

ENVIRONMENTAL LAW & MANAGEMENT

SPECIAL ISSUE

UNITED KINGDOM ENVIRONMENTAL LAW ASSOCIATION
UKELA CONFERENCE PAPERS 2018

Past reflections and future horizons:
environmental law in a post-Brexit world

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UNITED KINGDOM ENVIRONMENTAL LAW ASSOCIATION (UKELA) CONFERENCE PAPERS 2018

The University of Kent, Canterbury Campus, 22–24 June 2018

Past reflections and future horizons: environmental law in a post-Brexit world

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UKELA Conference 2018

The University of Kent, Canterbury Campus
22–24 June 2018

Past reflections and future horizons: environmental law in post-Brexit Britain

Foreword

Our theme this year is both reflective and forward-looking. That theme is apt for UKELA's 30th year, and gives us a chance to look back over the achievements of the first generation of environmental lawyers, and also to look at the challenges ahead for the next generation.

However, the theme resonates much further than just UKELA as an organisation. As we gather here in Canterbury, we have less than a year until the UK leaves the European Union, as yet uncertain about the future relationship with those EU institutions that have, to a large extent, driven the development of environmental law throughout the entirety of UKELA's existence. We have an English 25-Year Environment Plan that talks boldly about an ambition to be the first generation to leave the environment in a better state than we found it in, but which remains light on detail. We have the devolution settlements being tested by questions around where the powers returned from Brussels will reside, creating tensions within environmental policy, as elsewhere. We have environmental law high up the political agenda: it was only very recently that the UK Parliament debated enshrining the principles of environmental law into UK statute – a new concept, and one that we will debate ourselves at this conference. This is a period of change like no other for those who are environmental lawyers, and we have the opportunity to shape the future. We must seize that opportunity.

In its 30 years, UKELA has never been so relevant, or so vital. No other organisation brings together the full spectrum of voices in environmental law: regulators, campaigners, solicitors, barristers, consultants, academics, senior members of the judiciary, students and the voices of tomorrow, and those from other professions who are simply concerned to ensure the preservation and development of good law for the benefit of the environment. When we make our interventions into public debate, we have the ear of government and Parliament, and our reputation as an impartial, objective voice on matters of good environmental law is unparalleled.

In particular, I want to praise the work of the UKELA Brexit Task Force, which is a group of UKELA volunteers and staff who have explored the wealth of expertise and knowledge across the membership to generate insightful reports and interventions that have – without doubt – influenced the debate. We know the reports have been well received within Defra and within the Environmental Audit Committee, and – in accordance with our charitable status – the reports have also been made available to the public to educate and inform those who wish to know more about these essential questions facing us all. We will hear more about the work of the Brexit Task Force at this conference, and I recommend that everyone reads the Summary Report¹ that we have published on the successes of the Brexit Task Force so far. It shows just how much has been achieved in a short space of time, and we can take pride in that. But we do not rest on our laurels.

I want to turn to those future horizons. This conference – and UKELA as a whole – is not fixated on 11pm on Friday 29 March 2019, the moment in time when we leave the European Union. Whatever happens, the sun will rise on Saturday 30 March, and on the days that follow. The cycles of the natural environment will be ignorant of this political event, despite its significance for all of us. So, we are setting our sights much further. It is timely that our conference theme looks ahead to the challenges and ambitions of the next generation of environmental lawyers at the same time as the government sets out its plan for us to be the first generation to leave the environment in a better state than we found it in. During this conference, we will hear from some of UKELA's founders on what has been achieved in the past 30 years and the lessons we can learn from those achievements. We will also hear from those whose careers are in front of them, on their hopes and fears, and how environmental law can be shaped to overcome those fears and deliver on those great hopes. Some may argue that we have succeeded on the easy wins, the 'low hanging fruit', and that the big issues facing us (climate change, loss of biodiversity, population growth) are

¹ <https://www.ukela.org/content/page/6565/Year%20One%20Report%20Brexit%20Task%20Force%20June2018.pdf>.

going to be much more difficult, but if you listen to the enthusiasm and ambition of our younger voices, you will find many reasons to be optimistic.

The winds of change are blowing strong at the moment and our conference programme is not immune. We have introduced some late changes to accommodate a contribution from Defra on its consultation on the proposed Environmental Principles and Governance Bill. The proposals – to enshrine environmental principles into law and to create an oversight body to hold the government to account for its environmental record – might well be the most important change in environmental law in UKELA's history. It is therefore important that we hear from Defra on its current thinking and that we, the UKELA membership, have an opportunity to debate the points raised by the consultation document and to feed the outcome back into UKELA's consultation response.

The environment knows no national borders and environmental lawyers have always been interested in the world beyond the jurisdictions in which we practise. At this conference, we will hear about the challenges and achievements of environmental law in the United States, in South America and – a first for conference – in the Solomon Islands, where the impact of climate change is very real.

We will also, of course, look at environmental law in practice, as we consider the regulation of the waste sector as we transition to a circular economy, the important role that investment policies based on environmental, social and governance (ESG) factors can play in influencing corporate behaviour and driving change, and the potential for a radical overhaul of planning law to make better communities for people and the environment.

You will have gathered by now that this conference will cover a great deal of ground, and rightly so, because there is much to cover. Yes, it is a period of great change, with lots of uncertainty and questions about the future direction of environmental law, both in the UK and in the international arena. Some are optimistic, others have doubts, but there is one thing that is beyond doubt: it has never been a more exciting time to be involved in environmental law.

Simon Tilling *UKELA Vice-Chair, Chair of Conference 2018, Partner, Burges Salmon LLP*

Principal speakers at the UKELA Annual Conference 22–24 June 2018

Tim Clare

Director, Transactions & Corporate Services, Anthesis (UK) Ltd

Tim Clare is the European lead for environmental, social, governance (ESG) criteria at sustainability advisory firm Anthesis Group, based in London. Tim has over twenty years of experience. His focus for most of that time has been on the direction of multi-site, multi-jurisdictional environmental, health & safety (EHS) due diligence projects undertaken as part of M&A transactions and the provision of wider EHS advice and support. More recently, Tim has helped his clients, particularly in private equity, to respond to the ESG factors, helped develop their internal ESG policies and management systems and has worked with their portfolio companies to improve their ESG performance. Tim's current focus is on developing new ways to monitor portfolio company ESG performance and to enhance assessment of supply chain risks. Tim is a former trustee and Vice Chair of UKELA.

William (Bill) Howarth

Professor of Environmental Law, University of Kent

William (Bill) Howarth, BA, LL M, MIFM, CE, FRSA, FCIWEM is professor of environmental law at Kent Law School at the University of Kent and coordinator of international environmental law and policy LLM teaching. He is a past editor of the *Journal of Water Law* and author of several books on the law relating to fisheries, water pollution, aquaculture, water-courses, flood risk management and ecological conservation of the aquatic environment. He is the author of over 100 reports, monographs and academic journal articles on diverse aspects of water and environmental law. He is Honorary Legal Adviser to the Institute of Fisheries Management, a member of the Committee of Fish Legal, the regional representative for the International Association of Water Law, and a member of both the United Kingdom Environmental Law Association and the Agricultural Law Association.

Peter Kellett

Director of Legal Services, Environment Agency

Peter has a science degree and a master's in environmental law. He trained as a solicitor and worked in the City and in Brussels. He joined the Environment Agency in 1997. Peter's work has included:

- the Defra/Welsh Government/Environment Agency team creating the Environmental Permitting (England and Wales) Regulations
- civil sanctions implementation
- better regulation
- the creation of Natural Resources Wales
- EU Exit

His team's work includes: permitting, compliance, enforcement and sanctions across a wide range of environmental laws; carbon regulation; the six-year flood capital programme; fracking; navigation; invasive species; nuclear new build; and fish regulation. Peter was a trustee and then chair of the UK Environmental Law Association (www.ukela.org) between 2001 and February 2011. Peter currently chairs St Werburghs

City Farm in Bristol. He is the author of 'Better regulation, deregulation and environmental law' (2015) 27 *ELM* 200.

Paul Leinster

Professor of Environmental Assessment, Cranfield University

Professor Paul Leinster CBE has over 40 years of practical experience in environmental management, science, policy development and regulation. Paul has been professor of Environmental Assessment at Cranfield since October 2015. Prior to this he was Chief Executive of the Environment Agency. He is a member of the government's Natural Capital Committee, chairs the bpha Housing Association and the Bedfordshire Local Nature Partnership and is a board member of Flood Re, Delphic HSE and the Institute of Environmental Management and Assessment. Paul is a member of the Center for Ecology and Hydrology's Transition Oversight Committee. Prior to joining the EA in 1998 Paul worked in the private sector for over 20 years. This includes BP, SmithKline Beecham and Schering Agrochemicals. Paul is a UKELA patron.

Emma Lui

Former paralegal at Lexis Nexis, now a policy adviser at the Office for Nuclear Regulation (ONR)

In June 2018, Emma joined the Office for Nuclear Regulation (ONR) as a policy adviser, working on establishing the post-Brexit domestic safeguards regime. She was recently the sole paralegal in the construction, environment and energy teams for the LexisNexis practical guidance content service, LexisPSL. She was called to the bar in 2015 and obtained her LLM in environmental and public law with Distinction from UCL in 2014. Emma has written on environmental hot topics for the LexisNexis purpose-built public blog, UKELA's online journal 'e-law', *The Environmentalist* magazine's monthly case column update and the Environmental Law Foundation (ELF)'s newsletter and blog. Her previous experience includes a legal internship at ClientEarth in EU biodiversity law, and volunteer work on a conservation and biodiversity research expedition to the Peruvian Amazon. Emma was formerly a UKELA student adviser and is an advisory board member of Public Interest Environmental Law (PIEL) UK.

Richard Macrory

Professor of Environmental Law, UCL

Richard Macrory is emeritus professor of environmental law at University College London, a door tenant at Brick Court Chambers and legal correspondent to ENDS Report. He was a member of the Royal Commission on Environmental Pollution (1991–2003) and a board member of the Environment Agency (1999–2004). In 2006, he led the Cabinet Office review on regulatory sanctions. All his recommendations were accepted by government and reflected in Part III of the Regulatory Enforcement and Sanctions Act 2008. Richard has published widely. The second edition of *Carbon Capture and Storage: Emerging Legal and Regulatory Issues*, edited by Richard, Ian Havercroft and Dick Stewart, was

published by Hart Publishing in February 2018. Richard was the first chair of UKELA many years ago, and until March this year was co-chair of the UKELA Brexit Task Force.

John Milner

American Bar Association SEER Chair

John concentrates his practice primarily in environmental law and litigation. He represents business and industrial clients in environmental permitting and enforcement actions, natural resource damage assessments and regulation promulgation before the US Environmental Protection Agency and the Mississippi Department of Environmental Quality and other state environmental agencies in the south-eastern states. John Milner has been inducted as a fellow in the American College of Environmental Lawyers and in the American Bar Foundation. He has been recognised by *Chambers USA: America's Leading Lawyers* as a Band 1 practitioner of environmental law in Mississippi, by *Woodward/White* as one of the Best Lawyers in America in the fields of environmental law and litigation in Mississippi and by *Martindale-Hubbell* with an AV Preeminent Rating. John is currently serving as the Chair of the American Bar Association's section of environment, energy and resources (SEER). In 2013, John received from SEER the first annual 'Chair's Award for Outstanding Contribution' to the section.

Nick Raynsford

Former Minister of State for Housing and Planning and Chair of the TCPA's Review of Planning

Nick Raynsford was the Member of Parliament for Greenwich and Woolwich from 1997 to 2015 (and previously for Greenwich from 1992 to 1997). He served as a government minister from 1997, initially in the Department of the Environment, Transport and the Regions (DETR), holding responsibility for housing, planning and construction, as well as being Minister for London. He was Minister for local and regional government in the Office of the Deputy Prime Minister from 2001 to 2005, also holding responsibility for the fire and rescue service and for resilience planning. He was made a privy counsellor in the 2001 New Year's Honours List. Nick was Shadow Minister for housing and construction from 1994 and a front bench spokesperson for London from 1993. Nick is currently President of the Town and Country Planning Association.

Colin T Reid

Dundee Law School, University of Dundee

Professor Reid has written widely on matters of environmental regulation, including three editions of *Nature Conservation Law* and *The Privatisation of Biodiversity? New Approaches to Conservation Law* (with W Nsoh). He has been heavily involved in work on the consequences for environmental governance of the UK's withdrawal from the European Union, leading to several appearances before parliamentary committees and is a member of the ESRC-funded Brexit &

Environmental rights network. Other current work includes investigating the actual use and impact of the public right of access to environmental information. He is founding member of various environmental law bodies in the UK (including UKELA) and a member of the IUCN Environmental Law Commission and of the editorial boards of several leading academic journals.

Jenny Scott

Environment Agency

Jenny Scott is a lawyer specialising in waste and a member of the National Legal Services team at the Environmental Agency. She undertakes a broad range of waste-related work, including litigation and development of legislation, policy and other national waste-related issues.

Sue Sljivic

Founding member and Director of RSK Environment Limited, UK Director International Pipelines and Offshore Contractors Association (IPLOCA)

Sue set up RSK Environment in the 1980s with a couple of colleagues working on major pipeline projects in the UK. The company now employs over 2,500 technical specialists, who provide a wide range of geoscience, environmental health and safety and engineering experience to assist clients with their development, operations and decommissioning challenges. The company operates across the UK, Middle East, the Caspian region, Europe and East Africa. Sue's experience has mainly been in the energy sector, initially working on large-scale energy projects, including pipelines, interconnectors, offshore wind, LNG regasification, onshore oil and gas exploration, nuclear, CCGT and CHP projects. Nowadays, the work is more focused on the utilities as they endeavour to get to grips with development of the capacity market, SMART grid and embedded generation. Sue is the director on the board of IPLOCA and heads up the HSE & CSR committee, working with member companies to compile pipeline construction best practice and portals to share relevant experience on HSE and environmental protection. Sue manages the RSK corporate responsibility and sustainability network at RSK and the preparation of its annual report. She is a STEM ambassador working with local and national schools to promote the development of science in schools. She has a particular interest in the education of girls and the role of sports in building confidence and key skills.

Simon Tilling

Vice Chair of UKELA

Simon is a partner in Burges Salmon's environmental law team specialising in all aspects of UK and EU environmental law. His practice includes regulatory advice, transactional support, appeals, regulatory engagement, corporate defence and environmental litigation. He has been a UKELA member for 15 years and is currently Vice Chair of UKELA and the Chair of Conference 2018 organising team.

Challenges for waste regulators

Jenny Scott

*Senior Lawyer, Environment Agency**

Inevitably, in this article I focus on Environment Agency challenges; devolved regulators¹ and local authorities may also be experiencing any of the challenges I outline here in common with the Environment Agency, but not necessarily.

Introduction

We are on the brink of extraordinary change in environmental law and waste law in particular. The confluence of EU exit, the new amendments to the waste directives brought about by the Circular Economy Package,² and a steady flow of high priority and urgent government waste strategy and policy,³ has created conditions in which there is a remarkable opportunity to realise these seriously ambitious plans to improve resource efficiency significantly and reduce risk to the environment and human health. This is a huge challenge, to put it mildly.

The Environment Agency's 2016 plan was recently revised⁴ to take into account its role in relation to the 25-year plan,⁵ which is at the heart of its priorities. In terms of waste priorities, that plan is underpinned by its more detailed regulated industry strategic business plan for the next five years, the detail of which marshals the Environment Agency's day to day real world challenges and sets them firmly in the same direction as the 25-year plan. There is nothing remarkable in the four overarching regulated industry waste priorities: better waste management; contribute to economic growth; open and transparent regulation; and drive down illegal waste activity. They are old news, and you could easily mistake them for any other Environment Agency waste and resources strategy published over the last 20 years. But there is

something different about them now: this is the next level and it is a significant shift. Whereas before the Environment Agency was more likely to be focusing its efforts on influencing others to promote sustainability, for example through the planning system, public awareness and advice and guidance to business, now it is looking at far more direct and focused opportunities, with a clear and firm political and societal momentum behind them, to influence for example, the real possibility of extended producer responsibility reform,⁶ reinforcement of the duty of care,⁷ more work to support the waste hierarchy⁸ and more and better separate collection.⁹

Waste crime

This is still one of the Environment Agency's biggest challenges: specifically, serious organised crime, which is often flagrant and fraudulent, either taking place completely outside of regulation, or where there is a permit or exemption to start with that goes horribly wrong. The Environment Agency is getting better at closing down illegal sites, but as soon as one is closed down, another is discovered.¹⁰ By far and away the vast majority of waste operators are compliant and responsible¹¹ – driving down illegal waste activity is crucial in maintaining a level playing field, as well as maintaining and driving waste management standards up in order to deter the ever increasing sophistication of environmental criminal activity.

Not all illegal activity is shut down through the full force of criminal prosecution of course; there are other forms of intervention that the Environment Agency uses successfully, such as intelligence lead disruption techniques and other enforcement steps that have been in use for some time, which can be quicker and cheaper, such as enforcement notices, which on the whole work well, and also, with ever rising success, the win/win/win for business, local communities and regulators of enforcement undertakings.¹²

* Jenny.scott@environment-agency.gov.uk. The views in this article are personal and do not necessarily represent the views of the Environment Agency. With thanks to my colleagues and clients for their input, in particular Jonathan Hofton, Jessica Hicken and Mair Davies.

1 In Wales: Natural Resources Wales; in Scotland: Scottish Environmental Protection Agency; in Northern Ireland: Northern Ireland Environment Agency.

2 EU Commission Communication 'Closing the loop: An EU action plan for the Circular Economy' COM(2015) 614 (2 December 2015).

3 Notably the following: HM Government 'A green future: our 25 year plan to improve the environment' (11 January 2018); HM Government 'Industrial strategy: building a Britain fit for the future' (27 November 2017); HM Government 'The clean growth strategy: leading the way to a low carbon future' (12 October 2017); and the anticipated Resources and Waste Strategy due to be published in Autumn 2018.

4 Environment Agency 'Creating a better place: our ambition to 2020', first published (29 June 2016, updated 1 June 2018).

5 HM Government 'A green future' (n 3).

6 See art 9 of Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing certain directives (OJ L312/3, 22 November 2008), as amended by Directive 2018/851/EC of the European Parliament and of the Council (OJ L150/109, 14 June 2018).

7 See Environmental Protection Act 1990 section 34 on the duty of care as respects waste, and also Defra 'A consultation on proposals to tackle crime and poor performance in the waste sector and introduce a new fixed penalty for the waste duty of care' (15 January 2018). See also summary of responses published 3 July 2018 pending full government response: <https://consult.defra.gov.uk/waste/crime-and-poor-performance-in-the-waste-sector/>

8 See Directive 2008/98/EC (n 6) art 4.

9 *ibid* art 11.

10 Environment Agency 'Regulating for people, the environment and growth' (1 December 2017).

11 *ibid*.

12 See eg <https://www.gov.uk/government/publications/enforcement-undertakings-accepted-by-the-environment-agency>.

It is true that the Environment Agency conducts far fewer prosecutions than it did 10 or 20 years ago,¹³ but there are several reasons why that is, including outcome-based enforcement and the fact that there are a far wider range of enforcement options available that enable cases to be resolved that previously would have turned straight into case files. Where it does take proceedings, the difference is that today they are definitely more difficult, complex and harder fought.

Some specific enforcement challenges that we are experiencing at the hard end are:

- Disclosure: if a site has been regulated for several years, there will be thousands of pages of documentation to scrutinise.
- Court timetables: the delay in trials coming on are now part of the problem and trials are getting longer.
- Remediation orders under Regulation 44 of the Environmental Permitting (England and Wales) Regulations 2016:¹⁴ the civil courts are unfamiliar with them and it is difficult to persuade a court to enforce them through contempt of court proceedings.
- Abuse of waste exemptions:¹⁵ volume limits and waste types are breached, multiple exemptions are registered and permits obtained in an attempt to bump up the volume and waste types on one site and avoid more regulation.

There has been a great deal of recent activity to address the volume of and trends in waste crime. In November 2017, government invested an extra £30 million over four years to enable the Environment Agency to continue to drive down waste crime in England;¹⁶ the Waste Enforcement (England and Wales) Regulations 2018¹⁷ provisions which came into force in May 2018, now allow the Environment Agency physically to stop movement of waste into sites and require removal of all waste, and not just illegally deposited waste. Lastly, the recent consultation on proposals to tackle waste crime and poor performance¹⁸ will help to shape future work to shore up abuse of exemptions, raise the standards in operator competence and reinforce duty of care.

Waste industry challenges

In 2016, 95 per cent of poorly managed sites were in the waste sector¹⁹ and below is a selection of prominent challenges in this area, in no particular order; two of which are dealt with in further detail in sections 4 (abandoned sites) and 5 (definition of waste):

- Abuse of waste exemptions: there is no funding stream to support exemptions compliance – they are free (apart from TII²⁰). The recurring issue of where the boundary should lie between exemptions and permitting will soon be scrutinised again and the recent waste crime consultation will inform that process.
- Misdescription, misclassification of waste and duty of care: hazardous waste is deliberately or mistakenly classified as inert waste, resulting in the avoidance of payment of the higher rate landfill tax. Also, failure to apply the WM3 technical guidance on waste classification²¹ properly, in particular failing to classify whether mirror entries are hazardous or not.
- Amenity issues: dust, vehicle movement, noise and odour – if not managed correctly have a miserable effect on local communities.
- Aggregates and soils: from fly-tipping to large scale movement of soils on to farmers' land, masquerading as deposit for recovery activities²² or meeting the requirements of DoWCoP, the CL:AIRE Definition of Waste Code of Practice.²³
- Chinese waste import restrictions: the knock-on effect of this on regulated industry – the breaching of exemption and permitting waste limits, disposal costs and infrastructure issues.
- Reducing emissions from high risk landfill sites: the obvious impact of emissions on air quality. The considerable success in driving down nitrogen oxides and sulphur dioxide emissions over the last 10 years means that the Environment Agency is now pushing down at the hard end.

Abandoned sites

There are approximately 40 of these sites currently in England and Wales.²⁴ They are extremely costly to clear up and put a big strain on relationships with local communities and local authorities. The causes of abandonment are complex, but usually involve business failure or an incident. Occasionally, sites are intentionally crash filled and abandoned, undercutting legitimate business. Abandoned sites can and sometimes do lead to serious incidents, making people's lives a misery and disrupting local businesses, and they are difficult to manage.

Acting early is key, but anticipating abandonment is not easy – these sites are unpredictable. The financial situation of a business can change very quickly. The Environment Agency tries to prevent or limit the risks of abandonment

13 See <https://data.gov.uk/dataset/6f06910a-8411-4117-9905-6284f1997c33/environment-agency-prosecutions>.

14 SI 2016/1154, as amended.

15 Schedule 3, Part 1 Exempt waste operations to which section 33(1)(A) of the 1990 Act does not apply: descriptions and conditions, Environmental Permitting (England and Wales) Regulations 2016, as amended (SI 2016/1154).

16 HM Treasury 'Autumn Budget 2017' (n 3).

17 SI 2018/369.

18 Defra 'A consultation' (n 7). See also <https://consult.defra.gov.uk/waste/crime-and-poor-performance-in-the-waste-sector/>.

19 Environment Agency 'Regulating for people' (n 10).

20 Repairing or refurbishing waste electrical and electronic equipment (WEEE).

21 Technical Guidance WM3: Waste Classification – Guidance on the classification and assessment of waste, version 1.1 (May 2018) <https://www.gov.uk/government/publications/waste-classification-technical-guidance>.

22 See <https://www.gov.uk/guidance/waste-recovery-plans-and-permits>.

23 CL:AIRE 'The definition of waste: development industry Code of Practice' Version 2 (March 2011).

24 Defra 'A consultation' (n 7) on proposals to tackle crime and poor performance in the waste sector and introduce a new fixed penalty for the waste duty of care 15 January 2018. See also <https://consult.defra.gov.uk/waste/crime-and-poor-performance-in-the-waste-sector/>.

through, for example, working with the operator to bring them back into compliance, serving enforcement notices or liaising with the operator or insolvency practitioner to avoid the permit being disclaimed, but it depends on the particular circumstances of each case – it is a fine balancing act. And even where the Environment Agency has taken early enforcement steps, there is often push back from the operator which leads to local frustrations and difficult relationships with local authorities where there is no easy solution.

In circumstances when the occupier does abandon the site, in many cases all eyes are on the Environment Agency to sort it out, but crucially it has no duty to remove the waste. It has powers to, but they are often overestimated and sometimes they do not allow the Environment Agency to step in.²⁵ Usually, the Environment Agency is not going to exercise its powers unless there is significant risk to the environment or local communities and there is a reasonable prospect of recovering its costs – there is no funding that underpins this work.

The clean-up and other related costs to public bodies and government can be high, and in some of the bigger cases, run into millions of pounds, and it is us, the tax payer who ultimately foots the bill. Landowners need to understand their obligations when letting out land for waste operations; the Environment Agency looks to landowners to take steps to mitigate the risk that their tenants' abandonment of the site (or permit breaches) will put them in the firing line for the clean-up costs. Landlords should consider taking precautionary measures before leasing to waste operators and undertake regular monitoring of the site as a matter of course.

Definition of waste

The now defunct Environment Agency Definition of Waste/End of Waste panel was temporarily suspended for three months in September 2016 owing to lack of resources and suspended again in December 2016 pending review. The Environment Agency undertook that review, the outcome of which led to the launch of Definition of Waste Services on 26 June 2018.²⁶ It offers a much wider range of services, subject to a fee, and will allow the Environment Agency to provide opinions to business and industry sectors on the status of material both on a case by case and a framework basis. Getting applicants to provide the right data and information is more than half the battle and it is hoped that the funding that will now support this work will also help to refine the process.

The success of the Quality Protocols²⁷ needs to be protected and enhanced, but reviewing them is unfunded work. They are key waste derived product benchmarks.

25 See Regulations 57 and 57(2) of the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016/1154), as amended, and also s 59 of the Environmental Protection Act 1990.

26 See <https://www.gov.uk/guidance/turn-your-waste-into-a-new-non-waste-product-or-material>.

27 See <https://www.gov.uk/government/collections/quality-protocols-end-of-waste-frameworks-for-waste-derived-products>.

They are not obligatory or exclusive, but the Environment Agency has to guard against them being undermined or they are worthless. Funding for Quality Protocols to build on the legacy of the BREW programme²⁸ could really drive forward the government's objective of strengthening the market in recycled and recovered waste streams²⁹ and the Environment Agency is hopeful that it can at least start to review the Quality Protocols this year.

Business will always push at the boundaries of Environment Agency guidance, and definition of waste is no exception. Definition of Waste Services will inevitably be saying no in some cases, just as the panel used to. But the Environment Agency can only release waste controls within the legal framework and that is going to be frustrating in some cases. Managing that relationship going forwards will continue to be a challenge. Breaking down the misconception that definition of waste is a barrier to using waste is part of that.

EU exit and the Circular Economy Package amendments³⁰ will put pressure on the legal tests in Articles 5 and 6 on by-products and end of waste. Who knows on what terms the UK will depart the EU and how that will play out in the long term, but government publicly announced its decision to back the Circular Economy Package proposals in March 2018 and its intention to transpose the Circular Economy Package amendments despite leaving the EU.³¹ So, it looks like we will have recast Articles 5 and 6, and it is likely that there will be some tightening of those tests.

We will also need to take into account the apparent tension between that potential tightening of those tests and other obligations in the amending directives³² that place those tests under pressure to facilitate the release of waste controls and push waste around back into the product phase of the circular economy model.

The Circular Economy Package amendments

The circular economy amending directives came into force on 4 July 2018. There are two phrases that caught my eye in the European Parliament's resolution:³³ '[t]he transition to a stronger, more circular economy is both a great opportunity and a challenge ...' and '[t]he basic problem that must be resolved first is the secondary materials market ...'.

Referring back to the list of Environment Agency waste industry challenges above, I wonder how many of them will retain their prominence for regulators in the years to

28 Defra Business Resource and Efficiency Waste (BREW) Programme.

29 See HM Government 'A green future' (n 3).

30 See the amendments to arts 5 and 6 of Directive 2008/98/EC (n 6).

31 See <https://deframedia.blog.gov.uk/2018/03/29/thursday-29-march-funding-for-national-parks-support-for-recycling-package-stir-crazy-campaign-and-oceans-event/>.

32 Directive 2018/851/EC (n 6); Directive 2018/849/EC of the European Parliament and of the Council (OJ L150/93, 14 June 2018); Directive 2018/850/EC of the European Parliament and of the Council (OJ L150/100, 14 June 2018) and Directive 2018/852/EC of the European Parliament and of the Council (OJ L150/141, 14 June 2018).

33 European Parliament resolution of 13 June 2018 on cohesion policy and the circular economy (2017/2211 (INI)).

come? There is minimal circular economy amendment to the core waste regulation obligations of permitting and registration in the waste framework directive³⁴, compared to other chapters which have been heavily rewritten in parts. Unsurprisingly so, perhaps, but it does bring into stark relief the fact that the step change that the circular economy amendments bring is in the reinforcement of the obligations that put different pressures on the market – the waste hierarchy, prevention, producer responsibility, separate collection and targets.

The striking thing about the waste framework directive amendments is that waste regulation is suddenly looking very different. The Environment Agency's role to date has been about managing what is being done to waste, with the definition of waste work about whether something

needs to be regulated as waste. The new provisions will go way beyond that and it seems that it is going to have to involve many regulators – waste is no longer just about waste. There is a much sharper focus on resources generally, whether they are waste derived or not, drawing further into the equation manufacturing and product standards, tax and other financial instruments, food production and standards, chemicals etc – and the question is, how is that all going to fit together?

We have not seen the publication of the Resources and Waste Strategy yet, nor do we know exactly how the circular economy amending directives will be transposed, but what is clear is that there is a greater emphasis on a shared responsibility of all the many actors now directly involved, to bring these plans to life.

34 Directive 2008/98/EC (n 6).

Planning in crisis?

Rt Hon Nick Raynsford

Chair of the TCPA's Review of Planning

The Raynsford Review of Planning has taken on the ambitious task of an end-to-end examination of the English planning system to see what, if anything, is worth saving from the intense process of planning reform. After a year of taking extensive and often conflicting evidence, the Raynsford Review launched an Interim Report in the House of Lords on 15 May. The report, which is available as a free download from the TCPA website,¹ attempts to clear the ground about some of the myths surrounding the planning system before drawing on the evidence to offer nine propositions for the future of the system. These propositions – reproduced on the following pages here – address the rationale, purpose, structure and governance of the system. The idea is simply to generate further debate before the Final Report is published in November.

Painful though it may be, the Raynsford Review team is keeping a genuinely open mind about the outcome of the next phase of its work. It is true that some big-picture issues have been settled, including the importance of legal a purpose for the system based on a meaningful definition of sustainable development. But the majority of the detail remains to be resolved, and further responses are very welcome.

The response so far to the Raynsford Review has been heartening and challenging in equal measure. There is real and growing interest, which suggests that people care about the issues that the interim report highlights. Good planning seems to matter to people. But the launch events and subsequent online comment also illustrates some strong criticism of the interim report, which it is useful to reflect upon. In doing so, the intention is not to be defensive but to explain the Raynsford Review team's approach and hopefully encourage further debate. In summary, there were four main areas of criticisms – excluding those that were unprintable!

The first is that the interim report does not adequately reflect the evidence that the system is failing on particular issues, from the concerns of the heritage sector to those focused on the promotion of equalities and social justice. There was indeed powerful evidence to suggest that the current system does not reflect these diverse interests.

The way the interim report sought to handle these concerns was to present the widespread dissatisfaction with the outcomes of the system as being symptomatic of a set of more profound failings which relate to the purpose, structure and governance of the system. Fixing these problems should lead to a system which can command more confidence and deliver better outcomes.

A second and related strand of criticism is that the Raynsford Review has underplayed the anger of the community sector over the current state of the planning process. This is a legitimate concern and relates partly to the nature of the evidence received, which was inevitably often anecdotal and verbal. The Raynsford Review, like the planning system, has a difficult task in dealing with this kind of knowledge, which many dismiss out of hand as mere hearsay. The launch events reinforced the need to capture and try to quantify this dissatisfaction, which was expressed by politicians at all levels and by community groups. As well as the anger of some community groups who felt that they were locked out of planning decisions, there was also a sense of cynicism and disengagement, driven by a belief that nothing communities could do would have any impact on the outcome of planning decisions.

The third main area of concern was that the interim report overplays the system's problems and that the call for fundamental change is misguided. This is a debate the Raynsford Review must settle, because it determines the scale of changes that the final report might suggest. In progressing this debate, it worth reflecting that the evidence presented to the Raynsford Review was overwhelmingly negative about the system's performance. It is also worth noting that this dysfunction relates to all aspects of the planning system, from national and strategic arrangements, where the system is clearly failing, to local and neighbourhood levels, where the position is more complex.

Whether the current system could be made better with increases in resources and more coherent policy is an interesting consideration. However, such are the structural and governance flaws in the system that, taken as a whole, it is extremely hard to make the case for incremental change. It is true that many have pointed to the success of the system in allocating housing units and have argued that this process should not be disrupted. However, the interim report makes clear that this is not a coherent purpose for the planning system and sets out in detail why that is the case.

Finally, there are those who have understandably raised concerns that any report which catalogues the shortcomings of the system will be used by those very active voices seeking to finish off the planning system altogether. Some of those voices are now actively engaged in trying to undermine the nationalisation of development rights. The problem the Raynsford Review faces is that it can only proceed on the evidence presented to it and, while there are examples of successful development (as the report points out), the Raynsford Review team is interested in the generality of how the system operates.

¹ *Planning 2020: Interim Report of the Raynsford Review of Planning in England* Raynsford Review TCPA (May 2018) www.tcpa.org.uk/raynsford-review.

The Raynsford Review is also carrying out a valuable public service in exposing many of the changes to the system – such as those relating to permitted development – that are very poorly understood by the public. Planning is assumed, even by those communities who are frustrated with it, to be a piece of the furniture of local governance and the key forum for debate about community change. In many cases that is simply no longer the case as a matter of law, and it appears to be taking time for communities to catch up with that reality. Shining a light on the multiple and severe challenges presented and faced by the English planning system is not the same of as being critical of planning and planners as a discipline. In fact, what the interim report clearly establishes is that some of the worst outcomes from the current system are derived from non-planning, of which permitted development is one, but only one, example.

As the Raynsford Review moves towards its final phase, the team remains both daunted at scale of the challenge and resolute in its attempt to focus on the fundamentals. The team hopes that the interim report can be a catalyst for further debate, but there is no doubt that the English planning system requires fundamental change if it is to function in the long-term public interest.

The system as it currently operates can only be regarded as a success if you believe the planning system is a residualised form of land licensing. In any other sense, and particularly in relation to long-term delivery of sustainable development, the system is plainly a failure. The hope for positive change is thankfully not driven by any desire of planners to plan, but by the communities who will increasingly demand solutions to the real challenges that face them.

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The views expressed are personal.*

Nine propositions for a new planning system

Proposition 1: Planning in the public interest

There is both an evidential and a principled justification for the regulation of land and the built environment. This justification is founded on the inability of market mechanisms alone to deliver a full range of public interest outcomes, and on the principled assumption that decisions with a lasting impact on people and places should be subject to democratic accountability that goes beyond the exercise of individual property rights.

Proposition 2: Planning with a purpose

The basic purpose of planning is to improve the well-being of people by creating places of beauty, convenience and opportunity. The lack of any clear, overarching legal purpose for the planning system has led to confusion about what planning is for. The best way of solving this problem is to create a meaningful objective focused on the delivery of sustainable development. This objective is articulated in the United Nations' Sustainable Development Goals and in the

2005 UK Sustainable Development Strategy. This objective should be set out in a statutory purpose for the system and in supporting policy. The statutory purpose of planning should be as follows:

The purpose of planning

The purpose of the planning system is to positively promote the spatial organisation of land in order to achieve long-term sustainable development. In the Planning Acts, 'sustainable development' means managing the use, development and protection of land, the built environment and natural resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing while sustaining the potential of future generations to meet their own needs.

Proposition 3: A powerful, people-centred planning system

The planning system must be capable of dealing with the complex interrelationship between people and their environments. The scope of planning is therefore concerned not simply with land use, but with broader social, economic and environmental implications for people and places.

Planning requires sufficient regulatory powers to deal with problems where they are found. This means, for example, the control of changes to both urban and rural areas which may play a crucial role in creating cohesive communities and building resilience to climate change. To be effective, these powers must be comprehensive and should relate, with minor exceptions, to the use and development of all land and property. This requires both the restoration of development management powers over the conversion of buildings to homes under permitted development rights and the creation, for the first time, of a genuinely plan-led system which can deliver coordination and certainty to developers and communities.

Proposition 4: A new covenant for community participation

To be effective, planning must have public legitimacy. This legitimacy is under intense strain, with a broad disconnect between people and the wider planning system. Restoring legitimacy is a long-term project, requiring clarity on how far the citizen can positively participate in decisions. This, in turn, is based on action in four areas:

- democratic renewal, including clarity on the balance between representative, direct and participative democracy
- clear citizen rights, based on the provisions of the Aarhus Convention, so that people have a right to information, a right to participation, and a right to challenge – this will include exploring how civil rights in planning can be more evenly distributed
- a significant new approach to helping communities to engage in the planning process, with a focus on engaging groups who do not currently have a voice, such as children and young people and
- a new professional culture and skills set directed at engaging communities.

Proposition 5: A new commitment to meeting people's basic needs

While measures to increase public participation would improve the process of planning, they need to be accompanied by rights to basic outcomes which reflect the minimum standards that people can expect from planning. These outcome rights are an important balancing measure to ensure that the needs of those who may not have a voice in the planning process, including future generations, are reflected in the outcomes of decisions. These rights might include:

- a right to a home
- a right to basic living conditions to support people's health and wellbeing, secured through minimum design standards which meet people's needs throughout their lifetimes and
- a legal obligation to plan for the needs of future generations, through, for example, consideration of resource use.

Proposition 6: Simplified planning law

There is a powerful case for a simplified, consolidated and integrated Spatial Planning Act for England, to create a logical set of powers and structures. Planning must be capable of intervening at the right spatial scales to meet future challenges, including both local and neighbourhood issues as well as issues at much wider landscape and catchment area scales. To maximise the potential for the coordination of investment and other action to deliver effectively, regional and local strategies must be set within a national framework which reflects the nation's development priorities.

The structure of English planning should be composed of four spatial scales (neighbourhood, local, regional, and national planning), supported by the deployment of modernised Development Corporations to deal with particularly demanding issues such as flood risk, economic renewal, and population change. While the majority of decisions should remain with local planning authorities, regional and sub-regional planning will require renewed clarity on which institutions will be planning at this scale and the remit and governance arrangements that they should have.

Proposition 7: Alignment between the agencies of English planning

Investment in infrastructure needs to be coordinated with plans for housing as a shared ambition across the planning and development sector. The question is how to achieve such joint working. There is a significant opportunity to ensure better coordination between the existing public institutions that have a stake in the planning process – including the eight government departments with a stake in planning and their various agencies, such as the National Infrastructure Commission, the Infrastructure and Projects Authority, and Homes England. Closer alignment of these bodies and clarity over their specific responsibilities would aid delivery.

Proposition 8: A fairer way to share land values

The regulation of land generates substantial betterment values, created by the actions of public authorities but largely accruing as windfall gains to landowners. This can distort the planning system by incentivising speculation in land. It also leads to an unfair distribution of values in terms of meeting the costs of infrastructure and social facilities, and reduces opportunities for the long-term stewardship of community assets. A new planning system should provide a more effective and fairer way of sharing land values, and the Raynsford Review is exploring three related options:

- measures specific to large-scale growth conducted by Development Corporations and local planning authorities
- a reformed section 106 and community infrastructure levy process and
- an element of betterment taxation, as part of capital gains tax, which should be directed towards regeneration in low-demand areas.

Proposition 9: A new kind of creative and visionary planner

While a clear purpose and logical structures could do much to improve the planning system, the culture, skills and morale of planners are just as important. Planning is too often misrepresented as a reactive and negative profession, where the height of a planner's power is saying no. Current planning practice too often irons out the imaginative skills most useful to civil society. Planners and planning need to communicate their creative and visionary ambition, not to impose upon communities, but to inspire action by offering real options for the future of places. This requires reform of the education, ethics and continuing professional development of planners, but above all it requires a system, supported by necessary resources, that values high-quality and inclusive outcomes as much as it values speed of performance.

Conclusion

These nine propositions are the basis for a conversation about the future of planning in England, but the ambition of the final report, due to be published later this year, is to offer a lasting settlement around a new planning system. A planning system which is truly fit for purpose must offer a compelling and optimistic vision for the future of the nation, setting out the role of people and participation in the planning process.

Above all, change requires a new political consensus on the benefits of organising our activities to face the big challenges of the 21st century. Such a consensus may seem a distant prospect, but the value of planning should be defined not by political preconceptions but by the practical value of organising ourselves effectively to face the future.

From Planning 2020: Interim Report of the Raynsford Review of Planning in England. www.tcpa.org.uk/raynsford-review

Brexit and environmental law: the layers of the onion

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Prologue: The 30th anniversary of the United Kingdom Environmental Law Association

It has been a privilege to be a member of UKELA since its early days and to have been part of the movement supporting legal responses to environmental challenges from the late 1980s to the present 30th anniversary. UKELA was founded upon a common belief that laws have a key role to play in halting environmental decline. This faith has been maintained over the years, although it has been progressively tempered by an appreciation that law has its limits and must be recognised to operate alongside a range of social, economic, political and technical factors that delimit its sphere of effective operation. If environmental law is 'the law relating to environmental problems', it is necessary to look to other disciplines and lines of enquiry to ascertain what is to count as an 'environmental problem', why it should need to be regulated, and how it might best be regulated. Progressive appreciation of the importance of the 'what', 'why' and 'how' questions have marked the advancement of UKELA and the increasing sophistication of its inputs into policy debates on the future development of environmental law.

Another key factor that should be noted on the 30th anniversary of UKELA is the dynamic character of environmental law. As thirty years have passed, the UK has changed markedly as a society and similarly in respect of its environmental problems. Recent decades have seen the decline of pollution from heavy industry and the rise of new kinds of environmental problem, rooted in consumption patterns and the cumulative impacts of lifestyle choices. Using law to address these new kinds of environmental problem involves markedly different kinds of approach to the regulation of the 'factory down the road'. Indeed, the mainly local character of environmental problems has been largely displaced by an appreciation that many of the greatest environmental challenges are international or global in character. It is only necessary to note the massive recent concern about plastic in the marine environment to appreciate that concerted and coordinated international action by *all* nations is a necessity if the problem is to be adequately addressed.

International problems call for international responses and the internationalisation of environmental law has been another prominent feature over the lifetime of UKELA. National laws focused on industrial pollution have been superseded by a wide spectrum of measures adopted by international agreement, multilaterally or globally. Much

international law is used to register little more than an 'agreement in principle' on the need to take action in respect of an environmental concern. However, some agreements have a much more specific content in terms of actions needing to be taken and the consequences of failing to take action. The high-water mark in this respect is the contribution of the European Union which, over the lifetime of UKELA, has grown from the first tentative Treaty provisions providing for an environment policy to a massive programme of regulation affecting all aspects of environmental-impacting activities across the Member States. The momentous importance of this body of law for environmental and ecological protection cannot be overstated.

Inevitably, therefore, as the UK progresses towards Brexit, the future status of EU-originating policy approaches, laws, administrative arrangements and collaborative implementation and enforcement measures has become an all-encompassing concern. As far beyond the horizon as can be seen, the future of UK environmental law will be determined by the outcome of present Brexit negotiations. In this debate, as always, it is good to see UKELA playing its part to the full.

Introduction

Whatever the reasons for the Brexit vote, opposition to the EU's environmental programme does not seem to have been a significant factor. For the purpose of informing the debate on the referendum, the House of Commons Environmental Audit Committee undertook an inquiry on EU and UK environmental policy.¹ This inquiry confirmed a broadly positive view of EU membership insofar as environmental policy was concerned. The general view of those who gave evidence was that EU membership had been beneficial for the UK environment. The Inquiry provided a forum for the airing of diverse concerns, relating to the need for more rigorous national implementation of EU measures and reducing burdensome costs upon business. However, the overwhelming majority of informants took the view that membership of the EU had improved environmental protection in the UK. Understandably, therefore, the vote to leave the EU in the referendum of 23 June 2016 has not been seen as providing any mandate for major changes to the substantive content of environmental law or policy.

¹ House of Commons Environmental Audit Committee, Third Report of Session 2015–16, *EU and UK Environmental Policy* (2016) HC537 (23 March 2016) <https://publications.parliament.uk/pa/cm201516/cmselect/cmenvaud/537/537.pdf> and see the Government Response HC 644 (7 September 2016) <https://publications.parliament.uk/pa/cm201617/cmselect/cmenvaud/644/644.pdf>.

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Given this background of general support for the EU approach to the environment, the Brexit vote is not seen to justify any lowering of environmental standards. Hence, the Government's 25 Year Environment Plan, published in January 2018, 'looks forward to delivering a Green Brexit', involving improvements in environmental quality and biodiversity.² Beyond that, the Government seeks to ensure that 'the new mechanisms we put in place as we leave the EU don't just maintain, but strengthen protection for the environment'.³ The green-Brexit challenge, therefore, may fairly be seen as the UK having as its baseline the need to keep as many of the environmental and ecological benefits of membership of the EU as possible following the UK's departure.

The idea of maintaining an EU approach towards the environment in a UK that has relinquished EU membership seems inherently contradictory. Nevertheless, this appears to be the path on which the UK appears to be set, initially at least. Resolving the contradictions and putting in place a sufficient replacement for the diverse aspects of the EU's programme for environmental protection is no small task for the UK. Two rather fundamental notional questions need to be asked. First, what has been the contribution of the EU to environmental law in the UK? Second, how might that contribution be replicated and retained within the UK legal order post-Brexit? Only when the first (stock-taking) question has been addressed can the second (substitution) question be meaningfully considered.

What is most telling about the stock-taking exercise is that it has revealed a sequence of distinct kinds of EU environmental contributions. From an initially rather simplistic and over-legalistic view of the EU's environmental role, the investigation has proceeded to focus upon rather more diffuse, but no less significant, aspects of the contribution. The need to secure a sufficiently green Brexit has therefore prompted an unpicking of the distinct features of the present EU arrangements - like the layers of an onion. The findings, so far, are that there are actually four distinct elements in the present arrangements that need to be considered in the green Brexit transition: rules, governance, strategy and regulatory culture.

The purpose of this article is to investigate these four aspects of the EU contribution to environmental law and policy as successive stages in the green Brexit discovery process. What will become evident is that the stock-taking exercise shows a depth and sophistication in the EU environmental contribution which has raised increasingly challenging questions as to what extent (and whether) the replication and repatriation aim is genuinely feasible. In the final outcome, it is suggested that, at the very least, Brexit will inevitably result in a significant change of approach towards environmental and ecological protection. Whether this change is seen as a diminution or an enhancement will depend upon whether the mantra of 'taking back control' can be meaningfully applied to the inextricably international aspects of environmental protection which have arisen from EU membership.

2 HM Government *A Green Future: Our 25 Year Plan to Improve the Environment* (2018).

3 DEFRA *Environmental Principles and Governance after the United Kingdom leaves the European Union* (2018) Foreword.

Rules

Initially at least, securing a sufficiently green Brexit was seen to involve enacting EU environmental legislation into national law, so that EU rules against pollution of water, air and land, and loss of biodiversity, should be simply replicated as national rules to the same effect.

In this vein, the response of the UK Government in respect of its approach to delivering Brexit came in the form of the Brexit White Paper, *Legislating for the United Kingdom's withdrawal from the European Union*.⁴ This envisaged the enactment of a 'Great Repeal Bill' (subsequently termed the 'European Union (Withdrawal) Bill') to secure an orderly transition by converting the *acquis* of EU law into UK national law and the repeal of the European Communities Act 1972. Alongside this, it was recognised that a significant amount of 'EU-derived law' would cease to have its intended effect after departure, where, for example, the involvement of an EU institution, regime or system was envisaged by the relevant EU laws. In short, the initial task was seen as that of substituting national rules of law for corresponding EU rules, and making necessary 'corrections', so that the level of environmental protection under pre-Brexit provisions would continue seamlessly post-Brexit.

This plan has now been given broad effect through the European Union (Withdrawal) Act 2018, which gained royal assent on 26 June, although it will come into operation at a date to be determined. The Act converts EU law as it stands at the time of Brexit into domestic law and preserves UK laws implementing EU obligations. The Act also provides for secondary legislation to enable corrections to be made to allow EU law to operate 'appropriately' after the UK's departure. In addition, the Act enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal. Hence, insofar as environmental law is concerned, the Act takes as a baseline the need to convert existing EU environmental law into UK law.⁵

The initial perception of Brexit being secured by repatriation of environmental rules seems to have been the main preconception in early work on the Brexit transition. The then Environment Minister, Andrea Leadsom, giving evidence before a Parliamentary committee,⁶ took the view that about two-thirds of EU environmental legislation could be brought into UK law with mere technical changes,

4 UK Government *Legislating for the United Kingdom's Withdrawal from the European Union* (Cm 9946, March 2017). This had been preceded by a White Paper entitled *The United Kingdom's exit from and new partnership with the European Union* (Cm 9417, 2 February 2017) setting out the government's vision of what it was seeking to achieve in negotiating the exit from, and new partnership with, the EU.

5 DEFRA *Environmental Principles and Governance after the United Kingdom leaves the European Union* (2018) Foreword.

6 House of Commons Environmental Audit Committee *The Future of the Natural Environment after the EU Referendum* Sixth Report of Session 2016-17, HC599 2017, particularly evidence given on 25 October 2016. See also 'Government may not transpose third of EU environmental law' *Environment Analyst* (26 October 2016) <https://environment-analyst.com/50553/government-may-not-transpose-third-of-eu-environmental-law>.

but this might not be possible for the remainder. On that basis, continuing work was needed to ensure that those measures that were 'difficult' to transpose into national law continued to function effectively after leaving the EU. However, the Minister was rather unspecific on the reasons why the problematic third of EU environmental legislation was difficult to translate into national law. Nevertheless, the general view of the Government at this stage seems to have been that translation of EU into national law was a matter of lesser or greater technical 'difficulty', rather than something which raised insuperable issues of principle.

Some basis for this view might be found in the appreciation that much EU-originating laws have found their way into national law through the transposition process that is required to give effect to EU environmental directives in national law. The need for legal certainty⁷ requires that explicit and precise duties upon competent national authorities must be formally set out as binding legal obligations. There are innumerable examples of UK secondary environmental legislation that serves this purpose.

However, some caution is needed in supposing that *all* EU-originating laws are of this kind. EU environmental directives typically impose obligations directly upon Member States (as opposed to competent national authorities) and these obligations do not need to be transposed into national law. Hence, where an obligation falls upon a government itself, it would not be necessary to transpose this into national law since directives are already addressed to the Member States and therefore binding upon them. For example, where a directive requires a Member State to provide the Commission with a periodic monitoring report on the state of some aspect of the environment, that obligation would be binding irrespective of transposition into national law.

The key point is that the EU approach towards the environmental extends some way beyond the kinds of obligation that are customarily transposed into national law. Possibly, this is what the former Minister had in mind when referring to EU laws that were 'difficult' to transpose into national law. Nonetheless, at this early stage, there seems to have been some playing down of the weighty issues of principle surrounding how 'non-transposed' aspects of EU legislation might be incorporated within national law following Brexit.

Governance

A second reason for doubting the characterisation of the EU environmental contribution in terms of a set of substantive legal rules (of the kind that may be seen in legislation transposing EU directives into national law) is that these rules actually presuppose a background of administrative arrangements which are relied upon for their effective operation. Specifically, EU-derived national laws assume, without explicitly stating, a context of supra-national scrutiny and enforcement mechanisms. Breach of

an EU-derived law will be subject to the scrutiny and overseeing role of the European Commission leading, in the most extreme cases, to the imposition of a sanction by the Court of Justice of the European Union. This governance background to EU-derived laws sets them apart from purely national laws in rather fundamental ways.

The appreciation that EU environmental law involves considerably more than nationally transposed legal rules was highlighted by Lee and Fisher⁸ who drew attention to the important combination of substantive and procedural measures that are needed to secure satisfactory levels of environmental and ecological protection. The point is well made that much of what is commonly termed 'environmental law' is actually about 'environmental governance'. This involves public institutions that have appropriate responsibilities for directing, regulating, authorising, guarding and being subject to duties in respect of securing environmental protection. Not least significant amongst the diverse bundle of environmental governance obligations is the range of measures that may be applied to call governments to account for shortcomings in the performance of their diverse environmental protection roles. When the significance of environmental *governance* is appreciated, it is apparent that the green Brexit is about far more than the substantive environmental laws that need to be translated into national legislation. It is also about the national replication of environmental infrastructure that accompanies EU environmental measures, particularly the range of mechanisms for securing governmental accountability. As the authors put it, in 'taking back control' 'we forget the infrastructure of environmental accountability at our peril'.

The realisation that challenging aspects of Brexit are actually about institutional responsibilities and safeguards, rather than substantive rules of environmental law, is also taken as a key focus of the UKELA Report, *Brexit and Environmental Law: Enforcement and Political Accountability Issues*.⁹ This is concerned with the post-Brexit environmental duties of government and public bodies, particularly how these might change to encompass the supervisory, reporting and enforcement roles of the European Commission and the adjudicative and sanctioning roles of the Court of Justice of the European Union. A particular difficulty is seen to arise in securing accountability of government and public bodies and in providing a national counterpart of the citizen's complaints procedure that arises under EU law. As the UKELA Report notes, the sanctioning power of the Court of Justice will cease to apply after Brexit and it is difficult to see what national provisions could be put in place to serve as a counterpart. It is suggested that a specialised national body should be established to oversee the implementation of environmental law and to replace the supervisory role of the European Commission as the 'guardian of the treaties'. However, what

7 For references to the extensive EU caselaw on the legal certainty requirement see S Kingston, V Heyvaert and A Čavoški *European Environmental Law* (Cambridge University Press 2017) 78.

8 M Lee and L Fisher 'Environmental governance after the EU: the need for accountability: an expert review' *OUP Blog* (28 November 2016). See also M Lee 'Brexit: Environmental Accountability and EU governance' *OUP Blog* (17 October 2016) and M Lee 'Brexit and environmental protection in the United Kingdom: governance, accountability and law making' (2018) 36 *Journal of Energy & Natural Resources Law* 1.

9 UKELA (July 2017) <https://www.ukela.org/content/doclib/317.pdf>.

legal form the post-Brexit environmental supervisory body should take is not apparent, despite an illuminating survey of various ombudsman and parliamentary commissioner roles, and specialised environmental courts, from different jurisdictions that might serve as models for the UK.

In response to the concerns about post-Brexit loss of environmental governance, the present environment minister, Michael Gove, has been active in developing proposals for environmental governance to fulfil some of the roles noted above. A recent consultation on *Environmental Principles and Governance after the UK leaves the EU*¹⁰ envisages the publication of a Bill in the autumn of 2018, which will create 'a new, world-leading independent environmental watchdog to hold government to account on our environmental ambitions and obligations'.¹¹ The overarching aim is that the new body should bolster domestic environmental governance framework by providing an enhanced national approach to oversight and enforcement. The objectives for the new body are that it should:

- act as a strong, objective, impartial and well-evidenced voice for environmental protection and enhancement
- be independent of government and capable of holding it to account
- be established on a durable, statutory basis
- have a clear remit, avoiding overlap with other bodies
- have the powers, functions and resources required to deliver that remit and
- operate in a clear, proportionate and transparent way in the public interest, recognising that it is necessary to balance environmental protection against other priorities.¹²

Beyond sketching out these objectives in the most general terms, the Consultation Document gives little indication as to how the present powers of the EU Commission and the Court of Justice might be paralleled within the national arrangements. The suggestion is offered that the new watchdog body should be empowered to issue 'advisory notices' where it is of the opinion that government is failing to implement environmental law and that the government should be obliged to provide a response to such notices. Although advisory notices are regarded as the main form of enforcement mechanism, an alternative suggestion is that 'binding notices' could be issued to require the government to implement specified corrective actions, subject to a right of appeal. However, a major concern remains as to what would happen where a recalcitrant government still failed to act in accordance with such notices. The comparison with existing prosecution and sanctions being imposed at a supra-national level leaves the impression that the proposed national mechanisms for securing governmental compliance are far weaker than the EU measures needing to be replaced.

Section 16(2) of the EU Withdrawal Act 2018 requires draft legislation for the establishment of a public authority

with functions for taking proportionate enforcement action (including legal proceedings if necessary) where a minister of the Crown is not complying with specified environmental laws. Whilst this seems to formalise the need to establish an enforcement body to take the place of the EU institutions post-Brexit, the rather unspecific reference to 'proportionate enforcement action' prompts (rather than answers) the same questions as to what kinds of action should be provided for in respect of a government that fails to meet its environmental obligations.

The final outcome of the consultation exercise and the form of legislation establishing and empowering the environmental enforcement body remain to be seen, but the indications are that its powers are likely to fall some way short of the prosecution and sanctioning powers possessed by the EU Commission and the Court of Justice. It is difficult to see how the new environmental watchdog can be as effectively empowered to hold governments to account in meeting their environmental obligations as the Commission and Court under the present arrangements.

Strategy

Stage three in the stock-taking exercise is the realisation that, even if the substantive rules can be replicated and the governance powers made equally stringent, there is still something strategically different about EU environmental law, which lacks a counterpart in national law: environmental policy principles.¹³ The EU environmental programme differs from the traditional UK approach, in that laws are adopted in accordance with an explicit environmental policy, which is based upon key environmental management ideas. Amongst the overall aims of the EU is that of working for the sustainable development of Europe and a high level of protection and improvement of the quality of the environment.¹⁴ With a view to promoting sustainable development, environmental protection requirements are to be integrated into the definition and implementation of EU policies and activities.¹⁵ In pursuing these matters, the EU may adopt specific legislation founded upon its environment policy. This policy must be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.¹⁶ A key issue for the green Brexit, therefore, is about the maintenance of these strategic ideas in the post-Brexit UK approach to environment.¹⁷

The significance of the EU environmental policy principles is recognised by the EU (Withdrawal) Act 2018, which

¹³ On the environmental policy principles generally see N de Sadeleer *Environmental Principles* (Oxford University Press 2002); R Macrory *Principles of European Environmental Law* (Europa Law Publishing 2004); and E Scottford *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing 2017).

¹⁴ Treaty on European Union (TEU) art 3(3). On the legal aspects of sustainable development see A Ross *Sustainable Development Law in the UK: From Rhetoric to Reality?* (Routledge 2012).

¹⁵ Treaty on the Functioning of the European Union (TFEU) art 11.

¹⁶ TFEU art 191(2).

¹⁷ R Macrory and J Thornton 'Environmental principles: will they have a role after Brexit?' (2017) *Journal of Planning & Environment Law* 907.

¹⁰ DEFRA *Environmental Principles and Governance after the UK leaves the EU* (May 2018).

¹¹ *ibid* para 77.

¹² *ibid* para 79.

addressed the need for environmental policy principles in national law. Section 16(1) requires the publication of draft legislation setting out environmental principles, a formal statement with regard to the application and interpretation of those principles, and a statement of the circumstances in which ministers must have regard to them in making and developing policy. For the purpose of these requirements, the environmental principles (noted above) are listed alongside certain procedural rights encompassing public access to environmental information, participation in decision-making and access to justice in environmental matters.¹⁸

However, making formal legal provision for policy principles, even in the qualified form envisaged in section 16(1), is rather unconventional in UK legislation, which is largely concerned with enacting legal rules, rather than stipulating matters of policy. The unspecific character of the EU environmental policy principles, perhaps purposefully, sets them apart from legal rules. The ideas of precaution, prevention and making polluters pay have never been precisely defined. Similarly, the idea of sustainable development is understood in the broadest way possible: as requiring a fair distribution of the benefits of development across present and future generations. This generality can be seen to serve the purpose of securing the maximum level of political support for the principles and the greatest flexibility in their application. Equally, it emphasizes the role of the principles as a broad guide to various kinds of action, including environmental law-making, whilst purposefully not giving rise to binding rights and duties of kinds that might be enforced by courts of law.

It is the non-justiciable character of the environmental principles that sets them firmly within the sphere of policy, rather than law, and this is evident from the way the environmental principles operate under the present EU arrangements. EU legislation on environmental quality and biodiversity protection will usually refer to relevant environmental principles in a preamble or recitals. There may be situations where ambiguities in the meaning of legislation need to be interpreted in the light of its purposes, expressed in terms of furtherance of the general environmental policy principles. Despite this, the environmental policy principles remain distinct from the legal rules. No one has ever been prosecuted for contravention of the environmental principles as such, but only for breaches of legal rules that have been adopted to give effect to the principles in precisely defined contexts.

Beyond serving as a basis for environmental policy and a guide to legislation, there have been issues raised in the past as to whether the environmental principles can bind either national governments or the EU institutions. As a matter of national law there has been a strong resistance of the elevation of policy principles into binding legal requirements. In the *Duddridge* case¹⁹ a challenge was

raised against the Energy minister who had failed to act in accordance with the precautionary principle by declining to adopt requirements on the location of power lines. The national court held that a government minister was not bound to exercise his powers in accordance with the EU policy principle. In effect, whilst the EU environmental policy principles might be binding upon the EU institutions, they are not binding upon national governments of Member States. On the issue of EU institutions being bound by the principles, in the *Bettati* case,²⁰ the validity of EU legislation banning the sale of chemicals that might damage the ozone layer was challenged on the basis that EU environmental principles had been improperly applied as the basis for this legislation. Although the EU Court of Justice, broadly accepted that the Commission and Parliament were bound by relevant principles in formulating and adopting environmental legislation, it held that it would not be possible to challenge the validity of the legislation, except where there could be shown to be a 'manifest error of appraisal'. In effect, the interpretation and application of the policy principles was something on which EU law-makers should be given the greatest possible flexibility. The prospect that failure to adhere to the policy principles in adopting legislation could ever provide a basis for a challenge to the validity of that legislation, therefore, seems, at best, an extremely remote possibility. The upshot of this is that, at both national and EU levels, the courts have resisted the conversion of environmental policy principles into rules of law.

Given the emphatically extra-legal status of the environmental policy principles, it is curious that the UK Government has seen a need for them to be embedded into law, insofar as s.16(1) of the EU Withdrawal Act 2018 seeks to achieve this. Certainly, there are examples of UK public bodies, such as the Environment Agency and planning authorities, being bound to exhortatory obligations to 'have regard to' the need for sustainable development. However, the idea of central government as a whole being bound to any continuing statutory policy requirements, on the environment or anything else, is a novel departure. Governments come and go. Prospective governments have a free hand in using election manifestos to sketch out their plans for government in a way that they hope will be most attractive to the electorate. The idea of binding future governments on matters of policy seems alien to this process, demonstrating, perhaps, that there may be good practical political reasons for the separation of law and policy.

Beyond the curious constitutional status of the 'statutory policy' that is envisaged is the key question of whether this innovation would actually make any practical difference. Given the generality (or vagueness) of the EU environmental principles, is the obligation upon government to adhere to these principles likely to prevent a government taking any action that it might take in the absence of the statutory statement of environmental policy? The likely answer to this is in the negative. Environmental policy principles remain massively important

¹⁸ Deriving from the Aarhus Convention: United Nations Economic Commission for Europe (UNECE) Convention on Access to information, public participation in decision-making and access to justice in environmental matters adopted on 25 June 1998.

¹⁹ *R v Secretary of State for Trade and Industry, ex parte Duddridge* [1996] Env LR 325.

²⁰ Case C-341/95 *Bettati v Safety Hi-Tech Srl* [1998] ECR I-4355.

in guiding action but defy translation into legal obligations in any meaningful way. The most important factor will always be the political will of government to prioritise environmental protection and enhancement against other competing policy objectives. This is something which defies being embedded into law.

Regulatory culture

The fourth aspect of the stock-taking on EU contribution to environmental law concerns environmental regulatory culture. Even if the rules, governance and policy principles can be replicated in the post-Brexit national order, it is suggested that the approach of a detached UK may be, or become, 'culturally' different from that of the EU. Acknowledging that this observation is somewhat cryptic, the view offered is that adopting policies and enacting environmental rules, should be seen as the outcome of a process of inquiry that involves addressing a sequence of questions: why an activity is seen as environmentally harmful, precisely what activity is causing the harm and how should it be regulated. If so, a key issue with regard to the green Brexit is whether the EU-wide engagement with these questions should continue or whether they should become purely national concerns so far as the UK is concerned.

Whilst the UK has a comparatively long history of seeking to address environmental harm through law, this has tended to be a reactive response to the worst excesses of local industrial pollution and public health concerns. The UK model of an 'environmental problem' (of the kind addressed through law) has tended to focus upon an activity taking place in close proximity to its impacts (typically, the 'factory down the road'). The appreciation that many environmental impacts are the result of activities in remote locations, perhaps in other jurisdictions, is a relatively recent appreciation, although it has become greatly more significant as a result of international collaborations in environmental matters, particularly at EU level. If environmental harms straddle national boundaries, it is entirely appropriate that they should be addressed through supranational legal and policy actions by a body like the EU.

Within the EU, progress towards the formulation of environmental laws and policies is through dialogue between the Member States, particularly on the why, what and how questions. This involves the sharing of technical expertise and reconciling national perceptions of the science, economics and intrinsic value of the environment and ecosystems. Ultimately, national views on environmental problems and the appropriate responses to these are brought within a regional international consensus which forms a basis for EU environmental policy and legislation. The concern is that this culture of moving forward through international consensus on environmental action will be replaced by a separate and distinct national environmental culture in UK post-Brexit. For some, the idea of addressing environmental concerns through regional international collaboration and consensus is seen as a key strength of the EU approach and the prospect of a culturally detached UK 'going it alone' on the environment is seen as a retrograde step.

Recognising that environmental 'regulatory culture' is a rather nebulous idea which is difficult to define with any degree of precision, some brief coverage should be given of how this idea is manifested in practice. Whilst the role of regulatory culture can be seen to operate across a spectrum of activities, from policy formulation and the adoption of legislation to the approaches taken towards implementation and enforcement, some narrowing is needed for the present discussion. Perhaps the most graphic illustrations of the shared environmental regulatory culture of the EU are to be seen in the operation of the various cooperation bodies, networks and agencies established at EU level to enable information sharing, deliberation and decision-making on environmental matters.

Although high-profile political and economic concerns have been raised by the prospect of loss of key decentralised EU agencies from the UK post-Brexit (particularly the European Medicines Agency and the European Banking Authority²¹) relatively less attention has been given to the role of the UK in a range of EU bodies with key roles in regard to the environment. However, a valuable discussion of the more specific environmental impacts of UK departure from EU environmental bodies is provided by the UKELA report, *Brexit and Environmental Law: The UK and European Cooperation Bodies*.²² This report investigates the role of 18 EU bodies with greatest relevance to environmental law, considering whether UK participation will be possible after Brexit and an estimation of the consequences of loss of involvement. The report attaches the highest priority to continuing membership of the European Environment Agency, the European Chemicals Agency and the European Union Integrated Pollution Prevention and Control Bureau. The basis for UK having a continuing role in these bodies is quite intricate and heavily dependent upon whether the UK would continue to retain the relevant *acquis* of EU law and continue to accept the jurisdiction of the Court of Justice – matters which remain to be determined subject to the final departure agreement between the EU and the UK. Also of potential relevance to the continuing roles of the UK in EU bodies is the application of Article 8 of the EU Treaty, which provides that the EU 'shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation'. Again, the future 'European Neighbourhood' status of the UK, and the extent of 'cooperation' in environmental bodies, would need to be considered in the context of the departure agreement.

Placed lower down the rankings of importance in the UKELA Report are the European Network for the Implementation and Enforcement of Environmental Law (IMPEL) and cooperation bodies established to secure the consistent implementation of particular directives, such as the body entrusted with formulating a Common

21 See House of Commons Library *EU Agencies and post-Brexit Options* Briefing Paper 7957 (V Miller) (2017).

22 UKELA *Brexit and Environmental Law: The UK and European Cooperation Bodies* (2018).

Implementation Strategy (CIS) under the Water Framework Directive (2000/60/EC). By comparison to the European Environment Agency, the roles of these bodies are certainly far narrower, but nonetheless important in securing a collaborative and consistent approach to the interpretation and implementation of EU environmental law. IMPEL is an international association of environmental authorities which seeks to secure effective application of environmental legislation through raising awareness, capacity building, peer review and exchange of information and experiences of implementation.²³ In practical effect, IMPEL has an invaluable role in securing a consistent approach to implementation and enforcement of EU environmental law across national competent authorities. Similarly, the Common Implementation Strategy for the Water Framework Directive,²⁴ seeks to ensure a consistent approach to interpretation and implementation of the directive by sharing information, developing guidance on technical issues such as monitoring, determining the status of waters and the application of exemptions to the environmental objectives of the directive. The extensive body of CIS guidance is vitally necessary to steer competent authorities towards a consistent understanding to the many technical issues that arise in giving practical effect to the directive.

As must be stressed, the future participation status of the UK in the EU environmental bodies remains to be determined as a part of the final Brexit agreement and the issues surrounding this are of some complexity. Nonetheless, it is clear that EU bodies with an environmental law remit provide a vital function in securing international consistency in the application of the law. Moreover (and this is the more important point for this discussion), they do this

in a collaborative way, which progressively fuses disparate national experiences and perceptions of the environmental protection task into an increasingly unified EU approach. This approach of moving towards consensus through the exchange of information and experience, and deliberation on common way forward on environmental challenges serves a good illustration of the EU environmental regulatory culture in operation. The critical question, as regards the green Brexit, is about how much of this regulatory culture the UK will seek to retain and how far this will be possible within the terms of the Brexit agreement.

Conclusion

The only aspect of Brexit that is uncontroversial is that securing it will be more complicated than was generally anticipated at the time of the referendum. The implications of Brexit for environmental law and policy have revealed increasingly impenetrable levels of intricacy as the discussions have proceeded. In the search for a sufficiently green Brexit, hopefully the approach taken here, of putting the issues under the four headings of rules, governance, policy principles and regulatory culture, will have served to place an order upon the distinct kinds of challenge involved. What the discussion has shown is that the debate about the green Brexit has moved step by step from the more tangible aspects of the EU environmental contribution to the less tangible (but no less valuable). It is suggested that, as the contribution becomes more abstract, the challenge of replicating it within the UK becomes less achievable. The only certainty is that the final form of the green Brexit will prove a disappointment to the many for whom unrealistic expectations have been raised.

²³ For more information on IMPEL see <https://www.impel.eu/>.

²⁴ For more information on the CIS see http://ec.europa.eu/environment/water/water-framework/objectives/implementation_en.htm.

Successes of environmental law over the past 30 years, the challenges that lie ahead, and the solutions that environmental law can provide

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I approach this article as an optimist, acknowledging that others have a more pessimistic view, simply because: stretching challenges and there are plenty of these cause us to achieve more than we thought we could; and much has improved over the last 30 years.

Successes

Environmental law has played a key part in driving improvements to the environment over the past 30 years. I don't detect a keen enthusiasm from many to retreat from those improvements; indeed, the strength of the growing consensus on the need to find solutions to the multi-faceted plastics challenge should give us all cause for hope.

The key of course will be to build on these improvements in the years ahead, learn from where we have and have not made progress and to create the right governance, market signals and interventions to ensure that we continue to do better going forward.

The places I grew up in, in the North of England, have improved considerably in terms of environmental quality. Canals are restored,¹ garden and culture festivals aligned with capital inflows have helped regenerate entire cities,² beaches are cleaner,³ flood risk is better understood and managed (a higher storm surge in places than in 1953 along the East Coast in 2013 resulted in no fatalities as a result of coastal flooding),⁴ water quality has progressively improved through sustained investment,⁵ pollution from permitted industrial activity has cost-effectively reduced,⁶ vast compensatory habitat schemes have been created to

counterbalance hard flood defences.⁷ Indeed, it is not just environmental quality that has improved but worldwide many of the indicators of health and well-being.⁸

A good illustration of the effects of environmental law driving improvements is this graph of bathing water quality improvements over time which shows how hard law with ambitious targets set in law and effective interventions have made our waters vastly safer to swim in (see Figure 1 on the next page, source Environment Agency).⁹

The first improvements were perhaps 'easier' during the early days under investment programmes. But over time moving from 'good' to 'excellent' became more challenging. Organisations like Surfers Against Sewage¹⁰ played a key role in keeping bathing water quality issues in the public eye. Partnerships between regulators, NGOs and water companies to find solutions to a range of seemingly intractable problems have delivered substantial improvements. But even partnerships require a regulatory backstop. Independent regulatory scrutiny and enforcement has been necessary to drive improvements in some discharges. These factors in combination have led to record results for this bathing water season.¹¹

Dedicated environmental regulators were established from 1990 onwards to take a national view of environmental challenges and have largely survived, the most substantial change perhaps being the creation of a cross-cutting environmental regulator in Wales. The Scottish Environmental Protection Agency, the Marine Maritime Organisation, the Environment Agency for England, Natural England (formerly English Nature) and Natural Resources Wales (formerly the Environment Agency for Wales and Countryside Commission for Wales and the Forestry Commission in Wales)¹² have of course faced a constant

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1 If you had visited Brindley Place in Birmingham in 1986 you would simply not recognise the vibrant thriving heart of the City that now exists along the canal front.
2 The docklands of Liverpool and Bristol for example have changed immeasurably through regeneration.
3 It is now safe to eat cockles harvested from the River Dee foreshore – thirty years ago dogs were banned from the beach for fear they would be poisoned.
4 The Flood and Water Management Act provides a framework to ensure that flood risk is managed fairly.
5 Driven by a suite of directives including the Urban Waste Water Treatment and Water Framework Directives. See the graphs in the Environment Agency's annual state of the environment: water quality Report (February 2018).
6 First Integrated Pollution Control, then Integrated Pollution Prevention and Control and latterly the Industrial Emissions Directive have hugely reduced the impact of pollution from industrial activity.

7 Spend some time at the WWF site at Steart marshes in Somerset or at Medmerry in West Sussex to see the creation of stunning compensatory habitats.

8 For example, life expectancy, the proportion of people with higher incomes, access to basic healthcare, education: see Ola Hans and Anna Rosling 'Factfulness' Spectre (2018).

9 See State of the Environment 'Water Quality Environment Agency' (February 2018) <https://www.gov.uk/government/publications/state-of-the-environment>.

10 It is surprising to note that, outside of the water sector, there have been fewer NGO challenges to regulatory decisions.

11 Environment Agency Press Release (15 May 2018); Bonus beaches leads to record number of bathing spots <https://www.gov.uk/government/news/bonus-beaches-leads-to-record-number-of-swimming-spots>.

12 The Environment Agency and the Scottish Environment Protection Agency, Natural England, and more recently Natural Resources Wales subsuming the Environment Agency in Wales and CCW.

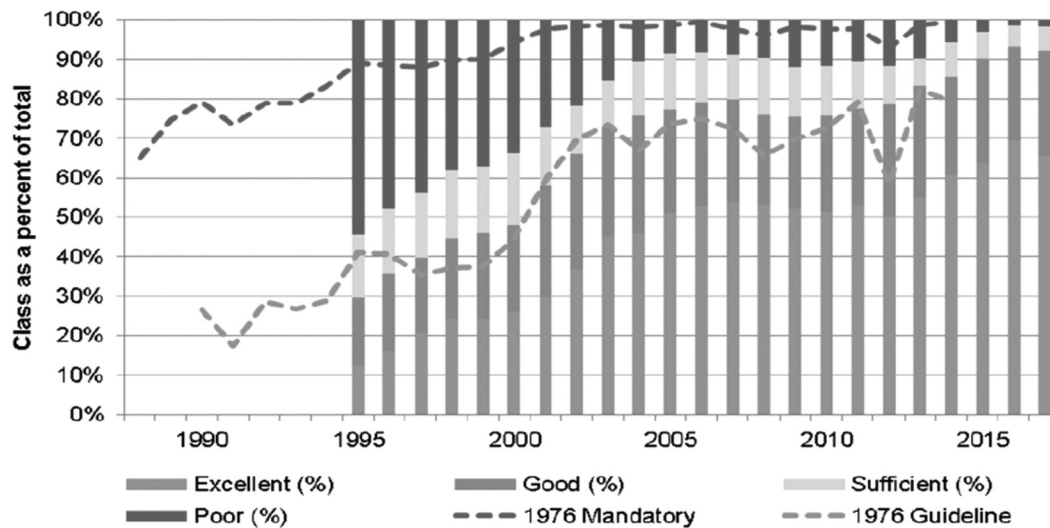


Figure 1. Trend in bathing water classification 1995 to 2017 (with comparison to historic data).

challenge of new functions to incorporate as environmental law has grown¹³ and regular reviews and reorganisations and financial challenges particularly since 2008. However, the very fact that dedicated environmental public bodies have survived given the nature and scale of risks that environmental regulators manage (from floods to droughts¹⁴) feels quite remarkable when compared with the ever changing financial or health regulatory landscapes. Some smaller environmental regulators and advisory bodies¹⁵ have ceased to exist over this period but the existence of national regulators with core environmental objectives and functions has meant that a sustained focus has been put on national environmental priorities which in turn has led arguably to some of the substantial improvements we have witnessed. For example, we know more about our water environment than ever before and the challenges we face to continue to improve and safeguard its quality and availability.

Of course, not all areas of environmental law have yet led to sustained improvement and some issues are multi-faceted and require a broad range of societal interventions. But it is worth pausing to reflect that even in air quality, which is the subject of considerable environmental litigation, emissions from sources controlled by permits where a sustained regulatory focus has been applied many emissions have greatly reduced over this period.¹⁶

Environmental law has progressively broadened and grown more sophisticated over this period and now:

- regulates a far wider range of potentially harmful activities (from alien invasive species through to batteries recycling requirements and carbon mitigation and measurement)
- creates new markets (applying a wide range of new mechanisms including emissions trading and producer responsibility schemes)
- drives improved standards and
- applies risk-based regulation so regulatory interventions¹⁷ including enforcement are based on environmental risk.

It is hard to find an area which is not covered by some aspects of environmental law (perhaps soil quality is the notable omission, as to which see below).

Until quite recently the operator of a potentially polluting industrial installation would have had to obtain separate environmental permits for different parts of that activity. Each activity was subject to separate and sometimes byzantine rules on obtaining, complying with, transferring, enforcing, and ultimately surrendering permits. This fragmented approach had a huge cost for little benefit.¹⁸ The creation of a common environment permitting framework (for water quality, groundwater, air pollution, industrial emissions, waste, mining waste, radioactive substances regulation, flood controls), most recently in the consolidated Environmental Permitting (England and Wales) Regulations 2016 (EPR)¹⁹ was a watershed moment. This common risk-based framework contains tiers of controls from: exemptions, exemptions subject to rules, standard permits through to bespoke permits and

¹³ Over a 10-year period at the start of the millennium the Environment Agency absorbed and delivered some 100 new environmental instruments.

¹⁴ Take at glance as the Cabinet Office's five-year assessment of national risk register of civil emergencies 2017 edition and note just how many are environmental risks: <https://www.gov.uk/government/publications/national-risk-register-of-civil-emergencies-2017-edition>.

¹⁵ Perhaps most notably the Royal Commission on Environmental Pollution.

¹⁶ See eg, Defra's Emissions of Air Pollutants in the UK, 1970 to 2015 www.gov.uk/government/statistics/emissions-of-air-pollutants cited in the supporting evidence to the 25-Year Plan at p 25.

¹⁷ We have moved far from the days of Waste Management Paper 4, which instructed waste regulators to visit all sites of a certain type no matter how well they were run or even if they were abandoned a fixed number of times per year. It was difficult to surrender waste permits so some waste permitted sites were covered by car parks but were still subject to statistically fascinating 'drive by inspections'.

¹⁸ If only tax law could also be simplified in this way, we might all find our lives a little easier to navigate.

¹⁹ SI 1154/2018.

bans.²⁰ Any activity can be placed within an appropriate control mechanism which is proportionate to the activity's environmental risk (for example, large incinerators need bespoke permits whereas many small waste recovery activities are covered by exemptions). Further, if the risk profile of an activity changes over time or they are subject to abuse²¹ their control mechanism can be changed. The alternative approach is to create a new control framework every time a new activity is identified for control and, in my experience, this results in a disproportionate focus on what a risk-based control framework should contain and far less debate, if any, on what precise activities should be controlled, by which control mechanisms and to what standards. I would suggest that the latter debate is more important. In Scotland a similar approach has been adopted for risk-based regulation (albeit with a different language) describing the tiers of control²². In England and Wales, the EPR framework still could be further expanded to reduce burden of having to obtain separate environmental permits.

The search for reliable combinations of mechanisms to influence individual and corporate behaviour and the balance of stick mechanisms (for example, prosecution and sanctions) against carrot mechanisms (for example, voluntary enforcement undertakings (VEUs) and league tables) is ongoing. The development of alternative sanctions, including civil sanctions in carbon regimes through to the Regulatory Enforcement and Sanctions Act 2008,²³ 'civil' sanctions alongside traditional criminal sanctions and the issuing of the Sentencing Council Guidelines on Environmental Offending has changed the approach of regulators, the regulated and also to a lesser extent in the NGO community. Regulators have adopted a more sophisticated risk-based approach to compliance, enforcement and sanctions which focuses not just on punishment but also on other outcomes including putting things right, bringing operations under control and stopping activities.²⁴ They are taking fewer cases through the criminal processes leaving the less serious to the civil sanctions process.

For large companies the increased level of fines flowing from the Sentencing Guidelines has increasingly brought offending behaviour to the attention of the finance director and the boardroom of larger companies.²⁵ However, for

some offending, for example waste offences, penalties remain too low to drive sustained behavioural change.²⁶ Environmental regulators lack access to the sanctions that economic regulators possess based on a percentage of turnover. When regulators choose to prosecute the effect of the Sentencing Guidelines is visible. There has been a growth in the number of Newton Hearings when companies accept guilt but challenge the regulators' assessment of culpability and harm. For large companies those assessments have a considerable impact upon the ultimate fine issued by the Courts.²⁷ We are also seeing more cases in the Crown Courts, rather than being dealt with by the Magistrates Courts.

Alternative sanctions including VEUs and Fixed and Variable Monetary Penalties for less serious offending have introduced different ways of dealing with offending. Offenders have the opportunity to put things right locally and quickly through VEUs or to face a proportionate sanction without a protracted costly criminal process.²⁸

NGOs have generally welcomed the introduction of civil sanctions and some have positioned themselves as 'attractive' recipients of VEU monies,²⁹ if an VEU offer is accepted by the regulator, with shelf ready environmental projects that would not otherwise be funded. It is too early to tell whether the early VEUs accepted for EPR offences³⁰ will have the same impact as for packaging waste where the evidence³¹ suggests that very little if any reoffending has occurred. What the Environment Agency has also seen is that in the absence of the threat of enforcement activity very few companies appear willing to offer VEUs. A regulatory backstop is necessary even for voluntary interventions.

Overall the evidence from the Environment Agency's enforcement activity suggests that most the available regulatory enforcement interventions are effective in achieving the outcomes they were designed for. Prosecution, as a tool to punish and/or stop offending, appears to be successful in the vast majority of cases. Enforcement notices appear to work well to bring operators back into compliance two-thirds of the time without the need for other interventions. Even waste removal notices have worked one third of the time, although they are often used in combination with other interventions at sites where too much waste has been taken in either in breach of a permit or in the absence of a permit and/or too cheaply to allow it to be properly dealt with. Appeals against Environment Agency regulatory notices (information, enforcement, suspension or revocation) are rarely upheld which I would suggest demonstrates that they are used sensibly

20 I should pay credit to a huge range of individuals (including those in the Environment Agency's legal team such as Julia Farthing) who worked tirelessly on this multi-year programme to create one of the most successful better regulation projects in environmental regulation where business, regulators and NGOs agreed that the outcome, a simpler risk based permitting framework was in everybody's interests.

21 For example, if there is evidence that a category of exemption subject to rules is being abused the activity's rules can be tightened. The line between exemptions and permits is often under review.

22 For this I pay huge tribute to Bridget Marshall and colleagues in SEPA.

23 Following the work of environmental law's very own Professor Richard Macrory.

24 See, for example, the Environment Agency's recently republished after consultation Enforcement and Sanctions Policy: <https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy>.

25 The record £20 million fine for multiple offending by Thames Water Utilities Limited has changed the narrative around environmental offending although of course as a percentage of turnover it is still small.

26 See eg Emma Howard-Boyd Environment Agency Chair's speech in Manchester: <https://www.gov.uk/government/speeches/what-we-talk-about-when-we-talk-about-green-cities>.

27 The appearance of QCs in the criminal courts for environmental offending has become more common.

28 Although of course there are appeal rights against monetary sanctions which can lead to a different protracted process.

29 See eg the approach of Buglife 'Enforcement undertakings: an opportunity for a good outcome from a bad situation'; see www.buglife.org.uk/enforcement-undertakings.

30 VEUs have been available for EPR offending since 2015.

31 From the Environment Agency's enforcement activity.

and sparingly in the right cases.³² Perhaps the interventions that have had more limited success are injunctions where a combination of factors³³ have sometimes limited their effectiveness.

Through this period there has been an exponential growth of transparency in the environmental field. The Aarhus convention's pillars access to information and public participation commitments together with increased public awareness and demands which have given us the Environmental Information Regulations, public participation requirements together with the growth of detailed public register requirements, the European Pollutant Release and Transfer Register,³⁴ the systemic publication of sanctions data,³⁵ the growth of free open data and the ability of the public to use cost-efficient technology to test what official sources state has caused a step change in business awareness including in what the public who buy business products will accept. This more transparent approach to pollution emissions and monitoring makes public the otherwise private debate between regulators and the regulated about what is acceptable.³⁶ Outliers responsible for the majority of a sector's emissions of a particular pollutant have found alternative ways to abate emissions.³⁷

We have a remarkable Climate Change Act, which generated astonishing consensus in Parliament, which contains a framework to drive down and decarbonise our economy. The Climate Change Committee and carbon budgets provide regular challenge to government departments as they seek to reconcile the costs and benefits of carbon mitigation and adaptation measures against other pressing priorities.

Despite the news and its relentless focus on the negative which we see echoed in the self-reinforcing social media communication channels we often forget that when rules are established in a democratic state most people comply with the rules that are well designed and properly enforced most of the time. For example, in the waste sector where avid readers of ENDS might conclude that as a result of market failure there is widespread non-compliance. In fact, of the 11,000 permits the Environment Agency regulates in England, it is just less than 5 per cent of the market where there appear to be non-compliance issues. In other words, and this is of course no comfort to anybody living next to a persistent problematic site as operators seek to avoid the consequences of non-compliance, most of the time most waste sites comply and no other permitted sector has quite such non-compliance issues.

Lastly having an ambitious 25-year plan for the environment (the 25-Year Plan)³⁸ is something quite remarkable. Having the 25-Year Plan launched by the Prime Minister stating that 'we hold our environment in trust for the next generation' and the Secretary of State stating that 'It is this government's ambition to leave our environment in a better state than we found it. We have made significant progress but there is much more to be done' is a sign that environmental consciousness is increasing again after a lull when other factors were felt to be more important, not least during the financial crisis. The 25-Year Plan is quite clear about the need to 'tread more lightly on the planet'.

So, in summary, I would suggest that a combination of dedicated environmental regulators, more comprehensive regulatory instruments including integrated permitting, which when enforced through a risk-based compliance framework, working in an era of far greater transparency have delivered a lot including high levels of compliance and provide a wide range of clues as to what may work and what may not as we look ahead.

Challenges

That said some of the challenges can appear daunting.

People need affordable places to live and the debate over sustainable growth and housing continues.³⁹ The 'need' for 1 million homes in the corridor just between Cambridge and Oxford is an astonishing figure. We face substantial challenges in building these homes affordably and sustainably⁴⁰ with resilience to flood risk in a world where weather will be more extreme and we will have less available water at times of peak demand. The evidence from the last booms of house building, assuming a boom can be engineered through the planning system,⁴¹ is not encouraging as we have at times as a nation built homes quickly and cheaply to poor standards and paid the cost later with poor quality housing stock that is hard to heat or cool, which people do not enjoy living in and which needs to be replaced far too often.⁴² In a more extreme climate, badly located or poorly built houses which lack resilience will be increasingly difficult to live in and insure. Future building standards are key, as is the insurance industry's attitude to risk.

High up on many lists but perhaps not always felt to be urgent in public consciousness is climate change in terms of mitigation, adaptation and resilience. Let us look at just two examples: flood risk in seaside communities and water scarcity.

32 Just one appeal was successful to overturn such a notice out of some 500 served between 2012 and 2016.

33 Including impecunious offenders who breach injunctions to clear up problems they have caused but who are not always dealt with severely because they are able to plead poverty.

34 See eg <https://www.gov.uk/guidance/uk-pollutant-release-and-transfer-register-prtr-data-sets>.

35 See eg <https://www.gov.uk/government/publications/enforcement-undertakings-accepted-by-the-environment-agency>.

36 If you look for example at the public register monitoring data requirements from a complex EPR permit you may be surprised by just how much is freely publicly available.

37 This approach has worked in diverse media and sectors to massively reduce the pollution load the environment carries.

38 HMG 'A green future: our 25-year plan to improve the environment' (January 2018).

39 The concept of net gain in the 25-Year Environment Plan has gained considerable traction.

40 The excellent UKELA Garner lecture by Julie Hirigoyen, CEO of the UK Green Building Council, in 2017: 'The role in ensuring that our built environment protects and enhances our natural environment' provided a wonderful tour of how it could work.

41 The recent Raynsford review of the planning system's effectiveness for the RTP1 makes a sorry read.

42 In Bristol, there are patches of housing stock that have been rebuilt three times since 1945, alongside those built to better standards at the turn of the 19th century, which still stand.

The Venerable Bede, one of the first environmental scientists, predicted the impacts of storm surges bowling down the North Sea and wreaking devastation along the coastline. Nobody died in recent flood events with storm surges higher than the great flood of 1953⁴³ as major coastal structures have held relatively well but there was still considerable flooding.⁴⁴ Time and better systems have reduced the risk recognition of many. Some recent events almost over-topped coastal flood structures yet despite good warning systems and instructions to evacuate often quite elderly communities in single story homes choose not to go. The demise of the expert perhaps has no better illustration (storm surge predictions rely on a complex weave of wind, tide, waves and timing) and another major tragedy will occur at some point.⁴⁵

Water scarcity is also a challenge due mainly to the combined effects of projected growth and climate change particularly in the South-East of England. It is quite sobering to recognise that unless action is taken soon to reduce water usage England will face water shortages. If we act now we can avoid some extreme scenarios.⁴⁶ Put simply, current levels of abstraction are unsustainable in a quarter of groundwater bodies and a fifth of freshwaters, three billion litres a day are lost by water companies to leakage equivalent to water to serve 20 million people, and we need better long-term infrastructure planning to serve the joint needs of people, industry, agriculture and the environment. I remember the summer of 1976 when we had our last great drought before this year's drought and, like flooding, there may be collective denial of the risk as people like us turn on their hosepipes each summer, expecting the miracle of clean water.

Many years of better regulation agendas under different governments have said similar things while moving the posts on when to intervene and when to remove barriers. Sometimes, the environmental law interventions we have chosen cause more harm than good or do not work and it is often only when they are put in place that this becomes evident. The shift to diesel cars has caused widespread pollution and harm to health⁴⁷ and requirements to create biofuels have replaced food crops illustrate adverse policy consequences. Conversely, other interventions may cause more good than harm but not by enough so they are not implemented, delayed or removed from the statute book through waves of better regulation initiatives.⁴⁸ There are also plenty of examples where the burden costs of measures were consistently over-valued and yet when

the goal was set industry rapidly innovated and the costs were far less than predicted.⁴⁹ Striking the right balance between what is an acceptable margin of benefit and in that valuing the environmental and human health costs to justify the imposition of a new regulatory cost remains a live issue. It would be helpful (but wishful thinking, I recognise) to find a point at which the benefits of regulatory interventions are felt to outweigh the costs.

Less tax money is available for the environment. As the state has reduced in size over the past decade the cost of regulation has in places been put under the polluter pays principle upon those whose activities have the potential to cause harm.⁵⁰ This trend is not limited to the environment.⁵¹ The tax money which is available is increasingly sought by multiple sources to deliver public good. That money is likely to be used more often in partnerships to secure multiple benefits. Two consequences could flow from this environment:

- some compromises are highly likely to be made and
- the regulated may seek greater ownership over regulatory activity – as you pay more you expect more. Care will need to be taken to avoid regulatory capture.

We chose to regulate to create or control markets. The market in waste regulation is quite fluid and arguably too easy to enter. Successive waves of increasingly complex interventions⁵² have driven innovation, stimulated new technologies and created new waste streams. Better regulation has rightly sought to make it simple for the compliant to enter the market but of course can allow poor performers to enter and remain in the market undercutting the compliant. For example, the poor quality waste exports which underpin China's waste export bans. There are no simple regulatory solutions here, industry must play its part in creating the right domestic infrastructure and in raising the bar alongside regulators. Market reform will take time. Measures which make it harder for poor performers to enter the market will need to increase.⁵³

At any time, the Environment Agency is involved in a broad range of environmental litigation⁵⁴ some of it of considerable wider importance⁵⁵ but I'll mention one aspect: operator appeals against regulatory decisions.⁵⁶

49 See eg the debate around the removal of lead in petrol.

50 See eg the recent Natural England consultation on species licensing costs or the Environment Agency's Strategic Review of Charges.

51 See eg the Charity Commission consultation last year which sought to recover much of its costs base from those it regulates.

52 For example, the Landfill Directive bans which have driven new markets as have the Producer Responsibility regimes.

53 See eg the Waste Enforcement (England and Wales) Regulations SI 2018/369, which empower regulators to block the gates – a power that surely would not be needed unless at the margins of a compliant industry there were real challenges.

54 Perhaps 300 pieces of criminal and civil litigation at any time. With 200 criminal cases, 15 judicial reviews and a range of tribunal cases of which there are perhaps 70 statutory appeals brought by industry against regulatory decisions to refuse permits, grant permits subject to conditions but the majority are against enforcement and suspension notices.

55 Such as the human rights issues tested this year in the *Mott and King* cases: *R (on the application of Mott) v the Environment Agency* [2018] UKSC 10; and *King v Environment Agency* [2018] EWHC 65 QB.

56 I recognise the debate about access to justice but am sure others will cover that aspect as a part of this conference.

43 My father helped with the clear up on Canvey Island where a friend's farm had been devastated. Fifty years later, he still struggled to describe the sheer devastation.

44 The Environment Agency is currently building a rising flood barrier in the river at Boston, a town where a major flood event will completely flood.

45 In the southern USA, in hurricane season, governors are increasingly warning communities that beyond a point in time nobody will risk their lives to save those who choose to stay put.

46 See the Environment Agency's 'the state of the environment: water resources' May 2018.

47 Quite apart from the scandals surround emissions measurements that have engulfed various car manufacturers.

48 I've tracked the outcomes of some of these waves in previous notes, for example P Kellett 'Better regulation, deregulation and environmental law' (2015) 27 *Environmental Law and Management* 200.

Most statutory appeals challenge enforcement notices (not refusals or grant of permits subject to conditions) which seek to require operators to take steps to prevent or reduce the consequences of harm on people and the environment. Many of these cases are heard by the Planning Inspectorate and are not reported so often do not attract the level of attention that challenges in the High Court from businesses or more rarely from NGOs.⁵⁷ The evidence from the outcome of these appeals is that the Environment Agency's decisions to serve a notice is ultimately upheld in almost every case.⁵⁸ The appeal, of course, almost always has the effect of delaying the taking of steps which the regulator argues are necessary to protect the public and the environment. These sorts of appeals are cheap to lodge and last many months during which the public at times continue to suffer and blame a framework that is designed of course and rightly for the compliant.⁵⁹

Much has been written about the inadequacy of agricultural interventions in the light of the Common Agricultural Policy. One of the huge potential opportunities of EU Brexit is to replace a subsidy system which rewards absolute production levels with one where public money is spent on public goods driving more sustainable food production. Agriculture is responsible for too many serious pollution incidents and a subsidy system as any economist would argue rewards the inefficient and allows businesses to continue to operate where in other markets new entrants would have overtaken them. One substantial gap is in finding a long-term solution to soil productivity, not just for agriculture, given the short terms pressures that affect the management of soil. Environmental law is engaged at the wrong end of this system, as fields that simply should not be used for certain crops⁶⁰ are so used, resulting in harmful compaction and soil erosion which ends up in local streams and inevitable enforcement action driven by the wrong market signal.

Water pollution incidents remain too high, particularly those caused by agriculture and by water companies. For example, water companies are paid to comply with the law, yet still appear to have unacceptably high levels of non-compliance, with 60 incidents serious per year:

Water quality is better than at any time since the Industrial Revolution thanks to tougher regulation and years of hard work by the Environment Agency and others. But there are still far too many serious pollution incidents which damage the local environment, threaten wildlife and, in the worst cases, put the public at risk. I would like to see fines made proportionate to the turnover of the company and

for the courts to apply these penalties consistently. Anything less is no deterrent.⁶¹

You can track water quality progress in the Environment Agency's state of the environment annual progress reports.

Decentralisation of production and new technologies pose substantial challenges for environmental regulation. There are of course potentially multiple benefits in terms of small-scale local production, reduced transport costs and waste. But the implications of decentralisation are broad for the energy, water, food and industrial production sectors. Decentralised units of production are already being created worldwide.⁶² Farming may become more small-scale and closer to the market, so supermarkets may grow salad in store rather than in sheds in Spain or Holland. Small units can produce bespoke chemicals and pesticides to order. We face a future where 3D printers are likely to create the ability for ever more sophisticated products to be made without the management and regulatory oversight of large scale production. The prospect of a small-scale pesticide factory being able to set up on a small agricultural unit with limited oversight is a cause for real concern.

We all presumably want simple risk-based legislative systems to control environmental risk. The challenge is finding the right balance between simplicity and prescription. De minimis thresholds make modest activities lawful. They create boundaries above which considerably more risk-based attention will be paid, yet below which little attention may be paid. Sometimes, the absence of thresholds can lead to perverse outcomes and very small activities like making soap in a bath needing a permit.⁶³ The use of exemptions/binding rules for lower risk activities can go some way to lessen the risk of over-regulation but the cost is of course more complexity.

Regulating highly automated sites poses different challenges, as they are often exempt from the need for a permit and sometimes at most they are subject to self-monitoring requirements. Self-monitoring requirements will be needed for higher risk activities. Self-monitoring is a perfectly acceptable regulatory strategy with appropriate automated check monitoring, background environmental monitoring and periodic auditing. There are limits to this approach if an entity's culture is 'rotten'. If so where environmental check monitoring and audits fail to spot the issue,⁶⁴ then it is only likely to become apparent through whistle blowing⁶⁵ or an avoidable major incident.

57 The Environment Agency is defending a judicial review application, after many years of pre-action protocol letters, by an NGO concerning a fracking permit decision and of course, given the public consciousness around fracking the legal community is aware of this fact.

58 Of course, it is the cases where decisions are not upheld that are reported.

59 A particularly difficult case resolved this year involved noise pollution from a waste site in a large city which had dragged on through litigation for years leaving local residents in some misery until at last the site closed.

60 For example, parsnips are not suitable crops for growing on steep hills in the rural South West.

61 Emma Howard Boyd, Environment Agency Chair (19 February 2018) <https://www.gov.uk/government/news/far-too-many-serious-pollution-incidents-says-environment-agency-water-quality-report>.

62 See eg a research paper on micro factories: <https://formlabs.com/blog/4-steps-starting-a-microfactory/> and a blog from Cranfield University on the implications: <https://blogs.cranfield.ac.uk/manufacturing/micro-factories-future-manufacturing>.

63 A bath scale soap process some years ago was identified and found to be strictly in need of an Integrated Pollution Prevention and Control Permit as an organic chemical process. Of course, common sense was applied.

64 Remember Enron's auditors?

65 The Public Interest Disclosure (Prescribed Persons) Order 2014 provides individuals who make certain environmental disclosures to the Environment Agency with limited protections.

Environmental whistle blowing relies on an employee being brave enough to tell the regulator. While whistle blowers are automatically protected in law against, say, losing their job they will think carefully before making a disclosure if it runs against company culture.⁶⁶ In practice, self-monitoring can be negated if a profit driven culture over-dominates: alarms can be switched off; self-reporting requirements of permit breaches ignored; and even by-pass channels have been constructed around treatment plants so that flows are recorded as passes.

Another great challenge lies in species and habitats conservation. Our biodiversity has radically changed over time. Some here will remember the presentation the last time UKELA visited Canterbury by Tom Mosedale showing that Great White Sharks used to flourish in the North Sea, feeding on the vast biological resources. We seek to ensure that others preserve their forests⁶⁷ yet, just after the Norman conquest, 85 per cent of England had already been deforested.⁶⁸ We have agreed measures to deal with Invasive Alien Species.⁶⁹ Yet it may be a struggle to stand still given increased trade and travel causing new introductions, a few invasive species will survive and thrive, the polluter pays principle is more challenging to apply to invasive species⁷⁰ and we face a warming climate and real challenges to preserve biodiversity within finite budgets.⁷¹

Brexit poses challenges (and opportunities) for many reasons, not least because of course nobody yet knows what the terms of departure will be and so what impact it will have on the environmental law challenges above. So, for example, as we prepare to leave the European Union it is not yet clear what deals will be achieved with the EU and non-EU Member States and organisations and therefore which interests will influence in future what is regulated, through what means and to what standards. The protracted debates between the House of Lords and the House of Commons on the EU Withdrawal Bill illustrate this uncertainty. This issue will of course eventually resolve in Parliament. In June 2018 the Commons defeated the following House of Lords' EU Withdrawal Bill amendment (my highlighting) to impose a standstill provision on, amongst others, changing environmental standards:

Enhanced protection for certain areas of EU law

- (1) Following the day on which this Act is passed, a Minister of the Crown may not amend, repeal or revoke retained EU law relating to—
- (a) ... or
 - (e) environmental standards and protection, except by primary legislation, or by subordinate legislation

⁶⁶ The recent *Barclays Bank* case where the CEO went against his company's policy to try to unmask a whistle-blower shows that, even in highly regulated sectors, employees may have reservations about coming forward.

⁶⁷ See Millenium Sustainable Development Goal 15 on sustainable forest management.

⁶⁸ See Oliver Rackham *History of the Countryside* (Phoenix 1986) 88.

⁶⁹ See Regulation EU No 1143/2014 on the prevention and management of invasive alien species [2014] OJ L317/35 (4 November 2014).

⁷⁰ Although I accept there are some quite creative environmental lawyers in the UKELA community.

⁷¹ See eg Ken Thompson *Where Do Camels Belong? The Story and Science of Invasive Species* (Profile Books 2014).

made under any Act of Parliament insofar as this subordinate legislation meets the requirements in subsections (2) to (5).

- (2) Subordinate legislation which amends, repeals or revokes retained EU law in the areas set out in subsection (1) must be subject to an enhanced scrutiny procedure, to be established by regulations made by the Secretary of State.
- (3) Regulations under subsection (2) may not be made unless a draft has been laid before, and approved by a resolution of, each House of Parliament.
- (4) The enhanced scrutiny procedure provided for by subsection (2) must include a period of consultation with relevant stakeholders.
- (5) When making regulations relating to the areas of retained EU law set out in subsection (1), whether under this Act or any other Act of Parliament, a Minister of the Crown—
 - (a) produce an explanatory statement under paragraph 22 of Schedule 7, and
 - (b) include a certification that the regulation does no more than make technical changes to retained EU law in order for it to work following exit.

UKELA's excellent report on environment standards in a post-EU world is a good start for anyone who is interested in the issue of standard setting. The defeated Lords amendment attempted to prevent it from being too easy to reduce standards but of course operates equally to make it hard to improve standards. Environmental standards have changed regularly in the past and have generally improved as it becomes possible to achieve better standards through cost-effective techniques.⁷² Although this form of amendment would make it harder to lower standards it would also make it far harder to raise standards which has been the norm over the past 30 years.

I appreciate that my challenges come from my world-view but they are substantial: adequate sustainable resilient housing; flood risk awareness; less money for the environment; a framework that is designed for the compliant being exploited by the non-compliant; agricultural interventions causing harm; too many serious pollution incidents; decentralised production; nature conservation as the climate changes; and the need to design an environmental law framework that works beyond Brexit.

Solutions

I would suggest that the best environmental law solutions to the challenges ahead should at least consider what has worked in the past. Dedicated regulators for the environment, high standards set in law, risk-based permitting, compliance and enforcement frameworks with sophisticated interventions and far greater transparency have delivered sustained improvements and high levels of compliance. This

⁷² Some years ago, I witnessed an (then IPPC now of course IED) Best Available Techniques Reference Document 2-day meeting in Seville where industry, government, regulator and NGO representatives sat together to finalise a BREF document. What struck me was variability of positions from each of the many parties and how that multi interest landscape led to the adoption of a BREF that greatly improved the techniques that were found to be affordable and achievable.

evidence gives clues as to what may work and what may not as we look ahead. Few parts of the ambitious 25-Year Plan can readily be delivered without new or amended regulatory interventions.

We need to seek *good law*⁷³ in the *future legislative framework*. The key to creating good environmental law interventions remains ensuring that:

- they are well designed⁷⁴ and avoid unfair outcomes through risk-based approaches⁷⁵
- they are seen as fairly made and understood by the public and those who are bound by them,⁷⁶ in this culture plays a huge part and
- they are properly enforced;⁷⁷ understanding the causes of non-compliance, prosecuting where necessary but also encouraging VEU's to put things right.

Risk-based permitting, compliance, charging and enforcement frameworks like EPR are vital. They underpin fair and even-handed regulatory approaches within and between regulated sectors and apply controls according to the environmental risk each activity presents to the environment. Creating separate rules (and regulators) for different sectors is bureaucratic, costly and burdensome and increases the risk of regulatory capture. Why should we treat effluent to different standards depending on who produces it when it is discharged into the same river?

We already have several separate producer responsibility schemes. The 25 Year Plan will need quite a few more. Does it make sense to keep designing new bespoke schemes with different rules which drive additional burden and inefficiency? It is surely time for EPR thinking to be applied to producer responsibility? It is also time to do more to raise the barrier to entry to operating in the waste market given that the Environment Agency closed some 850 illegal waste sites in 2016/17.⁷⁸ The Environment Agency's experience of applying new and traditional enforcement interventions is that they appear to work as intended. Such interventions need to be applied to future environmental laws. It is odd, for example, that civil sanctions including voluntary EUs only apply to a narrow range of existing environmental breaches? Perhaps there could be a form of community redress where operator appeals against enforcement notices are refused as the evidence suggests that appeals are often simply used as delaying tactics?

73 I recognise that good law is a subjective concept, so I've suggested elements environmental law might contain.

74 Consulting on the proposed policy alongside the proposed law helps us understand how a proposed measure will operate and fit within the wider environmental law framework.

75 For example, risk-based charging and permitting mechanisms such as those in environmental permitting and charging regimes mean that activities that pose lower risks face simpler permitting mechanisms and those whose performance is better attract less regulatory attention and so face lower charges.

76 Measures need to command respect, or they may become treated like rural speed limits.

77 Adequately funded enforcement activity is vital to avoid free riders and ensure people and the environment are properly protected.

78 Regulators should not need to have to seek powers like those in the Waste Enforcement (England & Wales) Regulations to bar the gates to illegal waste sites. The newly announced review of Serious and Organised Waste Crime should help in this.

Setting standards in the future

What is regulated, through what form of mechanism (from permits to trading schemes, producer responsibility schemes, bans, general binding rules to self-regulation) and to what standards are as yet key unanswered questions. In setting standards, a balance has to be struck on environmental, economic and social grounds for each standard. The best mechanisms I have seen involve participation and compromise between business, regulators, NGOs and government through a process set in law.⁷⁹ Parliamentary time will be particularly limited as we leave the EU, probably pass through a transition period and then need to do more domestically. It will be harder to make other environmental law changes that are not needed for this initial exercise. Emerging evidence of the need to change what is regulated, how and to what standards will necessarily have less priority during this period. June 2018 defeated Lords amendment on maintaining environmental standards would have made it very difficult to raise standards in the future as has been the *norm* over 30 years (or, indeed, to lower standards, as has been the exception).

The now closed consultation on environmental principles alongside the late Commons Amendments to the EU Withdrawal Act, section 16⁸⁰ will play a key role in establishing the domestic environmental law framework. The suite of proposed principles in the then government supported amendment to the EU Withdrawal Act is broad. Environmental principles are flexible: 'generally formulated phrases, representing policy ideas, and their versatility means they have been developing increasing roles in judicial reasoning as well as in other legal and non-legal fora'.⁸¹ For me they are lodestones. Their presence casts a magnetic spell over environmental policy and decision-making. They can provide a flexible framework to deal with often finely balanced environmental choices. In a domestic framework I will welcome their presence, despite the litigation that will follow, as well designed they will drive better integrated long-term environmental policy and assist in very challenging balanced decision-making.

There are so many areas to consider about a *proposed scrutiny body* replacing the role of European institutions alongside the Courts but, amongst the more obvious issues, are:

- the breadth of its powers to hold the government to account and how the Courts will play a role in this assisted by the EU Withdrawal Act to allow '*proportionate enforcement action (including legal proceedings if necessary)*'⁸²

79 See note 73 on the BREF process above.

80 See the David Davis, Oliver Letwin, Zac Goldsmith amendment moved on 13 June 2018 requiring the government to publish a draft bill within six months containing a list of environmental principles (precautionary principles, prevention, rectification at source, polluter pays, sustainable development, integration, access to information, public participation and access to justice).

81 Eloise Scotford *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing 2017) 260.

82 See the EU Withdrawal Act Section 16(1)(d) which suggests that the body will have powers to take 'proportionate enforcement action'.

- an ability to exercise independent scrutiny requires ring-fenced staff, year on year resources and freedom from interference
- avoiding overlap with other environmental bodies so finite money for the environment is spent once – if it takes an ombudsman role the current ombudsman role⁸³ must be constrained
- what role if any it should take in environmental standards – it is not immediately apparent that a scrutiny body should take a regulatory/policy role on setting standards but perhaps it could comment upon their proposed removal?
- the breadth of its remit across environmental law (if it only covers retained EU law its remit would shrink as retained EU law is replaced) and across government (should it scrutinise carbon, nuclear energy etc).

Self-monitoring will increase as units of production are decentralised with the huge benefits of less wasteful production methods. Despite this, the potential harm from small chemicals plants popping up anywhere will need a regulatory response – small pesticides spills can devastate finite groundwater resources. The trick and the carrot will be to apply risk-based rules to small units of production which allow the compliant to operate in local communities with considerable autonomy. But a stick to accompany this should be removing opportunities for others to cheat the rules. Perhaps we need greatly increased sanctions where self-monitoring rules are abused so it simply is not worth turning the warning alarms off, failing to self-report breaches and diverting waste streams around treatment plant?

Environmental litigation and the market will be just as important as regulation. The Chinese diesel car ban will have driven innovation far ahead of the regulatory curves in domestic, European and American markets. Contrast the relatively rapid Blue Planet switch of public consciousness around plastics⁸⁴ with that to date on climate change risk. There appears to be a growing recognition that a future of ever increasing plastics production, as a by-product of

oil refining, will not now occur due to regulatory interventions⁸⁵. The climate change resilience risk affecting the proposed 1 million new homes may be addressed by a combination of improved building standards and/or market insurability. Asset owners are increasingly using their influence to influence the way assets under management are preparing for a low-carbon economy.⁸⁶ The Transition Pathway Initiative (TPI),⁸⁷ which controls over £5 trillion of assets⁸⁸ is asking companies:

- to evaluate and track the quality of management of greenhouse gas emissions and of risks and opportunities related to a low-carbon transition
- to evaluate how companies future carbon performance would compare to international targets and national pledges made as part of the Paris Agreement and
- to publish the results of this analysis.

Future investment decisions will consider these results and has increased engagement with companies and fund managers. Some exciting environmental litigation will follow, should increasingly active shareholders suffer losses from investing in companies which remain wilfully blind to such issues.

Water quality is better but *reducing the unacceptably high level of pollution incidents* from the agricultural and water industries will take considerable effort, some cultural changes, new interventions for agriculture which support public good, enforcement and the support of the courts in the form of fines which send clear messages to boards and shareholders.

Climbing the mountains needed to meet the United Nations' Sustainable Development Goals⁸⁹ will take passion and dedicated effort. Put another way, *it is an exciting time to be an environmental lawyer.*

PS: An 'ambitious' Environment Bill was announced by the Prime Minister on 18 July – its content, given the above successes, challenges and possible solutions, is eagerly awaited.

83 See the Parliamentary and Health Service Ombudsman's role in the very broad term of maladministration.

84 The fact that MacDonald's has decided to replace plastic straws in its drinks in response to consumer pressure is telling.

85 See eg BP's Energy Outlook 2018.

86 The growth of ESG investment options demonstrates the increasing demand from individuals and pension funds for different investment opportunities.

87 See <http://www.lse.ac.uk/GranthamInstitute/tpi/>.

88 Which the Environment Agency Pension Fund as an asset owner supports.

89 See <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

Past reflections and future horizons: the evolution of public perceptions and the public's role in environmental law over the past 30 years

Emma Lui

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Have public perceptions of environmental law changed over the past 30 years?

On thinking about this question, I'd like to share a personal perspective. This involves three generations of women in my family: my grandmother, my mother and me. Several years ago, there was a conversation between us when I was about to begin my law degree studies at university. My grandmother had asked me what kind of law I wanted to practise and I replied excitedly, via my mother translating, that I wanted to be an environmental lawyer.

There were confused faces, raised eyebrows, and a perplexed silence at my answer.

I have reflected on why I received this discouraging reaction. Why did we have such different attitudes to environmental issues?

I thought about my grandmother. She had escaped from the Communist regime in China, emigrated from Hong Kong halfway across the world to Northern Ireland, and then had to raise a young family in a foreign country where she did not speak the language. Unsurprisingly, environmental issues were not high on her list of priorities.

I thought about my mother. She had grown up in Belfast during the Troubles, amid well-documented atrocities and violence, and had struggled with finding her identity where she did not share the ethnic, religious or cultural backgrounds of the community around her. Her mind, too, was probably far too preoccupied with other matters.

And then there was me: the millennial. Like many of my peers who had absorbed lessons on energy efficiency and waste management from school, I zealously monitored whether the lights were being turned off in unused rooms and enforced using the recycling bins correctly in our home. I relished every chance I had to go and explore the beautiful local surroundings of Northern Ireland. And I was so inspired by my personal hero David Attenborough's nature documentaries that I went and volunteered on a conservation and research expedition in the Peruvian Amazon.

So, in answer to the initial question: yes. As illustrated by my own family, public perceptions of environmental law have indeed changed over the past three decades. But why? I attribute this to the following three main reasons.

Greater awareness

During the past 30 years of economic growth, increasing access to mediums like television, cinema and the internet

has made sharing information and knowledge increasingly easier. Coverage of environmental issues and disasters across the world is now beamed into people's homes on a daily basis.

This increased coverage together with 'generational trigger events' has contributed to greater public awareness of environmental issues. Examples are the 1980s 'Save the Whales' conservation campaign, the 1990s hole in the Ozone Layer, climate change through Al Gore's groundbreaking film *An Inconvenient Truth* in the 2000s, BP's *Deepwater Horizon* oil spill in the Gulf of Mexico and corporate responsibility, and the spotlight on clean air through the vehicle emissions scandal and legal NGO ClientEarth's air quality litigation.¹ Most recently, David Attenborough's award-winning *Blue Planet 2* dramatically illustrated the harmful impacts of waste pollution upon our marine life and oceans.

These days one cannot open a newspaper, watch the news or browse an online news site without seeing environmental issues being given prominence. The general public's environmental conscious has now well and truly been awakened.

Greater interest

As a result of this greater public awareness, there has been greater environmental interest and activism over the past three decades. An example of this at home is anti-fracking groups engaging in grassroots campaigns² and legal challenges.³

Another recent example, this time from the USA, demonstrates how the internet has enabled environmental activism quickly to garner international attention and support. In 2016, protests erupted against the construction of the Dakota Access Pipeline (DAPL), which was to span oil fields in Western North Dakota to Illinois. Part of the DAPL was to go under Lake Oahe, the fourth largest reservoir in the USA, and located near the Native American Standing Rock Indian Reservation. What began as a local indigenous people's campaign evolved over months into an international movement as environmentalists joined hands with the Sioux tribe in violent and viral clashes with law

¹ *R (on the application of ClientEarth) No 3 v Secretary of State for Environment, Food and Rural Affairs and Others* [2018] EWHC 315 (Admin).

² Frack Off <http://frack-off.org.uk/fracking-hell/frontline/>.

³ *Preston New Road Action Group (through Holliday) v Secretary of State for Communities and Local Government and another* [2018] EWCA Civ 9.

enforcement. On 15 November 2016, activists in 300 cities across the globe participated in a coordinated act of solidarity, amplifying their cause through tools such as social media and live streaming. Twitter, Instagram and Facebook were alight that day with #NODAPL.

The US Army Corps of Engineers responded to the protestors in December 2016 by announcing the pipeline construction would be temporarily halted for the environmental impact statement of alternative routes to be explored.⁴

While President Trump has since revived the DAPL project, the Standing Rock protests illustrate how environmental activists are successfully harnessing new technology platforms. Elsewhere, e-petitions to ban single-use plastic bags in New Zealand⁵ and pesticides that are harmful to bees in the UK⁶ have reached their respective parliaments. Crowdfunding has benefited environmental activism using legal avenues, with climate change litigation receiving particular focus from donors.

Public ownership

This is where the greatest shift in public perceptions can be seen. *Blue Planet 2* is one example of how instrumental the media coverage I explored in my first point has been in bringing environmental issues to the attention of the masses in their homes. Scientists, politicians and campaigners can talk about climate change and its causes and consequences until they are blue in the face. But these words do not have the same public impact or intensity of reaction compared to the stark image of a mother walrus struggling to place her pup safely on an overcrowded ice floe because global warming has made the Arctic ice sheet melt and sea levels rise.

There is now an emotional connection with environmental issues. We feel guilt. This one image sparked a stark acceptance that we have contributed to this crisis, that it affects other living creatures and will affect future generations, and that we must find the solution to fix it. Climate change is now viewed as an urgent choice between zero and sum, and that we must take collective responsibility for our actions and our planet.

How has environmental law reacted to these changes?

As public awareness, interest and ownership of environmental issues have evolved in the ways previously discussed, so too has law responded as a tool to address

those environmental problems. I will briefly outline four ways in which it has done so.

International frameworks

The United Nations Framework Convention on Climate Change 1992 (UNFCCC)⁷ provided a landmark international agreement to tackle greenhouse gases and has nearly universal membership. It demonstrated that the international community was capable of reaching agreement and working together on a shared environmental objective.

The same spirit of global cooperation was called upon again with renewed urgency during the fraught negotiations for the Paris Agreement 2015, producing the first-ever legally binding climate change agreement between 195 countries to limit global warming below 2°C, effective from 2020.⁸ While this was a major diplomatic achievement for the governments involved, civil society played a crucial role in ensuring a range of voices were present at the bargaining table from the scientific community, businesses and banks, and NGOs,⁹ to the Alliance of Small Island States.¹⁰

The Aarhus Convention

The Aarhus Convention's three pillars (access to information, public participation and access to justice) have made environmental law more accessible than previously at national and international levels. Focusing on the third pillar in the domestic context, when the Civil Procedure Rules were amended in February 2017 to allow courts to vary the environmental costs cap where to do so would not make the cost of proceedings 'prohibitively expensive' for claimants, environmental groups fiercely challenged this decision with a degree of success.¹¹

The Aarhus Convention has provided an exclusively environmental legal gateway, conferring rights through which the public can wield a significant stakeholder role in environmental decision-making processes and laws. It is extremely encouraging to see that the public is not willing to give up those rights lightly.

Judicial review

I will use two examples of legal areas where environmental judicial review is growing.

First: air quality. As I mentioned earlier, ClientEarth has used the legal process to hold the government to account by demanding that European air quality standards

4 Jack Healy and Nicholas Fandos 'Protesters gain victory in fight over Dakota Access Oil Pipeline' *The New York Times* (4 December 2016) <https://www.nytimes.com/2016/12/04/us/federal-officials-to-explore-different-route-for-dakota-pipeline.html>.

5 As a UKELA 2018 conference postscript, New Zealand later announced a ban would be implemented. See Sabrina Barr 'New Zealand PM Jacinda Arden announces plans to ban plastic bags nationwide' *The Independent* (10 August 2018) <https://www.independent.co.uk/life-style/new-zealand-plastic-bag-ban-prime-minister-jacinda-arden-announce-single-use-a8486551.html>.

6 Although the e-petition was rejected on 10 June 2018, the government noted in its response that the EU voted for a permanent ban on neonicotinoids in April 2018.

7 Adopted 9 May 1992, entered into force 21 March 1994 1771 UNTS 107.

8 UNFCCC Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) FCCC/CP/2015/L.9.

9 Michael Jacobs 'High pressure for low emissions: How civil society created the Paris climate agreement' (2016) 22(4) *Juncture* 314.

10 Timothée Ourbak and Alexandre K Magnan 'The Paris Agreement and climate change negotiations: Small islands, big players' (2017) *Regional Environmental Change* 1.

11 *Royal Society for the Protection of Birds and Others v Secretary of State for Justice and Another* [2017] EWHC 2309 (Admin).

are enforced domestically. Through a series of judicial reviews, ClientEarth has obtained a declaration that the government was in fact in breach of its duties under the Ambient Air Quality Directive,¹² forced the publication and revision of air quality plans no fewer than three times¹³ and doubtless put intense scrutiny upon the contents of the recent draft Clean Air Strategy.

There is legal pressure on two fronts for the government on this matter as infraction proceedings loom at the European level. In May 2018, the European Commission announced it is referring the UK to the Court of Justice of the European Union owing to the UK's continued failure to respect agreed air quality limit values and failure to take appropriate measures to keep exceedance periods as short as possible.¹⁴

Secondly, there is a growing world movement of climate change litigation. Cases such as *Urgenda*¹⁵ in the Netherlands and the Arctic Oil drilling lawsuit¹⁶ in Norway are clear examples of how ordinary people are using the courts to demand change in how governments prioritise climate change in making their decisions.

In the UK, one such case is about to be heard before the High Court. Plan B, a charity whose aim is to support strategic legal action against climate change, and 11 UK citizens, are using judicial review as a means to compel the government to revise the Climate Change Act (CCA) 2008. The applicants allege that the government is violating the CCA 2008 by failing to revise the 2050 carbon reduction target in light of the Paris Agreement goals. The five grounds are couched in traditional judicial review terminology (such as illegality, irrationality, and based on errors of law), as are the remedies they seek: a mandatory order that the Secretary of State revise the 2050 target and a declaration that the government has acted unlawfully.¹⁷

On an aside, crowdfunding has been essential in funding this legal challenge. The Plan B case is therefore an example of how law, social media and technology can convert environmental activism into public ownership; ordinary people are channelling their interest in environmental issues into financial backing for a cause they strongly believe in: mitigating climate change.

Political pressure and consumer power

When the people roar with one voice, governments and multinational corporations act.

To highlight some recent examples, in Scotland, the Scottish Government announced a moratorium on fracking following a public consultation where an overwhelming majority of responses was against it.¹⁸ The legislative ban on plastic microbeads in cosmetics and personal care products, which recently came into force in England and Wales, was the culmination of campaigning and e-petitioning in bringing the strength of public feeling on this issue to the government's door.¹⁹ In addition, the 'Blue Planet effect' has undoubtedly influenced the government's 25 Year Environment Plan in its aim to eliminate single-use plastic waste by 2042, as well as the launch of a £20 million Plastics Research and Innovation Fund to drive the transition to a circular plastics economy.²⁰ There is evidently much more to be done politically to integrate sustainability into our everyday life-style choices, shown by the Environmental Audit Committee's announcement they will be holding an inquiry into the social and environmental impact of the clothing industry,²¹ but the progress made thus far should be acknowledged as positive.

As consumers become more vocal on issues like ethical sourcing and environmental impact of goods, there is a financial incentive for companies to change their supply chains and practices. For example, Iceland announced earlier this year that it will be the first UK major supermarket to ban palm oil and plastic packaging from its own brand products by 2023.²²

Sustainable development, through the United Nations 2030 Agenda and the Sustainable Development Goals (SDGs), has also played an important role in encouraging corporations to boost their green credentials.²³ International manufacturing conglomerates such as Procter & Gamble, Johnson & Johnson and Unilever hold partnerships and voluntary commitments with the SDGs, collaborating with other partners on initiatives to achieve specific SDGs. In the energy industry, even giants like BP, Shell and ExxonMobil have recognised their role in tackling climate change through their actions to reduce carbon emissions, supporting carbon capture and storage, and investing in developing renewable energy sources and research in biofuels.

12 [2013] UKSC 25.

13 [2015] UKSC 28, [2016] EWHC 2740 (Admin); *R (on the application of ClientEarth) No 3 v Secretary of State for Environment, Food and Rural Affairs and Others* (n 1).

14 European Commission 'Air quality: Commission takes action to protect citizens from air pollution' *European Commission Press Release Database* (17 May 2018) http://europa.eu/rapid/press-release_IP-18-3450_en.htm.

15 *Urgenda Foundation v The State of the Netherlands*, Hague District Court C/09/456689/HA ZA 13-1396 (24 June 2015).

16 Alister Doyle and Terje Solsvik 'Greenpeace appeals after losing Norwegian Arctic drilling lawsuit' *Reuters* (5 February 2018) <https://uk.reuters.com/article/us-climatechange-norway/greenpeace-appeals-after-losing-norwegian-arctic-drilling-lawsuit-idUKKBN1FP15B>.

17 In another UKELA 2018 conference postscript, Plan B's renewed application for permission to apply for judicial review was refused on 20 July 2018 in [2018] EWHC 1892 (Admin). Plan B has since filed its grounds of appeal to the Court of Appeal.

18 Scottish Government 'Scottish Government says no to fracking' (*Scottish Government Newsroom*, 3 October 2017) <https://news.gov.scot/news/scottish-government-says-no-to-fracking>.

19 Environmental Protection (Microbeads) (England) Regulations 2017, SI 2017/1312 and Environmental Protection (Microbeads) (Wales) Regulations 2018, SI 2018/760.

20 UK Research and Innovation 'Science Minister announces £20 million Plastics Research and Innovation Fund to turn the tide on plastics production' *UK Research and Innovation* (18 June 2018) <https://www.ukri.org/news/science-minister-announces-20-million-plastics-research-and-innovation-fund-to-turn-the-tide-on-plastics-production/>.

21 House of Commons Environmental Audit Committee 'Sustainability of the fashion industry inquiry launched' *Parliament UK* (22 June 2018) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/news-parliament-2017/sustainability-of-the-fashion-industry-inquiry-launch-17-19/>.

22 'Iceland supermarkets to ban palm oil in own-brand products' *BBC News* (10 April 2018) <https://www.bbc.co.uk/news/business-43696948>.

23 UNGA Res 70/1 (21 October 2015) UN Doc A/Res/70/1.

Conclusions

Public perceptions of environmental law have changed, and for the better. This is evident in the shift of generational attitudes and developments I have outlined as the public, politicians and corporations realise how environmental problems and climate change affect us all. There has also been a change in how the public values environmental law. Legal recourse is used as a meaningful way in which the public can take action on behalf of the environment, hold governments and institutions to account and effect change. Furthermore, environmentalism itself is no longer viewed suspiciously as fringe and radical. It is now prevailing and

mainstream, forcing political and corporate behaviours to change.

Finally, I am immensely grateful to UKELA for giving me the opportunity to share my views on this topic, and for having supported my enthusiasm and education in environmental law thus far. I am aware I am here as only one representative of my generation so I would like to ask those practitioners here at the conference please to spare a little time for those like me (at the early stages of our environmental careers) to share your advice and answer a few questions. We hope to be in your positions one day, to carry on UKELA's work, and to ensure better law for our environment and one planet. Thank you.

What have we achieved in environmental law in the last thirty years, what are the challenges still facing us, and how can environmental law solve those challenges?

Sue Sljivic

Founding director of RSK Environment Ltd

RSK Environment Ltd was established 30 years ago by a couple of colleagues and I to exploit the new requirement for environmental impact assessments (EIAs) for major pipeline projects. EIA was a new concept in those days. The first environmental statement we undertook was a perfect-bound document of about 100 pages for a 400 km pipeline between Scotland and Cheshire! RSK still undertakes EIA projects today but they are significantly different documents from those of the early days. They usually consist of several ring-bound files and associated drawings and maps.

RSK currently employs over 2,500 technical experts capable of surveying and analysing all sorts of data. We even use space technology for Earth observation and are working in remote parts of the world such as Iraq and East Africa. We still undertake EIAs for pipeline projects, but we also now work in multiple sectors including residential, transport and airport infrastructure projects.

EIA has changed over the past 30 years: first in response to EU Directives and then in the 1990s to incorporate some of the voluntary environmental and social guidelines adopted by banks such as the World Bank and the export credit agencies of the OECD member countries. These were formalised by NGOs into the Equator Principles, which still provide a set of voluntary guidelines adopted by finance institutions to ensure that large-scale development or construction projects consider appropriately the associated potential impacts on the natural environment and local communities.

More recently, the requirements for health impact assessments, impact on climate change and risk assessments of potential unplanned events have added to the vast amount of baseline data, analysis, stakeholder engagement, management plans and documentation accompanying development applications. The interpretation of some of the EU requirements on, for example, trans-boundary effects, the Habitats Regulations and legal cases such as the 'Rochdale Envelope' have increased the amount of consultation and general discussion on project description and the interpretation of projects' impacts and 'appropriate' mitigation measures.

In providing more and more data, we do run the risk of tripping ourselves up and providing conflicting information which then becomes the subject of a long and costly judicial review. I am not doubting the need for a stringent approach, but I am concerned that the amount of data is affecting our ability to obtain consent to develop infrastructure projects in a timely and efficient manner. I wonder sometimes whether a case could be made around scoping to identify the viability of a project early on. I also get the impression that the weight of scientific data is intimidating and lends to an element of distrust between developers and stakeholders.

We are currently unpicking ourselves from the EU requirements but will need, nonetheless, to align with the United Nations' Sustainable Development Goals and lenders' requirements, and to seek a simplified approach through planning reform. It is beyond doubt that a change in the UK is overdue.

Changes to the planning/DCO system to facilitate large-scale project development

Much debate has been held on proportionate EIA and, indeed, this is reflected in the new EIA regulations, which are seeking more robust scoping with the aim of streamlining the process. I am not convinced this will lead to much change, especially on complex and controversial projects where the statutory consultees fear judicial review if they dare to 'scope out' specific aspects.

Digital environmental statements, which are more interactive, do allow greater accessibility to the lengthy documentation without the need for sifting through reams of paper in the local library and enable quicker searches for locations or key words. However, I fear that this just means that the information loses its context, so it may need some form of signposting document or, dare I say, guidelines on how to navigate the EIA. We must endeavour to write in clear English and leave the technical detail for appendices.

Brexit: A view from Scotland

Colin Reid*

University of Dundee

- Brexit has proved to be a major issue of constitutional contention between the UK and Scottish governments, with the Supreme Court now scheduled to play a vital role.
- The constitutional arguments over where powers returning from Brussels are to be held and how common frameworks are to be developed has resulted in separate legislation dealing with the carry-over of EU law on UK and devolved matters.
- The Scottish Bill's competence is to be tested in the Supreme Court.
- Arrangements for environmental principles and governance are being discussed at both UK and Scottish levels, but with different sets of principles and different timescales, which make it more challenging to achieve strong collaboration.

In the referendum in 2016, in Scotland there was a clear majority in favour of remaining in the EU, with a 62 per cent vote in favour of Remain. Recognising that the UK would be leaving the EU, the Scottish Government's policy has long been in favour of staying in the Single Market and Customs Union. In its policy report *Scotland's Place in Europe*, published in December 2016 (<http://www.gov.scot/Resource/0051/00512073.pdf>), it also called for:

- a 'differentiated' position for Scotland that would allow Scotland to retain close alignment with the EU, regardless of what arrangements were made for the rest of the UK
- all powers in non-reserved areas currently exercised in Brussels to return to Edinburgh
- additional powers to be transferred to Scotland in some areas dominated by the EU (eg health and safety) and
- the establishment of a means for Scotland to create international agreements in areas of devolved power.

This is not the course that has been followed by the UK authorities.

Constitutional disagreement

As the UK Government has struggled to define its own position, relations between London and Edinburgh have been dominated by the major constitutional row over where the powers returning from Brussels are to rest. The Scottish position is simple, namely that all power in matters not expressly reserved to the UK under the Scotland

Act 1998 (as amended) should come to Edinburgh. The devolution settlement created a clear divide between a limited list of reserved matters that are for the UK institutions to handle everything else, which sits within the competence of the Scottish authorities. To provide for any non-reserved powers to rest, even temporarily, in London, it is argued, would disregard the fundamentals of the devolution settlement.

The UK position is that certain non-reserved powers should initially come to London to allow for an assessment of where uniform measures across the UK are needed, and for appropriate action to be taken, before the powers are passed on to devolved administrations. Many powers could be passed on immediately and, even where there was a delay, it is argued that in practice this would mean that there is no less control exercised in Edinburgh than at present, with the prospect of a rapid increase in exercisable powers as areas of responsibility are transferred from Westminster.

In the absence of any resolution, this dispute continued throughout the debates of the European Union (Withdrawal) Bill, which was finally passed in a form reflecting the UK Government's position. The Bill completed its passage without the legislative consent from the Scottish Parliament which is 'normally' a prerequisite for legislation at Westminster that affects Scotland (Scotland Act 1998 s 28(8)). This absence of consent is not a legal obstacle to the legislation being made, but although the Withdrawal Act now states the law, it has not ended the political arguments.

One consequence of the constitutional impasse has been that the Scottish Parliament has passed its own legislation to deal with the carry-over of EU law within the areas of devolved competence. The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill, which has completed all its parliamentary stages, is broadly parallel to the EU (Withdrawal) Act 2018 in retaining existing EU law and giving ministers powers to make the adjustments necessary for it to operate, but with some differences. Of particular environmental significance are:

- the general principles of EU law and the Charter of Fundamental Rights are retained as part of the law (s 5)
- in the exercise of 'tidy up' powers to allow 'retained EU law' to operate, Scottish Ministers must have regard to environmental principles and animal welfare (see below) (s 13B)
- the ministers must within six months produce and consult on proposals on guiding principles on the environment and effective and appropriate governance relating to the environment (s 26A).

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When introduced into the Scottish Parliament there was disagreement between the presiding officer and the government over whether all the terms of the Bill fell within devolved competence and royal assent has been delayed since the Advocate General has now referred this issue to the Supreme Court (hearings were held on 24 and 25 July 2018). Whatever the Court decides, there will be further work to be done to clarify the arrangements for the continuity of EU law in devolved and reserved areas.

Common frameworks

The depth of the constitutional disagreement over where powers should lie has unfortunately overwhelmed the depth of agreement over the need for some issues to be dealt with on a collaborative basis for the UK as a whole. All sides agree on the need for common frameworks in some areas, for environmental reasons among others. Indeed, in October 2017 all of the administrations agreed in the Joint Ministerial Council that common frameworks should be established where they are necessary:

- to enable the functioning of the UK internal market, while acknowledging policy divergence
- to ensure compliance with international obligations
- to ensure the UK can negotiate, enter into and implement new trade agreements and international treaties
- to enable the management of common resources
- to administer and provide access to justice in cases with a cross-border element
- to safeguard the security of the UK. (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf)

What followed, however, was not an open and principled discussion with stakeholders of where these criteria might be met. Instead, there emerged from London (with an unknown element of discussion with other authorities) a list of areas where frameworks were considered necessary. Moreover, there is still no agreement on how the frameworks are to be developed – through imposition from London, through full agreement with all the administrations, or something in-between. The EU (Withdrawal) Act sets out procedures that hope for discussion with and consent from the devolved parliaments, but ultimately allow for rules to be made in London without agreement, even on devolved matters. This leaves open questions over scrutiny and accountability, between the administrations and between the executive and Parliament in each case.

Environmental principles and governance

Environmental principles and governance have proved to be another area of some fluidity. The major consultation by DEFRA (<https://consult.defra.gov.uk/eu/environmental-principles-and-governance/>) has to some extent been upstaged by the provisions belatedly added into the EU (Withdrawal) Act 2018 (s 16), and it remains to be seen what will emerge later in the year. In relation to principles,

the list included in the Scottish Continuity Bill is shorter than that in the Westminster Act. It covers:

- the precautionary principle as it relates to the environment
- that preventative action should be taken to avert environmental damage
- that environmental damage should as a priority be rectified at source
- that the polluter should pay and
- that regard must be had to the welfare requirements of animals as sentient beings.

In terms of environmental governance, Scotland faces the same issues as for rest of the UK in terms of gaps left by the loss of EU machinery. A sub-group of the Scottish Government's Roundtable on Environment and Climate Change produced a report on *Environmental Governance in Scotland on the UK's withdrawal from the EU*, which identifies the gaps that will be created and provides a range of options for consideration (<http://www.gov.scot/Publications/2018/06/2221>). The report also recognises that with time becoming short before Brexit, there may be a need for interim arrangements since it may not be possible to get any new formal statutory framework in place before the EU Commission's role in overseeing environmental compliance disappears. The Environment Minister has welcomed the report and will be producing more detailed proposals in due course, as required by the Continuity Bill (<https://blogs.gov.scot/rural-environment/2018/06/01/next-steps-on-environmental-governance/>).

On the key issue of collaboration across the UK, the Roundtable's report notes the value of UK-wide coordination but cannot avoid the constitutional issue, simply stating that the arrangements should reflect the devolution settlement, whether that means separate bodies in the different nations working in conjunction or an agreed unified structure. DEFRA's consultation similarly holds out the prospect of discussion over various forms of collaborative working. Nevertheless, two things stand in the way of the likelihood of productive progress towards beneficial collaborative arrangements. The first is that the structural planning is progressing on different schedules – the UK Act requires a draft Bill by the end of the year, whereas the Scottish Bill's six-month period for consultation and reporting will not begin until after royal assent, which can come only after the Supreme Court's decision later in the year. Secondly, the breakdown of trust and cooperation between London and Edinburgh means that the environmental benefit of close collaboration could be a victim of the constitutional battles.

Conclusion

While we await the Supreme Court's decision on the Scottish Bill's competence, and the further political and legal discussion that will inevitably follow whatever the result, we face the prospect of having to live with two broadly parallel but different regimes for ensuring the continuation of retained EU law. This will lead to the need to identify clearly those matters which fall under the Westminster and those under the Holyrood provisions, an

issue which has been largely avoided in the past given the broad powers under the European Communities Act 1972, which created shared responsibility for implementing EU law. We also have two separate programmes developing the role of environmental principles and governance, with different sets of principles embedded and the likelihood of separate governance structures which seem unlikely, in the immediate future at least, to provide any clear means of dealing with those matters that do not fit neatly into a single administration's responsibility.

Finding a way forward will not be straightforward, given the lack of trust and collaboration between the governments in London and Edinburgh. The disagreement over where powers are to rest and how common frameworks are to be established is one that rests on deep constitutional principles but means that, despite the clear benefits to the environment, rapid progress seems unlikely

in developing soundly integrated mechanisms and approaches for environmental regulation and governance. At least partly because membership of the EU provided a safeguard against excessive fragmentation, the devolution settlement failed to provide any strong machinery for inter-governmental cooperation and dispute resolution (other than relying on Westminster's ultimate supremacy), and this deficiency is now being exposed. The difficulty in developing a clear approach on Brexit at the UK level has further muddied the waters, and has contributed to the lack of transparency, of collaboration with the devolved administrations and of stakeholder engagement at key stages in developing policy, both on Brexit in general and on the environment in particular. However, the cabinet meeting at Chequers in early July will surely get key issues sorted out neatly and leave everyone happy [oops!].

The 25-year environment plan and the natural environment

Paul Leinster

Professor of Environmental Assessment, Cranfield University

I want to talk about the 25-year plan and the natural capital approaches outlined within it and also what I think net gain means.

So if this truly is to be the first generation to leave the environment in a better state than the one we inherited, then we actually need to make the 25-year plan a practical reality, not just a document as it is now. And I'm also reminded of the *Monty Python* saying, what did the Romans ever do for us. So what did the Natural Capital Committee ever do for us? Well actually it was the Natural Capital Committee that recommended that there should be a 25-year plan. This 25-year plan is quite different to the 25-year plan that would have been produced by the Secretary of State before, and different to the Secretary of State before that. And I think one of the biggest risks we face just now, as people who care about the protection and improvement of the environment, is Mr Gove no longer being Secretary of State for the Environment. Because plans like this from my experience last as long as the person who wrote them is in place, unless they go in to statute. So one of the key objectives has to be that we get the 25-year plan onto a statutory basis.

It contains some interesting policy intents and hooks: *Public goods for public money*. What does that mean in practice? We don't really know just now? And at one level, who cares? Because it gets the debate going and then policy makers and others are able to think about how a concept like this can be translated into implementable measures.

When you talk with people about land management in the context of the 25-year plan, one of the core areas of discussion is soil health. But it is difficult to get agreement as to what a healthy soil is and what an appropriate set of related measures should be. However, if soil condition measures aren't included within the programme going forward then you're not going to get the traction and the action that needs to follow. So having better information on soil is key, and on trees, the greening of towns and cities and, as was said in the earlier presentation, making sure that we link health and wellbeing with the environment.

Within the 25-year plan there are 10 high-level goals which are good for example: clean air, clean water, thriving wildlife. But unless there are associated targets and quantified measures of success, what do they actually mean in practice? So, sat underneath those high-level goals, and this is something that DEFRA colleagues along with others are working on just now, needs a range of targets and measures, that then says 'clean air equals': what does it equal? One aspect for air could be a reduction in the numbers deaths brought forward – by how many? Should there be

no deaths brought forward? What is the figure that we want to achieve within a 25-year plan, a generational plan? We need to develop the targets and the measures.

And then there needs to be some iconic measures, otherwise people will drown in the large number and not engage. But there needs to be something more than 'trust us, we will deliver clean air'. And we need to agree common methodologies for measuring each measure and metric.

An approach that could be adopted is the one in place for carbon. The climate change legislation we have, has a target of an 80% reduction in emissions by 2050 against a 1990 baseline. So there needs to be a way of measuring carbon emissions, a baseline year, a target year, and all of this within legislation. Then there needs to be plan for how this will be achieved, with the governance in place to ensure that the plan and the required reductions are being delivered.

And I think that in the governance discussions, we need to consider two aspects. One is the body that stands in the place of the European Court of Justice and the European Commission, holding government as a whole to account, the conscience. But then, how do we know that we're actually delivering the 25-year plan metrics? This also needs to be monitored. These functions could be within the same body but could also be different bodies. And we need to be clear that delivery of the 25-year plan will require action across the whole of government. It is not just a DEFRA responsibility. And it can't be a system where people mark their own homework. We need independent scrutiny bodies.

But then we also need to think about what happens at a local level. Sometimes the thinking that goes on can be too Whitehall-centric. So what's the role of the devolved administrations? And the role of councils? Upper tier councils, county councils and district councils. What's the role of the national parks? What's the role of ... and you can think of lots of bodies that are having to deliver environmental outputs and outcomes. How can we be sure that the sum total of the nationally driven activities and the horizontally driven and locally driven activities actually add up to the ambition of the 25-year plan?

And who holds different groups to account within that process? So the effective meshing and interactions of local and national delivery arrangements are also key.

And then, as we've said before, full engagement with the health and wellbeing agenda. There is so much information now about the benefits to people of blue and green space, of publicly accessible green space. It's not green space that

you're not allowed to go in, it's publicly accessible green space. And it's not that we're going to be able to get hold of the national health budget. If you go in saying 'we want your budget', then you will have a short conversation. If, however, you say, 'how do we pool resources' and through the pooled resources deliver more of both of our agendas, I think we have a chance.

So natural capital principles. I just want to touch on this briefly. People often focus on the ecosystem services, the goods and benefits people get. And what natural capital is about is the asset base which underpins those goods and services. The problem of focusing predominately on the ecosystem services is in effect that you are only considering a revenue stream. It is as if you had £10,000 in the bank and you spend £1,000 a month and you don't put any more money in the bank, by month 11 you are bankrupt. And that is what we have been doing to the natural environment. And if we truly want to be the first generation to leave the environment in a better state, then we need to invest in the asset. This is a very simple infrastructure asset management approach. You need to think about – and this is why you need accounts – the potential reduction in the value of your assets on an ongoing basis. What's your depreciation cost? And how do you ensure that you are maintaining your assets, at a minimum to maintain the state that they are in but in many cases we actually have to invest in them to get them into a resilient state, and then maintain them in perpetuity. So natural capital is place-based, it's spatial, it's ownership.

Now there will be some organisations who are using assets that they don't actually own – for example water companies – they don't actually own the water. So it isn't a truly pure system of accounting. If you're thinking about an urban area, you are not going to get the Greater Manchester Combined Authority Finance Director to put 'air' onto their balance sheet. That won't happen. But it is that sort of concept that we need to think about. And we need to be managing assets and the associated risks to them so they meet future needs.

And in all of this don't forget the biodiversity. Because with biodiversity it is often not possible to place a value on it. Some people believe it is morally wrong to put a value on the invaluable biodiversity. The problem is, that if you

don't put a value on something in today's society, it isn't invaluable, it has no value. And that's a challenge that we face.

In my role as Chair of the Bedfordshire Local Nature Partnership I have also engaged with the environmental aspects of the Oxford to Cambridge growth corridor relating to: east–west rail; east–west expressway and significant housing growth.

What is clear from our work is that an agreed methodology needs to be developed and then used by all bodies and organisations across the corridor for local natural capital baseline plans; natural capital investment plans; and the delivery of net environmental gain.

Everyone needs to be working to the same version. So that if developers and infrastructure providers are putting something into a local planning committee, the local planning committee can understand it because it is the same approach that everybody else has been using.

And we also need to have a risk register of natural capital assets. What is at risk and why across this growth corridor? And what are we going to do about it?

Unfortunately, the revised National Planning Policy Framework has not used the net environment gain concept outlined in the 25-year plan. It has retained net biodiversity gain.

So some final thoughts on net gain. For me, net environmental gain has to be net biodiversity gain plus. You have to deal with the impacts of a development in the local vicinity before you think about offsetting somewhere else. And, we also need to include the so-called insignificant impacts which when considered as a whole could comprise 20% of the overall impact. So when considering the overall impact of a development, we need to add on 20 per cent to take account of the 'insignificant impacts'. Then we need to make sure that whatever is created is resilient. Then we also need to make sure that it is maintained. This addresses the mitigation aspects. Once we've got all of that funding, we then think about the investment aspects – the net gain. Then we can use costs and benefit approaches to help decide what to invest in and where. The investment though must be in natural capital assets. Otherwise we won't be the first generation to leave the environment in a better state.



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U.S. environmental law and policy developments during the Trump Administration

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Brunini, Grantham, Grower & Hewes, PLLC

Chair of the Section of Environment, Energy, and Resources, American Bar Association, July 22, 2018

Since my presentation at the UKELA Annual Conference on June 23, 2018, there have been several new developments in U.S. environmental law and policy. The submission of this post-conference presentation allows me briefly to present these new developments, as well as other issues that time did not permit me to address at the Canterbury conference. I greatly appreciate the opportunity to present this additional material and to have participated in the conference.

I Introduction – facts, “fake news,” “bravado,” and “hyperbole” – the polarity of political languages and realities has grown to “hyper-intensive” dimensions in the U.S.

On November 6, 2016, Donald J. Trump was elected the 45th President of the United States. As he did in his campaign, the new President continued his use of “tweeting” to (1) trumpet his “heroic” self-image as a “fighter” for “the country’s interests” to accomplish his campaign agenda and promises, and (2) to defensively rebut and offensively attack all critics, including the news media, which he dismisses as the purveyors of “fake news”:

I will represent our country well and fight for its interests! Fake News Media will never cover me accurately but who cares.

Donald J. Trump@realDonaldTrump (July 7, 2017).

Well before he became a political candidate, Trump communicated his self-image as a “big thinker” who can convince and persuade people to follow him, as well as his willingness to use “bravado” and “hyperbole” to excite and energize those who did not “think big themselves”:

The final key to the way I promote is bravado. I play to people’s fantasies. People may not always think big themselves, but they can still get very excited by those who do. That’s why a little hyperbole never hurts. People want to believe that something is the biggest and the greatest and the most spectacular.

I call it truthful hyperbole. It’s an innocent form of exaggeration – and a very effective form of promotion.

Trump, Donald J. (with Tony Schwartz),
The Art of the Deal (1987)
(Ballantine Books trade paperback edn 2015), p. 58.

President Trump’s divisive “us versus them” populism, including “fake news” accusations against the news media, is

indicative of the hyper-intensification of the polarity of U.S. conservative/liberal political language and agendas today:

[W]ith fake news there are serious potential problems ... problems that go even beyond disputes over what is fact and what is fiction. The shifting definition of fake news may be a sign of a broader gap between right and left. If it is indeed true that the term fake news has come to mean something different for a conservative than a liberal, it could be one more sign that the LeftLandian and RightLandian languages – and the people who speak them – have moved one more inch apart, into increasingly different realities.

Kurtzleben, Danielle “With ‘Fake News,’ Trump Moves From Alternative Facts to Alternative Language,”
National Public Radio,
<https://www.npr.org/2017/02/17/515630467/with-fake-news-trump-moves-from-alternative-facts-to-alternative-language> (February 17, 2017).

Writing from my home state of Mississippi, Nobel Laureate William Faulkner expressed this same divisive dilemma, in more colloquial words, in his ground-breaking work, “The Sound and the Fury”:

They all talked at once, their voices insistent and contradictory and impatient, making an unreality a possibility, then a probability, then an incontrovertible fact, as people will when their desires become words.

Faulkner, William, J., *The Sound and the Fury* (1929)
(2015 epub version) p. 61.

2 The U.S. Environmental Protection Agency in the Trump Administration “tempest”

This “insistent and contradictory and impatient” clash of “increasingly different realities,” as phrased by Faulkner, is exemplified by the recent storm that surrounded former Environmental Protection Agency (EPA) Administrator Scott Pruitt. Pruitt’s political problems of alleged corruption and abuse of power ultimately overshadowed the environmental policies that he was promoting and implementing at EPA, despite Trump’s vigorous support of these policies and of Pruitt personally:

Pruitt has seemingly successfully adopted the model that worked for his boss, President Trump: When everything is a scandal, nothing is a scandal. There are so many stories of corruption and abuse of power swirling around the administrator that the public becomes numb to them, relieving pressure for accountability.

The answer seems to come down, ultimately, to Trump. The president must see in Pruitt's travails an echo of what he views as his own persecution by the press. Regardless of the scandals, Trump approves of the job Pruitt is doing at EPA. And perhaps most importantly, the president may see Pruitt's fate as the bellwether for his own.

"Scott Pruitt is doing a great job within the walls of the EPA," Trump said Friday [June 9, 2018]. I mean, we're setting records. Outside, he's being attacked very viciously by the press. I'm not saying he's blameless, but we'll see *what happens*." (emphasis added)

Pruitt is one of the most dogged Cabinet members at executing the Trump agenda, and sometimes an effective one, despite numerous court setbacks. In fact, Pruitt's scandals may serve as an effective smokescreen for his work in rolling back environmental regulations and protections, many of which are not popular.

If dogged reporting from the press topples Pruitt, or if Congress rises up in protest, it might spell trouble for Trump down the road. But if Pruitt can withstand a barrage of revelations about corrupt behavior, and Congress remains supine, it's a heartening sign for an otherwise precarious president.

Graham, David A., "Why is Trump Protecting Scott Pruitt?," *The Atlantic*, <https://www.theatlantic.com/politics/archive/2018/06/is-scott-pruitt-unsinkable/562793/> (June 13, 2018).

Pruitt's tenure as EPA Administrator could not withstand this barrage. Responding to increasing Congressional, political and media pressure, President Trump asked for and received Pruitt's resignation on July 5, 2018 over concern about Pruitt's numerous spending and ethics issues. The President quickly appointed Deputy Administrator Andrew Wheeler as Acting Administrator on July 9, 2018.

Acting Administrator Wheeler has announced his commitment to continue the Trump Administration agenda for EPA regulatory rollbacks:

[T]he agenda for the agency was set out by President Trump. And Administrator Pruitt has been working to implement that. I will try to work to implement the president's agenda as well. I don't think the overall agenda is going to change that much, because we're implementing what the president has laid out for the agency. He made several campaign promises that we are working to fulfill here. But there will probably be a little bit of difference in the way Administrator Pruitt and I talk about some issues. There have already been some differences in how I've talked to EPA employees since I've been here ...

I really think we need to provide more certainty to the American public. And I look at certainty in three different areas. The first is certainty on permits. The second is certainty on enforcement actions. And the third – the one that's most important to me – is certainty on risk communication.

Dennis, Brady and Eilperin, Juliet, "Incoming EPA chief: This is the right job for me," *The Washington Post*, https://www.washingtonpost.com/news/energy-environment/wp/2018/07/06/incoming-epa-chief-this-is-the-right-job-for-me/?noredirect=on&utm_term=.6c5fcb60cfd (July 6, 2018).

Wheeler is pledging more transparency regarding agency activities than Pruitt and he is pushing back against criticism concerning his prior job of lobbying for a major coal producer. Wheeler "is expected to take a more methodological approach to setting policy in part to improve the agency's chances of defending its work in court."

InsideEPA Daily News, "Wheeler Pledges Continuity on Trump Agenda as Some Seek to 'Reset'," <https://insideepa.com/daily-news/wheeler-pledges-continuity-trump-agenda-some-look-to-reset> (July 6, 2018).

3 Trump framed EPA's agenda through issuance of "Executive Orders"

Acting EPA Administrator Wheeler has accurately stated that "the agenda for the agency was set out by President Trump." Almost immediately after taking office, President Trump began to set his administration's agendas in place unilaterally through the frequent issuance of "executive orders". The presidential use of executive orders (EOs) is not a new practice but President Trump is reported to be issuing EOs at the second-fastest rate of any modern Republican president, second only to President Eisenhower. This trend exists despite Trump's consistent criticism prior to being elected of President Obama's use of EOs: "Obama ... goes around signing all these executive orders. It's a basic disaster. You can't do it." *The Point with Chris Cillizza*, "Trump is on pace to sign more executive orders than any president in the last 50 years," <https://www.cnn.com/2017/10/13/politics/donald-trump-executive-orders/index.html> (October 13, 2017).

What is an Executive Order? It is a directive issued by the President to federal governmental agencies. The President may revoke, modify, or supersede any prior EO. Presidents often undo the EOs of their predecessors, as President Trump has done a number of times with regard to EOs issued by President Obama. Courts can declare an EO to be illegal or unconstitutional. Congress can pass legislation overturning an EO, subject to the President's veto authority.

President Trump has used EOs to create and significantly impact national environmental and energy policy. He has issued the following environmental and energy EOs:

1. **"Expediting Environmental Reviews and Approvals for High-Priority Infrastructure Projects,"** EO No. 13766, dated January 24, 2017 (82 FR 8657).
The EO directs the chairman of the Council on Environmental Quality (CEQ), within 30 days after a request, to determine a project's environmental impact and decide whether it is "high priority."
2. **"Reducing Regulation and Controlling Regulatory Costs,"** EO No. 13771, dated January 30, 2017 (82 FR 9339).
The EO states that executive departments and agencies must slash two regulations for every one new regulation proposed. Regulation spending cannot exceed \$0 and any costs associated with regulations must be offset with eliminations. The EO also directs the head of each agency to keep records of the cost savings, to be sent to the president.

3. **“Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the U.S.’ [WOTUS] Rule,”** EO No. 13778, dated Feb. 28, 2017 (82 FR 12497).

The EO calls on federal agencies to revise a regulation put in place by President Obama – called the Clean Water Rule (WOTUS). Published in 2015, WOTUS arguably expanded the number of bodies of water protected by the federal government to include certain streams, ponds, and smaller waterways that were not previously clearly covered. The EO directs the EPA Administrator and the Assistant Secretary of the Army Corps of Engineers to review WOTUS and propose a new one that either eliminates or revises the rule.

4. **“Promoting Energy Independence and Economic Growth,”** EO No. 13783, dated March 28, 2017 (82 FR 16093).

The EO directs EPA to review the Clean Power Plan (CPP) EO, signed by President Obama in 2014. In 2016, the Supreme Court granted a stay pending review in the U.S. Circuit Court for the District of Columbia of the CPP, which aimed to reduce carbon pollution from power plants. This EO also requires federal agencies to review any regulations that could “potentially burden the development or use” of oil, natural gas, coal, and nuclear energy resources. Within 180 days, the agencies must submit reports to the Office of Management and Budget, which will take action to eliminate burdensome regulations.

5. **“Review of Designations Under the Antiquities Act,”** EO 13792, dated April 26, 2017 (82 FR 20429).

The EO directs the Secretary of the Interior to conduct a review of all Presidential designations or expansions of designations under the Antiquities Act made since January 1, 1996, where (1) the designation covers more than 100,000 acres, (2) the designation after expansion covers more than 100,000 acres, or (3) the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders.

6. **“Implementing an America-First Offshore Energy Strategy”** EO No. 13795, dated April 28, 2017 (82 FR 20815).

The EO reverses a prior ban on Arctic leasing put in place under the Obama Administration and directs the Interior Secretary to review areas available for offshore oil and gas exploration.

7. **“Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure,”** EO No. 13807, dated August 15, 2017 (82 FR 40463).

The EO establishes “One Federal Decision” for major infrastructure projects, assigning each project a lead federal agency and creating a performance accountability system to track its progress. It sets a goal of two years for the average completion time of the permitting process. The EO also revokes Executive Order 13690, which mandated stricter environmental review standards in floodplains as part of President Obama’s Climate Action Plan. That prior EO required planners

to use flooding predictions that incorporated climate science.

8. **“Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States,”** EO 13840, dated June 19, 2018 (83 FR 29431).

The EO recognizes and supports federal participation in regional ocean partnerships, to the extent appropriate and consistent with national security interests and statutory authorities, for the advancement of environmental, as well as economic and security interests, of the United States.

The President may also issue proclamations, as well as presidential memoranda. Like EOs, presidential proclamations and memoranda can have significant impacts. For example, on December 4, 2018, President Trump issued a proclamation to substantially reduce the size of the Bears Ears and Grand Staircase-Escalante National Monuments in Utah. “Presidential Proclamation Modifying the Bears Ears National Monument,” <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument> (Land & Agriculture December 4, 2017). Additionally, the EPA Administrator may issue directives to the agency staff that have important ramifications, such as former Administrator Scott Pruitt’s October 16, 2017 directive to end so-called “sue and settle” judicial settlements relating to EPA regulations. “Directive Promoting Transparency and Public Participation in Consent Decrees and Settlement Agreements,” <https://www.epa.gov/newsroom/directive-promoting-transparency-and-public-participation-consent-decrees-and-settlement> (October 16, 2017).

It appears that EOs and their related executive edicts have become the standard operating procedure for Presidents and their appointees. The pressure to have “instant impact” is due, in part, to the political division in Congress and the impatience and uncertainty of legislative action. As always, “the buck stops” with the courts to deal with the issues created by these executive actions. As we all know, judicial action can bog down resolution of these issues almost indefinitely. There is no easy way out of this quagmire.

4 Summary of key changes in U.S. environmental policy by the Trump Administration

4.1 Withdrawing from the Paris Climate Accord

President Trump’s June 1, 2017 announcement of the Paris Climate Accord withdrawal echoed his familiar “populist persona”:

As President, I can put no other consideration before the well-being of American citizens. The Paris Climate Accord is simply the latest example of Washington entering into an agreement that disadvantages the United States to the exclusive benefit of other countries, leaving American workers – who I love – and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production.

Thus, as of today, the United States will cease all implementation of the non-binding Paris Accord and the draconian financial and economic burdens the agreement imposes on our country. This includes ending the implementation of the nationally determined contribution and, very importantly, the Green Climate Fund which is costing the United States a vast fortune ...

Statement by President Trump on the Paris Climate Accord, <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord> (Energy & Environment, June 1, 2017)

At the same June 1, 2017 announcement event, former EPA Administrator Pruitt's June 1 statement repeated this same "working man's hero" rhetoric:

This is an historic restoration of American economic independence – one that will benefit the working class, the working poor, and working people of all stripes. With this action, you have declared that the people are rulers of this country once again. And it should be noted that we as a nation do it better than anyone in the world in striking the balance between growing our economy, growing jobs while also being a good steward of our environment.

We owe no apologies to other nations for our environmental stewardship. After all, before the Paris Accord was ever signed, America had reduced its CO₂ footprint to levels from the early 1990s. In fact, between the years 2000 and 2014, the United States reduced its carbon emissions by 18-plus percent. And this was accomplished not through government mandate, but accomplished through innovation and technology of the American private sector ...

Mr. President, you have corrected a view that was paramount in Paris that somehow the United States should penalize its own economy, be apologetic, lead with our chin, while the rest of world does little. Other nations talk a good game; we lead with action – not words.

Our efforts, Mr. President, as you know, should be on exporting our technology, our innovation to nations who seek to reduce their CO₂ footprint to learn from us. That should be our focus versus agreeing to unachievable targets that harm our economy and the American people ...

Id.

4.2 Changes at the EPA

Former Administrator Pruitt steered EPA toward deregulation and rollback of Obama EPA initiatives.

Pruitt backed off from action on climate change – he acknowledged that climate change is occurring but has questioned the extent to which it is caused by human activities and the authority of EPA to regulate it. In fact, "climate change" does not appear in EPA's four-year FY 2018–2022 strategic plan that was adopted in 2017. Instead, it prioritized a focus on the "core mission" of clean air, land and water. The strategic plan emphasizes a "rebalance" of the federal role in environmental regulation, shifting more of the responsibilities to the states, including enforcement of laws, which Pruitt said is "as Congress

intended". FY 2018–2022 EPA Strategic Plan, U.S. Environmental Protection Agency, Washington, DC, <https://www.epa.gov/sites/production/files/2018-02/documents/fy-2018-2022-epa-strategic-plan.pdf> (February 12, 2018), p. 21. From a budgetary perspective, President Trump proposed a 30% budget cut for EPA, including major reductions to its enforcement work and staffing, as well as elimination of some programs.

4.3 Rolling back the Clean Power Plan

On October 16, 2017, Pruitt announced plans to repeal the Obama Administration's proposed "Clean Power Plan," which would have required states to meet specific carbon emission reduction standards based on their individual energy consumption. It includes an incentive program for states to get a head start on meeting standards for renewable energy and low-income energy efficiency. Subsequently, on December 18, 2017, EPA issued an Advance Notice of Proposed Rulemaking (ANPRM) to request public comment on "systems of emission reduction that are applicable to or at the EGU [electric utility generating unit] facility, information on compliance measures, and information on state-planning requirements under Clean Air Act section 111(d)." Then Administrator Pruitt issued a statement that argued that the original rule exceeded EPA authority:

Consistent with our commitment to the rule of law, we've already set in motion an assessment of the previous administration's questionable legal basis in our proposed repeal of the Clean Power Plan. With a clean slate, we can now move forward to provide regulatory certainty. Today's move ensures adequate and early opportunity for public comment from all stakeholders about next steps the Agency might take to limit greenhouse gases from stationary sources, in a way that properly stays within the law, and the bounds of the authority provided to EPA by Congress.

"EPA Announces Next Steps After Proposed Clean Power Plan Repeal," EPA News Release from Headquarters, Office of the Administrator, <https://www.epa.gov/newsreleases/epa-announces-next-steps-after-proposed-clean-power-plan-repeal> (December 18, 2017).

4.4 Big wins for oil

The oil industry has seen a number of big victories in the Trump Administration EPA, including:

- (1) a permit to construct the controversial Keystone XL pipeline has been approved;
- (2) President Trump's issuance of an executive order to begin a five-year development plan for offshore drilling in the Gulf of Mexico and off the East Coast of the U.S.; and
- (3) the recent Republican-passed Tax Reform Act's inclusion of a provision for allowing the Arctic National Refuge to be opened for oil and gas drilling.

4.5 Scaling back national monuments wilderness protection

Through a presidential proclamation, President Trump announced a significant shrinkage of protected wilderness areas of (1) Bears Ears National Monument from 1.35 million acres to 228,337 acres and (2) Grand Staircase-Escalante National Monument from 1.9 million acres to about 1 million acres will open up the land for oil and natural gas exploration. President Trump stated in his proclamation that the decision was made to

reverse federal overreach and restore the rights of this land to our citizens.

“Presidential Proclamation Modifying the Bears Ears National Monument,” <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-earsnational-monument> (Land & Agriculture, December 4, 2017).

5 Selected significant Trump EPA initiatives, proposed rules and Obama EPA rule rollbacks

5.1 Cooperative Federalism

One of the most prominent phrases in U.S. environmental law during the Trump Administration era is “cooperative federalism.” What does it mean? The Environmental Council of the States (ECOS), a national association that represents state environmental agencies, has recently focused on cooperative federalism, describing it as “[a] vision recasting state and federal roles for environmental management and public health protection at lower costs.” According to ECOS, cooperative federalism would result in the following positive changes:

- (1) Equal or greater environmental and public health protection and outcomes through smart deployment of resources on critical priorities;
- (2) Reduced operating costs due to a more efficient division of services, streamlined operating relationships, best practices sharing, and elimination of redundancies across states and divisions of EPA;
- (3) More effective allocation of limited resources by determining the best roles and functions states and EPA are each best suited to perform; and
- (4) With time, fewer disputes over who should take credit for successes and achievements, and who is responsible for decisions and actions that result in setbacks.

“Cooperative Federalism 2.0 – Paper, Webinar, Press Statement, Letters; <https://www.ecos.org/news-and-updates/cooperative-federalism-2-0> (June 12, 2017).

In June of 2017, ECOS published a paper that provides a more in-depth explanation of its views: <https://www.ecos.org/documents/cooperative-federalism-2-0> (June 2017). The U.S. EPA, in its FY 2018–2022 Strategic Plan, references this ECOS paper to point out that “states have assumed more than 96 percent of the delegable authorities under federal law” due to delegation authority agreements, while fully acknowledging that there are non-delegable programs

and trust responsibilities for environmental protection in Native American areas for which it retains primacy. Consequently, an underlying theme of the EPA’s strategic plan’s perspective on cooperative federalism is “to reduce duplication of effort with authorized states and tailor its oversight of delegated programs.” FY 2018–2022 EPA Strategic Plan, U.S. Environmental Protection Agency, Washington, DC, <https://www.epa.gov/sites/production/files/2018-02/documents/fy-2018-2022-epa-strategic-plan.pdf> (February 12, 2018), p. 21.

5.2 Clean Water Act Jurisdiction – “Waters of the United States” definition rule

In 2015, the Obama EPA sought to define “waters of the United States” (WOTUS) for purposes of determining the jurisdictional scope of the Clean Water Act (CWA). This time, the challenge was to a 2015 final rulemaking by EPA and the U.S. Army Corps of Engineers to “clarify” WOTUS and the extent of CWA jurisdictional authority for water discharge permits and remediation (WOTUS Rule). The proposed rule was challenged in a number of federal district courts and courts of appeal.

On January 18, 2018, the United States Supreme Court determined that federal district courts, rather than courts of appeal, have original jurisdiction for WOTUS Rule challenges. *National Association of Manufacturers v. Department of Defense*, ___ U.S. ___, No. 16-299, 2018 WL 491526 (Jan. 22, 2018) (NAM). The next round of litigation regarding WOTUS is already underway and is focusing on district court challenges to two rules issued by the Trump administration EPA rather than challenges to the 2015 WOTUS Rule:

- (1) a rule intended to replace the 2015 WOTUS Rule, “Definition of ‘Waters of the United States’ – Recodification of Pre-Existing Rules,” 82 Fed. Reg. 34,899 (July 27, 2017) (the “Replacement Rule”); and
- (2) a rule intended to delay the WOTUS Rule “so that it will not go into effect before February 2020,” “Definition of ‘Waters of the United States’ – Addition of an Applicability Date to 2015 [WOTUS] Rule,” 80 Fed. Reg. 5200 (Feb. 6, 2018) (the “Delay Rule”).

The Replacement Rule would set a new and narrower definition of WOTUS for purposes of CWA jurisdiction while the Delay Rule seeks to ensure that, upon the issuance of the Sixth Circuit’s mandate, the 2015 WOTUS Rule never has a realistic chance of going into effect. Parties have already begun to challenge or defend the Replacement and Delay Rules and seek to have the existing district court suits, previously stayed pending the U.S. Supreme Court’s jurisdictional decision, proceed to decision. At the moment, the Obama 2015 WOTUS Rule is not in effect anywhere. Stays on litigation have been lifted and preliminary injunctions on the WOTUS Rule have currently been issued or considered in 30 states.

The Trump Administration Replacement Rule was sent by EPA and the Corps of Engineers to the White House Office of Management and Budget (OMB) on June 15, 2018. This new Replacement Rule is expected to apply the

late Justice Scalia's relatively narrow test for CWA jurisdiction, which limits the law's reach only to "relatively permanent" waters and requires a "continuous surface connection" with navigable waters in order for a tributary, wetland or other upstream water in order to qualify for CWA applicability. OMB review is generally slated for 90 days (which would end on September 13, 2018) but that date is non-binding and can take more or less time depending on the type of rule.

InsideEPA Daily News, "EPA Sends New CWA Jurisdiction Rule to OMB But Legal Battles Escalate," <https://insideepa.com/daily-news/epa-sends-new-cwa-jurisdiction-rule-omb-legal-battles-escalate> (June 15, 2018).

A supplemental Repeal Rule justification was proposed by EPA and the Corps of Engineers (COE) and posted, ahead of Federal Register publication, on June 29, 2018. There is a 30-day comment period (currently ending July 30). EPA and COE would, through the Repeal Rule, "repeal the 2015 [WOTUS] Rule and restore the regulations in existence immediately prior to the 2015 Rule." The justification document greatly expands the prior brief justification for repealing the 2015 WOTUS Rule, adding legal and pragmatic reasons to support the repeal. See, "Supplemental Notice of Proposed Rulemaking" for "Definition of 'Waters of the United States' – Recodification of Preexisting Rule," <https://www.federalregister.gov/documents/2018/07/12/2018-14679/definition-of-waters-of-the-united-states-recodification-of-preexisting-rule> (June 29, 2018), pp. 1–2.

What's next for WOTUS? Litigation, litigation, litigation – challenges to the 2015 WOTUS Rule, the Replacement Rule and the Delay Rule, as well as more stays, different outcomes, appeals, and complex interrelationships among these legal issues could that could create unanticipated difficulties and delays on all fronts. Ultimately, the U.S. Supreme Court will be the final arbiter of WOTUS.

5.3 EPA considers revisiting policy regarding CWA permits for discharges via groundwater

On April 12, 2018, the Fourth Circuit ruled in *Upstate Forever v. Kinder Morgan Energy Partners*, No. 17-1640 (4th Cir. April 12, 2018), that discharges to hydrologically-connected groundwater can give rise to liability under the Clean Water Act. This decision comes two months after the Ninth Circuit reached a similar conclusion in *Hawaii Wildlife Fund v. County of Maui*, No. 15-17447 (9th Cir. Feb. 1, 2018). Comments were required to be submitted by May 21, 2018.

In the wake of the *Hawai'i Wildlife Fund and Upstate Forever* ruling, EPA is considering revising its policy of requiring permits for pollution of water bodies via groundwater. On February 20, 2018, EPA published a request for comment on a proposed rule, "Clean Water Act Coverage of 'Discharges of Pollutants' via a Direct Hydrological Connections to Surface Water" (83 FR 7126), on the question of "whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrological connection to the jurisdictional surface water may be subject

to CWA regulation." (83 FR 7126), <https://www.federalregister.gov/documents/2018/02/20/2018-03407/clean-water-act-coverage-of-discharges-of-pollutants-via-a-direct-hydrologic-connection-to-surface> (February 20, 2018).

5.4 Strengthening Transparency in Regulatory Science

On April 30, 2018, EPA proposed a new rule, "Strengthening Transparency in Regulatory Science" (83 FR 18768), <https://www.federalregister.gov/documents/2018/04/30/2018-09078/strengthening-transparency-in-regulatory-science> (April 30, 2018). The comment period on this proposed rule was extended to August 16, 2018.

Former EPA Administrator Pruitt made the following announcement concerning the proposed rule:

The era of secret science at EPA is coming to an end. The ability to test, authenticate, and reproduce scientific findings is vital for the integrity of rulemaking process. Americans deserve to assess the legitimacy of the science underpinning EPA decisions that may impact their lives.

"EPA Administrator Pruitt Proposes Rule to Strengthen Science Used in EPA Regulations," News Release from Headquarters, Office of the Administrator, <https://www.epa.gov/newsreleases/epa-administrator-pruitt-proposes-rule-strengthen-science-used-epa-regulations> (April 24, 2018).

The proposed rule requires EPA to publish all of the underlying scientific data used to support studies which guide clean air and clean water rules. It would bar EPA from basing regulatory decisions on any scientific information where the underlying information is not publicly available. The proposed rule is based on stalled Congressional legislation, which directs the agency to use the "best available science" in all its actions, but bars the agency from using any studies that cannot be released publicly online. The proposed rule faces a host of legal hurdles, including vague or undefined terminology, statutory mandates likely at odds with the rule and potential violations of administrative law. On September 24, 2018, in *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, No. 18-5115 (6th Cir. Sept. 24, 2018), and *Tennessee Clean Water Network v. TVA*, No. 17-6155 (6th Cir. Sept. 24, 2018), the Sixth Circuit Court of Appeals rejected the hydrologic connection theory, expressly disagreeing with the Ninth Circuit and the Fourth Circuit decisions. The U.S. Supreme Court will likely resolve this "split" in Court of Appeals decisions.

InsideEPA Daily News, "EPA Floats 'Secret Science' Ban Rule, Signaling Possible Internal Fixes," <https://insideepa.com/daily-news/epa-floats-secret-science-ban-rule-signaling-possible-internal-fixes> (April 20, 2018).

5.5 Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process

On June 7, 2018, former Administrator Pruitt signed an advance notice of proposed rulemaking (ANPR), "Increasing Consistency and Transparency in Considering

Costs and Benefits in the Rulemaking Process,” (83 FR 27524), <https://www.federalregister.gov/documents/2018/06/13/2018-12707/increasing-consistency-and-transparency-in-considering-costs-and-benefits-in-the-rulemaking-process> (June 7, 2018). The proposed rule’s public comment period was extended until August 13, 2018 in response to public requests.

The ANPR says that, with regard to many of EPA’s governing statutes – the Clean Air Act, Clean Water Act and the Safe Drinking Water Act – “there is a variation in terminology and specificity provided in each law regarding the nature and scope of the cost and benefits considerations. In language about how the agency should weigh the costs and benefits of its rules. The ANPR requests comment on:

whether and how “[1] EPA should promulgate regulations that provide a consistent and transparent interpretation relating to the consideration of weighing costs and benefits in making regulatory decisions in a manner consistent with applicable authorizing statutes [and] ... [2] these regulations, if promulgated, could also prescribe specific analytical approaches to quantifying the costs and benefits of EPA regulations.

Id.

Proponents of the proposed rule have charged that EPA rules issued under prior administrations underestimated the measures’ compliance costs or overestimated the potential benefits. Those who are skeptical of the rule point out that addressing numerous and varied cost and benefit requirements in different sections of different statutes would impose a significant burden. A time-consuming and complex regulatory undertaking would be required to reconcile all the provisions in all the environmental statutes and regulations that would make the proposed rule a prime target for judicial scrutiny.

InsideEPA Daily News, “EPA Unveils Prerule To Overhaul Agency Cost-Benefit Review Process,” <https://insideepa.com/daily-news/epa-unveils-prerule-overhaul-agency-cost-benefit-review-process> (June 7, 2018).

6 Supreme Court Justice Anthony Kennedy Announces Retirement and President Trump nominates Appeals Court Judge Brett Kavanaugh to the Supreme Court

U.S. Supreme Court Justice Anthony Kennedy announced his retirement from the Court on June 29, 2018. On July 13, 2018 President Trump nominated District of Columbia Court of Appeals Judge Brett Kavanaugh to replace Justice Kennedy on the Court. President Trump has already had one Supreme Court Justice nominee approved by the Senate who has taken his seat on the Court – Neil Gorsuch. As an interesting anecdote, both Justice Gorsuch and Judge Kavanaugh were clerks for Justice Kennedy after graduating from law school (Gorsuch is a Harvard Law School graduate and Kavanaugh is a Yale Law School graduate).

The Republican majority in the Senate will seek to schedule Judge Kavanaugh’s confirmation hearing soon and

to vote to confirm him before the November 6, 2018 Congressional mid-term elections.

Judge Kavanaugh has been described “as a ‘standing hawk,’ who would limit plaintiffs’ ability to challenge EPA and other agencies’ rules as too lenient by raising the bar for public-interest groups to show ‘harm’ from a government action ... Kavanaugh’s confirmation by the Senate likely would create new hurdles for plaintiffs to sue over EPA policies on the grounds that they do too little to protect human health or the environment.” On October 6, 2018, the nomination of Kavanaugh was approved 50–48 by the United States Senate and was sworn in as a Supreme Court Justice.

InsideEPA, “‘Standing Hawk’ Kavanaugh Seen Limiting Plaintiffs’ Access to Court,” <https://insideepa.com/daily-news/standing-hawk-kavanaugh-seen-limiting-plaintiffs-access-court> (July 11, 2018).

7 Closing reflection

It seems that, at this point, we should all “draw back” for reflection from the rancor and controversy surrounding environmental and many other contentious issues that exist in the U.S. and across the world. We all need to recapture some measure of perspective that can easily escape us due to all of the “insistent and contradictory and impatient” voices we hear. This polarity intensifies when people “all talk at once” and let “their desires become words”. We should remember and focus on our common identities and missions as members of the legal profession, advocates for justice, stewards of our earth’s resources and fellow human beings. I close with these wise words of William Faulkner:

So never be afraid, never be afraid to raise your voice for honesty and truth and compassion; against injustice and lying and greed. If you, not just you in this room tonight, but in all the other thousands of rooms like this one today and tomorrow and next week will do this, not as a class or classes, but as individuals, men and women, you will change the earth.

Faulkner, William J., Address to the graduating class of University High School, Oxford, Mississippi, <https://www.goodreads.com/quotes/31063-never-be-afraid-to-raise-your-voice-for-honesty-and> (May 28, 1951.)

Appendix

For more information on the Trump Administration EPA’s regulatory rollbacks, please access:

ENVIRONMENTAL LAW AT HARVARD – Regulatory Rollback Tracker <http://environment.law.harvard.edu/policy-initiative/regulatory-rollback-tracker/>

For more information on climate change developments, please access:

COLUMBIA LAW SCHOOL – Sabin Center for Climate Change Tracker <http://columbiaclimatelaw.com/resources/climate-deregulation-tracker/>

Both of these sites track and update new developments on an ongoing basis.

Environmental, Social, Governance (ESG): Why ESG is the next big thing for environmental lawyers

Tim Clare

Anthesis Group

I have been an environmental consultant for over 20 years and, for most of that time, primarily through my involvement in environmental, health and safety (EHS) due diligence projects, and my membership of UKELA, I have had the pleasure of working very closely with many members of the environmental lawyer community. During that time, I have watched as our remit has continued to grow, from the narrow focus on site-related issues such as contaminated land, asbestos and end-of-pipe compliance, through the development of product focused legislation and to the need to consider legislation such as the carbon reduction commitment and that for waste packaging, which has forced the consideration of whole company activities, and not just what happens on the main industrial sites.

I have been speaking about ESG as a term for around eight years now; however, for many years the interest on the client side was not seemingly matched by significant action. It is probably only in the last three years that I have seen a consistent flow of project opportunities with a distinct ESG scope. I will discuss why within this article. But I believe the two key take-aways should be that, first, just as with traditional environmental health and safety (EHS) due diligence, where the client gets the best advice when both a technical and a legal adviser are involved and crucially, working together; ESG, with a broader range of issues, also needs both technical and legal advice. Then, secondly, ESG is a new discipline and on the legal side no-one has yet claimed it. It is broad (and constantly expanding), covering EHS issues, human resources and corporate governance issues amongst others and thus could draw on the resources right across a legal firm's practices, but clients want one 'point' person to coordinate. That role, could be inputting during transactional phases, have an involvement in fund management, and also in the individual portfolio companies during ownership, and it is waiting for the environmental lawyer to take.

This article will predominantly focus on the relationship between institutional investors, such as the pension funds (the 'limited partners' or 'LPs'), the private equity funds they invest in (the 'general partners' or 'GPs') and the portfolio companies they acquire with the help of the LP's money. This primarily reflects the focus of my work, which itself I believe reflects the currently largest area of external adviser involvement in ESG. However, ESG is also applicable to different types of organisation and people, such as investors, funds, trustees, shareholders, public sector organisations, consumers and NGOs.

So, what is ESG? ESG is a term predominantly used in the financial sector; it is sometimes described as being the

sector's term for corporate social responsibility (CSR), which is both true and a little misleading. ESG is an umbrella term for a broad range of environmental, social and governance factors against which investors can assess the behaviour of the entities they are considering investing in, or have already invested in. The UN backed Principles of Responsible Investment (UN PRI), one of the key actors in the space, break down ESG into around 40 headings, which themselves can be subdivided into a greater number of differing issues, depending on the entity in question.

The environmental aspect of ESG is a measure of a company's impact on the natural environment (or, with issues such as water scarcity for example, the environments' impact upon it). It takes into account factors including its carbon footprint, its impact on biodiversity and its production of wastes and pollution. Crucially, I think it is important to note here that an ESG assessment should be considering both the 'traditional' legacy risks such as contamination and asbestos and the more forward-looking sustainability elements. For a client to make informed decisions, that client needs to understand the complete broad picture and that these elements are interconnected and should not be considered separately.

The social aspect of ESG measures how a company treats people such as employees, customers and the communities in which it operates. The governance aspect measures how a company operates in terms of audits, board diversity, internal controls and shareholder rights. These factors help investors and other stakeholders to measure the performance and ensure the accountability of companies.

ESG is not simply about seeking compliance with current regulations, albeit this is expected. ESG has also become about instilling a cultural commitment in a company that seeks to reduce its impact on the key ESG factors associated with its activities. This is irrespective of whether or not that company is heavily regulated. ESG focuses on the potential for a company to have a more positive impact as well as seeking to make a financial return.

So why has ESG grown in importance? In the private equity space, this can be primarily traced back to the pension funds (the LPs). Pension funds have long been conscious of environmental (and, more recently, social) issues and their potential impact on asset value. It can be argued that the contaminated land assessment market in the UK was kick-started and driven by the pension funds (and the more mainstream institutional-sized property companies) wishing to complete their due diligence and understand whether an asset runs the risk of being

contaminated. Subsequently, they have embraced climate change as a risk, particularly in the property space with flooding but also areas such as climate and its impact on ground stability issues such as subsidence. Such risks, combined with a longer-term mindset, necessitated by the need to consider issues that may develop beyond the traditional boundaries of a five to seven-year private equity style hold period, have in general encouraged a more advanced understanding in the pension funds of sustainability being a significant long-term business consideration. This has for a long time seen consideration given to ESG as part of their wider evaluation of public equities for example.

More recently, the pension funds have also felt increasing levels of pressure from their investors – the individuals, companies and public-sector organisations investing in pensions – to see their money invested ethically. This was originally focused on investment in specific 'ethical' or 'green' funds but has, over time, become more mainstream, with an increasing level of general expectation that pension contributions will be invested in companies that act responsibly. Over time, regulatory requirements have also caught up, forcing funds to show they are considering such issues as legitimate investment risks.

As indicated above, responses to this demand were first seen in the property and public equity investments areas. Private equity, although encouraged to act responsibly, was not as easy for the LPs to evaluate. As private companies, the performance of a fund or its portfolio companies was harder to assess, with less publicly disclosed data to access and compare. Those funds that were making public statements on their commitment to ESG were able to do so generally in a style of their choosing, inhibiting the ability of analysts to make like for like comparisons, with the disclosure often limited to a few good news case studies from amongst their portfolio companies. During this early phase, the pension funds were also far less sophisticated in their understanding of what to ask for and/or were understaffed, limiting their ability to scrutinise.

This situation then began to change rapidly over the last three to four years. More pension funds hired analysts specifically into ESG roles and the levels of guidance on what to ask began to increase significantly. Arguably, the most notable moment was the UN PRI publishing its Due Diligence Questionnaire for LPs in 2015. Suddenly, LPs were armed with a set of very specific questions to pose to a private equity fund. Such funds, especially when approaching a fundraising, began to realise that the usual presentation of good news case studies would not do. Instead, pension funds would want to hear about the overall ESG policies they had in place, how these were implemented on the ground and what key performance indicators (KPIs) and related performance targets its individual portfolio companies would be asked to report on. The pension funds have also then themselves started the process of tying their investments to requests for the writing up of specific metrics that were important to them. Thus, funds have found themselves needing to report back on the actual performance of their portfolio companies on a diverse set of metrics from carbon and water, health

safety, staff diversity, customer satisfaction and cyber security, amongst others. All of this requires time and resources and has pushed funds to begin to develop formal systems in order to be able to respond efficiently.

This period of increasing pension fund pressure has also coincided with private equity reacting to poor public perception of it, along with many other elements of the financial services industry after the financial crash. Private equity's bad press was driven by high-profile examples of apparent asset stripping and the failure of investments, and often the portfolio companies themselves, owing to over-leveraged deals. This drove an understanding that, as an industry, private equity needed to be seen to be putting its own house in order to avoid increased regulation. ESG has provided a useful vehicle to respond to these pressures.

Whilst pension fund pressure and the need to respond to its negative PR and regulation risk, has driven one element of response, more recently private equity has started to understand another key driver for ESG. This is the risk to actual portfolio company investments from ESG-related issues and, inversely, the value creation opportunities that may be realised through ESG. Historically, there was always some appreciation that ESG risks could impact the bottom line of a portfolio company, but these were often seen as likely to be less material than other business issues requiring attention and/or investment. Similarly, whilst private equity, an inherently entrepreneurial group of people, could see the benefits in initiatives such as energy efficiency schemes, they were often unmoved by the reported likely payback levels and timescales.

In the last two years especially, events have changed the perception of risk. On the environmental side, for instance, the public response to the waste plastic issue highlighted by the BBC's *Blue Planet II*, combined with China's decision to cease imports of waste plastics for reprocessing, have demonstrated how a whole industrial area can be impacted by both consumer preferences and regulation. The Carrie Gracie gender pay gap issue, again involving the BBC, showed how a social issue could significantly impact on an organisation's brand. A threat of litigation by female Tesco staff, again over gender pay equality, also showed how this could run the risk of resulting in direct costs. With regard to governance issues, the failure of Carillion again showed the risks if appropriate governance controls are not in place. All of these issues have helped private equity firms to conclude that ESG issues are legitimate concerns that should be subject to due diligence during acquisition and managed during ownership.

There has also been during this period an increase in the number of case studies and related information, showing how active engagement on ESG issues can directly improve a portfolio company's bottom line. Whether this is investments in energy efficiency, staff welfare or creating products or services that meet an ESG challenge, the opportunities are becoming clearer. The returns on investment are increasingly being shown to be meaningful and worth investing in, but moreover, even if they are lower than would historically have been attractive, they are more palatable when combined with pension fund pressure to see businesses act more responsibly. The increased ability

to get investments, such as energy efficiency measures, funded by third parties and thus limit the impact on a company's balance sheet has also had a clear effect.

So, where are private equity firms now with ESG? The answer is varied, but with some generalisations possible. The European funds are usually more advanced than the North American and Asian funds, with the Scandinavian, Dutch and British funds often described as leading the way. The larger funds, often more open to the sort of pressures felt by larger corporates and with more to spend on resources, are often ahead of the small and medium-sized funds. But there are star performers at every size. Most have done something, but few have done everything that a scrutinising pension fund may wish to see. It is routine to see a fund have a well-written ESG policy but no implementation structure behind it, and yet they may still have portfolio companies who are well positioned across the ESG piece. The numbers of funds doing meaningful pre-acquisition due diligence across the ESG field is, however, still small, but this is a solid growing trend.

So, what is in it for lawyers? First, I would reiterate that this is a fast developing and growing area and there is an opportunity to take a lead in the space within a legal practice. This is a potentially very large market as virtually every private equity house (and beyond the pension funds themselves and others) will need some external help.

The clear area of opportunity is in due diligence. As I said earlier, there is a small but growing trend for undertaking a broad ESG due diligence during transactions. If done properly, and following the guidance, this should include a screening assessment, undertaken early in the deal and hopefully allowing for the likely key issues to be identified then and to be properly assessed in a more realistic timeframe. Whether of course this will see the end for requests to look at product liability at five minutes to midnight we will have to wait and see, but there are some positive signs. What we do know is that ESG due diligence is broader, requiring assessment of sustainability, social and governance issues, and it is requested on deals that otherwise would not have been selected for environmental due diligence as they are considered more benign. However, that software business for example that might now be diligenced in more detail, may still be a CRC or ESOS participant, and have needed to provide gender pay gap information and/or a modern day slavery policy,

all of which can still need legal rather than technical comment.

Once the portfolio company is acquired, a private equity house will now need to sit down with it and set KPIs and related targets. This is really an in-house or consultant task, but what it will generate is portfolio company improvement initiatives, for instance in energy efficiency and/or onsite energy production, which may involve one or more third party solutions providers and/or external finance providers and there will therefore be a need for contractual support.

Similarly, supply chain management is the next area that private equity finds itself being encouraged to show that it and its portfolio companies are working on. The UN PRI has already published guidance on how this can be done and the trend within ESG seems to be that, once the UN PRI has provided information on an issue, the pension funds consider it fair game to expect funds to be acting upon that information. Supply chain management needs lawyers working for clients, helping them get the appropriate contractual obligations on their suppliers to encourage the behaviours they wish to see. This is also true around the use of third party sales or procurement agents.

Back at the fund level and with the portfolio companies, there is a need to get solid policies in place and especially in the governance area, this often needs to be legally rather than technically driven. Similarly, there are elements around compliance, both in terms of horizon scanning and implementing new legislation, and compliance with existing standards, that sits best with a client's legal adviser rather than their technical driver (or in-house).

Finally, of course, as ESG develops, there will come disputes, both commercial and regulatory and the potential for litigation. Here, clearly, the lawyer will take the lead and, whilst this might be an issue that falls squarely into an environmental lawyer's sweet spot, this could also likely see the environmental lawyer being the conduit, taking the opportunity from the client to another specialist within the firm.

ESG is still developing, and will continue to evolve, but it will be a growing area of concern for fund clients for years to come. Crucially, as it influences private equity's life blood – investment – it is no longer a peripheral consideration and it represents an opportunity for environmental lawyers to have a greater value in maintaining those client relationships.

Strengthening the judicial handling of environmental law post-Brexit

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Environmental law post-Brexit will pose new challenges and opportunities. A great deal of attention is currently being paid to the role of environmental principles in national environmental law and a new independent body to hold government to account for its environmental responsibility. However, there has been less focus on effectiveness of our existing judicial institutions to handle environmental law disputes in the future. A specialist environmental tribunal has been in existence in England and Wales since 2010. A four-point plan is presented to develop the role of the tribunal system to provide a more coherent and robust basis for handling many types of environmental claims in the future.

The Brexit challenge

The roll-over provisions of the European Union (Withdrawal) Act 2018 are based on the premise that Brexit will not, initially at any rate, create major changes in the detailed substance of national environmental law that has been derived from EU environmental directives and regulations. Yet it is now clear that the way that environmental law is handled in future will be different. The government is committed to establish an independent body that will have a role in supervising the government's environmental law responsibilities, and section 16 of the European Union (Withdrawal) Act provides that within six months of the date on which the Act was passed¹ the Secretary of State must publish a Bill providing for the establishing of such a body with enforcement powers 'including legal proceedings if necessary'. The precise details and scope of these powers are not yet known. At the same time, section 16 provides that the Bill must contain a set of environmental principles based on those contained in the EU Treaty and the Aarhus Convention. Again, how these principles will sit within the system of environmental law is deliberately left rather flexible at this stage. Despite these uncertainties, it is clear that in future the judiciary is likely to play a significant role in the interpretation and enforcement of environmental law. Less attention has been paid to date as to the effectiveness of the existing legal arrangements to handle these responsibilities, and how we might improve them in a post-Brexit world. I want to suggest that we should use the Brexit opportunity to build on existing developments within the tribunal system to provide a more coherent and effective response to many types of environmental law issues that are likely to arise in the future.

¹ 26 June 2018.

The Environment Tribunal

In 2010 the First-tier (Environment) Tribunal was established in England and Wales. It was the UK's first dedicated environmental judicial body, and at present exercises a fairly specialised function. The Tribunal was originally established to handle appeals against civil sanctioning powers acquired by the Environment Agency and Natural England in the same year under Part III of the Regulatory Enforcement and Sanctions Act 2008, and covering a limited number of environmental regulations. Appeals against the imposition of these sanctions went to the General Regulatory Chamber (GRC) within the First-tier Tribunal. Perhaps because it was thought there would soon be a large amount of appeals as the new legal rules were being tested in practice, the GRC carried out an internal administrative reorganisation and established the First-tier (Environment) Tribunal² in 2010, with both legal members and other specialists in various aspects of the environment. As it turned out very few such appeals were made, mainly because the environmental regulators found that enforcement undertakings³ agreed between the regulator and the industry concerned were an equally effective means of securing compliance once it was decided that a criminal prosecution was not warranted.

Since 2010, the Environment Tribunal has expanded its jurisdiction beyond environmental civil penalties, and now handles regulatory appeals across a range of environmental regulations. The preferred policy is that with new areas of regulation, appeals go to the tribunal. With existing regulations, where appeals have been heard before a range of bodies including the Planning Inspectorate, the magistrates' courts and the county court, there has to date been a more limited transfer of appeals. Nevertheless, the workload of the Environment Tribunal has increased. In 2012, there were 455 appeals concerning nitrate vulnerable zones. In other areas, the number of cases has been more modest – less than a dozen concerning environmental civil sanctions, and a small number under the Reservoirs Act 1975, the Green Deal Framework regulations and Climate Change agreements. Earlier this year, the tribunal gave a significant ruling on the Environment Agency's powers to vary Climate Change agreements (*Geo Speciality Chemicals v Environment Agency*⁴).

² 'The Environment Tribunal' in the rest of this article.

³ Regulatory Enforcement and Sanctions Act 2008 s 50 and Environmental Civil Sanctions (England) Order 2010 No 1157 Sch 4. Because undertakings are mutually agreed there are no appeal provisions except as to the issuing of certificates that an undertaking has been complied with.

⁴ General Regulatory Chamber NV/2017/0010 (12 January 2018).

Attractions of the Environment Tribunal

Compared to ordinary courts, the Environment Tribunal has distinctive attributes which are well suited to handling many types of environment law dispute. In addition to legally qualified members, it includes non-legal members with specialist expertise in relevant areas, and there is flexibility in adjusting the make-up of the tribunal to the case in hand. A case involving mainly issues of law can be handled by a single legally qualified member, while one that turns solely of questions of fact may require only a non-legal expert. Other cases may be more suited to a panel of both legal and expert members. Generally, each side bears its own costs whatever the result, an approach that provides advance certainty for both sides as to the financial risks involved, and an incentive to focus resources and legal argument. The tribunal is familiar with users who wish to appear without legal representation, and can sit anywhere to provide convenience to the parties involved.

The procedural rules of the General Regulatory Chamber Tribunal which govern the Environment Tribunal emphasise the overarching objective of dealing with cases fairly and justly.⁵ The rules state these concepts include dealing with a case proportionate to its importance and complexity, and the resources of the parties; ensuring that parties can participate in the proceedings; avoiding delay; and encouraging and facilitating the use of alternative dispute resolution. In many ways, these goals mirror the aspirations of environmental justice contained in the Aarhus Convention. The specialist nature of the tribunal's jurisdiction means that it can become rapidly familiar with the complexities of environmental law and policy.

Appeals on points of law go to the Upper Tribunal, which has the status of the High Court but which has the same underlying approach in its procedural rules as the First-tier Tribunal – emphasising the need to deal with cases fairly and justly, and with the ability to include non-legal expert members if appropriate. Where parties are legally represented, barristers are not wigged and gowned, and make submissions sitting down – a completely different atmosphere and approach to more formal court proceedings. Last year, the Upper Tribunal determined its first appeal on a point of law from the Environment Tribunal concerning the use of stop notices under the Regulatory Enforcement and Sanctions Act, and made important rulings on the interpretation of the legislation (*Forager Ltd v Natural England*⁶).

Strengthening the role of the tribunal system for handling environmental law in the future

I want to suggest four areas where we could build upon the existing experience and strengths of the tribunal system to provide a more coherent system for the future.

⁵ Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 SI 2009 No 1976 (L 20).

⁶ [2017] UKUT 0148 (ACC).

Statutory appeals

Applicants for environmental permits or similar consents, and those who receive various forms of administrative notice from bodies such as the Environment Agency generally have the right to a full merits appeal to the Secretary of State or another body. There is little coherence as to whom appeals are made, reflecting the complex history of environmental laws.⁷ Some appeals under existing legislation have now been transferred to the Environment Tribunal and new legislation often provides for this as well. To give one example, in 2014 appeals under greenhouse gas trading regulations were transferred to Environment Tribunal with the Explanatory Memorandum stating that, 'in line with the broader Government move towards the use of the FtT for appeals against decisions relating to environmental and climate change matters, these regulations introduce a system where appeals are determined by the FtT'.⁸

However, many more existing statutory appeals could be transferred including those under water legislation and environmental permitting which are currently handled by the Planning Inspectorate.⁹ Defra had been planning to do this, but backed off from doing so in 2013,¹⁰ mainly on grounds of potential costs involved. One important factor is that, in line with Treasury accounting requirements, the Ministry of Justice currently imposes financial charges on other Departments wishing to make use of the tribunal system. It seems that the charging scheme is more suited to an area of law involving a substantial amount of appeals (such as immigration) whereas environmental law typically has a large number of statutory appeal provisions with a small number of appeals in each. Defra's response in 2013 noted that 'More generally, the UK Government will continue to look to develop the environmental jurisdiction of the General Regulatory Chamber in the First-tier Tribunal',¹¹ but until the question of the internal charging system is effectively resolved addressed, it is unlikely that more substantive transfers will take place.

Third party rights of appeal

Third parties such as local community groups who object to an environmental regulatory decision have no right of

⁷ See R Macrory *Consistency and Effectiveness: Strengthening the New Environment Tribunal* (Centre for Law and the Environment, University College London 2011).

⁸ Greenhouse Gas Emissions Trading (amendment) Regs 2014/3075 para 7.4.2 of the Explanatory Memorandum.

⁹ Waste and environmental permitting appeals are currently handled by the Planning Inspectorate. A study of 57 statutory environmental appeals by PINS between 2010 and 2013 carried out by the author for the Ministry of Justice indicated that a fairly small number of inspectors are specialising in such appeals. If these appeals were transferred to the Environment Tribunal, these Inspectors could be ticketed to the tribunal. In at least one case, the Inspector felt unable to handle complex legal issues that had been raised – in contrast, the Tribunal would be able to handle both legal and technical issues.

¹⁰ Environmental Permitting Consultation on Draft Environmental Permitting (England and Wales) (Amendment) Regulations 2013 Government Response Department for Environment, Food and Rural Affairs (November 2013) para 7.7.

¹¹ *ibid* para 7.8.

merits appeal – their only legal recourse is a claim in judicial review on grounds of illegality. The underlying principle against third party appeals is that public bodies such as local authorities or the Environment Agency are expected to represent and reflect the public interest in their decision-making and no third party right of appeal is therefore justified. In 2003, as part of a study on a possible Environment Tribunal, I examined judicial review files concerning environmental claims over a three-year period, and concluded that almost two-thirds were really merits claims disguised as legal challenges, and which accounted for the high failure rate.¹² A more recent study of reported environmental judicial review claims also indicates a higher failure rate in environmental claims compared to other areas of administrative law.¹³ It could be argued that the judicial review system is simply being misused by third parties and stronger procedures should be introduced to filter out what are in truth merits claims. However, it could be equally argued that there is a genuine demand for third parties to question the merits of environmental regulatory decisions, and that, rather than trying to accommodate these needs through judicial review claims, more effective and appropriate procedures should be introduced.

In the past, calls for third party rights of appeal in planning and environmental law have consistently been rejected by governments of all persuasions.¹⁴ However, we do have precedent in national environmental law. Section 36 of the Control of Pollution Act 1974 dealing with water discharge consents provided a modified form of third party right of appeal. It required a water authority proposing to grant a consent to send copies of its proposed decisions to anyone who had made representations on the application. They then had a three week period in which to request the Secretary of State to take over the decision. A similar system could be introduced for environmental regulatory decisions but with requests to be made to the Environment Tribunal. The grounds for the request could be specified such as the decision would seriously jeopardise the 25-year environment plan, or on grounds of 'substantive and procedural illegality', reflecting the language of the Aarhus Convention.

Introducing such rights, even on a restricted basis, would raise concerns of regulatory delay. The Tribunal would need clear performance targets to make its decisions in response to requests within a reasonable time-frame, and equally to determine appeals.¹⁵ However, the Tribunal could be expected to handle such cases more cheaply and with greater legal and technical expertise than the Administrative Court, and it would reduce the pressure

on judicial reviews – there is clear case-law holding that applicants who have a right of statutory appeal before a specialised tribunal must exercise those rights rather bring a claim by way of judicial review.¹⁶

The Gove Environmental Commission

We now have on the agenda the possibility of some new form of independent Environment Commission, replicating some of the enforcement functions of the European Commission post-Brexit.¹⁷ Following government agreed amendments to the European Union (Withdrawal) Act 2018, it is clear that legislation creating the body will have to give the body powers to take enforcement action against government, 'including legal proceedings if necessary'.¹⁸ The precise powers and their scope are yet to be determined, but if, for example, the model of the Equality and Human Rights Commission were used, it could have the power to serve compliance notices on government (and maybe other public bodies) where it was unable to resolve an issue with government by negotiation. It is likely to be highly selective in any legal action taken, but a body served with such a notice should have a right to appeal if it disagrees with the Commission's interpretation of law or fact. Equally there needs to be some judicial forum where such notices could be enforced in cases of non-compliance.

The Environmental Tribunal, combining both legal and other specialist expertise in environmental matters, would seem the most obvious route of appeal, and would have the power to confirm, vary or dismiss a compliance notice. Some have argued that there should also be the power to impose financial penalties equivalent to those available to the European Court of Justice. Adopting the current model in European law, where a government department failed to comply with a compliance notice after appeal, the Environment Tribunal could, on application of the new Commission body, have the power to impose a financial sanction. Equally, rather than introducing new distinctive provisions concerning financial sanctions, it may be that contempt of courts powers would be sufficient where a government department refused to comply with a judgment of the Tribunal.¹⁹

12 Only four out of 55 claims examined were successful. See R Macrory and M Woods *Modernising Environmental Justice* (Centre for Law and the Environment, University College London 2003).

13 O Pederson 'A study of administrative environmental decision-making before the courts' (forthcoming 2019) 31 *Journal of Environmental Law*.

14 See eg Royal Commission on Environmental Pollution *Environmental Planning* 23rd Report, Cm 5457 (2002) paras 5.40–5.47.

15 The Planning Inspectorate has a number of performance targets in relation to timeliness (eg to determine planning appeals whether by written representation or inquiry within 14 weeks of the start date, although in 2017/18 owing to a number of factors it failed to meet them. See Planning Inspectorate *Annual Report and Accounts* 2017/18 HC 1264.

16 *R (on the application of Great Yarmouth Port Company) v Marine Management Organisation* [2013] EWHC 3052.

17 Department of Environment, Food and Rural Affairs *Environmental Principles and Governance after the United Kingdom leaves the European Union* Consultation Document (May 2018).

18 European Union (Withdrawal) Act 2018 s 16.

19 In practice, it is rare for a government department or public body to fail to comply with a clear order from a court in judicial review proceedings, but failure to do so would be contempt of court: 'In theory, all the normal sanctions are at the disposal of the court – imprisonment, sequestration, fine – however, in a case where a public authority fails to comply with a court order in judicial review, a mere finding of contempt rather than a penalty may suffice to mark the gravity of the situation'. See *De Smith's Judicial Review* (8th edn Sweet & Maxwell 2018) para 18-045. Contempt of court proceedings in 'an inferior court' are handled by the Administrative Court; see Civil Procedure Rules 81.13 ff. A tribunal has been held to be an inferior court in this context. See *Peach Grey & Co v Summers* [1995] ICR 549.

Environmental judicial reviews before the Upper Tribunal

The Upper Tribunal has the power to determine judicial reviews in classes of case designated by order in any particular case where the High Court consider it just and convenient to transfer a case.²⁰ The expertise that the Upper Tribunal (which can also include non-legal expert members) together with the flexibility of the procedural rules would meet many of the continuing concerns about the compatibility of current conventional judicial review procedures with the Aarhus Convention.

In 2013, the Ministry of Justice proposed transferred planning and environmental judicial reviews to a new specialist chamber within the Upper Tribunal.²¹ The main concern of government was with challenges to planning decisions and the need to ensure that decisions were made quicker, and to reduce the burdens on judicial review. At the time, the Administrative Court has already introduced fast track procedures for certain planning judicial reviews, and the senior judiciary argued that this could be developed into a planning court within the High Court rather than transferring such judicial reviews to the Upper Tribunal. Such a court with improved case management and specialisation could meet Government's concerns. The government accepted these arguments,²² and the Planning Court was established in 2014. The evidence is that in terms of speed it has been effective (almost halving the time it takes for a case to get to court).

The Planning Court currently only has limited jurisdiction in purely environmental law cases - those concerning EU environmental law and its domestic transposition. Post-Brexit it could be argued that all environmental law judicial reviews be transferred to the court and renaming it the Planning and Environment Court. However, it is also arguable that a more imaginative and in the longer term more effective solution would be to transfer certain classes of environmental Judicial Reviews to the Upper Tribunal. Speed of judicial decision-making is not the only criterion for effective review by the courts. The Upper Tribunal can bring informality, low-cost approaches, combined legal and non-legal technical expertise, and the capacity to encourage mediation and alternative dispute resolution to which conventional Judicial Review procedures are ill-suited. Environmental law issues often involve

complex policy and scientific considerations, together with the potential application of core environmental principles in a way quite unlike conventional judicial review. Planning judicial reviews should remain with the Planning Court, and although there will be issues of boundary jurisdiction between what is predominantly a planning or environmental case, these are resolvable in practice. If the idea of all environmental judicial reviews being transferred to the Upper Tribunal is considered too radical, it is arguable that the Upper Tribunal's jurisdiction in judicial review could be confined to challenges involving those areas environmental law where the Environment Tribunal already has jurisdiction. Judicial reviews concerning, say, enforcement decisions in civil penalties, greenhouse gas emissions trading and so on would be handled by the Upper Tribunal leaving other more general environmental judicial review to the Administrative Court. The Upper Tribunal will already be determining appeals on points of law in environmental cases heard before the Environment Tribunal, and in this way the Upper Tribunal would bring the expertise in the same areas of environmental law for both appeals from the First-tier Tribunal and judicial review claims.

Conclusion

These proposals build upon the existing tribunal system and are designed to create a system that could handle many types of environmental dispute in a way that would be cost-effective, fast, and bring more specialist legal and non-legal expertise to bear. Compared to the mainstream debates posed by Brexit to national environmental law, there has been to date far less attention to examining our judicial structures for handling environmental law. Securing political attention and change will not be easy because the existing systems are not in crisis and are working reasonably effectively. My argument is that we could create a far more effective system based on existing reforms that have already taken place, and one more likely to be able to deal with future challenges in environmental law post-Brexit. Doing so would provide greater coherence and regulatory confidence to the benefit of the regulated community, the public sector and the public interest in the improved environmental protection.

20 Tribunals, Courts and Enforcement Act 2007 s 15.

21 Ministry of Justice *Judicial Review – Proposals for Further Reform* (September 2013).

22 Ministry of Justice *Judicial Review – Proposals for Further Reform: The Government Response* (February 2014).

UKELA events



FUNDRAISING LUNCH

Wednesday 5 December 2018
12 noon–3pm

Join us in the elegant surroundings of the private dining room at Norton Rose Fulbright for our annual fundraising lunch.

We are delighted to welcome Baroness Barbara Young, former Chief Executive of the Environment Agency and current Chair of the Woodland Trust as our speaker. After a sumptuous 3 course lunch, relax and listen to Baroness Young's reflections on a varied career and her views on the current challenges for environmental law. The title of her talk will be: 'No Time to Stand Still!'

We are hugely grateful to Norton Rose Fulbright and in particular, Caroline May, for hosting this exclusive opportunity. All funds raised will go towards UKELA's ongoing work on Brexit-related matters and efforts to consolidate our membership base.

Tickets for this event are strictly limited and so early booking is recommended.

WASTE WP SEMINAR ON BREXIT

Wednesday 6 March 2019
Organised by Waste WP

Diary date

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.

WILD LAW WEEKEND 2019

Friday 24 May 2019–Monday 27 May 2019
5pm Friday–10am Monday
Organised by Wild Law SIG

Diary date

Join us at Boggle Hole youth hostel near Whitby in North Yorkshire. Details to follow.

For more details, and to book, please visit:
<https://www.ukela.org/environmental-law-events>

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