April 2021 Updates

Chapter Two: Understanding Environmental Problems

In our last update we mentioned how the pandemic has raised important issues for environmental law a set of commentaries on 'Environmental Law in the Time of Covid' can be found at (2020) 32 Journal of Environmental Law 339-364.

Chapter Four: Public Law

We discuss the Aarhus Convention at Section 4.3. Emily Barritt's new book *The Foundations of the Aarhus Convention* (Hart 2020) provides an excellent conceptual account of the Convention.

In our last update, we mentioned that the UK government had set up an independent review of administrative law focusing in particular on judicial review (4.5). The panel conducting the review published their report in March 2021 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf. It is a thoughtful and substantial report that is a useful resource for anyone wanting to get their head round judicial review and the debates surrounding it.

In our April and October 2020 updates, we discussed *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214. That case has now been overturned by the Supreme Court in *Friends of the Earth Ltd & Ors, R (on the application of) v Heathrow Airport Ltd* [2020] UKSC 52 (16 December 2020). The 4 legal questions before the Supreme Court concerned climate change and raised two separate issues concerning grounds of review – statutory interpretation and how a court reviews how a decision-maker considers particular issues in the exercise of their discretion.

Chapter Five: Criminal Law

New cases in the field of environmental criminal law confirm that English courts will use their powers to impose significant fines. Judges are also interpreting the Sentencing Council's 'Environmental Offences: Definitive Guideline' (2014) in a way that increases their discretionary powers to impose sentences aimed at individual and general deterrence.

In a recent case [unreported] heard at Aylesbury Crown Court Thames Water was fined in February 2021 £ 2,3 million for a pollution incident which occurred between the 21st and 24th of April 2016. In terms of culpability the pollution incident was classified as of 'high negligence' in accordance with the Sentencing Council's 'Environmental Offences: Definitive Guideline' (2014). The pollution arose from the discharge of untreated sewage into the Fawley Court ditch and stream which flows into the Thames at Henley on Thames. The facts of the case show a pattern that is familiar from many previous successful prosecutions of water companies for water pollution. Warning systems that showed low

levels of oxygen in the water due to the sewage pollution had been activated over a several days, but no effective action was taken.

R. (on the application of Environment Agency) v *Lawrence* [2020] EWCA Crim 1465 clarifies whether specific features of an environmental offence can be considered cumulatively and as coinciding and thereby move the 'harm' characteristic of an environmental offence from a lower category 2 into a higher category, e.g. category 1.

In this case the applicant Lawrence, an officer of a waste skip hire company, had pleaded guilty to various environmental criminal offences, in particular storage of waste on a site, that was in breach of Reg. 38 (2) and 41 (1) of the Environmental Permitting (England and Wales) Regulations 2010, and in breach of Reg. 33 (1), 33 (6) and s 157 of the Environmental Protection Act 1990.

Worcester Crown Court imposed a fine of £270, as well as a sentence of 9 months imprisonment suspended for 24 months, and 180 hours of unpaid work for each of the four counts in the indictment. Since the collapse of the family skip hire business Lawrence was unemployed. Lawrence appealed his sentence on the grounds that it was manifestly excessive because the Judge had misapplied the Sentencing Guideline. The Criminal Division of the Court of Appeal dismissed the appeal.

The facts of the environmental offence are stark. Due to excessive and inappropriate storage of waste at the site a fire broke out in December 2012. The EA sought to improve operations at the site, and a plan was put in place for greater fire safety, but waste accumulated again. In June 2013 another major fire broke out. Chemical laden smoke lead to significant deterioration in local air quality and water contaminated with pollutants from the site entered a nearby river causing serious pollution.

The key legal issue in the appeal was the correct interpretation of the Sentencing Council's 'Environmental Offences: Definitive Guideline' (2014):

- can coinciding cumulative features that are associated with a particular category of harm lead to the harm being classified as that of a higher category?

The following were the 'coinciding cumulative' features here:

the offences were committed:
- near housing, near a primary and secondary school, and close to an SSSI
- they were repeated over a period of time
- they were committed for financial gain.

Considering all of these features together the Judge considered them to push the harm category for the offences from Category 2 into the higher Category 1.

The Criminal Division of the Court of Appeal affirmed that coinciding cumulative features of an offence could be considered to lead to a higher harm classification. It thus rejected the appellant's interpretation of the Sentencing Council's Guideline which had suggested that the Judge was only allowed to consider these cumulative features as *aggravating factors*

when determining the sentence during step 4 of applying the Sentencing Guideline.

The Lawrence case affirms the ruling in *R* v *Thames Water Utilities Ltd* [2019] EWCA Crim 1344 (discussed in the April 2020 Update) in which the Criminal Division of the Court of Appeal upheld the sentence imposed by the Court even though the Judge had not followed a 'structured, step by step approach' as envisaged by the Sentencing Guideline. According to the CA in the Lawrence case sentencing guidelines are not 'a straitjacket' and a court can impose a sentence outside the guideline, if it is satisfied that it would be in the interests of justice to do so, as stipulated by s 125 (1) of the Coroners and Justice Act 2009.

For a further discussion of this case see Neil Parpworth, 'Sentencing for environmental crimes: the impact of the Sentencing Council's guideline' (2021) 85 (1) J. Crim. L. 2021, 58-61

It is questionable, however, whether high fines actually deter environmental crime. In relation to water pollution it has been argued that a new legal duty should be imposed upon water companies in order to prevent recurring incidents of water pollution from sewage. See below the update for Chapter Fifteen: Water Pollution – Rivers and Coastal.

Chapter Seven: Courts

Friends of the Earth Ltd, R (On the Application Of) v Secretary of State for Transport [2021] EWCA Civ 13 (13 January 2021) concerns the interpretation 45.83 of the Civil Procedure Rules and in particular whether cost capping orders are inclusive or exclusive of VAT. Finding against the Friends of the Earth argument that they should be exclusive, the Court of Appeal stated:

> [28] [I]n our view, the issue in the present case has to be determined on the true construction of CPR 45.43…….
> [31] As we have mentioned, there is no authority at the level of this Court in which the issue which now arises before us has been authoritatively considered. No reasoning appears to have been given in *Garner* and, in any event, that decision pre-dated the enactment of CPR 45.43. Accordingly, we must address the issue on first principles and, in particular, as a matter of interpretation.
> [32] On that issue, we have reached the conclusion that the caps which are set out in CPR 45.43, in particular at (2) and (3), are inclusive of VAT. This is for the following reasons.
> [33] First, that is the natural meaning of the words used in those provisions. The figures are set out as absolute amounts, without qualification.
> [34] Secondly, this construction is supported by the history of the consultation exercise and the response to it by the Government in the process which led up to the enactment of CPR 45.43.
> [35] Thirdly, it does not seem to us that this would impede or frustrate the implementation in domestic law of the Aarhus Convention. That Convention simply requires that the costs of environmental litigation such as this should not be prohibitive. It does not require a contracting State to specify a particular ceiling, still less to state whether it is inclusive or exclusive of VAT.

> [36] Fourthly, the fact that the regulations applicable in Northern Ireland expressly provide for the ceilings to be exclusive of VAT does not assist FoE. Indeed, it suggests that, when the relevant legislative body wished to make the point clear, it was able to, and did so.

In Section 7.4, we discuss specialist courts. Ceri Warnock has just published her ground breaking book *Environmental Courts and Tribunals: Powers, Integrity and the Search for Legitimacy* (Hart 2020). It is a must read for anyone interested in environmental courts.

Chapter Eight: Principles and Policy

Policy

In March 2021, the *Environmental Principles: Draft Policy Statement* was published, anticipating the requirement for such a policy statement in the Environment Bill 2019-21. It is a policy that explicitly aims for *all* Ministerial policymaking to look for opportunities for preventing environmental damage and environmental improvement. In that sense, it is an ambitious policy statement. However, its environmental ambition is also muted, since it treats environmental principles as considerations to be taken into account once an existing policy direction has been set, and which involve ready trade-offs with social and economic costs. See Maria Lee, 'DEFRA's Draft Environmental Principles Policy Statement' (SSRN working paper, 26 April 2021).

See Chapter 19 (Planning Law) update for the Supreme Court's interpretation of 'policy' in the context of the Planning Act 2008 (in *R (Friends of the Earth Ltd & Ors) v Heathrow Airport Ltd* [2020] UKSC 52). This is to be contrasted with the Court of Appeal's latest statement on interpreting planning policy, also in the Chapter 19 update below (*Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 104).

Principles

The October 2020 update mentioned the Scottish Continuity Bill and its approach to entrenching environmental principles into post-Brexit Scottish law. This Bill is now an Act (receiving assent in early 2021), and its provisions on principles were amended in two respects. First, Ministers and other public authorities must have 'due regard' to the nominated principles when policymaking. Second, the integration principle was added to the list of guiding environmental principles. See Colin Reid, 'A New Beginning for Environmental Governance: The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021' (2021) 10 *Scots Law Times* 41-45.

The *Environmental Principles: Draft Policy Statement*, discussed above, takes a relatively unambitious approach to interpreting the five environmental principles that it addresses (prevention, integration, precaution, rectification at source, precaution), defining them in a way that admits of many ways in which environmental damage might occur due to government policy, with harms then being mitigated or costs for that damage allocated.

Chapter 8 discusses the draft Global Pact for the Environment. For a critical analysis of the process of developing this draft Pact, see José Juste Ruiz, 'The process towards a Global Pact for the Environment at the United Nations: From legal ambition to political dilution' (2020) 29(3) RECIEL 479.

Chapter Nine: Regulatory Strategy

The Internal Market Act 2020 may affect regulatory strategy. See the discussion under Chapter Ten. Further insights into how the UK's environmental regulatory strategy is evolving in the wake of its exit from the EU can also be gleaned from the UK government's latest progress report which was published in June 2020. The report provides information about the implementation of the UK government's ambitious statutory 25 Year Environment Plan, which is the first Environment Improvement Plan under clause 7 of the Environment Bill 2019-21.

The June 2020 progress report recognizes the importance of a green recovery as part of the rebuilding of the British economy in the aftermath of the Covid-19 pandemic. It refers to 'nature-based solutions' as significant for tackling biodiversity loss, climate change and poverty. It thereby sets out a strategy that seeks to integrate different public policy areas in the pursuit of sustainable development. Part of this will be the establishment of a 'Nature for Climate Fund' that will finance the planting of 30,000 hectares of woodland annually, and the restoration of 35,000 hectares of peatland by 2025. Nature-based solutions, such as the use of natural flood plains for slowing the flow of water are envisaged to be part also of flood resilience work. Moreover, the UK government seeks to integrate different public policy areas in innovative ways in the quest for sustainable development through 'green social prescribing' (p. 9). This is based on the idea that access to high quality green and blue spaces benefits mental health, an issue that has been particularly salient during the Covid-19 pandemic. Linked to this is the government's independent Landscapes Review which has made recommendations for enhancing National Parks and Areas of Outstanding Natural Beauty, including improving access to them.

This emphasis on nature-based solutions has to be understood in the context of the Report's anthropocentric natural capital approach to environmental protection, which involves defining nature as a set of assets that benefit people and seeks to maximise the value of ecosystem services for society (p. 10). As part of this the UK is seeking to increase private sector funding for environmental protection (p. 45). This, in turn, is associated with an innovative understanding of the 'command and control' targets that the Secretary of State can set under clause 1 of the Environment Bill 2019-21. By virtue of being specific and long-term these targets are intended to also facilitate investment in natural capital assets. Environmental standard setting is thus linked here to a private finance agenda. In addition, the UK government's Environmental Land Management scheme and the Nature for Climate Fund are intended to attract private sector investment also in order to reduce reliance on grants and subsidies (p. 45). The government's natural capital approach also seeks to harness local action for environmental protection. The UK government's June 2020 progress report emphasizes the significance of Local Nature Partnerships (LNPs) which work in some areas closely with Local Enterprise Partnerships in order to shape Local

Industrial Strategies. These strategies enable to harness knowledge about the state of natural capital in a particular area (p. 47).

The UK government's progress report also provides a summary overview of the state of different parts of the natural environment, such as air and water quality. Its schematic assessment with upward, downward, and horizontal arrows that indicate positive, negative and stable trends in environmental quality need to be, however, considered in a wider context. For instance, while the state of the water environment is assessed with reference to the 'percentage of river bodies which meet the 'good ecological status' environment standard and are considered as 'in stable condition' [1] Environment Agency figures released in September 2020 suggest that only 14% of rivers are classified as of 'good ecological status'. [2] Moreover, a report published by the House of Commons Public Accounts Committee in February 2021 criticizes DEFRA's slow progress in improving air and water quality and halting wildlife loss.

Amy Burnett and Richard Nunes, 'Flatpack Democracy: power and politics at the boundaries of transition' (2021) Environmental Policy and Governance,(early access). This article provides insights into a particular dimension of sustainable development: attempts to implement a radical vision of it, including new socio-political norms at local government level. The article draws on a fascinating case study of the political strategies of a group of independent political councillors promoting a transition town agenda in Frome, Somerset.

Chapter Ten: UK Environmental Law

At the time of writing the Environment Bill (see our last updates) has still not passed. As noted in Chapter 8, the *Environmental Principles: Draft Policy Statement* (March 2021) has been published.

Environmental regulatory strategy in the UK may be affected by the United Kingdom Internal Market Act 2020. After its exit from the EU the UK can now set its own standards for the trade of goods and services. The UK government's intention is to maintain an internal market across all of its four countries: England, Wales, Scotland and Northern Ireland.
UK rules governing this internal market may limit, however, what economic incentive as well as 'command and control' legal rules that seek to protect the environment, can be developed and applied by the devolved administrations. For instance, according to the UK Internal Market Act 2020, legal rules relating to state aid are now, as a reserved matter, within the legal competency of the UK Parliament, rather than EU institutions.[3] This may limit legal powers for the devolved administrations to e.g. grant subsidies for incentivizing green

[1] HM Government, 25 year Environment Plan Progress Report, April 2019 to March 2020, 11 June 2020, 6.
[2] 'No farmers fined despite hundreds of breaches of "useless" pollution rules', The Guardian, Saturday, 13th of February 2021, 23.
[3] But according to Art. 10 of the Northern Ireland Protocol EU state aid rules still apply to trade in goods and electricity between Northern Ireland and the EU (s 7 A of the European Union (Withdrawal Act) 2018.

production methods. Section 50 of the Act provides, however, a power for the UK government to provide financial assistance to any person, which includes local authorities, community groups, sectoral organisations, educational institutions,[4] for a range of purposes which are linked to environmental protection, such as:

- infrastructure relating to water, electricity, gas as well as sewerage services, the provision of heat, and transport facilities,

- supporting educational and training activities and exchanges within the UK.

The UK Internal Market Act 2020 (IMA) may also limit 'command and control' standards for goods since regulatory requirements created after the Act entered into force which do not comply with the UK market access principles set out in Part I of the Act will have no legal effect.

In practice, not many new environmental protection standards developed in the four countries of the UK may be caught by this provision because section 2, 5, 7 and 8 of the Act establish a mutual recognition principle, as well as principles prohibiting direct and in-direct discrimination between goods on the basis of how they have been produced. This means that goods lawfully produced or imported into one country have to be accepted onto the market of any of the other three countries within the UK. Sections 20 and 21 also prohibit direct and indirect discrimination when services are regulated.

Hence, it may still be lawful for each of the countries within the UK to develop distinct standards for air, water or contaminated land control for which they have legislative competence, even if the standards are more stringent than those of any of the other four countries within the UK. This will be the case even though differences in standards may increase the costs of producing some goods and supplying some services, and thereby may be considered as a barrier to trade by some businesses. Waste regulation is a case that may be more directly affected by the IMA, since it often relates to substances that might have further productive use (as 'goods' in a circular economy), and differential regulation of such substances across the UK may be limited by the IMA.

It remains to be seen whether the provisions of the IMA will create incentives for lowering environmental standards in order to attract inward investment into either England, Wales, Scotland or Northern Ireland. If that happens this may promote further fragmentation of environmental regulatory strategy in the UK.

The provisions of the IMA should be read in the context of the new UK-EU Trade Agreement which was concluded just before Christmas 2020 and has been ratified by the European Parliament. Through Art. 7.2(5) of this Agreement the UK has committed itself 'to strive to increase [its] environmental level of protection'.[5] The UK has also committed itself to a level

[4] Explanatory Notes, United Kingdom Internal Market Act 2020, para. 65, at: https://www.legislation.gov.uk/ukpga/2020/27/contents/enacted.
[5] Trade and co-operation agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and

playing field of trading with the EU that is linked to upholding respective high levels of environmental protection.[6]

Chapter Fourteen: Integrated Pollution Control

According to section 2 of the EU Withdrawal Act 2018 domestic legislation derived from EU law, continues to have effect in domestic law after the 31 December 2020 (the implementation period completion day) as it had before that date. Courts in the UK can continue to refer to decisions by the European Court, or another EU entity, or the EU itself if relevant to the matter before the court (s 6 (2) European Union Withdrawal Act (2018)).

An evolving body of case law continues to specify legal requirements for the implementation of the policy idea of 'Integrated Pollution Control' with reference to the EU Industrial Emissions Directive (2010/75/EU). A case decided before the UK left the EU, is *R. (On the application of Baci Bedfordshire Ltd)* v *Environment Agency* [2019] EWCA Civ 1962.

The case confirms that in judicial review proceedings courts do not have legal powers to assess the merits of the regulator's 'scientific, technical or predictive judgement' [H7] in relation to an operator's installation and its working practices. In the *Baci* case the operator of an energy from waste incineration plant - Covanta - had made a mistake - which it conceded - in the documents it had submitted for obtaining a permit for its plant under the Environmental Permitting (England and Wales) Regulations 2016.

One of the legal issues in the case was the question whether the pollution control measures, such as a dust management plan, that the EA considered as the 'Best Available Techniques' were tainted by the mistake. Did the permit provide sufficient pollution control measures in order to comply with Art. 46 (5) of the Industrial Emissions Directive (IED)? Art. 46 (5) IED requires that:

'waste incineration plant sites and waste co-incineration plant sites, including associated storage areas for waste, shall be designed and operated in such a way as to prevent the unauthorised and accidental release of any polluting substances into soil, surface water and groundwater'. There must also be provision for storing contaminated rainwater run-off from the plant.'

The Civil Division of the Court of Appeal held that the EA had not committed a mistake of fact in the exercise of its powers here, since it had been aware of the mistake in the operator's documents and had thus inserted appropriate conditions in the permit for preventing pollution arising from toxic substances, including metals in the incinerator ash. The CA also rejected the second ground on which a local environmental pressure group had sought to challenge the legal validity of the permit. The group had argued that the conditions in relation to the pollution control measures were not sufficiently precautionary.

Northern Ireland, of the other part. Official Journal of the European Union, 31.12.2020, L 444/14, p. 217.
[6] Ibid, p. 19.

The CA found that the EA had applied the relevant legislative scheme, including the provisions of EU Directives on Industrial Emissions and Waste which by themselves already implemented the precautionary principle [101].

The case affirms a well-established separation of powers between the executive and the judiciary, according to which courts decline to review the merits of the decision of the independent regulator, confining their review to the legality of the regulator's decision, in this case the question whether a mistake of fact had occurred.

The CA's judgement sets out a clear dividing line between the powers of the executive and the judiciary. It defines, however, widely the scope for the independent regulator to decide the merits of the issues under consideration. An expert witness for BACI, the local environmental pressure group, had also challenged the definition of BAT by the EA. The witness had suggested to *adapt* the techniques - that the EA had defined as BAT in its technical guidance document EPR 5.01 - for dealing with toxic emissions from the waste incineration. The witness had also recommended continuous rather than just quarterly or biannually monitoring of heavy metals and organic compounds [26-7].

Chapter Fifteen: Water Pollution – Rivers and Coastal

A BBC Panorama program explores reasons for river pollution from sewage in England and Wales.

Water pollution from agriculture in England is also a continuing concern. There are too few EA staff for inspecting farms, and prosecutions have been falling ('No farmers fined despite hundreds of breaches of "useless" pollution rules', The Guardian, 13.2.2021). Run-off from agriculture is one of the most important sources of water pollution. The UK government, however, is seeking to develop new targets for improving the ecological health of the water environment, with particular reference to phosphorus and nitrate pollution from agriculture (clause 1 (3) (b) of the Environment Bill 2019-21).

Initiatives are also being developed by the devolved administrations in order to fine-tune and expand the reach of legal rules dealing with water pollution risks posed by agriculture. In Wales a new set of secondary legislation, the Water Resources (Control of Agricultural Pollution) (Wales) Regulations 2021/77 came into force on the 1st of April 2021. The regulations will extend the reach of controls on nitrate run-off from agricultural land. While previous regulations only applied to agricultural holdings in designated Nitrate Vulnerable Zones, the new Regulations will apply to all holdings in Wales.

The Regulations are an example of detailed and interventionist state 'command and control' regulation, and are controversial. The National Farmers Union (NFU) Cymru (Wales) has written to the Welsh government indicating its intention to bring a judicial review challenge in relation to the new Regulations. NFU Cymru considers them to be disproportionate, and has criticized the Regulatory Impact Assessment conducted for the Regulations as flawed.

Part 2 of the Regulations impose annual limits on the amount of nitrogen that may be applied or spread through organic manure. Part 3 makes the controls even more specific by establishing requirements which relate to the amount of nitrogen that can be spread on specific crops. Occupiers of agricultural holdings also have to plan how much nitrogen they are intending to use. Part 4 imposes a legal requirement to provide a risk map of the holding. It also sets out further specific legal rules on how, where and when to spread nitrogen fertilizer. Part 5 of the new Regulations specifies periods during which nitrogen fertilizer can not be spread. Part 6 sets out rules for the storage of organic manure, including rules relating to the capacity and construction of such storage. There are also requirements for keeping records, set out in Part 7.

Jayanath Ananda, Don McFarlane, Michael Loh,'The role of experimentation in water management under climate uncertainty: Institutional barriers to social learning' (2020) Environmental Policy and Governance, 319-331, provides an account of opportunities for and limits to social learning for the purpose of governing water resources, including limits arising arising from a mismatch of ecological and administrative scales.

Anglian Water Services Limited v *Environment Agency* [2020] EWHC 3544 (Admin). This case further clarifies the scope of courts to judicially review the exercise of discretion by regulators, such as the Environment Agency. Anglian water challenged the Environment Agency's decision to reclassify the water quality at three beaches in Lincolnshire in 2019 as 'good', a drop from their previous classification as 'excellent' in 2018. Anglian water argued that this drop in classification under the Bathing Water Regulations 2013/1675 was unlawful because the EA should have disregarded samples, that showed high levels of sewage contamination of the water, but were taken when there was very heavy rainfall [4].

The High Court dismissed two of the grounds of challenge, but allowed the JR claim on the basis of the third ground. In relation to the first ground the court found that the EA had lawfully exercised its discretion to decide when to disregard water quality samples. In relation to the second ground of challenge the Court ruled that it would not interfere with the EA's exercise of discretion when applying its Pollution Risk Forecasting system since this was part of the exercise of 'scientific, technical and predictive assessment' by the EA as a specialist regulator [110]. The court thereby confirmed its previous decision in the Baci case (discussed above in the Ch. 14 update). The High Court, however, found that the EA misconstrued what could be considered as an 'Abnormal Situation' under the Bathing Water Directive (2006/7/EC) and the domestic implementing Regulations. The EA had interpreted too narrowly the requirement for an 'Abnormal Situation' by applying it only to scenarios where the source of the pollution was known. This too narrow interpretation excluded 'unexpected pollution events with more complex causes' [110] such as heavy rainfall.

The High Court draws a clear distinction in this case between two different types of decision-making of the EA. On the one hand, the EA carried out technical and scientific assessments, for instance when it applied and developed over time its statistical Pollution Risk Forecasting model. The court declined to interfere with the merits of these assessments. On the other hand, the EA interpreted in a distinct way the legal term 'abnormal situation' which is defined in Reg 2 (1) of the Bathing Water Regulations 2013/1675 as an event or events that have an effect on bathing water quality and which the

'appropriate agency would not expect to occur, on average, more than once in every four years'. The court found that the EA's narrowing of the term 'Abnormal Situation' in its Technical Guidance to pollution incidents where the pollution source is known meant that the EA did not fully exercise its discretion under the Bathing Water Regulations 2013/1675. That discretionary power required the EA to determine whether the rainfall that had occurred in June 2019 was exceptional, and thus might justify the disregarding of some samples of water quality. The Met Office had described the rainfall in Lincolnshire as 'one of the most significant rainfall events of the last 50+ years' in the area [46].

The distinction drawn by the court between these two types of decision-making is clear, and affirms previous case law which requires those who exercise public powers not to fetter their discretionary powers granted to them by legislation. But the distinction between 'technical, scientific and predictive assessments' of facts by expert agencies and the construction of legal terms is not always clear-cut. The question of whether the EA misdirected itself in law when interpreting the term 'abnormal situation' in the Bathing Water Regulations is arguably an issue of mixed law and fact since it requires to apply an interpretation of 'abnormal situation' to facts about the state of the natural environment, thereby having to address the question what actually is an abnormal rainfall event? These assessments will become increasingly complex when rainfall patterns become more variable in the context of a changing climate. The case also illustrates the continuing significance of EU environmental law after Brexit, here the Bathing Water Directive (2006/7/EC) and its domestic implementing legislation

Chapter Sixteen: Waste Regulation

On the interaction between the circular economy in chemicals and EU waste regulation, see Joonas Alaranta and Topi Turunen, 'How to Reach a Safe Circular Economy?—Perspectives on Reconciling the Waste, Product and Chemicals Regulation' (2021) 33(1) JEL 113.

Vietnam is examined as a key global case study in managing and regulating plastic waste in Hai Dang et al, 'Vietnam's Regulations to Prevent Pollution from Plastic Waste: A Review Based on the Circular Economy Approach' (2021) 33(1) JEL 137.

Chapter Seventeen: Air Quality Law

In Case C-664/18 *Commission v UK*, the CJEU issued its first post-EU exit infringement case against the UK in relation to EU environmental law over breaches to EU air quality law prior to EU exit date. The judgment is notable for finding that the UK's ongoing failures to attain air quality standards were justiciable and in breach of EU law, despite the government's most recent UK air quality plan appearing to be 'compliant' with EU law after three judicial review challenges in the English courts. The systematic and persistent breaches of NO2 limit values breached Article 13(1) and Annex XI of Directive No 2008/50/EC, whilst the failure to adopt appropriate measures to ensure compliance breached Article 23(1) and Annex XV of the Directive.

As envisaged in the 2018 Clean Air Strategy, restrictions on sold fuels that can be burned in homes in England have been introduced to tackle $PM_{2.5}$ pollution (effective 1 May). Wet wood and coal have been largely banned, and other fuels must be certified and have low sulfur content and smoke emissions. See The Air Quality (Domestic Solid Fuels Standards) (England) Regulations 2020 SI 2020/1095.

The House of Commons Committee on Environment, Food and Rural Affairs has published its latest report into Air Quality, reflecting particularly on lessons learned from the COVID-19 pandemic. See its key findings and recommendations.

For an examination of EU case law on air quality regulation through the lens of a right to clean air, see Delphine Misonne, 'The emergence of a right to clean air: Transforming European Union law through litigation and citizen science' (2021) 30(1) RECIEL 34.

Chapter Eighteen: Climate Change Law

The UK government has accepted the Committee on Climate Change's recommendation for its sixth carbon budget, setting the 'most ambitious climate change target' in law to reduce emissions by 78% by 2035 compared to 1990 levels. Legislation is expected by June 2021.

See the discussion for Chapter 4 and 19 on the Supreme Court decision overturning the UK 'climate change case' in *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214, covered in the previous update.

Climate litigation cases around the world continue to spark intense attention. For example, in New Zealand, a tort law case has raised new questions for New Zealand tort law (see Hook et al, 'Tort to the Environment: A Stretch Too Far or a Simple Step Forward? *Smith v Fonterra Co-operative Group Ltd and Others* [2020] NZHC 419' (2021) 33(1) JEL 195.

More recently, in Germany, the First Senate of the Federal Constitutional Court held that the provisions of the Federal Climate Change Act of 12 December 2019 (*Bundes-Klimaschutzgesetz* – KSG) governing national climate targets and annual carbon budgets are incompatible with fundamental rights as they lack specific emission reductions beyond 2031.

Brian Preston has published Part I of an article on Paris Agreement and Climate Litigation, examining how the Paris Agreement is incorporated in domestic laws and policies, and the related potential for litigation. See Brian Preston, 'The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)' (2021) 33(1) JEL 1-32.

For an exploration of the links between climate-related loss and damage and litigation, see Patrick Toussaint, 'Loss and damage and climate litigation: The case for greater interlinkage' (2021) 30(1) RECIEL 16.

Chapter Nineteen: Planning Law

We mentioned above in Chapter Four that the decision in *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214 was overturned by the Supreme Court in *Friends of the Earth Ltd & Ors, R (on the application of) v Heathrow Airport Ltd* [2020] UKSC 52 (16 December 2020). In doing, so the Supreme Court interpreted 'policy' in s 5(8) of the Planning Act 2008. They stated:

> [105]. The principal question for determination is the meaning of "Government policy" in section 5(8) of the PA 2008. We adopt a purposive approach to this statutory provision which expands upon the obligation in section 5(7) that an NPS give reasons for the policy set out in it and interpret the statutory words in their context. The purpose of the provision is to make sure that there is a degree of coherence between the policy set out in the NPS and established Government policies relating to the mitigation of and adaptation to climate change. The section speaks of "Government policy", which points toward a policy which has been cleared by the relevant departments on a government-wide basis. In our view the phrase is looking to carefully formulated written statements of policy such as one might find in an NPS, or in statements of national planning policy (such as the National Planning Policy Framework), or in government papers such as the Aviation Policy Framework. For the subsection to operate sensibly the phrase needs to be given a relatively narrow meaning so that the relevant policies can readily be identified. Otherwise, civil servants would have to trawl through Hansard and press statements to see if anything had been said by a minister which might be characterised as "policy". Parliament cannot have intended to create a bear trap for ministers by requiring them to take into account any ministerial statement which could as a matter of ordinary language be described as a statement of policy relating to the relevant field.
>
> [106]. In our view, the epitome of "Government policy" is a formal written statement of established policy. In so far as the phrase might in some exceptional circumstances extend beyond such written statements, it is appropriate that there be clear limits on what statements count as "Government policy", in order to render them readily identifiable as such. In our view the criteria for a "policy" to which the doctrine of legitimate expectations could be applied would be the absolute minimum required to be satisfied for a statement to constitute "policy" for the purposes of section 5(8). Those criteria are that a statement qualifies as policy only if it is clear, unambiguous and devoid of relevant qualification: see for example Inland Revenue Comrs v MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569 per Bingham LJ; *R (Gaines-Cooper) v Comrs for Her Majesty's Revenue and Customs* [2011] UKSC 47; [2011] 1 WLR 2625, paras 28 and 29 per Lord Wilson of Culworth, delivering the judgment with which the majority of the court agreed, and para 70 per Lord Mance. The statements of Andrea Leadsom MP and Amber Rudd MP (para 72 above) on which the Court of Appeal focused and on which Plan B Earth particularly relied do not satisfy those criteria. Their statements were not clear and were not devoid of relevant qualification in this context. They did not refer to the temperature targets at all and they both left open the question of how the Paris Agreement goal of net zero emissions would be enshrined in UK law. Andrea Leadsom went out of her way to emphasise that "there is an important set of questions to be answered before we do." The

> statements made by these ministers were wholly consistent with and plainly reflected the fact that there was then an inchoate or developing policy being worked on within Government. This does not fall within the statutory phrase.

While not only significant in relation to the Planning Act 2008, this is another important example of how policy, and how it is defined is fundamentally important in planning law.

The proper interpretation of National Policy Statements (NPSs) in light of climate change was the issue in *ClientEarth, R (on the application of) v Secretary of State for Business, Energy and Industrial Strategy & Anor* [2021] EWCA Civ 43 (21 January 2021). The Court concluded that no misdirection of law had occurred. It is a good example of how the Courts approach the issue of interpreting NPSs.

Interpretation of the National Planning Policy Framework (NPPF) was the issue in *Gladman Developments Ltd v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 104 (03 February 2021). The court provided a pithy overview of the general approach the courts take:

> [32] The court's approach to the interpretation of planning policy is well established. It does not need to be enlarged or refined here. I would emphasise two basic and well-known principles:
> (1) Policy is not statute, and ought not to be construed as if it were. As Lord Carnwath observed in *Hopkins Homes Ltd.* (at paragraph 24), not all planning policies lend themselves to a rigorous judicial analysis. Where they do require interpretation, this should be done objectively in accordance with the language used, read in its proper context (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] PTSR 983, at paragraphs 19, 21 and 35). A sensible approach should be adopted in seeking the true sense of the policy in question. The courts should not encourage unmeritorious claims based on intricate arguments about the meaning of policy. They should resist the over-complication of concepts that are basically simple (see East Staffordshire Borough Council, at paragraph 50).
> (2) The interpretation of policy is a quite different exercise from judging its lawful application (see *Hopkins Homes Ltd*., at paragraph 26). Construing policy is, in the end, a task for the court, but the application of policy is for the decision-maker and may be challenged only on public law principles, and not on the planning merits (see *East Staffordshire Borough Council*, at paragraph 9). Subject to the limits of rationality, it is for the decision-maker to judge the matters to be taken into account in applying planning policy (see the judgment of Lord Carnwath in *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221, at paragraphs 30 to 32, and 39).
> [33] The status of national planning policy within the statutory arrangements for decision-making is also well established. Three points should be kept in mind:
> (1) The NPPF is one of the "other material considerations" to which the decision-maker must have regard in performing the statutory duties under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act (see *Hopkins Homes Ltd*., at paragraphs 21 and 75).

(2) The policies in the NPPF are predicated on the primacy of the development plan in the "plan-led" system. It was pointed out by the Supreme Court in *Hopkins Homes Ltd.* (at paragraph 21), and by this court in *East Staffordshire Borough Council* (at paragraph 13), that the NPPF must be interpreted and applied – as it recognises itself – consistently with the statutory scheme, within which it takes its place as a material consideration.
(3) The weight to be given to conflict or compliance with the policies of the NPPF is a matter for the decision-maker, and the court will not interfere except on public law grounds (see *St Modwen Developments v Secretary of State for Communities and Local Government* [2018] PTSR 746, at paragraph 6(3)).

Chapter Twenty: Environmental Assessment

Greenhouse gas emissions in environmental assessment

Finch, R (on the application of) v Surrey County Council [2020] EWHC 3566 (Admin) (21 December 2020) concerned the question of 'whether a developer's obligation under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 571) ("the 2017 Regulations") to provide an environmental statement ("ES") describing the likely significant effects of a development, both direct and indirect, requires an assessment of the greenhouse gas ("GHG") emissions resulting from the use of an end product said to have originated from that development' [1]. The case concerned a challenge to planning permission for the drilling of 4 new hydrocarbon wells. The Court concluded the answer was no. Justice Holgate stated:

[108] The jurisdiction of this Court is only concerned with questions of law. It is therefore necessary to return to the language and scheme of the relevant statutory law which the Court must apply, the 2017 Regulations (and, if necessary, the EIA Directive), together with any relevant case law.
[109] No help is to be gained by substituting different language for that contained in the legislation. The word "attributable" simply means "able to be attributed to" (see Shorter Oxford English Dictionary). But the verb "attribute" can mean "ascribe to as an inherent quality or characteristic" or "ascribe to as an effect or consequence".
[110] It is common ground that an EIA should assess both the direct and indirect effects of the development for which planning permission is sought which are likely to be significant. "Indirect effects" cover these consequences which are less immediate, but they must, nevertheless, be effects which the development itself has on the environment.
[111] One difficulty with the claimant's argument is that Mr Willers QC was not able to offer any test or criteria by which decision-makers could distinguish between indirect effects which qualify for EIA from those which do not, if the former were to be treated as including matters as indirect as GHG emissions from the downstream combustion of refined oil products.
[112] The 2017 Regulations do not require EIA to cover the environmental effects of other development on a different site unless separate applications have artificially been made for several developments which in reality form part of an overall project ("salami slicing"), or it is relevant to assess the effects of one

development cumulatively with other projects (see paragraph 5 of schedule 4 to the 2017 Regulations). Where that holistic approach is taken, EIA is still only carried out in relation to the effects of "development", whether that development has already been consented or is yet to be approved. Essentially, development control and the EIA process are concerned with the use of land for development and the effects of that use. They are not directed at the environmental effects which result from the consumption, or use, of an end product, be it a manufactured article or a commodity such as oil, gas or electricity used as an energy source for conducting other human activities.

Cumulative environmental effects

Pearce v Secretary of State for Business Energy and Industrial Strategy [2021] EWHC 326 (Admin) (18 February 2021) concerned the question of how should the cumulative effects of different developments ben taken into account. The Court concluded in the case before it there was an error of law in this regard. Justice Holgate also provided a pithy analysis of the relevant case law. He stated:

> [110] But the real question in the present case is whether the evaluation of an environmental effect can be deferred if the decision-maker treats the effect as being significant, or does not disagree with the "environmental information" before him that it is significant? A range, or spectrum, of situations may arise, which I will not attempt to describe exhaustively.
>
> [111] In some cases, the decision-maker may be dealing with the environmental implications of a single project. In *R v Cornwall County Council ex parte Hardy* [2001] Env. L.R. 473 the court held that the local planning authority had not been entitled to grant planning permission subject to a condition which deferred a requirement for surveys to be carried out to identify whether a European species would be adversely affected by the development. The authority could only have decided that it was necessary for the surveys to be carried out and additional data obtained because they had thought that the species might be present and harmed. It was possible that that might turn out to be the case and so, in granting planning permission, the authority could not rationally have concluded that there would be no significant adverse effects in the absence of that data. Consequently, they were not entitled to defer that decision ([61] to [62]).
>
> [112] In other cases, it may be necessary to decide whether associated works form part of a single project. Once that decision is made, it may be obvious that consideration of the environmental effects of the associated works cannot be deferred. In *R (Brown) v Carlisle City Council* [2011] Env. L.R. 71 the Court of Appeal held that where the acceptability in planning terms of a proposal for a freight distribution centre was contingent upon the provision of improvements to the runway and terminal at Carlisle Airport (which was reflected in a planning obligation under s. 106 of the Town and Country Planning Act 1990), the airport improvements formed part of the overall project comprising the distribution centre. Consequently, the EIA was required to assess the cumulative environmental effects of that overall project and not just the distribution centre. That was the only rational conclusion ([25]). The fact that the airport improvements were to be dealt with in a separate planning application was

nothing to the point. As Lindblom LJ explained in *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env. L.R. 440, the airport works formed an integral part of the overall project which included the distribution centre. The environmental assessment of the airport works could not be deferred to a subsequent consenting procedure because they were intrinsic to the decision as to whether any part of the project should go ahead.

[113] In some cases where the decision-maker is dealing with a single project, the issue of whether the evaluation of significant environmental effects may be deferred has not been so straightforward. For example, a project for the laying out of a residential or business estate may evolve over a number of years in a series of phases, led by changing market demand. At the outset planning permission may be sought in outline. In such cases there is a risk that if outline planning permission is granted for a proposal lacking in detail, significant adverse environmental impacts may only be identified at the reserved matters stage when the authority is powerless to go back on the principle of the development already approved and so cannot prevent it from taking place. A decision to defer the evaluation of a significant adverse effect and any mitigation thereof to a later stage may therefore be unlawful (*R v Rochdale Metropolitan Borough Council ex parte Tew* [2000] Env. L.R. 1, 28-31).

[114] In order to comply with the principle identified in Commission v Ireland, and illustrated by Tew and Hardy, consideration of the details of a project defined in an outline consent may be deferred to a subsequent process of approval, provided that (1) the likely significant effects of that project are evaluated at the outset by adequate environmental information encompassing (a) the parameters within which the proposed development would be constructed and operated (a "Rochdale envelope"), and (b) the flexibility to be allowed by that consent and (2) the ambit of the consent granted is defined by those parameters (see ex parte Milne at [90] and [93] to [95]). Although in Milne the local planning authority had deferred a decision on some matters of detail, it had not deferred a decision on any matter which was likely to have a significant effect (see Sullivan J at [126]), a test upon which the Court of Appeal lay emphasis when refusing permission to appeal (C/2000/2851 on 21 December 2000 at [38]). Those matters which were likely to have such an effect had been adequately evaluated at the outline stage.

[115] Sullivan J also held in *ex parte Milne* that EIA legislation plainly envisages that the decision-maker on an application for development consent will consider the adequacy of the environmental information, including the ES. He held that what became regulation 3(2) of the 2009 Regulations imposes an obligation on the decision-maker to have regard to a "particularly material consideration", namely the "environmental information". Accordingly, if the decision-maker considers that the information about significant environmental effects is too uncertain or is inadequate, he can either require more detail or refuse consent ([94] to [95] and [106] to [111]). I would simply add that the issue of whether such information is truly inadequate in a particular case may be affected by the definition of "environmental statement", which has regard to the information which the applicant can "reasonably be required to compile" (regulation 2(1) of the 2009 Regulations - see [19] above).

[116] The principle underlying *Tew*, *Milne* and *Hardy* can also be seen in *R (Larkfleet Limited) v South Kesteven District Council* [2016] Env. L.R. 76 when dealing with significant cumulative impacts. There, the Court of Appeal held that the local planning authority had been entitled to grant planning permission for a link road on the basis that it did not form part of a single project comprising an urban extension development. The court held:-
(i) What is in substance and reality a single project cannot be "salami-sliced" into smaller projects which fall below the relevant threshold so as to avoid EIA scrutiny ([35]);

(ii) But the mere fact that two sets of proposed works may have a cumulative effect on the environment does not make them a single project for the purposes of EIA. They may instead constitute two projects the cumulative effects of which must be assessed ([36]);

(iii) Because the scrutiny of the cumulative effects of two projects may involve less information than if they had been treated as one (e.g. where one project is brought forward before another), a planning authority should be astute to see that the developer has not sliced up a single project in order to make it easier to obtain planning permission for the first project and to get a foot in the door for the second ([37]);

(iv) Where two or more linked sets of works are properly regarded as separate projects, the objective of environmental protection is sufficiently secured by consideration of their cumulative effects in the EIA scrutiny of the first project, so far as that is reasonably possible, combined with subsequent EIA scrutiny of those impacts for the second and any subsequent projects ([38]);

(v) The ES for the first project should contain appropriate data on likely significant cumulative impacts arising from the first and second projects to the level which an applicant could reasonably be required to provide, having regard to current knowledge and methods of assessment ([29]-[30], [34] and [56]).

[117] However, in some cases these principles may allow a decision-maker properly to defer the assessment of cumulative impacts arising from the subsequent development of a separate site not forming part of the same project. In R (Littlewood) v Bassetlaw District Council [2009] Env. L.R. 407 the court held that it had not been irrational for the local authority to grant consent for a freestanding project, without assessing cumulative impacts arising from future development of the remaining part of the site, where that development was inchoate, no proposals had been formulated and there was not any, or any adequate, information available on which a cumulative assessment could have been based (pp. 413-5 in particular [32]).

Strategic environmental assessment

One of the legal arguments put before the UK Supreme Court in *Friends of the Earth Ltd & Ors, R (on the application of) v Heathrow Airport Ltd* [2020] UKSC 52 (16 December 2020) concerned Art 5 of the SEA Directive and how a court should judicially review discretion in relation to it. The Court stated:

[145]. The EIA Directive and the SEA Directive are, of course, EU legislative instruments and their application is governed by EU law. However, as the Court of Appeal observed (paras 134-135), the type of complex assessment required in compiling an environmental report for the purposes of environmental assessment is an area where domestic public law principles have the same effect as the parallel requirements of EU law. As Advocate General Léger stated in his opinion in Upjohn Ltd v Licensing Authority Established Under Medicines Act 1968 (Case C-120/97) [1999] 1 WLR 927, para 50, "[the] court has always taken the view that when an authority is required, in the exercise of its functions, to undertake complex assessments, a limited judicial review of the action which that authority alone is entitled to perform must be exercised, since otherwise that authority's freedom of action would be definitively paralysed …".

> [146] The appropriateness of this approach is reinforced in the present context, having regard to the function which an environmental report is supposed to fulfil under the scheme of the SEA Directive. It is intended that such a report should inform the public by providing an appropriate and comprehensible explanation of the relevant policy context for a proposed strategic plan or project to enable them to provide comments thereon, and in particular to suggest reasonable alternatives by which the public need for development in accordance with the proposed plan or project could be met. As article 6(2) states, the public is to have an early and "effective" opportunity to express their opinion on a proposed plan or programme. It is implicit in this objective that the public authority responsible for promulgating an environmental report should have a significant editorial discretion in compiling the report to ensure that it is properly focused on the key environmental and other factors which might have a bearing on the proposed plan or project. Absent such a discretion, there would be a risk that public authorities would adopt an excessively defensive approach to drafting environmental reports, leading to the reports being excessively burdened with irrelevant or unfocused information which would undermine their utility in informing the general public in such a way that the public is able to understand the key issues and comment on them. In the sort of complex environmental report required in relation to a major project like the NWR Scheme, there is a real danger that defensive drafting by the Secretary of State to include reference to a wide range of considerations which he did not consider to be helpful or appropriate in the context of the decision to be taken would mean that the public would be drowned in unhelpful detail and would lose sight of the wood for the trees, and their ability to comment effectively during the consultation phase would be undermined.