

Welcome to Landmark Chambers'
'Current Issues in Environmental Law Part 3'
webinar

The recording may be accessed [here](#).

Your speakers today are...



David Elvin QC (Chair)



Heather Sargent

Topic: Habitats Update



Robert Walton QC

Topic:
Environment Bill
Waste & Resource
Efficiency



Matthew Henderson

Topic:
The Environment Bill &
Air Quality

Habitats Update



Heather Sargent

- AG Kokott's Opinion in C-254/19 *Friends of the Irish Environment Ltd*
- The Court of Appeal judgment in *Plan B Earth v Secretary of State for Transport*
- The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019
- Finnish wolves

C-254/19 *Friends of the Irish Environment Ltd*

Case C-254/19 *Friends of the Irish Environment Ltd v An Bord Pleanála*

- Opinion of Advocate General Kokott delivered on 30 April 2020
- Art. 6(3) of the Habitats Directive (92/43/EEC): any “plan or project” that is likely to have a significant effect on a European site requires appropriate assessment
- Where a development consent is limited to a 10 year period, is a proposed extension of that period by a further 5 years a “plan or project”?
- Or are the original development consent and the extension to be regarded as a single operation such that no further assessment is necessary?

C-254/19 *Friends of the Irish Environment Ltd*

- AG Kokott: further assessment is required:

“the decision to extend the duration of the development consent to construct the facility, in the absence of which no works may be carried out, must be regarded as independent agreement of a project such as to trigger Article 6(3) of the Habitats Directive”
- Development consent for an LNG regasification terminal granted 13 March 2008
- 10-year time limit imposed on construction phase
- Development is not commenced
- Application made in September 2017 for a 5-year extension of the construction phase. Application granted by the Board

C-254/19 *Friends of the Irish Environment Ltd*

- AG Kokott: the Board “agreed to the project” for the purposes of art. 6(3) by issuing the extension in 2018 (AG[28])
- Board: notes that in the context of the EIA Directive, the CJEU does not regard the renewal of an operating permit as being development consent for a project, provided that there are no works/interventions involving alterations to the physical aspects of the site: **C-275/09 Brussels Hoofdstedelijk Gewest** and **C-121/11 Pro Braine** (AG[29])
- AG Kokott: no
 - “Project” in the EIA Directive is more narrowly defined than in the Habitats Directive (**C-293/17 Coöperatie Mobilisation for the Environment**)
 - In any event, on the facts the extension would be a development consent for a “project” under the EIA Directive too

C-254/19 *Friends of the Irish Environment Ltd*

- AG considers (AG[30]) whether the original 2008 development consent and the 2018 extension should be regarded as a single operation
 - If they are a single operation, the extension would not need further assessment under art. 6(3): **C-226/08 *Stadt Papenburg*** and **C-293/17 *Coöperatie Mobilisation for the Environment***
- No:
 - It's not an "old" project (initially authorised prior to the advent of the Habitats Directive) so there is "much less reason to protect the project developer via the legal concept of the single operation"

C-254/19 *Friends of the Irish Environment Ltd*

- The effort required to carry out an appropriate assessment of the extension “would be very limited”: “[o]ne could essentially refer to the previous assessment and would only have to take account of any changes that have occurred since then”
- Under Irish law, the terminal cannot be constructed without a new development consent for the extension of the construction phase (AG[39])
- The extension therefore enables the works to be carried out for the first time (where otherwise they could not be) - that is an "essential difference" from recurring activities, which "will generally not have an additional adverse effect [...] if they are repeated without being altered" (AG[47])

C-254/19 *Friends of the Irish Environment Ltd*

- Notes that under the EIA Directive, a decision that is necessary to prevent an existing development consent from expiring is considered to constitute a new development consent, requiring an assessment: **C-201/02 Wells** (AG[45])
- Requiring the application of art. 6(3) aligns with the purpose of a temporary development consent (AG[41]) - both the factual position and the legal position (applicable regulations, etc.) might have changed by the end of the 10-year period
- On the facts: deficiencies in the initial assessment of the 2008 development consent mean that the latter is of only very limited relevance (AG[42])

- What considerations does the competent authority have to take into account when screening the extension (i.e. the new project)?
 - The significance of the finding that the original project would not adversely affect the integrity of the relevant European site(s) depends on the reasons for that finding
 - Any “gaps” (flaws) in the assessment undertaken for the original project have to be closed

C-254/19 *Friends of the Irish Environment Ltd*

- The new assessment has to take into account any intervening changes in the project, the protected habitats / species and scientific knowledge
- Also have to update the assessment of potential cumulative effects, to include plans and projects consented since the date of the original development consent

Plan B Earth v Secretary of State for Transport

[2020] EWCA Civ 214

27 February 2020

Decision of the Court of Appeal in the Airports National Policy Statement (“ANPS”) litigation

- What is the appropriate standard of review to be applied when considering whether there has been a breach of the requirements of art. 6(3) and/or (4) of the Habitats Directive?

Plan B Earth v Secretary of State for Transport

- Divisional Court: ***Wednesbury*** irrationality
 - Relies on ***Smyth v SSCLG*** [2016] Env LR 7 and ***R (o.a.o. Mynydd y Gwynt) v SSBEIS*** [2018] Env LR 22
- Appellant: the appropriate standard of review is proportionality
- Court of Appeal: it is ***Wednesbury*** irrationality
 - Neither the decision of the CJEU nor the Opinion of AG Kokott in **C-723/17 *Craeynest*** supports a different conclusion ([75])
 - There is no good reason to distinguish between the appropriate standard of review for art. 6(3) and that for art. 6(4)

Plan B Earth v Secretary of State for Transport

The effect of art. 6(3) and (4) of the Habitats Directive is that where a plan or project will adversely affect the integrity of the relevant European site(s), it may only be consented if (i) there are no "alternative solutions"; (ii) imperative reasons of overriding public interest ("IROPI") require that it must be carried out; and (iii) all necessary compensatory measures are taken.

- Was the Secretary of State's rejection of the Gatwick second runway as an "alternative solution" for the purpose of art. 6(4) because it would not enhance the UK's aviation "hub" status lawful?

Plan B Earth v Secretary of State for Transport

- Court of Appeal: yes
 - Endorses (at [92]) the Divisional Court judgment at [341]: in respect of a national policy statement, a proposed option is not an "alternative solution" unless it meets the core policy objectives of the statement
 - Those objectives must be "both genuine and critical" i.e. objectives such that if they were not met, no policy support would be given to the development
 - An option cannot be excluded as an "alternative solution" simply because in the policy-maker's view, another (preferred) option meets the policy objectives to a greater extent and is on balance more attractive

Plan B Earth v Secretary of State for Transport

- Was the Divisional Court right to distinguish between "alternative solutions" under the Habitats Directive and "reasonable alternatives" under the SEA Directive?
- Court of Appeal: yes
 - The underlying purpose of each Directive is different
 - That of the SEA Directive is to ensure that environmental information is considered and to secure public participation; hence all reasonable alternatives must be considered and consulted upon

Plan B Earth v Secretary of State for Transport

- Conversely, there is no duty to consult before concluding that the requirements of art. 6(4) of the Habitats Directive are met. It would have been unnecessary and inappropriate for the Secretary of State to have had to consider the Gatwick second runway as an "alternative solution" under art. 6(4) in circumstances where his judgement was that it did not meet a core objective of the policy
- Consultees were able to argue pursuant to the SEA Directive that the "hub" objective should not be decisive against the suggested alternative

The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019

- Were due to come into force on “exit day” (31 January 2020) but will now come into force on “IP [implementation period] completion day” (31 December 2020 – 11pm)
 - References to “exit day” in these Regulations need to be read as references to “IP completion day” (see para. 1 of Part 1 of Sch. 5 to the European Union (Withdrawal Agreement) Act 2020)
- Intent: “to address failures of retained EU law to operate effectively and other deficiencies [...] arising from the withdrawal of the UK from the EU”

The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019

Amend the following legislation:

- Wildlife and Countryside Act 1981
- Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”)
- Conservation of Offshore Marine Habitats and Species Regulations 2017
- Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001

The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019

Amendments to the Habitats Regulations:

- New reg. 3A(4): the Secretary of State / Welsh Ministers may issue guidance as to the interpretation of the requirements of the Directives (must consult with the appropriate nature conservation body and such other bodies or persons as it considers appropriate)
- New reg. 9(4A): competent authorities must have regard to any such guidance

The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019

- Reg. 64 is amended so that the Secretary of State / Welsh Ministers (instead of the European Commission) will give an opinion as to whether there are IROPI
 - In doing so, regard must be had to the national interest;
 - The JNCC must be consulted;
 - Also the devolved administrations (or the Secretary of State where the Welsh Ministers are the appropriate authority); and
 - Any other person the appropriate authority considers appropriate

The Conservation of Habitats and Species (Amendment) (EU Exit) Regulations 2019

- New regs. 143 to 145
 - The Secretary of State / Welsh Ministers can amend Sch. 2 to 5 to the Habitats Regulations and the Annexes to the Habitats (and new Wild Birds) Directives if it is considered "necessary" to do so, to adapt them "to technical and scientific progress"
 - Must be done by statutory instrument and this needs approval by resolution of each House of Parliament (approval of National Assembly, in Wales)

And finally...

Case C-674/17 *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo—Kainuu Ry*
[2020] 2 CMLR 1

- The hunting of wolves in Finland
- Interesting CJEU judgment (10 October 2019) on the circumstances in which derogation permits (permitting hunting) may be granted, in accordance with the provisions of the Habitats Directive

Environment Bill Waste & Resource Efficiency



Robert Walton QC

Introduction

- The proposed legislation would allow us to take a major step forwards in terms of enhanced environmental protection.
- But clear potential for very significant additional supply chain costs.
- Legislation sets out regulatory framework – detail will be set out in secondary legislation – so precise approach and full impact unknown until then.

How did we get here?

HM Government

A Green Future: Our 25 Year Plan to
Improve the Environment



The Bill – the basics

- Waste & Resource Efficiency issues covered in Part 3 – which is broken down into four sections:
 - *Producer responsibility*
 - *Resource efficiency*
 - *Managing waste*
 - *Waste enforcement and regulation*

1. Producer responsibility

Breaks down into two sections:

- Section 48: *Producer responsibility obligations* -
- Section 49: *Producer responsibility for disposal costs*
- Links through to Schedule 4

Producer Responsibility Obligations (“PROs”) – Schedule 4

- General power:

The relevant national authority may by regulations make provision for imposing producer responsibility obligations on specified persons in respect of specified products or materials.

- Regulations may only be made for the purpose of:-
 - *preventing a product or material becoming waste, or reducing the amount of a product or material that becomes waste;*
 - *sustaining a minimum level of, or promoting or securing an increase in, the re-use, redistribution, recovery or recycling of products or materials.*

What will the regulations cover:

- Identifying the persons and products that will be subject to a PRO;
- Registration of persons subject to a PRO (including publication / inspection);
- Targets in relation to the proportion of products to be re-used, recovered, recycled etc (by weight, volume or otherwise);
- Circumstances in which the payment of money will discharge an PRO.

What the regulations will cover (cont ...)

- Compliance Schemes
 - *a scheme under which producer responsibility obligations of members of the scheme are discharged by the scheme operator on their behalf*
 - May be compulsory (seems almost inevitable)
 - Registration provisions

Limits on the power to make regulations

SS must be satisfied that:

- Regulations would be likely to achieve regulatory purposes;
- Regulations would produce significant environmental or economic benefits as against the likely cost of the imposition of the PRO;
- The burdens imposed on businesses are the minimum necessary to secure those benefits;
- The burdens are imposed on “*the persons most able to make a contribution to securing those benefits*” –
 - (i) having regard to the desirability of acting fairly between persons who manufacture, process, distribute or supply products or materials, and
 - (ii) taking account of the need to ensure that the proposed producer responsibility obligation is so framed as to be effective in achieving the purposes for which it is imposed.

Restriction on competition:

The relevant national authority must exercise the power to make regulations under this Part in the way it considers best calculated to secure that—

- (a) *the regulations do not have the effect of restricting, distorting or preventing competition, or*
- (b) *if the regulations are likely to have that effect, the effect is no greater than is necessary for achieving the environmental or economic benefits mentioned in paragraph 9(1).*

PROs - Enforcement

- Regulations will provide for:
- Enforcement Authority
- Compliance monitoring
- Records and information
- Powers of entry
- Sanctions – including criminal offences

Schedule 5 – Disposal Costs

General power:

The relevant national authority may by regulations make provision requiring the payment of sums by specified persons, in respect of specified products or materials.

Limitation

Regulations may be made only for the purpose of securing that those involved in manufacturing, processing, distributing or supplying products or materials meet, or contribute to, the disposal costs of the products or materials.

“Disposal Costs” and “Disposal”

- (1) ...“disposal costs” of products or materials means such costs incurred in connection with the disposal of the products or materials as may be specified in the regulations.
- (2) ... the “disposal” of products or materials includes their re-use, redistribution, recovery or recycling.
- (3) Disposal costs may include the costs of—
 - (a) collecting and transporting products or materials for disposal,
 - (b) sorting and treating products or materials,
 - (c) other steps preparatory to disposal of products or materials, and
 - (d) providing public information about the disposal of products or materials.
- (4) They may include costs incurred in relation to products or materials that have been disposed of unlawfully.

Disposal Costs cont ...

Regulations will provide for:

- Administration
- Enforcement (as per PROs)

2. Resource efficiency

General Power

The relevant national authority may by regulations make provision for the purposes of requiring specified persons, in specified circumstances, to provide specified information about the resource efficiency of specified products.

Exclusions

Medicinal, vet medicinal and food products are excluded, but not packaging for such products

What is *information about resource efficiency*?

Must be relevant to the product's impact on the natural environment; **AND** be information about:

- (a) the expected life of the product;
- (b) aspects of the product's design which affect its expected life;
- (c) the availability or cost of component parts, tools, or anything else required to repair or maintain the product;
- (d) whether the product can be upgraded, and the availability or cost of upgrades;
- (e) any other matter relevant to repairing, maintaining, remanufacturing or otherwise prolonging the expected life of, the product;
- (f) the ways in which the product can be disposed of at the end of its life(including whether and to what extent it can be recycled, and whether materials used in it can be extracted and reused or recycled). **OR** be information about:

...

- (a) the materials from which the product is manufactured;
- (b) the techniques used in its manufacture;
- (c) the resources consumed during its production or use;
- (d) the pollutants (including greenhouse gases within the meaning of section 92 of the Climate Change Act 2008) released or emitted at any stage of the product's production, use or disposal.

Who will be faced with these requirements?

- The regulations may impose requirements to provide information in relation to a product on a person only if the person is a person connected with the manufacture, import, distribution, sale or supply of the product.

SS's duties:

- (1) Before making regulations under this Part of this Schedule the relevant national authority must—
 - (a) consult any persons the authority considers appropriate, and
 - (b) have regard to the matters in sub-paragraph (2).
- (2) The matters are—
 - (a) the extent to which the proposed regulations are likely to reduce the product's impact on the natural environment at any stage of its production, use or disposal;
 - (b) the environmental, social, economic or other costs of complying with the regulations;
 - (c) whether exemptions should be given, or other special provision made, for smaller businesses.

Enforcement and sanctions:

- As per previous provisions ...

Schedule 7: Resource efficiency requirements

General Power:

The relevant national authority may by regulations make provision for the purposes of requiring specified products, in specified circumstances, to meet specified resource efficiency requirements.

Exclusions

Medicinal, veterinary medicinal, food – not including packaging

Definition is very similar, but not identical to definition of resource efficient information;

May be imposed on same class of persons

Examples of provision:

- Prohibition on sale / supply unless meets requirements;
- Requirement to provide information to others in supply chain;

SS's duties

- Before making regulations in relation to a new product the SS must be satisfied that:
 - (a) the product has a significant impact on the natural environment at any stage of its production, use or disposal,
 - (b) the proposed regulations would be likely to reduce the product's impact on the natural environment,
 - (c) the benefit of that would be significant as against the likely environmental, social, economic or other costs of the proposed regulations, and
 - (d) a reduction in the product's impact on the natural environment could not be achieved as effectively without making the regulations.

And **must** consider exemptions etc. for “smaller businesses”

Schedule 8: Deposit schemes

General Power

The relevant national authority may by regulations establish deposit schemes for any of the following purposes—

- (a) *sustaining, promoting or securing an increase in the recycling or reuse of materials;*
- (b) *reducing the incidence of littering or fly-tipping.*

with teeth ...

- Enforcement provisions will provide for criminal sanctions

Charges for single use plastics

- (1) *The relevant national authority may by regulations make provision about charging by sellers of goods or services for items specified in the regulations.*
- (2) *The regulations may specify only items which—*
 - (a) *are single use items,*
 - (b) *are made wholly or partly of plastic, and*
 - (c) *are supplied in connection with goods or services.*
- (3) *A “single use item” is a manufactured item which is likely to be used only once, or used only for a short period of time, before being disposed of.*

3. Waste management

Key points:

- Regulations under amended EPA 1990 will establish electronic waste tracking system
- New provisions in EPA 1990 allowing regulation of hazardous waste

The Environment Bill & Air Quality



Matthew Henderson

Overview

- Two thematic halves:
 - Legal framework for environmental governance (Part 1)
 - Specific measures for improvement (Part 4):
 - air quality; and
 - environmental recall of motor vehicles.

Background

- S. 16 European Union (Withdrawal) Act 2018
- 25 Year Environment Plan – statutory footing as an Environmental Improvement Plan
 - “Green Brexit”?
 - “25-year goals” – “Clean air.”
 - Chp. 4 – “Reducing pollution”:
 - publication of a clean air strategy; and
 - curbing emissions from combustion plants and generators

Part 1 – clauses 1 – 6 – environmental targets

- cl. 1 – environmental targets:
 - “long term targets” - “no less than 15 years”;
 - air quality as a priority area;
 - objective standard (“specified standard”); and
 - date for completion (“specified date”).
- cl. 2 – particulate matter target:
 - “annual mean level of PM_{2.5} in ambient air”; and
 - additional to duty in cl. 1(2) to set long term target for air quality.

Part 1 – clauses 1 – 6 – environmental targets

- cl. 3 – process:
 - experts;
 - satisfaction that target can be met;
 - revocation or lowering of target; and
 - Draft statutory instrument(s) by 31 October 2022.
- cl. 4 – effect: duty to ensure that targets are met.
- cl. 5 – reporting duties.
- cl. 6 – review.

Part 4 – clause 69 – 74 – air quality

- Two sub-themes.
 - (1) Air quality:
 - cl. 69 – local air quality management framework; and
 - cl. 70 – smoke control areas.
 - (2) Environmental recall of motor vehicles (cls. 71 – 74).

Part 4 – clause 69 & Schedule 11

- Amendments to Part 4 of the Environment Act 1995 :
 - Amend s. 80 (national air quality strategy) – review within 12 months and within each subsequent 5 year period.
 - New s. 80A – duty to report on air quality in England.
 - Annual assessment of progress.
 - Annual report of steps taken.
 - New s. 81A – functions of relevant public authorities.
 - Relevant public authorities – LAs, County Councils & by designation.
 - “must have regard to the strategy when exercising any function of a public nature that could affect the quality of air”

Part 4 – clause 69 & Schedule 11

- Amendments to Part 4 of the Environment Act 1995:
 - Amend s. 82 (local authority reviews) –
 - replicates former duty on LAs to identify where air quality standards or objectives are not likely to be achieved within the relevant period;
 - LAs must identify:
 - responsible sources of emission;
 - responsible neighbouring authorities; and
 - other responsible public authorities or the EA.
 - New s. 83A – preparation and revision of action plan.
 - Minor amendment to s. 84

Part 4 – clause 69 & Schedule 11

- Amendments to Part 4 of the Environment Act 1995:
 - New s. 85A – duty of air quality partners to co-operate.
 - Identified in accordance with s. 82.
 - “must provide the authority with such assistance in connection with the carrying out of any of the authority’s functions under this Part as the authority requests” – BUT may refuse if unreasonable
 - New s. 85B – role of air quality partners in relation to action plans.
 - Notification to AQP; submission of proposal by AQP; publication of proposal in action plan.
 - SoS power to direct AQP to make further proposals.

Part 4 – clause 69 & Schedule 11

- Amendments to Part 4 of the Environment Act 1994:
 - Amend s. 86 (functions of county council's for areas for which they are district councils) – notification by district council – broadly comparable to s. 85B.
 - New s. 86A – role of Mayor of London in relation to action plans – LAs in London – broadly comparable to s. 85B.
 - New s. 86B – role of combined authorities in relation to action plans – broadly comparable to s. 85B.
 - Minor amendments to ss. 87, 88, 91 and Schedule 11.

Part 4 – clause 70 & Schedule 12

- Amendments to the Clean Air Act 1993:
 - New s. 19A & Schedule 1A – penalty for emission of smoke in smoke control area in England (also applies to moored vessels):
 - notice of intent from LA;
 - right to object;
 - final notice;
 - appeals; and
 - financial penalty (£175 - £300).

Part 4 – clause 70 & Schedule 12

- Amendments to the Clean Air Act 1993:
 - New ss. 19B, 19C & 19D – acquisition and sale of controlled solid fuel in England –
 - new offence: acquisition of controlled solid fuel for use in a building, fireplace, fixed boiler or industrial plant to which a smoke control order in England applies;
 - not in respect of moored vessel if fuel for propulsion or to provide electric power;
 - additional offences:
 - failure to take reasonable steps to notify potential purchasers of above offence; and
 - sale by delivery to building or premises with fixed boiler or industrial plant;
 - statutory defence; and
 - penalty is a fine (summary only).

Part 4 – clause 70 & Schedule 12

- Amendments to the Clean Air Act 1993:
 - New s. 26A – duty of LA to reimburse for adaptations of vessels in England.
 - New s. 28A – LA in England must have regard to any guidance published by the SoS about the exercise of the authority's functions under this Part.
 - Other minor and consequential amendments. Some transitional provisions.

Part 4 – clauses 71 - 74

- Cl. 71 – power to make regulations for “recall of relevant products that do not meet relevant environmental standards”.
 - “relevant product” – product specified or described in regulations – but only:
 - (part of) a mechanically propelled vehicle;
 - (part of) an engine which is, or forms part of, machinery that is transportable (including by way of self-propulsion); or
 - part of such an engine or machinery that is connected with the operation of the engine.
 - “relevant environmental standard” –
 - standard which relevant product must meet by virtue of any enactment;
 - is relevant to environmental impact of product; and
 - is specified in regulations.
 - “environmental impact” includes any impact on the environment caused by noise, heat or vibrations or any other kind of release of energy or emissions resulting from use of the product.

Part 4 – clauses 71 - 74

- Cl. 72 – regs. under cl. 71 may make provision for power of SoS to give a compulsory recall notice to manufacturer or distributor of a relevant product.
 - Notice that requires recipient of the notice to organize the return of a relevant product to the recipient from persons who have been supplied (whether or not directly) with the product.
 - Only if SoS has reasonably grounds for believing the product does not meet a relevant environmental standard.
 - Including if relevant product forms part of another product.
 - May include supplementary requirements.

Part 4 – clauses 71 - 74

- Cl. 73 – regs. under cl. 71 may impose duty on a manufacturer or distributor of a relevant product to notify the SoS if the person has reason to consider that the product does not meet the relevant environmental standard.
 - Require provision of information and samples.
 - Conferral of powers of enforcement.
- Cl. 74 – interpretation.
 - “manufacturer” – meaning given by regs under cl. 73 – (1) involvement with manufacture; or (2) connection to such a person.

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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