Environmental Law and Planning: The Road Ahead

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Introduction

We stand at present in a position of inevitable change and uncertainty. The UK appears set to leave the EU (after several delays) which has been the source and basis for much, if not most, of our current environmental law. The legal preparations for the separation of the legal systems and sources of law are not yet complete. In addition, there are proposals for substantive changes in policy and regulation (e.g. on climate change) which appear bound to impact on planning. This paper considers those environmental law issues most directly relevant to planning.

It begins with a review of the EU's approach to environmental law and enforcement which, as it evolves, currently binds the UK, focusing on some recent developments. Secondly, the paper considers the European Union (Withdrawal) Act 2018 ("the Withdrawal Act") and the associated legislative changes which define the initial post-Brexit legal landscape. Finally, the paper examines the Government's draft Environment (Principles and Governance) Bill 2018 ("the Draft Bill"), published in December 2018, which includes the embodiment and treatment of environmental principles and the proposals for the new Office of Environmental Protection ("OEP") which is to act as independent watchdog, in place of the EU Commission. It also considers other likely developments, including the need for further serious action on climate change.

The consultation paper Environmental Principles and Governance after the United Kingdom leaves the European Union (May 2018)[1] was followed by its *Summary of responses and government response* (19 December 2018)[2] ("Government Response") and publication of the Draft Bill (December 2018). This has been the subject of significant comment and criticism, including by the House of Commons Environment, Food and Rural Affairs Committee, and Environmental Audit Committee, and may change. However, a formal bill has yet to be submitted to Parliament.

The Government Response notes:

> "The EU (Withdrawal) Act 2018 will make sure existing EU environmental law continues to have effect in UK law after the UK leaves the EU.
>
> It requires that the environmental principles which currently guide EU policy making and development must be set out in UK legislation. The UK government must produce a statutory policy statement explaining how those principles will be interpreted and applied in the making and development of policies.
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> It also requires the establishment of a public authority which must be able to hold government to account on environmental standards by taking proportionate enforcement action.
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> We will work to make sure that the OEP is in place as soon as possible in a no deal scenario, with the necessary powers to review, and if necessary take enforcement action, in respect of breaches of environmental law from when the jurisdiction of the Court of Justice of the European Union has ended."

* I am grateful to Nick Grant of Landmark Chambers for assistance in producing this paper, though the views expressed remain my responsibility. The paper deals with the position as at 1 September 2019.

[1] Available at: *https://consult.defra.gov.uk/eu/environmental-principles-and-governance/supporting_documents/Environmental%20Principles%20and%20Governance%20after%20EU%20Exit%20%20Consultation%20Document.pdf*.

[2] Available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767284/env-principles-consult-sum-resp.pdf*.

While part of the proposals for future environmental law are contained in the Northern Ireland Protocol to the Withdrawal Agreement and appear unlikely to be accepted, the Government Response states:

> "As part of the Northern Ireland protocol (sometimes referred to as 'the backstop') in the Agreement, the UK and the EU have agreed commitments to maintain fair and open competition within the single customs territory, in the unlikely event that the protocol need ever come into force. These include obligations related to the environment, including a non-regression clause.
>
> The text sets out that, if the protocol is required, the UK and EU will not reduce their respective levels of environmental protection below those in place at the end of the implementation period."

Moreover, in its consideration of the OEP and planning, the Government Response stated:

> "There are strong existing mechanisms for challenges to be brought to development plans and individual planning decisions. The government is clear that the OEP should not provide an unnecessary source of legal challenge or delay in planning in England compared with EU protections.
>
> Therefore we have provided for the OEP's functions to include elements relating to the planning system only where appropriate. This matches the current oversight by the European Commission in regard to environmental law and reflects provisions in the Withdrawal Act. The OEP will not be specified in the planning legislation as a decision-maker, consultee, or body through whom planning decisions must be approved.
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> We will continue to consider the remit of the OEP in this area during pre-legislative scrutiny of the draft Bill. Our objective, which we intend to ensure is reflected in the final Bill, is to enable the OEP to enforce the application of environmental law in an effective and proportionate manner, maintaining EU protections while avoiding the imposition of unnecessary burdens and delays."

Following this, the House of Commons Environment, Food and Rural Affairs Committee and Environmental Audit Committee launched a joint call for written evidence, and then conducted separate inquiries into the Draft Bill. The Environmental Audit Committee published, on 25 April 2019, its *Scrutiny of the Draft Environment (Principles and Governance) Bill: Eighteenth Report of Session 2017–2019* (HC 1951) ("the Eighteenth Report").[3] The Environment, Food, and Rural Affairs Committee published on 30 April 2019 its *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893) ("the Fourteenth Report")[4]. Both reports made a number of recommendations.

Regardless, therefore, of the status of the Withdrawal Agreement and Northern Ireland Protocol, there appears to be a Government intention to match the current oversight of environmental law by the new OEP. Whether that changes with the new administration remains to be seen.

At the same time, the Government has recently set the ambitious target of zero net emissions by 2050 following the advice of the Climate Change Committee in its May 2019 report *Net Zero: The UK's Contribution to stopping global warming*[5] and has also announced further changes in regulation and policy, which are proposed for a forthcoming environment bill.

EU Environmental law: Enforcement and current trends

Since it is the Government's current intention to mirror the current level of protection afforded by the EU's laws and institutions, it is helpful to review the enforcement mechanisms currently applicable to EU legislative requirements and recent trends in EU law which are likely to affect future regulation.

[3] Available at *https://publications.parliament.uk/pa/cm201719/cmselect/cmenvaud/1951/1951.pdf*.
[4] Available at *https://publications.parliament.uk/pa/cm201719/cmselect/cmenvfru/1893/1893.pdf*.
[5] Committee on Climate Change *Net Zero – The UK's contribution to stopping global warming* (May 2019)*https://www.theccc.org.uk/publication /net-zero-the-uks-contribution-to-stopping-global-warming/*.

EU environmental law is currently enforced primarily by the following complementary methods:

(1) EU legislation via directives, which the UK is under a duty to transpose and which may have direct effect, allowing individuals to enforce their rights in national court;
(2) the Commission monitors the implementation of EU environmental law and may initiate infraction proceedings where it considers the UK has not properly transposed EU legislation; and
(3) the CJEU, through its uniform interpretation of EU law, and application of the doctrine of direct effect where necessary, e.g. on references for preliminary rulings and through determination of infraction proceedings brought before it, in which it may ultimately levy significant penalties for non-compliance with its orders.

Enforcement mechanisms

The primary means of transposition of EU environmental law is via directives which require incorporation of their provisions within the national legal systems of the Member States. Many of these are very familiar. See, for example:

(1) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive");
(2) Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds ("the Wild Birds Directive");
(3) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive"); and
(4) The "EIA Directives": Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, and its subsequent amendment primarily by:
    (a) Council Directive 97/11/EC of 3 March 1997;
    (b) Directive 2011/92/EU ("the 2011 EIA Directive");
    (c) Directive 2014/52/EU ("the 2014 EIA Directive"), which introduced significant changes into the EIA regime now transposed in England by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571), and its equivalents in Wales, Scotland and Northern Ireland.

Underpinning the treaty duties to transpose directives into national law, is the doctrine of direct effect, allowing individuals to rely directly on rights granted where there has not been adequate transposition of a directive: see e.g. *Pubblico Ministero v Ratti* (C-148/78) [1980] 1 C.M.L.R. 96 and *R v Durham CC Ex p. Huddleston* [2000] 1 W.L.R. 1484. The scope of the doctrine is broad, as was demonstrated by *R. (on the application of Delena Wells) v Secretary of State* (C-201/02) [2004] Env. L.R. 27. The ability for individuals to rely directly on rights said to arise under such legislation enables the national courts in individual cases to make references to the CJEU for preliminary rulings such as in *Wells* (review of old mineral permissions and EIA), *R. (on the application of Barker) v Bromley LBC* [2007] 1 AC 470, following CJEU judgment in Case C-290/03 [2007] Env. L.R. 2 (reserved matters applications and EIA) or *R. (on the application of Edwards) v Environment Agency (No.2)* [2014] 1 W.L.R. 55, following the CJEU judgment Case C-260/11 [2013] 1 W.L.R. 2914 (Aarhus cost capping).

Importantly, EU environmental law is also enforced in the UK by the European Commission and its infraction powers. In this respect, the Commission has two key functions. It publishes implementation reports, monitoring the implementation of environmental law across the EU, and it may also bring infraction

proceedings. Infraction proceedings are brought pursuant to arts 258–260 of the Treaty on the Functioning of the European Union ("TFEU"):

> **"Article 258**
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> If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.
>
> **Article 259**
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> A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.
> Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.
> The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.
> If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.
>
> **Article 260**
>
> (a) If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.
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> (b) If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
> If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.
> This procedure shall be without prejudice to Article 259.
>
> (c) When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
> If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment."

These powers enable the Commission to monitor Member States' compliance with the provisions of the Treaties, including in environmental law and, if necessary, bring proceedings in the CJEU if it cannot reach a satisfactory resolution to its concerns by less formal means. When giving evidence to the Scottish Parliament's Environment, Climate Change, and Land Reform Committee, Michael Gove MP (then Secretary of State for the Environment), acknowledged that infraction proceedings have had "an effect in maintaining a high level of environmental protection".[6]

There are a variety of ways the Commission may become aware of a potential issue—it undertakes its own work, but there is also a standard form by which any EU citizen can submit a complaint free of charge. Put shortly, there is a three-stage process where the Commission considers a Member State is not fulfilling its treaty obligations:

(1) following up a complaint or the result of its own investigations, the Commission issues a letter of formal notice to the Member State outlining the subject matter of the dispute and providing the essence of the Commission's case. The Member State then has a reasonable period of time to respond (the pre-litigation stage);

(2) if the Commission is not satisfied with that response, it delivers a reasoned opinion on the matter to the Member State, giving it the opportunity to submit its observations. The purpose of this reasoned opinion is threefold: it gives the Member State the opportunity to remedy any transgressions, gives it the opportunity to defend itself, and means that any dispute placed before the CJEU is clearly defined (*Commission v Germany* (C-135/01) [2003] ECR I-02837 at [21]); and

(3) if the Member State does not comply with the reasoned opinion within the period allowed, the Commission may issue proceedings before the CJEU. The scope of the proceedings is broadly limited by that pre-litigation procedure (*Commission v Kingdom of the Netherlands* (C-508/10) [2012] 2 C.M.L.R. 48 at [33]–[36]), subject to certain cases where the breach is alleged to be ongoing and systemic.[7] For example, the CJEU declined to adopt the findings of the Advocate General on the issue of time limits for enforcement action in *Commission v. UK* (C-98/04) [2006] ECR I-4003 at [19]–[23] since it had not been an issue with which the Commission was concerned at the pre-litigation stage.[8]

If the CJEU finds that the Member State has failed to fulfil its Treaty obligations, the Member State must take the necessary measures order by the Court in order to comply. If the Commission considers that the Member State has not complied, art.260(2) allows it to refer the issue back to the CJEU and, if it agrees, the CJEU may then impose a lump sum or penalty payment (or both).[9] In the environmental sector, the power to levy penalties has been used to impose a penalty on Greece of €20,000 per day for failing to comply with a CJEU judgment finding the country in breach of its waste obligations[10] and to impose a

[6] See column 13 of the Report of the Environment, Climate Change and Land Reform Committee of the Scottish Parliament, 15 May 2019: *www.parliament.scot/parliamentarybusiness/report.aspx?r=12104*.

[7] See, e.g. *Commission v Bulgaria* (case C-488/15) ECLI:EU:C:2017:267, paras AG43 and 42–47: where a systemic breach of air quality legislation was alleged, the Commission could rely on air quality data which post-dated the reasoned opinion to support its contention.

[8] See also Sullivan LJ in *R. (on the application of Evans) v Basingstoke and Deane BC* [2014] 1 W.L.R. 2034 at [11]–[26].

[9] The Commission has laid down guidance on how it determines the level of financial sanctions to seek, originally in Memoranda issued in 1996 ([1996] OJ C242/6) and 1997 ([1997] OJ C63/2), replaced by a Commission Communication issued in 2005, Communication on the Application of article 228 of the EC Treaty, SEC(2005) 1658, *https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005SC1658:EN:HTML*. Consideration is given to the seriousness of the infringement, its duration, and the need to deter further infringements. The amount of the penalty in any given case would be determined by multiplying a uniform flat rate by two coefficients (one reflecting seriousness, the other duration), and then multiplying the result by a factor reflecting the ability to pay of the Member State concerned, and the number of votes it had in the Commission. In *Commission v Greece* (Case C-387/97) [2000] ECR I-5047 at [84]–[89], the CJEU stated that the 1996/1997 guidelines helped ensure the Commission was acting in a manner which was transparent, foreseeable, consistent with legal certainty and proportionality, and though not binding on the Court, were a useful point of reference.

[10] *Commission v Greece* (Case C-387/97) above.

penalty on Spain of €624,150 per year and per 1% of non-conforming bathing areas in Spain, for failing to comply with its obligation to reduce pollution in bathing waters.[11]

Once a case falls for determination by the CJEU, the question for the Court is whether there has been an objective failure by the Member State to comply with the treaty obligations: *Commission v United Kingdom* (Case C-508/03) [2006] QB 764 at [67]. This language is broad and is less specific than the domestic judicial review ("JR") tests of illegality, irrationality, fairness or procedural impropriety. There is, of course, some overlap—such as disputes over issues of law. However, the test applied by the CJEU here is whether the Commission has demonstrated that the national authorities made a "manifest error of assessment". In *Commission v United Kingdom* (Case C-508/03), above, which concerned whether an EIA had to be imposed at the reserved matters stage for the redevelopment at White City, the CJEU held:

> "91. In that last respect, it is also clear from paras [85] and [87] of *Commission v Portugal* that, in order to demonstrate that the national authorities exceeded the limits of their discretion by failing to require that an impact assessment be carried out before giving consent for a specific project, the Commission cannot limit itself to general assertions by, for example, merely pointing out that the information provided shows that the project in question is located in a highly sensitive area, without presenting specific evidence to demonstrate that the national authorities concerned made a manifest error of assessment when they gave consent to a project. The Commission must furnish at least some evidence of the effects that the project is likely to have on the environment.
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> 92. In the present case, it is clear that the Commission did not satisfy the burden of proof placed upon it. It cannot merely rely on presumptions that large-scale projects are automatically likely to have significant effects on the environment without establishing, on the basis of at least some specific evidence, that the competent authorities made a manifest error of assessment."

This has been characterised by the national courts as equivalent to a type of JR level of scrutiny. See, e.g., *R. (on the application of Evans) v Secretary of State* [2013] J.P.L. 1027, [32]–[43] and *Smyth v Secretary of State* [2015] P.T.S.R. 1417, where Sales LJ (as he then was) said

> "79. Mr Jones submitted that Patterson J erred in treating the assessment by the inspector of compliance of the proposed development with the requirements of article 6(3) as being a matter for judicial review according to the *Wednesbury* rationality standard: *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. He said that in applying EU law under the Habitats Directive the national court is required to apply a more intensive standard of review which means, in effect, that they should make their own assessment afresh, as a primary decision-maker.
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> 80. I do not accept these submissions. In the similar context of review of screening assessments for the purposes of the Environmental Impact Assessment ('EIA') Directive and Regulations, this court has held that the relevant standard of review is the *Wednesbury* standard, which is substantially the same as the relevant standard of review of 'manifest error of assessment' applied by the Court of Justice in equivalent contexts: see *R (Evans) v Secretary of State for Communities and Local Government* [2013] JPL 1027, paras 32–43, in which particular reference is made to Commission of the *European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C-508/03) [2006] QB 764, paras 88–92 of the judgment, as well as to the *Waddenzee* case [2005] All ER (EC) 353. Although the requirements of article 6(3) are different from those in the EIA Directive, the multi-factorial and technical

[11] *Commission v Spain* (Case C-278/01) [2003] ECR I-14141.

> nature of the assessment called for is very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts …"

However, there have been suggestions, supported by examination of some CJEU authority, that the manifest error criterion may involve a more intensive consideration of the issues by the CJEU than would be the case in JR. Professor Richard Macrory, in his evidence to the two House of Commons Committees undertaking pre-legislative scrutiny of the Draft Bill,[12] stated that in environmental cases:

> "8 … the approach of the UK courts in JR has been largely based on the *Wednesbury* irrationality principle – was the decision so unreasonable that no reasonable person could have made it? In contrast, the CJEU has tended to be less deferential, adopting a proportionality test involving a more structured examination of the balancing interest involved. The position is made a little more complex because in cases involving human rights and some EU law the British courts have in recent years been using the proportionality test, and in other cases, depending on the issue in hand, have applied the *Wednesbury* test with different degrees of intensity. Nevertheless, despite some academic arguments, it seems clear the two approaches are not exactly the equivalent. …
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> 9. I therefore have concerns that reliance on JR before the Administrative Court will not bring the same degree of review as currently adopted by the CJEU in infringement proceedings. In many infringement cases, the CJEU is prepared to engage in quite complex evidential issues. As Wenneras concluded in a major study on EU environmental enforcement, 'I*f one looks at the intensity of review which the ECJ has applied in infringement cases it quickly becomes obvious that it has not been deferential in its approach, but in fact applied a quite stringent review of legality'*. Furthermore, more recent case-law of the CJEU indicates that while the burden of proving an infringement initially rests with the Commission, this can shift to Member States once a prima facie case is established. It is by no means clear that this approach would be adopted in ordinary JR proceedings."

A recent example of that intense scrutiny is *Commission v Poland* (Białowieża Forest) (Case C-441/17) EU:C:2018:255. That case concerned wood harvesting and forest management measures, to deal with the spread of the spruce bark beetle, in a site designated both under the Habitats Directive and Wild Birds Directive. The Commission commenced infraction proceedings alleging the measures were unjustified and that the Polish Government had failed to ascertain that the measures would not adversely affect the integrity of the site. The CJEU, in a judgment of 269 paragraphs, subjected the decision of the Polish authorities to detailed evidential scrutiny, disagreed in part with the assertions of the Commission, and found at least four significant breaches of the Habitats and Wild Birds Directives notwithstanding the stability or growth in the relevant bird populations. This level of scrutiny does support an intense level scrutiny consistent with Professor Macrory's view, unlikely to be replicated in national JR.

Trends in EU Environmental Law

In recent years there appears to have been a tightening of environmental regulation at EU level, both in terms of legislation and CJEU judgments. To the extent that the Withdrawal Act has yet to come into

[12] Internal citations removed. See paras 8–9 of Professor Richard Macrory's *Written Evidence* to the House of Commons Environmental Audit Committee and Environment, Food and Rural affairs Committee (15 January 2019)*http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Environment,%20Food%20and%20Rural%20Affairs/Prelegislative%20scrutiny%20of%20the%20Draft%20Environment%20Principles%20and%20Governance%20Bill/written/94980.html#_ftnref6*.

force with respect to exit day, those recent developments will prima facie remain part of UK law after Brexit. That said, there have been clear signs for a number of years, for example, that a strict line was being taken with the need for certainty in habitats assessment[13] and in applying the precautionary principle, but legislative policy issues appear to have gone a stage further in driving their development in the last few years.

Article 191 of the TFEU sets out the basis for the EU system of environmental law and states, in part:

> "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall 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."

As Professor Macrory and Justine Thornton QC (as she then was) have written[14] that these principles:

> "… are not free-standing principles which can been invoked independently, but are expressed as the basis of any Community policy, including legislation, that is taken on the environment. But even with that limitation, they have provided significant leverage for the Court of Justice of the European Union in how it interprets EU environmental legislation. Well known cases include *Wallonia waste* where the court invoked the rectification at source principle to justify a region restricting movement of wastes from other Member States and regions within Belgium, even though this was contrary to free movement principles. The court gave the precautionary principle a strict interpretation in its application to the Habitats Directive in the *Waddenzee* case where it held that consent could only be given where it was certain that the effects of a project would not affect the integrity of the protected site, and the precautionary principle underpinning the Habitats Directive implied that this meant that 'no reasonable scientific doubt remains as to the absence of such effects'. The integration principle proved legally significant in *Pfizer* because it allowed to court to conclude that environmental protection requirements incorporated the precautionary principle and it could therefore be applied to decisions and laws made under other parts of the Treaty than solely the environment."

Against that background, at the legislative level, the EU appears to be increasingly rigorous in its environmental regulation. It is providing Member States with increasingly ambitious targets and appears to be referring (whether implicitly or explicitly) to the environmental principles in more legislative measures.

For example, the Circular Economy Package was adopted by the Commission in 2015. This was created in an effort to move Member States away from the "take-make-dispose" economic model to a "circular economy", maintaining the value of materials and products for as long as possible and minimising waste.[15] It included, broadly, two measures: first, a number of legislative changes to pre-existing directives; second, the adoption by the Commission of an Action Plan on the Circular Economy.

The legislative changes involved amendments (which took effect in June 2018) to the Waste Framework Directive,[16] the Landfill Directive,[17] the Packaging Waste Directive,[18] and Directives on End-of-life

[13] See e.g. *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (C-127/02) [2005] 2 C.M.L.R. 31.

[14] Macrory and Thornton QC, "Environmental Principles: will they have a legal role after Brexit" [2017] J.P.L. 907–913.

[15] European Commission *Circular Economy: Implementation of the Circular Economy Action Plan* (Updated 07 August 2019)*https://ec.europa.eu /environment/circular-economy/index_en.htm*.

[16] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, amended by Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste.

[17] Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, amended by Directive (EU) 2018/850 of the European Parliament and of the Council of 30 May 2018 amending Directive 1999/31/EC on the landfill of waste.

[18] European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, amended by Directive (EU) 2018/852 of the European Parliament and of the Council of 30 May 2018 amending Directive 94/62/EC on packaging and packaging waste.

Vehicles,[19] Batteries and Accumulators and Waste Batteries and Accumulators,[20] and Waste Electrical and Electronic Equipment.[21] New measures introduced included:

(1) a common EU target for recycling 65% of municipal waste by 2035;
(2) a common EU target for recycling 70% of packaging waste by 2030;
(3) recycling targets for specific packaging materials;
(4) a binding landfill target to reduce landfill to a maximum of 10% of municipal waste by 2035;
(5) the strengthening of separate collection obligations and their application to hazardous household waste (by end 2022), bio-waste (by end 2023), and textiles (by end 2025);
(6) minimum requirements for extended producer responsibility schemes to improve their governance and cost efficiency; and
(7) reinforcing prevention objectives, including requiring Member States to take specific measures to tackle food waste and marine litter.

These legislative changes were complemented by the Commission's adoption of an Action Plan on the Circular Economy,[22] outlining 54 new proposals the Commission intended to implement going forward, covering the production, consumption, and waste management of products. These included, for example: requesting European standardization organisations to develop standards on material efficiency for setting requirements on durability, reparability and recyclability of products under the Ecodesign Directive,[23] creating an initiative on waste to energy in the framework of the Energy Union, proposing legislation setting minimum requirements for reused water for irrigation and groundwater discharge, and developing core indicators to assess environmental performance throughout the lifecycle of a building.

In addition to the EU's move toward increasingly ambitious targets, there are also indications of an increase in references back to fundamental environmental principles woven into the fabric of environmental legislation. For example, the November 2017 *Study on the precautionary principle in EU environmental policies Final report*[24] noted:[25]

> "At EU level, the precautionary principle was introduced by the Treaty of Maastricht in Article 130r(2) (today's Article 191(2) of the Treaty on the Functioning of the European Union) as one of the guiding principles of EU environment policy. In 2000, the European Commission presented a Communication on the precautionary principle, which operationalised for the first time this Treaty reference by providing common guidelines on its application by both the EU and the Member States. The Communication provides that the precautionary principle may be invoked when a phenomenon, product or process may have a dangerous effect, identified by scientific and objective evaluation, if this evaluation does not allow the risk to be determined with sufficient certainty."

[19] Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of life vehicles, amended by Directive (EU) 2018/849 of the European Parliament and of the Council of 30 May 2018 amending Directives 2000/53/EC on end-of-life vehicles, 2006/66/EC on batteries and accumulators and waste batteries and accumulators, and 2012/19/EU on waste electrical and electronic equipment.

[20] Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC, amended by Directive (EU) 2018/849 (above).

[21] Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE), amended by Directive (EU) 2018/849 (above).

[22] Commission Communication on Closing the Loop- an EU action plan for the Circular Economy, COM(2015) 614 Final, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0614*.

[23] Directive 2009/125/EC of the European parliament and of the Council of 21 October 2009 establishing a framework for the setting of Ecodesign requirements for energy-related products.

[24] European Commission Directorate-General for Environment *Study on the precautionary principle in EU environmental policies Final report* (January 2018), Executive Summary at pp.6–12*https://publications.europa.eu/en/publication-detail/-/publication/18091262-f4f2-11e7-be11-01aa75ed71a1/language-en/format-PDF/source-61492393*.

[25] European Commission Directorate-General for Environment *Study on the precautionary principle in EU environmental policies Final report* (January 2018), Executive Summary at pp.6*https://publications.europa.eu/en/publication-detail/-/publication/18091262-f4f2-11e7-be11-01aa75ed71a1/language-en/format-PDF/source-61492393*.

The *Final report* found, among other things, an increase in references to the precautionary principle in EU environmental legislation (whether explicit or by indirect reference) since the Commission's Communication on the Precautionary Principle in 2000, which is when the report considered the principle was first "operationalised". It noted:

> "For instance, the concept of risk in EU environmental legislation is interpreted differently depending on the sector in question, e.g., chemicals regulation, water quality or nature conservation. Ultimately, the practice of Member States and interpretation of the CJEU play an important role in forming how the precautionary principle is applied when implementing EU environmental legislation.
>
> …
>
> Risk and risk assessment are intrinsic parts of many of the EU environmental legislative documents under review (e.g. Water Framework Directive, Marine Strategy Framework Directive, Floods Directive and Habitats Directive). This proceeds from an assumption that risks can be assessed probabilistically, employing a combination of statistical evidence and scientific understanding of causal relationships. But not all threats can be assessed probabilistically, and risk assessments need to be supplemented with other decision criteria when managing risk. Thresholds for triggering a risk assessment (where defined) vary, whilst the methodologies for assessing risk range from requirements such as gathering of empirical evidence, modelling of potential effects and establishment of risk reduction targets to the examination of alternative solutions and keeping records of impacts. Hence, risk assessment employs a variety of approaches to risk tailored to the individual requirements of the specific environmental policy area.
>
> …
>
> Overall, in the environmental sector, the precautionary principle is more rarely applied in policy areas related to chemicals or industrial pollution than in nature related cases. This could arguably be linked to the issue of how risk is assessed by those who bear the responsibility for determining extent of risk. In the case of the nature protection directives, for example, proponents of an activity that would depart from the general prohibition of harmful activities in Natura 2000 areas have to prove that there are no alternatives, that the proposed activity does not cause harm and it is needed because of overarching public interests – a generally stricter precautionary principle approach."

Complementing that increased legislative drive for greater environmental stringency, the CJEU also seems to be on the trajectory of both tightening (by interpretation) the effect of EU environmental law measures, and in ensuring they are strictly enforced.

First, as already outlined above, the CJEU appears willing to adopt an intensive level of scrutiny to issues of fact or expert evidence when determining the issue of compliance with legislation. See, above, *Commission v Poland* (Białowieża Forest) (C-441/17).

Secondly, in a number of recent cases the CJEU has taken the opportunity to tighten the application of the EU's environmental regulations, particularly in relation to the EIA Directive and the Habitats Directive.

The *Waddenzee* case firmly established the role of the precautionary principle in the context of art.6 of the Habitats Directive and the principle for the need for scientific certainty beyond reasonable doubt when considering whether there would be an adverse effect on the integrity of a Special Area of Conservation ("SAC") or Special Protection Area ("SPA"). Over the last two years, as is well known, the CJEU has extended its consideration of art.6(3) to make it clear that mitigation is not a concept within art.6(3) and that screening should not take into account any mitigation measures (built in or otherwise) in order to screen out an appropriate assessment. It appears that, regardless of the pragmatic approach earlier taken by the UK courts which still considered the issue of certainty, certainty may only be achieved as a matter of legislative interpretation within the context of an appropriate assessment.

It is ironic that it was only in 2008 that Sullivan J in *R. (on the application of Hart DC) v Secretary of State* [2008] 2 P. & C.R. 16 held that competent authority could look at the "whole package" of measures, including mitigation measures, in deciding what impact a project or plan would have on a special area of conservation and that any other approach, was considered to be "ludicrous". Indeed, endorsed several times by the Court of Appeal,[26] Sullivan J's reasoning received the eminent support of Sales LJ (as he then was) in *Smyth v Secretary of State* at [74] as being "compelling and is clearly correct, to the acte clair standard".

Beginning with *Orleans v Vlaams Gewest* (C-387/15) [2017] Env. L.R. 12, which rejected the place of mitigation measures under art.6(3) and the use of compensatory measures outside of art.6(4), the principle that mitigation measures (even if built into the scheme proposals[27]) could not be considered in screening a proposal for appropriate assessment was firmly established in *People Over Wind & Sweetman v Coillte Teoranta* (C-323/17) [2018] P.T.S.R. 1668, followed by consideration of related issues in *Grace and Sweetman v An Bord Pleanála* (C-164/17) [2019] P.T.S.R. 266 (which ruled out the use of dynamic habitat management due to its uncertainty), *Cooperatie Mobilisation for the Environment and Vereniging Leefmilieu* (C-293/17 and C294/17) [2019] Env. L.R. 27 (multi-stage decisions concerning nitrates where appropriate assessment at the highest level would only be suitable for the subsidiary decisions if it dealt with the specific impacts of those subsidiary decisions) and *Holohan v An Bord Pleanála* (C-461/17) [2019] P.T.S.R. 1054 which, for the first time, set more detailed guidance as to what was required in an appropriate assessment. See Dove J's analysis in *Gladman Developments Ltd v Secretary of State* [2019] EWHC 2001 (Admin) (applying his own judgment in *Canterbury CC v Secretary of State* [2019] EWHC 1211 (Admin) at [65]–[76]), where it was surprisingly contended that *People Over Wind* was wrongly decided.

Despite the apparent difficulty in meeting the requirements for derogation under art.6(4), in the event of an adverse appropriate assessment, the recent group of decisions appears to be driving decision-making in many cases to consideration of projects and plans under art.6(4) alone. Not only is mitigation ruled out for "policy" uncertainty at the screening stage, but its application at the appropriate assessment stage is strict and rules out matters which cannot be predicted with certainty beyond reasonable doubt, e.g. the dynamic habitat mitigation measures proposed in *Grace and Sweetman*. In passages appearing in similar form in a number of judgments,[28] the CJEU held in *Cooperatie Mobilisation* at [126] and [130] that:

> "… it is only when it is sufficiently certain that a measure will make an effective contribution to avoiding harm to the integrity of the site concerned, by guaranteeing beyond all reasonable doubt that the plan or project at issue will not adversely affect the integrity of that site, that such a measure may be taken into consideration in the 'appropriate assessment'…
>
> … The appropriate assessment of the implications of a plan or project for the sites concerned is not to take into account the future benefits of such 'measures' if those benefits are uncertain, inter alia because the procedures needed to accomplish them have not yet been carried out or because the level of scientific knowledge does not allow them to be identified or quantified with certainty."

If measures to prevent or offset an adverse effect cannot be regarded as uncertain because they are untested future measures, this has serious implications for approving projects reliant on future measures including, possibly, even the established use of SANGS and SAMMs—at least where they have yet to be

[26] *No Adastral New Town Ltd v Suffolk Coastal DC* [2015] Env L.R. 28 at [72]–[74]; *Smyth v Secretary of State* [2015] P.T.S.R. 1417 at [68]–[76].

[27] See also [2019] EWCA Civ 1562, considering licence terms for badger culling which were considered at first instance [2019] Env. L.R. 9 not to fall within the approach in *People Over Wind* but which did not arise on appeal due to the undertaking of new assessments: see the Court's judgment at [73].

[28] *Orleans* at [52] and *Grace and Sweetman* also at [52]. The *Orleans* judgment reads:

> "52 Moreover, it must be noted that, as a rule, any positive effects of a future creation of a new habitat, which is aimed at compensating for the loss of area and quality of that same habitat type on a protected site, are highly difficult to forecast with any degree of certainty and, in any event, will be visible only several years into the future (see, to that effect, judgment of 15 May 2014 in *Briels and Others*, C-521/12, EU:C:2014:330, at [32])."

established for particular developments. It is noted that the arts 6(3)/(4) approach has been adapted to apply to art.6(2) in *Grüne Liga Sachsen eV v Freistaat Sachsen* (C-399/14) [2016] P.T.S.R. 1240.

Article 6(4) may not be easily overcome. On 29 July 2019, in *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministers* (Case C-411/17) ECLI:EU:C:2019:662[29] at [145][30] the CJEU held that legislative measures extending the life of two nuclear power plants, which required the re-starting of one and fairly significant modernization works, constituted one "project" for the purposes of the Habitats Directive, and required an appropriate assessment before they were adopted by the legislator. This was so, notwithstanding that the implementation of the measures involved subsequent acts such as the issue of individual authorisations. The CJEU also held at [159], having explained at [150]–[158] the need for detailed assessment and information, that the reasons must be both "public" and "overriding", that, in respect of art.6(4):

> "… the first subparagraph of Article 6(4) of the Habitats Directive must be interpreted as meaning that the objective of ensuring security of the electricity supply in a Member State at all times constitutes an imperative reason of overriding public interest, within the meaning of that provision. The second subparagraph of Article 6(4) of that directive must be interpreted as meaning that if a protected site likely to be affected by a project hosts a priority natural habitat type or priority species, a finding which it is for the referring court to make, only a need to nullify a genuine and serious threat of rupture of that Member State's electricity supply constitutes, in circumstances such as those in the main proceedings, a public security ground, within the meaning of that provision."

These recent developments will become part of UK law under the provisions of the Withdrawal Act unless departed from on the narrow basis provided or the subject of specific legislative amendment. There is limited flexibility available in cases where the failure to undertake an appropriate assessment may not lead to quashing if the screening exercise was sufficiently detailed to fulfil the requirements of appropriate assessment or, possibly, where it can be cured at the reserved matters stage, following *R. (on the application of Champion) v North Norfolk DC* [2015] 1 W.L.R. 3710 at [58]–[61]. See *Canterbury CC v Secretary of State and Hollamby Estates;Crondall Parish Council v Secretary of State and Crondall Developments Ltd* [2019] EWHC 1211 (Admin) (failure to apply *People Over Wind* to screening) and *R. (on the application of Wingfield) v Canterbury CC* [2019] EWHC 1974 (Admin) (reserved matters).[31]

In EIA the changes introduced by the 2014 EIA Directive, which included amendments to art.5 and Annex IV of the Directive, specify in more detail what an EIA should contain. New additions included, for example, a description of any requisite demolition works, and a description of reasonable (as opposed to main) alternatives considered, including a comparison of environmental effects. The changes have been accompanied by three detailed sets of guidance from the Commission.[32] Again, this shows a legislative move toward tighter, more detailed regulation.

Holohan (C-461/17) (above), due to the transitional provisions in the 2014 EIA Directive, concerned what would be required in an environmental statement ("ES") (now, post-2014, an environmental impact

[29] See: *http://curia.europa.eu/juris/document/document.jsf?text=&docid=216539&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=8757368*.

[30] Contrast *Brussels Hoofdstedelijk Gewest v Vlaams Gewest* (C-275/09) [2011] Env. L.R. 26 which concerned only the renewal of a permit to operate an airport which was found not to involve works or interventions in the natural environment which would alter the physical aspect of the site.

[31] This may not be of general application since it concerned the grant of an outline permission in July 2017 prior to the judgment in *People Over Wind* (though it is noted after the *Orleans* judgment) and the challenge period had expired. AA was undertaken at the reserved matters stage, following *People Over Wind*. Lang J also held it was a proportionate remedy for the breach of EU law and would have refused relief in her discretion in any event.

[32] Screening: *https://publications.europa.eu/en/publication-detail/-/publication/494ada6c-cb4a-11e7-a5d5-01aa75ed71a1/language-en)*; scoping: *https://publications.europa.eu/en/publication-detail/-/publication/4d59e72a-cb4c-11e7-a5d5-01aa75ed71a1/language-en*; and the preparation of the environmental impact assessment report: *https://publications.europa.eu/en/publication-detail/-/publication/2b399830-cb4b-11e7-a5d5-01aa75ed71a1/language-en*.

assessment report) under the 2011 EIA Directive. At [56] and following, the CJEU took an expansive view of what should be included in an ES under the 2011 Directive:

(1) under art.5(1) and (3) of the 2011 EIA Directive, a developer had to supply information which expressly addresses the significant effects of its project on all species identified in the statement supplied under the directive; and

(2) under art.5 of the 2011 EIA Directive, the developer had to supply information on the environmental impact of both its chosen option, and all the main alternatives it studied, together with the reasons for its choice, taking into account at least the environmental effects.

In *Inter-Environnement Wallonie* (C-411/17), above, the CJEU held:

(1) legislative measures which will require physical changes cannot be split from those physical changes for the purposes of deciding what constitutes a project in EIA terms. Measures extending the life of a plant by 10 years (from 40), and which required major renovation work were of comparable magnitude, in terms of environmental risks, to the initial commissioning of a plant, and so required an EIA under Annex I ([71]–[81]); and

(2) under the 2011 Directive, art.1(5) stated that the directive would not apply to projects, the details of which are adopted by a specific act of national legislation. The CJEU, however, reiterated the requirements that for that carve-out to apply, the legislative act must certify that the objectives of the EIA directive have been complied with in the legislative process, and that the legislator must have at his disposal sufficient information under art.5(3), with any issues to be determined by the national court ([103]–[114]).

Although this paper focuses primarily on Habitats and EIA, there is also evidence that the CJEU deploys its purposive approach in other areas of environmental law. For example, in *Craeynest v Brussels Hoofdstedelijk Gewest* (C-723/17) ECLI:EU:C:2019:533, the CJEU has similarly taken a purposive approach to the air quality directive, offering a restrictive interpretation of compliance, and limiting national authorities' discretion in taking measurements. That case concerned sampling assessment under the Air Quality Directive,[33] and in particular the discretion given to national authorities in selecting the sampling points. The CJEU held, at [50] and following, that although this involved a number of technical and complex assessments, the discretion of the national authorities was limited by the purpose and objectives pursued by the directives. So, e.g., competent authorities had to choose sample points in such a way as to minimise the risk that incidents in which limit values are exceeded may go unnoticed. It would be for the national court to check this assessment. It also held ([57] and following), that in determining whether limit values with an averaging period of one calendar year had been exceeded, claimants could rely on readings at a single sampling point, rather than averaged across all points.

The state of EU environmental law, in terms of the corpus of legislation and judgments, in effect immediately prior to the UK's exit from the EU will remain applicable under the terms of the Withdrawal Act. Any proposed legislative or policy changes which have yet to be made concrete or brought into force will not become part of UK law and their relevance will then turn on the "have regard" duty in s.6(2) of the Withdrawal Act (below) or the extent to which the UK Government chooses to follow a similar path.

[33] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.

Brexit and Future Changes

European Union (Withdrawal) Act 2018

Purpose of the Act

As paras 1 and 2 of the Explanatory Notes to the Withdrawal Act state, it:

> "1 … repeals the European Communities Act 1972 (ECA) on the day the United Kingdom leaves the European Union.
>
> 2 The Act ends the supremacy of European Union (EU) law in UK law, converts EU law as it stands at the moment of exit into domestic law, and preserves laws made in the UK to implement EU obligations. It also creates temporary powers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left, so that the domestic legal system continues to function correctly outside the EU. The Act also enables domestic law to reflect the content of a withdrawal agreement under Article 50 of the Treaty on European Union once the UK leaves the EU, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal."

However, the Withdrawal Act does not render pre-existing EU law inapplicable or irrelevant, instead seeks to preserve it and convert it into domestic law. The Withdrawal Act preserves a significant amount of pre-Brexit EU law including the effect of CJEU judgments subject to limited cases where there may be departure by the Supreme Court and, of course, where legislation changes the provisions.

At paras 10 and 11 the Explanatory Notes state that the principal purpose of the Withdrawal Act is to provide:

> "10 … a functioning statute book on the day the UK leaves the EU. As a general rule, the same rules and laws will apply on the day after exit as on the day before. It will then be for Parliament and, where appropriate, the devolved legislatures to make any future changes.
>
> 11 The Act performs four main functions. It:
>
> - repeals the ECA;
> - converts EU law as it stands at the moment of exit into domestic law before the UK leaves the EU and preserves laws made in the UK to implement EU obligations;
> - creates powers to make secondary legislation, including temporary powers to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left the EU and to implement a withdrawal agreement (subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal); and
> - removes the existing restrictions on devolved competence in relation to acting incompatibly with EU law so that decision making powers in areas currently governed by EU law will pass to the devolved institutions, except where specified in secondary legislation under this Act."

To avoid any gaps in domestic law potentially created by the repeal of the ECA 1972 and the resulting loss of EU law (and legislation derived from it), the Withdrawal Act preserves and converts such law into domestic law. The Explanatory Notes state:

> "23 To avoid such gaps, the Act converts the body of existing EU law into domestic law and preserves the laws we have made in the UK to implement our EU obligations. After this,

because the supremacy of EU law will not operate on new, post-exit legislation, Parliament (and, within devolved competence, the devolved legislatures) will be able to decide which elements of that law to keep, amend or repeal once the UK has left the EU. This body of converted EU law and preserved domestic law is referred to in the Act and these notes collectively as 'retained EU law'.

24 This approach means that, as a general rule, the same rules and laws will apply on the day after the UK leaves the EU as before:

- the Act converts directly applicable EU law (e.g. EU regulations) into UK law;
- it preserves all the laws which have been made in the UK to implement EU obligations (e.g. in EU directives);
- it incorporates any other rights which are available in domestic law by virtue of section 2(1) of the ECA, including the rights contained in the EU treaties, that can currently be relied on directly in national law without the need for specific implementing measures; and
- the Act provides that pre-exit case law of the Court of Justice of the European Union (CJEU) be given the same binding, or precedent, status in UK courts as decisions of the Supreme Court or the High Court of Justiciary in Scotland."

Some definitions

There are a number of important definitions, which include:

(1) "exit day", which currently means 31 October 2019 at 11.00pm, unless the day or time at which the Treaties cease applying to the UK is different to that date, in which case a Minister of the Crown may amend its meaning (s.20(1)–(5)); and

(2) references to the principle of supremacy of EU law, the Charter of Fundamental Rights, any general principle of EU law or the rule in *Frankovich*[34] are read as references to that principle, Charter or rule so far as it would otherwise continue to be, or form part of, domestic law on or after exit day. However, note that references to the principle of supremacy do not include anything which would bring into domestic law any modification of EU law adopted, notified, coming in to force, or only applying, after exit day (Sch.1, para.5(1) and (2)).

EU-Derived Domestic Legislation

Section 2(1) of the Withdrawal Act provides that "EU-derived domestic legislation" continues in effect in domestic law "as it has effect in domestic law immediately before exit day". "EU-Derived domestic legislation" is defined in s.2(2) as any enactment, so far as it was:

(1) made under s.2(2) of, or para.1A of Sch.2 to, the ECA 1972;

(2) passed or made, or operating, for a purpose mentioned in s.2(2)(a) or (b) of the ECA 1972;[35]

(3) relating to anything which falls within (1) or (2) or to which ss.3(1)[36] or 4(1)[37] apply;

[34] *Frankovich v Italian Republic* (Case C-6/90) [1991] ECR I-05357, establishing a Member State could be liable to pay compensation to individuals who suffered loss by reason of that Member State's failure to transpose a directive into national law.

[35] Those purposes in s.2(2) are: "(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above." Section 2(1) refers to "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly…"

[36] Section 3(1): "Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day."

[37] Section 4(1):

(4) relating otherwise to the EU or the EEA.

However, this definition excludes any enactment contained in the ECA.

EU derived provisions which fall within this definition would include, for example, the Environmental Assessment of Plans and Programmes Regulations 2004/1633, the Town and Country Planning (Environmental Impact Assessment) Regulations 2017/571, and the Conservation of Habitats and Species Regulations 2017/1012. Although these provisions are widely drawn, if domestic legislation is not operating for one of those specified purposes, it does not fall within the section: Explanatory Notes para.78.

Direct EU Legislation

Section 3(1) Withdrawal Act incorporates direct EU legislation as part of domestic law on or after exit day "so far as operative immediately before exit day",[38] subject to s.5 and Sch.1. "Direct EU legislation" is defined by s.3(2) to include any EU regulation, EU decision or EU tertiary legislation, as it has effect in EU law immediately before exit day, and provided that it is not an exempt EU instrument.[39] Only the English language versions of direct EU legislation are incorporated (s.3(4)), and although other versions may be used to assist in interpretation, s.3 does not apply to legislation for which there is no English language version.

Rights under s.2(1) of the ECA

Section 4 Withdrawal Act provides for the continuation on and after exit day of rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day, are recognized and available in domestic law by virtue of s.2(1) of the ECA, and are enforced, allowed and followed accordingly. This does not apply to rights etc. incorporated by s.3 of the Withdrawal Act or which arise under an EU directive and are not of a kind recognized by the CJEU or any UK court or tribunal in a case decided before exit day. The loose phrase "of a kind" is explained in the Explanatory Memorandum to the Act as referring to rights "of a similar kind" to those already recognised. The example given is where rights arising under a directive have been recognised as having direct effect before exit day, an individual not a party to a case may rely on them.[40]

Two exceptions are worth noting: the Charter of Fundamental Rights is not to be considered part of domestic law on or after exit day,[41] and s.4 is subject to further exclusions provided by s.5 and Sch.1 (outlined below).

The principle of supremacy of EU Law

The well-established EU law principle that EU law takes precedence over the internal laws of the Member State (the "principle of supremacy": see *Costa v Enel* (Case 6/64) [1964] ECR 585) is retained so far as it is relevant to the interpretation, disapplication, or quashing of any enactment or rule of law passed on or before exit day, and applies to a modification made on or after exit day of a rule made or passed before exit day, if consistent with the intention of the modification: s.5(2) and (3) of the Withdrawal Act. The

"(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day—
(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
(b) are enforced, allowed and followed accordingly,"

[38] Section 3(3) defines "operative immediately before exit day" but includes anything said to be in force and applying before exit day, a decision notified before exit day, or (in any other case), an instrument in force immediately before exit day.

[39] Defined in Sch. 6 of the Withdrawal Act.

[40] Explanatory Notes to the European Union (Withdrawal) Act 2018. paras 97–98*www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpgaen_20180016_en.pdf*.

[41] Withdrawal Act s.5(4).

principle of supremacy does not, however, apply to any enactment or rule of law passed on or after exit day: s.5(1) of the Withdrawal Act.

Interpretation of retained EU law

Section 6 of the Withdrawal Act outlines the principles of interpretation to be applied to retained EU law. For those purposes, s.6(7) provides:

(1) "retained EU law" means anything which, on or after exit day, continues to be part of domestic law under ss.2, 3, 4, 6(3), or 6(6) of the Withdrawal Act, as that body of law is added to or modified by or under the Withdrawal Act or other domestic law from time to time;

(2) "retained domestic case law" means any principles laid down by, and any decisions of, a court or tribunal in the UK, as they have effect immediately before exit day and, so far as they relate to anything to which ss.2, 3, or 4 applies, and which are not excluded by s.5 or Sch. 1;

(3) "retained EU case law" means any principles laid down by, and any decisions of, the CJEU as they have effect in EU law immediately before exit day and insofar as they relate to anything to which ss.2, 3, or 4 applies, and are not excluded by s.5 or Sch. 1;

(4) "retained case law" means retained EU case law and retained domestic case law;

(5) "retained general principles of EU law" means the general principles of EU law, as they have effect in EU law immediately before exit day and insofar as they relate to anything to which ss.2, 3, or 4 applies and are not excluded by s.5 or Sch.1. Examples of the general principles are laid out in para.59 of the Explanatory Notes, and include proportionality, non-retroactivity, fundamental rights, equivalence and effectiveness.

Sections 6(1)–(5) Withdrawal Act then provides the following scheme for interpretation after exit day:

(1) a court or tribunal is not bound by any principles laid down, or any decisions made, on or after exit day by the CJEU, and may no longer make a reference to the CJEU (s.6(1) of the Withdrawal Act);

(2) nonetheless, and subject to ss.6(3)-(6), it may still "have regard to" anything done on or after exit day by the CJEU, another EU entity, or the EU, so far as it is relevant to any matter before the court or tribunal (s.6(2));

(3) any question as to the validity, meaning or effect of retained EU law is to be decided, so far as that law is unmodified on or after exit day and, so far as is relevant:
   (a) in accordance with any retained case law and retained general principles of EU law and;
   (b) having regard (among other things) to the limits of EU competencies immediately before exit day (s.6(3)).

(4) The Supreme Court, however, is not bound by retained EU case law, but must apply the same test as it would apply before departing from one of its own decisions before departing from retained EU case law (ss.6(4)(a) and 6(5)).

Schedule 1 Exclusions

Further exclusions are provided in Sch.1 of the Withdrawal Act. These provide, for example, that on or after exit day:

(1) no court, tribunal or other public authority may disapply or quash any enactment or other rule of law, or quash any conduct, or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law (para.3(2));
(2) there is no right in domestic law to *Frankovich* damages (subject to a transitional provision in para.38(7) of Sch.8, which delays the prohibition for two years from exit day, allowing individuals to continue to seek such damages for breaches of EU law that occurred on or before exit day).

Environmental Principles

Section 16(1) requires the Secretary of State, within six months of Royal Assent, to publish a draft bill including:

(1) a set of environmental principles;
(2) a duty on the Secretary of State to publish a statement of policy in relation to the application and interpretation of those principles in connection with the making and development of policies by Ministers of the Crown;
(3) a duty ensuring Ministers must have regard to that Ministerial Statement;
(4) provisions for the establishment of a public authority with functions for taking, in circumstances provided for under the Bill, proportionate enforcement action where the authority considers that a Minister of the Crown is not complying with environmental law (as defined); and
(5) such other provision as is considered appropriate.

The environmental principles are set out in s.16(2) of the Withdrawal Act, and include the precautionary principle, the polluter pays principle, public access to environmental information, and public participation in environmental decision-making.

The s.16(1) obligation was met by the publication in December 2018 of the draft Environment (Principles and Governance) Bill 2018 ("the Draft Bill"), discussed below.

Regulatory Changes

Section 8 of the Withdrawal Act confers on Ministers powers to deal by regulation with deficiencies arising from the UK's withdrawal from the EU. "Deficiencies" is defined by s.8(2)–(3) Withdrawal Act, and includes, for example, situations where retained EU law contains anything which is redundant, or contains no practical application in relation to the UK, or confers functions on EU entities which no longer have those functions.

A significant number of Statutory Instruments have been created under these powers (slightly more than 600 based on a basic Westlaw search). Commensurate with the purpose behind s.8, the general approach of government has been to keep the level of environmental protection conferred by the regulations being amended the same post EU-exit.[42] There have, however, been a number of changes in the mechanics by which environmental regulation is taking place. With the loss of access to EU institutions (such as the Commission) and EU initiatives (such as the Natura 2000 network), a significant focus of the amending regulations has been to find alternatives. Some examples are:

[42] See, e.g. the Environmental Assessment and Miscellaneous Planning (Amendment) (EU Exit) Regulations 2018/1232 and Explanatory Memorandum. In cases where there have been changes to substantive protections through an oversight, further Regulations have been enacted to remedy that further deficiency. See, e.g. the draft Pesticides (Amendment) (EU Exit) Regulations 2019 which in part is proposed because the original pesticide EU Exit amendment regulations omitted to continue banning substances with endocrine disrupting properties.

(1) Commonly, the role of the Commission will be undertaken by the Secretary of State under various terms. See, e.g., regs 25(2) and 26(2) Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019/579, substituting the "appropriate authority"[43] for "the European Commission" in the context of the Habitats Regulations 2017/1012 and reg.33 substituting "the relevant administration" for the Commission in the Offshore Habitats Regulations.[44]

(2) After Brexit, the UK will lose access to the European Eco-Management and Audit Scheme ("EMAS"), an instrument developed by the Commission for organisations to evaluate, report, and improve their environmental performance. The UK's competent body will lose its status, and the registrations it provides will no longer be valid. The solution adopted is that, UK organisations wishing to remain registered with EMAS may do so via the EMAS Global Registration, by being certified by a competent body located in one of the Member States offering the service and, secondly, the regulations will instead refer to a "conformity assessment body", which is a body accredited using a system described in Regulation (EC) 765/2008,[45] provided for by the End of Waste Regulations. See the Waste (Miscellaneous Amendments) (EU Exit) Regulations 2019/620 and Explanatory Memorandum.

(3) In the habitats context, the UK will no longer be part of the Natura 2000 network, nor send data to the Commission. Instead, a national site network is being created, including pre-exit day Natura 2000 sites, and post-exit day designated sites. Regulations 4 and 33 of the Habitats EU Exit Regulations amend both sets of Habitats Regulations to refer to:

> "'the national site network' means the network of sites in the United Kingdom's territory consisting of such sites as—
> (a) immediately before exit day formed part of Natura 2000; or
> (b) at any time on or after exit day are European sites, European marine sites and European offshore marine sites for the purposes of any of the retained transposing regulations …"

(4) Management objectives are being established for the network, to maintain or restore habitats and species listed in the Habitats Directive, and contribute to ensuring the survival and reproduction of wild birds in accordance with the Wild Birds Directive with the power in the Secretary of State to issue guidance[46] to which the nature conservation bodies and competent authorities must have regard[47] and a duty on the appropriate authority to issue a report every six years[48] on the implementation of the measures taken for the purpose of giving effect to the provisions of the Directives, and the achievement of the objectives set out in art.2 of the Habitats Directive and arts 2 and 3 of the Wild Birds Directive. The Commission's roles are largely being transferred to the Secretary of state. See the EU Exit Regulations 2019 and Explanatory Memorandum.

The Draft Bill

Following the result of the referendum in June 2016, concerns were raised (both in Parliament and by members of the public) that the UK's environmental standards could be weakened after EU-exit. In

[43] Already defined in the Conservation of Habitats and Species Regulations 2017/1012 reg.3(1) as the Secretary of State.
[44] Conservation of Offshore Marine Habitats and Species Regulations 2017/1013.
[45] Regulation (EC) 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No.339/93.
[46] Reg.5 inserting new reg.3A(4) into 2017/1012.
[47] Reg.7 inserting new reg.9(4A) into 2017/2012.
[48] Reg.8 inserting new reg.9A into 2017/1012 and reg.34 inserting new reg.6A into 2017/2013.

particular, issues were raised regarding the loss of the Commission's oversight, and a weakening of the European legal requirements ensuring that environmental policy was based on environmental principles.[49]

In November 2017 the Secretary of State for the Environment, then Michael Gove MP, announced a consultation on both the future of environmental principles and:

> "a new, world-leading body to give the environment a voice and hold the powerful to account. It will be independent of government, able to speak its mind freely.
>
> And it will be placed on a statutory footing, ensuring it has clear authority. Its ambition will be to champion and uphold environmental standards, always rooted in rigorous scientific evidence."[50]

With regard to environmental principles, he stated:

> "We also need to ensure that environmental enforcement and policy-making is underpinned by a clear set of principles. Environmental principles are already central to Government policy.
>
> However, besides their mention in the EU treaties, we do not set these principles down anywhere or define their role in policy making.
>
> So as we leave the EU, we will create a new policy statement setting out the environmental principles which will guide us. This statement will draw on the EU's current principles and it will underpin future policy-making."

The subsequent consultation was launched in May 2018[51]. In accordance with the Secretary of State's announcement, both environmental principles options consulted on required the Government to put forward a policy statement on those principles (whether or not those principles were enshrined in primary legislation). With regard to the new statutory body, the consultation stated that:

> "The government's overarching goal in establishing a new body is to bolster our domestic environmental governance framework as we leave the EU. This should support our long term ambition to be the first generation to leave the environment in a better state than that in which we inherited it, while providing an even more effective and bespoke national approach compared to the oversight and enforcement mechanisms that currently apply."[52]

As noted above, s.16 placed an obligation on the Secretary of State with regard to both environmental principles, and the new statutory body.[53]

On 19 December 2018, the Draft Bill was published. It covers, broadly:

(1) environmental principles post EU-exit;
(2) environmental improvement plans; and
(3) the OEP.

[49] *Environmental Principles and Governance: the draft bill* Briefing Paper CBP-8484 (30 Jan 2019), pp.6–11*https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8484*.

[50] Michael Gove MP *Environment Secretary sets out plans to enhance environmental standards* (13 November 2017)*www.gov.uk/government/speeches/environment-secretary-sets-out-plans-to-enhance-environmental-standards*.

[51] Michael Gove MP *Environment Secretary sets out plans to enhance environmental standards* (13 November 2017)*www.gov.uk/government/speeches/environment-secretary-sets-out-plans-to-enhance-environmental-standards*.

[52] Michael Gove MP *Environment Secretary sets out plans to enhance environmental standards* (13 November 2017)*www.gov.uk/government/speeches/environment-secretary-sets-out-plans-to-enhance-environmental-standards,* para.78.

[53] Reference to a new independent and adequately resourced environmental body, to ensure non-regression of standards in the sphere of environmental protection, was also made in the Withdrawal Agreement of the United Kingdom of Great Britain and Northern Ireland from the European Union and European Atomic energy Agency, Annex 4, Arts 2–3. Further reference to ensuring similar levels of protection between the UK and EU was made in the non-binding accompanying political declaration, para.79. Given the Withdrawal Agreement's widespread rejection by Parliament and the new Prime Minister's approach, this may be of no more relevance.

The Draft Bill appears intended to be only the first part of a larger bill. The second part, which is intended to include legislative measures to address particular environmental priorities, has not yet been published.[54] Indeed, at the time of writing, no revised bill has been published or lodged with Parliament.

Definitions

Cll.30–32 provide definitions, including:

(1) "Natural Environment" means animals, plants, living organisms, their habitats, land, water, and air (except buildings or structures and water or air inside them) and the natural systems, cycles and processes through which they interact (cl.30).

(2) "Environmental Law" means the statute and regulations made thereunder, and any legislative provision which is "mainly concerned with an environmental matter" and is "not concerned with an excluded matter". For these purposes, "excluded matters" are the emission of greenhouses gases, disclosure of or access to information, the armed forces, defence or national security, and taxation, spending or the allocation of resources in government (cl.31).

Para. 212 of the Explanatory Notes to the Draft Bill states that planning would ordinarily not fall within the definition of environmental law. This is surprising and there is (on present draft) no such exclusion nor would such an exclusion seem obvious especially given the width of the application of the Aarhus Convention. As Sullivan LJ noted in *Venn v Secretary of State* [2015] 1 W.L.R. 2328[55] the planning system embodies a number of important provisions to protect the environment:

"10. … Mr James Eadie QC on behalf of the Secretary of State did not take issue with Lang J's conclusion … that the description of 'environmental information' in article 2(3) of Aarhus was an indication of the intended ambit of the term 'environmental' in the Convention, and that the *Implementation Guide* to Aarhus was of assistance in reaching that conclusion. The *Implementation Guide*, 2nd ed, (2013) says, at p 40, that: 'The clear intention of the drafters, … was to craft a definition [of environmental information] that would be as broad in scope as possible, a fact that should be taken into account in its interpretation.'

11. In his skeleton argument the Secretary of State accepted that 'environmental information' is given a broad definition in article 2(3), and further accepted that since administrative matters likely to affect 'the state of the land' are classed as 'environmental' under Aarhus the definition of 'environmental' in the Convention is arguably broad enough to catch most, if not all, planning matters. The judge's conclusion that environmental matters are given a broad meaning in Aarhus (see para 15 of the judgment) is supported by the decision of the Court of Justice of the European Union ('CJEU') in *Lesoochranárske zoskupenie VLK v Ministerstvo ivotného prostredia Slovenskej republiky* (Case C-240/09) [2012] QB 606 ('the Brown Bear case').

…

15. The Secretary of State's submission … might have had some force if article 9(3) was a domestic UK enactment, and was not a provision governing the obligations of the parties to an international Convention, each of whom has agreed to give effect to article 9 'within the framework of its national legislation'. National legislation may address the issue of environmental protection in different ways. The UK has a sophisticated town and country planning system, and Parliament has chosen to implement much of the UK's environmental protection through that system. One obvious example is the environmental impact assessment

[54] *Scrutiny of the Draft Environment (Principles and Governance) Bill: Eighteenth Report of Session 2017–2019* (HC 1951), para.191.
[55] See, subsequently, e.g. *Royal Society for the Protection of Birds v Secretary of State* [2018] Env. L.R. 13.

process, which is tied to the grant of planning permission. Another example is the requirement that local development plan documents must include policies that are designed to ensure that development in each local plan area contributes to the mitigation of, and adaptation to, climate change: see section 19(1A) of the Planning and Compulsory Purchase Act 2004.

16. As a consequence, it is a characteristic of the UK's approach to environmental protection that much (if not most) of the detail is contained, not in statutory regulations, but in policies, both national policies adopted by the government (the NPPF), and local policies adopted by local planning authorities in their development plan documents. When preparing their local development plan documents local planning authorities must have regard to national policies; including the NPPF: see section 19(2)(a) of the 2004 Act. Decision-makers are then required by section 70(2) to have regard to such policies; and if the policies are contained in the development plan they must be followed unless material considerations indicate otherwise: see section 38(6) of the 2004 Act and para 22 of Lang J's judgment [2014] JPL 447."

Environmental Principles

The environmental principles are dealt with in cll.1–4 of the Draft Bill. Clause 2 offers an exhaustive[56] definition of environmental principles as being: the precautionary principle; the prevention principle; the rectification at source principle; the polluter pays principle; the principle of sustainable development; the principle that environmental protection must be integrated into the definition and implementation of policies and activities; the principle of public access to environmental information; the principle of public participation in environmental decision-making; and the principle of access to justice in relation to environmental matters.

Clause 1 of the Draft Bill places an obligation on the Secretary of State to prepare a policy statement of environmental principles. This must explain how they are to be interpreted and applied proportionately by Ministers in making, developing, and revising policies. It must also explain how Ministers are to take other considerations into account relevant to their policies (cll.1(1)–(3)). Policies excluded from the ambit of the statement are those relating to:

(1) the armed forces, defence or national security;
(2) taxation, spending, or the allocation of resources within government; and
(3) any other matter specified in regulations made by the Secretary of State.

Once the policy statement has been published, cl.4 of the Draft Bill provides that a Minister must have regard to that statement when making, developing, or revising policies dealt with by the statement. Nothing, however, requires a Minister to take (or refrain from taking) action or inaction, if that action or inaction would have no significant environmental benefit, or would be in any other way disproportionate to the environmental benefit.

Environmental Improvement Plans

Clauses 5–10 of the Draft Bill impose duties on the Secretary of State for the purpose of seeking to improve the natural environment. By cl.6, the Secretary of State must prepare a plan, covering not less than 15 years, setting out among other things the steps the Government intends to take to improve the natural environment in that period. By cl.7, the Secretary of State must then make arrangements for monitoring whether the natural environment is improving in accordance with the current plan. By cl.8, it must then

[56] It states that "'environmental principles' *means*", rather than "includes".

prepare annual reports on the implementation of the current improvement plan, which must be both laid before parliament and published. Clause 9 provides for the current plan to be reviewed, cl.10 for the plans to be renewed.

The OEP

The proposals for the OEP are set out in cll.11–29 of the Draft Bill. It is proposed to confer the following functions on the OEP:

(1) monitoring the progress in improving the natural environment in accordance with environmental improvement plans (cl.14);
(2) monitoring the implementation of environmental law (cl.15);
(3) advising Ministers on proposed changes to environmental law if requested (cl.16); and
(4) monitoring and enforcing public authorities' compliance with environmental law (cll.17–29).

With regard to the fourth function, under the current proposals:

(1) a public authority's failure to comply with environmental law is defined as meaning "unlawfully failing to take proper account of environmental law when exercising its functions" and "unlawfully exercising, or failing to exercise, any function it has under environmental law" (cl.17). This is wide enough to include issues in planning cases, especially given the *Venn* approach to planning and environmental law;
(2) there is provision for complaints to be made directly to the OEP, provided that the complainant is not one whose functions include functions of a public nature, and the complainant has exhausted any existing complaints procedure of the impugned public authority (cll.18–20);
(3) thereafter, there is a three-stage process for the OEP to deal with breaches of environmental law, which echoes the pre-litigation and litigation phases of EU infractions:
    (a) the OEP may give an "information notice" to a public authority if it has reasonable grounds for suspecting that public authority has failed to comply with environmental law. This will describe the alleged failure, request further information, and require a written response within at least two months, if not longer (cl.22);
    (b) if the OEP is satisfied on the balance of probabilities that a public authority has failed to comply with environmental law, and it considers that failure serious, it may issue a "decision notice" setting out the failure and the steps the OEP thinks the public authority should take. The decision notice is not binding on the public authority though it must provide a written response, again within a two-month period, if not longer (cl.23):

        "(a) whether the recipient agrees that the failure described in the notice occurred,
        (b) whether the recipient intends to take the steps set out in the notice, and
        (c) what other steps (if any) the recipient intends to take in relation to the failure described in the notice."

    (c) curiously, although the Draft Bill is clear that the OEP's decision notice is not binding, under cl.25 the OEP may make an application for judicial review to the appropriate courts of the various jurisdictions within the UK:

> "(1) The OEP may make a review application in relation to conduct described in a decision notice given to a public authority as a failure of the authority to comply with environmental law.
>
> (2) The OEP may make a review application in relation to conduct of a public authority occurring after a decision notice was given to the authority that is similar, or is related, to conduct that was described in the notice as a failure of the authority to comply with environmental law."

(d) this application must be made within three months of the day the public authority was required to respond to the decision notice (cl.25);

(e) whilst the OEP is deemed to have sufficient interest for judicial review purposes, cl.25 excludes or modifies a number of significant JR provisions:

> "(6) Section 31(2A), (3C) and (3D) of the Senior Courts Act 1981 (High Court to refuse to grant leave or relief where the outcome for the applicant not substantially different) does not apply to a review application under subsection (1) or (2) in England and Wales.
>
> (7) A review application under subsection (1) must be made before the end of the three month period beginning with the day by which the public authority was required to respond to the decision notice (see section 23(3)) (and this time limit applies instead of any other time limit that would otherwise apply).
>
> (8) Section 31(6) of the Senior Courts Act 1981 (power of High Court to refuse leave or relief for undue delay) does not apply to a review application under subsection (1) in England and Wales if the application is made within the time limit in subsection (7)."

Accordingly, even though a planning JR or s.288 challenge has to be brought in six weeks from the decision, the OEP's review power gives it three months. It does not appear to engage the preclusive provisions such as are found for s.288 challenges. There is no power to refuse relief/leave for undue delay and the provisions allowing the refusal of relief/leave where the outcome would not be different are excluded. The provisions, however, do not refer to the courts' inherent power to refuse relief if the error would not have made a difference to the decision.

As at 25 April 2019, the Secretary of State suggested the OEP would have a staff of between 60 and 120.[57]

Response to the Draft Bill

The Draft Bill has since been subject to pre-legislative Scrutiny by the House of Commons Environmental Audit Committee,[58] and the Environment, Food and Rural Affairs Committee,[59] both of which received oral and written evidence from a large number of key policy stakeholders. Significant concerns have been expressed about the Draft Bill in its current form. At the time of writing, there has been no amended bill

[57] *Scrutiny of the Draft Environment (Principles and Governance) Bill: Eighteenth Report of Session 2017–2019* (HC 1951), para.80.
[58] *Scrutiny of the Draft Environment (Principles and Governance) Bill: Eighteenth Report of Session 2017–2019* (HC 1951).
[59] *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893).

put before Parliament. There is an Environment Bill Summer Policy Statement (23 July 2019),[60] but this presents little additional concrete information on part 1 of the Draft Bill. It does refer to additional legislative intentions, but as those are likely to feature in part 2 of a larger draft environment bill, they are dealt with below, in the "future trends" section.

Current issues

Environmental Principles A number of issues have been raised regarding the Draft Bill's current approach to environmental principles. First, it differs from the current approach taken in the EU, as:

(1) there is no explicit objective of a "high level of protection", unlike in art.191(2) of the TFEU;[61] and

(2) a government policy statement on principles, which only directly affects the actions of Ministers, does not have the same legal effect as enshrining principles in constitutional documents such as the TFEU. The policy document will not bind all public authorities, can be politically varied by the Secretary of State when convenient,[62] and does not provide interpretative guidance to the courts.

Even without comparison to the position in the EU, there are concerns that the proposals do not go far enough in providing for environmental protection:

(1) there have been concerns that the principles do not go far enough. Some giving evidence to the House of Commons, for example, would like to see a further principle governing the prudent use of natural resources, while others argued for an "innovation principle" to help counter the effect of the precautionary principle;[63]

(2) an obligation on Ministers to "have regard" to the policy statement, does not impose a requirement to attach any weight to that statement. It is not, for example, an obligation to "act in accordance with" the principles and policy statement;[64]

(3) cl.4(2), allowing Ministers not to consider environmental principles where the action would have no significant environmental benefit, or would be disproportionate to the environmental benefit, provides Ministers with significant discretion not to take action. The proportionality aspect, in particular, would excuse Ministers from taking action where action might be most needed (where it would come with considerable cost or systemic change);[65] and

(4) the exceptions for defence, taxation, and any other matter specified by the Minister in regulations is extremely broad. Defence goes beyond, some argue, the current position where the Ministry of Defence is able to comply with most environmental laws without any national security issues. Taxation is an important tool having direct and indirect impacts on the environment. The discretion to add further exclusions is, some felt, open to potential abuse by future environment secretaries.[66]

[60] Department for Environment, Food & Rural Affairs *Environment Bill summer policy statement: July 2019* (23 July 2019)*www.gov.uk/government /publications/draft-environment-principles-and-governance-bill-2018/environment-bill-summer-policy-statement-july-2019* ("the Summer Policy Statement").

[61] *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893), para.14.

[62] *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893), paras 16–23.

[63] *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893), para.15.

[64] *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893), paras 27–30.

[65] *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893), paras 31-33.

[66] *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893), paras 37-41.

The OEP A number of concerns have also been raised regarding the OEP and its powers/remedies.

First, there are concerns regarding the extent of government control over the OEP, particularly through its appointment and funding structure.[67]

Second, issues have been raised over the scope and emphasis of the matters within the OEP's role:

(1) some, such as Professor Liz Fisher, have argued that the obligations to monitor and report on the environmental improvement plans are greater than those to monitor and report on environmental law;[68]

(2) there are also issues with the definitions of "natural environment" and "environmental law" in cll.30–31. Both greenhouse gas emissions and planning law appear to be highly environmentally relevant, but both (certainly in the former case, and potentially in the latter) lie outside the OEP's remit;[69]

(3) others raise concerns over what it means for a public authority to have "failed to comply with environmental law". Arguably, the use of JR will focus on administrative compliance in the *Wednesbury* sense, rather than substantive compliance with environmental outcomes. This would be a change from the approach of the Commission and the CJEU which, as noted above, is more substantive in its outlook and can undertake a complex evidential analysis;[70] and

(4) moreover, there are concerns that, unlike the Commission's procedure, the current approach makes individual public authorities accountable, where often environmental issues require a joined-up approach from multiple branches of government.[71] Similarly, arguably it should not be for individual complainants to identify which public body is responsible for an environmental harm. Nor should complainants have to indicate, in their complaint, that a breach is serious.[72]

Third, in addition to the scope of the OEP's role, there are potentially major issues with the mechanics of enforcement including the proposed cl.25 form of review:

(1) arguably JR is a poor fit in these circumstances, since:

  (a) it appears the JR would be focusing on the earlier decision of the public body, rather than its failure to abide by the non-binding decision notice. This power would, it has been argued, be weak, particularly where JR often involves being relatively deferential to complex evidential questions;[73]

  (b) notwithstanding that s.31(6) of the Senior Courts Act 1981 (the power of the high Court to refuse relief or leave for undue delay) is disapplied, concerns have been expressed that a JR could be bought significantly later than the matter of the six weeks usually imposed in planning cases. The removal of the application of s.31(6) appears to preclude the ability of those affected by a JR many months or even years after the decision to raise delay or prejudice e.g. if the statutory JR challenges a permission where the development has been commenced or even completed. The latter is not permitted even in the case of modification or revocation under the Town

[67] *Scrutiny of the Draft Environment (Principles and Governance) Bill: Eighteenth Report of Session 2017–2019* (HC 1951), paras 62-80. Note, though, that Michael Gove when Secretary of State said that he would reflect on the idea of requiring the chair of the OEP to be approved by all devolved administrations: Official Report of the Environment, Climate Change and Land Reform Committee of the Scottish Parliament, col.16, n.7.

[68] *Scrutiny of the Draft Environment (Principles and Governance) Bill: Eighteenth Report of Session 2017–2019* (HC 1951), paras 108–109.

[69] *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893), paras 90–100. Although note that planning law is a suggestion in the Explanatory Notes, rather than the Draft Bill.

[70] *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893), paras 116–117 and 133–137.

[71] *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893), para.118.

[72] *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893), para.123–128.

[73] *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893), para.133–137.

and Country Planning Act 1990 ("TCPA 1990"); the powers to modify or revoke are excluded after the development has been completed then. See s.97(3) and s.100(1) of the TCPA 1990. The proposed form of remedy might well have consequential effects, particularly in planning, where parties need to be able to contract and proceed in reliance on granted planning permissions and the risk of OEP action may impact on confidence or funding;

(2) the enforcement procedures themselves are slow, with two-month periods for each of the notices, in addition to requiring public complainants to go through the relevant public body's complaints procedure. These are bound, in any event, to extend any review remedy to a period long after the normal challenge periods have expired given the other process requirements. Some environmental failings, however, may require urgent action. Alternatives have been suggested, such as a power to bring JR at the start of the process, or an additional power to intervene in environmental JR undertaken by other parties;[74] and

(3) furthermore, given the almost inevitable delays, the Court may consider itself constrained as a matter of practicality when considering what remedy to provide. In planning in particular, this may raise issues regarding whether it is appropriate for a court to quash a planning permission, wrongly granted, if multiple parties have proceeded in reliance upon it for many months. In any event, until the procedure has bedded in, it seems likely to create uncertainty for developers and investors if the lawfulness of a major development is put in doubt due to an OEP investigation notwithstanding the protections of the usual 6-week challenge period.

Finally, if the UK leaves the EU on 31 October with no deal, there will be a period where there is no Commission oversight, but the OEP may not be functional. Current suggestions are that the OEP may be able to receive delayed reports from during that period,[75] or receive reports during the period so that the OEP can prioritise matters once it is operational, but that will not be able to prevent an environmental harm occurring.[76]

Many of these concerns are raised in both the Fourteenth Report and the Eighteenth Report. The Eighteenth Report in particular contains the views of the Secretary of State when the Environmental Audit Committee raised concerns with him. When giving evidence to the Scottish Parliament's Environment, Climate Change and Land Reform Committee's session on EU Exit and the Environment on 15 May 2019,[77] Mr Gove said:

> "We have published draft clauses of our environment bill that deal with principles and governance, which have been subject to pre- legislative scrutiny by two committees of the House of Commons, on which there are Scottish MPs. We have had feedback on the draft clauses and a number of points were raised about the way in which we might improve the operation of the office for environmental protection, and we are open minded in considering how we might respond.
>
> ….
>
> We have been clear that the office for environmental protection will be an arm's-length body that must be fully independent. We wanted to make sure that the appointment of the chair is subject to pre-appointment hearings, so that the members of the House of Commons have absolute confidence

[74] *Pre-legislative scrutiny of the Draft Environment (Principles and Governance) Bill: Fourteenth Report of Session 2017–19* (HC 1893), paras 138–140.

[75] Department for Environment, Food & Rural Affairs *Draft Environment (Principles and Governance) Bill 2018 policy paper* (23 July 2019)*www.gov.uk/government/publications/draft-environment-principles-and-governance-bill-2018/environment-bill-policy-paper* ("the Draft Bill Policy Paper").

[76] *Scrutiny of the Draft Environment (Principles and Governance) Bill: Eighteenth Report of Session 2017–2019* (HC 1951), paras 186–188.

[77] Official Report of the Environment, Climate Change and Land Reform Committee of the Scottish Parliament, cols 12–14.

in the politics and independence of that individual. The chair will appoint the chief executive and will be responsible for the day-to-day management of the organisation.

We also wanted to ensure that the body has sufficient funding to be able to discharge its functions without feeling that it is in any way constrained. We are publishing guidance to give further effect to that.

More broadly, in relation to fines—this is an open question, but it is a legitimate area of debate—the infraction proceedings that can be brought against members of the European Union have had an effect in maintaining a high level of environmental protection. I do not think that anyone denies that, but it involves a supranational fining of national Governments for their failure to adhere to the rules. If we had fines that were applied within a nation or state, what would happen to those fines? For example, we could have a situation in which my department or the Ministry of Defence was found not to have lived up to its obligations and a fine was imposed. The money would go to the Treasury, so we would in effect be shifting money between Government accounts.

There are others who say that we could have a system of fines whereby the money that comes from a particular Government department goes into a fund for environmental improvement. These are open questions. It is also the case that we could force compliance with the rules without necessarily having fines. We are exploring whether there should be a new system of environmental law tribunals, not to mirror but to emulate some of the good work that immigration and employment tribunals do, by developing a body of expertise in the legal profession that ensures that we have rapid adherence to regulations and laws that guarantee environmental protection. Ultimately, it might be that the High Court could impose a requirement on the Government to change its ways, and if that Government—whether it is the UK Government or any other—refused to comply, the relevant minister or cabinet secretary would be in breach of the law, with all the consequences that follow."

Future trends There are three broad aspects to future trends in environmental law post Brexit, particularly in relation to planning law: how the courts will interpret existing and future legislation (absent further legislative developments), what developments may occur and the potential effect of the OEP, added to which are existing important policy initiatives such as the recent drive to zero emissions by 2050 to respond to climate change.

Development of UK law First, and with regard to how domestic jurisprudence will develop, the combined effect of the Withdrawal Act, the various regulations, and the Draft Bill (if enacted in its current form), do not dramatically alter the environmental law and planning framework in the immediate term. For pre-exit day EU-law matters translated into UK law:

(1) with regard to unmodified matters, the Withdrawal Act effectively provides for these to continue being interpreted as at exit day, subject presumably to the amendments made by the various EU Exit regulations, with the CJEU's judgments as they currently are remaining binding on all but the Supreme Court—even if the CJEU then alters its jurisprudential course, though this may be something to which the national courts may have regard. The interpretative weight of the environmental principles as they take effect in EU law, and recent developments in the EU and CJEU to environmental regulation will therefore remain of significant importance in UK jurisprudence, unless and until the national legislation is modified or the Supreme Court determines to depart from CJEU decisions;[78]

[78] There are signs that even pre-Brexit there were issues on which the Supreme Court took a different view to the CJEU in full knowledge of the CJEU's approach: see e.g. Lord Neuberger and Lord Mance in the *HS2* case (*R. (on the application of Buckinghamshire CC) v Secretary of State for Transport* [2014] 1 W.L.R. 324) at [175]–[189].

(2) where there are modifications, however, there is the potential for divergence from the EU's approach. Even where the modifications are minor, and are still consistent with having regard to EU law or EU actions, the possibility of a divergence in the interpretative approach of UK and EU judges is a real one, as exemplified by differences over screening out of appropriate assessments where the UK courts combined a principled and pragmatic approach in contrast to the policy-driven approach of the CJEU. Any modifications of the law following Brexit may provide an opportunity for those divisions to become more pronounced; and

(3) the approach of the national courts, which is to treat infraction proceedings as comparable to judicial review rather than the more intensive approach to scrutiny exemplified in some recent CJEU decisions (see comments above), will be set into legislative form in the terms on which the OEP can seek review from the UK courts under the Draft Bill.

For post-exit day matters, the scope for divergence is broader:

(1) with regard to the interpretation of any post-exit day enactment or rule of law, the Draft Bill does not require or empower the courts to take account of environmental principles, and with the Withdrawal Act disapplying the principle of supremacy, the interpretation of environmental statutes or regulations will commence in the same way as any other exercise in statutory interpretation. However, unlike the current position where judgments of the CJEU are binding, any post-Brexit judgments (or other relevant acts of another EU entity, or the EU, subject to ss.6(3)–(6)) may be had regard to under s.6(2) of the Withdrawal Act (see above), which leaves considerable scope to the UK courts to take them into account or not, as they consider appropriate; and

(2) in terms of the standard and ground of review of government action, the courts are likely to apply traditional public law grounds and intensity of review, and not engage in the broader and more intensive approach taken by the CJEU in certain cases. The same appears to be likely with respect to reviews brought by the OEP under cl.25 of the Draft Bill.

The second issue is what further political and legislative developments will occur. Since the end of 2017, the Government has published a Clean Growth Strategy,[79] Industrial Strategy,[80] Clean Air Strategy,[81] Waste and Resources Strategy,[82] and an overarching *25 Year Plan to Improve the Environment*.[83] This last document sets out, in broad terms, policies for the next 25 years covering: land use and management; nature recovery; connecting people with the environment; increasing resource efficiency and reducing pollution and waste; securing clean, productive and biologically diverse oceans; and protecting and improving the global environment. This is intended to be a "living blueprint", to be reported on annually[84] and refreshed "periodically". It is intended to guide policy-making in the environmental sphere. There

[79] HM Government *The Clean Growth Strategy: Leading the way to a low carbon future* (October 2017), *www.gov.uk/government/publications/clean-growth-strategy*.

[80] HM Government *Industrial Strategy: Building a Britain fit for the future* (2017)*www.gov.uk/government/publications/industrial-strategy-building-a-britain-fit-for-the-future*.

[81] Department for Environment, Food & Rural Affairs *Clean Air Strategy 2019* (2019)*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770715/clean-air-strategy-2019.pdf?_ga=2.88851422.490355455.1566407665-984287152.1544444295*.

[82] HM Government *Our waste, our resources: a strategy for England* (2018)*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765914/resources-waste-strategy-dec-2018.pdf*.

[83] HM Government *A Green Future: Our 25 Year Plan to Improve the Environment* (2018)*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/693158/25-year-environment-plan.pdf?_ga=2.11783921.490355455.1566407665-984287152.1544444295*. For a summary of the targets contained in the 25-year plan, see Department for Environment, Food & Rural Affairs *At a glance: summary of targets in our 25 year environment plan* (16 May 2019)*www.gov.uk/government/publications/25-year-environment-plan/25-year-environment-plan-our-targets-at-a-glance#enhancing-beauty-heritage-and-engagement-with-the-natural-environment*.

[84] The first review was published on 16 May 2019. See HM Government *25 Year Environment Plan Progress Report January 2018 to March 2019* (2019)*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803266/25yep-progress-report-2019-corrected.pdf*.

has also been a recent policy paper[85] and policy statement[86] on the Draft Bill (23 July 2019) outlining the Government's priorities for part 2 of the Draft Bill, and various committee appearances from the Secretary of State for the Environment[87] to explain the government's position.

The following themes emerge:

(1) the Government's current position is that it will not weaken the UK's environmental standards,[88] whether in pursuit of a trade deal or otherwise.[89] In a recent blog post, Defra stated:

> "We have been clear on many occasions that we will not allow environmental standards to decrease when we leave the EU. What's more, leaving gives us a unique opportunity to enhance our standards even further. As a first step, this means transposing all existing EU environmental laws into UK law.
>
> We want to improve and enhance existing protections after 31 October 2019, whether we leave with a deal or not."

This mirrors the intention behind the Withdrawal Act and various sets of amending regulations. Given this position, and the numerous post EU-exit draws on legislative time, it does not, at the time of writing, appear as if there will be any significant immediate drive toward deregulation;

(2) the draft environment bill, including both the current Draft Bill and the proposed second part, is expected to be introduced in the second parliamentary session of 2019. This appears likely to bring forward a number of specific legislative powers and policies in four key areas: air, wildlife, water, and waste.[90] Particular points of note are:

(a) new legal measures to give effect to points contained in the Clean Air Strategy. The Government's 23 July 2019 policy statement refers to new powers allowing it to compel manufacturers to recall vehicles and heavy machinery which do not meet emission standards.[91] There are also references, in that policy statement, to a new legal framework better enabling local action on air pollution;

(b) new legal measures designed to enhance the wildlife and nature of the UK, including a new mandatory requirement for development to provide a biodiversity net gain (at present, a 10% increase in habitat value for wildlife compared with a pre-development baseline); a new statutory requirement for Local Nature Recovery Strategies, mapping important habitats and opportunities for the local environment to be improved; a new duty on public authorities to consult local communities before felling street trees; additional legislation for the protection of natural habitats; and new legislation providing for the creation of conservation covenants – voluntary agreements between landowners and others to help deliver local conservation;[92]

(c) with regard to waste, a number of new legislative measures aimed at moving from a linear to a circular economy. Some of those mooted do not at first glance appear relevant to planning directly (they concern, for example, increased producer

[85] Draft Bill Policy Paper.
[86] Summer Policy Statement.
[87] See, e.g. Report of the Environment, Climate Chance and Land Reform Committee of the Scottish Parliament on 15 May 2019.
[88] Department for Environment, Food & Rural Affairs *Our commitment to delivering a green Brexit* (14 August 2019)*https://deframedia.blog.gov.uk/2019/08/14/our-commitment-to-delivering-a-green-brexit/*.
[89] Department for Environment, Food & Rural Affairs *25 Year Environment Plan progress report published and Chlorinated chicken* (16 May 2019)*https://deframedia.blog.gov.uk/2019/05/16/25-year-environment-plan-progress-report-published-and-chlorinated-chicken/*.
[90] Draft Bill Policy Paper.
[91] Summer Policy Statement.
[92] Summer Policy Statement.

responsibility for packaging, resource-efficiency standards for products, powers allowing deposit-return schemes),[93] but greater moves to a circular economy are likely to have planning implications certainly in the waste sphere;

(d) with regard to water, the draft bill will include measures aimed at better regulation, strengthening Ofwat's powers to update water company licenses, and creating powers to direct water companies to work together on how to meet current and future demand.[94] This last point, in particular, may lead to different planning strategies being employed by co-operating water companies;

(e) There has been some suggestion that the *25 Year Plan* will be placed on a statutory footing in part 2 of the larger draft environment bill,[95] though it is not clear whether this is as the first Environmental Improvement Plan (referred to in cll.6–10 of part 1 of the Draft Bill), or in addition to it.[96]

(3) an Agriculture Bill has been progressing through the House of Commons, which intends to reward farmers who provide the greatest environmental benefit (rather than those who manage the most land).[97] However, given the prorogation of Parliament, the fate of this bill is now uncertain;

(4) apart from new legal powers introduced in the second part of the draft bill, there are further indications of additional or tightened government guidance being issued in the planning context:

(a) with regard to air, the Clean Air Strategy anticipates new guidance being provided to local authorities explaining how cumulative impacts of nitrogen deposition on natural habitats should be mitigated and assessed through the planning system, and a tightening of the PPG on air quality to help planning decisions drive improvements.[98] There is also the suggestion of revised Building Regulations standards for ventilation in homes, and a potential tightening of emissions standards from plants in the 500kW to 1MW thermal input range;[99]

(b) with regard to waste, the Waste Strategy, *Our Waste, Our Resources: A Strategy for England* (2018), outlines how Government wishes to move toward a circular economy. It states that the Government will work to align the National Planning Policy for Waste and PPG with the Resource and Waste strategy, and continue to maintain Building Regulations guidance to support its objectives;[100]

(c) the Government is in the process of creating a National Policy Statement for Water Resources Infrastructure. Consultation on a draft statement closed on 31 January

[93] Draft Bill Policy Paper, n.85.

[94] Summer Policy Statement.

[95] House of Commons Environmental Audit Committee *Oral evidence: Draft Environment (Principles and Governance) Bill, HC 1951* (Wednesday 2 March 2019), Question 158: *http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/draft-environment-principles-and-governance-bill/oral/98530.html*.

[96] Mr Goldsmith's question and Mr Gove's answer in the Committee referenced above imply a separate footing, but the Draft Bill Policy Paper appears to elide the two.

[97] *Press release: Landmark Agriculture Bill to deliver a Green Brexit* (12 September 2019) *www.gov.uk/government/news/landmark-agriculture-bill-to-deliver-a-green-brexit*.

[98] Department for Environment, Food & Rural Affairs *Clean Air Strategy 2019* (2019)*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770715/clean-air-strategy-2019.pdf?_ga=2.88851422.490355455.1566407665-984287152.1544444295.*, pp.8 and 82.

[99] Department for Environment, Food & Rural Affairs *Clean Air Strategy 2019* (2019)*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770715/clean-air-strategy-2019.pdf?_ga=2.88851422.490355455.1566407665-984287152.1544444295.*, p. 10.

[100] HM Government *Our waste, our resources: a strategy for England* (2018)*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765914/resources-waste-strategy-dec-2018.pdf.,* ss.3.1.3 and 3.2.1.

2019, and the Government aims to lay the final National Policy Statement in Autumn 2019;[101]

(5) There are also indications of what actions may yet be taken in the longer term:

(a) the *25 Year Plan* suggests that the "environmental net gain" obligation, to be embedded in relation to biodiversity, may be expanded to include other natural capital benefits;[102] and

(b) the *25 Year Plan* suggests the creation of natural capital plans – a process allowing all interested parties to develop environmental improvement plans for their area.[103] These are currently suffering from minor delays,[104] but appear likely to continue to be developed.

Climate change On 27 June this year, the UK set a new target to achieve 100% reduction on 1990 levels of CO_2 by 2050. In the Climate Change Act 2008, Parliament placed a duty on the Secretary of State to ensure a reduction of 80% in the same timeframe. In 2016, the UK signed the UN's Paris Agreement, a key aim of which is to hold the increase in global average temperature well below 2 C and pursue efforts to limit the temperature increase to 1.5 C above pre-industrial levels. In October 2018, the Intergovernmental Panel on Climate Change ("the IPCC") published a Special Report which found that limiting global warming to 1.5 C was possible but would require rapid changes in all aspects of society, including a need to reach net zero by roughly 2050. Following this report, the Minister for Energy and Clean Growth, in a letter co-signed by the Scottish and Welsh Cabinet Secretaries, wrote to the Committee on Climate Change ("the CCC") to ask for advice on a date by which the UK should achieve a net zero greenhouse emissions target.

On 2 May 2019, the CCC published its Report *Net Zero: The UK's Contribution to stopping global warming*[105] (together with a technical report and supporting data). The CCC Report:

(1) stated that the UK should "set and vigorously pursue an ambitious target to reduce greenhouse gas emissions (GHGs) to 'net-zero' by 2050, ending the UK's contribution to global warming within 30 years";[106]

(2) noted that this would require the introduction of clear, stable, and well-designed policies to reduce emissions further, across the economy as a whole and across all areas of government, central and local. "Current policy is insufficient for even the existing targets." While the policy foundations were currently in place, the targets needed to be "a major ramp-up in policy effort is now required"[107] and:[108]

> "Challenges that have not yet been confronted must now be addressed by government. Industry must be largely decarbonised, heavy goods vehicles must also switch to low-carbon fuel sources, emissions from international aviation and shipping cannot be ignored, and a fifth of our agricultural land must shift to alternative uses that support emissions reduction: afforestation, biomass production and peatland restoration. Where

[101] Department for Environment, Food & Rural Affairs *Consultation on the draft National Policy Statement for Water Resources Infrastructure* (2019)*https://consult.defra.gov.uk/water/draft-national-policy-statement/*.

[102] *The 25 Year Plan*, p.34.

[103] *The 25 Year Plan*, pp.139–140.

[104] *The 25 Year Plan Progress Report*, p.18.

[105] Committee on Climate Change *Net Zero – The UK's contribution to stopping global warming* (May 2019)*https://www.theccc.org.uk/publication/net-zero-the-uks-contribution-to-stopping-global-warming/*.

[106] Committee on Climate Change *Net Zero – The UK's contribution to stopping global warming* (May 2019)*https://www.theccc.org.uk/publication/net-zero-the-uks-contribution-to-stopping-global-warming/*, Executive Summary, p.11.

[107] Committee on Climate Change *Net Zero – The UK's contribution to stopping global warming* (May 2019)*https://www.theccc.org.uk/publication/net-zero-the-uks-contribution-to-stopping-global-warming/*, Executive Summary, p.11.

[108] Committee on Climate Change *Net Zero – The UK's contribution to stopping global warming* (May 2019)*https://www.theccc.org.uk/publication/net-zero-the-uks-contribution-to-stopping-global-warming/*, Executive Summary, p.12.

there are remaining emissions these must be fully offset by removing CO_2 from the atmosphere and permanently sequestering it, for example by using sustainable bioenergy in combination with CCS.

- Clear leadership is needed, right across Government, with delivery in partnership with businesses and communities. Emissions reduction cannot be left to the energy and environment departments or to the Treasury. It must be vital to the whole of government and to every level of government in the UK. Policies must be fully funded and implemented coherently across all sectors of the economy to drive the necessary innovation, market development and consumer take-up of low-carbon technologies, and to positively influence societal change."

(3) The importance of action at all levels, and not merely by HM Treasury was emphasised:[109]

"The Governments of Scotland, Wales and Northern Ireland must make full use of the policy levers available to them and work with the UK government closely to ensure delivery in those areas that are not devolved. This means making particular use of devolved policy levers on the demand side even where supply-side policies are reserved to the UK government (e.g. encouraging walking and cycling), providing 'soft' support (e.g. advice on buildings retrofits) to support UK government policies, and use of planning and procurement powers to drive decarbonisation (see s.5).

- Cities and local authorities are well placed to understand the needs and opportunities in their local area, although there are questions over well [sic] they have sufficient resources to contribute strongly to reducing emissions. They have important roles on transport planning, including providing high-quality infrastructure for walking and cycling, provision of charging infrastructure for electric vehicles, and ensuring that new housing developments are designed for access to public transport. They can improve health outcomes for people who live and work in the area by implementing clean-air zones that discourage use of polluting vehicles and other technologies.
- Regulators will also need to help drive the transition to net-zero emissions in a number of areas."

(4) many of the issues considered by the Report do not directly relate to planning but may ultimately involve new planning regulation or policy. For example, in the requirement for low carbon homes (including the adaptation of heritage buildings for greater energy efficiency) and low carbon heating. The accompanying Technical Report notes at p.102:[110]

"The Government must implement policies to deliver the commitments announced under the Future Homes standard - namely to ensure new build homes have low-carbon heating and world-leading levels of energy efficiency by 2025, alongside ambitious standards for new non-residential buildings. In addition to being low-carbon, these new buildings must be energy and water efficient and climate resilient.

New build standards and a strategy for decarbonised heat must be accompanied by ambitious product standards for lighting and appliances, which drive uptake of the most efficient products.

[109] Committee on Climate Change *Net Zero – The UK's contribution to stopping global warming* (May 2019)*https://www.theccc.org.uk/publication/net-zero-the-uks-contribution-to-stopping-global-warming/*, p.196

[110] See also Main Report, Committee on Climate Change *Net Zero – The UK's contribution to stopping global warming* (May 2019)*https://www.theccc.org.uk/publication/net-zero-the-uks-contribution-to-stopping-global-warming/*, p.201.

> Realising deep emissions reductions in buildings, will require co-ordination and co-operation across all levels of Government, industry, businesses and householders. Policy development by central Government and Devolved Administrations must be implemented effectively at local level, with evolution in the planning system to keep pace with Government ambitions. Cooperation from industry is central, driving down costs through innovation and delivering solutions in homes and businesses."

(5) noted the role of the planning system both as a limiting factor on decarbonisation (through, e.g., the time required to plan and deliver infrastructure supporting low carbon technology), and as one of the policy levers to be used by devolved administrations and local and city governments to actively progress a move to a decarbonised economy. In the latter instance, the report particularly noted the ability of the planning system to implement clean air zones, encourage sustainable modes of transport including reducing HGV emissions to zero, ensure readiness for electric vehicle charging points in new developments, and encourage low-cost onshore wind. The planning system, it was suggested, would have to evolve to keep pace with government ambitions."

On 15 May 2019 in evidence to the Scottish Parliament's Environment, Climate Change and Land Reform Committee's session on EU Exit and the Environment,[111] Michael Gove MP, then Secretary of State for the Environment, Food and Rural Affairs, acknowledged the challenge:

> "A range of policies need to be reviewed, including in areas such as how we build our homes and where we build them, land use, energy generation and how we decarbonise particularly energy-intensive parts of the economy, such as steel and concrete production. We also need to look at how we design our transport system and at how we can get more investment in science and innovation. Climate change is an issue for every UK Government department, from the Department for Education to the Department of Health and Social Care, the Department for Transport and the Treasury. No part of Government is unaffected by the challenge of climate change and the need to respond."

On 27 June 2019, the Climate Change Act 2008 (2050 Target Amendment) Order 2019[112] came into force, amending the target set out in s.1 of the Climate Change Act 2008 from 80% to 100%, following the advice of the CCC.

The need to significant change at all levels was emphasised by Sir Ian Boyd, on his retirement as Defra Chief Scientist, in August 2019.[113] He said, amongst other things:

> "Emissions are a symptom of rampant resource consumption. If we do not get resource consumption under control, we will not get emissions under control. That is absolutely clear."
>
> "We should not be complacent about the challenge that sits in the net-zero objective. That challenge is massive …"
>
> "It requires massive change in government attitudes and policy in order to be able to make sure that is implemented – and at the moment I'm not sure they're being fully scoped …"

Powers exist in the Civil Contingencies Act 2004 both for contingency planning or to declare emergencies (for a default period of 30 days) which appear to include some at least of the consequences of climate change.

[111] Official Report of the Environment, Climate Change and Land Reform Committee of the Scottish Parliament, col.17.
[112] SI 2019/1056.
[113] See e.g. *www.civilserviceworld.com/articles/news/government-wont-meet-net-zero-emissions-without-massive-change-warns-defra-chiefandwww.bbc.co.uk/news/science-environment-49499521*.

Contingency planning duties are placed on Category 1 and 2 Responders (see Sch.1 to the Act) which include local authorities (Part I para. 1) and to assess the risk of emergencies occurring. "Emergency" is defined for Part 1 purposes in terms wide enough to include at least some aspects of climate change as:

"(1) In this Part "emergency" means-
(a) an event or situation which threatens serious damage to human welfare in a place in the United Kingdom,
(b) an event or situation which threatens serious damage to the environment of a place in the United Kingdom, or
(c) war, or terrorism, which threatens serious damage to the security of the United Kingdom."

The duties under s.2(1) include (subject to the power of the Government to regulate or issue guidance):

"(a) from time to time assess the risk of an emergency occurring,
(b) from time to time assess the risk of an emergency making it necessary or expedient for the person or body to perform any of his or its functions,
(c) maintain plans for the purpose of ensuring, so far as is reasonably practicable, that if an emergency occurs the person or body is able to continue to perform his or its functions,
(d) maintain plans for the purpose of ensuring that if an emergency occurs or is likely to occur the person or body is able to perform his or its functions so far as necessary or desirable for the purpose of-
(i) preventing the emergency,
(ii) reducing, controlling or mitigating its effects, or
(iii) taking other action in connection with it,
(e) consider whether an assessment carried out under paragraph (a) or (b) makes it necessary or expedient for the person or body to add to or modify plans maintained under paragraph (c) or (d),"

Section 4 imposes duties to provide advice and assistance to the public and s.5 confers powers on ministers to direct Responders:

"to perform a function of that person or body for the purpose of–
(a) preventing the occurrence of an emergency,
(b) reducing, controlling or mitigating the effects of an emergency, or
(c) taking other action in connection with an emergency."

Some authorities have already declared climate change emergencies, which appears to trigger at least their duties to undertake contingency planning under Part 1 of the Act. Whether such declarations have any substantial effects remains to be seen.

Part 2 involves governmental declaration of emergencies. The effect of this is to confer power on Ministers under s.20, but not a duty, to make emergency regulations if s.21 is satisfied. The scope of such regulations includes (s.22(2)):

"(a) protecting human life, health or safety,
…
(c) protecting or restoring property,
(d) protecting or restoring a supply of money, food, water, energy or fuel,
…
(i) preventing, containing or reducing the contamination of land, water or air,

(j) preventing, reducing or mitigating the effects of disruption or destruction of plant life or animal life."

However, s.23(1) provides:

"(1) Emergency regulations may make provision only if and in so far as the person making the regulations is satisfied–

(a) that the provision is appropriate for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency in respect of which the regulations are made, and

(b) that the effect of the provision is in due proportion to that aspect or effect of the emergency …"

The Act defines "an emergency":

(1) by s.19 as:

"(1) In this Part 'emergency' means-

(a) an event or situation which threatens serious damage to human welfare in the United Kingdom or in a Part or region,

(b) an event or situation which threatens serious damage to the environment of the United Kingdom or of a Part or region, or

(c) war, or terrorism, which threatens serious damage to the security of the United Kingdom.

(2) For the purposes of subsection (1)(a) an event or situation threatens damage to human welfare only if it involves, causes or may cause–

(a) loss of human life,

(b) human illness or injury,

(c) homelessness,

(d) damage to property,

(e) disruption of a supply of money, food, water, energy or fuel,

(f) disruption of a system of communication,

(g) disruption of facilities for transport, or

(h) disruption of services relating to health.

(3) For the purposes of subsection (1)(b) an event or situation threatens damage to the environment only if it involves, causes or may cause-

(a) contamination of land, water or air with biological, chemical or radio-active matter, or

(b) disruption or destruction of plant life or animal life."

(2) Section 21 conditions include –

"(2) The first condition is that an emergency has occurred, is occurring or is about to occur.

(3) The second condition is that it is necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency.

(4) The third condition is that the need for provision referred to in subsection (3) is urgent.

(5) For the purpose of subsection (3) provision which is the same as an enactment ('the existing legislation') is necessary if, in particular–

(a) the existing legislation cannot be relied upon without the risk of serious delay,
(b) it is not possible without the risk of serious delay to ascertain whether the existing legislation can be relied upon, or
(c) the existing legislation might be insufficiently effective."

Other powers exist, e.g. to appoint Regional and Emergency Coordinators.

Accordingly, although a Parliamentary Motion on 1 May 2019 declared a climate emergency, it has no binding effect on the government and does not require it to take steps. It remains to be seen whether these powers may become relevant as the need to address climate change issues more radically increases and as the 2050 zero emissions target approaches.

Both the NPPF 2019 and PPG already require a proactive approach to be taken to climate change mitigation and adaptation, including (for example) incorporating the Government's national standards for building sustainability and zero carbon buildings. In light of the more ambitious target, it seems likely that local planning authorities will, in the short to medium term, have to revise upward any targets or requirements already incorporated in local plans, re-examine any local plans to ensure that any lacunae that exist regarding planning for climate change are closed off, and place a greater focus on "future-proofing" developments through not only requiring the implementation of low-carbon infrastructure, but by requiring developers to show their developments' resilience in the face of climate change. In the light of other national requirements, e.g. the intended net biodiversity benefit requirement to be implemented in the second part of the Draft Bill, it would be unsurprising if in due course national planning law and/or policy begins to devise and put into effect net greenhouse gas benefit requirements.

Post-Brexit environmental regulation The third main element that will affect post EU-exit environmental law is the OEP, and what effect it will have. Notwithstanding the fact that the extent of resources for the OEP are yet to be determined, and the issues raised with its current drafting, there are indications that the presence of the OEP will lead to beneficial environmental and regulatory outcomes, while not causing too much disruption to planning - assuming, contrary to the Explanatory Notes to the Draft Bill, that planning law will fall within the scope of its powers. In particular:

(1) currently, a large portion of infraction proceedings with the Commission settle. There is no reason, at present, to believe that the OEP will be less effective at securing settlement early in the enforcement process. That, however, is subject to the caveat that, as Professor Macrory noted earlier this year when delivering a speech to UKELA, the OEP's efficacy at securing pre-court compliance will largely depend on the trust and authority it engenders in the public bodies it regulates;
(2) assuming a staff of c.60–120, its focus would likely be on strategic litigation. Although there is a complaints function, it seems unlikely that the OEP will be able to investigate in depth every complaint referred to it. That suggests it might not be focusing individual planning matters, unless they are of strategic importance;
(3) There is likely to be a public benefit in having public bodies' actions checked by another public body, which can itself take account of specific scientific, environmental and legal expertise. Prior to litigation, the regulator and regulated can engage as equals. During litigation, notwithstanding the traditional deference to a decision maker found in JR a court *may* (and it cannot be put higher than that) gain a degree of comfort from the detailed evidence provided by the OEP. This is likely to be particularly important when the courts are required to monitor compliance with retained EU law. Professor Macrory, in the same speech to UKELA, took the view that the ClientEarth air pollution litigation might have been quicker

and more effectively resolved had a body like the OEP, which could identify clear steps to be undertaken, been involved.

Conclusion At present, environmental law is undergoing a period of change and faces difficult challenges, and not merely those created by Brexit. The UK appears set to leave the EU on 31 October 2019, which has underpinned much of the UK's environmental law through both promulgating specific laws that the UK has had to implement, and through monitoring and enforcing compliance with those laws. The effect of the Withdrawal Act is to carry over into national law much of the former EU law, while altering the mechanics of how it works, such that in the immediate EU-exit landscape, the UK has a functioning statute book. This has the effect of also incorporating the EU's pre-Brexit tightened approach to environmental regulation, at least in the short term.

Over the longer term, and with the enactment of the draft environment bill (both part 1, the current Draft Bill, and part 2) the UK looks set to maintain if not improve its high environmental standards, rather than undertake significant deregulation. Tied in with this is the challenges of climate change which is very likely to require more stringent planning policy and legislation in the short to medium term. Given the criticisms of the legal underpinning of the proposed new watchdog, the OEP, at present it is difficult to say what effect it will have, or what the final form of the legislative framework will be, but there is reason to be cautiously optimistic that, assuming a reasonable response to concerns expressed during consultation, by undertaking strategic litigation the OEP will help ensure compliance with environmental law, while not disrupting the planning law system too heavily.