Using resources more effectively

Regulators and enforcement agencies never have unlimited budgets, and these days are normally operating under increasing financial constraints. This means developing more effective approaches and strategies. Risk-based enforcement strategies based on focusing efforts on activities judged to be the most problematic have emerged as one response, which is reflected in recent legislation such as the [EU Industrial Emissions Directive](#). Carrying out the same inspection levels for all industrial installations in a sector may not be the most effective use of scarce resources; it is preferable to give a lighter touch to those considered most compliant, while drilling down on the more problematic. But it is important to first ensure that there is public understanding and confidence in such an approach. Risk assessments are never foolproof. Members of the public who have not been engaged in the development of risk-based strategies are unlikely to react positively to a pollution incident on a site where there have been few inspections because the installation had been previously judged to have little risk, for example.

Against a background of resource constraints, new ways of using technology and data are likely to prove important. The [Environment Agency](#) in England provides an example of an intelligence-led policy in the field of illegal export of wastes, using data-collection technologies in a more focused way. The resolution of satellites is becoming ever finer, and a leading British legal expert in the use of space technologies as evidence highlights the potential of such technology to alert authorities of potential breaches of law, to monitor high-risk offenders to ensure compliance, and to check historical data. This research emphasises the need for lawyers to engage with Earth observation specialists so that the disciplines can more fully understand one another's needs and constraints. A Belgian judge notes that Earth observation techniques are unlikely to replace ground-based monitoring and will have little to offer in some areas of environmental law, but nevertheless have a potential that is yet to be fully exploited.

Appropriate sanctions

The 2008 EU Environmental Crime Directive highlighted the potential significance of criminal law in dealing with breaches of environmental law, especially for those jurisdictions where there had been a heavy reliance of administrative penalties in dealing with regulatory breaches. Studies here include the use of imprisonment as a sanction, and argue for the

greater involvement and acknowledgement of victims in the process.

Yet the message of many recent studies is that reliance on a single form of sanction is unlikely to be the most effective approach. A mixture of administrative and criminal enforcement is preferable, but since in many jurisdictions this is likely to involve different agencies (including the police), the development of new coordination strategies will be vital.

It is clear, however, that we still have little robust, comparative data on the real effectiveness of different forms of sanctions — either in terms of their impact on the individuals or business involved in the breach of environmental law, or on how they affect the internal costs of regulators and the public sector, including the courts. This needs to be a continuing area for future research and monitoring.

Regulatory agencies are likely to be under increasing scrutiny for their cost-effectiveness and efficiency. In terms of public accountability, it is important to have performance indicators based on activity such as the number and type of enforcement actions taken. But we must not let these requirements obscure the reason we have environmental law and regulation in the first place. Outcome measures relating to the quality of the environment being protected should be a central aspiration, and studies here indicate how they are being developed in some jurisdictions. But it is not an easy exercise. It is all too easy for outcome measures to become goal-orientated targets which then over-dominate the enforcement body's strategy and thinking.

The more recent emphasis on implementation and enforcement is to be welcomed, but there are clearly many areas in which the research community has much to offer. Regulators and government should value the input of independent research to improve their own understanding and performance, and work closely with research bodies to help identify key issues that need exploring. Legislative bodies such as the [Council of the European Union](#) or UK [Parliamentary Select Committees](#) should systematically evaluate the actual implementation of environmental legislation so that improvements can be made to the enforcement of existing laws, and lessons learnt in the design of new legislation. The environmental challenges facing our society are profound, but the signs from the recent research identified in this thematic issue give some room for optimism.

Professor Macrory is a barrister and a member of Brick Court Chambers, London. He is also a Patron of UKELA. In 2000 he was awarded a CBE for services to the environment and law and in March 2008 he was made honorary Queens Counsel. In 2010 he was elected a Bencher of Gray's Inn.

Matters in practice

Highlights from the meeting with Turkish officials



Jill Crawford, Environmental Solicitor at BLM Law.

At a glance

- UKELA has a growing international environmental law dimension.
- To assist Turkey in transposition of the Environmental Liability Directive, Turkish officials were invited to a meeting with UKELA to discuss some of the practical legal issues faced in the UK when the UK government transposed the Environmental Liability Directive.
- The meeting was very successful, drawing on the experience and knowledge of UKELA members to provide a valuable and broad insight into the UK's difficulties with the Environmental Liability Directive.
- The meeting also provided important insight for UKELA about operating within international law, but outside of the European Union.

Introduction

UKELA's theme for 2016 was to highlight environmental law's international dimension. This looks set to continue in 2017 and beyond with the setting up of UKELA's International Ambassadors initiative. The team will focus on supporting the development and practice of environmental law and associations overseas. There was a call by our Chair in the last edition for more members to come forward and join the initiative; so a gentle nudge to any members who are able to help, to get in touch with Stephen.

During the course of 2016 UKELA met with delegates from Brazil, China, South Korea and Turkey on various environmental issues. In 2015 I met with delegates from the Uzbekistan government who were keen to find out more about the UK's environmental judicial review system. These meetings highlight UKELA's growing standing in the international arena as being recognised experts in environmental law. It is something that we all as UKELA members should be proud of.

The purpose of this article is to give you an insight into UKELA's meeting with officials from the Turkish government which took place on 15th November 2016. It concerned Turkey's transposition of the Environmental Liability Directive (the Directive) into Turkish law. Hopefully it highlights some of the issues surrounding Turkey's transposition of the Directive and provides an awareness of not only how UKELA were able to assist the Turkish officials, but the crucial behind the scenes planning and the importance of

UKELA members contacts and networking which enables such an event to happen in the first place.

Background planning of the meeting

In the summer of 2016 Rosie Oliver was contacted by a former colleague at DEFRA, Edward Lockhart Mummery (the environmental litigation working party had met with Edward previously to assist DEFRA with the government's Red Tape Challenge on environmental legislation). Edward had left DEFRA and was working on a project with the Turkish government in relation to its transposition of the Directive. Edward was arranging a week's visit to the UK with around 10 – 12 Turkish officials including delegates from SWECO (one of Europe's leading architecture and engineering consultancies) and during the course of that week wanted to include a meeting with UKELA to discuss some of the practical legal issues faced in the UK when the UK government had transposed the Directive into the Environmental (Damage and Remediation Regulations) (the Regulations).

UKELA was very keen to facilitate the meeting not only for reasons of knowledge exchange but also from an international networking perspective.

The original meeting was due to take place on 25 July in London. Simon Colvin (member of environmental litigation working party) very kindly offered to host the meeting at Weightmans offices in London. However due to the attempted coup in Turkey in July where regrettably over 300 people were killed, and 2,100 people injured, the meeting was cancelled. There was serious doubt that the meeting would be rearranged in light of the coup. The subsequent crackdown following the coup by President Erdogan, who had ordered the detainment of 40,000 people (over 2400 being Judges incidentally) and was talking about reinstating the death penalty to punish those involved in the coup, damaged Turkey's relations with the European Union.

In November 2016, the European Parliament voted in favour of a non-binding resolution to request that the European Commission temporarily suspend membership negotiations due to the 'disproportionate repressive measures' of the government to the coup.

However, we were all very pleased to hear from Edward again at the end of September who wanted to arrange a further date for our meeting, and that

despite the setback of the coup and difficulties surrounding Turkey's proposed membership of the European Union, Turkey still intends to continue with its accession bid to become a member of the European Union.

Identifying issues on transposition/implementation of Environmental Liability Directive

One of the conditions for full accession is that Turkey has to adopt the body of European Union law. The Environment chapter, which was opened for negotiations in December 2009, is among the European Union legislation that Turkey has to fully transpose and implement.

The purpose of the Directive when it was first introduced by the European Commission was to establish a framework of environmental liability, based on the 'polluter-pays' principle, by way of preventing and remedying environmental damage. Its aims were to ensure that the financial consequences of certain types of harm caused to the environment were borne by the economic operator who caused the harm.

With the assistance of Edward, the Turkish officials identified the following areas of concern regarding the transposition of the Directive of which they wanted UKELA to assist:

- 1 'Imminent threat' – the Directive provides that where there is an imminent threat of environmental damage occurring, the operator shall, without delay, take the necessary preventive measures and, in certain cases, inform the competent authority of all relevant aspects of the situation, as soon as possible and in the case where **actual** environmental damage has occurred, the operator shall, without delay, inform the competent authority of all relevant aspects of the situation.

The officials were keen to find out how the UK had interpreted 'imminent threat' and transposed it into its own Regulations.

In relation to the three categories of environmental damage set out in the Directive the category the officials were most interested to hear about was 'damage to protected species and natural habitats.' This is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The habitats and species concerned are defined by reference to species and types of natural habitats identified in the relevant parts of the Birds Directive 79/409 and the Habitats Directive 92/43.

Turkey has not fully transposed the Habitats and Wild Bird Directive and therefore is essentially proposing to 'cut and paste' the relevant Annexes

from the Habitats and Wild Bird Directive into its own regulations and wanted suggestions on whether UKELA thought that this was a good or bad idea.

- 2 Furthermore, in relation to the issue of environmental damage and assessment of environmental damage by a competent authority in accordance with the Directive there were concerns over the definition of 'Competent Authorities'. For example, that Turkish staff would not have the requisite skills to carry out all the assessments necessary to determine the significance of the damage and the required necessary remediation. The question for UKELA was how did a competent authority go about getting that assistance in the UK. Turkey was considering having a committee of 'experts'.
- 3 What issues if any did the UK have with the permit defence and state of the art defences? The permit defence provides a defence to the operator if an operation has been licensed and the permit requirements were being followed. The state of the art defence allows the operator not to bear costs of remedial action – but not of preventive action – when the operator can demonstrate that it was not at fault or negligent and the environmental damage was caused by an emission or activity – or any manner of using a product in the course of an activity – which the operator proves was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.

Interestingly Turkey did not intend to include either defence as part of its transposition of the Directive but the officials were keen to hear what issues if any had arisen in the UK with these two defences.

Addressing the issues

Rosie identified and organised an appropriate set of excellent speakers from UKELA who could best deal with these questions and issues, and included an academic, practitioner and a representative of an NGO.

Valerie Fogleman is Professor of Law at Cardiff University, a Consultant at Steven Boltsons, and lectures extensively on the issues and difficulties experienced in the UK with the government's transposition of the Directive into the Regulations. Valerie gave a presentation on legislation and non-legislative transposition measures in response to the issues raised by the Turkish officials.

Valerie considered on the whole that the Directive does not work across the European Union, including the UK. She highlighted that there were many

Member States that have had no cases at all under the Directive. However the European Union is aware of the difficulties and challenges of transposition of the Directive and is trying to do something about it.

She said that the 'state of the art' defence has only been used once over the entire European Union. In addition, Valerie did not consider it was a good thing to have so many 'competent authorities' in the UK. There are currently four 'enforcement authorities' listed.

Ray Clarke (Environmental law specialist and a Consultant at Weightmans) gave a really interesting presentation from the point of view of the operator (having had experience of representing operators) including approaches to defining and assessing environmental damage as it relates to biodiversity, water, land and contamination; and also approaches to remediation and compensatory measures. He also talked about the first case to go to a public inquiry.

Andrew Kelton, of Fish Legal, talked about the NGO's position generally in relation to Directive and the UK's transposition of the Directive. He also set out reasons why **not** to use the Regulations; for example the Directive only applies to damage occurring after 2007 and does not cover damage when the emission was post 2007 but the activity that caused the emission was pre-2007. Therefore it is quite different from the US CERCA (Superfund) Programme which requires clean-up of historic contamination, pollution etc.

Andrew also highlighted particular lessons learned from the Llyn Padarn judicial review which in summary is that Directive application in the UK seems likely to remain limited given the stringent requirements of a 'significant adverse change' caused by emissions occurring post 2007. He left an interesting question for everyone at the end of his presentation: 'Will the Water Framework Directive be adequate for dealing with continuing damage to water bodies such as Llyn Padarn?'

Conclusion

It was an excellent all round presentation with perspectives from all sides, providing the Turkish officials with a valuable and broad insight into the UK's difficulties with the Directive since imposing it into UK law.

The meeting provided a constructive understanding into how other countries view their environment; the legislation it has in place to protect it and how it plans to prioritise and enforce that legislation.

The officials were extremely pleased with the cast of speakers and for providing to them all the latest insights from experience at the sharp end. The officials considered it a very useful meeting in terms of guiding how they pull together the draft law over the coming weeks.

It was a great learning exercise on both parts, and as Edward rightly pointed out: while Turkish colleagues are learning from us about implementing European Union legislation, we perhaps also have lots to learn from them about operating within international law, but outside of the European Union.

A big thank you to Rosie for all her hard work and commitment in setting up the meeting and making it such a successful event, to Simon Colvin for hosting, and of course to our speakers for their excellent presentations and giving up their valuable time to attend.

Adverts, jobs and tender opportunities

High Court selection exercise – launch 12 January 2017

The Judicial Appointments Commission (JAC) will launch a selection exercise for High Court judges on 12 January. There are vacancies in all 3 divisions (Family, Chancery and the Queen's Bench division). Salaried part time working opportunities may be available, subject to the agreement of the relevant Head of Division.

High Court judges deal with serious and complex cases. They sit at the Royal Courts of Justice in London and also spend some time on Circuit. The Chancery Division undertakes civil work of many kinds, including specialist work such as companies, patents and contentious probate; the Family Division deals with divorce, and disputes over children, property or money, adoption and wardship; and the Queen's Bench Division has both a criminal and civil jurisdiction. In past selection exercises for the High Court, candidates have usually been expected to have previous judicial experience in either a fee-paid or salaried capacity. On this occasion previous judicial experience is not required; this change applies in all three divisions. Applications are invited from solicitors and barristers with at least 7 years' post qualification experience, who can demonstrate the necessary transferable skills and expertise required of a High Court judge.

Also for the first time, this exercise will offer 2 different application tracks. The first track will be on similar lines to previous selection exercises and will involve candidates submitting a self-assessment and the names of persons who could provide independent assessments. This track is open to all eligible candidates. Applications will be sifted on the basis of this information, and invitations extended to shortlisted candidates to a selection day. The second track is open to those appointed or authorised under section 9 of the Senior Courts Act 1981 (section 9 judges), to take account of their experience at High Court level. Section 9 judges applying via this route will be asked to provide a statement of suitability along with up to 3 judgments, notes of judgments or determinations. Invitations to selection day will be issued on the basis of this information. At that stage, shortlisted candidates will be asked to complete the usual self-assessment and to provide the names of persons who can provide independent assessments.

The JAC is extremely keen to reach as wide a range of potential candidates as possible, in order to attract a strong and diverse pool of applicants. Details about the exercise, including the competency framework

against which candidates will be assessed, are on the [JAC website](#).

Recorder selection exercise – launch 1 February 2017

The Judicial Appointments Commission (JAC) will launch a selection exercise for Recorders on 1 February 2017, and it is anticipated that this will mark a return to a programme of regular competitions.

This will provide an excellent opportunity for practitioners to join the ranks of the judiciary. The work of a Recorder is important, and it is an extremely interesting and worthwhile role. The part-time nature of the position means it can be combined with other professional commitments, which makes it particularly appealing to those in the relatively early stages of their professional lives. The JAC is particularly keen to recruit Recorders who have an interest in progressing to a full-time judicial career, and this will enable successful candidates to gain insight into, and experience of, the life and work of a judge.

The brief agreed by the Lord Chancellor and the Lord Chief Justice asks the JAC to select the best 100 of the applicants, in an exercise which will not pay any regard to jurisdictional experience. Although successful candidates will be deployed to sit in the criminal and family jurisdictions, the competition is open to all solicitors and barristers with at least 7 years' post qualification experience, regardless of their background. This approach will be reflected across the entirety of the selection process: knowledge of the three jurisdictions will not be tested, and candidates will not be required to study the detail of a new jurisdiction in order to compete on what will be a truly level playing field.

There will be 4 stages to this year's selection process, with the best candidates progressing from one stage to the next. The four stages are: an online multiple choice test; an online scenario test; a telephone assessment; and a selection day comprising an interview and role play. The tests have been devised and extensively 'road tested' by practitioners and judges from different jurisdictions, to ensure the process will enable the JAC to select fairly on merit. It is hoped that this new approach will provide reassurances to candidates who felt there was too much emphasis on jurisdictional expertise in the last selection exercise. This constitutes a valuable departure from the past, aimed at attracting a wide range of candidates of the highest calibre in order to identify the best and the brightest.

The JAC is also committed to making the judiciary more diverse. Applications are therefore welcomed and encouraged from groups currently underrepresented in the judiciary, including but not limited to those from Black, Asian and ethnic minority communities, solicitors, women, disabled candidates and those from the LGBT communities. Further details about the exercise are available on the JAC [website](#).

Pioneering new research on sustainability and the commissioning of legal services – add your voice

Work has been done to explore the relationships between law firms and their clients, and in particular what clients are looking for when they ask lawyers to tender for work. Thus far, however, no work has been done to explore the extent to which sustainability is a matter of interest for clients in choosing the law firms they engage and in the requirements they make of their firms. This project, the first of its kind and funded by the Legal Sustainability Alliance (LSA), seeks to remedy that gap. The LSA is an inclusive movement of solicitors, legal firms and organisations committed to working collaboratively to improve the environmental sustainability of their operations and activities.

The project consists of three phases. This first phase is directed at those in private practice (a later phase will gather data from those in-house) and consists of a survey, which you can access [online](#). The online survey should take between 10 and 15 minutes to complete. While we ask for the name of your law firm (so we can correlate answers from multiple people at the same firm), when we report on the data everything will be anonymous. All research data is confidential and securely held. Only the academic researchers have access to the data. They will publish overall findings from the research and will do so in a way that does not enable individuals or the organisations that they work for to be identified.

This research is being undertaken by Professor Robert Lee and Dr Steven Vaughan of the University of Birmingham's Centre for Professional Legal Education and Research, working with Begonia Filgueira of ERIC Ltd. If you have any queries, please contact [Begonia](#) directly.

Book reviews

The e-law editors are regularly sent book lists by various publishing houses which may appeal to UKELA members keen to write a review. If you are interested in contributing a book review to a future edition of e-law, but would first like some guidance or suggestions, please [drop us a line](#).

UK Environmental Law Association

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The editorial team is looking for quality articles, news and views for the next edition on 'Energy and Climate Change' due out in March 2017. If you would like to make a contribution, please email elaw@ukela.org by 15 March 2017.

Letters to the editor will be published, space permitting.

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