Update April 2020

We live in times of change and uncertainty. In writing the 2nd edition, we were dealing with the uncertainty of Brexit and the implications of that for environmental law. We write this update in global lockdown due to Covid-19. While the lockdown will pass, it has initiated a debate about the role and nature of the state -a question relevant to environmental law.

Chapter One: What is Environmental Law?

Defining environmental law is an ongoing project. Benjamin Richardson, *The Art of Environmental Law; Governing with Aesthetics* (Hart 2019) explores the aesthetic dimensions of environmental law. In doing so, the book opens up a very distinctive approach to thinking about environmental law and what scholars should be thinking about.

Teaching environmental law (1.3) is also an ongoing and dynamic enterprise. Michael Mehling and others, 'Teaching Climate Law: Trends, Methods and Outlook' (2020) 32 JEL (advance access) is an overview of how climate law has developed as a distinct subject in legal education.

Chapter Two: Understanding Environmental Problems

In discussing systemic complexity (2.2.3) we touched on the issue of time and included an extract from Benjamin Richardson, *Time and Environmental Law: Telling Nature's Time* (CUP 2017). Stokes has written a thoughtful review essay on the book. See Elen Stokes, 'Wanted: Professors of Foresight in Environmental Law!' (2019) 31 JEL 175

For a discussion of the role of sciences in environmental law (2.3.2) from a comparative perspective, see Elizabeth Fisher, 'Sciences, Environmental Laws, and Legal Cultures: Fostering Collective Epistemic Responsibility ' in Emma Lees and Jorge Viñuales (eds), *Oxford Handbook of Comparative Environmental Law* (OUP 2019).

Populism has emerged in many jurisdictions as a powerful political force. Environmental law is often the focus of populist politics. This is not surprising given the central role that the state plays in protecting the environment (2.5) and that reimagining the state is the focus on populist thinking. Right-wing populist ire is often directed at dismantling environmental laws. Left-wing populist movements in contrast are campaigning for more progressive environmental laws. The *Journal of Environmental Law* published a collection of four pieces on populism and environmental law in (2019) 31 JEL, Issue 3. There are contributions from Brian Preston, Chris Hilson, Sanja Bogojević, and Liz Fisher. For anyone wanting to get an overview of the relationship between populism and environmental law this is a good place to start. On populism and the EU climate change regime see also Liz Fisher, 'Challenges for the Climate Change Regime' (2020) 21 German LJ 5.

Chapter Three: Private Law

We touched on conservation covenants in 3.5 as a form of contract but they also govern property rights (3.3). In Part 7 of the Environment Bill 2019-2021, a regime for conservation covenants in England and Wales is set out. This regime originated in a recommendation from the Law Commission (Law Commission, *Conservation Covenants* (Law Com No 349 2014) but have also been in use in other jurisdictions. In the words of Rodgers and Grinlinton, such covenants are 'hybrid legal institutions'. See Christopher Rodgers and David Grinlinton, 'Covenanting for Nature: A Comparative Study of the Utility and Potential of Conservation Covenants' (2020) 83 MLR 373 for a good comparative and conceptual analysis.

Two recent private nuisance cases (3.4.1) raise different legal dimensions about private nuisance as a tort. *Network Rail Infrastructure Ltd v Williams & Anor* [2018] EWCA Civ 1514 found Network Rail liable in nuisance for allowing the spread of Japanese knotweed (a pernicious weed) onto neighbouring property. For a fascinating discussion of how harm was conceptualised in the case, see Mark Wilde, Japanese Knotweed and Economic Loss in Nuisance: Framing Environmental Harm in Tort' (2019) 31 JEL 343.

In *Fearn & Ors v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104, the Court of Appeal concluded that a nuisance claim for residential flats being overlooked by the viewing platform in the Tate Modern art gallery could not succeed. While that point of law is more relevant to privacy law, the judgment contains an excellent discussion of the tort of private nuisance.

Company law (3.6) is increasingly a focus in debates concerning climate change, particularly in regards to issues to do with corporate disclosure. See Emily Webster, 'Disclosure and the Transition to a Low-Carbon Economy: Climate-Related Risk in the UK and France' (2020) 32 JEL (advance access) for a discussion.

Chapter Four: Public Law

Ole Pedersen, 'Environmental Law and Constitutional and Public Law' in Emma Lees and Jorge Viñuales (eds), *Oxford Handbook of Comparative Environmental Law* (OUP 2019) provides a discussion of public law (4.1) and its interrelationship with environmental law.

For a discussion of the types of legal obligations involved in access to environmental information (4.3.1), see Sean Whittaker, Jonathan Mendel, and Colin T Reid, 'Back to Square One: Revisiting How We Analyse the Right of Access to Environmental Information' (2019) 31 JEL 465.

The theme of accountability (4.4) resonates throughout the debate about UK environmental law post-Brexit (see the update for Chapter 10 below). Maria Lee, *The Next Generation of Environmental Law: Environmental Accountability and Beyond in the Draft Environment (Principles and Governance) Bill* (UCL European Institute Brexit Insights March 2019) is an excellent discussion of accountability in this context.

Ole W Pedersen, 'A Study of Administrative Environmental Decision-Making before the Courts' (2019) 31 JEL 59 is an interesting statistical overview of judicial review and statutory appeal cases in the environmental context (4.5).

In the recent judicial review challenge to the Airport National Policy Statement that sets out the need for a third runway, at Heathrow a major issue was the standard of review in environmental cases (4.5.3). See *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214, [66]-[80], [126]-[144]. An important question that emerges from the analysis is how much can the standard of review be considered separately from the legal detail of the statutory framework.
We included an extract (4.5.3) from *Langton, R (on the application of) v Secretary of State for Environment, Food and Rural Affairs* [2018] EWHC 2190 (Admin) in regards to consultation processes giving rise to an error of law. In that case Sir Ross Cranston found the process lawful. The case was appealed but permission was not given to appeal on the consultation point. In refusing the permission Leggatt LJ noted

'In relation to ground 1, there is no dispute about the legal requirements for a valid consultation and the judge was best placed to assess whether on the facts the consultation in this case satisfied those requirements. I see no real prospect that the Court of Appeal would interfere with the judge's findings, including his findings that there was in fact sufficient consultation on whether there should be supplementary culling, that the consultation document, considered as a whole, was not misleading, and that the only matter among those relied on by the appellant which it was mandatory for the Secretary of State to take into account was that supplementary culling was untested – which he knew' (See *Langton, R (On the Application Of) v Secretary of State for Environment, Food And Rural Affairs* & Anor [2019] EWCA Civ 1562, [5]

Stefan Theil, 'Excavating Landmarks—Empirical Contributions to Doctrinal Analysis' (2020) 32 JEL (advance access) is a statistical examination of ECHR environmental case law (4.6) as a means of reflecting on what makes a landmark environmental case.

Chapter Five: Criminal Law

A number of recent cases clarify the scope of significant enforcement powers available to the Environment Agency, Natural Resources Wales, and other enforcement officers, such as the police when prosecuting environmental offences under Regulations 12 and 38 of the Environmental Permitting (England and Wales) Regulations 2016. These developments may promote the general deterrent effect of environmental criminal offences.

In *Thames Water Utilities Ltd v Regina* [2019] EWCA Crim 1344 the Criminal Division of the Court of Appeal clarified sentencing powers, in particular for very large organisations. Thames Water, the defendant had pleaded guilty to an offence under Reg. 38 (1) (a) of the Environmental Permitting (England and Wales) Regulations (EPRs) 2016 by causing a discharge of untreated sewerage from a pumping station into a nearby brook, in contravention of Regulation 12 (1) (b) of the EPRs. 2016. Thames Water was fined in the Crown Court at Oxford £ 2,000,000, and a victim surcharge order of £ 120 was issued.

Thames Water was also ordered to pay prosecution costs of £79,991.57. The fine was then further reduced by
£ 200,000 to £ 1,800,000 in return for contributions of £ 200,000 to local wild life and environmental charities after Thames Water was invited to do so by the Crown Court judge.

The CA dismissed Thames Water's appeal against the fine. The CA found that even though the Crown court judge should have adopted a more structured approach in applying the Sentencing Guideline for environmental offences by setting out explicitly how each of the steps of the guideline had been applied to the facts of the case, the £ 2 million fine was not 'manifestly excessive or wrong in principle' [22].

In determining 'culpability' and 'harm' for the purposes of the Sentencing Guideline the CA proceeded on the basis that the discharge of the untreated sewerage into the brook was the result of a failure in a pump, a type of operational failure for which Thames had been fined on a number of occasions before [25]. In this case it was not just a technological failure, but the incident was also a result of inadequate staff training. Operators in the Reading control centre for the pumping station had ignored repeated alarms thinking they were indicative of a faulty alarm system than of actual pump failure [7, 12]. The CA found that this amounted to 'recklessness' rather than merely negligence in the 'culpability' category of the Sentencing Guideline [30]. The harm caused by the escape of the untreated sewerage into the book, however, was not that serious. 146 fish had been killed as a result of the localized pollution, though there were sensitive water courses nearby. The CA found that the crown court judge had rightly classified the harm as at the upper end of category 3 harm.

The CA decided that in the case of very large and profitable organizations, such as Thames Water, significant fines in the millions of pounds are appropriate. The figures provided within the table of the Sentencing Guideline for large companies are 'of little relevance' to very large organizations [30]. Thames Water, the largest UK water and waste water company, had an annual turnover of about £ 2 billion, with operating profits of about £ 2 million per day [5,15].

Interestingly, the CA also rejected an invitation by counsel for Thames Water to specify in more detail how the judiciary will exercise its discretion when imposing sentences on very large organisations. The current Sentencing Guideline for environmental offences provides a table with a range of fines only for large organizations, defined as having a turnover of £50 million and over. In relation to very large organisations it simply suggests that where turnover 'very greatly exceeds the threshold for large companies, it may be necessary to move outside the suggested range to achieve a proportionate sentence' [23]. Since very large organisations vary greatly in size and in the nature of their operation, the Sentencing Council had – according to the CA - rightly provided only general guidance for sentencing such organizations [32]. The CA also affirmed *R v Thames Water Utilities Limited* [2015] EWCA Crim 960, stating that this case was setting out the specific criteria for sentencing environmental crime committed by very large organizations [31-2].

Do you agree with the CA's refusal to confine the exercise of judicial sentencing discretion?

The CA's decision preserves judicial independence and makes it more difficult to render the financial consequences of environmental crime more calculable. But does the CA's decision protect sufficiently the right of defendants to a fair trial, also in light of the fact that the fine imposed on Thames Water in the previous similar case of *R v Thames Water Utilities Limited* [2015] was £ 250,000?

In *John Jones Civil Engineering and Groundworks Ltd v Environment Agency* [2019] EWHC 3667 (Admin) (Lord Justice Holroyde and Mrs Justice Jefford DBE) the High Court decided that when calculating a fine for operating an unauthorized, regulated waste disposal facility it is not necessary to consider the costs incurred by the defendant in paying for his defence, nor was it necessary to consider hypothetical costs of paying landfill tax. This provides a strict interpretation of the provision in the Sentencing Guideline according to which fines should deprive defendants of any economic benefit derived from the commission of the environmental offence. The issue in the case was how 'economic benefit' should be calculated and what costs incurred by the defendant can be deducted to arrive at a figure for the 'economic benefit' obtained from the environmental crime.

The facts of the case were stark. The defendant had removed waste from an industrial site, and over four months deposited ca. 8,000 tonnes of waste into two ponds which provided a habitat for endangered species. This unlawful waste disposal destroyed 75% of the habitat [2]. The defendant made a profit of £ 92,000 and avoided disposal costs of £ 47,446. The Magistrates Court imposed a fine of £ 50,000 which was upheld on appeal by the High Court. The High Court noted that the Crown Court had been generous in assessing 'economic benefit' for the purposes of the Sentencing Guideline. The Crown Court had referred to the avoided costs, ie. the £ 47,446 for disposal, rather than the profit of £ 92,000 as the economic benefit [31].

Paperback Collection and Recycling Ltd, Re [2019] EWHC 2904 (Ch) (Mr Justice Halliwell) affirms the significance that the legal system ascribes to prosecutions of environmental crime. The High Court decided that it had no jurisdiction to stay environmental crime proceedings against a company that is undergoing liquidation in the Crown Court. The company was prosecuted for breach of environmental permit conditions by exceeding vastly the limits on the amount of waste they could store at their site. The company obtained £ 2 million in payment for the illegal waste storage. According to the High Court:

the public interest in the prosecution of serious environmental offences outweighed the disadvantages to the company's creditors of the cost of defending the proceedings and payment of a fine if convicted [34].

The High Court further stated obiter that if it had had a discretion to stay the environmental criminal proceedings, it would have declined an application to do so [25].

In *Regina v Lucy Mete* [2020] EWCA Crim 441 the Criminal Division of the Court of Appeal dismissed an appeal against a 26 weeks prison sentence for an offence contrary to Regulations 12 and 38 (1) (b) of the then Environmental Permitting (England and Wales) Regulations 2010. This sentence was at the lower end for Category 2 offences

referred to in the Sentencing Guidelines. The defendant had allowed building waste to be deposited on land she owed and on neighbouring land, close to a site of special scientific interest, without a permit as required by the EPRs. Companies disposing of waste on the defendant's land were charged about 50% less for their deposits than they would have had to pay to licenced facilities. The EA had to arrange for clean-up of the site at a cost of about £ 500,000. The Court also dismissed an appeal against a consecutive sentence of 4 weeks in prison for failing to attend the trial for the environmental offence, contrary to s 6 of the Bail Act 1976. The case further clarifies the mental state required for a defendant to be tried for an offence of allowing an unpermitted, in this case waste operation. The CA affirmed that the trial judge had proceeded rightly on the basis that the defendant had deliberately permitted rather than just caused the waste operation, and that she had done so knowingly, rather than recklessly or negligently.

Similarly in *Stone v Environment Agency* [2018] EWHC 994 (Admin) the High Court affirmed the strict liability nature of the criminal offence of knowingly permitting a waste storage operation without a permit, contrary to Reg. 12 (1) (a) and Reg. 38 (1) (b) of the then Environmental Permitting (England and Wales) Regulations 2010. No proof of a positive act undertaken by the defendant was necessary, only proof that they knew that the operation was taking place and did not prevent it. The High Court decided that storing waste as part of a 'waste operation' under Reg. 7 and Reg. 2 of the then EPRs 2010 does not require a positive act of retaining the waste. The Court also rejected the appellants' argument that after the serving of an enforcement notice the waste was no longer stored at the site but was simply subject to an on-going clean-up operation. In this case the company Salhouse Norwich Ltd, of which Stone was a director, was convicted of the environmental offence. The company owned the site on which another person Q operated, under a lease agreement, a waste recycling business, consisting of storing mattresses on the site before they were removed. The Environment Agency had served an enforcement notice on Q, who then stopped the recycling business. The High Court found that it did not matter that Stone had been out of the country when the enforcement notice was served on Q. The Magistrates Court had been right to find that the company knew that the waste, i.e. ca 20,166 mattresses, was still stored on the site after Q had ceased trading.

In the Matter of an application for Judicial Review The Queen on the Application of Desmond Campbell v Bromley Magistrates' Court v *The Commissioner of Police of the Metropolis* [2015] EWHC 3424 (Admin) (Mr Justice Goss) affirms the significant powers available for the enforcement of environmental offences under s 298 of the Proceeds of Crime Act 2002 (POCA). The High Court rejected a claim by Mr Campbell against a decision of Bromley Magistrates' Court to forfeit £ 7,720 which had been seized in cash by a police officer from Mr Campbell's premises. Bromley Magistrates Court had found the £ 7,720 to be recoverable property and/or that it was intended to be used in unlawful conduct.

The cash had been generated from Mr Campbell's business of converting waste vegetable oil into biodiesel. Bromley Magistrates Court found that this sum of money was intended to be used in the further operation of the business. Mr Campbell had failed to obtain a permit for his waste oil business in contravention of Regulations 12 and 38 of the then Environmental Permitting (England and Wales) Regulations 2010 (SI 2020/675). The

High Court found that the business was a regulated waste operation within the meaning of the Regulations and was subject to the permit requirement.

Under the forfeiture regime governed by POCA 2002 cash, as a form of property obtained through unlawful conduct or intended to be used in unlawful conduct, can be forfeited in civil proceedings in a Magistrates Court, independently from criminal proceedings. S 241 (1) POCA defines unlawful conduct as any conduct that is prohibited according to the criminal law in force in any part of the UK.

S 294 POCA provides a power to a police officer to seize cash if he/she has reasonable grounds to believe that the cash is 'recoverable property' or is intended to be used in unlawful conduct. S. 304 POCA defines recoverable property as property obtained through unlawful conduct.

The High Court found that Reg. 12 and 38 EPRs were very clear in criminalizing a waste operation without a required permit. The forfeiture proceedings under POCA in Bromley Magistrates Court were therefore lawful. Moreover, the High Court affirmed the power of using POCA 2002 for environmental enforcement by affirming that forfeiture was not dependent on a determination of the lawfulness of seizing and retaining the cash [37]. Any challenges to the lawfulness of the seizure and retention of the cash can be raised under the procedure provided for in s 297 POCA 2002.

The case also clarifies with reference to previous precedent that the classification of an offence as 'criminal' or 'regulatory' is not determinative of how the POCA regime can be applied. Instead the court should examine the specific statute and its wider statutory context in order to determine which conduct is defined as criminal conduct. Is the actual activity prohibited, or is simply the failure to obtain a licence criminalized, for what is otherwise a lawful activity? The High Court found that operating a regulated waste operation without a permit was clearly criminal conduct in the context of the EPRs.

Further cases have been decided that limit the use of criminal law against environmental protesters where fundamental rights such as freedom of speech and assembly are concerned. *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9 (Lord Justice Underhill, Lord Justice David Richards and Lord Justice Leggatt) concerned an order to commit to prison three persons who had protested against fracking operations carried out by the company Cuadrilla near Blackpool. The committal order was for breach of an injunction that had been obtained against the protesters. The injunction was intended to prevent trespass on Cuadrilla's land, to prevent interference with Cuadrilla staff's passage to and from the land, and to prevent interference with Cuadrilla's supply chain. The committal order was suspended on the condition that the protesters would obey the injunction for two years.

The protesters appealed against the suspended committal order on two grounds. First, they argued that the terms of the injunction were so unclear that they were not enforceable by a committal order because the injunction was dependent on showing intent to commit the prohibited acts. Second, the imposition of the committal order was too severe in the circumstances of the case. Here the injunction was issued not just against

four named individuals but also against unspecified ‘persons unknown’, and the fundamental rights to expression and assembly of the protesters were engaged [53].

In relation to the first ground of appeal the Court of Appeal (CA) found that the injunctions were not phrased in too uncertain terms. Counsel for the appellants had suggested that it would not be clear to a layperson what ‘intending’ to commit certain acts actually means. The CA rejected that argument also on the grounds that for the purposes of judges’ direction to juries in criminal trials it was now established ‘as a golden rule’ through *R v Maloney* [1985] AC 905 [928-9] that judges should not explain the legal meaning of intention but should let juries decide cases on the basis of a common sense understanding of intention. Furthermore, the AC distinguished its reasoning from the previous case of *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515 in which a fracking company had obtained an injunction against an unspecified group of ‘persons unknown’ which referred to environmental protesters intending to protest against incinerators before any protest action had taken place. The terms of some of the injunctions in the INEOS case had been found to be too uncertain.

The CA partly allowed the second ground of appeal ie. that the imposition of the committal order was unduly harsh. The order referred to two types of protest incidents at the Cuadrilla site, and only for the committal order for the second incident the CA ruled that the order should be changed by reducing its prison term from two months to four weeks. During the second type of incident one of the protesters had stood for a few seconds on a public highway in front a Cuadrilla lorry that was seeking to enter the fracking site in order to collect rainwater. The CA found that the committal order was for breach of an injunction that sought to prevent a tort of conspiracy to injure by unlawful means, with injury including economic loss [107]. While the CA took into account that there was a potential threat to the life and safety of the lorry driver, the protester herself and other road users, it noted that no harm was caused and that the economic loss intended or threatened by delaying the entry of the lorry on Cuadrilla’s site was small.

In reaching this conclusion the CA engaged with the human rights arguments raised by counsel for the protesters. The CA found, also with reference to ECHR jurisprudence, that Art. 10 and 11 ECHR, implemented through the Human Rights Act 1998 in the UK, provided for less protection in case the protest was intended to cause ‘disruption to ordinary life and inconvenience to other citizens’ in contrast to such disruption and inconvenience being merely a side-effect of the protests [42]. The CA then elaborated a category of ‘civil disobedience’ – with reference to John Rawls’ work ‘A Theory of Justice’ – defining it as:

‘a public, non-violent, conscientious act contrary to law, done with the aim of bringing about a change in the law or policies of the government (or possibly, though this is controversial, of private organisations)’ [97].

The CA further reasoned that in cases of civil disobedience sentencing guidelines should be interpreted in such a way as to be cautious about the imposition of custodial sentences since such sentences restrict citizens’ fundamental rights under Arts. 10 and 11 of the ECHR. Such restrictions need to be justified on the grounds that they are:

- Prescribed by law
- Pursue one or more of the legitimate aims referred to in Arts. 10 (2) and 11 (2) ECHR
- are necessary in a democratic society for the achievement of that aim, and thus are also a proportionate means to achieve that aim [41].

The CA then referred to various precedent which had established that when considering sentencing in cases of civil disobedience there had to be a proportionate balance between the rights of protesters to cause some interference with the ordinary life and convenience of other citizens, and the rights of other citizens to go about their lives without undue disturbance from protesters. The CA found that such a balance had not been struck here by the protesters. The protesters had resorted to compulsion in order to stop the lawful activities of Cuadrilla to which they were opposed, and they did so in 'deliberate defiance' of the injunctions [95]. According to the CA they did not seek to persuade Cuadrilla and other citizens through dialogue of the worthiness of their cause. The CA considered such a dialogue to be a core element of what is protected through a fundamental human right to freedom of expression and assembly [94].

The CA also referred to various judgements of the European Court of Human Rights relevant to the question whether a term of imprisonment would be an excessive interference with the rights guaranteed under Arts. 10 and 11 ECHR. One of these cases *Kudrevičius v Lithuania* (2016) 62 EHRR 34 involved Lithuanian farmers who had protested against a decrease in their agricultural subsidies by disrupting traffic on public highways. The ECHR did not find their suspended prison sentences in breach of Arts. 10 and 11. ECHR.

Do you think that the CA in Cuadrilla should have distinguished the Lithuanian case on the grounds that the farmers were protesting about their reduced income, and arguably a wider national interest in food security? In Cuadrilla the protesters were seeking to vindicate a wider public interest in preventing subsidence, as well as potential groundwater pollution through fracking, and a reduction in the contribution of extracted shale gas to climate change. How much should it matter that the suspended prison sentences were imposed for breaches of injunctions and thus were also intended to preserve the authority of the judiciary?

The UK government announced a moratorium on fracking on the 2 November 2019. But these legal issues raised by the use of the criminal law for dealing with environmental protests, will continue to be relevant also in light of protests by Extinction Rebellion.

There are also interesting legislative developments in relation to enhancing protection of wildlife through criminal law. The Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill 2019 (SP Bill 56) raises penalties for the most serious animal welfare offences.

Environmental criminal sanctions have also been strengthened in order to deal with greenhouse gas emissions and local air pollution arising from road traffic. The Vehicle Emissions (Idling Penalties) Bill 2019 (HC Bill 395) applicable to England and Wales is increasing the amount of fine that can be imposed through Fixed Penalties on stationary

vehicles that are left idling. The Bill - if enacted - will amend Regulation 8 of the Road Traffic (Vehicle Emissions) (Fixed Penalty) (England) Regulations 2002 (S.I. 2002/1808). The Bill provides for increased powers for local authorities to fine drivers of idling cars, and in particular to sanction repeat offending. While the first offence attracts a fixed penalty notice of £ 20, fourth and subsequent offences attract a fine of £ 40 times the number of repeat offences, up to a total fine of £ 400.

Chapter Seven: Courts

Much of the discussion concerning access to justice (7.2) focuses on access to justice within a jurisdiction. *In Vedanta Resources PLC & Anor v Lungowe & Ors* [2019] UKSC 20, the UK Supreme Court allowed an action to be brought in the UK against a parent company in regards to environmental pollution caused by a subsidiary. For a discussion of the case, see Carrie Bradshaw, 'Corporate Liability for Toxic Torts Abroad: *Vedanta v Lungowe* in the Supreme Court' (2020) 32 JEL 139.

As we examined in 7.2.3, standing for non-privileged applicants in the EU is narrow. In Case T-330/18 *Carvalho and Others v Parliament and Council* ECLI:EU:T:2019:32 the General Court dismissed a claim concerning the EU's climate change ambitions due to lack of standing. The case is currently being appealed to the Court of Justice. Gerd Winter, one of the legal counsel for the applicants has written an overview of the legal issues in the case. It is a good example of how questions concerning access to justice and substantive environmental law issues overlap. See Gerd Winter, '*Armando Carvalho and Others v EU*: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' (2020) 9 Transnational Environmental Law 137.

In contrast to the interpretation of Article 263(4) the CJEU as part of developing their jurisprudence on the effectiveness of EU environmental law have required Member States to ensure access to justice (see 7.3.1). Case C-197/18 *Wasserleitungsverband Nördliches Burgenland and Others* ECLI:EU:C:2019:824 is an example of this. It concerned locus standi in regards to the Nitrates Directive. The applicants in the case were users of groundwater in Austria. Building on Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* ECLI:EU:C:2017:987 and other cases, the Court stated:

> It follows from the above that a natural or legal person having the option of drawing and using groundwater is directly concerned by that threshold being exceeded or the risk of it being exceeded, which is capable of limiting that person's option by interfering with the legitimate use of that water.
>
> In view of the variety of uses referred to in Article 2(j) of Directive 91/676, the fact that values over that threshold do not, as such, involve a danger to the health of the persons wishing to bring an action is not capable of calling into question that conclusion.
>
> As regards in particular the situation of the applicants in the main proceedings, it is apparent from the order for reference that, pursuant to Paragraph 10 of the Law on water rights 1959, they are entitled to operate groundwater wells at their disposal for domestic or commercial needs.

To the extent that the nitrate levels in the groundwaters in question exceed or could exceed 50 mg/l, the use of that water by the applicants in the main proceedings is interfered with. [40-43]

In *Campaign to Protect Rural England & Anor v Secretary of State for Communities and Local Government & Ors* [2019] EWCA Civ 1230 the Court of Appeal considered how to apply the civil procedure rules on costs in Aarhus cases (7.3.2) to a case that did not get the permission stage. Coulson LJ for the Court concluded:
'I reject Mr Westaway's basic submission that, because the claim has failed at the permission stage, rather than failing subsequently after a substantial hearing, the costs should be subject to some sort of lower cap than the £10,000 stated in the CPR.
The starting point must be the absence of any express sub-caps or lower limits for particular stages of environmental litigation. The CPR provides for no lower cap on the costs that a successful defendant or interested party might be able to recover following success at the permission stage. On the contrary, the Aarhus cap is global. It is applied to the costs that have been incurred by the successful defendant or interested party, at whatever stage the costs assessment is being done [49]-[50].

Chapter Eight: Principle and Policy

Environmental Principles

As noted in the Chapter 10 update below, the Environment Bill 2019-21 (the 2020 Bill) includes a sub-chapter on environmental principles. This was foreshadowed in Section 8.1.4 (Post-Brexit Issues) which discusses the 2018 Bill containing a progenitor section on environmental principles as part of a new legislative scheme for post-Brexit UK governance. The sub-chapter on principles in the 2020 Bill is largely unchanged although the nominated environmental principles have been reduced to a list of five (no longer including Aarhus convention rights or sustainable development), and a new sub-clause 16(4) has been added requiring that the Secretary of State must be satisfied that the policy statement on principles contributes to the 'improvement of environmental protection' and 'sustainable development'. The duty on any Minister making policy (clause 18) has also been strengthened to require them to have 'due regard' of the policy statement.

Work continues in the devolved administrations on preparing their own governance provisions relating to environmental principles. In Northern Ireland, an almost identical set of legislative provisions is outlined in Schedule 2 of the Bill (although notably with specific consultation requirements for preparing the statement). In Scotland, the Scottish government carried out a Consultation on Environmental Principles and Governance in Scotland in 2019, but is yet to bring forward legislative proposals. In Wales, the National Assembly for Wales Climate Change, Environment and Rural Affairs Committee conducted a consultation and published a report in October 2019 on Environmental Principles and Governance post-Brexit.

Environmental Policy

The new provisions in the Environment Bill 2019-21 discussed above construct a form of legislative constraint on all government policy (see Section 8.2).

The UKSC decision in *R (Samuel Smith Old Brewery (Tadcaster)) & Ors v North Yorkshire County Council* [2020] UKSC 3 (see Chapter 19 update below) is an important case on how environmental policy is legally relevant.

The Court of Appeal's decision to vitiate the government's Airport National Policy Statement in *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214 (discussed above in the Chapter Four update) turned on a legislative requirement to consider relevant government policy. The Court considered what 'policy' meant in this context at [224]:

'it is important to appreciate that the words "Government policy" are words of the ordinary English language. They do not have any specific technical meaning. They should be applied in their ordinary sense to the facts of a given situation. In particular, we can find no warrant in the legislation for limiting the phrase "Government policy" to mean only the legal requirements of the Climate Change Act. The concept of policy is necessarily broader than legislation.'

Chapter Nine: Regulatory Strategy

The Covid-19 crisis has sparked debate about a new social contract between states, governments, citizens, and markets that would shift power back to state intervention in various areas of economic activity. In the context of environmental regulation the case for a new social contract includes calls for a 'natural contract' that entails greater protection of the environment (Serres, M. (2011) *The Natural Contract*, trans. by Elizabeth MacArthur and William Paulson. Ann Arbor: The University of Michigan Press). A new social contract may entail - in Karl Polanyi's terms (*The Great Transformation*, 1944, 2001, Beacon Press) – a greater embedding of economic activity in political institutions. We may also see a greater embedding of economic activity in third sector and social institutions. The latter have been strengthened for instance through citizens' voluntary initiatives which form an essential part of the response to Covid-19. The experimental learning generated by these new forms of public health emergency regulation may provide an impetus for developing environmental regulation in innovative ways. This, in turn, may contribute to further implementation of the sustainable development principle.

The Private Members Bill, the Wellbeing of Future Generations Bill 2020 (HL Bill 8) proposes to give effect in particular to the intergenerational dimension of sustainable development, the core policy aim of environmental regulation. The Bill, while highly unlikely ever to become law, proposes to impose a legal duty on public bodies to act in pursuit of the UK's environmental, social, economic and cultural wellbeing. Public bodies have to set out and publish 'wellbeing objectives' that are 'designed to maximise its contribution to achieving each of the wellbeing goals'. In the exercise of its function the public body must meet its wellbeing objectives. The Bill provides for various innovative procedural devices through which its purposes are to be accomplished. These are

- Publication of future generations impact assessments
- Accounting for preventative spending

- Public Services contracts
- The creation of the office of a Commissioner for Future Generations for the UK
- A new Joint Parliamentary Committee on Future Generations.

While the Bill is focused on achieving sustainable development through the activities of public bodies, it also envisages the creation of new Regulations that require companies, eg. in Directors' reports to consider the impact of their actions on the UK's wellbeing.

Wellbeing of citizens as an aspect of sustainable development (SD) features in the SD goal No. 3 of Agenda 2030. In the UK legislation for wellbeing as part of SD started with the Wellbeing of Future Generations (Wales) Act 2015.

While SD is often criticized as too fuzzy a concept to steer effective environmental regulation, wellbeing legislation is one of the ways in which broad sustainable development aims can be implemented. Such developments spark new legal reasoning about what activities can be considered as compatible or not compatible with SD. For instance, Friends of the Earth Cymru (FoEC) has challenged investments by Welsh council pension funds in fracking companies as being in breach of the Well-being of Future Generations (Wales) Act 2015.

The wellbeing agenda as part of sustainable development is further fleshed out through *The Environment Strategy for Scotland: Vision and Outcomes* published in February 2020. This ambitious strategy aims to end Scotland's contribution to climate change. It draws on insights generated by the State of Nature Scotland Report 2019.

In the mix of regulatory strategies pursued in the UK we are seeing a trend towards greater embedding of economic activity in political institutions, through more state 'command and control' over economic activity in relation to some products and services with particular significance for environmental protection.

In the context of local air quality regulation we see some UK cities such as Bristol proposing to ban all diesel cars at specified hours from designated 'Clean Air Zones': Ashley Bowes, 'Bristol set to outlaw all diesel cars', [2020] JPL 121. Stringent restrictions that may in effect amount to product bans potentially infringe a fundamental right to private property and thus need to be justified.

Also regulations that deal with very specific aspects of plastic pollution have been proposed. The Environmental Protection (Plastic Straws, Cotton Buds and Stirrers) (England) Regulations 2020 (Draft) (SI 2020 Draft) seek to prohibit, subject to certain exemptions, persons from supplying or offering:

- single use plastic straws,
- single use plastic stem cotton buds and
- plastic drink stirrers

as part of their business activity by making the supply or offering of these products to end users a criminal offence. The civil sanctions regime applies to these environmental offences.

But not just the most interventionist form of state 'command and control' techniques such as product bans are being used to deal with plastic waste, also legal requirements to provide information about products are intended to be harnessed to steer consumers towards more sustainable consumption patterns.

For a discussion of the potential of 'command and control' environmental standards to contribute to harmonization of environmental protection across different jurisdictions see: Bettina Lange, 'Command and Control Standards and Cross-Jurisdictional Harmonization',' in: Emma Lees and Jorge Viñuales (eds) *Oxford Handbook in Comparative Environmental Law* (OUP 2019).

Economic incentives continue to be an important part of UK government environmental regulatory strategies. HMRC has concluded a public consultation about a new proposed Plastic Packaging Tax. The 162,000 consultation responses received indicate strong interest in these new measures. The tax will apply from April 2022 to plastic packaging which is manufactured in or imported into the UK and which contains less than 30% recycled plastic. It has been set in the 11th of March 2020 UK government budget at £ 200 per tonne. Its success will also depend on how well the new tax will fit with the 'command and control' strategy of the Packaging Producer Responsibility (PPR) Regulations which are to be reformed. Issues that could arise are for example an increase in packaging materials other than plastic in order to avoid the tax, which, in turn, could undermine the objectives of the PPR Regs.

Regulatory measures for reducing waste, including plastic waste are also enabled by the Secretary of State providing financial assistance. The Financial Assistance for Environmental Purposes (England) Order 2020 (SI 2020/207) applies to England and amends s 153 (1) of the Environmental Protection Act (EPA) 1990. It provides a power to the Secretary of State to provide financial assistance with the consent of the Treasury for two additional purposes for any scheme, programme or organisation:

- 'for the purpose of preventing or reducing waste or litter in England or 'promoting resource efficiency in England.

- 'for the storage, transport, treatment or disposal of any material or product in England for the purpose of preventing or reducing environmental damage'.

Another important way of embedding economic activity in political institutions is the 'greening' of investment and finance activity also through the UK government's Green Finance Strategy published in July 2019. Since climate change can pose a financial risk to pension schemes and investment strategies, the Pension Protection Fund (Pensionable Service) and Occupational Pension Schemes (Investment and Disclosure) (Amendment and Modification) Regulations 2018 (SI 2018/988) and Occupational Pension Schemes (Governance) (Amendment) Regulations 2018 (SI 2018/1103) require occupational schemes to provide information about climate change in their statements of investment principles. Pension schemes are also required to apply two Codes of Conduct, the Pension Regulator's Governance Code, and the Financial Reporting Council's UK

Stewardship Code 2020: 'Heat is on schemes over climate change', Occ.Pen.2020,392,6-7.

Similarly Victor de Seriere discusses what legal obligations, such as increased capital charges on loans provided for projects likely to exacerbate climate change, may be imposed upon the financial sector in order to reduce climate change: 'Idealism or Realistic Approaches? Regulatory Possibilities to Require Financial Institutions to More Substantially Contribute to Achieving Climate Goals? An Overview' in (2020) 35 JIBLR 2020 94.

Last but not least part of the mix of regulatory strategies that inform the development of environmental law in the UK are various citizen initiatives. The 'Keep Cumbrian Coal in the Hole (KCCH)' group has been granted permission for judicial review of Cumbria County Council's planning permission for a deep coal mine, the first in 30 years in the UK. The challenge rests on the claim that the council did not consider the relevant considerations of greenhouse gas emissions, their impacts, and the UK government's net zero target for greenhouse gas emissions.

Moreover we are seeing a new dimension of an established trend of transnationalism in regulatory strategy. While various types of international co-operation between states and public bodies continue to be an important aspect of transnational environmental regulation, we see citizens' extra-territorial litigation as new drivers of transnational environmental regulation. This happens in the UK, but also in other countries, such as Germany. Ca. 200,000 Brazilians filed in November 2018 a class action for compensation for those affected by the Samarco dam collapse in Brazil in 2015. The claim for £ 3.8 billion against mining company BHP Billiton, lodged with the Business and Property Courts in Liverpool, is one of the largest in UK legal history. The case is significant also in light of the subsequent dam collapse disaster in Brazil in Brumadinho in January 2019.

Similarly a Peruvian farmer tried to obtain compensation for damage, ie the costs incurred in protecting his home now at a higher risk of flooding by a glacial lake due to a changing climate. The claim was brought in a German court in relation to the historic greenhouse gas emissions of German energy company RWE. The case before the Oberlandesgericht Hamm is pending while expert testimony is being obtained.

There are also further developments of the link between emotions and environmental regulation discussed in Chapter 9. The Private Member's Anxiety (Environmental Concerns) Bill 2020 (HC Bill 33) proposes to place a duty on the Secretary of State to reduce anxiety about environmental concerns among the general population. The second reading for the Bill is scheduled now for the 15th January 2021. A similar Private Member's Bill Anxiety in Schools (Environmental Concerns) Bill 2020 (HC Bill 30) is scheduled for a second reading on the 12th March 2021. The Bill proposes that guidance should be developed for schools to reduce anxiety about environmental concerns among pupils and staff. These Bills raise questions about whether and how legal duties can be harnessed for changing emotional states, and whether it will be possible to have clear measures for ascertaining whether such legal duties have been discharged or not. This will be necessary in order to avoid such potential legislation being merely symbolic law.

Chapter Ten: UK Environmental Law

Richard Macrory, *Irresolute Clay: Shaping The Foundations Of Modern Environmental Law* (Hart 2020) is a vibrant personal account of the development of UK environmental law in the latter half of the twentieth century (10.2.2).

Peter Kellett, 'Securing High Levels of Business Compliance with Environmental Laws: What Works and What to Avoid' (2020) 32 JEL (advance access) is a thoughtful analysis of environmental regulatory and enforcement strategy (10.3.4) from the Director of Legal Services in the Environment Agency.

As we outlined in 10.6, Brexit will have a major impact upon UK environmental law. How environmental law in the UK will evolve depends on how key judgments of the Court of Justice of the European Union (CJEU) will be taken into account by courts in the UK after the end of the transition period (referred to by the UK government as implementation period), currently ending on 31.12.2020. The on-going Brexit process has failed so far to provide certainty about what is involved. Section 6 of the European Union (Withdrawal) Act 2018 defines 'retained EU case law' widely, as referring to 'any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before exit day'. This includes any activity by the CJEU, or another EU entity, or the EU that a court or tribunal may refer to on or after the end of the implementation period because the court or tribunal considers this to be relevant to any matter before the court or tribunal. This also includes any questions about the validity, meaning or effect of any retained EU law.

Section 26 of the European Union (Withdrawal Agreement) Act 2020 inserts a new S5A into the 2018 Act that empowers a Minister of the Crown to make Regulations that can provide for the extent to which, or the circumstances in which, a relevant court or a relevant tribunal is not bound by retained EU case law, and the test for the judiciary to apply when considering whether to depart from retained EU case law. The Regulations can also specify the 'considerations' which are to be relevant for the Supreme Court of the High Court when considering whether to depart from retained EU case law.
Section 26 also enables a minister to address in the Regulations the extent to which, and the circumstances in which a relevant court or tribunal may not be bound by domestic case law that relates to retained EU case law. Section 26 also includes a new Section 5C which requires a Minister to consult senior members of the judiciary, such as the President of the Supreme Court, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session, the Lord Chief Justice of Northern Ireland, the Senior President of Tribunals, and other persons the Minister considers appropriate, before making the Regulations.

It remains to be seen what impact section 5B and 5C will have on environmental law in the UK. If Regulations enable relevant courts and tribunals to depart from retained EU case law this could open up new creative opportunities for tribunals and courts to continue to ensure a high standard of protection for the environment in the UK. It also poses the risk that UK standards may in future be lower than EU standards.

Since publication of the textbook, there have been a number of important new legislative developments specifically related to environmental law. In December 2018, DEFRA published the Draft Environment (Principles and Governance) Bill. It was subject considerable debate and a number of concerns was raised about it. See for example Environmental Audit Committee, *Scrutiny of the Draft Environment (Principles and Governance)* Bill (HC 1951 2019) and Environment Food and Rural Affairs Committee, *Pre-Legislative Scrutiny of the Draft Environment (Principles and Governance) Bill* (HC 1893 2019). In October 2019, an Environment Bill was introduced to Parliament but was not made law before the national election in December 2019. Another Environment Bill was introduced in January 2020 (Environment Bill 2019-2021) and is currently moving through the legislative process (although the process has stalled due to the Covid-19 lockdown).

The Draft Bill and the two further Bills share a common architecture which includes processes for creating environmental improvement plans and policy statements on environmental principles as well as creating an Office for Environmental Protection to monitor and enforce environmental law.

New clauses 19 and 20 may amount to a form of 'non-regression' obligation which should prevent environmental law in the UK regressing to lower standards of environmental protection. Clause 19 of the Environment Bill 2019-20 requires a Minister in charge of a new piece of environmental legislation to make a statement to Parliament that the new legislation would not reduce the level of environmental protection provided for by existing environmental law. But clause 19 does not prevent a minister from proceeding with legislation that would lead to regression. It will just make this more difficult by virtue of greater accountability and transparency in that case. In a similar vein clause 20 requires the Secretary of State to report every two years to Parliament on significant developments in international environmental protection legislation. The latter provision would enable MPs to spot differences between international initiatives for environmental protection and standards of domestic environmental law. There is, however, no legal requirement imposed upon the Secretary of State to reform law in the UK in accordance with international developments.

The 2020 Bill also includes target setting powers and sets out legislative obligations in regards to producer responsibility for waste, air and water quality, conservation covenants, and other nature conservation issues. It also includes provisions for environmental governance in Northern Ireland.

There have been criticisms and concerns about the Bill. We note three here. First, as noted above there are concerns it will lead to a lower level of environmental protection. Second, the Bill is likely to result in a far more fragmented body of environmental law. Third, much of the Bill's core governance architecture vests considerable power in the executive. See Elizabeth Fisher, 'Executive Environmental Law' (2020) 83 MLR 163 for a discussion of this in regards to the Draft Bill.

Many lawyers and scholars have raised concerns that Brexit put UK environmental law at risk. The very thoughtful environmental law scholar Ben Pontin puts another perspective in Ben Pontin, *The Environmental Cases for Brexit* (Hart 2019). For a review essay on the

book see Maria Lee, ‘Environmental Pasts and Futures: The European Union and the ‘British Way’’ (2019) 31 JEL 559.

For an overview of the different approaches in the different devolved regions (10.6.3) of the UK see Colin T. Reid, ‘The future of environmental governance’ (2019) 21 Env L Rev 219 and Ciara Brennan, Mary Dobbs, and Viviane Gravey, ‘Out of the frying pan, into the fire? Environmental governance vulnerabilities in post-Brexit Northern Ireland’ (2019) 21 Env L Rev 84

Chapter Eleven: European Union Environmental Law

For a discussion of the current policy directions of EU environmental law (11.2.2), see Anthony Zito, Charlotte Burns, and Andrea Lenschow, ‘Is the Trajectory of European Union Environmental Policy Less Certain?’ (2019) 28 Environmental Politics 187.

Lorenzo Squintani, *Beyond Minimum Harmonisation: Gold-Plating and Green-Plating of European Environmental Law* (CUP 2019) is an excellent examination of issues to do with the implementation of environmental law (11.4).

Chapter 14: Integrated Pollution Control

Chapter 14 raises the question how interpretations of the policy and legal concept of ‘integrated pollution control’ can be further developed. During the Covid-19 crisis we are seeing new and unexpected links between public health and environmental policies and legal regulation. On the one hand, social distancing and ‘lockdowns’, leading to reduced car and plane traffic, and limited factory production, have increased local air quality in various parts of the UK and have reduced emission of nitrogen dioxide in the UK and various European cities according to European Space Agency analysis. On the other hand, public health regulation can also limit environmental protection. During the Covid-19 crisis all four nations in the UK have amended their secondary legislation in relation to the charge payable for the use of single use plastic carrier bags. The new Order for England - during the time period from 21st March to 21st of September 2020 – exempts from the charge bags intended to be used solely for carrying goods ‘purchased for home delivery as part of an online grocery delivery service’. Single Use Carrier Bags Charges (England) (Amendment) Order 2020 (SI 2020/324). Similar Orders have been enacted for Northern Ireland, Wales and Scotland. These amendments are intended to reduce the spread of Covid-19.

Environmental regulators, such as the Environment Agency and the Scottish Environment Protection Agency (SEPA) are adapting their approach to enforcing environmental law to the Covid-19 public health emergency measures. SEPA exhorts that operators should continue to adhere to permit and licence conditions, and where this is not possible operators should prioritise conditions that directly protect the environment over those that are of an administrative nature. Operators are asked to work closely with SEPA in continued efforts to comply.

In *The Queen on the application of Friends of the Earth Limited v The Environment Agency v Cuadrilla Bowland Limited* [2019] EWHC 25 (Admin) Friends of the Earth (FoE) brought an unsuccessful judicial review claim against the Environment Agency's variation of an environmental permit for fracking operations of the company Cuadrilla. The permit extended to groundwater activities, which consisted of the discharge of fracturing fluid into the rock which could entail an indirect input of a pollutant into groundwater.

The variation of the permit changed the limit for the injection of fracturing fluid into rock. While the previous limit was 765m3 fracturing fluid per day, the permit variation changed this to a limit of 765m3 per hydraulic fracturing stage. This change brought the varied permit in line with the limit that had been set out in the Waste Management Plan which had been approved for the site under the original permit. The substantive issue in the case was whether electrocoagulation was the best available technique for reducing the environmental impacts of managing the flow-back of fluid used for the hydraulic fracturing of the rock.

While the UK government imposed in November 2019 a moratorium on fracking the case is of continued significance for clarifying under which circumstances a variation of a permit triggers a legal duty for the regulator to carry out an assessment of the 'best available techniques' (BAT).

The High Court found that there was nothing in the EU Mining Waste Directive (2006/21/EC) or the 2016 EPRs that automatically required the EA to reassess a Waste Management Plan that it had approved earlier when considering an application for a variation of a permit. Interestingly the judicial reasoning relied significantly on an analysis of the text of the EU Mining Waste Directive itself. The Court stressed the importance of achieving certainty in the interpretation of the legal provisions, and avoiding that an operator would be subjected to the risk of changes in permit conditions unrelated to the permit variation each time he/she made an application for a variation [34, 38, 39]. According to the High Court Art. 5 (4) of the Mining Waste Directive clearly specifies the two circumstances under which a previously approved Waste Management Plan has to be reassessed. These were either after five years, or where there were 'substantial changes to the operation of the waste facility' [35].

The High Court proceeded on the basis that there was no substantial change in the operations at the site here that could have triggered a duty to carry out a new 'BAT' assessment. The EA had significant discretion in deciding whether there was a substantial change. For a successful challenge to the EA's view on this the claimant had to show that the exercise of discretion by the EA was 'Wednesbury irrational'. The High Court affirmed this to be 'a high hurdle' since it involved to challenge 'the decision of the expert regulator in a complex technical field' [44]. Moreover, evidence on behalf of the EA confirmed that electrocoagulation was not considered as BAT in the current European Commission's BAT reference document [50].

Chapter Fifteen: Water Pollution – Rivers and Coastal

Further developments of drought law in England are anticipated. They continue the trend of increasing legal powers for the regulator to 'claw back' water that had been allocated under abstraction licences. The new proposed powers may contribute to reducing water pollution and protecting habitats.

Clause 80 of the Environment Bill 2019-21 (HC) proposes to extend in two ways the range of existing grounds under which no compensation is payable for a revocation or variation of an abstraction licence. This applies to licences for abstracting surface- or groundwater from the natural environment in England which are still in force, and which are to be varied or revoked on or after 1st of January 2028. First, clause 80 grants a legal power to the EA to revoke or vary an abstraction licence if the Secretary of State considers this necessary for meeting 'a relevant environmental objective' or in order to 'otherwise protect the water environment from damage'. While 'achieving an environmental objective' is further specified with reference to the objectives set out in the EU Water Framework Directive (2000/60/EC), these powers are fairly broad.

Second, it is also proposed that there will be no longer a compensation requirement for the variation of an abstraction licence if the abstractor has used less than 75% of the water allocated to him/her during each of the 12 years preceding the date of the notice of the proposed variation of the licence. The new reduced allocation must, however, meet reasonable requirements of the licence holder for water. The requirement to meet reasonable requirements for water use provides an opportunity for the EA to consider how efficiently an abstractor is using water, also with reference to the sustainable development principle. This clause is proposed in order to deal with historic overallocations of water. It is based on empirical data that show that about 12% of all licence holders take less than half of the water that they are entitled to abstract under their licence, and 17% take less than three quarters of their licenced volume (DEFRA, *Improving our Management of Water in the Environment, Consultation Proposals* (January 2019) 24).

The integrated and cross-cutting nature of environmental law is further illustrated by the Infrastructure Planning (Water Resources) (England) Order 2019 (SI 2019/12). The provisions are also indicative of the increased drought risk that is perceived to exist in parts of the UK, in particular the South East and the Thames water basin.

Art. 2 of this Statutory Instrument amends the Planning Act 2008 by introducing a new type of Nationally Significant Infrastructure Project (NSIP): desalination plants. The alteration or construction of these will be subject to only a stream-lined application process. The SI also increases the hold back capacity that a dam or reservoir must have in order for the development to constitute a NSIP. The threshold for considering developments for the transfer of water resources as NSIPs is lowered, from a transferred volume of 100 million cubic metres a year to a deployable output exceeding 80 million litres per day.

Severe flooding occurred again between November 2019 and February 2020 in parts of the UK.

The Welsh government published in February 2020 a summary of responses received in response to its public consultation in June 2019 on its Draft National Strategy for Flood

and Coastal Erosion Risk Management in Wales. The Environment Agency has published its draft National Flood and Coastal Erosion Risk Management Strategy for England. The revised EA strategy is to be published in spring 2020.

In the context of continuing episodes of severe flooding in the UK a body of flood law is developing that includes innovative soft law. Among these is the Code of Practice for Property Flood Resilience which was launched on 10th of February 2020 by the Construction Industry Research and Information Association (CIRIA). The Code sets out six standards for the flood resilience and flood recovery measures for properties. The Code provides also for a duty for solicitors to advise their clients on flood risk, eg. when buying property.

Two key policy documents in relation to managing water resources in the UK. have been recently published.

The first is the EAs 'Meeting our Future Water Needs: A National Framework for Water Resources'. In light of the fact that a changing climate is continuing to put pressure on the quality and quantity of water resources in the UK the EA has published in March 2020 an overarching strategy that develops policy for managing water resources in the longer term. The document provides for a specific target of domestic water consumption of 110 litres per person per day by 2050 and promotes water efficiency across all water users. An ambitious target of water companies halving their leakage rates by 2050 is further proposed, and the strategy promotes the movement of water to areas that are experiencing water shortages through regional water transfers. The document is entitled 'A National Framework for Water Resources' and thus raises questions about how different scales of governance for water, ie. the river basin, regions, the UK as a whole, and the scale of England, Wales, Northern Ireland and Scotland can be best co-ordinated.

The EA document further discusses an anticipated shift in the scale at which water resources management planning will be carried out. Clause 75 of the Environment Bill 2019-21 proposes to amend Chapter 1 of Part 3 of the Water Industry Act 1991 by granting a legal power to the Minister to give a direction to two or more water undertakers 'to prepare and publish a joint proposal'. This is intended to promote joint measures taken by various water undertakers, such as water supply companies, in order to 'improve the management and development of water resources'. The proposed legal power for the Minister to issue directions is specified in some detail. It can include a specific form for the joint proposal, a specific matter to be addressed by the proposal, and the area in relation to which the specific proposal is to be prepared, with reference to specific criteria, and on the basis of a specified assumption, for instance about projected demand for water.

This proposed move to greater co-operation in England and Wales between privatized water undertakers seeks to limit fragmentation in the management of water resources. So far Water Resources Management Plans have been prepared by each water undertaker for its water resource zones. 'Joint proposals' also signal a move towards more collaborative water resources planning. It remains to be seen how this will fit with the competition law regime governing the activities of the privatized water undertakers and licensed water suppliers in England and Wales.

The second key policy document is the National Audit Office's Water Supply and Demand Management, published in March 2020. The report examines how the Department of the Environment, Food and Rural Affairs is dealing with water quantity issues through its governance of water regulators and the water companies.

Chapter Sixteen: Waste Law

Some key legislative measures delivering the Waste and Resources Strategy for England have been introduced in Parliament. These are outlined in the Chapter Nine update above, focusing on plastic pollution targets, and more specific controls banning the use of plastic straws, cotton buds and stirrers, as well as product requirements for nappies (seeking to prevent harmful waste).

Several waste crime cases are discussed in the update for Chapter Five (criminal liability).

The Environment Bill 2019-21 contains Part 3 on Waste and Resource Efficiency, setting out a framework for producer responsibility, as well as measures for waste deposit schemes, charges for single use plastics, and some new waste management and enforcement measures.

Chapter Seventeen: Air Quality Law

In Case C-723/17 *Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Brussels Instituut voor Milieubeheer*, ECLI:EU:C:2019:533, the CJEU decided an important case on how individuals might challenge authorities on how they monitor and assess air quality. In particular, the relevant rules on the use and location of sampling points in Directive 2008/50/EC were found to be directly effective and authorities have limited discretion. The CJEU also interpreted Article 13(1) of the Directive to find that the exceedance of a limit value at a single sampling point is sufficient to trigger the obligation to draw up an air quality plan. See further Ugo Taddeu, Case C-723/17 *Craeynest*: New Developments for the Right to Clean Air in the EU (2020) 32(1) JEL 151-160.

In Case C-752/18 *Deutsche Umwelthilfe eV v Freistaat Bayern*, ECLI:EU:C:2019:1114, the CJEU clarified the conditions under which national courts may be obliged to order coercive detention of public officials to ensure compliance with the Air Quality Directive.

In *R (Shirley & Anor) v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 22, the Court of Appeal dismissed the appeal from this case (discussed in section 17.4.2). In relation to obligations on government flowing from Directive 2008/50/EC, the Court of Appeal held:
Dove J.'s description of article 23 as providing the "specific and bespoke remedy" for a breach of article 13 therefore seems apt. This does not mean that Member States may not also adopt other measures to address a breach of article 13, in addition to preparing and putting into effect an air quality plan complying with article 23. But nor does it mean that Member States are compelled by any provision of the Air Quality Directive to do that. A demonstrable breach of article 13 does not generate some unspecified obligation beyond the preparation and implementation of an air quality plan that complies with article 23.

Note also the appeal in *Gladman Developments Ltd v Secretary of State for Communities and Local Government & Ors* [2019] EWCA Civ 1543 (also section 17.4.2 and discussed below in the Chapter 19 update).

In *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214 (discussed above in Chapter Four and below in Chapter 19), air quality was considered as part of the unsuccessful argument based on the SEA Directive (see [145]-[162]).

The Environment Bill 2019-21 (discussed above) sets out new measures for air quality governance in England. These measures include proposed changes to the enforcement of smoke control areas (amending Clean Air Act 1993) and proposed amendment to the Local Air Quality Management (LAQM) framework (Section 17.4.2). The LAQM changes seek to address some of the concerns raised in Section 17.4.2 about the capacity limits of local authorities in controlling air quality, by giving more control and responsibility to local authorities, and a role for other public authorities to work alongside local authorities in tackling air pollution. Local authorities however remain the central governance actors having responsibility for tackling air pollution under the Bill's initial proposals.

Chapter Eighteen: Climate Change Law

The EU has set out a proposal for a much anticipated 'climate law' – Proposal for a Regulation of the European Parliament and Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) COM(2020) 80 final. The competence basis is Article 192(1), and you might think about how this competence basis is being balanced by the principles subsidiarity and proportionality in the provisions of the proposed Regulation. It proposes a legally binding target of net zero greenhouse gas emissions by 2050, which the EU and Members States must collectively achieve, and includes measures to track progress and adjust actions during that timeframe. This proposal outlines a scheme of EU climate governance. You might compare it with the scheme of UK climate governance set out in Section 18.4.2. The Commission has also proposed a Climate Change Pact, which seeks to give citizens and stakeholders a voice in relation to climate action.

The legal decarbonization challenge for the UK outlined in Sections 18.4.2 and 18.4.3 has been made even tougher with an amendment to the UK Climate Change Act, amending the 2050 greenhouse gas emissions reduction target in the Act from at least 80% to at least 100% (a 'net zero target'). See The Climate Change Act 2008 (2050 Target Amendment) Order 2019 SI 2019/1056.

For a penetrating discussion of targets in climate change law see Chris Hilson, 'Hitting the Target? Analysing the Use of Targets in Climate Law' (2020) 32 JEL (advance access).

Appeals in key climate change cases have been heard since the textbook was published. In particular, the Dutch Supreme Court heard the final appeal in *Urgenda*, upholding the result, although the reasoning shifted in the Court of Appeal to be based on human rights grounds (*The Netherlands v Urgenda Foundation* (Dutch Supreme Court) ECLI:NL:HR:2019:2007). The US *Juliana* litigation also came to an end, with the claimants' standing being denied on appeal (9th Circuit Court of Appeals).

In *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214 (discussed above in Chapter Four and below in Chapter 19), climate change was a central issue in the success of the appeal. As Lord Justice Lindblom explained, this was a matter of unlawful decision-making rather than preventing the expansion of Heathrow from ever going ahead on climate change grounds. Section 5(8) of the Planning Act 2008 requires that National Policy Statements must give reasons for their policies, including 'an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change'. The failure of the Airport NPS to take into account the Paris Agreement thus failed to take into account relevant government policy (which had endorsed the Paris Agreement through ratification and Ministerial statements), and the ANPS was thus found to be unlawful.

Issue 1 of (2020) 9 Transnational Environmental Law contains a collection of articles on climate change litigation that focus on, among other things, the influence of the Paris Agreement, litigation in the Global South and corporate litigation.

Chapter Nineteen: Planning Law

Public participation is a conceptual theme in planning law (19.2.2). Carolyn Abbot, 'Losing the local? Public participation and legal expertise in planning law' (2020) Legal Studies, FirstView is an interesting study of the interface between participation and legal expertise.

As discussed in 19.3.2.1, the National Planning Policy Framework (NPPF) is the most significant of the planning policy documents. A good overview of its most recent iteration can be found in William Upton QC, 'What is the Purpose of Planning Policy? Reflections on the Revised National Planning Policy Framework 2018' (2019) 31 JEL 135.

Friends of the Earth Ltd v Secretary of State for Housing, Communities and Local Government [2019] EWHC 518 (Admin) concerned a challenge to the revision of the NPPF on the basis that it should be subject to a strategic environmental assessment. The challenge did not succeed, but in dismissing the arguments, Justice Dove made a number of interesting observations about the nature of the NPPF. For example he noted,

The first issue which needs to be addressed in accordance with the submissions of the parties is the question of whether or not the Framework is a measure "required by legislative regulatory or administrative provisions". I have reached the conclusion that it is not for the following reasons.
Firstly, it is clear that, as was observed by Lord Carnwath in paragraph 99 of *Walton*, there is a need to identify some level of formality in the form of the legislative, regulatory or administrative provisions regulating or governing the production of the measure. ….
The fact that the Framework is a material consideration in the planning system does not assist the Claimant. It is plain from the evidence which the Claimant has produced that the policies of the Framework are material considerations, and sometimes important material considerations, in the determination of planning applications. However, the role the Framework plays does not give rise to any legislative or administrative provision regulating its production. In the absence of the Framework the remaining development plan policies and material considerations would have to be evaluated in order to resolve the equation of

whether or not planning permissions should be granted. In short, therefore, there are no specific statutory or administrative provisions which govern or regulate the procedure for preparing or adopting national planning policy in the form of the Framework. Furthermore, the fact that the statutory Framework makes references to the need to have regard to, or take account of, national planning policies does not amount to such a provision: they provide an explanation for why the Defendant might choose to exercise his express or implied power to produce national planning policy but, again, they do not amount to provisions within the scope of Article 2(a). [47-48], [51]

Plan B Earth v Secretary of State for Transport [2020] EWCA Civ 214 (discussed above) concerns a legal challenge to a national policy statement (NPS) designated under the Planning Act 2008 (19.3.2.4). As discussed above in relation to Chapter Eight, the Court concluded there had been a breach of Section 5(8) and Section 10 obligations to consider climate change as the Government's commitment to the Paris Agreement had been expressly disregarded. While the legal analysis is, as the CA stated, an 'entirely conventional exercise in public law' [230], it does underscore that the Planning Act 2008 does set out a significant number of obligations that should be considered as part of the NPS process.

The Supreme Court has made clear that the interpretation of planning policy is a matter of law. But is all policy to be interpreted in the same way? In *Samuel Smith Old Brewery (Tadcaster) & Ors, R (on the application of) v North Yorkshire County Council* [2020] UKSC 3 Lord Carnwath argues not. The case concerned the interpretation (and application) of the concept of openness in the NPPF. He stated:
In the *Hopkins Homes* case (paras 23-34) I warned against the danger of "over-legalisation" of the planning process. I noted the relatively specific language of the policy under consideration in the *Tesco* case, contrasting that with policies:
"expressed in much broader terms [which] may not require, nor lend themselves to, the same level of legal analysis …"
The concept of "openness" in para 90 of the NPPF seems to me a good example of such a broad policy concept. It is naturally read as referring back to the underlying aim of Green Belt policy, stated at the beginning of this section: "to prevent urban sprawl by keeping land permanently open …". Openness is the counterpart of urban sprawl and is also linked to the purposes to be served by the Green Belt. As PPG2 made clear, it is not necessarily a statement about the visual qualities of the land, though in some cases this may be an aspect of the planning judgement involved in applying this broad policy concept. Nor does it imply freedom from any form of development. Paragraph 90 shows that some forms of development, including mineral extraction, may in principle be appropriate, and compatible with the concept of openness. A large quarry may not be visually attractive while it lasts, but the minerals can only be extracted where they are found, and the impact is temporary and subject to restoration. Further, as a barrier to urban sprawl a quarry may be regarded in Green Belt policy terms as no less effective than a stretch of agricultural land. [21]-[22]
The reasoning is a reminder that the interpretation of policy is a nuanced exercise taking place within a particular factual and legal context.

*Wright, R (on the application of Wright) v Resilient Energy Severndale Ltd & An*or [2019] UKSC 53 concerned the question of whether a community fund donation could be a material consideration (19.5.1) under s 70(2) of the Town and country Planning Act 1990

for a planning application for a wind turbine to be run by a community benefit society. The Court concluded no. Lord Sales (with who the other justices agreed) stated:
In the present case, the community benefits promised by Resilient Severndale did not satisfy the *Newbury* criteria and hence did not qualify as a material consideration within the meaning of that term in section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. Dove J and the Court of Appeal were right so to hold. The benefits were not proposed as a means of pursuing any proper planning purpose, but for the ulterior purpose of providing general benefits to the community. Moreover, they did not fairly and reasonably relate to the development for which permission was sought. Resilient Severndale required planning permission for the carrying out of “development” of the land in question, as that term is defined in section 55(1) of the 1990 Act. The community benefits to be provided by Resilient Severndale did not affect the use of the land. Instead, they were proffered as a general inducement to the Council to grant planning permission and constituted a method of seeking to buy the permission sought, in breach of the principle that planning permission cannot be bought or sold. This is so whether the development scheme is regarded as commercial and profit-making in nature, as Hickinbottom LJ thought it was (para 39), or as a purely community-run scheme to create community benefits [44]
In many ways this conclusion is a straightforward one. The test of ‘material considerations’ must relate to the land. The case is a reminder however that no matter how innovative or community minded a project it must accord with basic planning law priniples

In discussing how air quality issues are considered in planning decisions (19.6.3), we included an extract from *Gladman Developments Ltd v Secretary of State for Communities and Local Government & Ors* [2017] EWHC 2768. That case has now been considered by the Court of Appeal (*Gladman Developments Ltd v Secretary of State for Communities and Local Government & Ors* [2019] EWCA Civ 1543) who dismissed the appeal by the developer. In doing so Lindblom LJ agreed with Supperstone J’s legal analysis of paras 122 and 124 of the NPPF:
In my view, however, Supperstone J. was right to conclude that the policy in paragraph 122 was not engaged here. The policy was directed to situations where some proposed process or operation liable to cause pollution is subject to control under another regulatory regime. As the judge recognized, its purpose was to avoid needless duplication between two schemes of statutory control. It was concerned with "the control of processes or emissions … where these are subject to approval under pollution control regimes" and with "permitting regimes operated by pollution control authorities" (my emphasis). Such regulatory regimes would include those to which the judge referred, and also, for example, the regime for the issuing of environmental permits under the Environmental Protection Act 1990, which operates in parallel to the land use planning system.
As Mr Moules and Dr Bowes submitted, the Air Quality Directive and the 2010 regulations are not a licensing or permitting regime of that kind. The Air Quality Directive is "programmatic in nature". It imposes obligations on the state to comply with the relevant limit values within the shortest possible time, and by the means chosen to achieve compliance. In the United Kingdom the approach adopted by the Government is to promulgate an air quality plan for the relevant zones or agglomerations. Paragraph 122 of the NPPF, properly understood, did not contemplate any assumption being made about that process. It does not require a planningdecision-maker to assume that the Government will have acted expeditiously to take the action required to discharge its own responsibilities under the legislative scheme for air quality.

Government planning policy did engage with air quality, explicitly, in paragraph 124 of the NPPF. The policy in that paragraph was not qualified or expanded by the policy in paragraph 122. It was directed both to planning policies – which were expected to "sustain compliance with and contribute towards EU limit values or national objectives for pollutants …" – and to individual planning decisions – which were expected to "ensure that any new development in Air Quality Management Areas is consistent with the local Air Quality Action Plan". But there was no requirement to assume the Government would have complied with the Air Quality Directive by the time the development was carried out. [45-47]

Smith, R (On the Application Of) v Castle Point Borough Council [2019] EWHC 2019 (Admin) (31 July 2019) is another cases concerning how contaminated land is considered part of the planning process (19.6.4). The main argument about contamination was that it had been treated in too summary a fashion. The judge concluded that 'the clear position is that the guidance did not require the reports and assessments in question in the present case' [12].

Chapter Twenty: Environmental Impact Assessment

In Case C-280/18 *Alain Flausch and Others v Ypourgos Perivallontos kai Energeias and Others* ECLI:EU:C:2019:928, the CJEU reinforced the importance of the public participation obligations under Article 6 of the EIA Directive (20.2.3). The Court stated:
The competent authorities must ensure that the information channels used may reasonably be regarded as appropriate for reaching the members of the public concerned, in order to give them adequate opportunity to be kept informed of the activities proposed, the decision-making process and their opportunities to participate early in the procedure.

33 It is for the referring court to determine whether such requirements were complied with in the procedure prior to the main proceedings.
34 However, in order to provide it with a useful answer, it may be pointed out that, inasmuch as, on the date on which the invitation to participate in an EIA was made public, most of the interested persons resided or owned a property on the island of Ios, the posting of a notice in the regional administrative headquarters, located on the island of Syros, even accompanied by publication in a local newspaper of the island of Syros, would not appear to have been liable to contribute sufficiently to informing the public concerned.
35 An assessment to the contrary would be possible only if it were found that the local newspaper in question had at the time a very wide circulation and readership on the island of Ios. Otherwise, methods of communication such as those adopted in the main proceedings could be regarded as sufficient only in the absence of other more suitable means of communication which could have been applied by the competent authorities without thereby requiring disproportionate effort, such as posting notices in the most frequented places on the island of Ios or at the very place where the project was to be carried out.
36 As the Court does not have specific information regarding the manner in which the local newspaper of the island of Ios is circulated, it is for the referring court to establish

whether, in the light of the considerations set out in the previous paragraph, the informing of the public concerned was adequate in the case of the procedure at issue.
37 The referring court expresses reservations, second, in respect of the place where the file containing the information relating to the project at issue in the main proceedings was made available to the public.
38 In that regard, the conditions for access to the participation procedure file must be such as to enable the public concerned to exercise its rights effectively, which entails accessibility to the file under easy conditions. [33]-[38]

Kenyon v The Secretary of State for Housing Communities & Local Government [2020] EWCA Civ 302 (05 March 2020) is a good example of the approach taken in English courts to reviewing screening decisions(20.4.2). One of the arguments put before the Court of Appeal was that the precautionary principle required an EIA to be carried out. In regards to this argument Coulson LJ noted:

It seems to me that the answer to that issue is this. A decision-maker in this situation has three options: they can decide that an EIA is necessary; they can decide that an EIA is not necessary; and finally, they may not know whether an EIA is necessary or not. It is in that third situation that the precautionary principle applies. It is difficult to see how it could apply to the second option, save perhaps for the rare case where, although the decision-maker had no doubt, the absence of any such doubt was irrational on *Wednesbury* principles. But that would just bring the debate back to the lawfulness or otherwise of the underlying decision and, for the reasons I have given, I do not doubt the lawfulness of the screening decision in this case [69]

In *Squire, R (On the Application Of) v Shropshire Council* [2019] EWCA Civ 888 the Court of Appeal found that an environmental statement was 'deficient in its lack of a proper assessment of the environmental impacts of the storage and spreading of manure as an indirect effect of the proposed development' [69]. The reasoning in the case is a reminder that while judicial review of an environmental statement (20.4.3) must ensure that the statement meets the requirements of the EIA Directive.

As already noted in *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214 (discussed above) one of the issues was the standard of review in regards to reviewing the adequacy of a strategic environmental assessment (20.5.2). The Court concluded the standard was the same as for an environmental assessment under the EIA Directive ([126]-[144]) ie *Wednesbury* review. While that is no doubt correct, it is important to remember that each assessment regime has different obligations.

Chapter Twenty-One: Nature Conservation

The Environment Bill 2020 (see our discussion in Chapter 10 above) includes both regimes for conservation covenants and biodiversity offsetting in planning decision-making. This is an area likely to see a shake up of legal approach (21.2) in the next five years.

We included an extract from *Langton, R (on the application of) v Secretary of State for Environment, Food and Rural Affairs* [2018] EWHC 2190 (Admin) in our discussion of permitting schemes. That case was appealed - *Langton, R (On the Application Of) v Secretary of State for Environment, Food and Rural Affairs & Ano*r [2019] EWCA Civ 1562 including on the issue of the interpretation of s 10(2)(a). The Court of Appeal dismissed the Appeal. On the s 10(2)(a) point the Court noted:
By its very nature, scientific knowledge is a developing concept. Contrary to popular thinking, scientific knowledge cannot always deliver certainty. Experts may not know that a specific experiment will achieve an identified result; but based on their experience and expert knowledge they are properly able to conclude that an experiment is logically justified on the information available. In the circumstances of this case, what was proposed was an adaptive process which would be monitored. The monitoring and the results would be used to evaluate the effectiveness of the activity which would add to existing knowledge of the effect of supplementary culling as a means of controlling the spread of disease. There is nothing in section 10 which states that the procedure is lawful only if the outcome is certain. Its purpose is to seek to achieve a particular end, the prevention of the spread of disease. The dichotomy raised by the appellant between scientific certainly and scientific opinion is a false one.
The issue is whether the Secretary of State could rationally rely on the information available to him in reaching a decision to give the Guidance. In our judgment he could. The Secretary of State relied upon the available evidence relating to intensive culling and its effect, and upon the scientific judgments of the Animal and Plant Health Agency, Defra and informed independent experts. The second limb of this ground of appeal fails to reflect the nature and extent of the material before the Secretary of State. There was relevant evidence and informed scientific opinion before the Secretary of State. He was entitled to and did act upon the same. For the reasons given this ground of appeal is not made out. [69-70]

In *Langton, R (On the Application Of) v The Secretary of State for Environment, Food And Rural Affairs & Anor (Rev 1)[*2019] EWHC 597 (Admin) the claimant contended that 'In assessing the risks in the 45 SSSIs, the claimant contends that Natural England omitted relevant interest features [in notifying SSSIs] which could be adversely affected by operations under the licences. These flaws give rise to legal errors in the grant of the badger control licences in that Natural England failed to have regard to its statutory duties and to legally relevant considerations' [35]. The claimant was somewhat successful in his argument, particularly in regards to older style notifications. No relief was granted, as Natural England was willing to take action. The case is a powerful example of how the notification documentation is important (21.4.1).

Natural England v Warren [2019] UKUT 300 (AAC) concerns an appeal of a stop notice issues by Natural England. The case is a good reminder of the importance of the enforcement regime in protecting SSSIs (21.4.2) and is a reminder of the importance of process in issuing those notices.

Plan B Earth v Secretary of State for Transport [2020] EWCA Civ 214 (discussed above) also included challenges to the ANPS on the grounds that the process was not consistent with Article 6(4) of the Habitats Directive. The Court of Appeal dismissed the claim. As

with the strategic environmental assessment challenge above, a major focus in the legal argument was on the standard of review ([66]-[80]).