



e-law

Better law for the environment

November/December 2018 | Issue 109



The focus of this issue is human health, human rights and the environment.

As Brexit shines a spotlight on environmental principles and the need for comprehensive environmental protections in UK law, now seems an apt time to consider how these principles and protections fit with human health and rights and how a healthy environment will benefit us all in terms of our health and well-being, and could consequently result in economic benefit due to the cost of environmentally-related illness.

Dr Veneta Cooney's article [Sick of hearing about the environment: Why a change in narrative is required](#) sets out the human benefits of a healthy environment in more detail, identifying environmental pollution and the depletion of nature as a social justice issue. It is argued that the psychology of the public needs to change in such a way as to incorporate environmentally-related illness as part of the social justice model for health care provision.

Sonam Gorhan's article [Building the case for a 'Right to a Healthy Environment'](#) articulately explains how human rights have been a valuable tool in the development of environmental rights, but are subject to limiting factors with current rights of action not offering sufficient redress. The article concludes that substantive environmental rights would provide a more robust and comprehensive level of protection. It will remain to be seen, as events unfold, if the opportunity for environmental rights to be enshrined in UK law is seized.

Our final themed article, [70th Anniversary of the Universal Declaration of Human Rights: what gift to bring?](#) highlights an emerging trend towards adoption of legal personality for non-humans and rights for nature with the 2010 Proposal for a Universal Declaration of the Rights of Mother Earth marking a turning point in this respect. We are grateful to Dr Michèle Perrin-Tallatt for this interesting and timely piece.

We are also grateful for Huw Thomas' comprehensive student article, [A critical analysis of extension of enforcement undertakings to the offence of causing or knowingly permitting water pollution](#), which critically analyses and evaluates the extension of enforcement undertakings to the offence of causing or knowingly permitting water pollution.

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Finally, don't miss Victoria Jenkins piece on [Meeting Ecological Needs in the Implementation of the National Development Framework](#) which formed the basis of a presentation at the Policy Forum for Wales Seminar on Priorities for the National Development Framework on 6th November 2018.

This edition marks the end of Jessica Allen and Lewis Hadler's three year tenure as Assistant Editors for e-law. I would like to take the opportunity to thank Jessica and Lewis for their hard work and fantastic contribution to e-law in this period. We are now recruiting for two new Assistant Editors to work alongside Ben Christman who will continue as Senior Editorial Assistant, please see [Student news](#) section and [Adverts](#) section for more information.

Best wishes,

Sophie Wilkinson

Sophie Wilkinson
UKELA e-law Editor

E-law editorial team

Sophie Wilkinson, Editor – Sophie is an environmental law specialist at LexisPSL with 13 years' experience, including 11 years' experience in private practice. She moved to LexisNexis from Shoosmiths LLP where she was a Senior Associate. Prior to this Sophie trained at Browne Jacobson LLP and spent 6 years at Eversheds LLP.

Jessica Allen is currently pursuing the BPTC at City Law School, with a view to qualifying as a domestic and international public law barrister. She graduated with distinction in Law (BCL) at the University of Oxford in 2018, having previously graduated with honours in Law with French and French Law at the University of Nottingham in 2017. Jessica has also served as the Vice President for Academic Activities of ELSA UK (2016-17).

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



It is my very great pleasure to announce that the UKELA Board has elected Kirsty Schneeberger as UKELA's next Chair Elect. Kirsty has a wealth of experience in environmental policy and law. She is currently Head of Grants and Trusts at Client Earth and was previously a Manager in the

Climate Change team at CIFF, leading on the 'Strategic Climate Litigation' and 'Initiative for Climate Action Transparency' grants. Kirsty worked for the Office of the Executive Secretary at the UNFCCC in the build up to COP21, as the lead of the investor engagement programme. She also lead the UN Rio +20 stakeholder engagement process for the Stakeholder Forum and was awarded an MBE for Services to Environmental Conservation in 2010. Although Kirsty does not currently practice, she was called to the Bar in 2015.

Kirsty has been a very active member of UKELA since she was a student, and has been a member of UKELA's Board and Executive Committee for a number of years. Kirsty will work alongside me as Chair Elect until the annual conference in Sheffield next year, when she will assume the position as Chair. This format continues the procedures put in place by past Chair Stephen Sykes to ensure a smooth transition during handover. Kirsty is a highly respected member of the environmental law sector and is a dynamic and determined champion of both the law and the environment. I am delighted to be passing the mantle on to her and look forward to helping support her in taking UKELA from strength to strength.

Regards,

Anne Johnstone

Anne Johnstone
UKELA Chair

UKELA news

UKELA membership renewals 2019

Membership renewal reminders will be going out to all members week beginning 10 December with details on how to pay. If there are any queries, please contact [Elly-Mae Gadsby](#), UKELA Senior Administrator.

Annual Conference – bookings opening soon!

We are almost ready to open bookings for next year's annual conference in Sheffield over the weekend of 28-30 June. Look out for details coming your way shortly. We are pleased to offer Early Bird tickets for those booking promptly, but these will be strictly limited and available for a short time only – so don't miss out, be ready to [book](#) as soon as you can!



UK visit by Chinese delegation of judges

On 15 November 2018, Alison Boyd, UKELA's Operations Director, and Dr Paul Stookes, Working Party & Brexit Advisor, were very pleased to meet an 18-strong delegation of judges from Jinan Municipal Intermediate People's Court, Shandong Province in China, in London during their two-week visit to the UK. The purpose of their visit, organised by the Sino-Bridge International (set up to offer training visits to the UK for Chinese delegations), was to learn more about environmental protection policy and the legal system in the UK. The group was keen to understand the purpose and function of UKELA and our role in raising public awareness of environmental law, as well as hear more about our work in influencing UK environmental law and relevant policies. Alison and Paul gave the delegation a short presentation and then answered questions.

News from the devolved administrations

Wales

Wales working party

The Wales working party has recently carried out a review of its membership, practice and activity in line with the recommendations of the UKELA working party guidance. A report has been sent to members in Wales and all were invited to an 'open meeting' to discuss this on 27 November 2018. Further details can be obtained from Victoria at v.a.jenkins@swansea.ac.uk. Alternatively, if you have any comments or suggestions that you would like to make in writing please use this e-mail address.

The Wales working party has been working hard to provide representation of a Welsh perspective in matters related to Brexit. To this end we held an event on 16 October 2018 on environmental governance and principles in Wales after Brexit. We were keen to elicit views from the wider membership about these important issues.

The following is a flavour of some of the responses to help those unfamiliar with the Welsh perspective.

Environmental governance post Brexit from a Welsh Perspective

Existing Welsh bodies, such as the Future Generations Commissioner (created under the Well-Being of Future Generations (Wales) Act 2015 (Future Generations Act)) will be insufficient to meet the governance gaps created by Brexit. Ultimately, many of the challenges in relation to the governance and the enforcement of environmental law are the same in Wales as elsewhere but the question of resource is important. It may well be better for governments to work together on a UK basis than separately.

More generally it was noted that the challenges we face are as much an issue of resources in the context of austerity as they are change heralded by Brexit. Furthermore, the role of wider bodies such as local authorities and the Welsh government's historic environment service (Cadw) in governance post-Brexit is often underrepresented.

Environmental principles

The Welsh government has provided a commitment to ensure that the current 'core principles' of EU law are maintained in Wales but there is some confusion as to what this means. There is a concern that those suggested for the UK might conflict with those already in legislation in Wales, in particular the 'sustainable development' principle in the Future Generations Act.

There is confusion around the status of the new principles and, again, how this will relate to the 'sustainable development' principle in the Future Generations Act and the principles of sustainable natural resource management in the Environment (Wales) Act 2016 (the latter underlining the work of Natural Resources Wales).

Working party news

Land contamination working party – new co-convenors

We are delighted to welcome two new co-convenors of the land contamination working party. They are Emma Tattersdill of Freeths LLP and Jeff Roberts of Roberts Environmental Ltd. Read more about them below. We must also say a huge thank you to Andrew Wiseman who has stood down as convenor. As many of you will know, Andrew has been the land contamination working party convenor for many years. Andrew joined Historic England as General Counsel & Corporate Secretary in April this year.

Emma Tattersdill is a solicitor and partner within Freeths LLP's specialist planning and environment group. Emma qualified as solicitor in 1998 and joined Freeths in 2013, following periods with Edge Ellison, Eversheds and niche planning and property practice Marrons. Emma's dedicated environmental practice covers the full range of contentious and non-contentious legal services but with a particular focus on land contamination, waste, environmental permitting and nuisances such as noise and odour. Emma is recommended as a leading individual for environmental law in both Legal 500 and the Chambers & Partners Directory. She has also recently taken over from Andrew Wiseman as UKELA's representative on the National Brownfield Forum.

Jeff Roberts set up Roberts Environmental Ltd having previously worked for GVA Grimley Ltd as an Associate Director where he headed up the Environmental Services department for the North of England and Scotland. He has also worked in consultancy for WSP Environmental Ltd in the London market and Waterman Environmental within the North East. Jeff provides a service that identifies the environmental risks and liabilities for investors, banks and developers. In jargon-free terms, he assesses the many complex issues which can arise in assessing environmental land quality. Jeff's work includes all aspects of land quality, due diligence auditing, flood risk, site investigation and remediation project management. Over the years, Jeff has worked as a consultant for many government departments, local authorities, major landowners and FTSE100 companies advising on land contamination issues and remediation strategies. Jeff is a Member of the Institution of Environmental Sciences and a Chartered Environmentalist (CEnv).

Nature conservation working party – wildlife law bursary 2018

The wildlife law course arranged every November under the auspices of UKELA's nature conservation working party makes a little profit due to the generosity of the tutors and Browne Jacobson solicitors. The profit is used to fund an annual bursary to support a post graduate research project addressing wildlife law and this year the working party are delighted to offer the bursary to Jessica Allen.

Jessica spent part of the summer at Maynooth University in Ireland researching extinction and de-extinction of species and will be working this up into a paper to be presented to the working party in 2019. The project is intended to inform the production of laws, regulations and policies to address some of the key issues facing societies affected by species loss and potential return.

Jessica recently completed her BCL at the University of Oxford in June and she is currently pursuing the Bar Professional Training Course in London. This edition marks the end of her three year tenure as an Assistant Editor for e-law.

Students news

Annual careers evening

Once again kindly hosted by Francis Taylor Building, the UKELA annual careers evening was held on 8 November and had an encouraging turnout. Thank you to our advisers for giving up their time to guide our students into environmental law, to UKELA Vice Chair Kirsty Schneeberger for greeting our students, and to Ned Westaway, UKELA Temporary Vice Chair, for his inspirational presentation. There was a wonderful atmosphere, lots of enthusiasm (which wasn't all down to the refreshments!), and some excellent discussions. Thanks to Paul Leonard for the photographs of the evening in action.



UKELA moot competition

The 2019 moot competition finals will be held on Friday 22 February 2019, kindly hosted once again by King's College London. The rules are now available and the problem has been announced on the [website](#).

We are pleased to be able to offer moot training; kindly arranged and hosted by No 5 Chambers. There are three sessions, with the 27 November session in London having already occurred:

[5 December 5-6pm – Bristol](#)

[13 December 5-6pm – Birmingham](#)

Spaces are limited, so book your free place now!

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 [Lewis Hadler](#), our student advisor. 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 themes and deadlines for 2019 will be posted on the website in the new year.

Develop your legal editorial skills – UKELA elaw Editorial Assistant (2 voluntary positions available)

UKELA is looking for a 2 volunteer editorial assistants for elaw.

The first role requires the volunteer to:

- Liaise with regular elaw contributors regarding their copy.
- Manage emails to the elaw@ukela.org account.
- Prepare the first draft of elaw based on content sent by contributors.

The second role requires the volunteer to:

- Carry out the first edit of all articles (aside from themed articles).

This is a great opportunity to develop your legal editorial skills and grow your network in the legal and environmental sector. While both positions are on a voluntary basis and require a commitment of up to 15 hours per bi-monthly edition, the successful candidate will be eligible for a variety of UKELA benefits, including free membership for the period of their role and free or reduced cost attendance at a number of UKELA events. To express interest, please write to the Operations Director, Alison Boyd, attaching your CV, by midday on Monday 14th January 2019.

If you would like to discuss either of the roles, the current role holders would be pleased to hear from you. Contact them in the first instance by email – jessica.allen@city.ac.uk and lewis.hadler@gmail.com.

UKELA events

Look out for details of all our events coming up in 2019! See below for some diary dates. In the meantime, thank you to all those many hundreds of you that have supported our 2018 events programme. We hope you have found something to inspire and inform you. If there is a topic you think we have missed, please do get in touch.

We also hope to offer more options for joining our events via webcasts or video link next year. Watch this space!

UKELA wild law special interest group podcast

The wild law special interest group held a wild law conference at Bristol University on 21 September, during which a podcast was recorded with Planet Pod discussing "How wild is our law?". Listen [here](#).

Non-UKELA events

Castle debates: health, wellbeing and the environment – 30 January 2019

A debate exploring health, wellbeing and the environment in association with Arup, chaired by Pamela Castle OBE. For more details, and to book your place, please visit our [events](#) page.

Brownfield land Scotland conference – 6 February 2019

This informative event will update you on the current planning and regulatory backdrop for brownfield land development, as well as providing practical solutions to current challenges faced when risk assessing and remediating contaminated and derelict land. UKELA members will receive a 10% discount – please use the code UKELA10. For more details, and to book your place, please visit our [events](#) page.

Castle debates: can digital technology protect the environment? – 5 March 2019

A debate discussing whether digital technology can protect the environment. In association with Accounting for Sustainability; chaired by Pamela Castle OBE. For more details, please visit our [events](#) page.

UKELA diary dates

'A First Response to the Environment Bill: The New Body, the Courts, and the Future of UK Environmental Law' - 14 January 2019

Keep the afternoon of 14 January free for a half day conference on the above. We are teaming up with UCL, ClientEarth and WWF to bring you an afternoon of debate, information and insight as the Environment Bill part 1 is published. [Booking details](#) coming soon.

***This event is subject to the publication of an Environment Bill as required by 26 December 2018 under the European Union (Withdrawal) Act 2018.*

Nature conservation working party meeting – 19 January 2019

Details to be confirmed on the [website](#) shortly.

Energy post Brexit seminar – 29 January 2019

'Whither UK energy post-Brexit?' Current energy policy/ legal updates with a forward scan to some expert thoughts on possible implications of Brexit. This event is organised by the climate change and energy working party. [Bookings](#) open soon.

Waste working party seminar on Brexit – 6 March 2019

A follow up to the highly successful seminar on waste and Brexit in March 2018, this seminar will examine the latest position as Brexit day draws close. [Bookings](#) open soon.

Circular economy seminar – 2 April 2019

Organised by the waste working party. Join us at Ashurst in London for a circular economy update. [Bookings](#) opening soon.

Wild law weekend – 24-27 May 2019

Join the wild law SIG at Boggle Hole youth hostel near Whitby in North Yorkshire. [Details](#) to follow.

UKELA annual conference 2019 – 28-30 June 2019

Join us in Sheffield for our 2019 conference. [Bookings](#) open soon!

The e-law 60 second interview



Dr Veneta Cooney, consultant physician in occupational and environmental medicine, convenor of the UKELA public health and environmental law working party and UKELA Trustee

Veneta's area of interest is the psychology of human behaviour and the factors that influence responses to challenges. She was awarded an MA in Employment Law in 2003 and undertakes medico-legal work for employment tribunals, with a particular interest in discrimination cases under the Equality Act 2010. She has been a Trustee of UKELA since 2017 and was awarded an LLM in Environmental Law in 2018.

How did you get into environmental law?

Spending every summer on my grandmother's farm in Ireland from a very young age ignited my longstanding and entrenched respect and utter admiration for nature. It was always important to me to defend it at every opportunity. This evolved into spending quite a bit of time on marches holding heavy home-made placards, particularly in my university days when I probably should have been in the library. Then you grow up, become a tax payer, the scales fall from your eyes and you see life through a much more realistic lens, which can be quite a shock to an idealistic young person. Literally shouting about how wonderful nature is didn't get me very far with changing human behaviour and attitude towards the environment. A new tactic was required. A lot of pondering and head scratching followed. Then one day out running I fell over a tree root and in doing so fell into the idea of somehow getting involved with the law to facilitate change (a random connection I know but life is full of those!). If the law could alter human attitude towards smoking in public places, women's rights, homosexuality, and drink driving, well let's see if I could somehow make an impact, no matter how minor, on how the law could facilitate change in attitude about an issue I care deeply about. One phone call and copious reading, multiple essays, and a dissertation later, I obtained an LLM in Environmental Law from De Montfort University in May 2018: I loved every minute of it and it enabled me to meet more fabulous, like-minded people than I ever would dare to hope for.

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

Understanding that I do not have and never have had, a career in environmental law and I am only an observer looking from the outside in, from where I am standing, the Environmental Protection Act 1990 was a game-changer. For the first time the environment

was seen in the eyes of the law as something to consider, to think about, even to prioritise. Despite its multiple flaws, it was the first time that politicians, policy makers and the judiciary had to stop if only for a brief moment, to think about the consequences of their decision-making on the environment. Maybe Brexit is an opportunity to develop another legislative game-changer, particularly now we understand much more fully the impact of environmentally-related illness has on our lives.

To be particularly welcomed is the necessity to undertake environmental impact assessments. Even though they are often seen as just yet another obstacle for developers to overcome to ultimately achieve their goal, assessing the risks to the environment creates the opportunity of 'a safe space' within which human impact on nature can be considered and thought through.

From my perspective as a doctor, I consider the legal caveat of 'overriding public interest' to be the area of greatest potential in driving home the message that environmental protection is essential to facilitate economic and social prosperity. We understand more now than ever before that environmental pollution and the degradation of nature are contributing to a wide range of adverse health outcomes, all of which have a personal and economic cost.

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

The key barrier to environmental justice not only in the UK but globally, is our present economic paradigm. The present economic model is based on perverse accounting. What adds value to gross domestic product is anything that creates tax revenues, such as the arms trade, opening up coal mines, building a 3-lane motorway through an ancient woodland, and inbuilt obsolescence. There is a fundamental lack of understanding or myopic disregard of the fact that economic prosperity is dependent upon a viable, thriving natural environment. All negative externalities such as public ill health, lost productivity, and pressure on the public purse, cascade from dwindling natural resources and the depletion of nature. Environmental justice is the same as social justice. There needs to be a decoupling of the concept of economic prosperity from the depreciation of natural resources. Unless environmental protection is at the heart of economic legislation and policy, then the anthropogenic impacts upon the environment will continue on its present negative trajectory, which is not in the public interest.

When did you get involved with UKELA?

I joined UKELA in 2016 when I was undertaking the LL.M in Environmental Law. I just happened to discover it whilst researching for yet another essay. I couldn't quite believe that I had never come across it before considering my involvement with environmental pressure groups and my general interest in all things to do with trying to raise the profile of nature.

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

Due to its credibility, UKELA is in a position of strength to shape how environmental law evolves. Even though the environment, like the NHS, is a political issue, UKELA's political neutrality enables it to have a unique platform to provide independent advice to politicians and policy-makers, particularly in times of perceived societal flux such as the plethora of uncertainties associated with Brexit. It is during these times of flux that organisations such as UKELA are looked to for guidance. Respect and credibility is hard won but easily lost, and it is a testimony to the level of professionalism, scope of expertise, and combined experience amongst the membership that is the life blood of the respect and credibility that UKELA has hard-won over the years.

What is your favourite UKELA memory?

Even though my treasure trove of UKELA memories is still rather embryonic, the one memory that springs to mind is the emails that I received from both Stephen Sykes and Alison Boyd when I contacted them to ask whether someone like me would be considered an appropriate candidate for Trustee. Their responses were so incredibly warm and encouraging that it prompted me to continue with my application. So they are to blame for my involvement! I look forward to creating more wonderful memories of being part of UKELA and adding value in some small way.

What are the main benefits of UKELA membership?

What is unique about UKELA is that its membership covers a wide range of disciplines including legal practitioners, biochemists, physicists, marine biologists, planning experts, toxicologists, psychologists, medics and economists. The networking and learning opportunities are boundless and I personally have not come across a professional forum like it. Of particular importance is that UKELA has a vibrant, younger membership who are enthusiastic and passionate about the environment and are driven to make a positive difference. To be able to tap into such a vast array of expertise and energy is a privilege. This interdisciplinary forum provides a wonderful platform to exchange ideas, explore topics, to challenge opinions and most importantly, to push the established boundaries of contemporary thinking. It provides an academic and professional space to critically analyse the interpretation and application of present

environmental law and to explore how that law should evolve to be an increasingly effective tool to strengthen planetary health.

What opportunities exist to advance environmental law in the UK?

Love it or loath it, Brexit is an opportunity to facilitate a seismic shift in the legislative approach to environmental protection. To date, even though European law and the national legislation that has cascaded from it has been welcomed on many levels, it has not attenuated or reversed the relentless decline in biodiversity. Brexit could be the platform to think creatively and ambitiously about the level of importance we place as a nation on our own natural resources. If economic prosperity is our main priority, being mindful of the present state of our nature, leaving Europe may be the least of our worries.

The inevitable exponential increase in urbanisation required to accommodate population growth will require a re-think of the concept of 'living in harmony with nature'. Environmental law should be at the heart of the planning system to ensure that the natural world is an integral part of the urban fabric and is no longer considered something separate and to be found in National Parks.

Being mindful of the human and economic impact of environmentally-related illness, environmental law has an opportunity to re-define what is in the public interest to ensure that the key driver of what is of 'overriding public interest' is the prevention of environmental degradation.

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

Being hopeful maybe, I think there will be a slow burn of acidic realisation of the extent of the personal and economic costs associated with environmentally-related illness. As politicians, policy makers, the judiciary and the public realise that we have been cutting the tree branch that we have been sitting on, addressing environmental degradation and pollution will migrate up the legislative and political ladder. The inevitable advancement of AI technology is likely to be required to assist us with processing all the information that scientific research will produce to not only explain the dynamics of planetary ill health and its consequences but also, to assist us with creating solutions. A legislative framework will need to be developed to encompass the advancement of this AI involvement to ensure government and corporate responsibility and governance towards AI-based solutions to environmental problems. It is likely that AI will not only be able to offer up solutions for present environmental challenges but also, have a predictive role in determining future environmental issues not yet known. Therefore, environmental law needs to be flexible enough to be able to respond to rapid changes

in technological advancements to remain relevant and credible so that early 21st century legislation relates to mid to late 21st century problems.

Theme question: do you see human rights having an increasing impact on environmental law over the coming years?

Despite David Attenborough's admirable efforts, humans en masse are a long way from truly appreciating nature in such a way that it facilitates the fundamental change in behaviour and attitude required to address the fragmentation of the natural world. If we are not to undo the health gains achieved over the past century, we need to tap into our human-centric psyche and believe that protecting the environment is in our interests economically and socially. Hence, translating the rights of nature into the rights of mankind will be an essential evolutionary step for environmental law. Without the law advocating environmental protection as a human rights issue, it is difficult to envisage the present political and societal inertia towards the depletion of nature being resolved any time soon.

Environmental law headlines

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

Gearing up for the abyss? A summary of the recent no-deal Brexit notices

[Practical Law Environment](#)

Since late August, the UK government has published a significant number of no-deal Brexit technical notices, which provide guidance and information for UK businesses and citizens on how to prepare for a no-deal Brexit scenario.

‘No deal’ describes the situation in which the UK and the EU fail to conclude a draft withdrawal agreement by the time of the UK’s exit from the EU. This would mean no transition period, and a sudden “cliff-edge” break in the application of EU rules to the UK at 11pm on 29 March 2019 (see [Practice note, Brexit: Article 50 and the withdrawal process: Consequences if no withdrawal agreement is reached: no deal](#)).

At the time of writing this article, the government has put the draft withdrawal agreement agreed with the EU negotiating team before Parliament. There is considerable uncertainty as to whether Parliament will approve the draft.

To date, 14 no-deal technical notices have covered a wide variety of environmental topics including the REACH chemicals regime, climate change and transboundary waste. Practical Law’s materials on a no deal Brexit, including a list of all the articles we have written on the no-deal technical notices, can be found at [Brexit materials: No-deal Brexit](#).

For the most part, the no-deal technical notices have been “cold comfort” for UK business and citizens as they simply confirm some of the issues that businesses in the relevant sectors have identified or restate what the government has already said it would do without providing much detail as to what preparations businesses or individuals can make. For example, in relation to chemicals regulation, the no-deal technical notice states that in a no-deal scenario the government will establish a UK regulatory framework for chemicals, led by the Health and Safety Executive (HSE), that would:

- Preserve the REACH regime as far as possible.
- Maintain existing standards of protection for human health and the environment.
- Minimise disruption to the supply of chemicals by providing a transitional phase for registrations under the new UK regime.

- Enable the registration of new chemicals through a UK IT system that is similar to the existing EU IT system and by requiring the same information as under REACH.

No indication is given as to how the HSE will be able to set up a UK version of REACH by March 2019 and issues such as the ability of UK businesses to access data on chemicals that they have submitted to the European Chemicals Agency (ECHA) in order to be able to submit the same information to the HSE are not addressed.

Unsurprisingly, the House of Lords EU Energy and Environment Sub-Committee [report](#) on chemicals regulation in the UK post-Brexit published in November 2018 expressed concern that the government lacked a credible plan of action for chemicals regulation in the UK post-Brexit (see [Practice note, REACH: EU chemicals regime, Impact of Brexit on the UK chemicals industry](#)).

Practical Law has extensive materials on Brexit. For more information on:

- The potential implications of the UK’s decision to leave the EU on environmental legislation in England and Wales and on the energy sector in Great Britain, see [Practice note, Brexit: the effect on environmental law](#) and [Practice note, Brexit and energy](#).
- The latest updates on Brexit, see [Brexit key developments: tracker](#).
- Legislating for Brexit, see [Brexit materials: Brexit legislation](#), [Brexit statutory instruments](#) and [Brexit statutory instruments: tracker](#).
- Common questions about Brexit, see [Brexit essentials: Q&As on agreements, timeframes and no deal](#).
- Practical Law’s Brexit-related content generally, see the [Brexit page](#).

Budget 2018 – environmental announcements

[LexisPSL Environment](#)

The 2018 Budget contained several environmental announcements, including:

- Action on single-use plastics, including introducing a tax on the production and import of plastic packaging from April 2022 and reform of the packaging producer responsibility system, which will aim to increase producer responsibility for the costs of their packaging waste, including plastic. A consultation on both measures is to follow and further detail is to be set out in the Resources and Waste Strategy later this year. For more information, see: [Waste types and controls - plastics](#).
- In the event of a no deal Brexit the government will introduce a carbon emissions tax to provide a domestic system equivalent to the role of the EU Emissions Trading System (EU ETS) and help meet the UK's legally binding carbon reduction commitments under the [Climate Change Act 2008](#). This tax would apply a £16 rate to every tonne of carbon dioxide emitted which exceeds an installation's emissions allowance, which would be based on the installation's free allowances under the EU ETS. The tax would apply to all stationary installations that participate in the EU ETS from 1 April 2019. For more information on the carbon emissions tax, see: [Emissions controls and carbon pricing in respect of carbon emissions from UK fossil fuel powered electricity generation](#) and [News Analysis: Proposed carbon emissions tax in case of a no-deal Brexit](#).
- A freeze on the Carbon Pricing Support (CPS) rate at £18/tCO₂e for 2020-21, and an aim to reduce the CPS rate if it remains high from 2020-21. For more information on the CPS, see: [Emissions controls and carbon pricing in respect of carbon emissions from UK fossil fuel powered electricity generation](#).
- Climate Change Levy (CCL) main rates for 2020-21 and 2021-22 and a commitment to rebalance the main rates paid for gas and electricity. For more information on CCL, see: [Climate change levy](#).
- Enhanced Capital Allowances (ECAs) and First Year Tax Credits for technologies on the Energy Technology List and Water Technology List will cease from April 2020 because they add complexity to the tax system and are seen as ineffective ways to drive energy efficiency. The savings will be reinvested in an Industrial Energy Transformation Fund, to help significant energy users to cut their energy bills and transition UK industry to a low carbon economy. For more information on ECAs, see: [Enhanced capital allowances](#).
- A freeze on aggregates levy rates for 2019/20, with an intention to return the levy to index-linking in future. For more information on the aggregates levy, see: [Aggregates levy](#).
- Several measures to protect the environment in the transport sector, including
 - A promise to maintain the difference between alternative and conventional fuel duty rates until 2032, subject to review in 2024.
 - A review of the impact of the Worldwide harmonised Light vehicles Test Procedure (WLTP) on Vehicles Excise Duty (VED) and company car tax, with a report expected in the Spring.
 - Publication of a summary of responses from the consultation on VED reform for vans in May 2018, to set out proposals to introduce environmental incentives from April 2021. Bands and rates will be set out ahead of Finance Bill 2019/20.
 - The ECA for companies investing in electric vehicle charge points will be extended to 31 March 2023 to support the UK's transition into a world-leader in the ultra-low emission vehicle market.
- Measures to shift to a clean economy, including establishment of an Industrial Energy Transformation Fund, a call for evidence on introducing a new Business Energy Efficiency Scheme, £20m additional funding to support more local authorities to meet their air quality obligations, £15m to distribute food waste, £10m to help transform the fishing industry, setting up a Woodland Carbon Guarantee scheme and £10m for local community street trees and urban trees, £10m to clear the worst abandoned waste sites, £20m to support measures to tackle plastics and boost recycling and £13m to tackle risks from floods and climate change.
- A consultation on how to encourage innovation in the utilities sector. For more information, see: [Encouraging innovation in UK regulated utilities](#)

For more information, see News Analysis: [Budget 2018—environmental headlines](#).

Climate change snapshot: preparations for Katowice

[Practical Law Environment](#)

The United Nations Framework Convention on Climate Change (UNFCCC) annual climate change conference will take place in Katowice, Poland between 2-14 December 2018. Various preparations have been made internationally and by the UK to get ready for the discussions on implementation of the Paris Agreement. This article summarises the Intergovernmental Panel on Climate Change (IPCC) Special Report on Global Warming of 1.5°C and some of the key steps taken by the UK government to prepare for the conference.

IPCC special report on global warming of 1.5°C

In October 2018, the IPCC published the Special Report on Global Warming of 1.5 degrees Celsius (°C), which was prepared at the request of the UNFCCC when it adopted the Paris Agreement in 2015. The report, by 99 authors and review editors from 40 countries, is a key scientific input into the 24th Conference of the Parties (COP 24) in Katowice.

The report highlights:

- Limiting global warming to 1.5 °C will require rapid and far-reaching transitions in land, energy, industry, buildings, transport, and cities.
- Global net human-caused emissions of carbon dioxide (CO₂) would need to fall by about 45% from 2010 levels by 2030, reaching net zero around 2050. This means that any remaining emissions would need to be balanced by removing CO₂ from the air.
- A number of climate change impacts that could be avoided by limiting global warming to 1.5°C compared to 2°C or more.
- Allowing the global temperature to temporarily exceed or overshoot 1.5°C would mean a greater reliance on techniques that remove CO₂ from the air to return global temperature to below 1.5°C by 2100. The effectiveness of such techniques are unproven at large scale and some may carry significant risks for sustainable development.

(See [Legal update, UNFCCC Paris Agreement: IPCC publishes special report on global warming of 1.5°C.](#))

UK government joins international Carbon Neutrality Coalition

In September 2018, the government confirmed that the UK would join 18 other countries that are part of the Carbon Neutrality Coalition. The Carbon Neutrality Coalition is an initiative led by New Zealand and the Marshall Islands, which requires members to commit to develop and publish long-term strategies to achieve carbon neutrality (also known as net-zero emissions) during the second half of the century. It

was reported in the press that although the UK has joined the coalition it has not yet committed to achieving net-zero emissions by 2050 (see [Legal update, UK Government joins international Carbon Neutrality Coalition.](#))

UK government publishes response to Committee on Climate Change's tenth progress report

In October 2018, the government published its [response](#) to the UK Committee on Climate Change's (CCC's) tenth annual progress report to Parliament. The CCC report had stated that the UK is likely to miss the carbon targets in its fourth (2023-27) and fifth (2028-32) carbon budgets.

The government response addresses the CCC's recommendations and sets out the UK's progress over the past 12 months and planned future actions, policy plans and consultations for later in 2018 and 2019. It covers emissions from power, buildings, industry, transport, agriculture and land use, waste and fluorinated greenhouse gases, and the devolved administrations.

The government notes that the UK has achieved rapid decarbonisation of power and made real change in waste management and landfill emissions. However, the government recognises that its progress has not been uniform. It will focus now on replicating the progress on power and waste across the economy.

Amongst other things, the government will:

- Publish a carbon capture usage and storage (CCUS) deployment pathway by the end of 2018 (see [Legal update, CCUS: Government publishes action plan to enable development of UK's first CCUS project.](#))
- Consider further refinements to the policy for Contracts for Difference (CFD), and consult later in 2018 on opening up the Capacity Market to allow renewables to participate. (However, the Capacity Market was suspended in November 2018, see [Legal update, Judgment annulling Commission's decision not to raise objections to the aid scheme establishing a capacity market in the UK \(General Court\).](#))
- Consult further on proposals to halve the energy use of new buildings by 2030 including consulting on Part L of the Building Regulations, which deals with energy efficiency.
- Consult on tightening minimum energy efficiency standards (MEES) in the domestic and non-domestic private rented sectors.
- Develop a market framework for heat networks.

The response document also sets out the UK's progress against the milestones in the Clean Growth Strategy, and sets new milestones.

(See [Legal update, Government publishes response to Committee on Climate Change's tenth progress report.](#))

UK government takes advice on a net zero carbon target

Also in October 2018, the Energy and Clean Growth Minister, Claire Perry, invited the CCC to give advice to the government on a net zero carbon target, including:

- Setting a date for achieving net zero greenhouse gas (GHG) emissions from across the economy, including from transport, industry and agriculture. A net-zero target means GHG emissions from human activity are balanced by methods of removing emissions from the atmosphere.
- Whether the government should review the UK's 2050 target in the Climate Change Act 2008 of cutting emissions by at least 80% relative to 1990 levels to meet international climate targets set out in Paris Agreement.
- How emissions reductions might be achieved in industry, homes, transport and agriculture.

(See [Legal update, Government asks Committee on Climate Change for advice on net zero carbon target](#)).

For more information, on:

- The targets set in the Paris Agreement and the UNFCCC Conferences, see [Practice note, UNFCCC, the Kyoto Protocol and the Paris Agreement](#).
- The UK's existing targets under the Climate Change Act 2008, see [Practice note, Climate Change Act 2008](#).

Court finds Netherlands must reduce greenhouse gas emissions by 2020 (State of Netherlands v Urgenda Foundation)

[LexisPSL Environment](#)

A landmark decision from the Dutch courts has put pressure on governments to increase their climate change reducing activity, or risk being taken to court. The case was an appeal and cross-appeal from the judgment of the District Court of The Hague. Urgenda, a Dutch environmental group, had succeeded in arguing that the Netherlands should reduce its greenhouse gas emissions by at least 25% by 2020. The state appealed against this judgment. Urgenda cross-appealed on the finding that it could not rely on Article 2 and 8 of the European Convention on Human Rights (ECHR) in the proceedings.

The state raised a number of issues in its defence. It argued that the ECHR did not allow class actions and, even if it did, there was no indication that the class represented by Urgenda was united in a common belief on how climate change should be tackled. It further argued that directing the Netherlands to have a higher emissions reduction target than other EU countries put the Netherlands and Dutch companies

at a disadvantage to other states, and that if such a step were to be taken, it should be done through legislation rather than a court order.

The Hague Court of Appeal, in rejecting both the arguments, found that the fact that climate change was a global problem does not 'release the state from its obligation to take measures in its territory, within its capabilities, which in concert with the efforts of other states provide protection from the hazards of dangerous climate change', nor would legislation be necessary to impose the targets.

The fact that the Dutch Court of Appeal held that it would be a breach of its citizens' human rights for the state not to do its utmost to combat climate change has potentially wide implications for other countries, including the UK. Domestic courts may be persuaded to follow the Dutch example to put pressure on their states to implement more stringent policies to curb greenhouse gas emissions.

For more information, see: [Netherlands must reduce greenhouse gas emissions by 2020, Hague Court of Appeal rules \(State of Netherlands v Urgenda Foundation\)](#).

The post-Brexit future for UK agriculture—Agriculture Bill 2018

[LexisPSL Environment](#)

12 September 2018 saw the laying before Parliament of the long-awaited Agriculture Bill (the Bill) to deal with the transition away from the Common Agricultural Policy (CAP) following Brexit on 29 March 2019, and how the UK government intends to deal with future agricultural subsidy.

The current European CAP system has undergone significant change over the last decade. It has often been accused of not supporting the environment sufficiently and rewarding inefficient farming practices. CAP is also accused of being overly bureaucratic in both its construction and implementation.

Future payments will be for 'public goods' and productivity improvements as set out in section 1 of the Bill which states that the Secretary of State (SoS) may give financial assistance for or in connection with any of the following purposes:

- a. Managing land or water in a way that protects or improves the environment.
- b. Supporting public access to and enjoyment of the countryside, farmland or woodland and better understanding of the environment.
- c. Managing land or water in a way that maintains, restores or enhances cultural heritage or natural heritage.
- d. Mitigating or adapting to climate change.

- e. Preventing, reducing or protecting from environmental hazards.
- f. Protecting or improving the health or welfare of livestock.
- g. Protecting or improving the health of plants’.

Further detail of how future subsidies will work in practice is to be left up to future regulation.

There are also proposals for the greater collection and sharing of data within the food chain (including whistleblowing) (section 12), as well as the ability for the SoS to intervene in exceptional market conditions (section 17), and also fair dealing obligations by first purchasers of agricultural products (section 25).

Section 5 of the Bill sets out a seven-year transition period to move from the basic payment system to the new system of payments.

Again, further regulation is needed in relation to how the transition period is to work, which will be published in due course, but might not be available until much closer to the commencement of the transition period itself.

For more information, see News Analysis: [The post-Brexit future for UK agriculture—Agriculture Bill 2018](#).

Student article

A critical analysis of the extension of enforcement undertakings to the offence of causing or knowingly permitting water pollution.



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At a glance

- Enforcement undertakings (EUs) are voluntary offers made by offenders to restore and remediate any damage they have caused, in agreement with the regulator, without attracting a criminal record.
- On 6 April 2015, Parliament extended the power of the Environment Agency (EA) and Natural Resources Wales (NRW) in Wales to use an EU in the event of non-compliance or pollution incident associated with a permitted activity.
- This article will critically analyse and evaluate the extension of EUs to the offence of causing or knowingly permitting water pollution.
- It will argue that the expansion of the civil sanctions regime provides greater flexibility to regulators in the way they secure compliance, reserving criminal prosecution for the most serious offences.
- It is submitted that the expansion of the civil sanctions regime possesses the capability to ensure greater transparency and more open relationships between the environmental regulators and those that they regulate.

Introduction

In a recent assessment of water quality, an EA - now NRW in Wales – report has identified ‘waste and agricultural chemicals as major threats to the health of United Kingdom groundwater and wildlife, and the safety of drinking water.’¹ With 80% of rivers in England and Wales failing to achieve ‘good ecological status’² and 317 pollution incidents reported in 2016,³ the EA has stated that it aims to meet environmental breaches with ‘prosecutions, pursuing voluntary enforcement undertakings for minor offences and proportionate fines for serious offences.’⁴

EUs are voluntary offers made by offenders to restore and remediate any damage they have caused, in agreement with the regulator, without attracting a criminal record.⁵ EUs were first introduced by the EA in relation to certain offences and potential offences in relation to packaging.⁶

On 6 April 2015, Parliament extended the power of the EA and NRW to use an EU in the event of non-compliance or pollution incident associated with a

permitted activity,⁷ providing a natural expansion of the civil sanctions regime.⁸

This article will critically analyse and evaluate the extension of EUs to the offence of causing or knowingly permitting water pollution.⁹ It will argue that the expansion of the civil sanctions regime ‘gives greater flexibility to regulators in the way they secure compliance, reserving criminal prosecution for the most serious offences.’¹⁰ Therefore, it is submitted that the extension of EUs to the environmental permitting regime (EPR), particularly to the offence of causing or knowingly permitting water pollution¹¹ ‘not only demonstrates the possibility of better outcomes for both business and the environment, it has the potential to encourage more open relationships’ between the environmental regulators and those that they regulate.¹²

EUs in practice

In practice, the extension of EUs to the EPR has faced a number of difficulties. Tilling advocates that recent experience in ‘negotiating civil sanctions for permitting offences for a number of clients suggests that the EA is still on a learning curve on how best to utilise enforcement undertakings in the permitting context and is giving careful consideration to the circumstances in which they will be accepted.’¹³

Moreover, in instances of non-compliance or pollution, regulatory guidance stipulates that the Environment Agency will not normally accept an offer where legal proceedings have been commenced.¹⁴ However, a recent case demonstrates an exception to this rule,¹⁵ generating an unfavourable precedent¹⁶ and significant commercial uncertainty for prospective applications of undertakings in instances of environmental non-compliance or pollution. Burges Salmon acted on the first EU accepted for a water pollution event in Wales. At the point of instruction, the operator had already received a magistrates’ court summons for an unauthorised discharge of cleaning products from an agricultural unit into a stream. Following an offer of undertaking by the operator to donate £1,000 to a local wildlife cause and take proactive steps to prevent similar incidents arising in the future, the regulator accepted

the EU and withdrew the summons,¹⁷ demonstrating that the extension of EUs to the offence of causing or knowingly permitting water pollution¹⁸ can create unwarranted precedents¹⁹ and substantial commercial uncertainty²⁰ for prospective applications.

Nevertheless, this notion is challenged by the publication of statistics for the period 1 September 2017 to 31 January 2018,²¹ which pioneer the more appropriate view that 'there is real traction in the use of enforcement undertakings for permitting offences.'²² Evidence supports this as 'water companies agreed to pay out more than £860,000 in the five months to 31 January 2018 for flouting environmental rules', with latest figures showing that Thames Water agreed to make the largest financial contributions, totalling £460,000. Moreover, ENDS' analysis illustrates that 'United Utilities agreed to make financial contributions of £155,000 over the same period, while Anglian Water agreed to pay out £150,000, and Northumbrian Water will pay £97,000,'²³ demonstrating support for the extension of EUs to the offence of causing or knowingly permitting water pollution.²⁴

Commercial viability of EUs

Yan opines that the extension of EUs to the offence of causing or knowingly permitting water pollution²⁵ is commercially disadvantageous as the process of submitting an offer of undertaking 'requires the cards to be put on the table' and in some circumstances, 'offers of compensation might be made when the EA have neither the means nor the evidence to prosecute.' The limitations of EUs are clear; reinforcing the notion that operators 'can ignore the new regime and wait to see whether the EA can build a case to prosecute, as has been the case for many years.'²⁶

Contrastingly, Jones challenges this notion, constructing the more appropriate view that EUs are 'becoming a more established part of the regime and may offer an attractive alternative for business to a prosecution'²⁷ due to their commercial viability. Tilling reinforces this view, asserting that utilising EUs for EPR offences permits operators to avoid the negative commercial implications of criminal prosecution which include reputational damage, loss of management time, legal costs and uncertainty. This can prove commercially advantageous²⁸ in circumstances 'where offenders have to disclose convictions in business dealings and tender processes.'²⁹

Moreover, another commercial benefit of EUs is that they provide businesses with a degree of control.³⁰ Evidence supports this notion as EUs permit operators with the opportunity to 'take control of a post-incident investigation or non-compliance and propose the steps they are prepared to take to make amends.'³¹ In contrast to 'reactive' criminal investigations and

proceedings, EUs enable 'proactive negotiations and allow the matter to be brought to an end quickly for an agreed financial sum.'³²

Furthermore, EUs provide businesses with a mechanism to remediate environmental harm, build positive rapport with local communities and reassess internal compliance management systems,³³ demonstrating support for the expansion of EUs to the offence of causing or knowingly permitting water pollution.³⁴

Despite significant commercial advantages,³⁵ the expansion of the civil sanctions regime has notable societal implications, leading commentators³⁶ to assert that regulators 'no longer prosecute even some of the most extreme pollution events.'³⁷ Evidence supports this notion as figures show the NRW 'received 6,886 reports of water pollution between April 2013 and December 2016' and although 60% of incidents were investigated, there were only 41 resultant prosecutions and 10 civil sanctions - amounting to less than 1% of investigated incidents.³⁸ Consequently, Monbiot criticises EUs as a 'parody of justice: arbitrary, opaque and wide open to influence-peddling, special pleading and corruption,'³⁹ eroding support for the expansion of EUs to the offence of causing or knowingly permitting water pollution.⁴⁰

Contrastingly, Hitchcock challenges this notion, pioneering the more appropriate view that the expansion of the civil sanctions regime provides enhanced flexibility to regulators in the way they secure compliance,⁴¹ with a report⁴² stating that the EA will not 'hesitate to prosecute where necessary.'⁴³ Further, the EA asserts that 'consistency is key in courts giving fines over environmental offences in order to make companies 'take environmental risk seriously and not see it as an operational expense.'⁴⁴ Moreover, Kellett emphasises that 'regulators do not use criminal sanctions lightly,' as 'they involve the application of finite resources in a necessary but costly and resource intensive process sometimes over several years.' Additionally, 'regulators are less likely to accept EUs if it appears that the offending behaviour may recur, particularly where the alternate deterrent effect of a large criminal sanction may drive behavioural change.'⁴⁵

Evidence supports this as Thames Water were sentenced in the largest freshwater pollution case ever taken by the EA and ordered to pay £20,361,140.06 in fines and costs for a series of significant pollution incidents on the River Thames.⁴⁶ Badger emphasises that although the case has not added to the general principles of sentencing, it has raised the bar for sentencing very large organisations and demonstrated that 'courts treat incidents of environmental pollution seriously.' Not only does this 'drive home the message that companies are at risk of

highly significant fines,' it reinforces the notion that the utilisation of EUs permit regulators to 'devote their limited time and resources to going after the worst offenders.'⁴⁷

Bureaucracy versus regulatory flexibility

Kellett advocates that the expansion of EUs to the offence of causing or knowingly permitting water pollution⁴⁸ has led commentators to criticise regulators as 'unwieldy, too bureaucratic' and lacking strategy as 'offending must still be investigated when an offer is received to determine whether an EU is a suitable response, which takes time and cooperation.'⁴⁹

Contrastingly, opposing commentators⁵⁰ challenge this notion, pioneering the more appropriate notion that the natural extension of the civil sanctions regime has streamlined the enforcement process, giving 'greater flexibility to regulators in the way they secure compliance, reserving criminal prosecution for the most serious offences.'⁵¹ *Jones* furthers this notion, asserting that the 'flexibility of civil sanction arrangements has been embraced by the EA since their introduction,⁵² reinforcing the notion that the expansion of EUs to the offence of causing or knowingly permitting water pollution⁵³ will continue to have positive implications for businesses and regulators alike.'⁵⁴

Quantifying environmental harm

As part of the EU process, operators face an obligation to propose a fair remedy for the damage caused. In the context of the water environment, 'while fish restocking costs are relatively easy to calculate, for example, calculating the costs of a damaged environment over several years is a more challenging exercise.'⁵⁵ Consequently, environmental harm from water pollution could be significantly undervalued⁵⁶ as a result of the 'transient impact of a polluting event,'⁵⁷ diminishing support for the extension of EUs to the offence of causing or knowingly permitting water pollution.⁵⁸

However, *Hammond* challenges this notion, establishing the more appropriate view that new EA proposals to utilise a natural capital calculator hold promise as an effective means to assess long-term environmental harm from water pollution incidents.⁵⁹ Evidence supports this natural capital approach⁶⁰ as *Ramboll* has utilised natural capital-based methodologies for numerous years when 'assessing and valuing environmental damage, recovery and compensation.'⁶¹

Despite this, the EA's proposed calculator⁶² has been criticised as 'too simplistic,' given its limited focus and failure to 'incorporate all of the services provided by an aquatic ecosystem such as angling and the

provision of drinking water amongst many others.'⁶³ *South West Water* reinforce this view, asserting that the proposed calculator⁶⁴ is 'unworkable' in its current form due to the lack of clarity provided by the EA with regards to the values that underpin it.⁶⁵ Additionally, ENDS' analysis⁶⁶ pertains that the proposed calculator⁶⁷ requires further detail, necessitating another period of consultation to be undertaken with the industry.⁶⁸

In a recent comparison⁶⁹ of accepted EUs versus calculations undertaken by the proposed calculator⁷⁰ of the cost of environmental damage, *Ramboll* demonstrated that 'the proposed methodology is likely to result in steeper financial penalties.'⁷¹ In accordance with the firm's analysis,⁷² the proposed EA calculator⁷³ 'appears to overestimate the value of environmental damage – using default settings – by at least double or triple those derived using established environmental damage valuation methods and already accepted enforcement undertakings in 2015 to 2017,'⁷⁴ undermining support for the extension of EUs to the offence of causing or knowingly permitting water pollution.⁷⁵

Fairness

ENDS' analysis⁷⁶ suggests that the proposed calculator⁷⁷ has raised questions over fairness.⁷⁸ The draft guidance⁷⁹ stipulates that EU offers 'relating to an incident that caused an environmental impact should put right the environmental harm caused, achieve an environmental benefit and include a financial contribution to a local and/or related environmental cause or charity.'⁸⁰ *Crawford* questions why the financial penalty should still include an additional charity contribution 'in circumstances where the environmental benefit offered in compensation is equivalent or greater than the damage caused.'⁸¹ *Freeman* posits further concerns, asserting that 'natural capital should not be used as the only means to analyse environmental risk and opportunity,' reinforcing the notion that although a 'good idea,' the model requires 'a little more work'⁸² before the approach⁸³ can be considered as an effective means to assess long-term environmental harm from pollution incidents.⁸⁴ Perhaps the expansion of the civil sanctions regime provides the EA with the opportunity to revise proposals to take account of the government's 25-year Environment Plan and extend the utilisation of a natural capital calculator approach to other EUs beyond those relating to water,⁸⁵ thus reinforcing the viability and suitability of the mechanism.

Changes to Sentencing Guidelines for environmental offences

Although EUs may appear costly,⁸⁶ in light of the changes to magistrates' sentencing powers,⁸⁷ which enable them to impose unlimited fines, EUs may be considered a sensible and viable alternative to

criminal proceedings.⁸⁸ On 26 February 2014, new official Sentencing Guidelines for environmental offences were published and have since established a 'big step up in the size of financial penalties being applied by the courts.'⁸⁹ Evidence supports this as cases have included 'a fine of £933,000 plus costs for a water company and its contractor for polluting a waterway; ... a company that allowed sewage to pollute two beaches being fined £153,000; and ... a Thames Water fine of £20 million for polluting the Thames with sewage.'⁹⁰ Despite the notion that 'bigger penalties will deter those prepared to behave badly and provide even greater focus on environmental protection,'⁹¹ the ability of the courts to impose unlimited fines further emphasises the suitability of EUs as a viable and appropriate alternative,⁹² reinforcing support for the extension of EUs to the offence of causing or knowingly permitting water pollution.⁹³

Recommendations

Although the extension of EUs for EPR offences such as the offence of causing or knowingly permitting water pollution⁹⁴ has led to a significant increase in their use,⁹⁵ the current approach could benefit from revised guidance. Such guidance could usefully 'clarify what counts as 'harm' and equivalent benefit in the fourth limb of what an EU can offer; ... address the practical aspects of assessing and quantifying harm so the EUs can be properly valued; and indicate the level of harm for which an EU would be an acceptable alternative to a prosecution.'⁹⁶

Furthermore, although UKELA 'endorses the use of the wider range of civil sanctioning powers' and agrees with the EA's proposal to publish details of all EUs offered (including those rejected) on the public register, Crawford advocates that SEPA's approach in relation to EUs is 'much more transparent and that more than just the EU form is shared publicly.' Consequently, greater consideration should be given to a similar approach in England and Wales in order to ensure greater levels of transparency and consistency.⁹⁷

Conclusion

In conclusion, it is maintained that the extension of EUs to include the offence of causing or knowingly permitting water pollution⁹⁸ 'gives greater flexibility to regulators in the way they secure compliance, reserving criminal prosecution for the most serious offences.'⁹⁹ Further, EUs prove commercially advantageous¹⁰⁰ as it permits operators to act quickly and take control of environmental non-compliance or pollution, avoiding risk of prosecution, reputational harm, legal costs, higher penalties and raised insurance costs, while also building trust and providing environmental improvements.¹⁰¹ Therefore, it is submitted that the expansion of the civil sanctions regime possesses the capability to 'encourage more

open relationships' between the environmental regulators and those that they regulate.¹⁰²

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Human health, human rights and the environment

Sick of hearing about the environment: Why a change in narrative is required



Dr Veneta Cooney, Convenor of the UKELA Public Health and Environmental Law Working Party

At a glance

- Environmental protection is in the public interest.
- Environmental pollution and the depletion of nature is a social justice issue.
- The psychology of the public needs to change in such a way as to incorporate environmentally-related illness as part of the social justice model for health care provision.

It is no longer a matter of opinion but a matter of fact that the health of the public is dependent upon the health of the environment.¹ Even though there is now a plethora of scientific evidence regarding environmentally-related illness,² in reality a plethora of statistical data was not required to link pollution with pathology. This is because there are some things in life that are so obvious that they don't need to be said or proven. Breathing dirty air, drinking polluted water and living in a concrete jungle is not good for the health and well-being of people nor is it good for the health and well-being of the public purse.³

Despite air pollution and its contribution to climate change being an existential threat,⁴ we continue to fail to act appropriately. Even the most recent report in October 2018 from the IPCC⁵ and its Armageddon tales of economic, societal, and ecological collapse cannot seem to trigger the seismic shift required in human behaviour and attitude. Is it disbelief, disinterest or just a collective compulsion to self-destruct that is at the heart of our inertia?

When it comes to the consequences of human impact upon the natural environment, there is a disconnection between our knowledge and our behaviour, and between our perception and reality. To reconcile this anomaly a change in narrative is required about why environmental protection is essential. The adverse health impacts of environmental pollution, particularly air pollution, is potentially the key to de-ossify the present societal and political sclerosis towards the implementation of legislation and policy that will enable environmental harm to be addressed in the way that is required. By understanding the socio-economic impacts of

environmental pollution, habitat loss, and biodiversity decline; stakeholders such as politicians, local authorities and the judiciary will be appropriately informed about what is truly in the public interest - whether that is a fracking site in Lancashire, a large motorway system in the north of England, a tidal lagoon project in south Wales, or when deciding how many runways should be available to British Airways.

However, the true architect of political and societal behaviour and attitude is the public themselves. If there is one thing that Brexit demonstrated it is that when the public are impassioned about a subject, they can initiate a seismic shift in political direction and alter the course of a country's future. No matter what side of the camp one sits, the 'Brexit experiment' has been a lesson learned in the powers of self-determination. The public need to be as impassioned about the environment as they were about Brexit.

The key to make people care enough to act is to enable them to develop a visceral connection with the environment. Notwithstanding the potential perverse evolution of AI technology, humans are not cyborgs. Therefore, human behaviour and attitude are not moulded by rational analysis of the evidence in front of them. Behaviour and attitude is resultant of emotions and how people feel, and not on a critical assessment of scientific data. We need to translate the data available about environmentally-related illness into a language that people understand. This language would personify the data and link it with real-life examples of how environmental pollution is making their families sick. People will then link pollution from air toxins for example, with their mum's lung cancer,⁶ their dad's heart disease,⁷ their brother's asthma,⁸ their little sister's developmental problems,⁹ and their grandmother's dementia.¹⁰

In essence, people *feel* that health and social care provision for their families is a social justice issue. Hence, the NHS is an iconic organisation that despite its many entrenched flaws is considered a national treasure and is part of the British cultural DNA. Environmental protection is as much of a social justice issue as the provision of health care because no

matter which way one slices the statistical data, knowingly making our families sick is not within the boundaries of today's societal moral compass.

The public psyche needs to change in such a way as to incorporate environmentally-related illness as part of the social justice model for health care provision. The importance of this should not be underestimated. This is because how a particular political party manages health and social care provision will determine whether their legitimacy is threatened or not. So much so that no matter what political ideology the various political parties adopt, the over-arching topic that unites them all is the NHS. It is an organisation that is perceived as 'untouchable' politically, and will invariably be at the top of the list when the Treasury is crafting its hierarchy of priorities.

The environment needs to be a fracture line along which the legitimacy of a government is based. Governments must be judged by how they address environmental pollution in the same way that governments are judged about how they manage the NHS. There is nothing that stirs a sense of injustice within people quite like the perception that the government of the day is falling short of their 'moral duty' to support the health and social care needs of their families. That sense of injustice and 'moral duty' needs to be instilled within the mind-set of the voting public when it comes to the environment.

Even if you do not care much for nature or the health of the public and instead, like George Bernard Shaw you believe that it is lack of money that is the root of all evil, the economic cost of environmentally-related illness should be enough of a mind-set changer to make environmental protection worthwhile for the sake of the monetary health of the tax payer as well as for end of year profits.

No matter which set of financial data one chooses to focus on, it is clear that environmentally-related illness costs the UK a lot of money annually. Whether it is £12 billion in health-related benefits¹¹ or £16 billion in sickness absence and lost productivity,¹² both the tax payer and business picks up the bill. Even though more research is needed to distil the financial data to clarify what proportion can be attributed to environmentally-related pathology, it is a matter of fact that living in an increasingly polluted and nature-depleted world has its price.

It is now beyond reasonable doubt that a sick environment is making us ill and both the human and economic costs of that warrants a substantial change in the narrative about environmental protection in the public interest. Without this change in narrative, on the balance of probabilities, *us homo sapiens* will continue to press the self-destruct button and continue to knowingly harm the environment upon

which both the quantity and quality of the lives of our families depend.

Veneta Cooney's area of interest is the psychology of human behaviour and the factors that influence responses to challenges. She was awarded an MA in Employment Law in 2003 and undertakes medico-legal work for employment tribunals, with a particular interest in discrimination cases under the Equality Act 2010. She has been a Trustee of UKELA since 2017 and was awarded an LLM in Environmental Law in 2018. She is a Consultant Physician in Occupational and Environmental Medicine and the Convenor of the UKELA public health and environmental law working party.

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Human health, human rights and the environment

Building the case for a 'right to a healthy environment'



Sonam Gordhan, Legal Intern with Friends of the Earth

At a glance

- Human rights have been a valuable tool in the development of environmental rights.
- The victim-focused nature of human rights litigation is a limiting factor for claims in public interest environmental law.
- Rights of action under existing common law domestic frameworks do not offer substantive redress for environmental harm, and human rights do not provide additional, necessary protections.
- Substantive environmental rights would provide a more robust and comprehensive level of protection.

Human rights have a distinct and important role in ensuring a healthy and safe environment. The Aarhus Convention 1998 (Aarhus Convention), considered to have the 'potential to serve as a global framework for strengthening citizens' environmental rights'¹ is a clear manifestation of fundamental human rights principles applied to matters of environmental democracy.² Although crucial to the realisation and implementation of *procedural* environmental rights, neither the Aarhus Convention nor the European Convention on Human Rights (ECHR) provide the legal tools necessary for a *substantive* environmental 'right' to a healthy, thriving or decent environment (or similar). Furthermore, the gaps in existing regulatory frameworks, whether international, regional or domestic, cannot be filled with human rights principles alone. Rather, a more robust commitment to a substantive environmental right, bolstered by fundamental environmental principles is required.

This article will focus on key difficulties claimants face when engaging with the UK's domestic legal framework to seek substantive redress for environmental harm. It will then conclude with a proposal for an autonomous and directly effective environmental right, which Friends of the Earth believes could offer more comprehensive protection for victims of environmental harm. This would mirror the initiative of over 100 constitutions across the globe and offer the UK an additional environmental safeguard upon its possible departure from the EU's environmental governance framework.

'Human' rights, not 'public' rights

The jurisprudence of the European Court of Human Rights (ECtHR) has expressly avoided carving out a substantive right to a healthy environment; the case law focuses on violations of Article 8 (on the right to respect for private and family life) and, consequently, the severe effects of harmful pollution on *individuals*. The ECtHR's decision in *López Ostra v Spain*³ exemplifies this, as it was determined that 'severe environmental pollution may affect *individuals*' [emphasis added] well-being and prevent them from enjoying their homes...without, however, seriously endangering their health.⁴ This position was reinforced by the judgement in *Kyrtatos*,⁵ where the Court determined that the 'crucial element' when determining whether environmental pollution has severely restricted Article 8 rights was the effect on the individual concerned – and not simply the general deterioration of the environment.

Furthermore, the issue of standing perpetuates the victim-focused nature of human rights-based approaches. Article 34 of the ECHR provides that the Court may receive applications from non-governmental organisations 'provided they are a... *victim* [emphasis added] of a violation' of the rights in the ECHR. In the UK domestic context, Section 7(1) of the Human Rights 1998 (HRA) implements this, stating that 'a person' may bring proceedings only if he/she is (or would be) a victim – with no mention of NGOs at all. Its utility in public interest environmental litigation is therefore significantly restricted, exemplified by the inability of NGOs to act on behalf of affected groups.⁶ In contrast, Article 9 of the Aarhus Convention provides that claimants with 'sufficient interest' are able to engage in public interest environmental litigation, even when their rights are not in issue. Boyle considers this a 'significant difference' to the narrower focus of the ECHR, 'with important implications for any debate about an autonomous right to a decent or satisfactory environment'⁷. This is particularly important, as:

a) NGOs have the capacity and expertise to raise widespread public awareness of environmental concerns; and

b) they have demonstrated higher success rates in enforcement action and public interest litigation.⁸

Standalone, independent environmental rights that build upon the foundations of the Aarhus Convention could therefore present a useful tool in enforcing environmental rights of a more public nature - i.e. in instances of harm arising from poor air quality, flood defences and sewage treatment. That is so long as they were not just 'totemic' but practical and accessible too.

Limitations of safeguarding a right to a healthy environment through existing domestic frameworks

In practice, the ECtHR is conservative in its approach to reading environmental rights into the existing ECHR. Below, it will be shown that the effect of this approach contributes to the overall complexity of navigating domestic rights of action when seeking redress for environmental harm.

1. The wide margin of appreciation

The UK enjoys a wide margin of appreciation when determining the necessary steps required to comply with the ECHR. In *Hatton v United Kingdom*,⁹ the claimants alleged that government policy on night flights at Heathrow infringed their Article 8 rights under the ECHR, and that they were denied an effective domestic remedy for their complaint (as provided for by Article 13). The Court refrained from expanding Article 8 rights to protection from severe environmental pollution, and simply reiterated the 'subsidiary role of the Convention' in enabling states to strike a fair balance between the competing interests of the individual and of the community as a whole. It held that the UK could utilise a 'certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention',¹⁰ thus denying the claimant of asserting its rights under Article 8.

The rationale for this is understandable; in the words of the Grand Chamber, 'national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions.'¹¹ Without engaging in a debate about the separation of powers, the reluctance of courts to entertain human rights claims that infringe on government policy-making reflects the inappropriateness of using this forum to further the agenda for 'environmental rights'.

Effective environmental rights that sit outside the framework of the ECHR, could therefore offer a more direct method of challenging environmentally harmful decision-making by governments. They would, however, need to be developed separately (possibly at national level) and as such may lack the consistency or unifying force that the ECHR currently provides.

2. Statutory enforcement procedures generally cannot be sidestepped in favour of a common law or human rights approach

It is a general rule in common law that an action in private nuisance against a body whose operation interferes in one way or another with neighbouring land is not possible where Parliament has authorised the construction and use of an undertaking or works, and there is a statutory scheme in existence which is inconsistent with such liability.¹² The exception to this is when a claimant can identify negligence on the part of the public authority, or body carrying out works for a public function.

This adversely affects the outcome of human rights claims. *Marcic v Thames Water plc*¹³ established that when there is no negligence alleged, the legislature is afforded a wide margin of discretion when determining a proper balance between community and individual interests. The facts of the case are well known: the claimant's house was regularly flooded by water and foul sewage from the respondent's neighbouring premises. He sought damages and an injunction and claimed a breach of his Article 1 Protocol 1 right to property under the HRA.

The Court struck down his claim and held that the existence of a statutory remedy under the Water Industry Act 1991 meant that a parallel common law right could not run alongside this enforcement procedure. As the claimant did not seek damages under the statutory enforcement scheme, he was not offered any remedy for the pollution on his land. Furthermore, the result of *Hatton* above provided sufficient justification for the court to hold that a claim to the enjoyment of Article 1 Protocol 1 rights (to property) was not absolute, and was subject to a balancing exercise between individuals affected and the wider public.¹⁴

The significance of this 'gap' is yet clearer on consideration of the extent to which statutory enforcement schemes are relied upon by the Environment Agency. Relying solely upon existing human rights and common law rights of action does not guarantee either preventing harm or penalising those in breach of their statutory duties.

3. Absence of substantive remedies

Courts are reluctant to 'top up' common law remedies using the HRA – leaving groups unable to seek substantive remedies. In contrast to *Marcic* above, the claimants in *Dobson v Thames Water Utilities Ltd*¹⁵ did establish a common law action in nuisance against the offending water authority, and were also held to be victims of a breach of Article 8 ECHR. However, the damages awarded as a result of the nuisance constituted 'sufficient just satisfaction' for the purpose of the HRA – which meant that, despite the

establishment of a breach of ECHR rights, no further remedies were available to the claimants.

Thomas Bannister was a child of one of the claimants, who had also suffered a breach of his Article 8 rights yet did not have any proprietary interest in the land. It was held that it would not be appropriate, just or necessary to award a further sum for breaches to Thomas, as the award of damages at common law to a property owner would normally constitute just satisfaction to the owner for the purposes of section 8(3) of the HRA and no additional award of compensation under the HRA would normally be necessary.

Once again, the question of the appropriateness of the human rights framework for claims of this nature is raised. When negligence cannot be established, the decision in *Marcic* applies. When negligence is established, only those with a proprietary interest in the land are remedied for their losses under common law rights of nuisance, regardless of whether a human rights claim is successful.

The Way Forward

It has been shown that victims of environmental harm are left in something of a 'catch 22' when seeking redress or damages. Although human rights have enriched the development of procedural environmental rights, and 'humanized' the effects of environmental degradation, their value in offering viable legal solutions to problems of environmental degradation is not convincing.

Express environmental rights could offer a renewed approach to public interest environmental litigation and environmental protection in general. Questions remain about the nature of such a right; should it be a proactive obligation or simply a tool for litigants? Should it include the right to biodiversity, or simply commit to a 'healthy environment'? How will the courts approach such a right? Is there political will for such a right to exist?

The concept is not new; over 100 constitutions worldwide give effect to environmental rights provisions, and the UN Special Rapporteur on human rights and the environment recently declared that the global recognition of a right to a healthy environment would 'complement, reinforce and amplify the existing...legal framework'.¹⁶ How this works practically in the UK depends upon a thorough understanding of our existing legal culture, and an innovative, creative approach on the part of environmental lawyers, campaigners and NGOs to successfully realise new and effective substantive environmental rights. This is a project we at Friends of the Earth consider to be a necessary and important step in protecting people and the planet.

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Endnotes

- 1 UNECE, The Aarhus Convention – An Implementation Guide (2000).
- 2 The three pillars of Aarhus are access to justice, public participation and access to information.
- 3 Lopez Ostra v Spain App no 16798/90 (ECHR, 9 December 1994).
- 4 Ibid [51].
- 5 Kyratos v Greece App no 41666/98 (ECHR, 22 May 2003).
- 6 See section 7(1) of the Human Rights Act 1998.
- 7 Alan Boyle, "Human Rights and the Environment: Where Next?" EJIL (2012) 23(3) EJIL 613, 626.
- 8 Nicolas de Sadeleer, Gerard Roller and Miriam Dross, Access to Justice in Environmental Matters (Final Report Doc ENVA 3/ETU/2002/0030), 7.
- 9 Hatton v United Kingdom App no 36022/97 (ECHR 8 July 2003).
- 10 Ibid [98].
- 11 Ibid [97]-[104].
- 12 Hammersmith & City Railway Company v Brand (1869) LR 4 HL 171, (Cairns LJ) in Allen v Gulf Oil Refining Ltd [1980] UKHL 9.
- 13 Marcic v Thames Water plc [2003] UKHL 66
- 14 Ibid [71].
- 15 Dobson v Thames Water Utilities Ltd [2009] EWCA Civ 28.
- 16 UNHCR, 'Environmental hazards kill 8 million a year: UN expert urges global recognition of the human right to a healthy environment' (New York, 25 October 2018) available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23782&LangID=E> (accessed 13th November 2018).

Human health, human rights and the environment

70th Anniversary of the Universal Declaration of Human Rights: what gift to bring?



Dr Michèle Perrin-Taillat, linguist and semiotician. UKELA wild law special interest group

At a glance

- The Universal Declaration of Human Rights is 70, and new trends have emerged.
- The Universal Declaration of Human Rights: its origins and its future. Comparing the French Declaration of Human and Civic Rights (1789), the Universal Declaration of Human Rights (1948), and the Proposal for a Universal Declaration of the Rights of Mother Earth (2010).
- Current trends are to adopt legal personality and rights for nature.

On 10 December 2018, the United Nations celebrates the 70th anniversary of the [Universal Declaration of Human Rights](#) (UDHR). This landmark declaration, modeled on the French [Declaration of Human and Civic Rights](#) of 1789 (the French Declaration), and therefore still rooted in the philosophy of the Enlightenment,¹ has opened the way for a series of legal instruments that reinforce unalienable human rights. From being the prerogative of French adult male citizens, rights have over time and space been acquired by an increasing number of categories of human beings. Women, children, indigenous people, from being legal objects, have gradually become subjects of the law. They can stand in court to assert their rights and claim redress. As we are becoming increasingly aware of the extent and danger of climate change and biodiversity loss, and their impact on humanity, it is suggested that it is now time to extend rights from humans to non-human beings. The 2010 [Proposal for a Universal Declaration of the Rights of Mother Earth](#) (UDRME) marks a turning point in this respect.

In the background there is a global feeling that there is an imbalance that needs to be redressed in favour of nature, which will also help to reinforce human rights. A conspicuous manifestation of this feeling is UN General Assembly Resolution [A/RES/63/278](#) of 1 May 2009 that proclaimed 22 April as 'International Mother Earth Day'. On 24 April 2010, people who had gathered from all over the world in Cochabamba (Bolivia) offered a proposal for a UDRME. Since December 2009, the UN General Assembly has

adopted yearly Resolutions on Harmony with Nature². During the same period there has been a growth in recognition of rights for nature in different countries around the world. Environmental law is present in many constitutions or statutes worldwide³, and many states, local authorities, or courts have acknowledged rights of nature⁴. In light of this trend, it is interesting to make a comparison between the UDRME and landmark human rights declarations: the first declaration - the 1789 French Declaration - and the first universal declaration - the 1948 UDHR.

Developments in declarations of rights

The French Declaration was adopted on 26 August 1789 by the representatives of the French People formed into a National Assembly. The people had suffered under the joint absolutism of church and monarchy who had tested their forbearance to its limits. The French Declaration came into being 13 years after the [Declaration of Independence of the Thirteen States of America](#) adopted in Congress on 4 July 1776 (the America Declaration). The American Declaration also had its origins in the rejection of a dominating power that had become unbearable in the eye of the people of the American colonies. Both declarations were inspired by the philosophy of the Enlightenment, but the French Declaration and the American Declaration were drafted in a very different format. Whereas the latter appeared as a mono-block, a text without paragraphs, the French Declaration innovated by adopting a format that was to become the canonical form for Declarations of Rights: a Preamble consisting of a series of paragraphs explaining the circumstances followed by a series of numbered Articles enunciating the principles to be followed. The French Declaration is part of the current French constitution.

The UDHR was adopted by the General Assembly of the United Nations on 10 December 1948. It followed two world wars that had deeply hurt nations in their flesh and in their conscience. The context of the UDHR is one of doubt cast on the capacity of 'civilised nations' to behave according to the ideals spawned by the Enlightenment. Science and technology had led to

two world wars and atrocities of unprecedented scale and horror. National languages had gained ground as education became free for all, often at the expense of vanishing dialects. Amongst the vast majority of Europeans who can read and write their national language many had been ensnared by the rhetoric of nationalism. In 1948 Europe had to be reconstructed, physically, mentally, and politically. The greatness of the 'nation' had been dwarfed by the disasters wrought by exacerbated national pride, leading to mass destruction of those who did not belong. The Second World War was a time when even intellectuals in France and Germany were divided, some opting for free clandestine writing putting their very lives at risk whereas others more or less enthusiastically embraced national socialism, contemptuously denying basic human rights as they were either silently or actively endorsing an ideology of hatred and contempt. Hence the need to reaffirm human rights within the broader concept of universality in the UDHR. The Charter of the United Nations (adopted in 1945) served as a framework for the UDHR, and the French Declaration served as a model; a Frenchman, René Cassin, played a leading part in the drafting of the UDHR, which is symbolically significant if one considers that France was one of the nations where division had been most painful, tearing apart its members in fear, hatred, and mistrust of one another. The UDHR was published in both English and French running in parallel columns as resolution 217 A (III) of the General Assembly of the United Nations.

The Proposal for a UDRME was unofficially adopted on 22 April 2010 at the World Peoples Conference on Climate Change and the Rights of Mother Earth in Bolivia. It reflects the reaction of South American people who had suffered under what they perceived as the 'hegemonic capitalist power' of the United States. The peoples of South America have inherited a philosophy from Native American Indians that has cascaded down via Spanish, a colonial lingua franca remodeled by the cult of Pachamama, or Mother Earth culture. The UDRME was drafted in Spanish and English. Conceptually, the English of the UDRME is not the English of American capitalism; it is an example of English as a lingua franca that thrives on borrowing from many different cultures and languages. The UDRME more generally reflects the 'indignation' of people in the world who had become aware of the extent of the damage caused to the planet by 'industrial and financial interests'. It slightly borrows from the English of popularised biological science, and its style is influenced by the UDHR, but it is mostly the expression of those who call for Earth justice as relationships have been damaged by abuse of ecosystems. The UDRME extends rights to non-human beings and innovates by devoting an important section to Human Duties.

Declarations of rights are emotional. They use expert

legal language superficially rather than substantially, leaving the substance of law to be created and the enforcement of the law to be implemented. They have a deictic value, showing the way to be followed by signatory states, their legislative and judiciary powers, and more widely by their citizens. Over the centuries declarations have been products of time and place, of social, economic and political contexts, and of intertextuality. Landmark declarations have been the foundation of vast bodies of codified and case law.

What gift for the 70th anniversary of the Universal Declaration of Human Rights?

The principles of the Proposal for a UDRME have already had a strong echo in constitutions, statutes and case law worldwide. To obtain a detailed view of the advancement of Earth jurisprudence and rights of nature, the eighth report of the Secretary-General on Harmony with Nature, published on 23 July 2018 ([A/73/221](#)), can be consulted. The general trend is reflected in paragraph 14:

It was highlighted that human rights and constitutional law are evolving towards recognition of the inherent rights of nature, and that human rights, as recognized in international treaties and conventions, depend on a healthy and balanced environment. ...

And in paragraph 99:

Earth jurisprudence continues to be incorporated into national law in an increasing number of countries worldwide. In some instances, the judiciary has demanded State action affirming or restoring the rights of rivers, forests or glaciers, while in other instances, municipal or local legislative bodies have recognized the rights of nature.

By treating non-human beings as subjects of the law (i.e. granting them legal personality), human law puts them in a much better position to survive and develop. The concept of legal personality already applies to physical persons who cannot stand for their own interests (children, disabled persons, etc) and to associations, trade-union and corporations. It is by no means a new idea, but a concept that should be adapted and broadened in its application. In order to do so, it is necessary to develop human knowledge of non-human beings to understand their needs, and thereby define their rights. We need to recover traditional knowledge of indigenous people (including Western indigenous people), to learn from failures and successes of the past and present, and to develop science. Research should watch for conflict of interest, and all human beings should be concerned (participative research). Science, legal research and ethno-sociology should support one another to achieve best results and practices.

The main issue is the 'recognition of the inherent rights of nature, and that human rights, as recognized in international treaties and conventions, depend on a healthy and balanced environment', as highlighted in [A/73/221](#). Abuse of ecosystems goes hand in hand with the violation of human rights as local populations are deprived of their livelihood and are exposed to pollutions that are detrimental to their health, threatening their very life. These populations have no say in decisions made elsewhere. Those who defend their rights are often prosecuted and persecuted. In view of environmental disasters and dramatic failures to implement human rights that often go hand in hand with environmental disasters, is it not overdue to recognise that 'human rights ... depend on a healthy and balanced environment'? Is it not high time to bring such recognition as a gift to the UDHR on its 70th anniversary, and to act promptly upon it? It is a question of ethics, philosophy and political will.

Michèle Perrin-Taillat is a [UN Harmony with Nature Expert](#). Since 2010 Michèle has developed an increasing interest in environmental and nature issues, and in seed legislation and the impact of agriculture on the environment.

Endnotes

- 1 This illustration highlights the close relation between the French Declaration of Human and Civic Rights and the philosophy of the Enlightenment.
- 2 <http://www.harmonywithnatureun.org/chronology/>
- 3 <http://www.harmonywithnatureun.org/environmentalProvisions/>
- 4 <http://www.harmonywithnatureun.org/rightsOfNature/>

Matters in practice

Meeting ecological needs in the implementation of the National Development Framework



Dr Victoria Jenkins, Hillary Rodham Clinton School of Law, Swansea University and co-convenor of UKELA Wales Working Party

At a Glance

- The Planning (Wales) Act 2015 introduced a large number of amendments to the Town and Country Planning Act 1990 and Planning and Compulsory Purchase Act 2004 as they apply to Wales.
- One of the key changes was the introduction of a National Development Framework (NDF). Unlike its predecessor, the Wales Spatial Plan, this will extend to the siting of new development.
- The NDF will focus on the physical infrastructure that underpins social and economic development, such as road, rail and energy projects, and it is vital to consider how this will take environmental concerns into account.
- This will depend on co-ordination between the new land use planning processes in Wales and systems for the Well-Being of Future Generations (WBFG) and the Sustainable Management of Natural Resources (SMNR). The connection with existing environmental laws will also be key.
- A final point of interest is the way in which 'infrastructure' and 'ecology' are conceptualised in the NDF and the impact this might have on legal architectures in future.

Infrastructure is a term generally associated with the physical infrastructure that underpins social and economic development, such as road, rail and energy projects (this is certainly how this is identified in the secondary legislation defining Developments of National Significance (DNS)). Yet, we also need to pay greater attention to the ecological structures that provide the foundation for this.

The implementation of the NDF will be provided through a new system of land use development planning and decision making in Wales and new law and governance frameworks for the WBFG and the SMNR. This presents new opportunities to ensure greater attention to meeting our ecological needs, which, given the findings of the latest State of Natural Resources Report for Wales, should be a priority.

This paper highlights three issues for consideration that relate to:

- i the place of ecological protection within the nexus of new legislation in Wales on land use planning, WBFG and SMNR
- ii the co-ordination between the new land use planning processes and existing laws on environmental protection and,
- iii the way in which 'infrastructure' and 'ecology' are conceptualised and the impact this might have on legal architectures in future.

The legal framework for land use planning in Wales now ensures that the NDF will be implemented through a system that strives towards the achievement of sustainable development and specifically the well-being goals. These goals include: 'creating a low carbon society which recognises the limits of the global environment and therefore uses resources efficiently and proportionately' and 'maintaining and enhancing a biodiverse natural environment with healthy functioning ecosystems' (s4 Wellbeing of Future Generations (Wales) Act 2015 (WBFG Act 2015)). As in the past, the role of Natural Resources Wales (NRW) will also be key to the way in which land use planning is co-ordinated with Wales' goals for SMNR.

However, whilst there is clear attention to the well-being goals in land use planning there is less of a connection, at least within the legal frameworks, to the new system for SMNR. The only cross-referencing is provided by the obligation to ensure that the NDF explains how the National Natural Resources Report has been taken into account (s60(5) Planning (Wales) Act 2015). At the local level, the work of NRW will be underlined by an approach known as Area Management, but there is no legal requirement to provide co-ordination between this and local development planning. The assumption perhaps being that this will be provided indirectly through efforts to achieve the well-being goals through the work of public service boards (for example, according to the Explanatory Memorandum to the Environment (Wales) Bill it was intended that area statements would feed indirectly into local development plans in their use as evidence for local wellbeing plans under the WBFG Act 2015).

A related issue is that the 'spatial areas' for area management have little connection with either strategic development planning at the regional level, local authority areas or indeed those for public service boards. This will present something of a challenge in 'joining up' these processes in the implementation of the new system.

The NDF refers to the importance of ensuring that new development 'avoids areas of environmental risk and builds resilience to the risks from flooding, air quality, water quality, increases in temperatures, loss of habitats and ecosystems.'¹ The achievement of this aim in providing consent for new developments will rely upon existing environmental laws. There are a few points to highlight here about the interaction between these legal regimes and the land use planning system:

- Environmental permitting – is now well-established but the separation of the legal regimes for land use planning and pollution control has long been a concern. The Welsh government's plans to unify consenting processes for the development of new infrastructure in Wales (including not just environmental permitting but other permitting regimes) is, therefore, to be welcomed².
- Environmental impact assessment - provides a legal structure to ensure that environmental risks are considered in the land use planning process but has always operated using, arguably, arbitrary thresholds to assess the likely significant impacts of development. The new system of DNS similarly operates using a threshold approach and, although there is some connection between the two there are also clear differences (for example, the threshold for mandatory environmental impact assessment of 'dam and reservoir projects' align with those for DNS but those for on-shore energy wind projects are very different). This relates not just to the exact thresholds but the approach in focusing either on the size of projects or their intensity (e.g. by size of the development in hectares/number of wind turbines or the volume of water or energy produced). The differences may be entirely appropriate but there are issues with transparency where such processes are fraught with complexity and lack coordination. Furthermore, seemingly arbitrary thresholds can cause problems as the recent case of intensive poultry production has proven.
- Habitat assessment - is mandatory for any plan or project likely to have a significant effect on a site designated under European law whilst NRW must be consulted on applications affecting Site of Special Scientific Interest (SSSIs). Planning Policy Wales also dictates that 'such sites are protected

from damage and deterioration.'(The draft Planning Policy Wales 10 also states that we must ensure that 'Sites designated for their landscape or nature conservation importance are fully considered and their special characteristics and features protected and enhanced, whilst the network of sites of should be recognised as being at the heart of improving the resilience of ecosystems.'). These legal frameworks have been essential to the protection of such areas, but arguably require some strengthening in terms of the level of protection. More fundamentally, it is increasingly recognised that conserving small sections of land in this way is insufficient to meet our ecological needs.

- Public participation – is essential in processes of law that aim to ensure environmental risks are considered as risk assessment is not an entirely technical process. Participation has long been a consideration in planning and is increasingly so in environmental legislation. The new processes for development planning, and particularly decisions on DNS, include new approaches to participation. This draws on the experience of 'front-loading' participation in major infrastructure development across the UK under the Planning Act 2008, but it will be important to monitor the impact of these changes in Wales. Of particular note is the wide discretion given to planning inspectors to decide how to proceed in DNS cases, including whether or not to hold an inquiry in public.

The NDF refers to the importance of 'facilitating new green infrastructure' and 'strengthening nationally important ecosystems'.

The term 'green infrastructure' is now familiar in land use planning, but it continues to defy clear definition. It is often associated with 'green space' in the urban environment but could have an extended meaning at the national level. In the same way that strategic economic infrastructure needs across Wales are identified and developed we should ensure attention to green infrastructure. Perhaps a barrier to this is the traditional disaggregation of land use planning processes and agriculture. Agricultural land is clearly a significant part of our green infrastructure and should, arguably, be part of this conversation.

The idea of 'nationally significant ecosystems' is also an interesting one and might provide a conceptual framework that can take us beyond the current approach to habitat protection. It will, therefore, be interesting to see how this is developed.

To conclude, creating law and governance frameworks to support the maintenance and enhancement of ecological structures in Wales will not be easy. There have already been significant changes in Wales that

may create new opportunities to support this objective. Nevertheless, challenges remain. Legal architectures are not, however, static and there will, undoubtedly, be further changes during the lifetime of the NDF that will hopefully seek to address these.

This paper formed the basis of a presentation at the Policy Forum for Wales Seminar on Priorities for the National Development Framework on 6th November 2018. The author would like to extend her thanks to this organisation for permission to publish this piece in E-Law.

Endnotes

- 1 National Development Framework: Issues, Options and Preferred Options (Welsh Government, April 2018), page 19.
- 2 see further *Towards Establishing a Bespoke Infrastructure Consenting Process In Wales* (Welsh Government, April 2018).

Adverts, jobs and tender opportunities

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