



e-law

Better law for the environment

May/June 2018 | Issue 106



Welcome to the May/June edition of elaw.

The theme for this issue is 'the mixed energy economy', ie one which draws on different energy sources (including nuclear and renewables) to meet energy needs. With decarbonisation goals, renewable energy targets, environmental protection and energy security in mind, decisions about what comprises a sustainable energy mix are predictably contentious.

Before considering some of the legal issues set out in the articles below, I thought it would be useful to look at some statistics about the UK's energy production. According to the Department of Business Energy and Industrial Strategy (BEIS) [Energy Trends report](#) issued in March this year, total energy production in 2017 was 0.4 per cent higher than in 2016. Although only a small increase, the report notes that it is the third increase in successive years, and was a result of rises in output from gas, bioenergy and wind, solar and hydro. The headlines are that coal output fell to a record low (27% lower than in 2016), while output from oil and nuclear also fell. Coal levels were said to have fallen due to a number of mines not operating while being restored and other mines producing less coal as they were coming to the end of their production. Interestingly, imports of coal in 2017 were at a similar level to 2016.

It was encouraging to see that renewable electricity generation was at a record high at 98.9 TWh in 2017, representing an increase of 18.8% on the 83.2 TWh in 2016, due to increased capacity and higher wind speeds. The report also notes that provisional estimates show that carbon dioxide emissions fell between 2016 and 2017 by 3%; primarily due to switching generation from coal and gas to renewable sources. While this is encouraging, the UK still has a long way to go in decarbonising its energy supply.

To further complicate matters, we of course have Brexit. In Northern Ireland, this creates a particular issue given that a Single Electricity Market (SEM) operates across the whole of Ireland, with the Republic of Ireland. We are grateful to Thomas Muinzer, for his article [Re-Energising Northern Ireland? The Impact of Brexit on Ireland's All-Island Energy Market](#), which explains the issues Brexit raises for the SEM and provides some solutions for how it could be addressed.

And in Scotland, there remains tension between devolution and the exercise of Scottish competences in the energy field. Again, we are grateful to Dr Daria Shapovalova for her article on [Fracking, nuclear, and renewables: Is the Scottish Government competent to pursue these](#)

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[policies?](#) which considers this question in the context of the Scottish Government's effective ban on fracking and the threat of judicial review proceedings by energy firms.

Finally, on a related topic, don't miss Tanya Jones' book review of "[Shale Gas, the Environment and Energy Security by Ruthven Fleming](#)" nor Samuel March's winning essay on [The right to a healthy environment is a fundamental human right](#).

Best wishes,

Hayley Tam

Hayley Tam
UKELA Trustee & e-law Editor

E-law editorial team

Hayley Tam, Editor – Hayley is Head of Environment at LexisPSL having previously worked in both the private and public sector at the Environment Agency, Allen & Overy, Stephenson Harwood and Ashurst Australia. She is qualified as an environmental lawyer in Australia, England and Wales.

Jessica Allen, Assistant Editor – Jessica is a postgraduate student pursuing the Bachelor of Civil Law at the University of Oxford, having recently finished her term as Vice President for Academic Activities of ELSA United Kingdom. She graduated with honours in Law with French and French Law at the University of Nottingham in 2017.

Dr Ben Christman – Assistant editor, is an independent environmental law researcher.

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



Welcome to your May elaw, in this edition we are looking at “the mixed energy economy”. As with most things, the questions of energy supply and security become increasingly difficult when viewed through the prism of Brexit; however we must also remember that the bigger

question of climate change and decarbonisation of our energy supplies has to be answered regardless of the political landscape. Just last week, the Scottish government published its Climate Change Bill, setting a 90% emission reduction target by 2050. Reaction to the Bill has been mixed, with many commentators expressing disappointment that the bill stopped short of a zero emissions target. The Scottish ministers’ defence of the target, arguing that it is as ambitious as possible based on current science and will ultimately lead to zero emissions in the fastest time possible, versus the criticism that an opportunity was lost to show ambition and leadership now, sums up the challenge facing us as a society now in trying to meet the Paris Agreement goals. Or it should, but of course we still have the challenge of the leadership of the world’s largest economy currently ignoring the 97% expert consensus on climate change and actively pursuing policies that will increase carbon emissions. It’s very easy to feel despondent, but let’s focus on what we can do. I’m sure you will feel upbeat by the time you get to the end of this edition!

In other news, it is less than a month until our annual conference and I look forward to seeing many of you there. You will also have received an email from Electoral Reform Services to vote in the Council Elections. Please take time to read the candidates’ manifestos and cast your vote.

Regards,

Anne Johnstone

Anne Johnstone
UKELA Chair

UKELA News

Brexit Task Force (BTF) Year One report

The BTF is delighted to present its year one report. With a foreword by co-chairs Richard Macrory and Andrew Bryce, it provides a comprehensive look at the work undertaken by the task force. Read it on our [website](#), which also includes full details of the discussions at BTF meetings. If you would like to look at the work UKELA has undertaken on Brexit matters in the past 18 months or so, then have a look at the many reports and consultation responses prepared on our [website](#). See later on in the edition for details of how you can comment on the Environmental Principles and Governance (EPG) consultation.

New Working Party and Brexit Advisor

We are delighted to welcome Paul Stookes to the staff team as our Working Party and Brexit Advisor. Many of you will be familiar with Paul, who brings with him a wealth of experience from right across the environmental law field. Paul looks forward to meeting many of you at the annual conference and events coming up this year. Read about him on our [website](#).

Call for Co-Convenor of Water Working Party

We are currently asking for anyone with an interest in this area to consider becoming co-convenor of the Water Working Party. If you wish to be considered, please contact our new Working Party Advisor, [Paul Stookes](#), before 30 June.

Membership

Can you help us recruit more members? 2018 is UKELA's 30th anniversary. To celebrate this milestone and to help the organisation become even stronger as it heads into the next 30 years, we are calling on all members to help us recruit! Can you add one more member to our ranks? Is there a friend or colleague

you know who has been thinking about joining and not quite gotten around to it? Or do you know someone who used to be a member and has fallen by the wayside?

Recruit someone new or bring back an old friend and help UKELA grow! As an incentive, the first 30 members to recruit a new or returning member, will be given 2 free tickets (for them and the new member) to a UKELA event of their choice* – so, get recruiting! To let us know about the person you have recruited, please get in touch. Our membership application form is on our website.

Thank you!

*not including the Annual Conference, Scottish Annual Conference or the Wild Law weekend. Events included currently are: Water & Marine Issues 24 September; Young UKELA: Chimneys and Tunnels 13 October. Other events will be added as they become available. All free tickets are subject to availability and offered at UKELA's discretion. Free tickets will only be issued once the new member has completed registration. UKELA has the right to vary these terms at any time.

UKELA Annual Elections

You should have received your voting details for this year's Council elections (sent only to the lead member for corporate memberships). Please do take a moment to read the [Candidate's manifestos](#) and cast your vote for your Board of Trustees, as they will represent you.

UKELA Chair becomes pod star!

Our chair, Anne Johnstone, recently contributed to a podcast with Planet Pod. The discussion covered a wide range of topics including the circular economy, the gender pay gap, the representation of women, sustainability and the environment. The recording is available to listen to [here](#). Please do share the link with any of your friends and colleagues.

GDPR – Data Protection

We have now been in touch with all members about our updated privacy policy. If you have any queries please [get in touch](#).

Recyclists cyclo-pilgrimage Southwark to Canterbury

Join us? Or support us? Or both?

As ever, there will be a Recyclist ride to the conference, starting the day before (Thursday 21 June) at Southwark Cathedral with an overnight stop not far from Whitstable and arriving at Canterbury in good time for the start. The route very loosely follows the Pilgrim's Way. Though pleasant, it is not without its hilly challenges! The long day will involve a cycle of around 70 miles, the second day will be a dash from breakfast to the finish line.

The Recyclists are fundraising for the Lord Nathan fund established to support Law and Your Environment, which offers the public free-to-access information regarding their environmental rights and responsibilities.

Your sponsorship would be greatly appreciated, both to keep Law and Your Environment going but also to inspire the Recyclists up those hilly challenges. The donation page is:
<https://mydonate.bt.com/events/recyclists2018/466744>

It is not too late to join the ride, which promises to be a lot of fun. The Recyclists are also very much on the hunt for someone willing to drive a support vehicle. Anyone interested in taking part, whether cycling or as support driver, please contact james.burton@39essex.com.

Students news

UKELA Andrew Lees Essay Prize 2018 – winner announced!

We are pleased to announce that the Andrew Lees Essay Prize for 2018 has been awarded to Samuel March. Samuel is a graduate of the University of Cambridge (BA, MA) who has spent the last five years working in communications, principally consulting for sustainability-focussed international NGOs and non-profits in Geneva. He is now studying at the University of Law, where he is enrolled on both the GDL and A4ID's 'Law for Development' course. Samuel has won a place at the UKELA Annual Conference in Canterbury and his [winning essay](#) is published in this edition of e-law. Well done Samuel!

We'd also like to extend our thanks to our essay question writers and judges, Bob Lee and Donald McGillivray. Our judges felt that, as the standard was so high, the following entrants were worthy of honourable mentions: William O'Brien, Vedantha Kumar and Alex May. Well done to you, and to all who entered.

UKELA Student Environmental Law Conference Prize – winner announced!



We are pleased to announce that the winner of the UKELA Student Environmental Law Conference Prize Winner is Yahya Al-Qaq. The prize includes a free one-year student membership of UKELA. Yahya was born in Florida, USA, where he subsequently lived for several years. He resides in

Jerusalem, Israel, but is currently concluding his third year of LLB studies at Cardiff University. He plans on pursuing a commercial law LLM next year. Well done Yahya!

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 [Rosie McLeod](#) or [Lewis Hadler](#), 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 on the theme of our Annual Conference, 'Post-Brexit Britain', and is expected to be published in the week commencing 30 July.

UKELA Events

Seminar: 'Sustainability in Hot Water' – This seminar has been postponed

This seminar is being organised by the Planning and Sustainable Development and Water working parties. It will be held at the British Geological Society where Professor Michael Stephenson, with a number of his senior colleagues, have kindly agreed to offer us a detailed briefing about their work. It was originally scheduled for 4 June, but has been postponed. A new date will be advertised in due course.

Public Health and Environmental Law Working Party meeting – 11 June

UKELA members are invited to join the next meeting of the Public Health & Environmental Law working party. If you would like attend, please email the [convenor](#).

Annual Conference: Past Reflections and Future Horizons: Environmental law in a post-Brexit World – 22 to 24 June

Very few places remain for our annual conference in Canterbury at Kent University's beautiful campus. Our Conference theme this year is 'Past Reflections and Future Horizons: Environmental law in a post-Brexit World'. The Conference gives us time and space to recharge as we approach Brexit – and UKELA's 30th anniversary. Our programme starts earlier this year to give you even more CPD value. Please book your place online [soon to avoid missing out](#).

London meeting on Water and Marine Issues – 24 September

Save the date for when bookings open later in the year for this topical debate.

Young UKELA: 'Chimneys and Tunnels' – 13 October

Save the date for this private walking tour followed by an informal meal. For more details about our events programme, please visit our [website](#).

Wild Law half day conference, Bristol – 21 September

Save the date for this half day event kindly hosted by the University of Bristol. Booking details coming soon.

Annual Scottish Conference, 27 September

Save the date for the annual Scottish conference, this year held once again at the Apex Hotel Waterloo, Edinburgh. Booking details coming soon.

Non-UKELA events

Landmark Chambers seminar: 'Pushing the boundaries: what role does environmental law have to play in international dispute settlement?' – 6 June

Landmark Chambers is running a free seminar on international environmental disputes for environmental law practitioners, international arbitration and litigation specialists, and public international lawyers. The seminar will cover topics such as investment treaty arbitration, international toxic torts, and cross-boundary environmental disputes and human rights. More details are available [online](#). To book, please visit the [website](#).

Castle Debates: 'The Clean Growth Strategy' – 3 July

The Clean Growth Strategy has been largely well received and maps out focus areas and opportunities for new markets and significant greenhouse gas reductions. The panel of expert speakers will assess the key aspects and propose areas for improvement. This event is organised and chaired by Pamela Castle OBE. For more details and to reserve your place, please visit our [website](#).

The e-law 60 second interview

30th Anniversary edition

Becky Clissmann, Co-Convenor of the Climate Change and Energy Working Party

Becky Clissmann is a Senior Editor in the Environment Team at Practical Law. Before joining Practical Law in 2009, she helped to set up Eversheds' environment practice in London where she specialised in climate change and renewable energy issues. Becky trained at Denton Wilde Sapte (now Dentons).

Prior to qualifying, Becky obtained extensive experience in climate change policy measures working for the Carbon Trust, where she set up an account management service for FTSE 250 companies and large public-sector organisations. She also has experience in the energy and commodity markets, having worked as a Policy Manager at the UK Power Exchange (UKPX) (now part of the APX Group) and also the London International Financial Futures and Options Exchange (LIFFE) (now part of the Intercontinental Exchange group).

How did you get into environmental law?

I've always been an environmentalist at heart. During my training contract at Dentons, one of my seats was with the Environment Team. I loved the mix of work and I was hooked! When I qualified, I moved to Eversheds' environment team where I got involved with UKELA.

What are the greatest achievements in environmental law during your career?

I think the greatest achievement made by environmental law has been the huge shift in public opinion on climate change. When I was working at the Carbon Trust in the noughties we recognised that an absolutely vital key to reducing emissions was behavioural change. In those days the vast majority of the population was not convinced that human activity was changing the climate. Now, the reverse is the case. Leaving aside some notable exceptions in the White House, most people accept that the climate is changing as a result of human activities. Even better, they accept that things must be done to prevent that change or at least adapt to it. A huge swing in public opinion in such a relatively short period of time is a significant achievement and, one which I hope is not too late to prevent critical climate change events such as stalling of ocean currents.

What barriers (if any) have you seen to achieving environmental justice in the UK?

The obvious answer is the costs of bringing legal proceedings but I also think a significant challenge is the tremendous complexity of environmental law. Concepts such as emission reduction targets, baseline methodologies, environmental impact assessments and so on, trip off an environmental lawyer's tongue but for many they are a baffling fog that surround some core environmental truths (we shouldn't mess up the only planet we can live on and we should clean up after ourselves)...

When did you get involved with UKELA?

I started coming to UKELA events when I qualified and during my time at Eversheds. While the CRC was being developed, I got involved in putting together UKELA's responses to the various CRC consultations and from there it was a natural progression to joining Tom Bainbridge as a co-convenor of the Climate Change and Energy Working Party.

How does UKELA contribute to the development of environmental law in the UK?

UKELA is a voice for reason and practicality in what can be a complicated area of law. With Brexit negotiations ongoing, this role is vital. We provide sensible commentary on how environmental law developments will work (or not!) and a forum for legislators and policy makers in government to talk to practitioners to ensure environmental law works in the way they intend. We don't have a political bias (at least not an overt one!) and we don't represent any single interest group – we are a bunch of likeminded people who work hard to try and ensure that environmental law protects the environment. I think UKELA has become a respected commentator that the government increasingly relies on for advice.

What is your favourite UKELA memory?

I have so many good memories from the last 11 years of UKELA conferences and events. I think the 25 year anniversary conference in Cambridge in 2013 was an amazing conference – the venue for the gala dinner was particularly memorable. Moving quickly from the sublime to the ridiculous, another favourite UKELA memory was at my first conference, when Andrew Bryce stood up at the start of the Saturday morning session waving a pair of trousers that he said he had found outside the conference venue... I'm not sure he ever managed to find the owner!

What are the main benefits of UKELA membership?

I think environmental law can sometimes be a bit of a lonely experience for many practitioners. If you work in a law firm or inhouse you are likely to be part of a small team or you may be the only environmental lawyer within your organisation. Being a UKELA member not only offers you training events on a range of environmental law topics to support your CPD needs but also gives you an opportunity to talk to other practitioners about environmental law issues that you may not be able to discuss within your organisation.

What opportunities exist to advance environmental law in the UK?

The Brexit task force and UKELA's response to the consultation on post-Brexit environmental principles and a new environmental body are the most obvious opportunities at the moment to influence the development of environmental law. Brexit brings both risks (that EU environmental principles such as the precautionary principle and polluter pays will be abandoned or diluted) and the possibility that we can persuade the government to introduce environmental protections that are both equivalent to EU law and more tailored to the UK's needs.

What changes to environmental law in the UK do you think we'll see over the next decade?

Environmental lawyers have always been under pressure to deliver expert advice quickly and on a wide array of topics. I remember the challenge, when I was in practice, of providing accurate advice on developing areas of law without putting too much time on the clock. Obvious changes in the next decade will be continuing improvements to know-how tools (such as Practical Law) as well as the use of Artificial Intelligence (AI) in deals. How environmental regulation in the UK will be shaped by Brexit will be the biggest challenge of the next 10 years. All of our efforts as part of UKELA will be critical to ensuring that the government delivers the green Brexit they have promised. The next 10 years will also be key in that they will mark a tipping point for whether the world manages to get a grip on greenhouse gas emissions. We are currently in the "last chance saloon" for reducing GHG emissions. If we can't radically reduce our emissions in the next few years the 1.5 degrees aspiration will definitely be missed and the 2 degrees target will be at risk. On a more positive note, I am hopeful that the next 10 years will see us deal with the problem of micro plastic pollution. It really feels that there has been a sea change in attitudes (if you will pardon the pun!) to single plastic use in the last 12 months.

Theme question: What opportunities or challenges do you see for community energy projects contributing to the UK's energy mix in the future? For example, do you see projects like the Tesla/South Australian government's virtual power plant being successful in the UK?

The Tesla project is really interesting – the combination of solar and storage being installed across 50,000 homes to create a virtual power plant seems beguilingly simple. A key issue in getting projects like this mobilised will be the financing. Community energy projects in the UK are already being challenged by the loss of feed-in tariffs (FITs) and Enterprise investment Scheme (EIS) relief so they are looking to other forms of financing like crowdfunding. To scale up existing community energy projects to produce something like the example given would be a very tall order that will require some very determined champions not to mention a bit of technological help from things like smart grids, blockchain and peer-to-peer trading.

Environmental law headlines

April – May 2018

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

Consultation launched on new Environmental Principles and Governance Bill

Lexis®PSL Environment

On 10 May 2018 the Department for Environment, Food and Rural Affairs (Defra) opened a [consultation](#) on the contents of the Environmental Principles and Governance Bill, which will establish a world-leading body to hold government to account for environmental outcomes.

Subject to consultation, the new body could be responsible for:

- providing independent scrutiny and advice on existing and future government environmental law and policy;
- responding to complaints about government's delivery of environmental law; and
- holding government to account publicly over its delivery of environmental law and exercising enforcement powers where necessary.

The government is also consulting on its intention to require ministers to produce – and then have regard to – a statutory and comprehensive policy statement setting out how they will apply core environmental principles as they develop policy and discharge their responsibilities. The consultation seeks views on whether or not the principles to be contained in the policy statement should be listed in primary legislation.

The consultation proposals apply to England and reserved matters only. The consultation closes on 2 August 2018 and it is intended that the Environmental Principles and Governance Bill will be published in draft in the autumn. Public consultation on the environmental principles policy statement will follow in due course.

For more information, see News Analysis: [Consultation on post-Brexit environmental principles and governance](#).

Knowingly permitting waste permitting offence does not require positive act

Practical Law Environment

S Ltd owned a site, on which another person (Q) operated a waste business, of recycling mattresses, under a lease. Mr S is a director of S.

The Environment Agency (EA) served an enforcement notice on Q and he ceased trading. Approximately 471 tonnes (over 20,000 mattresses) of waste material remained on the site.

The magistrates convicted S Ltd and Mr S (the appellants) of knowingly permitting a waste operation to continue at the site (in the form of storage pending removal or disposal) without an environmental permit in breach of the Environmental Permitting (England and Wales) Regulations 2010 (*SI 2010/675*) (EP Regulations 2010).

The magistrates' court referred two questions to the High Court by way of case stated.

On 1 May 2018, in *Stone and another v Environment Agency [2018] EWHC 994*, the High Court dismissed the appeal against conviction in the magistrates' court. Responding to the two questions that had been referred to it from the magistrates' court, the court confirmed that:

- There was a continuing waste operation. There was no authority for the appellants' argument that storage required some positive act of retention.
- The offence of "knowingly permitting" did not require the accused to carry out a positive act. It was enough for the prosecution to show that the defendant knew about the waste operation and did nothing to prevent it.

The decision confirms existing case law on what the prosecution must show to make out the "knowingly permitting" offence in environmental permitting (now under regulation 12 of the Environmental Permitting (England and Wales) Regulations 2016 (*SI 2016/1154*)).

For more information, see [Legal update, Knowingly permitting waste permitting offence does not require positive act \(High Court\)](#).

Fluff and shredded waste used in landfill cell is subject to landfill tax

Practical Law Environment

The First-Tier Tribunal (Tax) (FTT) has recently taken a tough line in two cases on whether black bag waste fluff and “engineered into the void permanently” (EVP) material at landfill sites was subject to landfill tax.

On 11 April 2018, in *Devon Waste Management Ltd (and others) v Revenue and Customs Commissioners [2018] UKFTT 0181 (TC)*, the FTT gave its decision on a number of appeals concerning the use of fluff (mainly black bag waste) in the construction of landfill cells on which the appellants claimed that no landfill tax was due.

The four appellants (Devon Waste Management Ltd, Biffa Waste Services Ltd, Veolia ES Landfill Ltd and Veolia Cleanaway (UK) Ltd), which operate, or are the representative members of groups of companies that operate, a number of landfill sites across England and Wales had used fluff in the construction of landfill cells at these sites in accordance with industry practice to protect the base and cap liners of the cells between November 2006 and December 2013.

The FTT dismissed the appeals as it considered the deposits of fluff were taxable disposals and so subject to landfill tax within the meaning of section 40(2) of the Finance Act 1996 that were made:

- with the intention of discarding the material as waste;
- by way of landfill.

The FTT did not accept the appellant’s argument that *HMRC v Waste Recycling Group Ltd [2008] EWCA Civ 849* was authority for the proposition that “use” was the antonym (opposite) of “discard” so that the use of the fluff to protect the liner and cap negated any suggestion that they intended to discard it. The fact that the fluff continued to serve a useful function after its disposal did not affect the conclusion that the appellants had intended to discard it.

The FTT considered that as landfill sites are designed to accommodate the landfilled material permanently in cells rather than elsewhere, the deposit of material into a landfill cell was an indicator that the material was being disposed of by way of landfill for the purposes of section 65 of the Finance Act 1996.

Also on 11 April 2018, in *Biffa Waste Services Ltd v Revenue and Customs Commissioners [2018] UKFTT 199 (TC)*, 11 April 2018, the FTT dismissed an appeal of a 2012 HMRC ruling that EVP material used in the protection layers at various landfill sites was subject to landfill tax at the standard rate.

The tribunal considered the deposits of EVP were also taxable disposals within the meaning of section 40(2) of the Finance Act 1996 for the same reasons as the fluff in the Devon Waste Management case. The FTT noted that there was no physical difference (apart from shredding) between the EVP material used in the protection layer and the other waste in the landfill cell. The only differences were the use to which the EVP deposits were put and the difference in the way that the EVP material was placed. These differences were not sufficient to negate the “otherwise obvious intention to discard the material”.

For more information, see [Legal update, Fluff used in landfill cell is subject to landfill tax \(First-Tier Tribunal\)](#) and [Legal update, Use of shredded waste as protection layer in landfill is subject to landfill tax \(First-Tier Tribunal\)](#).

Progress on the Circular Economy Package

Lexis®PSL Environment

On 18 April 2018 the European Parliament approved the provisional agreement on the Circular Economy package. The draft, which has already been informally agreed with the Council of the European Union, will now be submitted to the Council for formal approval. It will enter into force 20 days after its publication in the Official Journal.

Significant changes to the Waste Framework Directive ([Directive 2008/98/EC](#)), Landfill Directive ([Directive 1999/31/EC](#)) and Packaging Waste Directive ([Directive 94/62/EC](#)) are proposed as part of the package.

There are new recycling targets for municipal waste, with 55% to be recycled by 2025, 60% 2030, rising to 65% by 2035. By 2035, only 10% of municipal waste is to be landfilled.

By 2025, textiles and hazardous waste from households will have to be collected separately. By 2024, biodegradable waste will have to be either collected separately or recycled at home through composting.

Member States are to aim to reduce food waste by 30% by 2025 and 50% by 2030.

In respect of packaging waste, 65% of packaging materials will have to be recycled by 2025 and 70% by 2030. Separate targets are set for individual streams such as paper and cardboard, plastics, glass and wood.

The European Parliament has also agreed that the Commission should undertake a review before the end of 2018 to bring the producer responsibility directives in line with the principles of the circular economy.

These relate to end-of-life vehicles, waste electrical and electronic equipment and waste batteries and accumulators. In addition, the data gathering relating to such provisions is to be improved.

For more information, see News Analysis: [Ever increasing circles? The EU's transition towards a circular economy.](#)

New rules on agricultural diffuse pollution

Lexis®PSL Environment

From 2 April 2018, the Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018, [SI 2018/151](#) contain new prohibitions, requirements, restrictions and offences to reduce and prevent agricultural diffuse pollution.

The regulations apply to farmers and land managers who have custody or control of agricultural land and set out:

- a number of prohibitions on the application of organic manure and manufactured fertiliser to agricultural land;
- a number of other requirements for applying manure and fertiliser;
- a prohibition on storing manure in some circumstances, and other requirements for its storage apply where the prohibition does not;
- prohibitions and requirements for managing livestock and soil.
- the EA will enforce the regulations and it is an offence to fail to comply with the requirements. Civil penalties can be imposed and there is a defence of due diligence.

Joint inquiry into the impact of air pollution on public health

Lexis®PSL Environment

On 15 March 2018 the [final report](#) on 'Improving air quality' was published following the joint inquiry by four select committees into the impact of air pollution on public health. The inquiry was launched in order to scrutinise the government's air quality plan published on 26 July 2017.

The inquiry did not believe that the 2017 air quality plan would deliver improvements 'at a pace and scale proportionate to the size of the challenge'.

In particular, the report concluded that the plan's messaging on the issue of adopting clean air zones (CAZs) as a measure to reduce air pollution is unclear and hampers councils' ability to tackle the issue as quickly as possible.

Evidence heard by the inquiry raised concerns that the plan contained unclear messaging, insufficient detail on the operation and local impact of key proposed measures, and inadequate support for local authorities to assess and implement appropriate measures.

Criticisms were also made regarding the air quality monitoring data and modelling used to inform the plan. The government's wider approach to air quality was also criticised within the report.

To help local authorities take action to mitigate pollution exceedances as quickly as possible, the report suggests a revised approach to CAZs. The report also suggests that the government extends further technical and financial support to the 45 local authorities who continue to suffer from illegal levels of pollution in their areas.

The inquiry conclusions made a number of wider recommendations with respect to air quality policy generally, including a call for government to work with local authorities to expand local air quality monitoring and ensure that the data collected locally effectively informs policy action, an urgent national information campaign providing the public with information about the risks of air pollution and a new Clean Air Act to set national air pollution standards and independent enforcement mechanisms post-Brexit.

During the course of the inquiry ClientEarth launched fresh judicial review proceedings challenging the legality of the government's plans. In February 2018, the High Court ruled that the revised plans were once again inadequate. In particular, they lacked sufficient action with respect to Wales, as well as 45 local authority areas in England which continue to suffer from illegal levels of air pollution. The court has ordered that the government publish a supplementary air quality plan to address the identified insufficiencies by 5 October 2018.

For more information, see News Analysis: [Cleaning the air.](#)

Mitigation measures not relevant at the screening stage of Habitats Directive appropriate assessment process

Practical Law Environment

People Over Wind (an environmental non-governmental organisation (NGO)) and Peter Sweetman brought proceedings (the main proceedings) against Coillte Teoranta (a forestry company owned by the Irish state) relating to the works necessary to lay a cable connecting a wind farm to the electricity grid. The applicants argued that the

works would result in pollution (such as silt and sediment) of two river Special Areas of Conservation (SACs) that are habitats of the Nore pearl mussel, which is listed in Annex II to the Habitats Directive (*Council Directive 92/43/EEC*) as a protected species.

Based on a screening report prepared for Coillte, the programme manager recommended that an appropriate assessment was not needed as the works would not have a significant effect on the SACs. This conclusion was based on the distance between the grid connection works and the SACs and the fact that protective measures had been built into the design of the proposed works. Coillte adopted this recommendation and, as the appropriate authority under the Irish Habitats Regulations 2011, decided that an appropriate assessment was not required. The Irish High Court requested a preliminary ruling by the Court of Justice (ECJ) on whether, or in what circumstances, mitigation measures can be considered when carrying out appropriate assessment screening under the Habitats Directive.

On 12 April 2018, the ECJ decided that Article 6(3) of the Habitats Directive should be interpreted to mean that mitigation measures should not be considered at the screening stage when determining whether it was necessary to carry out an appropriate assessment of the impact of a proposed plan or project on a protected site. (*People Over Wind and another v Coillte Teoranta* (Case C-323/17) EU:C:2018:244.)

The ECJ has caused a bit of a stir by deciding that mitigation measures should not be considered at the screening stage when determining if it is necessary to carry out an appropriate assessment. Although the ruling applies the ECJ's earlier judgment in the Orleans case, other earlier UK cases had established that mitigation measures could be taken into account at the screening stage of development proposals.

For more information, see [Legal update, Mitigation measures not relevant at the screening stage of Habitats Directive appropriate assessment process \(ECJ\)](#).

UKELA Andrew Lees essay prize 2018

The right to a healthy environment is a fundamental human right



Samuel March, Student at the University of Law and 2018 Prize Winner

Introduction

As the temperature rises, those who are concerned about the environment search to convince the unconcerned of the gravity of the situation. One approach has been to draw on the success enjoyed by the human rights movement which, following the Nuremberg trials, became arguably the dominant cultural paradigm of the late 20th and early 21st centuries. Hence the claim that 'the right to a healthy environment is a fundamental human right'. The claim capitalises on the urgency, unconditional normative value and immediate applicability¹ afforded to human rights. Of course, for those who support both human rights and sustainability, the strategy is attractive. But is it sensible? We have to ask what a 'fundamental' right to a healthy environment really means. Are we ready to equate reckless consumption to a crime against humanity? Is it possible to enforce the universal duties required to turn the tide on climate change? Is a permissive and individualist 'rights' agenda the correct structure in which to formulate a communal duty to protect the planet? Is there anything 'human' about the right to a healthy environment? Using fundamental human rights to promote an austere environmental policy would require impossible trade-offs between existing freedoms and novel duties. However, the nexus between welfare rights and climate action holds potential for a complementary and progressive agenda.

'Fundamental'

Human rights are generally considered to fall into two groups: liberty rights and welfare rights. Liberty rights, such as the right to life are 'universal, and claim that they can be justified without reference to Covenants or institutions.'² Welfare rights on the other hand, such as the right to food tend to be rights to goods or services.³ While many such rights are identified as 'human rights' they do not share the universality of liberty rights. It is impossible to tell who violates the right to a good or service unless a specific duty bearer has been designated. Welfare rights tend to be ratified by treaties or institutions, whereas fundamental liberties ascribe their authority to unalienable and unalterable truths. If the proposed human right to a healthy environment is to be a 'fundamental' one, it follows that it must be a liberty right.

'Rights', 'duties' and 'crimes'

The finality of liberty rights should not be underestimated. An emphatic fundamentalist approach to human rights is adopted by McBride; who argues that 'if someone has a human right not to be treated in a certain way, then it would always be wrong to treat them in that way, no matter how beneficial the consequences of treating them in that way will be.'⁴ His own list includes only eight such crimes:

- 1 *Executing someone else;*
- 2 *torturing someone else;*
- 3 *having sex with someone without their consent;*
- 4 *intentionally sterilising someone without their consent;*
- 5 *experimenting on someone without their consent;*
- 6 *depriving someone of their liberty for an indefinite period;*
- 7 *intentionally destroying or getting in the way of someone's friendship with another;*
- 8 *treating someone with a contempt that is not based on an honest assessment of that person's character.*⁵

Fundamental human rights to freedom from these atrocities are ensured because each crime against humanity corresponds directly to a universal duty not to commit it. The claim of a fundamental freedom from an unhealthy environment fails to identify what behaviour it outlaws or what exact crime it proposes to protect us from. The current climate crisis can rarely be attributed to atrocities, on the contrary it is created largely by emissions from superficially innocuous consumption. Figure 1 shows the reduction in emissions that can be achieved by avoiding carbon-intensive actions. If we say that the fundamental right to a healthy environment demands a universal duty to emit less than 2.1 tCO₂-eq. per capita (as required to ensure a healthy environment within 2°C of pre-industrial levels) are we ready to rule that carbon emissions above that level constitute 'crimes against humanity'? And, if so, are we all criminals?

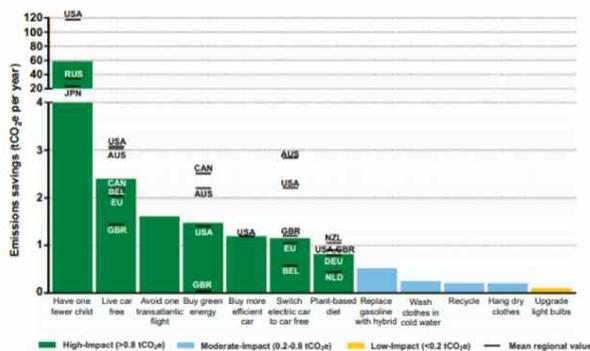


Figure 1: A comparison of the emissions reductions from various individual actions⁶

A legal duty to have fewer children and/or live car free and/or avoid transatlantic flights, could see individuals directly deprived of their rights to family, possessions and freedom to travel. This may sound appealing to the climate-conscious ascetic or eco-authoritarian; but a normative and fundamental approach to a healthy environment as a liberty right appears politically impossible in light of current unwillingness to comply with the kinds of responsibilities required to avoid dangerous climate change⁷.

Dispensing with democracy?

Faced with this political impossibility Zellentin suggests there are 'good reasons to doubt whether democracy – as currently understood – is the right institutional setting for bringing about just climate policies.'⁸ The voices of the developing world, as well as those of the young, or of future generations are underrepresented in the elections of the handful of countries with the power to instigate meaningful change. Democracy struggles to achieve justice where first, the actions of the individuals of a nation have international consequences; second, where cost of current behaviour is met in an uncertain future; and third, where dangers and benefits are hard to foresee⁹.

Of course the difficulties faced by change-makers in democratic societies are not faced everywhere. Since Trump's ascendance to the US presidency, the isolationist stance of his administration and the US' withdrawal from the Paris Agreement have created an opportunity for a new player to emerge. Headlines were made at the World Economic Forum in 2017 as China asserted its new leading role in global affairs, particularly on climate issues. China, once infamous for its reliance on coal, is now 'at the centre of a global energy transformation.'¹⁰ The world's most populous nation has been hailed the 'undisputed renewable growth leader.'¹¹ Furthermore the Asian giant's infamous 'one child policy' was, even in 2007, credited with avoiding 300 million births and averting 1.3 billion tonnes of CO₂ emissions in 2005¹². To put this in context the United States, China, Russia, India and Japan were the only countries in the world emitting more 1.3 billion tonnes a year at the time. If freedom from an unhealthy environment is to be considered a

fundamental human right, then Xi Jinping, 'the president of the world's largest authoritarian state'¹³ would be set to emerge as its principal proponent. A fine irony given heavy criticism of his regime by both Human Rights Watch and Amnesty International for its 'broad and sustained offensive on human rights'¹⁴ and lack of safeguards to protect the right to privacy, freedom of expression, freedom from arbitrary detention and other human rights.¹⁵ China, with its swift energy transition and one child policy, gives some idea of the kind of regime that would have the power to enforce a fundamental duty to protect the environment, but at what cost to established human rights?

Aspirational approaches: all bark and no rights

The alternative to a fundamental, universal and potentially authoritarian approach to imposing a healthy environment is to adopt an aspirational view of human rights. This type of reading is commonly encountered in attempts to extend the cultural prominence afforded to human rights issues to emerging social causes. With an aspirational approach it is easy to champion a cause, to imbue it superficially with the gravity and liberal values of human rights discourse without the political impracticalities of attempting to assign the relevant duties or the criminalisation of contrary behaviours. But this kind of vague, aspirational approach has led to emerging scepticism, allegations of 'rights inflation'¹⁶ and perceived reluctance to acknowledge the necessary 'trade-offs'¹⁷ between rights and duties required to make them meaningful. Rights are presented as entitlements that one party holds against another. This leads to a culture of blame, victim identification¹⁸, ego-centrism and permissiveness.¹⁹ Selfish assertions of what the individual is owed, or what they are allowed to do, are not conducive to the communal commitment to duty, benevolence and sacrifice needed to cut consumption to sustainable levels. Adopting an aspirational approach would both fail to make environmental duties enforceable and, in presenting this new human right as unenforceable, detract from the credibility of human rights more generally. Both human rights and climate action deserve to be taken seriously, the aspirational approach does justice to neither.

Nothing 'human' about it...

The problems with the words 'fundamental' and 'rights' in this context are complex, the problem with the word 'human' is comparatively straightforward: environmental discourse would do well to distance itself from the hubris and entitlement of drawing authority from a human-centric paradigm. Human rights are of vital importance to all of us, but to assert that there's anything specifically human about the right to a healthy environment shows a total disregard of our duties to ensure that millions of other species

are not deprived of their environment. The language of 'human' rights is not suitable for the climate and environment agendas.

A healthy environment is a pre-requisite for welfare rights

Aspirational approaches appear too light handed and fundamental approaches too heavy. Welfare rights, however, do offer some scope to bridge environmentalism and human rights issues to the benefit of both movements. ICESCR, Article 11 establishes a right to be free from hunger²⁰, so with climate change threatening to put close to 50 million more people at risk of hunger by 2020, and an additional 132 million people by 2050,²¹ it's hard to see how this right can be upheld without a healthy environment. ICESCR, Article 12 recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'²² It is also hard to see how this right can be guaranteed as increasing floods and droughts lead to more cases of diarrhoea and cholera, with 150,000 people currently estimated to die each year from diarrhoea, malaria, and malnutrition caused by climate change.²³ While the requirement for universal duties mean the right to a healthy environment itself should not be reduced to a welfare right, environmental issues can nevertheless be used to justify affirmative action in delivering established welfare rights.

Welfare rights draw justification from covenants, treaties and institutions rather than fundamental principles; they also tend to place duties on states, institutions and organisations rather than individuals.²⁴ Whilst this may make them ideologically underwhelming in contrast to universal liberty rights, it nevertheless puts the corresponding duties into the hands of institutions that, practically, have the ability to bring about policy change and generate real impact. By acknowledging the nexus between the climate crisis and important welfare rights, states and international organisations can address both issues simultaneously.

There is no 'fundamental' 'human' 'right' to a healthy environment

Given that both climate action and fundamental human rights are flagstones of the progressive agenda, the claim that 'the right to a healthy environment is a fundamental human right' is seductive. However, upon further examination it has been shown that, as far as environmental issues are concerned, the words 'fundamental' 'human' and 'right' are each problematic in their own way. Firstly, 'fundamental' human rights demand a universal duty that individuals do not commit crimes against humanity, so until we are ready to equate individual overconsumption to atrocity, then claims that the right to a healthy environment is 'fundamental' will lack justification. Secondly the notion that the right to

a healthy environment is specifically 'human' is demonstrative of the disregard for the world around us that has led us into the present crisis. Thirdly a focus on 'rights' in the climate crisis will only encourage people to identify as victims and attribute blame rather than assume responsibility and take action. If the utilitarian necessities of climate action and the permissive nature of liberty rights make awkward bedfellows of these progressive ideals, there is nevertheless some scope to reconcile human rights and environmental dialogues by recognising a healthy environment as a vital precursor to delivering welfare rights. Most importantly though, every possible step must be taken to encourage a democratic recognition of a fundamental human duty to maintain a healthy environment. Failure to assume duties in a democratic manner will lead either to environmental disaster and failure to ensure welfare rights or will see a rise in authoritarian and undemocratic climate action measures that will put the climate agenda on a collision course with fundamental human rights.

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The mixed energy economy

Re-Energising Northern Ireland? The Impact of Brexit on Ireland's All-Island Energy Market



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At a glance

- Although it is part of the UK, Northern Ireland operates an integrated Single Electricity Market with its immediate neighbour, the Republic of Ireland.
- Northern Ireland is on course to leave the EU as a consequence of Brexit, while the Republic of Ireland will remain an EU Member State.
- In spite of numerous commentaries on Brexit, analysts have tended to overlook these important circumstances, and the impact that Brexit will have on the all-island arrangements.
- This article examines this problem, and outlines solutions to Brexit's potential negative impact.

I have examined previously in these pages Northern Ireland's capacity to innovate in the area of climate and energy decarbonisation through its substantial devolved powers,¹ and the way in which these sorts of powers were badly misapplied to Northern Ireland's Renewable Heat Incentive (RHI) scheme, precipitating the collapse of the devolved government.²

Here, I turn to Northern Ireland once again, this time to address an important Brexit-related issue that has been all but ignored in mainstream Brexit coverage, and in most energy economy analysis; that is, the Single Electricity Market, or 'SEM', that operates across the island of Ireland.

This bespoke energy market spans Northern Ireland – a UK jurisdiction on course to leave the EU under the terms of Brexit – and the Republic of Ireland, an EU Member State that will remain within the EU after Brexit is complete. The UK's departure from the EU poses uncertainties and challenges for this complicated arrangement, and as such it merits careful attention.

The SEM Arrangement

The Northern Ireland Act 1998 (NIA 1998), as amended, has been the headline legislation governing contemporary devolution in Northern Ireland since its implementation in 1998. The expression 'contemporary' devolution is used here because

devolution has played a prominent role in Northern Irish governance since Northern Ireland's creation in 1921. 'For fifty years,' Burrows notes, 'from 1920 to 1972, the system of government in Northern Ireland was devolved'.³

Devolution has been suspended and reinstated several times since 1998 due to the politically fragile nature of the Northern Irish peace process.⁴ The Northern Ireland Assembly term ending in 2011 had been the first full term to run to completion, until the Democratic Unionist Party's alleged extreme mismanagement of RHI subsidies precipitated the devolved government's collapse again in early 2017 (it remains in this condition at the time of writing).⁵

It was during a period of 'Direct Rule'⁶ after a collapse of the devolved institutions, while Peter Hain was acting Secretary of State for Northern Ireland,⁷ that the Hain administration cultivated a crucial energy partnership with the Republic of Ireland and both jurisdictions launched the SEM (commencing November 2007). A bilateral north/south legal framework provides for the arrangement on the island,⁸ supported by a *Memorandum of Understanding* between the UK Government and the Government of Ireland.⁹

The SEM created a single all-island electricity market by drawing together the Northern and Southern electricity markets, with most electricity on the island to be bought and sold through a gross mandatory pool. The SEM's 'key design features' have been summarised as follows:

- the pool arrangements where all generators receive and all supplier units pay the same single system marginal price (SMP);
- a system of collection and distribution of payments for capacity based on fixed amounts determined annually; and
- the rules of the market are set out in the SEM Trading and Settlement Code.¹⁰

A Single Electricity Market Operator (SEMO) oversees the market, and this is regulated by the SEM

Committee, a joint committee comprised of Northern and Southern regulators.

Since the restoration of devolution following Direct Rule under the Hain administration, the SEM has been operated jointly by Northern Ireland's devolved administration and the Republic of Ireland.¹¹ Generally speaking, the SEM has been highly successful; it has been noted that the 'benefits of an all-island market' of this nature 'include promoting competition, improving security of supply, reducing energy costs and making efficiency benefits available to all consumers.'¹²

It is very much the case therefore that certain key aspects of Ireland's energy economy must be viewed through an 'all-island' lens. Whether Brexit will serve to distort this lens, fracture it, or leave it entirely intact is an important question that ought to be asked.

I-SEM and the EU

The SEM has been influenced by the EU. Most particularly, at present it is subject to an EU objective to incorporate Ireland's all-island market into the EU's Target Model.¹³ The Target Model has arisen from the EU's Third Energy Package, which is designed to develop a single EU gas and electricity market, with the Target Model focusing on achieving electricity market integration. In Ireland the process of integration between the all-island market and the European Target Model is known as the Integrated Single Electricity Market (I-SEM) project.¹⁴ It is clear that the European Target Model threatens to continue pulling the Republic of Ireland in one direction (towards greater EU integration) just as Brexit threatens to pull Northern Ireland in a different direction (out of the EU), tugging at the seams of the SEM in opposite directions.

In weighing up the potential impact of Brexit, experts have pointed out that it is possible for the UK to accept the application of EU law in Northern Ireland in relation to electricity, rendering Northern Ireland a distinct zone within the UK that would remain subject to EU law in this area and thus be in regulatory harmony with the south of Ireland.¹⁵ Here, 'one part of the [UK] would be subject to EU legislation, while the rest would not.'¹⁶ Quite apart from other problems with this option (space precludes elaboration), if Brexit positions the citizens of Northern Ireland squarely outside of the EU it is undemocratic to make the jurisdiction subject to EU legislation in this way, because the Northern Irish population would lack a democratic facility to influence that legislation. This option must be set aside.

It has also been posited that the UK might opt into the European Economic Area (EEA) model,¹⁷ where participating states comply with the EU's Third Energy Package and associated law, meaning that the SEM could remain harmonious on both sides of the Irish

border through this channel. Surely, however, this is imaginary thinking: EEA members must subscribe to the EU's 'four freedoms',¹⁸ and UK Government has set its face against this sort of policy, notably the 'free movement of persons'.

At any rate, in principle Brexit means that even though one overall electricity market is at issue, the Republic of Ireland as an EU Member State will be compelled to align with the EU Target Model and associated EU requirements, whereas Northern Ireland, as part of a post-Brexit UK, would be free in principle not to. As noted, this is merely the case 'in principle', for the current market cannot continue under such circumstances, and retention of a healthily functioning and coherent SEM is in both jurisdictions' interests at present. In practice, then, in the post-Brexit period a strong degree of harmonised common rules will be required to permit the SEM to continue running, and these should be achievable through diplomacy, Brexit notwithstanding.

Taking the energy sector generally, it is the case that any detailed legalistic analysis of Brexit's likely impact in this area will no doubt be a complex affair.¹⁹ More narrowly, participation in the EU's Internal Energy Market is legally onerous, with the Northern Ireland Affairs Committee noting that it 'requires ongoing alignment with the EU rules and regulations which govern it, including the Industrial Emissions Directive, restrictions on state aid, and the EU Emissions Trading Scheme.'²⁰ An IIEA policy brief²¹ has also highlighted that there may be issues around citizens' data rights and protections in the context of SEM cross-border energy data exchange.²² Nonetheless, such technicalities are far from insurmountable, and in the author's view the key to achieving a fruitful outcome lies in recognising that it is in all parties' interests to adequately preserve the working of the SEM.

Key Republic of Ireland and Northern Irish actors are agreed on the importance of its post-Brexit preservation, and the UK Government and the European Commission also support the arrangement. Given all this, it would be a damning indictment of UK-EU diplomacy if decision makers could not come to a suitable agreement.

Solutions

Bearing in mind that the EU's Internal Energy Market is separate to the Single European Market, the UK as a whole may endeavour to remain part of the EU I-SEM model for broader strategic purposes. This is possible, and is being calculated over the course of the Brexit negotiations. It would mean that no significant dissonance should arise to trouble the SEM. If the UK does not pursue this course, an ideal bespoke SEM-Brexit agreement could be fashioned along the following lines:

- A The UK could compromise by agreeing to grandfather an adequate level of EU rules into its system such that the SEM could function in a largely harmonised way north and south of the Irish border; this would minimise disruption to the Republic's adherence to the Target Model.
- B The EU could compromise by agreeing to an arrangement that respects the UK's general Brexit parameters in the point (A) setting; for example, the UK Government has been clear that in general it will not support the direct jurisdiction of the Court of Justice of the EU (CJEU) within its borders, meaning that alternative or bespoke resolution procedures/bodies should be appointed to deal with SEM disputes if or as required where otherwise the CJEU (or an equivalent EU-specific institution) might have been appealed to.
- C To formalise the (A) and (B) arrangements, the UK Government should seek a *special status* or *derogation* for the components of the energy sector relevant to the SEM in Northern Ireland, and the EU should facilitate this.
- D The status at (C) and the framework at (A)–(B) should be facilitated by the UK/EU under the principle of *mutual interest*, that is, it is in the interest of both Northern Ireland and the Republic of Ireland, and hence the UK and EU, to secure a balanced arrangement.²³

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Fracking, nuclear, and renewables: Is the Scottish Government competent to pursue these policies?



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At a glance

- In October 2017, the Scottish Government issued an 'effective' ban on hydraulic fracturing in the country.
- The energy firms Ineos and Research CSG announced they would challenge the Scottish Government's decision to block any future fracking.
- Although under the devolution acts most of the energy competences are reserved with the UK government, Scotland has been exercising control over its fuel mix through its competences in environment, climate policy, and planning.
- Apart from effectively banning fracking, the Scottish Government has also made clear its opposition to any new nuclear energy power stations in Scotland.
- These decisions are in line with the Scottish Government's commitments under the Climate Change (Scotland) Act 2009, and its political pledges on electricity and heating from renewable sources.
- Some of the questions that remain unanswered are: how do these ambitions fit into the reality of today's energy mix? Is the Scottish Government overstepping its legal mandate by exercising control over the country's energy sector?

This article examines the Scottish Government's ban on hydraulic fracturing and new nuclear projects and its pro-renewable energy policies in the context of the devolved competences in the field of energy.

Does Scotland have competence on energy decision-making?

Under the Scotland Acts 1998 and, more recently, 2016, competence to formulate policy on most aspects of energy supply is reserved to the Westminster. These include policies on supplies of electricity, oil and gas, nuclear energy, and on energy conservation.¹

However, a big role in executing energy-related decision-making comes from the devolved powers in planning, climate policy, and environment. These allow the Scottish Government to legislate, *inter alia*, on decarbonisation targets through the Climate Change (Scotland) Act 2009, and to exercise broad powers with regards to authorisation of energy projects on-land and up to 12 nautical miles off the

coast. The Scotland Act 2016 devolved further energy-related powers to Scotland, such as onshore petroleum licensing and fuel poverty initiatives.²

The energy outlooks of Scotland and the UK have clashed repeatedly in the past decade. While the UK Government is generally supportive of shale gas development and new nuclear power plants, the Scottish Government opposes them. Scotland has consistently backed onshore and offshore wind, amidst the withdrawal of support for the former in England and a UK-wide roll-back of subsidies.³ These clashes intensified leading up to the 2014 independence referendum,⁴ but are still relevant today as the Scottish Government's competence to pursue its energy policy goals remains open to question.

Scotland and the 'ban' on fracking

Hydraulic fracturing or 'fracking' refers to the method used for the extraction of shale gas by injecting water at high pressure.⁵ Although it has been used widely around the world, particularly in the US in recent years, there are significant concerns over the effects of using fracking with regards to water pollution, triggering seismic activities, and diverting the use of land and water from other users, e.g. agriculture.⁶

The UK Government has been supportive of shale gas development, stressing the rising reliance on gas imports and rigorous safety and environmental regulation.⁷ The 2015 Shale Gas and Oil Policy Statement argues there is 'a national need to explore and develop our shale gas and oil resources in a safe, sustainable and timely way'.⁸

The Scottish Government, in turn, took an opposing position; the moratorium on unconventional oil and gas development in Scotland has been in place since January 2015. It further announced the need for comprehensive evidence gathering and, in 2017, carried out a four-month consultation, 'Talking 'Fracking', showing an overwhelming support for the ban from the public.⁹ In October 2017, the Scottish Government announced an 'effective ban' on hydraulic fracturing in the country,¹⁰ followed by a Scottish Parliament vote overwhelmingly supporting this position.¹¹ The Scottish Energy Strategy, published just a few months later, states that this 'preferred policy position' will be subject to a Strategic Environmental Assessment and, once finalised, 'will also be reflected

in the next iteration of the National Planning Framework'.¹²

Earlier this year, the energy firms Ineos and Research CSG announced they would challenge the Scottish Government's decision to block any future fracking. Ineos holds two licenses for shale gas development in Scotland and argues that it is 'unlawful for Scottish Ministers to use their powers under planning legislation to introduce a ban on (fracking) in Scotland'.¹³ They emphasise the potential lack of competency on the part of the Scottish Government and the missed opportunities 'on the numerous economic and employment benefits'.¹⁴

Although the arguments can be made for both sides, this judicial review will be of significant importance for assessing Scotland's competence in energy decision-making. While strong language on the 'fracking ban' seemed unequivocal back in October 2017, following the judicial challenge, the Government has clarified that it had merely 'announced a preferred position' and 'had not yet adopted a decision'.¹⁵

Nuclear energy in Scotland

A similar approach was taken by the Scottish Government with regards to the new nuclear power stations in Scotland. Currently, the two remaining nuclear power stations in Scotland, Hunterston B and Torness, are scheduled for decommissioning in 2023 and 2030 respectively.¹⁶ The UK Government expressed support for new nuclear energy developments in England, emphasising its importance as a low-carbon baseload electricity source. The State support for new nuclear projects, such as the Hinkley Point C, include the Government Debt Guarantee Scheme and the Contracts for Difference.¹⁷ Notably, the strike price defined in the CfD for Hinkley Point is £92.5/MWh,¹⁸ compared to about £75 for offshore wind in the second CfD auction.¹⁹

The Scottish Government does not object to life extensions for the existing plants, but opposes the construction of new nuclear power stations.²⁰ The main arguments for the opposition relate to the lack of sustainable nuclear waste storage solutions²¹ and the commitment to achieve renewable electricity production equivalent to 100% of Scotland's gross electricity consumption from renewable sources by 2020.²² This opposition to new nuclear was formulated in the 2008 Energy Strategy, and reaffirmed in the updated 2017 one.²³ Although, as discussed above, nuclear energy is a reserved matter, under the 1989 Electricity Act, Scotland can refuse applications for new nuclear power developments by using its powers to licence large generating stations.²⁴ The Scottish Government said it would consider the applications and it has not yet used its licensing power to refuse new nuclear plants, but any attempt to do so could raise a similar challenge to that currently being

considered in the fracking case of an administrative power being used inappropriately to advance a policy which the Scottish Government may not have been competent to adopt.

Renewable future for Scotland – ambitious but achievable?

Climate considerations and support for renewables are frequently used as reasons to abandon nuclear and shale gas. Although, in most parts the Climate Change (Scotland) Act 2010 is consistent with the UK-wide Climate Change Act 2008, Scotland sets a more ambitious interim decarbonisation target – 42% net greenhouse gas emissions reduction by 2020, compared to 1990.²⁵ Scotland has already exceeded its 2020 interim target,²⁶ but reaching the 2050 80% emissions reduction target will present a much more ambitious challenge both in practical terms and with regard to the Scottish Government's competence relating to renewable energy policy.

Experts argue it will require full decarbonisation of electricity production and accelerated use of carbon sink measures.²⁷ The Scottish Government set a further political commitment to generate 100% of its electricity and at least 11% of its heating from renewable sources by 2020.²⁸ In the context of Scotland's fuel mix today, these are rather ambitious targets to achieve. Although the share of renewables is the largest single source and steadily growing, it accounted for only 42% of electricity production in 2015, with over a half still delivered by nuclear and fossil fuels (35% and 22% respectively).²⁹ Gas constituted an 80% share of the fuel sources for domestic heating, while renewables accounted for just under 5% in 2016.³⁰ With over half of the UK's gas being imported, either via pipelines from Norway and the EU, or by tankers, it is clear that more ambitious efforts are required for significant change in the heating sources and demand.³¹ The import dependence and the current high carbon intensity of heating may thus weaken the arguments for banning fracking. Nuclear energy, while having its drawbacks, has proven to be a reliable low-carbon baseload electricity source not just in Scotland. For example, Sweden, generating 40% of its electricity from nuclear sources, aims to achieve zero net greenhouse emissions by 2045 through its Climate Act and policy adopted in early 2018.³² In the context of climate change, cautious voices arguing for reconsideration of the firm opposition to nuclear and shale gas development sound reasonable. For example, it has been argued that the outright opposition to any new nuclear with the sole focus to replace the need in demand with wind farms 'is not viable'.³³

In addition to concerns over the practicability of energy decarbonisation, questions have also been raised over whether Scotland's powers are sufficient to support its strong backing for renewable energy.³⁴ The

Scotland Act 2016 enhanced Scotland's competences relating to renewable energy only marginally,³⁵ whilst it has lost a significant policy tool for supporting renewables by the closure of the Renewables Obligation support scheme, control over whose implementation in Scotland lay with the Scottish Government.³⁶ By contrast, the UK Government has control over the financing and design of the Contracts for Difference scheme, which succeeds it, subject only to a requirement to consult the Scottish Government on its proposals.³⁷ It also retains control over the regulation of the electricity and gas markets. Considerations of financing and network and market access are central to attracting investment in renewable energy developments.

Scotland is, no doubt, taking on an ambitious challenge in its energy strategy. However, it is not clear if the powers accorded to it under the devolution settlement will be enough to grant it full control over its energy sector. As demonstrated, abandoning nuclear and shale gas alone, might not provide a viable solution. With heating still being gas-dependent and the subsidies for renewables still reserved with Westminster, boosting wind energy in order to close the gap might provide a bigger challenge for Scotland than defending its planning permission powers. Domestic heating, are of the fuel source of Scotland's Scottish government fit into the future, Scotland has been exercising

Dr Daria Shapovalova, Lecturer in Law at the University of Aberdeen. Daria is working on the effectiveness of international environmental regimes and energy governance. In this context, she published on Arctic energy governance and the interplay between air pollution and petroleum development. The author is grateful to Dr Olivia Woolley and Dr Gloria Alvarez for their comments and suggestions. All errors are my own.

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Book review

Shale Gas, the Environment and Energy Security by Ruthven Fleming

Tanya Jones

'This book has been written to prove a point – or rather two points', writes Ruthven Fleming as his opening lines. The first point, repeated throughout the text, is that 'cautious but permissive' regulation is the best way for European countries to address shale gas extraction. The second is that a 'new methodology', which Dr Fleming refers to as the 'trias', can provide a regulatory template for this and other emerging technologies.

The core argument of the book is that shale gas extraction brings potential environmental threats and energy security benefits, that prudent regulation of the industry has to operate between these 'two poles' of environmental protection and energy security and that these are in opposition but must both, as constitutional and quasi-constitutional (EU-wide) objectives, be reconciled in any relevant legislation.

Dr Fleming follows the industry assertion that shale gas exploitation using high volume hydraulic fracturing, better known as fracking, is not in reality a new technology, and he suggests that public concern on the issue is excessive. He does, however, identify four major areas of serious environmental concern: groundwater contamination and well integrity issues; disposal of flowback fluid; land use conflicts and, classed together, climate change and insufficient monitoring. While this range of negative impacts is briefly explored, the conclusions are vague and reassuring, diminishing evidence into 'suspicions' and downplaying the applicability of North American experience to Europe. The climate change implications of shale gas exploitation are especially rapidly dismissed, although he acknowledges the weakness of the 'bridge fuel' argument.

The relevance of shale gas to European energy security is similarly asserted rather than demonstrated. Mention is made of the unlikelihood of European shale gas production being large enough to affect either supply or price, of inevitably high production costs and of the debate about the relevance of energy independence as a concept at all, but these are not allowed to impinge further upon the assumption, central to the rest of the book, that energy security depends upon the facilitation of fracking. The possibility that alternative and renewable forms of energy might exist which would fulfil energy security requirements without posing substantial environmental threats is referred to only in

a footnote, stating that 'smart alternatives are currently increasing in prominence, but they lie beyond the scope of this book'.

Dr Fleming then proceeds, in a useful and comprehensive summary, to deal with the extent to which current European law regulates shale gas extraction. He identifies substantial regulatory gaps and the weakness of the 2014 Communication and Recommendation package, which merely urges Member States to consider appropriate assessments, regulations and baseline studies and pledges to look into the publication of a best practice document. He goes on to examine the policy of three individual Member States: France, with its 'ban by law', Germany, with its 'moratorium by law', both of which are criticised, and the UK. He describes the Conservative government's brief suspension of its otherwise pro-fracking policy, following the Blackpool earth tremors, as a 'political moratorium', commending it as a 'flexible regulatory tool'. In the light of the latest policy announcements, and the experiences of communities opposing fracking in England, this is a generous assessment.

Incidentally, the short section on Northern Ireland contains some inaccuracies, giving the impression that fracking has been prohibited since the Assembly passed a moratorium motion in 2011. In fact, the NI Executive ignored the motion, and the claim by the then Minister, Arlene Foster, that 'no permit has yet been issued' was carefully worded, as at least one of the licences issued that year contained a compulsory work programme specifically requiring the fracturing of two test wells. It was only the failure of the company to meet deadlines within that work programme which brought the licence to an end.

Part Two of the book introduces Dr Fleming's trias methodology, which envisages a cascade down from constitutional objectives, through environmental law principles, to specific rules. Again, there is a significant exclusion, for any assessment of the proposed measures' effect upon fundamental rights 'lies beyond the scope of the present work'. The constitutional objectives identified as relevant to shale gas regulation are environmental protection and energy security, the first being easily demonstrated as an essential aim of both the EU and the two national constitutions considered, those of France and Germany. Energy security is not such a clear-cut

priority, and Dr Fleming is forced to argue that it 'can be considered as a public service' or as an essential component of economic and social development. Once asserted, however, it is treated as being of 'co-equal ranking' with environmental protection.

The next stage is legal principles, which are analysed with suggestions made as to how they could be translated into regulatory measures. The precautionary principle is sharply distinguished from the preventative, and given a broad interpretation, under which 'every measure can be counted as a precautionary measure, as long as it is a measure that is taken out of precaution.' Polluter pays, sustainable development, public participation and rectification at source are also considered, with regulatory proposals including the obligatory use of 'eco-friendly fracturing fluids', strict liability for accidental pollution, a participatory decision-making process and compulsory environmental impact assessments. While all these are positive suggestions, they would depend for their effectiveness upon technical feasibility, good governance, vigorous enforcement, a culture of genuine consultation and an assurance that the initial licence-holding company would be in accountable existence at the end of the process. Sadly, these are not assumptions that can be confidently made across Europe, even before the uncertainties of Brexit.

Finally, an analogy with carbon capture and sequestration regulation is suggested, with possible further measures including the incentivisation of offshore shale gas extraction, quantitative restrictions on the volume of gas extracted and provisions for administrative areas to opt out of undesired development. These are tentative, not least because CCS has not thus far been economically practicable, and therefore is of limited comparative value.

This is an engagingly-written and very interesting book, with a broad scope and a truly impressive bibliography, bringing together concepts from constitutional, environmental and energy law in a thought-provoking synthesis. As a basis for practical policy and law-making, however, it raises more questions than it gives answers. The core argument depends upon key assumptions: that global experiences of seriously negative fracking impacts are inapplicable to Europe, that shale gas production is essential to energy security, that energy security itself is a legally-binding objective to the same extent as environmental protection, that tangible and particular physical effects are best tackled beginning with abstract principles and that the mild restrictions proposed here would be sufficient and sufficiently well-enforced to be effective.

More significant yet are the considerations excluded from the book: the rapid development of clean energy technologies, the human rights implications of an

industry whose primary negative impacts have been upon health, and the duty of responsible governments to protect economic stability for other sectors, community cohesion and the wellbeing of present and future generations. Most importantly of all, climate change can no longer be considered as a subset of environmental protection, a minor weight on a balanced scale. Europe's responsibilities under the Paris Agreement require an urgent and overwhelming transition to truly sustainable energy, with no time to linger on what is almost certainly a bridge to nowhere.

The eBook is priced from £22 from Google Play, ebooks.com and other eBook vendors, while in print the book can be ordered from the Edward Elgar Publishing website.

Tanya Jones is a former solicitor, was legal co-ordinator for the Fermanagh Fracking Awareness Network and is currently deputy leader of the Green Party in Northern Ireland.

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](#).

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The Non-Compliance Mechanism under the Aarhus Convention as ‘soft’ enforcement of International Environmental Law: not so soft after all!

[Alistair McGlone](#), who has been a UKELA member on and off for decades, has just written an article with [Elena Fasoli](#) of Trento University, a relatively recent UKELA member, on the role of the Compliance Committee of the Aarhus Convention in enforcing international environmental law. The article discusses the Committee’s role in enforcing obligations arising under that Convention, and explains that the findings may, in appropriate circumstances, have legal effect particularly in the light of Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties. The article also looks at the procedure of Committee hearings and compares the Committee’s application of the domestic remedies rule with equivalent human rights procedures.

The authors hope the article makes a useful contribution to the discussion of how international law might be enforced post-Brexit. It demonstrates that the procedures that are still available at the international level are ... not so soft after all! The article is now available found [online](#).

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UKELA Council elections

UKELA Council Elections 2018, Candidates' Manifestos

Simone Davidson, Lexis Nexis

I am an environmental lawyer at LexisPSL and previously worked in private practice at Clyde & Co. My work covers the full spectrum of environmental law issues and I am keen to use this knowledge to help UKELA as a committed Council member.

Working on E-law as acting editor for a year (September 2016- September 2017) whilst Hayley Tam was on maternity leave was a fantastic opportunity for me to get involved with one aspect of UKELA. It also gave me a great insight into the many facets of UKELA's work and showed me what an important time it is for a charity striving to make the law work for a better environment. I would therefore like to keep helping UKELA by using my E-law experience to assist on the editorial board.

Alongside this, I would be more than happy to be involved in supporting Young UKELA activities. I think it is important to keep younger members of our profession engaged, enthused and involved, as ultimately, they will be carrying on UKELA's crucial work.

Nominated by Hayley Tam, Lexis Nexis

Brigid Finlayson

I am a Canadian qualified lawyer (inactive member of the Law Society of Upper Canada), MA Environment, Politics and Globalisation (KCL, 2010) and long-time UK resident. I am currently working as an independent environment and sustainability professional in London.

I have been interested in the work and activities of UKELA for many years and was originally drawn to the wild law group. Last year I attended my first conference and recently have become involved in the Public Health and Environmental Law working group, which I intend to continue to actively support.

Brexit offers an opportunity for UKELA to participate in shaping the UK's future legal landscape in relation to the environment and our relationship to it. I would look forward to the opportunity to contribute to the work of UKELA in the role of trustee. I do not have a unique area of expertise, but rather, consider myself a generalist willing to provide assistance where needed. I understand the nature of the commitment and am able to set aside the time required. Additionally, I suggest that I could be helpful in terms of providing links to both the Canadian Bar Association and IEMA.

Nominated by Dr Veneta Cooney

Matthew Fraser, Landmark Chambers

I am a junior barrister at Landmark Chambers in London, specialising in planning and environmental law. I was called to the Bar in 2013. I became a member of UKELA in 2017 and attended my first annual conference last year in Nottingham.

Although my membership of the association has only been brief so far, I am already very impressed with UKELA's work and seek to become more involved in the association. I have been encouraged to put myself forward by other members of my chambers, who speak highly of their own experiences on the Council.

I have a particular interest in assisting with the organisation of the annual UKELA conference, and with editing the bi-monthly e-law bulletin.

Nominated by James Maurici QC, Landmark Chambers

John Jolliffe, Francis Taylor Building

I have been an active member of UKELA for a decade, and a member of Council for the past 4 years. My responsibilities have included working on E-law and assisting with conference activities. I organised and led the walk through the Attenborough Nature Reserve, a SSSI, before the 2017 conference, and have spoken at events.

I am a barrister at Francis Taylor Building. My environmental law practice includes freshwater ecology, infrastructure, landfill, nuisance (private law and statutory), permitting, waste and other matters. I was part of the counsel team instructed by the Secretary of State for Transport to promote the HS2 railway, which is the largest infrastructure project in Europe. I am a member of the Attorney General's B panel of counsel. My clients include DEFRA, the Environment Agency and the Secretary of State for Communities and Local Government, as well as utility companies, local authorities and individuals.

I am interested in international work and have provided training and advice to Sierra Leonean lawyers – I visited Sierra Leone in 2016 and 2017 and worked with the Environmental Protection Agency, the National Minerals Agency, the Law Officers Department and the Anti-Corruption Commission.

Nominated by Michael Barlow, Burges Salmon

Nina Pindham, No5 Chambers

Taking note of the aim to create a well-balanced and informed Council that can actively contribute to the work of UKELA, I herewith nominate myself for a position on UKELA's Council.

I am a barrister practising at No5 Chambers. In terms of my ability to contribute to a well-balanced Council I would bring a broader perspective, being based outside of London and retaining links to the North American Bar. The Council could be better balanced (with six male barristers but only one female barrister). I would like to help UKELA achieve greater diversity within its membership and posts, particularly in terms of race and ethnic diversity.

In terms of my ability to contribute to an informed Council, I regularly deliver seminars on current legal topics in environmental and planning law, write articles, and contribute to consultations on proposed changes to the law.

Finally, I have previous board-level experience at a UK-based charity, serving as a trustee for IXIA, a public art think-tank. I also have experience with all aspects of UKELA's work, from being a student attendee at events to serving as co-convenor / convenor of the Water Working Party for the past six years. I am thus well placed to actively contribute to the work of UKELA.

Nominated by Stephen Sykes, Sykes Environmental

Ned Westaway, Francis Taylor Building

I am recognised as a leading barrister in environment, planning and agriculture and rural affairs. My work covers a broad range, including water management/flooding, nature conservation, waste, planning and nuisance. I am standing counsel for the Campaign for National Parks, a trustee for the Organic Research Centre and a visiting fellow at UCL.

I wish to serve on UKELA's Council for four more years, having been actively involved since 2014. I co-ordinated the 2017 Conference, acted as PEBA co-ordinator and (with James Burton and Heather Hamilton) maintained a successful programme of Young UKELA events. I want to deepen my commitment to UKELA over what will be an important four years both for UK environmental law, and for my practice in the area. As well as remaining active in decisions, strategies and events, I will help broaden membership, invigorate Working Parties and ensure that UKELA remains a leading actor on Brexit. I am keen to strengthen UKELA's links to food and agricultural: an area that will become more critical with Government's 25 Year Environment Plan and the end of the EU Common Agricultural Policy. I would be honoured to represent UKELA over this period of particular opportunities and challenges.

Nominated by Kirsty Schneeberger, ClientEarth

Jamie Whittle, R&R Urquhart LLP

I would very much like to stand for election for the UKELA Council in 2018. I had the privilege of serving on the Council for 8 years, and greatly value the work of UKELA and its role in promoting environmental law in the UK.

I work in private practice in Scotland on a range of contentious and non-contentious environmental, planning and rural land matters. For the past 10 years I have taught environmental law and renewable energy law part-time at the University of Edinburgh School of Law. I am currently the secretary for UKELA in Scotland. I am chairman of the Roy Dennis Wildlife Foundation, and a director of Wild things! Environmental Education in Action and of the Findhorn, Nairn and Lossie Fisheries Trust.

I am passionate about the protection and restoration of the countryside, wildlife and seas in particular, and am keen to do what I can to support the ongoing work of UKELA at this important time.

Nominated by Kirsty Schneeberger, ClientEarth

Alison York, SEPA

I would welcome the opportunity to become a member of UKELA's Council. I am Head of Legal in SEPA and have over 20 years of experience practising in environmental law and regulation in the public sector in Scotland. I was the first Law Society of Scotland Accredited Environmental Lawyer and I sit on the Law Society of Scotland's Environmental Law Sub-Committee. I have been involved in significant aspects of the development of environmental law in Scotland over the years. Recently I have been particularly involved in development and implementation of the legislation which has provided SEPA with new enforcement tools and in the development of the new Integrated Authorisation Framework legislation.

It is a really exciting time to be involved in environmental law in Scotland, however it is also a very challenging time, as it is for all environmental lawyers across the UK, as we seek to resolve the legal issues arising in relation to Brexit. UKELA is central to helping to resolve those issues.

I believe that if I become a member of the UKELA Council my particular environmental legal background in the Scottish public sector will be valuable to UKELA, particularly at this time.

Nominated by Bridget Marshall, SEPA

UK Environmental Law Association

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The editorial team is looking for quality articles, news and views for the next edition due out in July 2018. If you would like to make a contribution, please email elaw@ukela.org by 16 July 2018.

Letters to the editor will be published, space permitting.

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