39 Essex Chambers
Environmental Law Conference

1 November 2017

#39enviro
Brexit: the Great Repeal Bill and the current plan

Richard Macrory and Justine Thornton
“The Great Repeal Bill will ensure that the whole body of existing EU environmental law continues to have effect in UK law.

This will provide businesses and stakeholders with maximum certainty as we leave the EU. We will then have the opportunity over time, to ensure our legislative framework is outcome driven and delivers on our overall commitment to improve the environment within a generation. The Government recognizes the need to consult on future changes to the regulatory frameworks, including through Parliamentary scrutiny”
Retained EU Law

- EU Regulations continue to have force in national law and will override conflicting national law.
- EU Directives no longer have legal status but existing transposing national law remains in force (“roll-over”) as far as possible.
- Decisions of the Court of Justice made before Brexit interpreting EU law continue to bind lower courts but the Supreme Court may depart from them.
- Courts are likely in the immediate future after Brexit to have regard to decisions of the European Court made post-Brexit.
(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate—

(a) any failure of retained EU law to operate effectively, or
(b) any other deficiency in retained EU law,

arising from the withdrawal of the United Kingdom from the EU
Open-ended definition of Deficiencies

• 7 (2) “Deficiencies in retained EU law include (but are not limited to) where the Minister considers that retained EU law…..”

• Seven categories listed including
  - anything with no practical application
  - provisions conferring functions on EU entities
  - provisions for reciprocal arrangements no longer existing
• S 7(4) Regulations under this section may make any provision that could be made by an Act of Parliament.
UK Environmental Law Association
Brexit, Henry VIII Clauses and Environmental Law

• We need to know the extent of the problem with Henry VIII powers

• Analyzed Environmental Acts relating to England – 29 Acts of Parliament to determine where such powers would be needed

• A presumption that use of powers should be minimized

• Categorized the potential problem areas into necessary changes and those where it may be advisable for the sake of clarity but probably not strictly necessary
Henry VIII Powers : No amendments needed

- Ancient Monuments and Archaeological Areas Act 1979
- Control of Pollution Act 1974
- Countryside and Rights of Way Act 2000
- Electricity Act 1989
- Endangered Species (Import and Export) Act 1976
- Food and Environment Protection Act 1985
- National Parks and Access to the Countryside Act 1949
- Natural Environment and Rural Communities Act 2006
- Planning (Listed Buildings and Conservation Areas) Act 1990
- Planning and Compensation Act 1991
- Planning and Energy Act 2008
- Water Industry Act 1991
- Water Industry Act 1999
- Wildlife and Countryside Act 1981
Climate Change Act 2008

• The Secretary of State must set carbon budgets with a view to meeting the overall reduction target “and complying with the European and international obligations of the United Kingdom” (s 8)
Henry VIII Powers – 6 Amendments Necessary

- Environment Act 1995  
  2 sections

- Planning Act 2008  
  2 sections

- Pollution Prevention and Control Act 1999  
  1 section

- Water Resources Act 1991  
  1 section
Henry VIII Powers : 25 Amendments Advisable but not Necessary

<table>
<thead>
<tr>
<th>Act</th>
<th>Sections</th>
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<tbody>
<tr>
<td>Climate Change Act 2008</td>
<td>1 section</td>
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<tr>
<td>Control of Pollution (Amendment Act) 1989</td>
<td>1 section</td>
</tr>
<tr>
<td>Endangered Species (Import &amp; Export) Act 1976</td>
<td>1 section</td>
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<tr>
<td>Energy Act 2013</td>
<td>3 sections</td>
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<tr>
<td>Energy Act 2016</td>
<td>1 section</td>
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<tr>
<td>Environment Act 1995</td>
<td>10 sections</td>
</tr>
<tr>
<td>Marine and Coastal Access Act 2009</td>
<td>4 sections</td>
</tr>
<tr>
<td>Pollution Prevention and Control Act 1999</td>
<td>1 section</td>
</tr>
<tr>
<td>Town and Country Planning Act 1990</td>
<td>1 section</td>
</tr>
<tr>
<td>Water Resources Act 1991</td>
<td>2 sections</td>
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Regulatory Amendments

• Many references to EU Directives could stay post Brexit during the roll-over period

• Definitions in national regulations referring to definitions in EU legislation – e.g. the definition of ‘estuarial waters’ in s 28(9A) Wildlife and Countryside Act 1981 refers to the definition in the Water Framework Directive.

• Technical specifications: e.g. The Air Quality Standards Regulations provide that “measurements must be carried out in accordance with the criteria set out in sections A and C of Annex I to Directive 2008/50/EC
• 850 pieces of legislation requiring amendment requiring around 100 statutory instruments

• Most in animal/plant health and food/farming

• 27 statutory instruments in environment

• But many areas of environmental law (e.g. environmental assessment, product standards, energy conservation) fall to other departments
ENFORCEMENT

• Withdrawal Bill focused on black letter of the law

• Enforcement of obligations against private sector remains function of specialized regulators (Environment Agency etc.) or local authorities

• European Commission has duty to enforce EU obligations on member states using infringement procedures

• These include duty to transpose EU Directives correctly but also failure to apply in practice by any part of the Member State
Enforcement Post Brexit

- Commission’s role will disappear. No citizens complaint procedure.

- Previous Secretary of State said that judicial review adequate mechanism for holding government and public bodies to legal account

- Should one rely solely on willingness of NGOs and others to take legal action?

- Let alone costs issues, can Judicial Review replicate Commission’s ability to negotiate and resolve issues without going to court?
Possible solutions

• A new institution to monitor compliance with environmental law by Government and public bodies

• Other countries have established various forms of environmental ombudsmen

• New Zealand Parliamentary Commission for the Environment

• Strengthen role of first-tier environmental tribunal and upper tribunal in environmental law
My personal vision for the courts

UPPER TRIBUNAL ← Environmental JUDICIAL REVIEWS

(appeals on points of law only)

FIRST TIER ENVIRONMENTAL TRIBUNAL

Regulatory appeals

Third party challenges on Aarhus grounds
(substantive or procedural illegality)
The future of the precautionary principle after Brexit

Richard Macrory and Justine Thornton QC

1 November 2017
Environmental principles

• Journal article: Macrory & Thornton
• Part of EU legal order for over 20 years
• No expectation of explicit roll over
• To date: domestic Courts reluctant to use but Planning Inspectors more keen
• Models for their future use?
  – CPR – Health and Safety – broad statutory duties on public authorities - NPPF
CONTAMINATED LAND

Recent Developments

STEPHEN TROMANS QC
BACKGROUND: PART 2A EPA 1990

- In force since April 2001
- Authorities have inspected 11,000 sites and determined over 500 as contaminated
- Very little by way of decided cases or appeals
- Difficulties with the scheme
- End of capital grant for local authorities 2017
- At least 10,000 sites remain for inspection
New sources of concern

- Fly tipping
- Micro-plastics (see CIWEM Report August 2017)
- Persistent fluorinated chemicals, e.g. PFOS, PFOA
THE FUTURE?

• Natural Capital Committee in September 2017 report to Secretary of State on the 25 year environment plan suggested as a goal: “Soils are healthy, productive and managed sustainably. All historic contaminated land is cleaned up.”

• Brownfield registers and permission in principle Brownfield Land Register and Permission in Principle Regulations 2017

• Brownfield land release fund
SUCCESSION TO LIABILITY

• House of Lords decision in *National Grid Gas v. Environment Agency* – privatised company did not succeed to any liability of nationalised gas board upon privatisation/transfer

• Court of Appeal decision in *Price & Hardwicke v. Powys CC* [2017 EWCA Civ 1133
  – Former landfill
  – Transfer after Part 2A enacted but before in force
  – Liabilities did not include the possibility of Part IIA liability
  – Cases on contingent liability of local authorities distinguished (see *Walters v. Babergh DC* (1983) 82 LGR 235)
APPEAL DECISIONS

• *St Leonard’s Court* – contamination of water resources by bromide and bromate. Discussion of causing

• *Willenhall Gasworks* – presence of “gasworks waste” within housing estate. Issues of validity of determination, and knowingly permitting
St LEONARD’S COURT

- Contamination by bromide and bromate from former chemical works carried out by Redland. Site redeveloped by Crest Nicholson. Preliminary works broke up hardstanding and allowed contaminants to be washed deeper into soil. Shallow excavation did not remove contaminants. Crest found to have “caused”.


- Decision on appeal that Redland and Crest be liable for scavenge pumping as an interim measure upheld; also decision on partial application of “sold with information” test in Crest’s favour was upheld (awareness of bromide in upper parts of soil): R (Redland Minerals Limited) v. Secretary of State [2010] EWHC 913 (Admin)
Agreed that case for existence of pollutant linkage with B(a)P. Walsall’s approach to SSAC, zoning and topsoil were upheld as reasonable

Advice to Walsall fell short of expert standard

Failure to investigate high results as possible anomalies – relevance of CIEH guidance

Shortcomings in Walsall’s approach to SPOS. No toxicological assessment undertaken. No risk assessment based on sound science.

Failure to consider financial and stress impacts on residents in para. 4.27 appraisal
WILLENHALL LIABILITY ISSUES

• Sale by council to developer
• Developer did not “cause” by moving material/infilling
• “Knowingly permitting”
  – Knowledge must relate to B(a)P not general gasworks waste, but no need for knowledge of its health risks
  – Finding that developer did knowingly permit, despite fact that at the time chemical analysis of soil was unlikely
  – Council not unreasonable to exclude itself from liability under “sold with information” test
CONCLUDING THOUGHTS

• Ongoing viability of Part 2A?

• Lessons for local authorities
  – Importance of sound technical basis for determination
  – Use of experts
  – Preparation for appeal

• Lessons for developers/purchasers
  – Risks of liability for causing
  – Knowingly permitting test
  – Sold with information test
Air Quality and Development

Rose Grogan
39 Essex Chambers
Air Quality: Silent Killer

• NO2 is a harmful gas produced by the combustion of fuel at high temperatures in the presence of oxygen.

• Human exposure to NO2 is associated with a number of poor health outcomes, including premature death and hospital admissions even where NO2 levels are below legal limits. Early exposure to NO2 is linked to lung damage and increased likelihood of lung infections.

• WHO describes NO2 pollution as a “health emergency”

• The UK has the second highest number of premature deaths due to exposure to NO2 in Europe.
Air Quality: Silent Killer

• Health Impacts;
  – Linked to poor sleep, respiratory problems, heart disease and cancer.
  – Causes 40,000-50,000 early deaths per year

• In London:
  – Toxic air causes more than 9,000 early deaths every year in London.
  – London not likely to comply with legal limits until 2025.
Air Quality in your area

• [https://www.londonair.org.uk/london/asp/annualmaps.asp](https://www.londonair.org.uk/london/asp/annualmaps.asp)
Air Quality in your area

See: https://www.londonair.org.uk/london/asp/annualmaps.asp
Air Quality in your area

• KCL Daily Air Quality Index
• http://www.londonair.org.uk/LondonAir/Forecast/
• Today is “low”
<table>
<thead>
<tr>
<th>Air Pollution Banding</th>
<th>Value</th>
<th>Accompanying health messages for at-risk groups and the general population</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Low</strong></td>
<td>1-3</td>
<td>Enjoy your usual outdoor activities.</td>
</tr>
<tr>
<td><strong>Moderate</strong></td>
<td>4-6</td>
<td>Adults and children with lung problems, and adults with heart problems, who experience symptoms, should consider reducing strenuous physical activity, particularly outdoors. Enjoy your usual outdoor activities.</td>
</tr>
<tr>
<td><strong>High</strong></td>
<td>7-9</td>
<td>Adults and children with lung problems, and adults with heart problems, should reduce strenuous physical exertion, particularly outdoors, and particularly if they experience symptoms. People with asthma may find they need to use their reliever inhaler more often. Older people should also reduce physical exertion. Anyone experiencing discomfort such as sore eyes, cough or sore throat should consider reducing activity, particularly outdoors.</td>
</tr>
<tr>
<td><strong>Very High</strong></td>
<td>10</td>
<td>Adults and children with lung problems, adults with heart problems, and older people, should avoid strenuous physical activity. People with asthma may find they need to use their reliever inhaler more often. Reduce physical exertion, particularly outdoors, especially if you experience symptoms such as cough or sore throat.</td>
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</table>
Legal and Policy Context

• EU Ambient Air Quality Directive 2008/50/EC, implemented in the UK through Air Quality Standards Regulations 2010. Imposes duties upon Secretary of State.

• Local authorities have duty under Part IV Environment Act 1995 to assess whether air quality objectives are being achieved or likely to be achieved.

• Where objective not being achieved or likely to be achieved must designate an Air Quality Management Area.
Legal and Policy Context

• Development Plan has primacy (see s.38(6) Planning and Compulsory Purchase Act 2004). Duty to make decisions in accordance with Development Plan unless material considerations indicate otherwise

• Starting point is Local Plan policies

• National Planning Policy Framework is a material consideration – but it does not override Development Plan
Legal and Policy Context

• Other legal obligations in planning:

  – EIA and SEA Regulations contain duty to take environmental information into account.

  – Duty to have regard to the Habitats Directive (likelihood of significant impact on protected species and habitats)
Policy Context

- NPPF and Presumption in favour of Sustainable Development
- Paragraph 14
  - Approve development proposals that accord with the development plan without delay; and
  - Where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
    - Any adverse effects of doing so would significantly and demonstrably outweigh the benefits…or
    - Specific policies in this Framework indicate development should be restricted.
Policy Context

National Planning Policy Framework para 120

“To prevent unacceptable risks from pollution and land instability, planning policies and decisions should ensure that new development is appropriate for its location. The effects (including cumulative effects) of pollution on health, the natural environment or general amenity, and the potential sensitivity of the area or proposed development to adverse effects from pollution, should be taken into account. Where a site is affected by contamination or land stability issues, responsibility for securing a safe development rests with the developer and/or landowner.”
Policy Context

National Planning Policy Framework para 124

“Planning policies should sustain compliance with and contribute towards EU limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas and the cumulative impacts on air quality from individual sites in local areas. Planning decisions should ensure that any new development in Air Quality Management Areas is consistent with the local air quality action plan.”
Policy Context

London Plan

7.14 “Development proposals should:

... be at least ‘air quality neutral’ and not lead to further deterioration of existing poor air quality (such as areas designated as Air Quality Management Areas (AQMAs)).
Policy Context

Manchester

EN16

• The Council will seek to improve the air quality within Manchester, and particularly within Air Quality Management Areas, located along Manchester’s principal traffic routes and at Manchester Airport. Developers will be expected to take measures to minimise and mitigate the local impact of emissions from traffic generated by the development, as well as emissions created by the use of the development itself, including from Combined Heat and Power and biomass plant.

• When assessing the appropriateness of locations for new development the Council will consider the impacts on air quality, alongside other plan objectives. This includes cumulative impacts, particularly in Air Quality Management Areas.
Legal and Policy Context

*R (ClientEarth) v Secretary of State for Environment, Food and Rural Affairs No 2 [2016] EWHC 2740*

- Challenge to draft Air Quality Plan which promised compliance by 2020 (outside London) and 2025 (in London).
- Comments on requirements of Directive (paras 49-53):
  - Where there is a breach of limit values, the government’s discretion is heavily circumscribed. Must adopt an air quality plan that achieves compliance as soon as possible.
  - Must select effective measures.
  - Must choose the route which achieves compliance as soon as possible and which reduces exposure as quickly as possible.
Legal and Policy Context

National Air Quality Strategy

• Duty on local authorities to develop local plans to achieve statutory limit values.

• May have an impact on local planning policy and planning decisions.

• LPAs may use planning system creatively to obtain infrastructure (although query legality).
Recent Case Law

• *R (on the application of Shirley) v Secretary of State for Communities and Local Government* [2017] EWHC 2306 (Admin):
  - Analysis of duties of Secretary of State under the Air Quality Directive in the context of the planning system.
  - Decision not to call in application for urban extension comprising 4,000 dwellings.
  - Duty is to meet limit values, no wider duty to take specific steps in relation to planning applications.
Recent Case Law

• *R (on the application of Hillingdon and others) v Secretary of State for Transport* [2017] EWHC 121 (Admin)
  - Relationship between Air Quality Directive and major infrastructure development (Heathrow Third Runway).
  - Failed on procedural grounds – no analysis of merits.
  - One ground related to error in approach to Directive.
Recent Case Law

- **Gladman Developments v SSCLG and CPRE**
  - Judgment awaited
  - Decision to refuse planning permission on air quality grounds.
  - Inspector found that baseline data for mitigation was incorrect (2010 vs. 2015) and that not clear if mitigation would be effective.
  - Developer challenged decision on three grounds
    - Failure to have regard to ClientEarth No 2;
    - Failure to apply principle at para 122 NPPF (presumption regulatory regimes are effective);
    - Erred in respect of mitigation.
Key Questions

- Is there now a stronger link between the planning system and the AQD?
- Can development be permitted where it materially worsens air quality?
  - Above limit values?
  - Below limit values?
Further Cases

• *PS v Greenwich RLBC* [2016] EWHC 1967 (Admin)
  – Argued failure to take into account cumulative and combined effects on air quality for cruise terminal development. Challenge failed.

• *Wealden DC v SSCLG* [2017] Env. LR 31
  – Decision to adopt joint core strategy wrong in light of incorrect advice by Natural England about traffic impacts on SAC (case of clear error).

• *Wealden DC v SSCLG* [2017] JPL 625 (CA)
  – Inspector assessment of nitrogen deposition wrong and so failed to undertake appropriate assessment.
Environmental taxes
EU ETS
REACH

Recent Developments

Kelly Stricklin-Coutinho
Environmental Taxes

Cases from the last 12 months:

• Patersons of Greenoakhill Ltd v HMRC [2017] STC 225
  • Landfill tax: whether biodegradable materials, which decomposed in landfill, producing methane, were “used” to produce electricity
  • Follows earlier cases on “use” of materials on landfill sites, including Waste Recycling Group, Veolia and Viridor
  • Court of Appeal refused the taxpayer’s appeal
  • “material” does not include future by-products from it
Environmental Taxes

• Anglian Water v HMRC [2017] UKFTT 386
  • VAT on infrastructure charges imposed under the Water Act 1989
  • FTT held that HMRC had established a defence of unjust enrichment
  • Taxpayer had passed the VAT on to its customers
  • Appealed to UT

• Straid Farms Limited v Revenue Scotland [2017] FTSTC 2
  • Scottish Landfill Tax: Penalty for late payment of tax varied to lowest possible (£100) because individual penalty was disproportionate and unreasonable
Environmental Taxes

• PJ Thory Ltd v HMRC [2016] UKFTT 568 (TC)

  • Aggregates Levy: exemption from aggregates levy where:
    • the aggregate is won by being **removed from** the bed of a river, canal or watercourse or a channel in or approach to any port or harbour
    • In the course of carrying out any **dredging** undertaken exclusively for the purpose of creating, restoring, improving or maintaining the river, canal, watercourse, channel or approach

  • Is a marina a watercourse?  Was the activity dredging?
  • On appeal to UT; other cases
Environmental Taxes

Legislative Change

Landfill Tax – Policy Paper published 13th September 2017

• redefine a taxable disposal for Landfill Tax purposes so that material is taxable unless expressly exempt

• Covers sites with an environmental disposal permit and extends to disposal of materials at illegal waste sites

• Implementation date 1 April 2018

Welsh Landfill Tax replaced by Landfill Disposals Tax from April 2018

• Lower rate, standard rate, unauthorised disposals rate
Energy Arbitrations

• Energy Charter Treaty claims before the International Centre for the Settlement of Investment Disputes (ICSID)
• Charanne BV v The Kingdom of Spain:
  – Regulatory changes in Spain in 2007 & 2008 – new measures for a specified feed-in tariff for 25 years after which some generators would benefit from 80% of the feed-in tariff, an entitlement to distribute all energy generated to the Spanish electricity grid and no limitation on the operating hours of generators
  – Solar sector flooded; in 2010 feed-in tariff removed after 26th year
  – Investors claimed the 2010 changes retrospectively and detrimentally affected the legal and economic framework within which they had decided to invest; breaches of fair and equitable treatment and legitimate expectations
Energy Arbitrations

• Charanne BV v The Kingdom of Spain:
  – Held:
    • Legitimate expectation not made out
    • No deprivation of property

• Other countries with pending renewable energy arbitrations under the ECT:
  – Spain (more cases)
  – Czech Republic
  – Italy
  – Bulgaria
REACH

• Charcoal:
  • On 29 June 2017 ECHA revoked four registrations under REACH, one of which concerned charcoal
  • difficulties for small and micro-sized charcoal registrants in accessing joint submission for charcoal

• Consultation and draft regulation published to amend REACH Regulation
  • Changes clarify registration duties and downstream user obligations relating to nanomaterials
  • REACH Regulation 2006 uses the term “nanoform” to refer to any form of a substance or a distinct substance meeting the definition of nanomaterial
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