December 2021 Updates

In early November 2021, the UK/English Environment Bill became an Act: the Environment Act 2021. That Act provides a new architecture and will over time transform English environmental law, and environmental law in Northern Ireland (at least for a time). We have touched on the Act before in our updates (discussing the long gestation of the Bill), and below we touch on some of its key features. At the time of this update, much of the Act was not yet in force (see section 147 of the Act). Comprehensive analysis of the Act will follow in the next edition of the textbook, along with related developments in Scotland (under the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, 'Scottish Continuity Act')) and Wales (new legislation on post-Brexit environmental governance is expected).

Chapter 1 – What is Environmental Law?

In Section 1.2.4, we discuss the importance of definitions. The new Environment Act 2021 provides definitions of 'natural environment' and 'environmental law' that relate to Part One of the Act (the 'environmental governance' provisions).

> s 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.
>
> s 45 Meaning of "environmental protection"
> In this Part "environmental protection" means—
> (a) protection of the natural environment from the effects of human activity;
> (b) protection of people from the effects of human activity on the natural environment;
> (c) maintenance, restoration or enhancement of the natural environment;
> (d) monitoring, assessing, considering, advising or reporting on anything in paragraphs (a) to (c).
>
> 46 Meaning of "environmental law"
> (1) In this Part "environmental law" means any legislative provision to the extent that it—
> (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……..

Think about the implications of these different definitions. What is included and what is excluded?

Chapter 2 – Environmental Problems

Given the polycentricity of environmental problems, it is important that there is a diversity of knowledge and a diversity of voices in environmental decision-making. The implications of this for environmental law are explored in a series of commentaries in volume 33(3) of the *Journal of Environmental Law*.
See here for details - https://academic.oup.com/jel/issue/33/3?browseBy=volume.

Chapter 3 – Private Law

A number of recent cases open up the possibility of tort actions being brought in the UK against UK parent companies for environmental damage in other jurisdictions. In *Okpabi* v *Royal Dutch Shell Plc* [2021] UKSC 3, the UK Supreme Court, relying on the reasoning in *Vedanta Resources Plc* v *Lungowe* [2019] UKSC 20, held that a case was arguable in an English court of whether a corporate structure authorized the delegation of authority in relation to safety and environmental issues arising from the operation of the oil pipeline. A similar approach can be found in *Municipio de Mariana* v *BHP Group Plc (formerly BHP Billiton Plc*) [2021] EWCA Civ 1156.

Chapter 4 – Public Law

In Section 4.4 we discuss accountability. An important new accountability mechanism in the UK is the Office for Environmental Protection (OEP), which was legally formed on November 17 2021 (Environment Act 2021 (Commencement No 1) Regulations 2021/1274). Under the Act, the OEP has monitoring, reporting, and enforcement functions. Under section 32 of the Act, '[a] person may make a complaint to the OEP under this section if the person believes that a public authority has failed to comply with environmental law'. The Act sets out a multistep process for how complaints are handled, with any initial investigation of complaints depending on a threshold of 'seriousness' (section 33). The OEP also has independent power to investigate 'serious' failures to comply with environmental law. Commentators have raised concerns about how independent the OEP will actually be and whether it will have the powers and resources to enforce environmental law effectively. This is particularly in light of the weak nature of remedies available under the new procedure of environmental review, should a complaint proceed to that stage (section 38).

Even though the OEP will only start formally operating in early 2022, it has been operating in interim form and accepting complaints since January 2021, first as the Interim Environmental Governance Secretariat and then as the interim OEP. For statistics on complaints received during this time, see IEGS Complaint Report (1 January – 31 March 2021); and the First and Second Complaint Reports of the Interim Office for Environmental Protection (15 July 2021, 22 October 2021).

In *Richards, R (On the Application Of) v The Environment Agency* [2021] EWHC 2501 (Admin) (16 September 2021), the High Court considered whether there had been a breach of s 6 of the Human Rights Act 1998 (relying on Articles 2 and 8 ECHR) rights due to the Environment Agency's failure to deal with hydrogen sulphide emissions from a waste disposal site, which was having serious health impacts on the 5 year old claimant (and the neighbouring community). The Court concluded

that, in the specific circumstances, both positive duties in relation to Articles 2 and 8 were triggered. While finding no actual breach, they made a detailed declaration requiring the Environment Agency to reduce emissions from the site within a limited time frame.

Chapter 5: Criminal Law

Criminal prosecutions of the main water companies for known types of pollution incidents, such as discharges of sewage from malfunctioning sewage works, are continuing. In September 2021, Yorkshire Water was fined £150,000 and ordered to pay costs of approximately £35,000 for the discharge of sewage effluent into a South Yorkshire nature reserve. The discharge was caused by a valve failure at one of Yorkshire Water's sewage treatment works (https://www.bbc.co.uk/news/uk-england-south-yorkshire-58549612).

The continuing stream of prosecutions for similar types of pollution incidents caused by water companies raises questions about the general and individual deterrent effect of these criminal prosecutions. The EA considers fines issued by the courts as not sufficiently large to be effective (ENDS Report No. 554, May 2021, p 14).

Against this backdrop, the new legal duties imposed upon both government and water companies to plan for a reduction of sewage pollution are important. Section 80 of the Environment Act 2021 deals with storm overflows from sewers and introduces new section 141 A-E into the Water Industry Act 1991.

- Section 141A and B impose a new legal duty upon the Secretary of State to publish a plan by September 2022 to limit volume, frequency and duration, as well as adverse impacts on public health and the environment, of sewage discharges from storm overflows from sewerage undertakes in England. The Secretary of State must also present a progress report to Parliament on the implementation of this plan, initially after a three-year period.

- Section 141C imposes a new legal duty upon sewerage undertakers in England to publish annually a storm overflow report, starting with reporting about the year 2021. This must contain information such as the location of the overflow, its volume, frequency and duration, data about the water course into which sewerage is discharged, as well as information about investigations and improvement works in relation to storm overflows.

- Section 141D imposes a new legal duty upon the EA to publish annual reports on the operation of storm overflows by sewerage undertakers in England, starting with a report about the year 2021. That report must contain information similar to that contained in the sewerage undertakers' reports.

These new legal obligations are expected to also improve bathing waters in light of the fact that the Combined Sewer Overflows (CSOs) of eight water companies discharge into bathing waters (ENDS Report No 555, June 2021, p 12). Protecting the quality of ground- and surface waters matters from both an ecocentric and anthropocentric perspective. An anthropocentric perspective has been re-emphasized by the UK government's promotion of 'social prescribing' in its 25-year Environment

Plan. This entails enhancing access to and enjoyment of nature for people in the UK, a policy that has gained further significance in the light of Covid-19 related travel restrictions.

In addition, Brexit is posing new challenges for tackling water pollution from sewage. Due to a lack of lorry drivers transporting goods to the UK, supply chain shortages have arisen for ferric sulphate, an acidic solution used in third stage treatment of sewage in order to limit the growth of algae. On 7 September 2021, the EA issued a regulatory position statement that waives the requirement for a third stage in the treatment of water until the end of 2021, if water companies do not have sufficient ferric sulphate. The absence of a third treatment stage, however, increases the risk of discharges of sewage from treatment works in breach of permit conditions (Lisa O'Carroll, Guardian, 8 September 2021, p 12).

Ryder and Green v *Environment Agency* [2020] EWCA Crim 1110 further clarifies the law in relation to the Proceeds of Crime Act 2002 (POCA) in the context of breaches of the Environmental Permitting Regulations (EPRs). Ryder and Green owned a waste management site near Barnsley, which was let to Grantscope Ltd, a company of which they were directors. Grantscope Ltd held an environmental permit to store and treat waste from skips at the site. It failed to comply with the permit and a subsequent enforcement notice which had been issued by the EA. Grantscope Ltd's permit was revoked, it went into liquidation, but left the waste at the site.

Ryder and Green, however, continued with waste activities on the site without a valid permit being in place. They were successfully prosecuted for this by the EA under the Environmental Permitting Regulations 2010. The EA also asked for confiscation orders against Ryder and Green under POCA since it considered them to have gained a financial advantage. That consisted of about £276,004, which amounted to the costs of removing waste stored at the site. The Court of Appeal rejected the three arguments that Ryder and Green had raised: that the EA had not served them with a notice to remove the waste, and – somehow in contradiction to the fact that they were continuing to store waste at the site – that they did not have a pecuniary advantage because the obligation to remove the waste was ongoing, and that the costs of this reduced the value of the site.

Referring to *Stone & Anor* v *Environment Agency* [2018] EWHC 994 (Admin), the Criminal Division of the Court of Appeal held that a landowner who stores waste without an environmental permit commits an offence under the EPRs, and also obtains a pecuniary advantage for the purposes of POCA, by not having to pay for the removal of the waste. *Ryder and Green* v *EA* is significant in finding that the actions of landowners and not just those of the immediate holders of the environmental permit are relevant for assessing whether a pecuniary advantage has been obtained for the purposes of POCA.

Chapter 8 – Principles and Policy

As foreshadowed in previous updates, the Environment Act 2021 constructs a framework for Ministerial policymaking that is based on environmental principles (ss 17-19). This statutory framework is both expansive (in reaching across government departments) and limited, in that it requires Ministers to have 'due regard' of a policy statement on environmental principles (prepared by the relevant Minister), but not if that requires doing anything that would have no significant environmental benefit or which would be disproportionate to the environmental benefit. This

contrasts with a related duty in the Scottish Continuity Act which requires Scottish Ministers to have due regard to environmental principles (not a Ministerial policy statement concerning their meaning and interpretation) in policymaking, and imposes a parallel obligation on all pubic bodies where policymaking is likely to have significant environmental effects.

Chapter 9: Regulatory Strategy

Regulatory strategy in the UK continues to evolve also in response to the recent constitutional moments of Brexit and Covid. Within the UK, responses to the Covid-19 pandemic have led, for instance, to some integration of environmental and public health law with anti-discrimination law, as the recent case of *HHRC Ltd v Hackney BC* [2021] EWHC 2440 (Admin) illustrates.

Legal powers for the Environment Agency to enforce 'command and control' environmental regulation have been further strengthened through the Covert Human Intelligence Sources (Criminal Conduct) Act 2021 which received Royal Assent in March 2021. Investigatory powers of the EA are strengthened by undercover EA officers and informants being able to commit crimes – where necessary and proportionate to do so – as part of investigations into environmental crimes. The provisions may be particularly relevant for tackling waste management crimes committed by organized crime groups.

Suzanne Kingston, Edwin Alblas, Mícheál Callaghan, Julie Foulon, 'Magnetic Law: Designing Environmental Enforcement Laws to Encourage Us to Go Further' (2021) *Regulation and Governance* 1 questions whether private enforcement is more effective than enforcement by public authorities. It focuses on private enforcement as facilitated by the UNECE Aarhus Convention (1998) granting third party citizens and environmental NGOs rights to access environmental information, public participation and access to justice in environmental matters. The authors' argument is based on extensive empirical survey and interview research with farmers, environmental, and non-governmental organisations, and citizens in Ireland, France and the Netherlands. The article also identifies factors promoting and limiting voluntary pro-environmental behaviour in the context of nature conservation.

Chapter 10 – Environmental Law in the Legal Culture of the United Kingdom

In Section 10.3.1, we discuss the importance of legislation in the UK. Eloise Scotford, 'Legislation and the Stress of Environmental Problems' (2021) CLP (advance access) provides an excellent account of the important but complex role of legislation in environmental law.

As mentioned in the introduction, in November 2021, the Environment Act 2021 was finally passed after nearly three years from the Draft Environment (Principles and Governance) Bill being published in December 2018. The delay in passing the Bill was mainly due to the Covid-19 pandemic and a national election at the end of 2019, but no one should doubt that the Act is also controversial. While there can be no attempt to do justice to the Act here, it is useful to note the following.

Part One sets out a new governance framework for English environmental law. Chapter One grants duties and powers to the Secretary of State to set targets in relation to certain environmental issues (s 1); environmental improvement plans (s 8); and policy statements on environmental principles (s 17). The target setting regime (ss 1-7) is a new way of setting environmental standards in English environmental law, with some notable features (targets must be achievable, based on expert advice, and are susceptible to being lowered in light of changing 'social, economic, or environmental or other costs'). Regulations setting out the targets must be published by 31 October 2022. Chapter Two creates the OEP (see above). The rest of the Act is then a series of parts and schedules which relate to specific issues such as waste, biodiversity, and water.

There are three features of this new framework. The first is it is not a particularly coherent framework and the relationship between its different parts as well as retained EU environmental law is not clear. Many of the later parts of the Act amend other Acts and it is likely that, at least in the early days of its operation, there will be a great deal of legal uncertainty. Second, the Act contains few aims and objectives – rather discretion is routinely vested in the Secretary of State to pass regulations in relation to issues. This is particularly in regard to Chapter 1, Part 1 of the Act, and there are over 50 powers to make regulations under the Act. Third, as noted above, there are concerns that the framework is weak in relation to environmental protection. Besides issues to do with the OEP, there are also concerns that there is no overarching environmental protection duty on the Secretary of State, and no objective of a high level of environmental protection driving the Act as a whole.

Carolyn Abbot and Maria Lee, *Environmental Groups and Legal Expertise*: *Shaping the Brexit Process* (UCL Press 2021) is an excellent study (and open access) of the role of the NGO community in addressing the environmental fallout from Brexit.

Chapter 12 – International Environmental Law

Jaqueline Peel and Lavanya Rajamani, *Oxford Handbook of International Environmental Law* (2nd ed, OUP 2021). Building on an excellent first edition, this handbook presents a series of chapters by leading scholars exploring state of the art in environmental law.

Giulia Claudia Leonelli, 'From Extra-Territorial Leverage and Transnational Environmental Protection to Distortions of Competition: The Level Playing Field in the EU–UK Trade and Cooperation Agreement' (2021) 33 JEL 611 provides an excellent analysis of the environmental protection implications of the EU–UK Trade and Cooperation Agreement.

Lavanya Rajamani is one of the world's leading climate change law scholars and she has just published Lavanya Rajamani, *Innovation and Experimentation in the International Climate Change Regime* (Collected Courses of the Hague Academy of International Law/ Receuil des Cours, Brill 2020).

Chapter 14: Integrated Pollution Control

The UK government – together with the Scottish and Welsh Governments, and the Department of Agriculture, Environment and Rural Affairs in Northern Ireland – has consulted on a future regime

for developing what 'Best Available Techniques' (BAT) mean for the purpose of controlling industrial air pollution post Brexit.

The consultation closed in March 2021 and sought views on key elements of a common governance process applicable across the UK, such as how to marshal evolving technical expertise for defining BAT, how to ensure public participation in the BAT definition process, and how to ensure accountability for BAT definitions. This raises particular challenges in the post-Brexit context since air quality is a devolved matter. Each of the governments of the four nations in the UK has powers to define BAT and to do so in potentially different ways. The Scottish government, for instance, has stated that it will seek to stay aligned with EU BAT standards. The UK government's response to the consultation is still awaited and details of the new BAT regime as applicable to environmental permitting is expected in early 2022.

As noted in the October 2020 update, the European Commission is revising the Industrial Emissions Directive (IED) (2010/75/EU). A proposal for the revision is now expected in early 2022. A revised IED Directive would not change the law in the UK in relation to industrial emissions, but nevertheless may have impacts in the UK, such as upon the exercise of powers by the Secretary of State to set targets for air quality as envisaged under the Environment Act 2021, also in light of the fact that EU wide standards for air quality may affect water, soil and air quality in the UK through transboundary pollution deposits.

The European Commission is also considering revising 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 (EPRTR). The revision of both the IED Directive and the EPRTR forms part of the Commission's European Green Deal package which seeks to achieve zero pollution also in support of decarbonisation and the EU's energy, and circular economy policies.

The European Commission is also seeking to strengthen the participation of civil society representatives in the issuing of IED permits in its revision of the IED Directive. This approach to defining environmental standards that addresses directly the various interests involved is already part of the co-operative standard setting process at the EU level that involves NGOs, Member States and industry as key stakeholders. By contrast, as set out above (ch 10), section 4 of the Environment Act 2021 envisages the setting of environmental standards to be predominantly expert based.

Chapter 15: Water Pollution – Rivers and Coastal

Water pollution continues to be a significant environmental problem in England, and water pollution events from the water and farming sectors have increased (ENDS Report, Nov 2020, issue 548, p 7). The Environment Agency (EA) has only limited capacity to carry out inspections on farms. Most farm inspections focus on animal wellbeing rather than environmental regulation, and farmers are seldom prosecuted for pollution incidents (ENDS Report No 548, Nov 2020, pp 12, 13). The new environmental land management regime is informed by a 'public money for public goods' approach,

set out in the Agriculture Act 2020, and may put in place a more preventative approach to limiting pollution from farmland.

Chemicals, including pharmaceuticals and run-off from highways, also continue to be a significant source of water pollution. According to an EA report published in September 2020, no river in England is meeting the EU Water Framework Directive standard of 'good chemical status'. One of the reasons for this result is that the European Commission has added 12 new substances to the required assessment of chemical status of surface water bodies, with 6 of these being Priority Hazardous Substances. Moreover, a change in sampling methods with samples now also taken of fish, and not only water, has raised the threshold for meeting the 'good chemical status' standard (ENDS Report, No 548, Nov 2020, p 32).

Water companies have suggested that 'end of pipe' sewage treatment solutions for dealing with chemicals pollution can be very costly, thus raising the spectre of increased bills for final consumers of water. Water companies are therefore advocating taxes for reducing the use of chemicals (ENDS Report, No 548, Nov 2020, p 35). It remains to be seen what contribution the UK's own post-Brexit REACH regulatory regime will make to reduce chemicals pollution in water courses.

Water scarcity also increasingly requires regulatory intervention. Even in regions of the UK that are traditionally considered as water rich, evidence of water scarcity is emerging. For instance, the catchment of the River Spey in Scotland – known for its salmon fishing and thus of significance also for the local tourist industry – is facing a water shortage caused by over-abstraction and artificial diversion. The EA has suggested that it will need extra funding to guarantee sufficient future water supplies. Key measures for tackling water scarcity are the building of new reservoirs, the reuse of effluent and transfer of water between catchments (ENDS Report, Sept 2021).

Developing regulatory measures for reducing water scarcity will also be further promoted through standard setting. As noted above (ch 10), section 1 of the Environment Act 2021 empowers the Secretary of State to set long-term targets in relation to priority areas. One of these is water, and DEFRA has proposed to set a target for reducing water demand (*19 August 2020: Environment Bill – Environmental Targets*, updated 6 September 2021). This could entail different measures. First, it could limit the amount of water that conditions in abstraction licences authorize significant abstractors, such as water companies, thermal power stations, industrial producers and farmers, to abstract from the natural environment. Second, it could entail a target for personal water consumption, which the UK government specified in the 25 Year Environment Plan as an average per capita consumption target of 131 litres per person per day to be achieved by 2025. Retail water companies that provide administrative services to large organizations in connection with their water supply are expected to promote water conservation and efficiency measures. DEFRA is also considering targets for reducing pollution from agriculture and waste water, especially phosphates and nitrates (ENDS Report No 554, May 2021, p 31).

Legal powers to deal with pollution from sewerage systems have also been strengthened through planning case law. In *Backland v Monmouthshire County Council* [2021] EWHC 2185 (Admin), Justice Jarman QC affirmed that planning decision-making in relation to sewerage systems for buildings should scrutinize sewerage systems for their environmental impacts, such as amenity and nuisance. In this case, Monmouthshire County Council had granted planning permission for a non-

mains sewerage system which involved piping sewage to an underground treatment plant, and then onto drainage fields. The system was to service two new dwellings in rural Wales. A neighbour of the two new dwelling houses lodged a judicial review challenge to the granting of the planning permission for the sewerage system.

The High Court granted the judicial review claim on the grounds that the planning officer's report had not sufficiently considered material factors in the planning context, such as amenity and nuisance, and there had been insufficient consideration of 'other authoritative standards' for planning controls, including Approved Guidance set out by the Welsh Government which recommended that waste water treatment plants and drainage fields should be at least at a 15m distance from buildings. The planning officer's report had recommended granting planning permission, simply on the basis that the sewerage system complied with building control standards which had required non-mains sewerage systems to be sited at a distance of 10m from any building.

The fundamental issue of what constitutes a sewer (in contrast to a natural water course which benefits from riparian rights) was decided in the recent case of *Bernel Ltd v Canal and River Trust* [2021] EWHC 16 (Ch). The claimant Bernel Ltd sought a declaration that it was authorized to discharge surface water and treated sewage into a pipe that ran across its land and discharged onto a neighbour's land. The court held that the pipe could not be considered as a culverted natural water course associated with riparian rights for Bernel Ltd. Bernel Ltd also could not claim an easement for a prescriptive drainage right.

The significance of judicial review remedies for environmental protection also depends on the speed with which they can tackle environmental problems in light of the fact that environmental pollution can be cumulative and environmental damage can be irreversible. The Covid-19 pandemic and Brexit have put extra constraints on regulator action. In a pragmatic judgment in *R (on the application of WWF-UK) v Secretary of State for Environment, Food and Rural Affairs* [2021] EWHC 1870 (Admin) (7 July 2021), the High Court recognised this. The court clarified the meaning of a requirement of compliance 'as soon as reasonably practicable' with a schedule to a consent order granted in a judicial review claim. Given the urgency of remedying water pollution, the court's ruling should not be interpreted as granting leeway for compliance but as indicating the importance of sufficient resources for regulators to discharge their legal obligations.

In this case, WWF-UK had brought a judicial review claim against DEFRA and the EA, arguing that they had failed to meet their obligations under the European Union Water Framework Directive (WFD) (2000/60/EC) in conjunction with the Habitats Directive (92/43/EEC). WWF-UK argued that the Habitats Directive and Article 4(1)(c) WFD required that by 22 December 2015 'favourable conservation status was to be achieved for the water dependent features of Natura 2000 sites where the maintenance or improvement of the status of water was an important factor in their protection'.

WWF-UK withdrew its claim in November 2015 since the court issued a consent order. In the schedule to that order the EA and DEFRA had provided an undertaking that the results of their assessment of specific sites would be available as 'soon as reasonably practicable' and set out in Diffuse Water Pollution Plans (DWPPs) or Site Improvement Plans. By February 2021 – due to a lack of resources – only four out of the required 37 DWPPs had been produced.

The court held that a consent order was akin to a Tomlin order issued in civil proceedings in order to stay proceedings on terms agreed by the parties. In order to assess whether the defendants had acted as 'soon as reasonably practicable', the following factors could be considered:

- 'the scale and complexity of the task was greater than expected';
- no additional funding had been made available;
- resources for this work competed with other responsibilities of the EA, and the interested party Natural England. In addition, the EA's budget had been cut;
- DEFRA, the EA and Natural England had to divert resources to deal with Brexit and the Covid-19 pandemic.

The court also found that there was evidence that DEFRA, the EA and Natural England were genuinely committed to do the work set out in the Schedule to the consent order. For a case comment, see Justin Neal, 'Environmental Justice: Water Framework Directive; Tomlin orders, as soon as reasonably practicable', (2021) Env LM (1-5 August).

Chapter 16: Waste Regulation

The Environment Act 2021 introduces new measures in relation to waste. Under Section 1, the Secretary of State must introduce at least one long term target for resource efficiency and waste reduction by October 2022 (and may introduce more). Defra's initial policy paper on environmental targets (19 Aug 2020, updated 6 September 2021) indicates that two England-wide targets are being explored:

- measuring resource productivity as a ratio of national economic output (eg Gross Domestic Product) to raw material consumption;
- a reduction in the per capita tonnage of residual waste.

Chapter 17: Air Quality Law

In September 2021, the WHO updated its air quality guidelines, advocating more stringent concentration-based standards for criteria pollutants, and putting more pressure on governments globally to tighten up air quality standards and ensure their implementation. See https://apps.who.int/iris/handle/10665/345329.

In September 2021, the UN Environment Programme published the first global assessment of air pollution legislation – *Regulating Air Quality*. The study, authored by Eloise Scotford and Delphine Misonne, analyses the extent to which legislation is constructing systems of ambitious air quality legislation in countries around the world.

The Environment Act 2021 introduces new measures in relation to air quality. Under Section 1, the Secretary of State must introduce at least one long term target for air quality (and may introduce more). Under section 2, the Secretary of State must introduce a specific target for the annual mean level of $PM_{2.5}$. Defra's initial policy paper on environmental targets (19 Aug 2020, updated 6 September 2021) indicates that two England-wide targets are being explored:

- reducing the annual mean level of fine particulate matter ($PM_{2.5}$) in ambient air (as required by the Act);
- target aimed at reducing average population exposure to $PM_{2.5}$ across England (focused on driving continuous improvement in air pollution levels).

The *Richards* case (see ch 4 update) is a notable case on air pollution impacts and how human rights law might be used to hold regulators to account for not controlling emissions that are harmful to human health. This case is interesting as it concerned hydrogen sulfide pollution for which there is no legal ambient air quality standard in England, and the Court looked at policy and technical guidance to establish whether unlawful levels of pollution exposure existed on the facts.

A rash of litigation has been launched against local authorities following the controversial introduction of low traffic road measures, designed to minimise local air pollution and discourage car use. Legal arguments have concerned: whether powers under the Traffic Management Act 2004 were properly exercised; compliance with the Public Sector Equality Duty under section 149 of the Equality Act 2010; failure to adequately consult; and breach of ECHR rights. To date these claims have been unsuccessful, but they demonstrate the complex social issues involved in addressing air pollution – including the socio-economic impacts of traffic measures, the differential needs of people to use cars (such as those with disabilities), and the needs of children to get to school. See for example: *R (on the application of Sheakh)* v *London Borough of Lambeth* [2021] EWHC 1745 (Admin); *R (on the application of Tomkins) v City of London Corporation* [2021] EWHC 2265 (Admin); *HHRC Limited v Hackney Borough Council* [2021] EWHC 2440 (Admin); *SM & SJ v London Borough of Hackney* [2021] EWHC 3294 (Admin).

Chapter 18: Climate Change Law

In international climate law, the Glasgow 2021 COP was a moment of great expectation, having been delayed by a year due to the Covid-19 pandemic, and the political and scientific pressures of global climate policy remaining urgent. The main outcome of this COP was the Glasgow Climate Pact. The Pact calls on countries to 'revisit and strengthen' their 2030 nationally determined contributions by the end of 2022, so that they align with the Paris Agreement's temperature goals. It also asks countries to prepare long-term strategies to 2050, aiming for a just transition. The Pact calls on countries to reduce potent climate-forcing gases such as methane, and notably outlines the need to 'phase down unabated coal' and 'phase-out fossil fuel subsidies'. Aside from the Pact, other collective commitments were agreed in Glasgow, including on reversal of forest loss and aligning the finance sector with net-zero by 2050.

On the legal nature of temperature targets in public international law, see Benoit Mayer, 'Temperature Targets and State Obligations on the Mitigation of Climate Change' (2021) 33(3) JEL 585. On the normative linkages between the intergovernmental climate regime and the non-state dominated 'transnational partnership governance', see Charlotte Streck, 'Strengthening the Paris Agreement by Holding Non-State Actors Accountable: Establishing Normative Links between Transnational Partnerships and Treaty Implementation' (2021) 10(3) TEL 493.

On 19 October, the UK government published its long-awaited carbon plan - *Net Zero Strategy: Build Back Greener* – setting out policies for achieving the 2050 net zero target. This strategy prioritises green technology (electric vehicles, nuclear power, carbon capture and storage), tree planting and development of alternative fuels.

There continues to be a steady flow of climate litigation globally, with some of it showing elements of 'legal disruption'. Thus, in Canada, the reasoning in *References Re Greenhouse Gas Pollution Pricing Act* 2021 SCC 11 shows new insights, upholding the constitutionality of Canadian carbon pricing legislation (see Jocelyn Stacey, 'Climate Disruption in Canadian Constitutional Law' (2021) 33(3) JEL 711). In Germany, a major case declared the German Climate Law unconstitutional due to a lack of a clear reduction pathway in line with the rights of the young generation, developing a new concept of the advance effect of basic rights ("Vorwirkung" der Grundrechte: BVerfG, Beschluss des Ersten Senats vom 24. März 2021- 1 BvR 2656/18 -, Rn. 1-270). In the Netherlands, another groundbreaking legal case was decided in *Milieudefensie Nederland (Friends of the Earth Netherlands) v Royal Dutch Shell (RDS)* by The Hague district court on 26 May 2021 (ECLI:NL:RBDHA:2021:5339; English; see https://en.milieudefensie.nl/climate-case-shell). Based on a duty of care (interpreted using scientific facts/data, widespread consensus and internationally accepted standards, including a reference to human rights), the Court ordered RDS to reduce its corporate emissions by 45% by 2030 relative to 2019 levels. In *Sharma v Minister for Environment in Australia* [2021] FCA 560, the Federal Court found that the Australian Government owed a novel duty of care to children to prevent climate harms. This case may be subject to appeal (see Jacqueline Peel & Rebekkah Markey-Towler, 'A Duty to Care: The Case of *Sharma v Minister for the Environment* (2021) 33(3) JEL 727).

See also commentary on the 'first' Norwegian climate case, Christina Voigt, 'The First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics' (2021) 33(3) JEL 697; a critical evaluation of public interest litigation in China (Lei Xie, Lu Xu, 'Environmental Public Interest Litigation in China: A Critical Examination' (2021) 10(3) TEL 441; and an analysis of Brazilian constitutional climate claims in Joana Setzer and Délton Winter de Carvalho, 'Climate Litigation to Protect the Brazilian Amazon: Establishing a Constitutional Right to a Stable Climate' (2021) 30(2) RECIEL 197.

Chapter 19: Planning Law

As mentioned in a previous update, the Government in August 2020 published a White Paper proposing significant structural reform to English planning law. At the time of writing this update, there have been no further substantial proposals, although the prospect of planning reform is proving controversial.

While turning very much on its specific legislative setting, *Save Stonehenge World Heritage Site Ltd, R (On the Application Of) v Secretary Of State For Transport* [2021] EWHC 2161 (Admin) (30 July 2021) is a good example of how infrastructure and heritage values can give rise to a legal dispute. The claimants were partially successful in their action against a development consent order under the Planning Act 2008 (s 19.1.3) granting consent to the building of a road close to the World

Heritage site of Stonehenge. The case required the judge to navigate a significant amount of legal and policy material.

Sections 98-101 and Schedules 14 and 15 of the Environment Act 2021 formally introduce the concept of biodiversity net gain into English planning law. Natural English has also recently updated their biodiversity metric – The Biodiversity Metric 3.0 –
see http://nepubprod.appspot.com/publication/6049804846366720. It still early days but it is clear that biodiversity net gain will become an ingredient in the planning balance (as an illustration, see *Tewkesbury Borough Council v Secretary of State for Housing Communities And Local Government* [2021] EWHC 2782 (Admin)). An important question is how the Court will approach of assessments of net gain. This recent case concerning nitrogen neutrality highlights the type of questions that might emerge: *Wyatt, R (On the Application of) v Fareham Borough Council* [2021] EWHC 1434 (Admin).

Chapter 20: Environmental Impact Assessment

Strategic environmental assessment (20.5) continues to give rise to litigation. In *Rights: Community: Action, R (On the Application Of) v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 1954, the issue was whether adjusting 'permitted developed rights' required an SEA to be carried out because such adjustment would result in certain types of development not being subject to development control. The Court of Appeal upheld the Divisional Court and concluded it was not needed. Their legal analysis is interesting to note.

> 59. What emerges from both the European Union and domestic authorities, as the Divisional Court recognised, is that a qualifying plan or programme must be a measure whose effect is to establish, "by defining rules and procedures for scrutiny applicable to the relevant sector, a significant body of criteria and detailed rules for the grant and implementation of consents for the development of land", and "which [deals] with future development consents, and … [does] so by setting out a significant body of criteria for determining how such future development consents will be determined". A defining characteristic is that the measure in question establishes a coherent framework comprising such "criteria" or "rules", which are then to be applied by decision-makers when considering individual projects of development in a process for the granting or refusal of consent. It is clear from the case law that the process for the granting of development consent contemplated in this concept of a plan or programme is a process lying in the future, for which the plan or programme provides a framework of "criteria" or "rules" to assist the making of that decision. Such a plan or programme is not itself a consent for an individual project. It looks to, and generates criteria for granting, such consents – explicitly, the "future development consent of projects". It is a measure whose preparation and promulgation are separate from the granting of development consent itself, which is a distinct and different process. This was stressed by Lord Sumption in Buckinghamshire County Council (in paragraphs 125 and 126 of his judgment).

60. Having in mind those principles and their emphasis in the cases, I do not think any of these three statutory instruments is a plan or programme within article 3(4) of the SEA Directive. They are not, either in character or in content, measures of that kind.

61. As amended by S.I. 2020/757, the Use Classes Order is not a plan or programme that sets a framework comprising criteria for determining whether future development consent should be granted for a project. Nor is S.I. 2020/757 itself. The Use Classes Order is a statutory measure whose effect, in England, is to amend the definition of those changes of use that are development. What it does is to identify classes of use, and thus, in effect, dictate that certain changes of use are not development and do not require planning permission. S.I. 2020/757 changed these arrangements by altering the provisions identifying the various uses. As the Divisional Court concluded, the alterations it made had nothing to do with the creation of a "framework for future development consent of projects".

62. A similar conclusion applies to the "permitted development" rights in the GPDO [General Permitted Development Order] , again both in its previous form and as amended. S.I. 2020/755 and S.I. 2020/756 are statutory measures whose effect, in England, is to expand the categories of "permitted development". But they do not affect the established style and structure of the provisions by which the GPDO has itself granted planning permission, or of the provisions for prior approval. As before, the provisions of the GPDO for each class of "permitted development", though necessarily formulated in generic terms, are not, and do not contain, a "framework for future development consent". On the contrary, they are in themselves, and operate as, individual grants of planning permission, either with or without a requirement, under a condition attached to that planning permission, for prior approval to be obtained before implementation takes place (see Keenan, at paragraphs 32 and following). And they do not apply to development that is required to be the subject of environmental impact assessment under the EIA Directive, which is expressly excluded by article 3(10) of the GPDO.

63. A statutory process by which development consent is actually granted for a project of development is not to be equated to a "framework for future development consent of projects". The GPDO does not set a framework comprising criteria for determining whether such "future development consent" should be granted. The process of granting "development consent" is inherent in the GPDO itself. The GPDO contains the planning permission for each of the "permitted development" rights it provides. It puts in place the restrictions imposed on that planning permission by way of exceptions, limitations and conditions. It sets the "Procedure for applications for prior approval" where that applies, describing the local planning authority's function in granting such approval before the planning permission is implemented. That "procedure" delimits the discretionary powers exercisable by an authority in dealing with an application for prior approval made under the relevant condition. It establishes

the parameters of what the authority must do, the consultation it must carry out and matters to which it must have regard, including the NPPF. But the provisions for each class of "permitted development", including those relating to prior approval, embody, for a development within that class, the process of granting "development consent" for that project. Prior approval is not a free-standing "development consent". It is one element of the "development consent" for the project. The grant of planning permission and the prior approval together compose that "development consent". Nothing else is needed in the future to complete it.

Chapter 21: Nature Conservation

The Environment Act 2021 introduces new measures in relation to biodiversity. Under Section 1, the Secretary of State must introduce at least one long term target for biodiversity (and might introduce more), and section 3 requires the setting a target in regard to species abundance. As discussed in relation to Chapter 19, the Act also introduces a regime for bioversity net gain in planning. Alongside that, it amends section 40 of the Natural Environment and Rural Communities Act 2006 (see s 21.2.3) and also introduces local nature recovery strategies. The Parliamentary Office of Science and Technology (POST) has done a briefing paper on the latter (see https://post.parliament.uk/research-briefings/post-pn-0652/). Part 7 also introduces a regime for conservation covenants. Section 112 allows for some forms of amendment of the Conservation of Habitats and Species Regulations 2017 as they apply in England, which is likely to prove a controversial power if exercised to lower levels of protection for protected sites.