



Francis Taylor Building

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## Quarterly Environmental Law Update

12 January 2022



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## COP26 and the Glasgow Climate Pact

Flora Curtis  
12 January 2022



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## COP26 Overview

- 26<sup>th</sup> Conference of the Parties to the UNFCCC
- Monitoring body of the UNFCCC
- Expectations were high for COP26: “code red for humanity”



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## What did the Parties achieve?

- The Glasgow Climate Pact
- Completion of the Paris Rulebook
- Other bilateral/multilateral agreements



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## The Glasgow Climate Pact

- Signed almost 24 hours after the COP was meant to end
- Key pledges to deliver on the Paris Agreement:
  - 1) Science, and urgency and the temperature goals
  - 2) Coal and Fossil Fuels
  - 3) NDCs
  - 4) Adaptation and Finance
  - 5) Loss and Damage



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## Science, and Urgency and the Temperature Goals

21. *Recognizes* that the impacts of climate change will be much lower at the temperature increase of 1.5 °C compared with 2 °C and *resolves* to pursue efforts to limit the temperature increase to 1.5 °C;

22. *Recognizes* that limiting global warming to 1.5 °C requires rapid, deep and sustained reductions in global greenhouse gas emissions, including reducing global carbon dioxide emissions by 45 per cent by 2030 relative to the 2010 level and to net zero around mid-century, as well as deep reductions in other greenhouse gases;

- Shift in focus: greater emphasis on 1.5°C.
- Welcomes the findings of the IPCC 6AR.



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## Nationally Determined Contributions

- Steps that Parties will take to reduce emissions and adapt to climate change.
- First NDCs communicated in 2021.
- Glasgow Climate Pact calls on parties to “*revisit and strengthen*” NDCs before COP27.



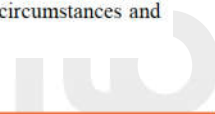
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## Coal and Fossil Fuels

- Original version (first draft):
  19. *Calls upon* Parties to accelerate the phasing out of coal and subsidies for fossil fuels;
- Final version:
  20. *Calls upon* Parties to accelerate the development, deployment and dissemination of technologies, and the adoption of policies, to transition towards low-emission energy systems, including by rapidly scaling up the deployment of clean power generation and energy efficiency measures, including accelerating efforts towards the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies, while providing targeted support to the poorest and most vulnerable in line with national circumstances and recognizing the need for support towards a just transition;



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## Adaptation and Finance

- Only half of the Parties to Paris have submitted adaptation communications.
- New financial pledges made
  - USD350m to the Adaptation Fund
  - USD100bn annually to assist developing countries
- Two-year Glasgow Sharm el-Sheikh Work Programme

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## Loss and Damage

- Recognised in the text of the Glasgow Pact.
- Agreement to fund the Santiago Network.
- No separate fund established.

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## Other Agreements

### Paris Rulebook

- Guidelines on implementation of Paris Agreement finalized.
- Article 6: carbon trading.
- Article 13: transparency and reporting.



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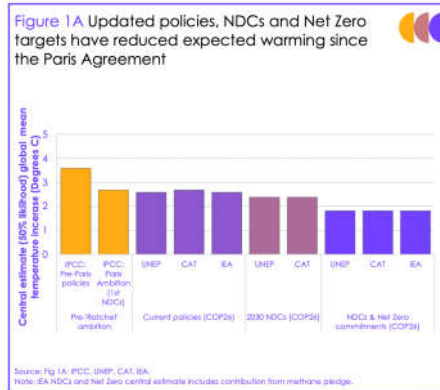
## Other Agreements

- Global Finance Alliance for Net Zero
- Methane Pledge
- Glasgow Declaration (deforestation)
- Ending finance for unabated coal power
- Zero emission vehicles
- Glasgow Breakthroughs
- US-China Joint Declaration



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## Successful or unsuccessful?



## Domestic Implications

- UK communicated one of the most ambitious NDCs
- Steps need to be taken, e.g.
  - Implementation of the Net Zero Strategy
  - Review of tax
  - Consider whether to strengthen NDC



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Thanks for watching

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## Quarterly Environmental Law Update: Climate change litigation update (Part 1)

Richard Honey QC

@RichardHoney  
January 2022



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## 1. *R (Elliott-Smith) v SoS BEIS* [2021] EWHC 1633 (Admin)

- Judicial review of the decision to implement the UK Emissions Trading Scheme as a replacement for the EU ETS
- Two grounds of challenge – application dismissed on both:
  - In approving the UK ETS with the Cap and Auction Reserve Price proposed, Ds failed to have regard to a material consideration: the imperatives of the Paris Agreement
  - UK ETS does not fulfil or serve the statutory purpose for establishing such schemes under s44 of CCA 2008 – power was exercised for an improper purpose



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### Ground One

- C argued that PA Article 2 and 4(1) provisions re urgency of action to limit GHG emissions had been left out of account
- Dove J held that, as the PA is an unincorporated international treaty, so long as the Government's interpretation was tenable, that should be followed – not for the Court to resolve a question of construction
- Dove J further held that the Government's interpretation was not only "tenable" but "entirely appropriate"
- Held that each D was fully aware of the PA and was taken into account in reaching the decisions



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## Ground Two

- C argued that the s44 power had been exercised for an improper purpose, as the cap was set above projected level of 'business as usual' emissions such that emissions would not be reduced
- Question of statutory interpretation – C argued that the wording must be interpreted to mean that an ETS had to achieve a reduction in GHG emissions
- Dove J held s44(2)(a) did not require that an ETS had to achieve a reduction in activities consisting of GHG emissions or causing or contributing such emissions: sufficient that the design limits or encourages the limitation of those activities

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## Ground Two

- Dove J held the decision was underpinned by an evidence base and modelling work which it would be neither appropriate nor possible for the Court to go behind
- Dove J held that the evidence showed that reduction of GHG emissions would be achieved in any event
- Held that the UK ETS fulfilled the statutory purpose in s44(2)(a) and would achieve that aim, so it fell within the scope of the statutory power

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## 2. *R (Plan B & Ors) v Prime Minister & Ors* [2021] EWHC 3469 (Admin)

- Renewed application for permission – refused by Bourne J
- Cs now seeking permission to appeal that refusal re HRA 1998
- Cs alleged Gov't action on climate change breached ss 13 and 58 of CCA 2008 and s6 of HRA 1998 re ECHR Articles 2, 8, and 14
- Four grounds: mitigation; adaptation; finance; loss & damage
- Cs sought to use compliance with the Paris Agreement as benchmark for compliance with ECHR Articles 2 and 8
- Bourne J held: court cannot determine whether UK has breached an unincorporated international treaty such as the PA

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## Alleged breaches of the CCA 2008

- Statutory duties are to prepare proposals and policies and to lay programmes before Parl't – not to achieve specific outcomes
- SoS had prepared proposals and policies and laid programmes before Parliament
- Disagreement with the merits of those proposals and policies did not give rise to an arguable claim of a breach of the duties
- Critical comments in reports by CCC did not give rise to an arguable claim
- Reports demonstrate that CCA 2008 is working as intended

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### ECHR Article 2 claim (and any Article 8 ECHR claim based on the physical/psychological effects of climate change)

- Bourne J said such a claim was undermined by the fact there was an administrative framework to deal with climate change – covered mitigation, adaptation and finance
- Lack of a provision to compensate people outside the UK for climate change loss and damage did not give rise to any arguable breach of a positive obligation under ECHR Articles 2 or 8
- Framework consists of high level economic and social measures involving complex and difficult judgements – wide margin of appreciation



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### Family life - ECHR Article 8 (and/or Article 14)

- Lack of evidence of a family life which fell within the scope of ECHR Article 8
- No evidence of that family life being carried on within the UK
- Also no exceptional circumstances such that the Court would extend its jurisdiction to such family life when carried on overseas
- Claim failed the evidential threshold
- Irrespective of that, would have failed because there is an administrative framework to address climate change
- In any event, none of the Cs could establish status of 'victim' as required by s7(1) HRA 1998



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### 3. *R (Friends of the Earth) v SoS for International Trade & Ors*

- Judicial review heard by Divisional Court in December 2021
- Challenge to the decision that UKEF would provide export support in relation to a Liquefied Natural Gas plant in Mozambique
- Ground 1A: Decision was based on an error of law - that the Project and its support were compatible with the UK's and Mozambique's obligations under the Paris Agreement
- Ground 1B: Decision was otherwise unlawful in so far as it was reached without regard to essential relevant considerations

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### Issues in the case

- What is the applicable standard of review? Did the view of compatibility with the PA have to be correct or merely tenable/rational?
- Foreign act of state doctrine: Can the Court consider whether Mozambique is in breach of its PA obligations?
- What does alignment of finance flows with the low emissions pathway require (see Article 2(1)(c) of PA)?
- Scope 3 GHG emissions: Did they have to be quantified?
- Was the assessment of climate change impacts irrational?

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#### 4. Proposed JRs of the 'Net Zero Strategy: Build Back Greener'

- Reported this morning: proposed judicial reviews of the NZS by ClientEarth and Friends of the Earth
- Challenges on the basis that there has been a failure to comply with ss 13 and 14 of the CCA 2008
- Section 13 CCA 2008 requires SoS to prepare such proposals and policies as they consider will enable carbon budgets to be met
- Section 14 CCA 2008 requires a report to be laid before Parliament setting out the proposals and policies
- Raises questions of statutory interpretation of those provisions

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#### Potential issues

- ClientEarth arguments: NZS needs to include real-world policies that ensure it succeeds; current policies will not reduce emissions enough; Government has failed to set out sufficient policies
- Court cannot consider merits or substance of NZS
- Do proposals and policies have to be concrete and detailed?
- Do the GHG emissions reductions of the proposals / policies in a s14 report have to be quantified?
- How detailed does a s14 report have to be?

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## Quarterly Environmental Law Update: Climate change litigation update (Part 2)

Merrow Golden

January 2022

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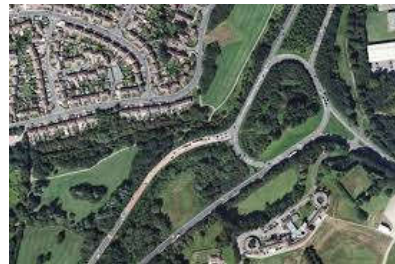
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## A38 Derby Junctions

- DCO for construction/operation of three replacement roundabouts on A38 in Derby
- Included in DfT's Road Investment Strategies 1 and 2
- Climate change impacts were a key controversial issue during examination
- Applicant's ES considered GHGs impacts by reference to Climate Change Act 2008, which at the time had an 80% reduction target (not Net Zero target)
- Challenge brought by a local resident and active interested party



Headline: SoS conceded on the basis that there had been a failure to provide a "reasoned conclusion" as required under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 and/or a failure to include a reasoned conclusion in the decision notice

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## A38 Derby Junctions

On Paris Agreement:

*“We consider that not enough robust evidence was presented to the Examination for us to reach a view as to whether the Proposed Development, or the RIS1 or RIS2 programmes of which it is a part, would be consistent with the Paris Agreement 2015. In these circumstances we are unable to conclude whether the Proposed Development would cause the UK to be in breach of its international obligations. The SoST will need to satisfy themselves on this matter before making their decision.”*

(ExA report at 4.15.110)

On cumulative impacts:

*“[the Applicant was] not able to provide an assessment of cumulative impacts of the Proposed Development with other highways developments, particularly given its approach of assessing the proposal against UK carbon budgets.”* (ExA report at 4.15.116)

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## A38 Derby Junctions

SoS need to satisfy himself on three matters:

*“whether the Proposed Development would lead to the UK being in breach of the Paris Agreement 2015. Whilst there was no evidence that there would be a breach (as per s104(4) of the PA2008) we are unable to confirm there would not be a breach on the evidence submitted;*

*consideration of the cumulative effects of carbon emissions from the Proposed Development with those from other developments on a consistent geographical scale, for example by assessing the cumulative RIS1 or RIS2 programmes (of which the Proposed Development is part) against the relevant UK carbon budget;*

*whether the Proposed Development would affect the ability of the Government to meet the target of the revised net zero carbon by 2050 that was set (in July 2019) after the application was submitted;”*

(ExA Report at 4.15.126)

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## A38 Derby Junctions

*“The Secretary of State notes that the ExA has recommended that further consideration should be given to the cumulative effects of carbon emissions from the Proposed Development and proposed that this should be undertaken in relation to consideration of the cumulative effects of the Road Investment Strategy (“RIS”) 1 and 2. The Secretary of State is satisfied that appropriate consideration was taken of the carbon impacts of the RIS programmes during their development and that any impact is not incompatible with the national wide carbon targets and commitments of the Government. The Secretary of State considers that the cumulative assessment of the RIS is a matter for national consideration and as mentioned above, is satisfied that appropriate consideration was given during the RIS’s development. The Secretary of State is content with the assessment undertaken by the Applicant and that it is in accordance with paragraphs 5.17 and 5.18 of NPSNN. The Secretary of State is satisfied that any increase in carbon emissions that would result from the Development is not so significant that it would have a material impact on the ability of the Government to meet its carbon reduction targets and that having regard to s104(4) of the PA2008 would not result in a breach of international obligations.” (SoS DL at 72)*

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## Greenpeace Limited v The Advocate General [2021] CSIH 53

Facts:

- Vorlich oil field in the North Sea
- Challenge to OGA’s consent /SoS’s decision to agree that consent should be granted
- Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regs 1999



Qn: whether the environmental impact, not of the exploitation process but of the consumption thereafter of the extracted and refined oil, is a relevant consideration? (at [2])

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The environmental impact assessment must (Art 3.1):

"identify, describe and assess...the direct and indirect significant effects of a project on...

(c) ...climate...".



“The question is whether the consumption of oil and gas by the end user, once the oil and gas have been extracted from the wells, transported, refined and sold to consumers, and then used by them are "direct or indirect significant effects of the relevant project". The answer is that it is not. The exercise which the applicant had to carry out, and the Secretary of State had to assess, was a determination of the significant effects of drilling the two wells and removing the oil and gas. That involved considering the effects of depositing and operating an exploration rig or rigs on site. The ultimate use of a finished product is not a direct or indirect significant effect of the project. It is that effect alone which, in terms of the Regulations, must be assessed.”

(Greenpeace at [64])



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## R (Sarah Finch) v Surrey CC [2020] EWHC 3556 (Admin)

- Permission granted for retention and expansion of site producing hydrocarbons (for 25 yr period)
- ES assessed GHGs produced from operations on site
- But no assessment of GHG produced when the crude oil produced was consumed (post-refinement elsewhere)



"It goes without saying that the extraction of crude oil resulting in the supply of fuel will result in GHG emissions when that end product is used. It is common ground that that is addressed by Government policy on climate change and energy, aimed *inter alia* at reducing the use of hydrocarbons. The issue raised in the present challenge is whether, by virtue of the 2017 Regulations, it was necessary for the planning authority to go further than apply those policies in its decision on whether to grant planning permission for the development, by requiring those GHG emissions to be estimated and assessed as part of the Environmental Impact Assessment ("EIA") of the development." (at [11])

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## Finch

In my judgment, the fact that the environmental effects of consuming an end product will flow "inevitably" from the use of a raw material in making that product does not provide a legal test for deciding whether they can properly be treated as effects "of the development" on the site where the raw material will be produced for the purposes of exercising planning or land use control over that development. The extraction of a mineral from a site may have environmental consequences remote from that development but which are nevertheless inevitable. **Instead, the true legal test is whether an effect on the environment is an effect of the development for which planning permission is sought.** An inevitable consequence may occur after a raw material extracted on the relevant site has passed through one or more developments elsewhere which are not the subject of the application for planning permission and which do not form part of the same "project".

(per Holgate J at [101])

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## Greenpeace Limited

Further takeaways:

“In *Finch*, Holgate J went on (at paras 105 *et seq*) to explain that the overall responsibility for the transition to a low carbon society, including the net zero target in the Climate Change Act 2008, lay with the UK Government. A range of measures was being pursued to achieve a reduction in the consumption of oil. Development control and EIAs had a specific, limited ambit. They did not regulate the environmental effects of the general use of all land in the country. The use of motor vehicles was not regulated by planning control. Increased use of an airport was an indirect effect of an additional or expanded runway, but that was a different situation. Once more, the court finds itself in agreement with Holgate J, who carried out a detailed analysis of several of the European and English cases to which this court was also referred, sometimes *en passant*, and which does not require to be repeated.” (at [67])

“The issue is essentially a political and not a legal one.” (at [68])

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## Greenpeace Limited

“It would not be practicable, in an assessment of the environmental effects of a project for the extraction of fossil fuels, for the decision maker to conduct a wide ranging examination into the effects, local or global, of the use of that fuel by the final consumer.

Although the appellants' aspiration is for such extraction to cease, it does not appear to be contended that the UK economy is not still reliant in a number of different ways on the consumption of oil and gas. At present, a shortage of oil and gas supplies is a matter of public concern.

The argument is, in any event, an academic one. It is not maintained that the exploitation of the Vorlich field would increase, or even maintain, the current level of consumption. Unless it did so, it is difficult to argue that it would have any material effect on climate change; even if it is possible to arrive at a figure for its contribution by arithmetical calculation relative to the production of oil and gas overall.”

(at [68])

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“The issue of what may be an obviously material consideration does not arise because the parameters of what is to be assessed are defined by reference to the effects of the project.” (Greenpeace at [66])

“...because the incidence of planning control depends upon whether planning permission is required, or enforcement action is possible, these regimes do not regulate the environmental effects of the general use of all land in the country. So, for example, the use of motor vehicles in connection with, or GHG emissions from, development which has already been permitted is generally not regulated by the development control system” (Finch at [107])

“Essentially, development control and the EIA process are concerned with the use of land for development and the effects of that use. They are not directed at the environmental effects which result from the consumption, or use, of an end product, be it a manufactured article or a commodity such as oil, gas or electricity used as an energy source for conducting other human activities.” (Finch at [112])

- Challenge to the Oil and Gas Authority's new Strategy by three climate activists
- Strategy is required under Part IA of the Petroleum Act 1998
- Section 9A sets “principal objective” of “maximising the economic recovery of UK petroleum”
- The Strategy must enable the principal objective to be met



Two grounds of challenge:

- (1) Error of law/frustration of statutory purpose: the Strategy incorrectly defines the principal objective and, thereby, frustrates the statutory purpose of section 9A
- (2) The Strategy, including its definition of the term “economically recoverable” was irrational in light of the Strategy’s stated aim of assisting the SoS to reduce as far as reasonable in the circumstances the GHGs associated with recovery



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Environmental law – quarterly update  
12 January 2022

## AIR QUALITY: THE ENVIRONMENT ACT AND BEYOND

Ned Westaway



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ROYAL ASSENT

I have to notify the House, in accordance with the Royal Assent Act 1967, that Her Majesty has signified Her Royal Assent to the following Act:

Environment Act 2021

## Air quality

- Existing legal framework:
  - Specific controls
  - Local air quality management
  - (Retained) EU law
- New provisions in the Environment Act 2021
- Reflections

## Air quality – existing legal framework

- Clean Air Act 1993 – and other specific or point source controls



- Part IV of the Environment Act 1995: local air quality management
  - National AQ Strategy
  - Local authority review
  - AQMAs and Action Plans





- Part IV of the Environment Act 1995: local air quality management
  - National AQ Strategy
  - Local authority review
  - AQMAs and Action Plans

HHRC Ltd v Hackney LBC [2021] EWHC 2440  
(Admin)

- Directive 2008/50/EC and Ambient Air Quality Standards Regulations 2010 (and Directive 2016/2284/EU and National Emission Ceilings Regulations 2018)
  - ClientEarth litigation (2010-2018)
  - Government directions under EA 1995 to meet AAQ Regulations

- Human rights?

R (Richards) v Environment Agency [2021] EWHC 2501 (Admin)



- Human rights?

R (Richards) v Environment Agency [2021] EWHC 2501 (Admin)



Overtaken by CA on 17 December 2021

## Air quality – proposals in the 2021 Act

- Part 1
  - Binding long term target(s) on air quality (s.1) and separate target(s) on PM2.5 (s.2)
  - To be set out in Regulations by 31 October 2022
  - Interim targets in environmental improvement plan
  - Reporting and OEP scrutiny

- Directive 2008/50/EC and Ambient Air Quality Standards Regulations 2010 (and Directive 2016/2284/EU and National Emission Ceilings Regulations 2018)
  - ClientEarth litigation (2010-2018)
  - Government directions under EA 1995 to meet AAQ Regulations

## Air quality – proposals in the 2021 Act

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- Part 4/Schedule 11 – amendments to LAQM
  - Regular review of National Air Quality Strategy (new s.80(4A)) and annual reporting (s.80A)
  - Express duty to have regard to NAQS (s.81A)
  - Co-ordination between local authorities (s.82(4)-(5)) and duty to co-operate (s.85A)
  - Improved co-ordination in the development of action plans (ss.85A and 83B)

- Part 4/Schedule 12 – amendments to Clean Air Act 1993
- Part 4 – environmental recall



## Reflections





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**Thanks for watching**

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Environmental Quarterly seminar, 12 January 2022

## Environment Act 2021



**David Graham** Barrister, Francis Taylor Building



## A long journey...

Formal consultation  
May–August 2018

Draft Environmental Principles and  
Governance Bill  
December 2018

Full Bill published 2019  
Three Queen's Speeches...

**Royal Assent 9 November 2021**

Not a codification:  
amendments to other statutes.



## Structure

PART 1: GOVERNANCE

PART 2: NI

PART 3: WASTE &  
RESOURCE EFFICIENCY

PART 4: AIR QUALITY &  
ENVIRONMENTAL RECALL

PART 5: WATER

PART 6: NATURE

PART 7: CONSERVATION  
COVENANTS

PART 8: MISC. [REACH]



## Governance (Part 1)

- Targets
- Policy Statement
- Environmental Improvement Plans
- Monitoring
- Statements to Parliament
  - about Bills
  - about International legislation
  - about monitoring
  - OEP



## Targets

s.1(1) SoS *may* by regulations set 'long-term' targets in respect of any matter which relates to the natural environment or to people's enjoyment of the natural environment

s.1(2) – *must* exercise the power to set a long-term target in respect of *at least 1 matter within each priority area*.

s.7 – must review by 31 Jan 2023 and every 5 yrs whether targets would 'significantly improve the natural envt in England'. (ratchet)

'LT' = no less than 15 yrs after the date it is set

AQ

Water

Biodiversity

Resource efficiency & waste reduction

ss.2-3 Must set a target in respect of PM2.5 and species abundance. May but need not be short-term.

**Setting:** Must receive advice 'from persons the SoS considers to be independent and to have relevant expertise' before making the Regs. Must be measurable. Regs must set target reporting date; and may set out how to measure the target. Must be satisfied that targets 'can be met'.

Duty to meet them. But a power to amend or revoke, replace with lower targets where satisfied 'no significant benefit' in the stricter target OR because of changes in circs, the envtl, economic or social costs would be disproportionate to the benefit of meeting it.

s.5: SOS duty to ensure targets are met.





## Policy Statement (1)

s.17:

(1) The Secretary of State must prepare a policy statement on environmental principles in accordance with this section and section 18.

(2) A “policy statement on environmental principles” is a statement explaining how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy.

(3) It may also explain how Ministers of the Crown, when interpreting and applying the environmental principles, should take into account other considerations relevant to their policy.

(4) The Secretary of State must be satisfied that the statement will, when it comes into effect, contribute to—

(a) the improvement of environmental protection, and

(b) sustainable development.

(5) In this Part “environmental principles” means the following principles—

(a) the principle that environmental protection should be integrated into the making of policies,

(b) the principle of preventative action to avert environmental damage,

(c) the precautionary principle, so far as relating to the environment,

(d) the principle that environmental damage should as a priority be rectified at source, and

(e) the polluter pays principle.



## Policy Statement (2)

Process:

s.18(2) ‘must consult such persons as the SoS considers appropriate’.

(3) – must lay draft before Pt for 21 days; if recommendations or resolution, must respond and lay final version.

No need for adoption; no veto.

### **19 Policy statement on environmental principles: effect**

(1) A Minister of the Crown must, when making policy, have due regard to the policy statement on environmental principles currently in effect.

(2) Nothing in subsection (1) requires a Minister to do anything (or refrain from doing anything) if doing it (or refraining from doing it)—

(a) would have no significant environmental benefit, or

(b) would be in any other way disproportionate to the environmental benefit.

(3) Subsection (1) does not apply to policy so far as relating to—

(a) the armed forces, defence or national security,

(b) taxation, spending or the allocation of resources within government, or

(c) Wales.



## EIP

ss.8–15:

Must prepare EIP for period no less than 15 yrs and renew it thereafter.

*s.8(4): 'An environmental improvement plan must set out the steps Her Majesty's Government intends to take to improve the natural environment in the period to which the plan relates.*

*(5)It may also set out steps Her Majesty's Government intends to take to improve people's enjoyment of the natural environment in that period'.*

Adopts 25Year Plan (Jan 2018) as the first one.

To have interim targets related to the ss.1–3 targets. *'must be satisfied that meeting the target, or the revised target, would make an appropriate contribution towards meeting the target under sections 1 to 3'.*

To be reviewed by Jan 31<sup>st</sup> 2023 and within every 5 years; may be revised following each review.

Annual progress reporting to Parliament by SoS (s.9).



## Statements

s.21: Must report to Plt every 2 years on *'developments in international environmental protection legislation which appear to the SoS to be significant'*

### **20 Statements about Bills containing new environmental law**

*(1)This section applies where a Minister of the Crown in charge of a Bill in either House of Parliament is of the view that the Bill as introduced into that House contains provision which, if enacted, would be environmental law.*

*(2)The Minister must, before Second Reading of the Bill in the House in question, make—  
(a)a statement to the effect that in the Minister's view the Bill contains provision which, if enacted, would be environmental law, and  
(b)a statement under subsection (3) or (4).*

*(3)A statement under this subsection is a statement to the effect that in the Minister's view the Bill will not have the effect of reducing the level of environmental protection provided for by any existing environmental law.*

*(4)A statement under this subsection is a statement to the effect that—  
(a)the Minister is unable to make a statement under subsection (3), but  
(b)Her Majesty's Government nevertheless wishes the House to proceed with the Bill.*



## Statements

*s.46: Meaning of “environmental law”*

*(1) In this Part “environmental law” means any legislative provision to the extent that it—*

- (a) is mainly concerned with environmental protection, and*
- (b) is not concerned with an excluded matter.*

*(2) Excluded matters are—*

- (a) disclosure of or access to information;*
- (b) the armed forces or national security;*
- (c) taxation, spending or the allocation of resources within government.’*



## Monitoring

### **Section 16:**

*SoS “must make arrangements for obtaining such data about the natural environment as the Secretary of State considers appropriate for the purpose of monitoring” whether there are improvements in accordance with the current EIP, progress being made towards targets, and progress towards any interim targets.*

*Must lay before Plt a statement of what kinds of data are to be collected.*

*May revise the statement at any time.*



## OEP



[www.theoep.org.uk](http://www.theoep.org.uk)



## OEP objects and strategy

Est by s.22.

Section 23.

*(1)The principal objective of the OEP in exercising its functions is to contribute to—*

- (a)environmental protection, and*
- (b)the improvement of the natural environment.*

*(2)The OEP must—*

- (a)act objectively and impartially, and*
- (b)have regard to the need to act proportionately and transparently.*

*(3)The OEP must prepare a strategy that sets out how it intends to exercise its functions.*

The strategy has to contain an enforcement policy. It has to respect the integrity of other statutory regimes and avoid overlap with CCC.

It must prioritise cases that:

- raise a point of envtl law of general public importance;
- have national implications,
- relate to ongoing or recurrent conduct, or
- relate to conduct it considers may cause or has caused serious damage to the natural environment.

The SoS may issue guidance to the OEP to which it must have regard (s.25)



## OEP objects and strategy

### 44 Meaning of “natural environment”

In this Part the “natural environment” means—

- (a) plants, wild animals and other living organisms,
  - (b) their habitats,
  - (c) land (except buildings or other structures), air and water,
- and the natural systems, cycles and processes through which they interact.



## OEP – duty to co-operate

### 27 Co-operation duties of public authorities and the OEP

(1) A person whose functions include functions of a public nature must co-operate with the OEP, and give it such reasonable assistance as it requests (including the provision of information), in connection with the exercise of its functions under this Act.

(2) Subsection (1) does not apply to—

- (a) a court or tribunal,
- (b) either House of Parliament,
- (c) a devolved legislature,
- (d) the Scottish Ministers, the Welsh Ministers, a Northern Ireland department or a Minister within the meaning of the Northern Ireland Act 1998,
- (e) a person exercising a parliamentary function, or
- (f) a person whose only public functions are devolved functions.

(3) A person whose public functions include devolved functions is only required to co-operate with the OEP by virtue of subsection (1) to the extent that co-operation is in relation to functions that are not devolved functions.

(4) If the OEP considers that a particular exercise of its functions may be relevant to the exercise of a devolved environmental governance function by a devolved environmental governance body, the OEP must consult that body.



## OEP - monitoring and advice

- **Section 28:** Must monitor progress towards EIP improvements, targets, interim targets
- Annual progress report
- May make recommendations
- SoS must make a response and lay it before parliament within 12 months.
  
- **Section 29:** OEP must monitor the implementation of envtl law; may report on any matter concerned with the implementation of envtl law (except CCC matters). Any report on implementation must be responded to within 3 months by the SoS.
  
- **Section 30(1):** must give advice to a Minister of the Crown about any proposed change to envtl law, or any other matter relating to the natural environment on which the Minister requires it to give advice. (2) Minister may specify matters which the OEP is to take into account in giving the advice. (3) OEP may give advice to Ministers about any changes to envtl law proposed by them. The OEP must publish its advice.



## OEP – Enforcement (1)

### Enforcement functions (ss32–43)

s.31 For the purposes of those sections, a reference to a public authority failing to comply with environmental law means the following conduct by that authority—

- (a)unlawfully failing to take proper account of environmental law when exercising its functions;
- (b)unlawfully exercising, or failing to exercise, any function it has under environmental law.

### **s.32 – right of complaint**

‘may not be made by any person whose functions include functions of a public nature’ [not whistleblowers e.g. local councillors or officers?]

Must exhaust any internal complaints process

may not be made after the later of—

- (a)the end of the 1 year period beginning with the day on which the alleged failure that is the subject of the complaint last occurred, and
- (b)if the substance of the complaint was subject to an internal complaints procedure, the end of the 3 month period beginning with the day on which that procedure was exhausted [s.34- duty to notify/update]



## OEP – Enforcement (2)

### s.33- Investigations

May investigate where it has information (following a complaint or otherwise) that indicates that (a) a public authority may have failed to comply with envtl law, and (b) if it has, the failure would be serious failure,

- Must notify the PA and (if not a minister) the relevant minister.
- If it concludes NFA, must issue a report to the PA.

### s.35 –Information Notices

'reasonable grounds for suspecting that the authority has failed to comply with envtl law' and considers the failure, if it occurred, would be serious. Must specify the alleged breach, and may request any information. Duty to comply 'so far as reasonably practicable'.

### s.36 –Decision Notices

- Where it finds a failure to comply on the balance of probabilities and considers the failure is serious.
- Must set out the steps the OEP considers the authority should take in relation to the failure, which may include steps designed to remedy, mitigate or prevent recurrence of the failure.
- 2 months (or longer if specified) to respond as to whether it accepts the finding and intends to take the steps.



## OEP – Enforcement (3)

### s.37 – may link notices /investigations

### s.38 –Environmental review

'Where the OEP has given a decision notice to a public authority it may apply to the court for an environmental review, but only if—

(a) it is satisfied, on the balance of probabilities, that the authority has failed to comply with environmental law, and

(b) it considers that the failure is serious.

(2) An environmental review is a review of alleged conduct of the authority that is described in the decision notice as constituting a failure to comply with environmental law.'

- Only after a Decision Notice and the time-limit for a response has expired.
- Must be done within the time limit for 'judicial review or other similar legal proceedings for questioning the alleged conduct'.



## Environmental Review (1)

(5) On an environmental review the court must determine whether the authority has failed to comply with environmental law, applying the principles applicable on an application for judicial review.

(6) If the court finds that the authority has failed to comply with environmental law, it must make a statement to that effect (a “statement of non-compliance”).

(7) A statement of non-compliance does not affect the validity of the conduct in respect of which it is given.

(8) Where the court makes a statement of non-compliance it may grant any remedy that could be granted by it on a judicial review other than damages, but only if Condition A or Condition B is met.

(9) Condition A is that the court is satisfied that granting the remedy would not—

(a) be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority, or

(b) be detrimental to good administration.

(10) Condition B is that Condition A is not met but the court is satisfied that—

(a) granting the remedy is necessary in order to prevent or mitigate serious damage to the natural environment or to human health, and

(b) there is an exceptional public interest reason to grant it.

## Environmental Review (2)

(11) In deciding whether to grant a remedy the court must (subject to subsection (8)) apply the principles applicable on an application for judicial review; but this does not require the court to apply section 31(2A) of the Senior Courts Act 1981 (High Court to refuse to grant relief where the outcome for the applicant not substantially different) on an environmental review in England and Wales.

(12) If, on an environmental review, the court has made a statement of non-compliance in respect of a public authority, and the statement has not been overturned on appeal, the authority must publish a statement that sets out the steps it intends to take in light of the review.

(13) A statement under subsection (12) must be published before the end of the 2 month period beginning with the day the review (including any appeal) concludes.



## OEP Judicial Review

### **39 Judicial review: powers to apply in urgent cases and to intervene**

(1) The OEP may apply for judicial review, or a statutory review, in relation to conduct of a public authority (whether or not it has given an information notice or a decision notice to the authority in respect of that conduct) if—

(a) the OEP considers that the conduct constitutes a serious failure to comply with environmental law, and

(b) the urgency condition is met.

(2) The urgency condition is that making an application under subsection (1) (rather than proceeding under sections 35 to 38) is necessary to prevent, or mitigate, serious damage to the natural environment or to human health.

[(4) And (5) -public auth must publish statement w/i 2 mths of adverse finding.]

(3) 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 an application for judicial review made under subsection (1) in England and Wales.

(6) Subsection (7) applies to proceedings (including any appeal) that—

(a) are in respect of an application for judicial review or a statutory review, and

(b) relate to an alleged failure by a public authority to comply with environmental law (however the allegation is framed in those proceedings).

(7) If the OEP considers that the alleged failure, if it occurred, would be serious, it may apply to intervene in the proceedings (whether it considers that the public authority has, or has not, failed to comply with environmental law).

## OEP duty to involve Ministers

### **s.40**

Must notify the relevant Minister of the Crown of Information Notices, Decision Notices, Environmental Reviews, Judicial Reviews or statutory reviews in which it intervenes, along with a statement whether it considers the Minister should intervene in any litigation.

## Confidentiality

### ss.41

The OEP must make public statements that it has taken certain steps (e.g. information notices, decision notices, court applications) unless it considers it would not be in the public interest to do so.

s.42 (1)– no ‘obligation of secrecy imposed by statute or otherwise’ prevents providing info in connection with an investigation under s.33 [quaere – whistleblowing prior to instigation of an investigation], compliance with Information Notices or Decision Notices

(2) And (3) – legal professional privilege and public interest immunity are exempted.

(4) Data protection legislation is excepted, to be applied taking into account ‘duties imposed and powers conferred by this Part’. [duty of cooperation?]

S43- imposes certain obligations of confidentiality on the OEP. Chiefly, by subsection (3) ‘must not disclose correspondence between the OEP and that, or any other, public authority that—

(a)relates to a particular information notice or decision notice, or

(b)is, or contains, such a notice.’, subject to exceptions where made in response to the IN or DN, for the purpose of co-operating with an investigation or for purposes connected with any proceedings in relation to ER, JR or SR.

## Questions

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