Update October 2020

Chapter Two: Understanding Environmental Problems

Ceri Warnock, 'Environment and the Law: The Normative Force of Context and Constitutional Challenges' (2020) 32 JEL advance access provides an excellent account of how environmental law is a response to the nature of environmental problems.

Naomi Oreskes, *Why Trust Science* (Princeton UP 2019) is based on her Tanner Lectures on Human Values at Princeton University. With responses from other scholars, the book is a powerful discussion of how the processes of science (2.3.2), particularly a commitment to 'transformative interrogation', make science a form of reliable knowledge.

The Covid-19 pandemic is underscoring the importance of specialist knowledge in dealing with collective action problems (2.3) as well as the necessary role of the state in addressing such problems (2.5). In particular, it is drawing attention to how such knowledge is mobilised and integrated into decision-making. While the speed of the pandemic has not allowed for much reflection, there are some important reports emerging.

One example is that the NSW Government set up a Special Commission of Inquiry into the Ruby Princess which published its 320 page report in August 2020 (*Report of the Special Commission of Inquiry into the Ruby Princess* (14 August 2020)). On 19 March 2020, 2650 passengers of a cruise ship, the *Ruby Princess,* were allowed to disembark in Sydney, Australia without being tested for Covid-19 despite there being suspected cases on board. As of early August 2020, this decision has been linked to 900 infections and 28 deaths. The report is wide ranging. An important part of the report is a study of the 'carpentry of delegated legislation and statutory instruments involved' [1.44]. While it focuses primarily on the actions of the NSW Health Department and its risk assessment criteria and testing practices, the report also shows how those issues were embedded in a wider set of supply chain and other issues. The report also concludes:

> The mistakes made by NSW Health public health physicians were not made here because they failed to treat the threat of COVID-19 seriously. They were not made because they were disorganised, or did not have proper processes in place to develop a plan to assess the risks posed by this disease, and how to limit those risks. Those physicians relied on the best science, not pseudoscience or matters of political convenience. They were diligent, and properly organised. There are no 'systemic' failures to address. Put simply, despite the best efforts of all, some serious mistakes were made [9.126].

As also noted in the report 'it is not an adequate answer to scrutiny of a public health official's conduct in this Inquiry to assert that he or she was doing their best' [1.141].

As we see throughout the textbook, understanding the socio-political dimension of environmental problems is vital to understanding environmental law. There is currently a Royal Commission in Australia on the 2019-2020 bushfire season during which a total of

3,094 houses were lost and over 17 million hectares burnt. Part of the Royal Commission is a bushfire history project in which people are being encouraged 'to record their personal experience and share photos and videos taken during the 2019-20 bushfires or the ongoing recovery' (https://naturaldisaster.royalcommission.gov.au/2019-20-bushfire-history-project).

Chapter Four: Public Law

Public participation is an important element of environmental law (see 4.3.2 in particular). Carolyn Abbot, 'Losing the Local? Public Participation and Legal Expertise in Planning Law' (2020) 40 LS 269 is an analysis of why access to legal expertise is so important for participation in the planning context.

A significant amount of environmental law case law concerns judicial review of administrative decision-making (4.5). In late July 2020 the UK government set up an independent panel to conduct an 'independent review of administrative law' with the primary focus on judicial review (https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review). The panel is expected to report back by the end of 2020.

Legislation has a fundamental role to play in structuring what is, and is not, relevant for a decision-maker to take into account. In our last update we discussed *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214. *Packham, R (on the application of) v High Speed Two (HS2) Ltd* [2020] EWCA Civ 1004 makes clear how the reasoning in relation to climate change and the Paris Agreement in *Plan B Earth* turned on the wording of the Planning Act 2008. Packham concerned a challenge to the decision of the Government to continue with the controversial HS2 project after a review of the project had been undertaken by a panel chaired by Douglas Oakervee. One of the grounds of challenge was the 'effect of the project on greenhouse gas emissions between now and 2050, in the light of the Government's obligations under the Paris Agreement and the Climate Change Act 2008'[11]. The CA in *Packham* concluded:

> In this case the decision under challenge was not taken under a statutory scheme in which the decision-making process is shaped as it is under the provisions of the Planning Act [2008] governing the designation of a national policy statement, with specific duties such as those in sections 5(8) and 10(3) – or under any statutory scheme. To make the decision at all was itself a matter of free choice for the Government, as were the decision-making parameters themselves. The Government was at liberty to select the issues on which it wished to be advised by the Oakervee review, against the background of HS2's evolution as a project, including the statutory approval process. In doing so it was not constrained by the provisions of the Climate Change Act or by any policy of its own [103].

We discussed *Langton, R (On the Application Of) v Secretary of State for Environment, Food and Rural Affairs & Anor* [2019] EWCA Civ 1562 in our last update. A case analysis of it can be found at Emma Lees, 'Langton v Secretary of State for Environment, Food and Rural Affairs: Badger Cull in the Court of Appeal' (2020) 22 Env L Rev 43.

R (Friends of the Antique Cultural Treasures Ltd) v Secretary of State for the Department of Environment, Food and Rural Affairs [2020] EWCA Civ 639 concerns an unsuccessful challenge to the Ivory Act 2018 on Article 1 of the 1st Protocol of the European Convention of Human Rights (A1P1 ECHR) among other things. The analysis in the case is a good example of the steps of legal inquiry relevant to a A1P1 case.

Chapter Five: Criminal Law

Mustafa v Environment Agency [2020] EWCA Crim 597 develops the case law in relation to the criminal offences set out in Regs 12 and 38 of the Environmental Permitting (England and Wales) Regulations 2010, with the case also being relevant for the interpretation of the now Environmental Permitting (England and Wales) Regulations 2016. *Mustafa v Environment Agency* concerns the operation of a facility for the storage and treatment of waste wood on an industrial estate in Rainham, Essex. Mehemet Mustafa, Adrian Hennessy and Finbar Breslin were directors of the company operating the site. Mehemet Mustafa and Finbar Breslin were convicted in the Central Criminal Court under Reg 12(1)(a) of the Environmental Permitting (England and Wales) Regulations 2010, which requires a regulated facility to be authorized by an environmental permit. Where there is no such permit an offence has been committed (Reg 38 (1)(a)). The Central Criminal Court held that the offence was committed 'with the consent or connivance of, or attributable to neglect on the part of Adrian Hennessy, Finbar Breslin and Mehemet Mustafa' [3]. Mehemet Mustafa appealed against his conviction. That appeal was dismissed by the Court of Appeal.

The case is significant for two reasons. First, it clarifies the relationship between the legal rules for exempt sites and those for regulated waste management sites, for the purpose of applying criminal offences spelt out in Regs 12 and 38 of the EPRs. It thereby affirms environmental protection as an important purpose of the Environmental Permitting (England and Wales) Regulations 2010. Second, it confirms that an enforcement strategy that pursues 'prosecution as a last resort' (Keith Hawkins, *Environment and Enforcement*, (Clarendon Press,1984) see 10.3.4) does not expose environmental regulators to the risk of making criminal prosecution at a later stage more difficult.

In relation to the first point, the CA decision clarifies that revoking the registration of a waste management facility as exempt from the requirement for a permit triggers a need to obtain a permit. If the waste management site then fails to obtain such a permit and continues to operate as an unpermitted site the criminal offences under Regs 12 and 38 EPRs can be applied. In the particular case the waste management facility had been exempt by the Environment Agency (EA) from the requirement to obtain an environmental permit. The exemption, however, included a condition that not more than 500 tonnes of waste wood would be stored or treated at the site over a seven-day time span. This condition was

breached by the operators on various occasions. Attempts by the EA to bring the site fully into compliance with that condition over a period of six months were not successful. In March 2014 the EA therefore informed the company that the waste operation ceased to be an exempt waste operation, and that an environmental permit was required to store more than 500 tonnes of wood at any one time at the site. The letter also informed the company that the EA considered the initial deposits and ongoing storage of the material to constitute an offence under Reg 38 (1) (a) and Reg 12 (1) (a) of the Environmental Permitting (England and Wales) Regulations 2010 [25].

The main legal issue in the case was the question whether for maintaining the status of an exempt waste management facility the operator had to comply with all the provisions in reg 5 and para 3 of Schedule 2 of the Environmental Permitting (England and Wales) Regulations 2010 or whether simply the act of registering and the maintenance of the register of exempt facilities determined whether the waste management operation would be considered as an exempt facility [56].

The CA confirmed that in order to maintain the exempt status, the waste management facility did not just have to be formally registered as an exempt facility, but also had to comply with the provisions of reg 5 and para 3(1) of Schedule 2 of the Environmental Permitting (England and Wales) 2010 Regulations. These required that the 'type and quantity of waste' to be handled at the site were consistent with a duty to achieve the objectives of Art. 13 of the EU Waste Framework Directive (2008/98/EC). Here, the EA had further specified how to achieve these objectives through the condition that no more than 500 tonnes of waste wood would be stored on the site. In setting out its reasoning the CA also affirmed the previous case law of *O'Grady Plant and Haulage Ltd v London Borough of Tower Hamlets Council* [2011] EWCA Crim 1339 and *Environment Agency v Stanford* [1999] Env LR 286.

The implication of the CA's reasoning is that the EA does not have to wait with instigating a prosecution until a facility has been actually removed from the register of exempt facilities but has a discretion to start a prosecution earlier if the provisions of Reg 5 and para 3 (1) of Schedule 2 of the EPRs are not complied with [80].

In relation to the second point, Lord Justice Lindblom stated [57]:

> The suggestion that the Environment Agency had "in some way condoned the offending" was, in Spencer J.'s view, unfounded. As he said, "the reality … is that [it] repeatedly attempted to bring the company into compliance, which is the standard method of enforcement", and that "[when] that failed, there was no reason … why the alleged breaches of the conditions of the exemption should not have been prosecuted in the usual way" (paragraph 64).

Hence, initial reliance on discussions between EA officers and site operators during enforcement visits, and the sending of letters by the EA warning the company that it was in breach of the condition that formed part of its exempt facility status, did not preclude the EA from later instigating a criminal prosecution.

The Scottish case of *Transocean Drilling UK Ltd v Greenpeace Ltd* [2020] ScotCS CSOH_66 provides further insights into how criminal law is used in order to police environmental protests. The case - which was decided in July 2020 - considers in affirmative terms the English Court of Appeal decision in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9 – discussed in the Spring 2020 on-line update for this textbook. *Cuadrilla* dealt with a similar issue, i.e. the use of injunctions against environmental protesters [88].

In the *Transocean* case Greenpeace protesters had entered in June 2019 one of Transocean's mobile drilling rigs which was being towed towards an oil field in the North Sea. Greenpeace had also intended to enable protesters to board the rig by launching inflatables in direction of the rig from its vessel 'Arctic Sunrise'. Greenpeace's protest was intended to interrupt the drilling of oil in light of the climate emergency declared by the UK Parliament on the 1st of May 2019 [5, 41].

Transocean had obtained an injunction which precluded Greenpeace and 'persons unknown' from boarding the rig and/or any vessel towing the rig, or entering a 500 m exclusion zone around the rig. Two further protesters boarded the rig in breach of that injunction, and the zone was also breached by two inflatable Greenpeace boats approaching the oil rig. Transocean then applied to the Court of Session for judgement to be delivered against Greenpeace for contempt of court. The Court of Session imposed a £ 80,000 fine on Greenpeace for contempt of court. The case raises two main legal issues. Firstly, what *mens rea* is required for contempt of court if a corporate body and not just individuals are involved in the protest [56]? Secondly, what are the limits of the protection conferred by Arts 10 and 11 ECHR when the environmental protest is intended to cause disruption to activities to which the protesters object, with that disruption not just being an 'inevitable side-effect' of the protests, and when the protest seeks to coerce the behaviour of those against whom the protest is directed? [30]

In relation to the first point, the *Transocean* case establishes that in Scottish law failure to comply with the court order requires 'wilful disobedience'. If an injunction had been obtained against corporate entities, such as Greenpeace here, it was irrelevant if the individual who actually engaged in the activities that constituted the contempt of court did not have the requisite *mens rea*. A failure of the body corporate to ensure that those over whom it exercised control complied with the injunction meant that *mens rea* could be inferred from this to the body corporate. The Court of Session thus rejected Greenpeace's argument that a distinction had to be drawn between Greenpeace as an organisation, and the acts of individuals who volunteered for Greenpeace and acted on their own behalf in their personal capacity as responsible individuals [40]. The Court held that the acts of some individuals were undertaken with 'the full knowledge, consent and support of Greenpeace' which meant that Greenpeace as an organization had the required *mens rea* and could be held responsible for the contempt of court [71].

In relation to the second point, this Scottish case affirms an interpretation of Arts. 10.2 and 11.2 ECHR in the case of environmental protests that affords limited protection to direct action protests that are deliberately directed at disrupting and coercing the activities of those against whom the protest is directed [85-6].

Two wider questions arise from the judicial reasoning in the case. First, in considering what constitutes a proportionate sanction for contempt of court when the ECHR rights under Arts 10 and 11 are engaged, the Scottish court found that the ECHR rights provided more limited protection when the protest was directed against the **lawful** activities of a commercial entity in comparison to protest directed against a government or state authority. The Court of Session reasoned that in a democracy the actions of a government and state bodies should be subject to close scrutiny, not just by legislative and judicial authorities, but also by the press and public opinion [84].

Do you find this distinction between protest against the lawful activities of private commercial entities, such as BP, to whom Transocean was supplying the rig, and protest against government and state authorities convincing? Chapter 9 of the textbook draws attention to research that charts the significant role that powerful private actors are playing in contemporary governance regimes for the protection of the natural environment. If private commercial actors may be just as powerful as national governments and other state actors. how convincing is the distinction that the Court of Session draws here? Does this distinction disproportionately limit a fundamental right to protest?

The case also raises the question of how to determine the lawfulness of BP's actions. Do you agree with the Court of Session's finding that BP's actions were lawful? Or do you agree with Greenpeace's argument which justified its own actions as actually upholding 'the law', both in a broad and narrow sense. In a broad sense Greenpeace argued that its protest intended to prevent drilling of oil from the North Sea and thereby was 'enforcing' the UK government's target of net zero greenhouse emissions by 2050 [13]. Section 1 of the Climate Change Act 2008 imposes a legal duty upon the Secretary of State to achieve that target. Greenpeace also claimed that its actions were about upholding the law in a narrow sense. It alleged that the drilling of the Vorlich North Sea oil field with the aid of Transocean's rig was not in compliance with the law, because BP had obtained unlawfully the permit for this. No public consultation had been carried out during the permitting process, a point admitted by the UK government in April 2020. [1] Greenpeace has been considering to apply to have the drilling permit quashed through a judicial review challenge in the High Court.

When considering aggravating factors in relation to the charge of contempt of court, the Court of Session also differentiated between traditional protest activity in a public space which other citizens may choose to observe or to pass by, and Greenpeace's protest in the dangerous environment of the North Sea [74]. But in light of the fact that Greenpeace was filming the activities of its protesters with a drone [34] to promote its campaign on its website and through social media, does this distinction hold?

Efforts to tackle waste crime are being stepped up also in light of the fact that the annual costs of waste crime just in England are ca. £ 604 m. [2] A new Joint Unit for Waste Crime seeking to tackle serious and organised waste crime brings together law enforcement agencies, the National Crime Agency, environmental regulators and Her Majesty's Revenue and Customs (HMRC). There is also continuing concern about low sentences being

[1] https://www.greenpeace.org.uk/news/government-admits-bp-drilling-permit-process-was-unlawful-greenpeace-wins-legal-challenge/
[2] https://www.gov.uk/government/news/helping-to-tackle-lockdown-waste-crimes-in-the-north-east

imposed for waste crimes, and fly-tipping in particular which has significantly increased during the Covid-19 pandemic. During 2018/19 81% of fines did not exceed £ 500 despite the fact that the courts have powers to impose fines up to £ 50,000.[3]

Chapter Nine: Regulatory Strategy

Outcomes of a public consultation in relation to a Scottish circular economy bill were published in May 2020. The proposals are intended to promote sustainable development and implement the 'polluter pays' principle by reducing resource use and waste. The UK government has set out its own Circular Economy Package in response to the EU's Circular Economy Package. Policy commitments from that UK government package are intended to be implemented also through the Environment Bill 2019-21 (see Chapter 10).

The consultation in relation to the Scottish proposals indicates significant interest from members of the public, NGOs, public bodies and private organisations in the idea of a circular economy in Scotland. It attracted 1,658 responses from 144 organisations or groups, 270 individuals and 1,244 campaign respondents.[4]

The Scottish proposals envisage legislation that draws on a range of regulatory strategies, including economic incentives, but also traditional 'command and control' powers. For instance, there is a proposal for a power for Scottish Ministers to impose charges on certain items, such as single-use disposable items, which are '(i) harmful to the environment, (ii) can be replaced with sustainable alternatives, or (iii) are problematic to recycle'.[5] The public consultation exercise yielded significant support for this proposal with plastic takeaway food containers and cutlery, as well as stirrers and straws being identified by respondents as possible targets for the environmental charge. The Scottish proposals are similar to the efforts in England to combat plastic waste, e.g. through the Environmental Protection (Plastic Straws, Cotton Buds and Stirrers) (England) Regulations 2020 (Draft) (SI 2020/971, not yet in force) which seek to prohibit persons, as part of their business, from supplying or offering single use plastic straws, single use plastic stem cotton buds and plastic drink stirrers (see the on-line Spring 2020 update). The Scottish consultation also showed strong support for doubling the economic charge for single-use carrier bags from five to ten pence per bag.

There is also a proposal to enable Scottish Ministers to require Scottish businesses to publicly report any surplus stock and certain waste materials they hold. This may enable other businesses to use these as raw materials for their manufacturing and promote green banding. Consultees expressed support to extend such mandatory reporting to the textiles and clothing sector.

[3] https://www.gov.uk/government/statistical-data-sets/env24-fly-tipping-incidents-and-actions-taken-in-england
[4] https://www.gov.scot/publications/developing-scotlands-circular-economy-proposals-legislation-analysis-responses/, para. 2.
[5] Ibid, para. 4.

In order to improve domestic recycling rates the anticipated Scottish Circular Economy Bill proposes to move away from the current voluntary approach to 'command and control', mandatory provisions. Circular economy and climate change obligations are also proposed to be included in the procurement strategies of public bodies. Most interestingly, several respondents to the public consultation want the Circular Economy Bill to be part of a transition towards a 'new economic model' in Scotland aimed at reducing production and consumption, rather than promoting economic growth. [6]

The following two articles are of interest: Robert A. Huber,'The Role of Populist Attitudes in Explaining Climate change Skepticism and Support for Environmental Protection' (2020) 29 (6) Environmental Politics 959 and Manuel Arias-Maldonado, 'Blooming Landscapes? The Paradox of Utopian Thinking in the Anthropocene' (2020) 29 Environmental Politics 1024.This latter article examines how the Anthropocene is changing our relation with time, and thus how we imagine the future in green utopian thinking.

Chapter Seven: Courts

Emma Lees and Ole Pedersen have just published *Environmental Adjudication* (Hart 2020), a study of the different adjudicatory avenues for environmental law in England and Wales.

Chapter Eight: Principles and Policy

Environmental principles

In the April 2020 update, we foreshadowed that the devolved administrations were developing their own post-Brexit environmental governance plans. In Scotland, the UK Withdrawal from The European Union (Continuity) (Scotland) Bill 2020 has now been introduced. This includes Scottish-specific provisions on environmental principles, which differ from those in the UK/English Environment Bill 2019-21. In some respects, it is narrower in scope, such as not including the integration principle (it lists four 'guiding principles on the environment: the preventive principle, the principle of rectification at source, the polluter pays principle, the precautionary principle 'as it relates to the environment'). Mainly, the Bill's provisions on principles have a wider scope than the English Bill. This is particularly seen in how it imposes a duty on all public bodies to consider the principles directly, rather than requiring Ministers (only) to consider a policy statement on environmental principles. Public bodies are to have regard to environmental principles in making policies and plans, not in making individual decisions, with their duty linked into the regime for strategic environmental assessment. This approach creates some devilish legislative complexity but maintains and enhances the 'green thread' that already exists for policymaking in Scotland, with environmental principles adding a substantive policy direction to existing strategic environmental assessment duties for public policymaking at large. The Stage 1 Committee report for this Bill was released on 22 September 2020.

[6] Ibid, para. 9.7.

Chapter Ten: UK Environmental Law

We discussed the new Environment Bill (10.6) at length in our last update. The pandemic has stalled the process. The Public Bill Committee is now scheduled to report on the Bill on the 1 December 2020. As we stressed in our previous discussion, this Bill is fundamental in creating the post-Brexit legal architecture for environmental law in England. What form the Bill is passed is thus crucial to the future of English environmental law.

This is highlighted by Andrew Jordan and Brendan Moore in their report, *Regression by Default?: An Analysis of Review and Revision Clauses in Retained EU Environmental Law* (Brexit and the Environment May 2020), which shows there is a risk of 'zombification' of environmental law due to the removal of revision clauses as part of the Brexit delegated legislation process.

As set out in the Chapter Eight update, the UK Withdrawal from The European Union (Continuity) (Scotland) Bill 2020 has been published and has been scrutinised by committees of the Scottish Parliament. A striking feature of this legislation is that it empowers the Scottish government to 'keep pace' with EU law. It thus envisages and facilitates a divergence of environmental regulation across the United Kingdom, which is at odds with the Common Framework approach for post-Brexit environmental policy and with the controversial Internal Market Bill, which was subsequently introduced by the UK government in September 20202.

An excellent overview of post Brexit plans in the different devolved regions can be found in two blog posts by Colin Reid 'Environmental Principles Take Root: Post-Brexit Environmental Governance A cross the UK' (Part 1)' (14 July 2020) and 'Watchdogs Compared – and Reviewed?: Post-Brexit environmental governance across the UK (Part 2)' (16 July 2020) on the Brexit and Environment Blog (https://www.brexitenvironment.co.uk).

Chapter Twelve: International Environmental Law

The detail and diversity of international environmental law can make it difficult to get a bird's eye view of the subject. Daniel Bodansky, 'Top 10 Developments in International Environmental Law: 1990-2020' (2020) 30 Yearbook of International Environmental Law (in press currently on SSRN) is an excellent overview of 30 years of development of the law which charts trends as well as providing detail.

Chapter Fourteen: Integrated Pollution Control

The European Commission is considering a revision of the Industrial Emissions Directive (IED) (2010/75/EU) by the fourth quarter of 2021. While a revision of the IED Directive after the Implementation Period Completion Day (31.12.2020) would not change the law in the UK in relation to industrial emissions, a revised Directive may nevertheless have impacts in the UK. First, if a revised IED Directive imposes less or more stringent standards than the current IED Directive this may have a bearing on the long-term and interim targets the

Secretary of State will set in relation to air pollution under the Environment Bill 2019-21. Targets imposed under the Environment Bill 2019-21 that are significantly different from EU standards for industrial emissions may be difficult to justify. Second, standards adopted for air pollutants under a revised IED Directive for the 27 EU Member States can affect air or water quality in the UK given the transboundary nature of air pollution, and the acidifying effect that deposits of sulphur dioxides and nitrogen oxides have on water courses.

A revised IED may include further sectors, such as cattle farms, extractive industries and aquaculture. The scope of the IED may be also extended to smaller installations in sectors already covered by the IED by lowering the thresholds for its applicability. There are also plans to improve the interaction between the IED and Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register.

The European Commission's evaluation of the current IED Directive[7] sets out two interesting ideas for developing further the policy idea of 'integrated pollution control'. First, the evaluation suggests that the IED could be harnessed more effectively for achieving EU water policy objectives by paying greater attention to how standards limiting air pollution can also improve water quality. The evaluation points out that only 18% of relevant BAT conclusions refer to process design as a means for avoiding at source emissions to water. Process design is one of the most integrated ways of achieving emission reductions in comparison to 'end of pipe' measures. Moreover, the evaluation finds that BREFs had limited impact on reducing water use.

Second, the Commission's evaluation identifies untapped potential in using the IED's 'Best Available Techniques' standard for achieving a circular economy. More could be done to develop and implement at installation level the BAT Conclusions set out in the BREFs in relation to circular economy issues, such as energy and materials use, waste generation, use of hazardous materials and industrial symbiosis, i.e. one company using another company's waste as a raw material for its production process. Currently the BAT conclusions in BREFs mainly address the circular economy issue of energy use. Greater emphasis in the BAT standard, also as set out in the BREF Conclusions, on recycling rates, and use of recycled materials as raw materials input could therefore further develop the policy idea of 'integrated pollution control'.

The Opinion of the Advocate General Bobek, delivered on the 2 July 2020 in Case C-826/18 *LB, Stichting Varkens in Nood, Stichting Dierenrecht, Stichting Leefbaar Buitengebied* v *College van burgemeester en wethouders van de gemeente Echt-Susteren, joined parties: Sebava BV* ECLI:EU:C:2020:514 raises interesting questions about how broad the scope of rights to public participation and access to justice, i.e. a court or tribunal, under Arts 24 and 25 of the EU Industrial Emissions Directive (IED 2010/75/EU) in the context of environmental problems that are global in their reach. The AG's opinion was delivered in response to a request for a preliminary ruling by a Dutch court deciding about the public participation and access to justice rights of protesters against an intensive pig rearing farm in the Netherlands.

[7] https://ec.europa.eu/environment/industry/stationary/ied/legislation.htm

In following the wording of the provisions, the AG suggests that Art 24 EU IED confers rights to participate in the process of permitting IED installations only to 'the public concerned', not to 'the public' at large. In addition, in his opinion Art 25 EU IED does not prohibit national law to limit access to a court to contest an administrative decision under the IED to 'the public concerned'. But in AG Bobek's Opinion Art 25 EU IED prohibits a condition in national law that would limit access to justice only to those members of 'the public concerned' that had engaged in a prior public participation procedure [153]. The AG's Opinion is also grounded in a detailed analysis of Arts. 6 and 9 (2) of the Aarhus Convention.

One of the ways in which AG Bobek justifies his interpretation of Art 6 of the Aarhus Convention and Art. 24 EU IED as conferring a right to participate only to 'the public concerned' and not to 'the public' at large is by asking:

> 'what interests, not to say rights, would a Czech, a Dane, or a Chinese, each residing hundreds or even thousands of kilometers away from the proposed activity, have in the construction of a new pen for 855 sows in Echt-Susteren, in the southeast of the Netherlands?*'* [73].

How would you answer this rhetorical question posed by AG Bobek? It has been suggested that intensive animal farming, which is a part of global food supply chains, may generate new zoonotic diseases that jump the species barrier from animal to human: Parker and others (2020) 'Can Labelling Create Transformative Food System Change for Human and Planetary Health?', forthcoming in a special issue of the International Journal of Health Policy and Management on 'The global political economy of food systems, nutrition and public health: towards healthy and sustainable food systems in the 21st century'.

Chapter Fifteen: Water Pollution – Rivers and Coastal

There are some limited developments in the setting of standards for water quality in water courses under clause 1 (3) (b) of the Environment Bill 2019-21. Defra has not yet set legally binding targets, but has set out the procedures, principles and criteria that will frame its target setting process. A public consultation about these targets, including those for water, is planned for early 2022.

Clauses 1(1) and (6) of the Environment Bill 2019-21 require the UK government to set legally binding long-term targets through secondary legislation, with those targets spanning at least 15 years. Draft SIs setting out the targets are expected to be published by the 31st of October 2022. At least one of those long-term targets has to be set for water. Achievement of these long-term targets is to be facilitated through the setting of interim targets in the statutory Environmental Improvement Plan (Clause 10 (1)), covering 5 year periods. Targets have to specify a standard to be achieved (Clause 1 (4)).

The targets may contribute to the protection and improvement of the quality and amount of water in UK water bodies since Clause 6 of the Environment Bill 2019-21 requires Defra to periodically review the targets by assessing - at least every five years – whether alongside other statutory environmental targets, they would significantly improve the natural environment in England. Defra must report to Parliament on the outcome of this Significant

Improvement Test. If the targets fail the test, Defra must set out how the targets need to be reformed. The first Significant Improvement Test has to be carried out by January 2023.

So far the government has provided general indications about what targets for water courses may look like, with some of the targets perhaps not going further than standards specified in the EU Water Framework Directive (WFD) (2000/60/EC). All monitored rivers and lakes in England currently breach EU WFD standards for chemical pollution, and 84% are not in compliance with the WFD's 'good ecological status' standard. [8]

Defra is proposing targets intended to reduce phosphorous and nitrate pollution in water courses caused by waste water [9] and agriculture, and one of the main reasons for water bodies in the UK failing to meet EU WFD standards of 'good ecological status'. Defra is also planning to establish a target for reducing demand for water in order to tackle increasing concerns about periodic water scarcity in particular in the South East of England in the context of a changing climate and development pressures. That target could cap the volume of water distributed or abstracted by water companies. There may also be a new target for reduced per capita consumption of water.

Defra has also identified overarching procedural principles and criteria it will apply when specifying the targets. Among these is that targets should benefit 'future generations and respect nature's intrinsic value, independent of human use'.[10] This partly ecocentric approach to target setting could turn legal standards for water into regulatory tools for water and land based habitat protection, and thereby promote a more integrated approach to environmental protection. Traditionally standards for water have focused on maintaining water resources for the purpose of drinking water supply. Moreover, anthropocentric property rights have set limits to regulatory standards for water use.

Defra has further emphasized that the setting of targets will be evidence based. This will be achieved also by consultation of the relevant statutory agencies, such as the Environment Agency, Natural England and the Joint Nature Conservation Committee, and consideration of socio-economic evidence about the costs, benefits and distributional impacts of the targets on businesses and society. But Defra will also consult 'other evidence partners' at its discretion.[11] The role of parliamentary Select Committees in scrutinizing the draft secondary legislation enshrining the long-term targets is acknowledged by Defra, as well as the need for Parliament to approve the draft secondary legislation. But Parliament's role in scrutinizing the scientific evidence intended to form the basis for the targets may be limited, thus raising questions about whether there will be sufficient democratic accountability for the standard setting process. Defra's suggests that 'ultimately, it will be for the Secretary of State to decide which targets to set'. [12]

[8] Ben Webster, The Times, Friday, 18 September 2020.
[9] Rachel Salvidge, 'Pow: Damage to Environment by water sector still "far to great", ENDS Report, 9 Sept. 2020.
[10] https://www.gov.uk/government/publications/environment-bill-2020/august-2020-environment-bill-environmental-targets.
[11] Ibid.
[12] Ibid.

Most interestingly, Defra perceives the relationship between evidence and target setting as a two-way process. Target setting should not just be based on available evidence but should also trigger the production of new evidence in order to enable the setting of new targets.

Measures for improving water quality and quantity in UK water courses will also be set out in the new round of River Basin Management Plans developed under the EU WFD. The EA's public consultation on the draft Plans ended on the 24 September 2020.

The Agriculture Bill 2019-21 is a major piece of proposed legislation that will frame farming in a post Brexit world. Its new 'public money for public goods' [13] approach will replace EU financial support through its Common Agricultural Policy for farmers in the UK. The new agricultural law may play an important role in protecting water quality and biodiversity.

Clause 1(1)(a) of the Bill provides a new power for the Secretary of State heading Defra to provide financial assistance e.g. to farmers for managing land or water in England in a way that protects or improves the environment. There are additional powers to provide financial assistance for managing land or water:

- 'in a way that maintains, restores or enhances cultural or natural heritage' (Clause 1 (1) (c)) or
- 'in a way that mitigates or adapts to climate change' (Clause 1 (1) (d)) or
- 'in a way that prevents, reduces or protects from environmental hazards'

The power to provide financial assistance is not unqualified. In exercising it the Sec. of State must have regard 'to the need to encourage the production of food by producers in England and its production by them in an environmentally sustainable way' (Clause 1 (4)). This provision is particularly salient in light of the fact that the UK is a net food importer, with 73% of those food imports coming from the EU.[14]

Depending on how much financial assistance is provided under these new powers, they may help to reduce pollution of water from fertilizer (nitrate, phosphorous) and pesticides (other chemicals) run-off from agricultural land.

Neelke Doorn, *Water ethics: An Introduction* (Rowman & Littlefield 2019). This book sets out key elements of different perspectives on water governance, including a justice, economic valuation, human rights, broader normative ('responsibilities') and technological engineering perspective.

Chapter Sixteen: Waste Regulation

In March 2020, the EU Commission issued a new Communication on 'A New Circular Economy Action Plan: For a cleaner and more competitive Europe' COM(2020) 98 final, as one of the main blocks of the European Green Deal. The Action Plan is not only about

[13] https://www.gov.uk/government/news/once-in-a-generation-opportunity-to-shape-future-farming-policy
[14] https://ec.europa.eu/info/food-farming-fisheries/farming/eu-agriculture-and-brexit_en

reducing waste, but making sustainable products the norm, empowering consumers, focusing on sectors with highest potential for circularity (electronics and ICT, batteries and vehicles, packaging, plastics, textiles, construction and buildings, food, water and nutrients), and providing global leadership on the circular economy.

The EU Circular Economy policy and legislative package has been incorporated into post-Brexit UK law via The Waste (Circular Economy) (Amendment) Regulations 2020 SI 2020/904.

In *Fabricom UK Limited V MW High Tech Projects UK Limited* [2020] EWHC 1626 (TCC), a contractual issue turned on whether the operations at a facility were 'power generation' or 'waste treatment. This is an interesting legal consequence of the difficult legal divide between waste and non-waste (the 'definition of waste') that arises in an increasingly circular economy.

See updates for Chapter Five (Criminal Law) for recent waste crime cases and the establishment of the Joint Unit for Waste Crime.

Chapter Seventeen: Air Quality Law

The Good Law Project has launched legal action against the UK government, arguing that the government is under a legal duty to revise its air quality standards, based on an interpretation of regulation 17 of the Air Quality Standards Regulations 2010 ('Secretary of State must ensure that levels are maintained below… limit values and *must endeavor to maintain the best ambient air quality compatible with sustainable development*') and the precautionary principle.

The House of Commons Environment, Food and Rural Affairs Committee has launched a new inquiry into Air Quality, following up on its 2018 Improving Air Quality report.

Car owners around the world are suing Volkswagen for losses arising out of the VW emissions scandal. In the UK litigation, preliminary litigation in the High Court of England and Wales relating to certain issues of law was decided on 6 April 2020. See *Crossley and others v Volkswagen Aktiengesellschaft and others* [2020] EWHC 783.

Chapter Eighteen: Climate Change Law

COP26, originally scheduled for November 2020 in Glasgow, has been postponed due to the COVID-19 pandemic.

See the Chapter Four (Public Law) update for how climate change arguments were not strong enough to allow leave to bring a new judicial review challenge to the High Speed 2 rail project in England: *R (Packham) v High Speed Two (HS2) Ltd* [2020] EWCA Civ 1004.

As outlined in the Chapter Nineteen (Planning Law) update, ClientEarth were unsuccessful in a judicial review seeking to overturn the development consent of two gas-fired power plants in North Yorkshire, which were approved as nationally significant infrastructure projects. Arguments on climate change grounds were unsuccessful in the context of this

planning regime. See *R(Clientearth) v Secretary of State for Business, Energy and Industrial Strategy & Anor* [2020] EWHC 1303 (Admin).

On 25 September 2020, the Secretary of State for Business, Energy and Industrial Strategy agreed to review the Energy National Policy Statement, to consider its conformity with climate change targets. This was a concession in response to a judicial review challenge launched by the Good Law Project and environmentalists, including George Monbiot.

For analysis of carbon risk disclosure as a form of regulation to incentivise climate change mitigation, see Emily Webster, 'Information Disclosure and the Transition to a Low-Carbon Economy: Climate-Related Risk in the UK and France' (2020) 32(2) JEL 279.

See Volume 29, Issue 2 of the Review of European, Comparative and International Environmental Law for a Special Issue on 'Assessing the EU 2030 Climate and Energy Policy Framework'.

For analysis of large-scale private law climate litigation, see Kim Bouwer, 'Lessons from a Distorted Metaphor: The Holy Grail of Climate Litigation' (2020) 9(2) TEL 347.

Chapter Nineteen: Planning Law

In early August 2020, the Government published their Planning White Paper, *Planning for the Future* which sets out proposals for dramatically overhauling the English planning system. While the White Paper is short on detail, the major thrust of the reforms is to reduce individualised discretion in the planning system. An excellent account and critique of the paper can be found at Samuel Ruiz-Tagle, 'White Paper Planning for the Future: Understanding the Importance of Judgement in Public Administration', UK Const L Blog (9th Sept. 2020) (available at https://ukconstitutionallaw.org/).

As discussed in our last update, *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214 concerned a challenge to a National Planning Statement under the Planning Act 2008 (19.3.2.4). The case is on appeal to the Supreme Court. A number of case notes have been published on the case including Joanna Bell and Elizabeth Fisher, 'The 'Heathrow' Case: Polycentricity, Legislation, and the Standard of Review' (2020) 83 MLR 1072 and Sonam Gordhan, 'Plan B Earth v Secretary of State for transport: Airport Expansion, the Paris Agreement and the Planning Act 2008' (2020) 32 JEL advance access.

Clientearth, R (on the application of) v Secretary of State for Business, Energy and Industrial Strategy & Anor [2020] EWHC 1303 (Admin) (22 May 2020) concerned another challenge to a decision taken under the Planning Act 2008 (19.1.3), this time to a development consent order ('DCO') for a 'nationally significant infrastructure project' – a gas fired power station. Nine grounds of challenge were put forward including misinterpretation and misapplication of policy and legislation, as well as legal errors relating to the net zero emissions target. All claims were dismissed after lengthy legal analysis. The case is a good example of how infrastructure projects raise a series of complex legal issues.

In Section 19.6.4 we discussed the relevance of contaminated land in planning law. *QM Developments (UK) Ltd v Warrington Borough Council* [2020] EWHC 1511 (Admin) (11

June 2020) is an example of the importance of the interrelationship in practice. The case concerned a challenge to an 'informative' in a certificate of lawfulness of existing use for development (CLEUD). The facts are complicated, but the basic issue was that an original planning permission had been granted for a residential development on the basis that land contamination be investigated and any necessary remediation occurr (condition 6 of the planning permission). The development was ultimately built, and a house sold on. The new owners got into a dispute with the developers, claiming that condition 6 had never been fully discharged thus meaning the new owners could not sell the property. To resolve the dispute, the developers sought a CLEUD. The CLEUD that was ultimately issued included the following informative, 'Whilst planning permission 2010/16124 was lawfully implemented, condition 6 attached to that permission was not fully discharged and will require the submission of additional details'. It is this the developer was challenging.
The application for judicial review was dismissed. Among other things this was because an appeal against the CLEUD was pending before the Planning Inspector. But the case does illustrate the commercial consequences of land contamination.

Chapter Twenty: Environmental Impact Assessment

In *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179 (09 September 2020) the Court of Appeal dismissed an appeal in which one of the arguments concerned failures in relation to environmental impact assessment (EIA). In doing so they noted

> The right of an aggrieved party to seek judicial review of a planning decision is an important safeguard to prevent capricious or irrational decision-making. Too often, however, such challenges can depart radically from the original planning objections, and focus instead on what might be called generic failures to comply with statutory obligations which have never before been raised. Two regular candidates for such after-the-event challenges are the planning authority's alleged failure to have regard to the Public Sector Equality Duty ("PSED") and the failure to require a proper Environmental Statement ("ES"). Sometimes, these kinds of challenge can take on an arid quality, raising matters of form rather than substance. This appeal involves challenges on both these grounds, based on complaints which had not been raised by the appellant (or his predecessor, the relevant Parish Council) during the lengthy planning process. [1].

This statement is both a reminder of the importance of being able to challenge planning decisions in court, but also the dangers of 'arid' legal arguments.

A case where the legal arguments were not arid is the successful challenge in *Swire, R (On the Application Of) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 1298 (Admin) (22 May 2020) to a screening decision (20.4.2) of a local planning authority relating to a development on an old meat rendering site. The site was contaminated and had also processed BSE-infected animals. After an excellent analysis of the relevant legal authorities and the amendments brought in by the 2014 reforms to the EIA Direcitve, Justice Lang concluded:

> Applying the principles established in the case law, a screening authority must have sufficient evidence of the potential adverse environmental impacts and the availability and effectiveness of the proposed remedial measures, to make an informed judgment that the development would not be likely to have significant effects on the environment, and that therefore no EIA is required. See *Gillespie*, per Pill LJ at [37], [40], [41] and per Laws LJ at [46]; *Jones*, per Dyson LJ at [38], [39], [53], [55]; *Catt*, per Pill LJ at [27], [33], [34]; Loader, per Pill LJ at [43], [47]; *Champion*, per Lord Carnwath at [51] – [53]; all cited above.
>
> The difficulty facing the Defendant in this case was that there was very limited evidence as to the presence and nature of contamination from BSE-infected carcasses at the Site; the hazards which any such contamination might present for the homes and gardens to be constructed on the Site; and any safe and effective methods of detecting, managing and eliminating any such contamination and hazards.
>
> The developer commissioned risk assessment and remediation reports which he submitted to the Council in support of his application for planning permission. None of these reports made any reference to the Site's former use for BSE-infected animal carcass disposal from 1998, nor any risk of contamination from such use. The authors of the reports were not even aware of this former use. In my view, the reports were very inadequate in this regard. The information was available in the public domain, the BSE crisis had occurred within living memory, and it was well-known in the locality, as demonstrated by the objections made by the Claimant and others to the planning application [90-92].

In *London Historic Parks And Gardens Trust v Secretary of State for Housing Communities And Local Government* [2020] EWHC 2580 (Admin) the claimant argued that the UK had not properly transposed Article 9a of Directive 2011/92/EU. That Article states:

> Member States shall ensure that the competent authority or authorities perform the duties arising from this Directive in an objective manner and do not find themselves in a situation giving rise to a conflict of interest.
>
> Where the competent authority is also the developer, Member States shall at least implement, within their organisation of administrative competences, an appropriate separation between conflicting functions when performing the duties arising from this Directive.

The Article has been transposed into English law in Reg 64 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017

> "(1) Where an authority or the Secretary of State has a duty under these Regulations, they must perform that duty in an objective manner and so as not to find themselves in a situation giving rise to conflict of interest.
> (2) Where an authority, or the Secretary of State, is bringing forward a proposal for development and that authority or the Secretary of State, as appropriate, will also be responsible for determining its own proposal, the relevant authority or the Secretary of State must make appropriate administrative arrangements to ensure that there is a functional separation, when performing any duty under these

> Regulations, between the persons bringing forward a proposal for development and the persons responsible for determining that proposal."

The challenge arose as part of a challenge to the process by which a planning application for a Holocaust Memorial in London is being considered, ie. the planning application at the time of the challenge had not been determined. The Secretary of State put in the planning application and also 'called in' the application under s 77 of the Town and Country Planning Act 1990. The process for determining the application involves a planning inspector holding a planning inquiry and presenting a report to the Secretary of State. The Secretary of State will then make the final decision.

After a pithy and thoughtful analysis of the legal duties in regard to transposition, the Court found that there had been proper transposition. Reg 64(2) was essentially a 'copy out' [108] of Article 9a. As Holgate J noted: 'Regulation 64(2) applies to a wide range of authorities and projects across the country. It is entirely appropriate that the legislation allows for arrangements to be tailor-made in this way by individual authorities for their own circumstances'[113]. Any arrangements made would of course need to meet the requirements of Article 9a and Reg 64(2).

The second line of challenge was whether the procedure in this case did comply with Reg 64(2). The Court found that the document setting out the handling arrangements did not, and nor did its lack of publication. Holgate J stated:

> However, I accept [the claimant's] criticisms that the current version of the handling arrangements fails to refer to regulation 64(2) and that there has also been a failure to publish the document. These requirements derive from the principle of legal certainty. They are matters of substance and not mere formalism. It is important to bring home to those to whom the arrangements apply, whether involved in the promotion of the development or the handling of the application by the competent authority, that the document lays down a regime in order to comply with the Secretary of State's legal obligations under regulation 64(2), and that those obligations are enforceable in the courts. Accordingly, ministers and officials must understand that they have to comply with the arrangements. The document is not to be treated as simply guidance. The document, and any amended version, should also be published so that the public is aware that it sets out the arrangements made by the Secretary of State in order to comply with his legal obligations under regulation 64(2) [126]

This is a reminder that of the importance of decision-making process in EIA.

C24/19 *A v Gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen, afdeling Oost-Vlaanderen* ECLI:EU:C:2020:503 concerned the question of whether Article 3(2)(a) of the Strategic Environment Assessment Directive (20.5) 'must be interpreted as meaning that an order and a circular, both of which contain various provisions regarding the installation and operation of wind turbines, including measures on shadow flicker, safety and noise level standards, constitute plans and programmes that must be subject to an environmental assessment in accordance with that provision' [64]. The answer was yes with the Court stating that 'it must be noted that the concept of 'plans and

programmes' relates to any measure which establishes, by defining rules and procedures for scrutiny applicable to the sector concerned, a significant body of criteria and detailed rules for the grant and implementation of one or more projects that are likely to have significant effects on the environment' [67].

Chapter Twenty One: Nature Conservation

Jessica Allen and others, 'De-Extinction, Regulation and Nature Conservation' (2020) 32 JEL 309 is an interesting and provocative discussion about the idea of 'de-extinction' – that is the idea of bringing back extinct species through a number of different routes.

John Condon, 'Biodiversity Offsetting and the English Planning System: A Regulatory Analysis' (2020) 32 JEL advance access is a pithy discussion of proposals for biodiversity offsetting in planning (21.3.5) under the Environment Bill.

Case C-254/19 *Friends of the Irish Environment Limited v An Bord Pleanála* ECLI:EU:C:2020:680, concerns whether the extension of a development consent, which is limited to a period of 10 years, by a further 5 years a plan or project within the meaning of Article 6(3) of the Habitats Directive (21.5.3). The Court concluded it was noting that 'the purpose of such a consent is not to renew the consent for a recurrent activity in the course of operation, but to allow the execution of a project which, as is apparent from the order for reference, in particular the description of the Irish legal framework, was the subject of a first consent that lapsed without the intended works having even commenced' [38].