

**Welcome to Landmark Chambers and Browne**

**Jacobson LLP's**

**'Dealing with net zero, biodiversity and air  
quality issues in planning' webinar**

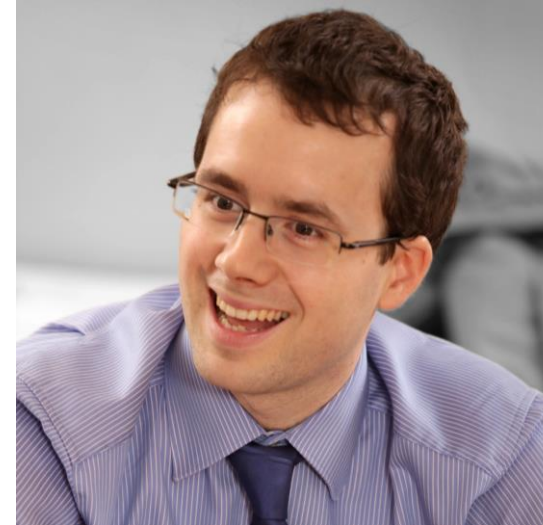
**The recording may be accessed [here](#).**

# Your speakers today are...



**Richard Barlow (Chair)**  
Browne Jacobson LLP

**Topic:**  
Net-Zero: The practical options and the legal implications and techniques required



**Ben Standing**  
Browne Jacobson LLP

**Topic:**  
Net-Zero: The Legal Obligations



**David Elvin QC**  
Landmark Chambers

**Topic:**  
The Environment Bill (2020)  
– biodiversity net gain



**James Maurici QC**  
Landmark Chambers

**Topic:**  
Air Quality Issues in Planning

# Net-Zero: The Legal Obligations

Ben Standing, Senior Associate

# What is Net Zero?

- Climate change Act 2008 - it is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline.
- Carbon budgets
- Duty to prepare proposals and policies for meeting carbon budgets

# What change is needed?

- According to the Climate Change Committee:
  - resource and energy efficiency, that reduce demand for energy across the economy
  - societal choices that lead to a lower demand for carbon-intensive activities
  - extensive electrification, particularly of transport and heating, supported by a major expansion of renewable and other low-carbon power generation
  - development of a hydrogen economy to service demands for some industrial processes, for energy-dense applications in long-distance HGVs and ships, and for electricity and heating in peak periods
  - carbon capture and storage (CCS) in industry, with bioenergy (for GHG removal from the atmosphere), and very likely for hydrogen and electricity production.

# Legal frameworks to help us meet our target

- **Energy Savings Opportunity Scheme Regulations 2014**
- **The Energy Efficiency (Building Renovation and Reporting) (Amendment) Regulations 2020**
- **The Minimum Energy Efficiency Standards Regulations 2015**
  - Relevant provisions
  - Enforcement

# Legal frameworks to help us meet our target

- **The EU Emissions Trading System**
- **Future legislation:**
  - **The UK Emissions Trading System**
  - Changes to the planning regime
  - Environment and agriculture bills
  - Energy white paper - will it ever arrive?
  - Circular economy

# Energy Savings Opportunity Scheme (“ESOS”) Regulations 2014

- **What are the ESOS Regulations?**
  - ESOS implements Article 8(4)-(6) of the EU Energy Efficiency Directive 2012 requiring Member States to introduce a framework of measures for promoting energy efficiency to achieve EU’s 2020 energy efficiency target of cutting its annual consumption of primary energy by 20%.
- **Who must comply?**
  - Large undertakings (employers of at least 250 people or has an annual turnover of 50 million Euros and an annual balance sheet in excess of 43 million Euros) (**Regulation 15**).
  - Public bodies and companies in insolvency are excluded.



# Energy Savings Opportunity Scheme (“ESOS”) Regulations 2014

- **Key Obligations**

- **Regulation 20:** Carry out an ESOS assessment comprising of measuring total energy consumption (including buildings, transport and industrial processes) over a 12-month reference period.
- **Regulation 26:** Carry out energy audits of at least 90% of energy consumption. The extra 10% (the de minimis energy use) can be allocated in any combination and proportion.
- **Regulation 27:** Identify cost-effective recommendations to improve energy efficiency. Currently participants are not required to implement the energy efficiency recommendations identified by the energy audit but this may become mandatory in the future.
- **Regulation 28:** Responsible undertakings must keep ESOS evidence packs, consisting of a written record in relation to each ESOS assessment. Evidence packs must be kept for at least 2 compliance periods (8 years from the relevant compliance period).

# Energy Savings Opportunity Scheme (“ESOS”) Regulations 2014

- **Enforcement and Penalties**

- Under regulation 38, compliance bodies can serve enforcement notices on a responsible undertaking that is in breach of the ESOS Regulations. These notices must include the nature of the breach, how to remedy it and a deadline for compliance.
- Civil penalties are available for a number of breaches of the ESOS Regulations including for failing to maintain records, failing to provide the Environment Agency with information about compliance, failing to carry out an energy audit and failing to comply with an enforcement notice.
- Civil penalties include financial penalties or publication penalties.

# The Energy Efficiency (Building Renovation and Reporting) (Amendment) Regulations 2020

- Came into force on 24 June 2020. Will no longer have effect on 31 December 2020.
- They implement three requirements of the EU Energy Performance of Buildings Directive 2010 as amended by the Energy Performance of Buildings Directive 2018 ((EU)2018/844) (Amending EPB Directive 2010) as follows:
  - Article 2a: Requirement for Member States to produce a Long-Term Renovation Strategy to decarbonise their building stock by 2050.
  - Article 10(6): Requirement for Member States to link financial measures for improving the energy performance of buildings to those for energy savings.
  - Article 20(2): Requirement for Member States to provide energy efficiency advice and information.

# The Minimum Energy Efficiency Standards Regulations 2015 (“MEES Regulations”)

- **Part 2** of the MEES Regulations contains a right for residential tenants to request their landlord’s consent to carry out energy efficiency improvements, regardless of whether this is permitted by the lease.
- **Part 3** provides that a landlord of a sub-standard property (properties with an EPC rating of F or G) must not grant new leases or continue existing leases unless the landlord:
  - makes sufficient energy efficiency improvements to the property, so that it is no longer substandard; or
  - claims a legitimate reason not to do so under the MEES Regulations and this has been validly registered on the PRS Exemptions Register.

# The Minimum Energy Efficiency Standards Regulations 2015 (“MEES Regulations”)

- One legitimate reason is that an exemption in Chapter 4 of Part 3 of the MEES Regulations applies. These are as follows:
  - Consent exemption
  - Devaluation exemption
  - Temporary exemption
- Where a property is sub-standard a landlord may not:
  - Continue to let a domestic private rented (“PR”) property on or after 1 April 2020.
  - Continue to let a non-domestic PR property on or after 1 April 2023.
- Although the MEES Regulations refer to PR properties, they can apply to leases granted by public sector landlords as well as private landlords.

# The Minimum Energy Efficiency Standards Regulations 2015 (“MEES Regulations”)

- **Enforcement**

- Part 3 of the MEES Regulations does not impose a positive obligation on a landlord to make energy efficiency improvements to properties so that they are no longer sub-standard.
- A breach of the MEES Regulations is not a criminal offence. Civil penalties are permitted to be imposed which can either be financial, or adverse publicity, for example entry of the details of the breach on the public part of the PRS Exemptions Register (or both).

## The EU Emissions Trading System (“EU ETS”)

- The EU ETS is a cap and trade system that seeks to reduce greenhouse gas (“GHG”) emissions by requiring operators and installations in energy-intensive sectors e.g. manufacturing, oil refineries and power stations to surrender an equal number of emission allowances as the total emissions of GHG emissions from that installation for that year. Essentially, the number of allowances held by the operator at the end of an EU ETS year must be equal to, or more than, the total volume of GHG emissions from its installation for the EU ETS year.
- An allowance represents the right to emit one metric tonne of CO<sub>2</sub> into the atmosphere.
- Allowances can be purchased at auction or can be allocated for free by the regulator of certain industries.

What's in the pipeline?



## The UK Emissions Trading System (“UK ETS”)

- The draft Greenhouse Gas Emissions Trading Scheme Order 2020 published on 14 July 2020 sets out the framework for the UK ETS.
- The Order will come into force the day after it is made to allow regulators to prepare for the transition. Requirements of the UK ETS will take effect from **1 January 2021**.
- The UK government would like to link the UK ETS to the EU ETS but this will depend on negotiations.

## The UK Emissions Trading System (“UK ETS”): Key Features

- The UK ETS will cover the same GHGs and sectors as the EU ETS.
- Aligned with the EU ETS, the UK ETS will include an opt-out for hospitals or small emitters and an ultra-small emitter exemption.
- Under the UK ETS, operators will have to apply for a GHG emissions permit.
- The cap on UK ETS allowances allocated each year will initially be set at 5% below the UK’s expected notional share of the EU ETS cap for Phase IV of the EU ETS. The cap will be roughly 156 million allowances in 2021.
- Part 7 of the draft Order provides that the regulator can issue an enforcement notice or a civil penalty for non-compliance.

# Future Homes Standard

- Consultation response due this autumn. Aim to implement by 2025
- Should reduce carbon emission by 75% - 80%
- New fabric standards: All new homes will be built with low carbon heating and standards for glazing, walls, floors and roofs that limit heat loss.
- Amendments to Parts L and F: the standards of the Building Regulations 2010 Parts L and F, which deal with conserving fuel power and ventilation respectively, will be increased from 2025.
- Changes to local planning authorities' power: local planning authorities will not be able to set their own energy efficiency standards higher than those in the amended Building Regulations.

# Future obligations - EU Exit and a green recovery?

- Environment and agriculture bills
- Energy white paper - will it ever happen?
- Circular economy
- 'Simplification' of EIA

# Net-Zero: The practical options and the legal implications and techniques required

Richard Barlow, Partner

# Introduction

- **Reducing energy consumption by becoming more energy efficient**
  - Synthetic fuels
  - Sensor operated lights
- **Switching to a green tariff for power consumption**
- **Using energy from renewable and low-carbon sources**
  - Solar farms
  - Anaerobic digestion facilities
  - District Heating Systems

# Introduction

- **Reducing indirect emissions**
  - Green procurement
  - Green couriers
  - Embodied Carbon
- **Purchasing carbon offsets**
  - Woodland Trust offset
  - Regulated vs Voluntary offset schemes
- **Green Bonds/ Funding**
  - Community Municipal Investments

# Reducing Energy Consumption

## Synthetic Fuels

- The use of synthetic fuels is the only way in the short to medium term to decarbonise transport whilst the technology in relation to other cleaner fuel sources is further developed. This is because:
  - Synthetic fuels can be utilised without a need to modify existing engine or fuel supply infrastructure as they can be easily added to conventional petrol and diesel to help reduce the CO<sub>2</sub> emissions from ICE vehicles. Such reduction in CO<sub>2</sub> emissions could therefore be achieved immediately upon launch.
  - Synthetic fuels are currently also a lot easier and cheaper to store and transport compared to other alternative fuel sources.



# Reducing Energy Consumption

## Synthetic fuels

However.....

- Synthetic fuels have lower engine efficiency rates compared to other alternative fuel sources and the most common method of their production, Fischer Tropsch synthesis, still uses fossil carbon sources.
- Further technological development should seek to ensure that non-fossil carbon dioxides are used in the production process of biofuels. Equally, further development of renewable energy sources, such as wind, nuclear or solar power, can assist in ensuring electro fuels are produced in a carbon-neutral manner.

# Reducing Energy Consumption

## Hydrogen powered vehicles

The technology exists to utilise hydrogen to fuel vehicles. It is particularly suitable for certain types of vehicles - eg refuse collection vehicles which cannot realistically be electrically powered due to the weight of the necessary battery.

However the hydrogen is produced through the use of electricity so it is important that the hydrogen is produced using renewable electricity otherwise the benefit is diminished.

Currently the UK lacks the hydrogen supply infrastructure - this is a chicken and egg type situation.

# Reducing Energy Consumption

## Electric Vehicles

Providing the electricity is generated from renewable sources, then powering vehicles electrically is a substantial improvement on petrol and diesel.

The infrastructure for charging electric vehicles is growing and it is possible to charge at home. The range of vehicles is also improving.

However there can be precious resources such as lithium and cobalt in the batteries and so battery power ought not to be the only long term motive vehicle solution.

# Reducing Energy Consumption

## Sensor Operated Lights

- Sensor operated lights, particularly motion sensors, are a valuable tool to ensure that lights are switched off when not in use.
- Motion sensors in commercial buildings are estimated to reduce energy use by up to 30%.
- Sensor operated lights could also have applications for public lighting, such as street lamps.

# Switching to a greener tariff for power consumption

## Power Purchase Agreements

Businesses, organisations and individuals can all choose to receive power from a greener power provider and by doing so, support renewable energy generation.

# Using energy from renewable and low-carbon sources

## Solar Farms

- For example the solar farm at Langar - Nottinghamshire Community Energy Ltd
- Supports green community projects annually
- Pays a dividend to shareholders

# Using energy from renewable and low-carbon sources

## Anaerobic Digestion Facilities

- An essential feature for future bio-energy generation
- More work is required to improve the technology - but in principle eg using vegetable offcuts to generate methane gas is a no-brainer

# Using energy from renewable and low-carbon sources

## District Heating Systems (“DHS”)

- DHSs involve heat for an area or local community being supplied from a central source to multiple sites for heating, cooling or hot water.
- DHSs reduce carbon dioxide emissions by using centrally generated heat that is consumed by the networks end users and reduce costs of heat for end users.



# Using energy from renewable and low-carbon sources

## Manchester District Heating System

- Manchester City Council's city centre District Heating Scheme: this is an ambitious and high profile DH project in a complex city centre site.
- The Council is planning to provide heat and power to private customers in the area as well as its own buildings, requiring a robust corporate structure and navigating issues such as the interaction between the Public Contracts Regulations and Utilities Contracts Regulations in the context of energy projects.

# Using energy from renewable and low-carbon sources

## What is on the horizon for DHSs?

- Ofgem Decarbonisation Plan published in February 2020.
- In February 2020, BEIS published a consultation on building a market framework for heat networks, including developing a regulatory system with Ofgem as the regulator.
- Announcement in the spring 2020 Budget that the government will allocate £270 million for a new Green Heat Networks Scheme.
- Energy White Paper “expected in autumn 2020” - maybe?

# Reducing Indirect Emissions

## Green Procurement

- If your major customer asks you to demonstrate your organisation's environmental credentials - how will your organisation perform?
- If this has not yet happened to your organisation - then plan for it to do so now

# Reducing Indirect Emissions

## Green Couriers

- Green couriers, such as WeGo can reduce emissions and improve air quality by using:
  - Eco-friendly logistics.
  - Ultra-low emission vehicle fleets and “green hubs” as central charging points.
  - Bicycles in urban areas to reduce congestion/ access pedestrianised areas.
  - Secured compartments on scheduled passenger trains.
  - Intelligent scheduling to reduce unnecessary journeys and boost efficiency.
- “4 tonnes of CO2 saved per year by each cargo bike used instead of a van”.

# Reducing Indirect Emissions

## Embedded/ Embodied Carbon

- In recent years, operational energy use of buildings has been reduced in a number of ways for example, by improving insulation.
- However, it is embodied carbon that constitutes 20-50% of the whole life (embodied + operational) carbon emissions of a new building and so must not be overlooked.
- Embodied carbon is the carbon footprint of a material i.e. how many GHGs are released throughout the supply chain.
- Emergence of an embodied carbon database to increase awareness.
- Shift in building constructions materials for example, greater use of wood in building construction.

# Purchasing Carbon Offsets

## Woodland Trust Offset

- Planting trees is a great way to sequester CO2 emissions.
- The Woodland Trust works to:
  - Promote the benefits of woodland creation as a way of reducing atmospheric CO2.
  - Engage with businesses and individuals seeking to reduce their GHG emissions footprint by planting trees.
  - Lobby for greater recognition of the role of woodland in helping to mitigate environmental impact.

# Purchasing Carbon Offsets

## Not the only solution

“There’s no way we can plant our way out of the climate emergency”

- Carbon offsetting projects should not be used as a substitute for reducing emissions directly.
- A newly planted tree could take up to 20 years to capture the amount of CO2 emissions that a carbon offset scheme promises.
- When trees and plants die most of the carbon “stored” in them is released into the atmosphere.

# Purchasing Carbon Offsets

## Regulated vs Voluntary Offset Schemes

- The regulated market is governed by the United Nations Framework Convention on Climate Change.
- In contrast, the voluntary offset market has developed separately from government policies and targets. Most voluntary carbon credits are not recorded on external registers, increasing the risk of fraud through double-selling.
- In July 2019, Chris Grayling called for evidence of offsetting carbon emissions produced by transport to help customers make more informed decisions.



# Green Bonds/ Funding

## West Berkshire Council Green Bond

- West Berkshire Council recently launched the UK's first local green bond in a bid to raise £1 million from residents to fund solar panel installations on five council owned buildings.
- Community Municipal Investment (“CMI”) is a bond/loan mechanism issued by the Council directly to the public. CMIs are thought to have a low risk profile and are comparable to government backed investment instruments.
- “Hailed as a breakthrough in delivering green projects” particularly as Councils are struggling to recover as a result of the pandemic.
- A further five pilot schemes to follow shortly.

But most important of all, do something to make an environmental difference.

Empower the convinced and Convince the empowered.

## The Environment Bill (2020) – biodiversity net gain



**David Elvin QC**  
**Landmark Chambers**

## Timeline: Bill and supporting policy

- Latest version of the Bill introduced in HoC on 20.1.20 (a comparison version is available at <https://publications.parliament.uk/pa/bills/cbill/58-01/0009/Enviro%20Compare.pdf>)
- See also
  - Explanatory Notes to the Bill  
<https://publications.parliament.uk/pa/bills/cbill/58-01/0009/en/20009en.pdf>
  - Environment Bill Policy Statement 30.1.20  
<https://www.gov.uk/government/publications/environment-bill-2020/30-january-2020-environment-bill-2020-policy-statement>
  - Environmental Governance Factsheet (parts 6 and 7 - Nature and conservation covenants) 10.3.20  
<https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-nature-and-conservation-covenants-parts-6-and-7>

## Timeline (2)

- Draft Environment (Principles and Governance) Bill 19.12.18, to comply with s.16 of the European Union (Withdrawal) Act 2018 followed by consultation
- Government consultation *Net gain, Consultation proposals* (December 2018)  
[https://consult.defra.gov.uk/land-use/net-gain/supporting\\_documents/netgainconsultationdocument.pdf](https://consult.defra.gov.uk/land-use/net-gain/supporting_documents/netgainconsultationdocument.pdf)
- Government *Summary of responses and Government Response* (2019)
- Full Environment Bill first published before 2019 General Election
- New version of the Bill published after the General Election
- Parliamentary scrutiny
  - Second reading
  - Committee hearings began but suspended following lockdown
  - Now proposed to be completed by 29 September 2020
- 2020 policy statements relating to the Bill

## Current position

- Current policy has to approach BNG (absent development plan policies to the contrary) in terms of mitigation following established principles. See e.g. NPPF 2019 §§170, 174, 175 and PPG *Natural environment* §§18-24.
- The “have regard” duty in s. 40 of the Natural Environment and Rural Communities Act 2006 is only a weak duty
- Government *Net Gain* consultation 2018 –
  - “This system works well to avoid the most severe impacts on biodiversity and protect the best sites for wildlife, but less well to manage the gradual erosion of lower value habitats. Cumulatively, even ‘insignificant’ losses of habitat at a development scale add up to significant rates of biodiversity loss overall. The approach also leaves much to be agreed in relatively subjective and discretionary ways – while this offers some flexibility, it can also result in uncertainty and costs for both developers and LPAs. Current practice enables some enhancement but without reliable measurement there is no way of understanding how much this benefits the environment and people.
  - In practice, a variety of approaches are employed by the 353 local authorities in England ...”

## Objectives

- *“Nature is in decline, much of England’s wildlife is deteriorating, and many ecosystems are degraded. The UK has a number of international and legislative commitments to take urgent and effective action to halt the loss of nature or biodiversity.”* Explanatory Notes, para. 44.
- The Bill seeks to improve biodiversity in several respects of which BNG is only one (though perhaps the one attracting the greatest attention) –
  - a strengthened biodiversity duty on public authorities, strengthening s. 40 of Natural Environment and Rural Communities Act 2006
  - Local Nature Recovery Strategies (LNRSs)
  - targeted measures to protect existing trees
  - conservation covenants
  - a 10% biodiversity net gain requirement on new development

## Transition to BNG

- *Summary of responses and Government Response* p. 15 –
  - **“Transition**
  - There was strong support for a notice period and clear deadlines. Support for a transition period longer than a year was balanced by concern that too protracted a transition may pose risks to effective implementation and biodiversity outcomes. **Government will make provision in the Environment Bill to set a transition period of two years [footnote: 2 years from the Bill receiving royal assent]**. It will work with stakeholders on the specifics of transition, including accounting for sites with outline planning permission, and will provide clear and timely guidance to support those involved understand what will be required of them and when.”
  - That transitional period can only start to run when the bill becomes law. The Parliamentary process has been delayed further with the public bill committee not now completing its work until 29 September 2020.



## Bill proposals: BNG mechanism

- The Bill sets out the proposed mechanism for BNG in Part 6 and Schedule 13
- Not yet clear as to how this will integrate with proposals in Planning White Paper
- This will introduced new provisions into the TCPA 1990 primarily by subjecting all permissions (with certain exclusions) to a mandatory condition. This will overcome current issues regarding what is needed for mitigation etc.
- Cl. 90 provides
  - “Schedule 14 makes provision for biodiversity gain to be a condition of planning permission in England.”
- Cl. 91 confers power on the SoS to introduced regulations for a publicly accessible biodiversity gain site register for obligations enduring for 30 years + embodied in planning obligations or conservation covenants and where the enhancement is made available to be allocated in accordance with the terms of the covenant or obligation to one or more developments for which planning permission is granted.

## Bill proposals: proposed Schedule 7A TCPA 1990

- Schedule 14 para. 1 introduces a new Schedule 7A into the TCPA
  - “90A Biodiversity gain in England  
Schedule 7A (biodiversity gain in England) has effect.””
- Sched 7A para. 1 -
  - “1 (1) This Schedule makes provision for grants of planning permission in England to be subject to a condition to secure that the biodiversity gain objective is met.
  - (2) Paragraphs 2 to 12 have effect for the purposes of this Schedule”
- Sched 7A para.13 -
- “The condition is that the development may not be begun unless—
  - (a) a biodiversity gain plan has been submitted to the planning authority (see paragraph 14), and
  - (b) the planning authority has approved the plan (see paragraph 15).”

# Proposed Schedule 7A TCPA

- “*Biodiversity gain objective*”
- 2(1) The biodiversity gain objective is met in relation to development for which planning permission is granted if the biodiversity value attributable to the development exceeds the pre-development biodiversity value of the onsite habitat by at least the relevant percentage.
- (2) The biodiversity value attributable to the development is the total of—
  - (a) the **post-development biodiversity value** of the onsite habitat,
  - (b) the biodiversity value, in relation to the development, of any **registered offsite biodiversity gain allocated to the development**, and
  - (c) the **biodiversity value of any biodiversity credits** purchased for the development.
- Paras. 2(3) and (4) set the relevant percentage at 10% subject to variation by SoS
- Paras. 3 and 4 provide for references to the biodiversity value of any habitat or habitat enhancement are to its value as calculated in accordance with the **biodiversity metric** which is a document to be published by the SoS (subject to consultation) and may be revised from time to time for the purposes of measuring the value of habitat or habitat enhancement

# Proposed Schedule 7A TCPA

- §§5-7 “**Pre-development biodiversity value**” which in general is the biodiversity value of the onsite habitat on the “relevant date”. The relevant date (subject to agreement to the contrary) is -
  - (a) in a case in which planning permission is granted on application, the date of the application, and
  - (b) in any other case, the date on which the planning permission is granted
- NB anti-avoidance provisions
  - Where activities are carried out without permission or of a kind specified by the SoS, which leads to the value being “lower on the relevant date than it would otherwise have been ”the value is taken to be prior to the commencement of those activities
  - Where the land on which permission is granted is land ”registered in the biodiversity gain site register its pre-development pre-development biodiversity value should be taken to be the *enhanced* value of the registered site, regardless of whether or not the registered biodiversity enhancement has in fact been delivered successfully.

# Proposed Schedule 7A TCPA

- §§8-9 “**Post-development biodiversity value**” projected value of habitats on the development site since needed by LPA to determine whether proposal satisfies the BNG objective. Government expects it to be determined by applying the metric to the developer’s plan for the site as detailed in the BGP. Significant increases in onsite value only to be considered if secured through a suitable mechanism and will be maintained for at least 30 years after completion of development.
- §§10 “**Registered offsite biodiversity gains**” – cl. 91
- §11 “**Biodiversity credits**” – cl. 92 – SoS may make “arrangements” (see cl. 92(3)) under which a person entitled to carry out the development of any land may purchase a credit from the SoS for the purpose of meeting the biodiversity gain. A credit is to be regarded as having such value as is determined under the “arrangements” (which must be published). SoS to have regard to the need to determine an amount which does not discourage the registration of land in the biodiversity gain sites register
- §12 general definitions for Sched. 7A - references to the grant of planning permission include the deemed grant of planning permission

## Biodiversity gain: exclusions and modifications

- Para. 17 **excludes** development where permission is granted by development order or planning permission is granted s. 293A (urgent Crown development), or development of such other description as the SoS specifies in regulations.
- SoS may **modify** the application of BNG to “Irreplaceable habitat” by regulations under para. 18 but is to be defined in regulations, may confer powers/requirements on Natural England and “must make provision requiring, in relation to any such development, the making of arrangements for the purpose of minimising the adverse effect of the development on the biodiversity of the onsite habitat”. Likely to include SPAs, SACs, SSSIs and Ramsar Sites. See para. 1575 of the Explanatory Notes and Government Response of July 2019 at p. 6.
- Also power to **modify/exclude** by regulations
  - Para. 19 allows **modification** for outline permissions where reserved matters made be phased or “any kind of planning permission” where the grant is subject to conditions “having that effect” - “that effect” appears to refer back to phasing (see Explanatory Notes at para. 1576)
  - Para. 20 allows **modification or exclusion** where permission is granted under s. 73A (development already carried out) or s. 102 (discontinuance)

## Biodiversity gain: the applicable metric

- Already subject to consultation – Biodiversity Metric 2.0 (Dec 2019)
- Final version intended to be published in December 2020
- <http://publications.naturalengland.org.uk/publication/5850908674228224>
- Natural England -
  - Consultation response 7.8.20. Many points made and changes proposed.
  - “We have now published a summary consultation response following the end of the beta Biodiversity Metric 2.0 consultation period. This summary consultation response can be downloaded below. We will publish full details of all the changes made to the final version of the Metric compared to this beta test version when we publish the final version of the Metric.”

## Biodiversity gain: reserved matters approvals?

- Government Response noted (p. 78):
  - “There was no clear consensus on whether reserved matters applications should be included in net gain requirements, with some suggesting that they should be exempted to ensure a smoother transition.”
- Bill refers to “planning permission” – whether outline, detailed or deemed
- Expl Notes emphasis on “all planning permissions” §§820, 1555, 1567, “a development approved by planning permission” at §1568
- Case law distinguishes applications for permission from RMAs -
  - ***R v Bradford-on-Avon UDC, Ex p Boulton*** [1964] 1 WLR 1136, 1147–1148
  - ***Castlebay Ltd v Asquith Properties Ltd*** [2006] 2 P & CR 22
- RMAs for permissions granted before the BNG provisions come into effect? Quite apart from the fact that RMAs do not appear to be covered in the Bill, appears to run contrary to the transitional assurance given by Government
- No need to include RMAs since the condition will be imposed by operation of law for all outline permissions granted after Part 6 comes into effect. Contrast s. 73 applications.



## Biodiversity gain: reserved matters approvals?

- NB in the Government Response (2019) “Impact on developers” (p. 14) made commitments regarding engagement and practical guidance:
  - “However, government acknowledges the need for **clarity, consistency and simplicity** and good guidance to help developers design net gain into their processes in the early stages of development. Government commits to:
    - continue to engage with the industry to address concerns, identify and address risks and communicate opportunities offered by net gain
    - publish practical guidance which **makes it clear to developers what will be required and when**, and how requirements interact with other environmental considerations including district-level licensing.”
- The Bill process of course has yet to conclude.

## Air Quality Issues in Planning



**James Maurici QC**

**Landmark Chambers**

## Introduction: some key points (1)

- AQ legislation and policy voluminous and complex, and increasingly so;
- AQ now an issue in many planning applications/appeals;
- Main issue: NO<sub>2</sub> - but not the only issue (ND, ammonia, PM);
- Main source of NO<sub>2</sub>: transport (also power generation, industrial processes and domestic heating);
- An AQ issue thus potentially arises in respect of **any** new proposed net traffic generating development: see below;
- Result is increasingly:
  - (i) a popular ground of objection by third parties;
  - (ii) a RfR by local authorities;
  - (iii) a main issue on s. 78 appeals/call-ins;
  - (iv) developers being asked to provide via conditions and/or s. 106 obligations mitigation for potential AQ impacts.

## Introduction: some key points (2)

- See, the PPG, para. 006, **What specific issues may need to be considered when assessing air quality impacts?**
  - (1) *“Lead to changes (including any potential reductions) in vehicle-related emissions in the immediate vicinity of the proposed development or further afield. This could be through ... altering the level of traffic congestion; significantly changing traffic volumes, vehicle speeds or both; or significantly altering the traffic composition on local roads”;*
  - (2) *“Introduce new point sources of air pollution ...”*
  - (3) *“Expose people to harmful concentrations of air pollutants, including dust. This could be by building new homes, schools, workplaces or other development in places with poor air quality”;*
  - (4) *“Give rise to potentially unacceptable impacts (such as dust) during construction for nearby sensitive locations; Have a potential adverse effect on biodiversity, especially where it would affect sites designated for their biodiversity value”.*

## The legislative background (1) EU derived

- **The legislative background is complex, and getting ever more complex:**
- (1) The 2008 ambient air quality directive (2008/50/EC) (“the AQD”) sets legally binding limits for concentrations in outdoor air of major air pollutants that impact public health such as particulate matter (PM10 and PM2.5) and nitrogen dioxide (NO2).
- (2) Transposed in England by the Air Quality Standards Regulations 2010.
- (3) Other important EU legislation includes:
  - Directive 2004/107/EC of the European Parliament and of the Council relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air (the Fourth Daughter Directive) (transposed also by 2010 Regulations, above).
  - Directive 2015/1480/EC of 28 August 2015 amending several annexes to Directives 2004/107/EC and 2008/50/EC of the European Parliament and of the Council laying down the rules concerning reference methods, data validation and location of sampling points for the assessment of ambient air quality
  - Commission Implementing Decision 2011/850/EU.

## The legislative background (2) EU derived

- (4) The National Emission Ceilings Directive (2001/81/EC), transposed as the National Emission Ceilings Regulations 2002, and now the National Emission Ceilings Regulations 2018: sets national emission reduction commitments for fine particulate matter (PM2.5), ammonia (NH3), nitrogen oxides (NOx), sulphur dioxide (SO2) and non-methane volatile organic compounds (NMVOCs) (and see also the Gothenburg Protocol to the UNECE Convention on Long-range Transboundary Air Pollution);
- (5) Industrial Emissions Directive: transposed by the Environmental Permitting Regulations

## The legislative background (3): EU derived

- NB all the above “retained law” following Brexit ...
  - (1) UK free to repeal any and all retained law after Implementation Period over, unless any “deal” with the EU prevents this;
  - (2) UK not obliged update its legislation if amendments to EU AQ laws or new laws on AQ, again unless any “deal” with the EU prevents this;
  - (3) Post-exit case-law of CJEU not binding;
  - (4) Supreme Court (and maybe other Courts – see ongoing consultation) power to depart from pre-exit CJUE case-law.

## The legislative background (4): domestic

- (1) Transposed – retained - EU law: see above;
- (2) Old but still in force: Air Quality (England) Regulations 2000;
- (3) Part IV of the Environment Act 1995 requires local authorities to review AQ in their area and designate air quality management areas (“AQMA”) where improvements are necessary. Where an AQMA is designated an air quality action plan describing the pollution reduction measures must then be put in place. These plans contribute to the achievement of AQ limit values at local level;
- (4) Clean Air Act 1993;



## The legislative background (5): domestic

- New provisions proposed in the Environment Bill:
  - Cl. 2: requires government to set and meet an air quality target for fine particulate matter in ambient air;
  - See <https://airqualitynews.com/2020/08/19/government-to-introduce-legally-binding-environmental-targets/>
  - Also amendments to the Clean Air Act 1993
  - Also amendments to the 1995 Act – see Schedule 14: Local Air Quality Management Framework: *“the Bill will strengthen these duties by giving greater clarity on the requirements of action plans enabling greater collaboration between local authorities and all tiers of local government, as well as with Relevant Public Authorities, in the creation and delivery of those plans”*. Plus require regular review the National Air Quality Strategy: see below.

## From DEFRA: *Air Pollution in the UK 2015*

### 2 Legislative and Policy Framework

The UK air quality framework is derived from a mixture of domestic, EU and international legislation and consists of three main strands:

- 1) Legislation regulating total emissions of air pollutants – the UK is bound by both EU law (the National Emission Ceilings Directive) and international law (the Gothenburg Protocol to the UNECE Convention on Long-range Transboundary Air Pollution to which both the UK and the EU are parties);
- 2) Legislation regulating concentrations of pollutants in the air – implementing the EU Air Quality Directive; and
- 3) Legislation regulating emissions from specific sources such as legislation implementing the Industrial Emissions Directive and the Clean Air Act. Reducing air pollution requires action to reduce domestic emissions as well as working closely with international partners to reduce transboundary emissions (pollutants blown over from other countries) which, at times, can account for a significant proportion of pollutant concentrations experienced in the UK (for example, it is estimated that sources outside of the UK account for 35-50% of measured ambient particulate matter concentrations)

## Policy (1): Planning

- (1) NPPF: para. 181

“Planning policies and decisions should sustain and contribute towards compliance with relevant limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas and Clean Air Zones, and the cumulative impacts from individual sites in local areas. Opportunities to improve air quality or mitigate impacts should be identified, such as through traffic and travel management, and green infrastructure provision and enhancement. So far as possible these opportunities should be considered at the plan-making stage, to ensure a strategic approach and limit the need for issues to be reconsidered when determining individual applications. Planning decisions should ensure that any new development in Air Quality Management Areas and Clean Air Zones is consistent with the local air quality action plan”

## Policy (2): Planning

- (2) PPG: see Paragraphs: 001 - 008 Reference ID: 32-001-20191101: see above
- (3) National Networks NPS;
- (4) Airports NPS, see **Spurrier** [2019] EWHC 1070 (Admin), AQ not issue on the appeal ... NB air quality policy does not need to, and should not, set out legal requirements for AQ ...
- (5) Myriad of local planning (and other) policies on AQ...

## Policy (3): Other

- (1) UK plan for tackling roadside nitrogen dioxide concentrations (July 2017) and Supplement to the UK plan for tackling roadside nitrogen dioxide concentrations (October 2018) – this is the Article 23 Plan under the AQD – the subject (product of) of the many Client Earth JRs over last few years;
- (2) Clean Air Strategy – complements three other strategies - the Industrial Strategy, the Clean Growth Strategy and the 25 Year Environment Plan;
- (3) Reducing emissions from road transport: Road to Zero Strategy;
- (4) The Air Quality Strategy for England, Scotland, Wales and Northern Ireland (under s. 80 of the 1995 Act).

## Refusing PP on AQ grounds (1)

- Two Court of Appeal cases help set parameters for this:
- (1) ***R (Shirley) v SSHCLG*** [2019] PTSR 1614 and
- (2) ***Gladman Developments Ltd v Secretary of State for Communities and Local Government*** [2020] P.T.S.R. 128
- **Summary:**
- (i) AQ is an important material consideration in planning;
- (ii) PP can be refused on the basis of potential AQ impacts;
- (iii) BUT whatever the position is in the area (zone) in terms of compliance with the AQD and irrespective of whether under the 1995 Act there is an AQMA declared there is not ever a legal obligation to refuse PP for a development that worsens AQ. Question of planning balance ...

## Refusing PP on AQ grounds (2)

- **Shirley:**
- **FACTS**
- (1) Challenge to refusal by the Secretary of State (“S/S”) to call-in following LPA’s resolution to grant permission for 4,000 homes on outskirts of Canterbury;
- (2) In April 2006 the city council declared an AQMA in part of the City after high levels of nitrogen dioxide had been recorded there. The AQMA was extended in November 2011 to include most of the area within the city centre ring road;
- (3) Local measurements for the 1995 Act showed the NO<sub>2</sub> exceeded 40 micrograms per cubic metre;
- (3) In terms of the AQD – Canterbury in the South East zone. The monitoring station near Canterbury where monitoring etc done in accordance with the Directive showed no exceedance of the NO<sub>2</sub> annual mean limit value. But the South East zone was a non-compliant zone. This is largely because of exceedances elsewhere most notably in the centre of Oxford.
- **NB: cannot rely on local measurements to say Directive limits values breached, need to look at DEFRA data.**

## Refusing PP on AQ grounds (3)

- Argument was if a zone not compliant in terms of NO<sub>2</sub> (as Article 13 required) and development would further add to pollution (“*Mr McCracken submitted that the potential effects of proposed development on air quality are material considerations in planning decisions. Major development can prolong or worsen exceedances of limit values*”) then the S/S must call-in and refuse PP or impose such strict conditions as mean no adverse AQ impact (suggestion was a complete ban on car ownership for residents!)...
- Court of Appeal rejected these arguments:
  - AQD contains its own remedy for breaches of Article 13: the requirement under Article 23 to establish and implement an Air Quality Plan (“AQP”) which is effective and reduces any periods of exceedance; and
  - Therefore there is no basis for reading in a duty to take particular actions in relation to permits or development consents e.g. call-in and/or refuse ...



## Refusing PP on AQ grounds (4)

- 33. *Dove J's description of [article 23](#) as providing the “specific and bespoke remedy” for a breach of [article 13](#) therefore seems apt... **The case law does not suggest, for example, that in such circumstances [i.e. a breach of [article 13](#)] a member state must ensure that land use planning powers and duties are exercised in a particular way—such as by imposing a moratorium on grants of planning permission for particular forms of development, or for development of a particular scale, whose effect might be to perpetuate or increase exceedances of limit values, or by ensuring that decisions on such proposals are taken only at ministerial level.”***
- “40. *If a proposed development would cause a limit value to be breached, or delay the remediation of such a breach, or worsen air quality in a particular area, neither the Air Quality Directive nor the 2010 Regulations states that planning permission must be withheld or granted only subject to particular conditions. **These may of course be material considerations when an application or appeal is decided...***”

## Refusing PP on AQ grounds (5)

*“48. This is not to deny that the likely effects of a proposed development on air quality are material considerations in the making of the decision on the application for planning permission, to be taken into account alongside other material considerations weighing for or against the proposal. Indeed, the Secretary of State acknowledges in these proceedings that the effects of development on air quality in the local area, or more widely, or the likely consequences of the development for compliance with limit values under the Air Quality Directive, are capable of being, in a particular case, a decisive factor in the determination of an application for planning permission—no matter whether the decision-maker is the Secretary of State himself or, as it will normally be, the local planning authority.”*

## Refusing PP on AQ grounds (6)

- **Gladman**: an example of this ...
- **FACTS**:
  - PP refused by LPA for 330 dwellings plus 60 care units;
  - S. 78 appeal made;
  - Inspector took into account the fact that the Article 23 AQP (December 2015) had at that point been quashed (Client Earth litigation) and no new Plan at that point adopted;
  - He found that it would be unsafe to rely on vehicle emissions falling to the extent assumed in the models relied on by the claimant and that, despite proposed mitigation measures, the proposals would have an adverse effect on AQ;
  - Refused PP on appeal;
  - That decision challenged under s. 288.

## Refusing PP on AQ grounds (7)

- C argued that:
  - (1) The inspector should have proceeded on the basis that the Government would comply with the law, rather than assuming that the breaches of the AQD and the 2010 Regulations would continue; and
  - (2) The Inspector failed to give effect to the principle, in paragraph 122 of the NPPF (2012) that the planning system presumed that other schemes of regulatory control were legally effective.
- Claim failed on both grounds.
- Focus on (1) below, but (2) also of interest, so other controls relevant e.g. Environmental Permit for new point source emission but not for AQ issues more generally e.g. with a housing scheme.
- NB at date of decision the 2015 AQP (Article 23 Plan) had been quashed and new one was not in place ...

## Refusing PP on AQ grounds (8)

- Held:
- (1) the duty to produce and implement an AQP by the earliest possible date did not mean that planning decision makers were to presume that the UK would become compliant in the near future;
- (2) that, where it was not known what measures the new national AQP would contain, the inspector could not know how any new national measures might relate to local measures or what might be “the soonest date possible” by which the new plan would aim to achieve compliance;
- (3) that the Inspector therefore could not have reached any view as to whether compliance would be secured by any particular date, and thus was not required to assume that local AQ would improve by any particular amount within any particular time frame;
- (4) that in such circumstances the inspector had been entitled to consider all the evidence in forming his own judgment as to what the AQ would be likely to be in the future, including the latest available monitoring data..

## Mitigation (1)

- To avoid getting refused on AQ grounds mitigation is important:
- (1) In **Gladman** Inspector not satisfied re efficacy of the mitigation ... :
  - *“The proposed measures include electric vehicle charging points for each dwelling, green travel measures and incentives to encourage the use of walking, cycling, public transport and electric or low emission vehicles. No specific evidence has been provided, however, to show how effective those measures are likely to be in reducing the use of private petrol and diesel vehicles and hence in reducing forecast NO2 emissions.”*
- But such mitigation accepted elsewhere ...
- (2) In **Shirley** developer was at a cost of approximately £3.7m providing an “*air quality mitigation package*” that would include the installation of domestic electric vehicle charging points in both the residential and commercial/retail areas, monitoring and the provision of “*an electric bicycle per dwelling*”. Accepted by LPA.

## Mitigation (2)

### How can an impact on air quality be mitigated?

Mitigation options will need to be locationally specific, will depend on the proposed development and need to be proportionate to the likely impact. It is important that local planning authorities work with applicants to consider appropriate mitigation so as to ensure new development is appropriate for its location and unacceptable risks are prevented. [Planning conditions](#) and [obligations](#) can be used to secure mitigation where the relevant tests are met.

Examples of mitigation include:

- maintaining adequate separation distances between sources of air pollution and receptors;
- using green infrastructure, in particular trees, where this can create a barrier or maintain separation between sources of pollution and receptors;
- appropriate means of filtration and ventilation;
- including infrastructure to promote modes of transport with a low impact on air quality (such as electric vehicle charging points);
- controlling dust and emissions from construction, operation and demolition; and
- contributing funding to measures, including those identified in air quality action plans and low emission strategies, designed to offset the impact on air quality arising from new development.

Paragraph: 008 Reference ID: 32-008-20191101

Revision date: 01 11 2019

## Mitigation (3)

1. Encouraging non-car based trips: cycling, walking etc.
2. Travel plans;
3. Routing – if a particular AQ black spot?
4. On-site cycle infrastructure;
5. Electric car charging points;
6. Discouraging/preventing car ownership other than electric cars;
7. Green infrastructure;
8. Providing electric bikes;
9. TROs reducing speed limits.

Need to think creatively ...



## Habitats

- Not focused on this but issues with nitrogen deposition and impact on European sites;
- Led to moratorium on development around Ashdown Forest and also Epping Forest;
- See in relation to Ashdown Forest cases like:
- (1) ***Wealden DC v Secretary of State for Communities and Local Government*** [2017] Env. L.R. 31;
- (2) ***Wealden DC v Secretary of State for Communities and Local Government*** [2018] Env. L.R. 5
- See also ***Compton Parish Council v Guildford BC*** [2020] J.P.L. 661, despite ***Dutch Nitrogen*** case can properly rely on anticipated reductions in background AQ levels, if evidence supports the view they are sufficiently certain to happen ... NB contrast decision in ***Gladman*** above ... a question of judgment ...
- A whole talk in itself ...

## 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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