Monday 11 October 2021

Landmark Chambers

Welcome to Landmark Chambers' Environmental Law Conference 2021

The recording may be accessed here.

Your speakers for Session 1…

Professor Richard Macrory (Chair)
UCL Faculty of Law

Professor Liz Fisher
Oxford Law Faculty

Topic:
Legal Architecture of the Part 1 of the Environment Bill

Professor Eloise Scotford
UCL Faculty of Law

Topic:
Environmental ambition in UK Law and the role of the OEP

Tim Buley QC
Landmark Chambers

Topic:
OEP investigations and Environmental Review

Legal Architecture of the Part 1 of the Environment Bill

Professor Liz Fisher

Professor of Environmental Law, Faculty of Law and Corpus Christi College, University of Oxford

Associate Member, Landmark Chambers

Outline

1. The Architectural Nature of Environmental Law
2. Background to the Environment Bill
3. Overview of Part 1, Ch 1 as it currently stands (15 Sept 2021)
4. Three Problems
   A. A disjointed architecture
   B. An executive architecture
   C. A ‘weak’ architecture
5. Risks

1. The Architectural Nature of Environmental Law

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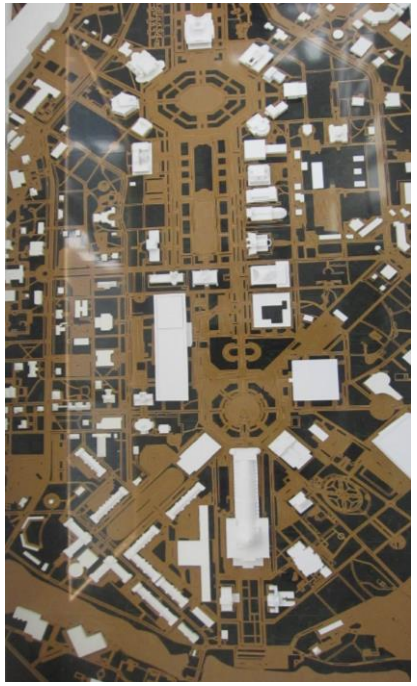
- Environmental problems are collective action problems
  - Socio-politically controversial
  - The necessity and limits of science
  - The controversial role of the state



- The architectural nature of environmental law
  - legislation - stable, justiciable, and constituting a frame
  - administration – applying, enforcing, assessment
  - courts – dispute resolution, enforcement, and accountability
  - accommodating disagreement through separation of powers

An Antipodean Example: A Working Legal Architecture

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Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority [2021] NSWLEC 92

Section 9(1) Protection of the Environment Administration Act 1991 (NSW)

The Authority is required to—

(a) develop environmental quality objectives, guidelines and policies to ensure environment protection, and

(b) monitor the state of the environment for the purpose of assessing trends and the achievement of environmental quality objectives, guidelines, policies and standards.

2. Background to the Environment Bill

- 80% of UK environmental law derived from EU law
  - Directives and National Implementation
  - National Courts and the CJEU
  - Commission and enforcement
- Brexit
  - European Union (Withdrawal) Act 2018
- Post Brexit
  - Filling holes or creating a new architecture?

3. Ch 1 of Part 1 of the Bill – An Overview

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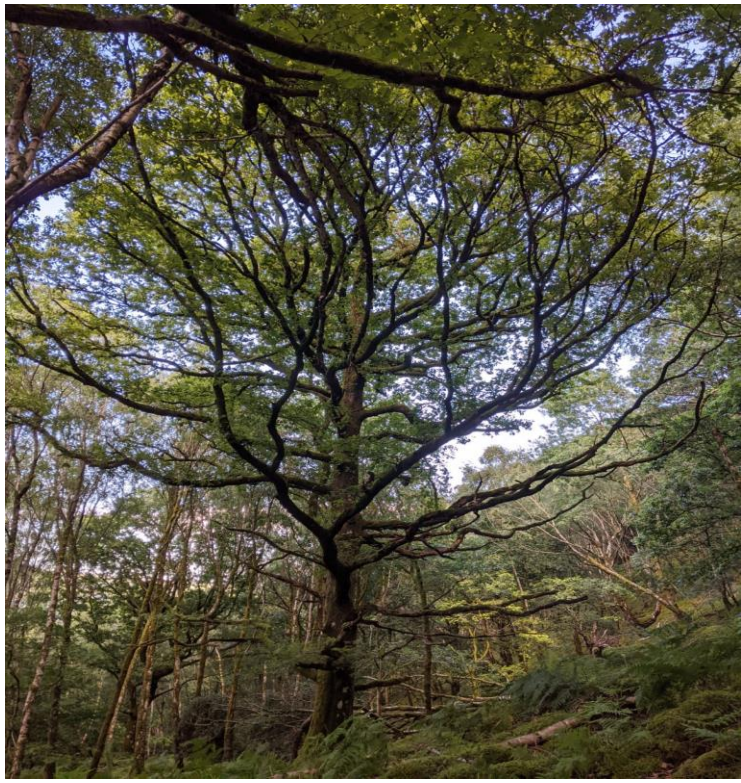
- Cl 1 – purpose and declaration – biodiversity and climate emergency
- Cls 2-8 Environmental targets (and note interim targets – cl 12)
- Cls 9-16 Environmental improvement plans
- Cl 17 Environmental monitoring
- Cls 18-20 Policy statements on environmental principles
- Cl 21-22 Statements and reports

Note evolution of Bill since Dec 2018



4. Three Problems

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A) A Disjointed Architecture

- The Act is more than about the ‘purpose of the Act’ in cl 1.
- No explicit relationship between the Bill and retained environmental law
- Target setting (cl 2) has no priority setting
- No ‘environmental logic’ guiding environmental improvement plans

B) An ‘Executive’ Architecture

‘Make provision about targets, plans, and policies for improving the natural environment’ (Short title of the Bill)

- Ch 1, Part 1 vests considerable power in the hands of the Secretary of State to articulate the norms (principles), aspirations (targets and EIPs), and accountabilities (monitoring and reporting)

- Discretionary powers over public duties

C) A ‘Weak’ Architecture

- Many of the SS’s powers rest on a requirement to establish an environmental benefit
- Aspirations are those set by the SS in targets and EIPs
- There is little legislative ‘obligation’ that is enforceable
- Environmental principle policy statements – cl 20(1)

Examples from the Bill and EIPs

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1 Purpose and declaration of biodiversity and climate emergency

(1) The purpose of this Act is to address the biodiversity and climate emergency domestically and globally.

(2) As soon as reasonably practicable and no later than one month beginning with the day on which this Act is passed, the Prime Minister must declare that there is a biodiversity and climate emergency domestically and globally.

(3) The Government must have regard to this purpose and declaration when implementing the provisions of this Act.

HL Bill 53 58/2

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2 Environmental targets

(1) The Secretary of State may by regulations set long-term targets in respect of any matter which relates to—

(a) the natural environment, or

(b) people's enjoyment of the natural environment.

(2) The Secretary of State must exercise the power in subsection (1) so as to set a long-term target in respect of at least one matter within each priority area.

(3) The priority areas are—

(a) air quality;

(b) water;

(c) biodiversity;

(d) resource efficiency and waste reduction;

(e) soil health and quality.

5 Environmental targets: process

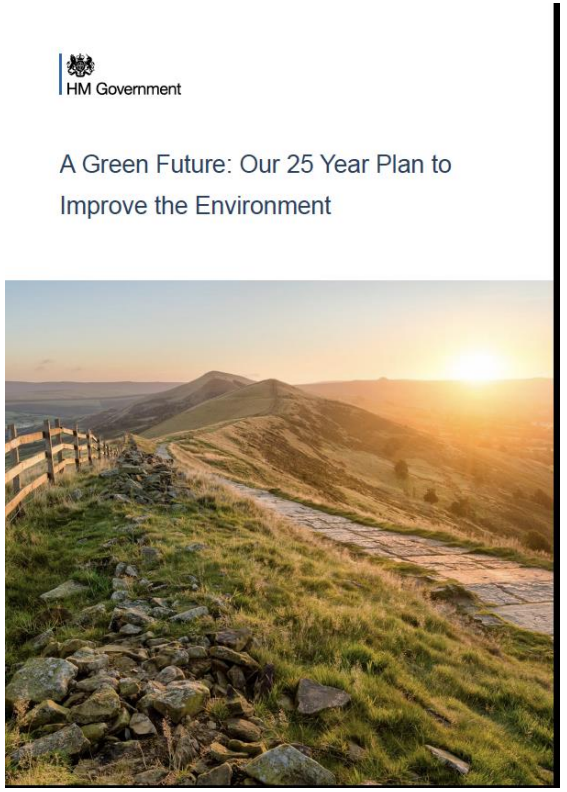
(1) Before making regulations under sections 2 to 4 the Secretary of State must seek advice from persons the Secretary of State considers to be independent and to have relevant expertise.

(2) Before making regulations under sections 2 to 4 which set or amend a target the Secretary of State must be satisfied that the target, or amended target, can be met.

2. Clean and plentiful water

We will achieve clean and plentiful water by:

- Improving at least three quarters of our waters[3] to be close to their natural state[4] as soon as is practicable by:
  - Reducing the damaging abstraction of water from rivers and groundwater, ensuring that by 2021 the proportion of water bodies with enough water to support environmental standards increases from 82% to 90% for surface water bodies and from 72% to 77% for groundwater bodies.
  - Reaching or exceeding objectives for rivers, lakes, coastal and ground waters that are specially protected, whether for biodiversity or drinking water as per our River Basin Management Plans.
  - Supporting OFWAT's ambitions on leakage, minimising the amount of water lost through leakage year on year, with water companies expected to reduce leakage by at least an average of 15% by 2025.
  - Minimising by 2030 the harmful bacteria in our designated bathing waters and continuing to improve the cleanliness of our waters. We will make sure that potential bathers are warned of any short-term pollution risks.



5. Risks (For Everyone)

- **Legal Uncertainty**

‘Businesses will always seek to maximise clarity and certainty’ (Mineral Product Association, Written Evidence)

- **Lack of Rigorous Basis**

‘The Bill fails to set out what criteria or evidence government must consider when setting new air quality targets. The Bill provides no meaningful or transparent role for independent expert health advice in the government’s decision-making.’ (British Lung Association)

- **Not Fit for Purpose**

‘The Environment Bill is a landmark constitutional bill’ (ClientEarth, written evidence).

Thank you!

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- Environment Bill and associated documents - https://bills.parliament.uk/bills/2593
- Elizabeth Fisher, 'Executive Environmental Law' (2020) 83 Modern Law Review 163 – Comment on Draft Environment Bill 2018
- Elizabeth Fisher, 'Towards Environmental Constitutionalism: A Different Vision of the Resource Management Act 1991' (2015) Resource Management Theory and Practice 63

Environmental ambition in UK Law and the role of the OEP

Professor Eloise Scotford

www.ucl.ac.uk

Outline

- Is some level of UK environmental ambition legally required?
- If so, to what extent do we need common environmental governance across the UK?
- Against this background, what is the actual legal picture emerging?
  - Environmental ambition in the Environment Bill
  - Legal fragmentation in two dimensions: pre/post-Brexit law, devolution
  - Higher environmental ambition in Scotland?
- Role of OEP in this context
  - Monitoring/advising
  - Enforcement

Legal obligations for UK environmental ambition?

HM Government

Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom

19 October 2019

Environment Bill

EXPLANATORY NOTES

Explanatory notes to the Bill, prepared by the Department for Environment, Food and Rural Affairs, have been ordered to be published as HL Bill 16—EN.

EUROPEAN CONVENTION ON HUMAN RIGHTS

Lord Goldsmith of Richmond Park has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Environment Bill are compatible with the Convention rights.

Status: This is the original version (as it was originally enacted).

UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021

2021 asp 4

The Bill for this Act of the Scottish Parliament was passed by the Parliament on 22nd December 2020 and received Royal Assent on 29th January 2021

Department for Environment Food & Rural Affairs

Draft Environmental Principles Policy Statement

10 March 2021

L 149/10 EN Official Journal of the European Union 30.4.2021

TRADE AND COOPERATION AGREEMENT

between the European Union and the European Atomic Energy Community, of t United Kingdom of Great Britain and Northern Ireland, of the oth

PROTOCOL ON IRELAND/NORTHERN IRELAND

The Union and the United Kingdom,

HAVING REGARD to the historic ties and enduring nature of the bilateral relationship between Ireland and the United Kingdom,

Legal obligations for environmental ambition?

1. *Keeping pace with EU standards?*
   - No obligation (2019 Political Declaration; TCA art 391.1); cf UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (SCA) s 1
2. *Taking account of EU/other international standards*
   - Environment Bill, cl 22; cf SCA s 13(2)-(3)
3. *Non-regression*
   - UK or EU shall not 'weaken or reduce, **in a manner affecting trade or investment between the Parties**, its environmental levels of protection or its climate level of protection' (TCA art 391.2)
   - Environment Bill (cl 21)?
4. *Future ambition*
   - 'Each Party commits to respecting the internationally recognized environmental principles **to which it has committed**…' (TCA art 393.1)
   - Environment Bill!

Do we need (some) common UK environmental governance?

- Devolved competence
- EU/UK Trade and Cooperation Agreement
- Multilateral environmental agreements
  - eg Aarhus Convention, CLRTAP, Berne Convention
- Internal Market Act 2020 and Common Frameworks Analysis
  - Shifting picture: 'active framework policy areas' ➤ 'no further action' ('shared understanding that no further action is required to create frameworks in several areas')
  - No further action proposed: natural environment and biodiversity, water quality, land use (implementation of EIA and SEA Directives), GMO marketing and cultivation
- Northern Ireland Protocol: exceptional status for NI

Environment Bill: environmental ambition

- Level of ambition
  - **No clear overarching objective** related to human health, high level of protection generally
  - **Environmental improvement plans** ➢ aim for 'significant improvement' of natural environment during plan period
  - **Environmental principles via EPPS** ➢ proportionate application, no action disproportionate to benefit – should inform new target setting
  - **OEP**'s principal objective
- Regression risk
  - Mechanism for **lowering standards** if economic costs disproportionate to benefits
  - **Repeal** (express or implied) of retained EU standards possible
  - Replacing existing standards with more stringent targets (eg $PM_{2.5}$) may be less binding in terms of **enforcement**

Emerging UK picture: legal fragmentation

First layer of fragmentation: pre- vs post-Brexit law in England

- Retained EU law
  - E.g. strong binding obligations of result, interpreted by reference to environmental principles in retained EU case law, driven by a 'high level of protection' objective
- New policymaking, targets and regimes under Environment Bill
  - Weaker framing of obligations if targets set under the Bill not met (cl 7)
  - Legal influence of environmental principles limited

Second layer of fragmentation: devolution

- Alignment with EU environmental law: Scottish aspiration (note UK reserved matters) and NI Protocol
- Non-alignment: England vs Wales, but for different reasons

Higher ambition of Scottish environmental governance?

- Narrower governance provisions but…
- Environmental principles
  - Tied to EU environmental principles, no policy statement on environmental principles, wider scope of public policymaking within scope of due regard duty
- ESS functions and powers set out more clearly, wider than OEP?
- Stronger enforcement powers
  - Independent investigation powers, for effectiveness of environmental law generally, role of improvement reports
  - ‘failure to comply with environmental law’ – wider funnel to enforcement
  - Force of compliance notices in Scotland (cf English decision notices), no need for complex environmental review

OEP: monitoring/advising on environmental law

- Important OEP role in tracking this landscape
- Cl 30: monitoring and reporting on environmental law
  - Reporting on how environmental laws (retained, pre-existing, new) are working as a coherent body of law to support environmental protection and improving the natural environment
- Cl 31: advising on changes to environmental law
  - Discretionary advice to Minister on ‘any changes to environmental law proposed by a Minister’

OEP: enforcement functions

- Apply to all 'environmental law', but only if there is a *failure to comply with environmental law* and failure is 'serious'
- Precise construction of that underlying law will be critical: note different kinds of environmental regulation
  - ➢ Obligations on private operators
  - ➢ Obligations on Ministers and public authorities: to regulate private operators, to achieve outcomes, to take into account considerations in decision-making, to undertake a process → **concern of OEP**
- Enforcement as a process under the Bill
  - ➢ Complaints, investigations, information notices, decision notices, urgent judicial reviews, environmental review
- Environmental review as the big stick?

Failure to comply with environmental law: cl 32

32 Failure of public authorities to comply with environmental law

(1) Sections 33 to 42 make provision about functions of the OEP in relation to failures by public authorities to comply with environmental law.

(2) For the purposes of those sections, a reference to a public authority failing to comply with environmental law means the following conduct by that authority—

(a) unlawfully failing to take proper account of environmental law when exercising its functions;

(b) unlawfully exercising, or failing to exercise, any function it has under environmental law.

Underlying legal obligations: enforcement of targets

- Basic legal duty on SoS to ensure targets are met (cl 6)
  - ➢ Note duty in relation to interim targets (cl 6(4))
  - ➢ Role of OEP will be critical if targets not met/not looking likely to be met
- ‘Reporting duties’ (cl 7)
  - ➢ On the reporting date (when target due to be met), SoS must report whether target met ➢ if not met, SoS must report including steps to ‘ensure the standards is achieved **as soon as reasonably practicable**’
  - ➢ Differential substantive obligations for retained vs post-Brexit environmental targets

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OEP INVESTIGATIONS AND ENVIRONMENTAL REVIEW

TIM BULEY QC

11 OCTOBER 2021

ENVIRONMENT BILL – LATEST VERSION

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- Bill has been going through Parliamentary States. Currently in the House of Lords. Underwent significant amendment in the House of Lords over the summer.
- Most recent version, as amended on report, 15 September 2021. Available at:

Environment Bill - Parliamentary Bills - UK Parliament

https://bills.parliament.uk/bills/2593

OEP – ENFORCEMENT FUNCTIONS

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- OEP has enforcement functions under clauses 32-42 of the Bill. All such functions relate to (clause 32(1)):

  ... failures by public authorities to comply with environmental law ...

- Three main enforcement functions:

  (i) Consideration of complaints and carrying out of investigations (clauses 33-38);

  (ii) Bringing proceedings for "environmental review" (clause 39);

  (iii) Bringing and intervening in claims for judicial review (clause 40).

- The first two of these, *complaints / investigations* and *environmental review*, are linked, in that the latter can only take place upon the completion of the former. Judicial review is separate albeit some understanding of the OEP's role in judicial review is important in understanding the other functions.

OEP – COMPLAINTS AND INVESTIGATIONS

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- Members of the public may make a "complaint" to the OEP concerning an alleged failure to comply with environmental law (clause 33)

- Either pursuant to such a complaint, or of its own motion, the OEP may carry out an investigation in relation to possible failures to comply with environmental law, under clause 34. Note that OEP is not limited to investigating complaints, but may also initiate investigation of its own motion.

- Process further delineated in clauses 35-37, including duty to keep complainants informed, and power to issue information notice seeking information relating to the alleged breach.

OEP – DECISION NOTICES

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- Under clause 37, OEP can issue a "decision notice" if it concludes that public authority has failed to comply with environmental law and that the failure is serious (clause 35(1)). In such a case, the decision notice:

  A decision notice is a notice that—

  (a) describes a failure of a public authority to comply with environmental law,

  (b) explains why the OEP considers that the failure is serious, and

  (c) sets out the steps the OEP considers the authority should take in relation to the failure (which may include steps designed to remedy, mitigate or prevent reoccurrence of the failure).

- Public authority must then indicate whether it intends to take the steps recommended (clause 37(5))
- So "remedy" is in in (c). Note limitations:
  - OEP recommendation is *non-binding*
  - OEP does *not* have power to *set aside, quash or undo* the action in question

OEP – ENVIRONMENTAL REVIEW

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- Clause 39(1) provides that OEP may apply to the court (in England and Wales, the High Court) for an environmental review where it has issued a decision notice and continues to think that the conditions for issue of that notice (serious failure to comply with environmental law) are made out.
- Clause 39(2) – subject of application is conduct in decision notice
- Role of court specified by clause 39(5):

  On an environmental review the court must determine whether the authority has failed to comply with environmental law, applying the principles applicable on an application for judicial review.

- Remedy:
  - Statement of non-compliance ("SONC") (clause 39(6))
  - Where SONC made, may also grant any remedy available on judicial review, and subject to certain limitations relating to prejudice to third parties.

- Response
  - Public body must also publish a statement as to steps it proposes to take. But not for court to specify or recommend steps. No obvious remedy if steps are nugatory or not in the event complied with

ISSUES, CONTROVERSIES AND ANOMALIES: (1) FAILURE TO COMPLY WITH ENVIRONMENTAL LAW

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- Clause 32(2) says as follows:

  … a reference to a public authority failing to comply with environmental law means the following conduct by that authority—

  (a) unlawfully failing to take proper account of environmental law when exercising its functions;

  (b) unlawfully exercising, or failing to exercise, any function it has under environmental law.

- Environmental law is defined in clause 47:

  … any legislative provision to the extent that it (a) is mainly concerned with environmental protection and (b) is not concerned with an excluded matter [access to information, defence or taxation]"

- Questions / problems:
  (i) Definition of "failure to comply" appears to *narrow* meaning of this phrase
  (ii) What is scope of OEP's consideration of environmental law? Is it limited to judicial review scrutiny, or can it carry out more detailed factual investigation and determine facts for itself?

ISSUES, CONTROVERSIES AND ANOMALIES: (2) MISMATCH BETWEEN OEP AND ER REMEDIES

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- Where it finds a failure to comply with environmental law, the OEP issues a decision which must explain the nature of the breach, why it is serious and:
  …set[] out the steps which the OEP considers the authority should take in relation to the failure (which may include steps designed to remedy mitigate or prevent recurrence of the failure).

Limitations:

  - Non-binding
  - OEP can only recommend / invite authority to do something which it has power to do. But in many or most cases, the authority will be *functus officio* (see *In re Denton Road, Twickenham, Re* [1953] Ch 51) and unable to reverse the action which is the subject of complaint. This severely limits the remedies which the OEP can grant / recommend

- By contrast, court on environmental review can grant judicial review remedies such as quashing order and the like. The subject of the environmental review is, not compliance with the OEP's recommendation, but the underlying subject of complaint / investigation. But court cannot recommend, or enforce, OEP's wider recommendations.

- This mismatch is likely to undermine both procedures:
  - Complainant whose real aim is to reverse the action complained of will not be attracted to OEP process, knowing that OEP cannot grant the remedy that is sought and that it will depend on further court action at end of process.
  - OEP is left with no means of enforcing wider recommendations

ISSUES, CONTROVERSIES AND ANOMALIES: (3) RESTRICTIONS ON ER REMEDIES

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- The bill as approved by the commons contained the following restriction on the grant of remedies in ER (old clause 37(8)), that the court could only grant a remedy where satisfied that it would not:

  … be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority, or

  (b) be detrimental to good administration.

- As many pointed out, this would in practice prevent the grant of a remedy in most cases.

- This was removed in the House of Lords, and replaced with a new clause 39(9), requiring the court to "have regard to" such prejudice as well as to the nature and consequences of the breach of environmental law.

- This is greatly to be preferred, and leaves the court with a discretion. But it is far from clear that this amendment will be accepted by the government or survive a return to the House of Commons.

ISSUES, CONTROVERSIES AND ANOMALIES: (4) JUDICIAL REVIEW BY OEP ONLY IN URGENT CASES

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- Clause 40 gives the OEP power, *inter alia,* to seek judicial review, but only where it considers that "the conduct" in issue constitutes a serious failure to comply with environmental law and where it considers that making a claim for judicial review:

  … (rather than proceedings under sections 36 to 39) is necessary to prevent, or mitigate, serious damage to the natural environment or human health.

- This is called the "urgency condition", presumably on the basis that it limits judicial review to cases which are too urgent for investigation / environmental review.

- Not quite its effect, because it would also appear to justify judicial review where investigation / environmental review could not provide an appropriate remedy i.e. in cases where a quashing order is needed.

- Cannot be used to enforce OEP recommendations in a decision notice, because refusal to comply with recommendation will not generally itself be a failure to comply with environmental law.

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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.

Your speakers for Session 2…

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David Elvin QC (Chair)

James Maurici QC

Topic:
Aarhus update

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Aarhus update

James Maurici Q.C.

Introduction

- **<u>Cover recent developments (last year)</u>:**

- (1) Domestic costs cases concerning Aarhus;
- (2) Aarhus in domestic cases beyond costs;
- (3) Recent ACCC findings in several UK communications: C90, 131 and 142;
- (4) Other UK ACC cases in the pipeline: C150 and 156.

Status

- Save to extent incorporated into our law via:
  - (i) CPR in relation to costs and interim relief;
  - (ii) Any retained EU law;

  … the Aarhus Convention has the status of unincorporated treaty, and so not binding in domestic law: see ***Morgan v Hinton Organics (Wessex) Ltd*** [2009] EWCA Civ 107
- Similarly, ACC findings not binding – see below
- Been said (by Lord Carnwath in ***Walton***) that ACCC findings deserve great respect; do they?
- Nature of ACCC and its findings;
- Processes for endorsement of findings by Meeting of the Parties.

(1) Domestic costs cases

- (1) ***R (Friends of the Earth Ltd) v Secretary of State for Transport*** [2021] PTSR 941: CA, short but important point: the capped costs recoverable from a claimant or a defendant specified in CPR r 45.431 in an Aarhus Convention claim as defined in CPR r 45.41 are, consistently with that Convention, absolute and unqualified figures and so fall to be treated as inclusive of VAT (and see also **R (CARA) v North Devon DC** [2021] EWHC 703 (Admin))
- (2) ***CPRE Kent v Secretary of State for Communities and Local Government*** [2021] 1 WLR 4168: SC, some limited discussion of Aarhus in the context of affirming the ***Mount Cook*** approach to multiple sets of costs at the permission stage.

(1) Domestic costs cases

- (3) ***R (Danning) v Sedgemoor DC*** [2021] EWHC 1649 (Admin) a challenge to a PP for converting a pub to residential, Steyn J. records "*HHJ Jarman QC rejected the claimant's contention that the claim is an Aarhus Convention claim and the claimant has not sought to renew that aspect of his claim*".
  - On what basis? Judgment does not say …
  - My experience is post ***Venn v Secretary of State for Communities and Local Government*** [2015] 1 W.L.R. 2328 (per Sullivan LJ "*since administrative matters likely to affect "the state of the land" are classed as "environmental" under Aarhus the definition of "environmental" in* ***the Convention is arguably broad enough to catch most, if not all, planning matters****. The judge's conclusion that environmental matters are given a broad meaning in Aarhus (see para 15 of the judgment) is supported by the decision of the Court of Justice of the European Union ("CJEU") in … Case C-240/09… [2012] QB 606 …* ***the Brown Bear case …****")* difficult to argue any planning challenge not covered by Aarhus.

(1) Domestic costs cases

- (4) ***Wingfield v Canterbury CC*** [2020] EWCA Civ 1588:
  - Applications under CPR 52.30(1) to re-open orders refusing permission to appeal in two planning JRs;
  - NB opening para. of the judgment "*The question raised by these renewed applications, put at its simplest, is this: when must an unsuccessful litigant accept "No" for an answer?"* … ouch!
  - In those JRs the C had Aarhus costs protection
  - CA said "*Unmeritorious applications under CPR 52.30 are inimical to that endeavour, repeated unmeritorious applications even more so. Not only do they undermine the principle of finality in legal proceedings. They also impose an unnecessary burden on the court's resources, impede access to justice for litigants in other proceedings, including those with the benefit of costs protection in Aarhus Convention claims, and are damaging to the rule of law itself*".
  - This raises a wider issue: given caps – how can costs be used to enforce discipline in proceedings? Wasted costs orders? Touched on in CMCs in Heathrow litigation.

(2) Other domestic cases

- ***Heathrow Airport v ICO*** Appeal Number: EA/2020/0101
  - ICO finds that Heathrow is a “public authority” for the purposes of the EIR;
  - First-tier Tribunal overturns that decision;
  - Extensive consideration of ***Fish Legal***;
  - The legal analysis takes on board the Aarhus Convention background.

(3) Case C-90: findings

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Case 1: ACCC/C/2013/90 (adopted 26/7/2021)

- NI case, a company expanded its concrete production plant without PP and in close proximity to the River Faughan SAC. The development included a settlement lagoon for contaminated materials within the floodplain;
- Some enforcement action, and company applied for retrospective PP, and eventually granted;
- The communicant ("C") JRd the PP and lost, costs award vs C was limited to £5,000 by the Costs Protection (Aarhus Convention) Regs 2013 but own costs were c £160,000
- Took matter to ACCC

(3) Case C-90: findings

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- (1) Any activity covered by Article 6 of the Convention (essentially EIA development) cannot be permitted after commenced "*save in highly exceptional cases and subject to strict and defined criteria*"
  - Seems to go further than CJEU case-law on retrospective EIA consent: see Case C-215/06 ***Commission v Ireland*** [2008] ECR I-4911 and the CA in ***R. (Ardagh Glass Ltd) v Chester City Council*** [2011] P.T.S.R. 1498 – how much further?
- (2) Such development cannot become immune from enforcement or be subject of lawful development certificate:
  - Goes further than CJEU caselaw: ***Commission v United Kingdom*** (Case C-98/04) [2006] ECR I-4003, ECJ;
  - Contrary to CA in ***R (Evans) v Basingstoke*** [2014] 1 W.L.R. 2034

(3) Case C-90: findings

- (3) Breach of standard of review because High Court did not itself consider if Schedule 3 EIA criteria met rather than relying on evidence that the public authority had properly screened … NB do also say though Convention does not require "*a completely fresh analysis*" … ?!
- (4) Breach of Aarhus Convention that developers have right of appeal but not third parties (NB this contrary to earlier findings in ACCC/C/2010/455 and ACCC/C/2011/60) no recommendation though pending ACCC/C/2-17/156 re standard of review in JR – see below …
- (5) The £160k own costs not a breach as although high – no evidence how could have mitigated e.g. CFA, one counsel not two.

(3) Case C131

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Case 2: ACCC/C/2015/131 (adopted 26/7/2021)

- PP for redevelopment of a former hospital site in LB of Merton;
- Negative screening opinion not uploaded on to online planning register;
- Ombudsman complaints – some success;
- Discharges of conditions under PP, said to require screening, C JRd, certified TWM and costs awarded capped at £5,000
- Complains to ACCC

(3) Case C131

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- Findings of breach include:
  - (1) Not making documents available promptly online including screening decisions;
  - (2) Legal system which sets time to bring JR from date decision taken not date C knew or ought to have known of it!!
    - This totally vs domestic law position;
  - (3) That costs vs C were awarded at £250 per hour when actual rate charged less – NB this common, and allowed in our system, for GLD and local government costs based on old case law;
  - (4) £5,000 at permission stage too high;
  - (5) In allowing low LIP recovery rates vs rates for lawyers!

(3) Case C142

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Case 3: ACCC/C/2016/142 (adopted 25/7/2021)

- Litter abatement proceedings vs Council under EPA brought by local MP, following Council failures to collect green waste;
- Proceedings in Magistrates Court – lost and costs awarded of c. £13,000, and account taken of failure to accept offer;
- Then High Court proceedings – case stated – failed and more costs c. £5,000;
- Findings:
  - (i) proceedings prohibitively expensive;
  - (ii) taking account of offer to settle being refused unfair and inequitable!

(3) Cases

Landmark Chambers

- ACCC increasingly radical findings;
- Many of these findings:
  - (i) fail properly understand our legal system at all;
  - (ii) are huge departures from our established law;
  - (iii) are difficult to justify;
  - (iv) seem to ignore CJEU law on very similar points …
- Will the Government fight the Meeting of the Parties adopting the ACC findings, as the EU Commission did in C32?
- Will our Courts reject, as non-binding?
- Where does this lead?
- UK a rogue state, as some suggested? No, not at all. ACCC gone rogue?

(4) Other ACC pipeline cases

- (1) ACCC/C/2017/150: this is a communication concerning Brexit and impact on environmental law; lodged October 2017 – still no hearing …
- (2) ACCC/C/2017/156: this has been heard, and it concerns whether the ***Wednesbury*** standard of review is compatible with Article 9
  - This issue first raised as concern by ACCC in ACCC/C/2008/33, a "concern" but no finding of breach;
  - View rejected by CA in ***R (Evans) v Secretary of State for Communities and Local Government*** [2013] JPL 1027;
  - Despite strong defence by UK Government at ACCC seems inevitable will rule ***Wednesbury*** a breach ….
  - Seen reference to this in C90 above … in context of third party appeals …

Thank you for listening

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NB all views are my own

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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.

Your speakers for Session 3…

Landmark Chambers

David Forsdick QC (Chair)

Jenny Wigley QC

Topic:
Air Quality and the Bill

Matthew Fraser

Topic:
Climate Change: current issues

Landmark Chambers

Climate Change: current issues

Matthew Fraser

Climate change: current issues

Landmark Chambers

- Legislative framework: the Climate Change Act 2008 and the Carbon Budget Order 2021
- Policy update: Net Zero Strategy, NDC, NPPF and COP26
- Current pending planning decisions: Cumbria coal mine and expansion of Leeds-Bradford Airport
- Recent cases: *Friends of the Earth*, *Packham, Transport Action Network, ClientEarth, Vince, Elliott-Smith*
- Pending/future cases: *Plan B, Good Law Project, Finch*

Legislative framework

Landmark Chambers

Climate Change Act 2008

Section 1:

- Originally enacted: reduction by 2050 to at least 80% below 1990 level
- 2019 Order: reduction by 2050 to at least 100% below 1990 level (“net zero”)

Section 4: duty to set carbon budgets for five year periods

Section 13: duty to prepare policies to achieve carbon budgets to 2050

Legislative framework

Landmark Chambers

The Carbon Budget Order 2021

16 April 2021

Sixth carbon budget (covering 2033-2037)

Target: 78% reduction in emissions by 2035

CCC comment (December 2020): on track to achieve Net Zero, and compliance with Paris Agreement target of limiting increase to 1.5 degrees above pre-industrial levels. A “world leading” position.

Policy Update

Landmark Chambers

- Net Zero Strategy – expected in November 2021
- UK has Presidency of COP26 in November 2021
- Nationally-determined contribution (“NDC”) communicated to the UNFCCC Secretariat (December 2020): emissions reduction of at least 68% by 2030 (highest of any major economy to date).
- NPPF 2021: planning system should “shape places in ways that contribute to radical reductions in greenhouse gas emissions”: para. 152 (and section 14)

Current/pending planning decisions

Landmark Chambers

- September/October 2021: Inquiry into decision by Cumbria CC to grant permission for a new underground metallurgical coal mine at Whitehaven in Cumbria ("called-in" by SoS to examine "the extent to which the proposed development is consistent with Government policies for meeting the challenge of climate change". Friends of the Earth a Rule 6 Party.

- 6 April 2021: Direction by SSHCLG preventing Leeds City Council from granting permission until SoS considers the proposal for expansion of Leeds-Bradford Airport.

Recent cases

R (Friends of the Earth Ltd and Plan B Earth) v SST [2021] PTSR 190

2018 Airports National Policy Statement ("ANPS") in relation to a third runway at Heathrow was lawful because the SST did have regard to the Paris Agreement and the ANPS required any future development consent application to be assessed against the carbon reduction targets in place at the time.

Recent cases

R (Packham) v SST [2021] Env LR 10

The Government did not fail to consider the implications of the Paris Agreement and the Climate Change Act 2008 in the decision to proceed with HS2 following the Oakervee review.

The statutory and policy arrangements for achieving net zero by 2050 were said to *"leave the Government a good deal of latitude in the action it takes to attain those objectives"* [87].

Recent cases

R (Transport Action Network Ltd) v SST [2021] EWHC 2095 (Admin)

In decision to set the Road Investment Strategy 2 (for 2020-2025) (providing for various strategic road network improvement schemes), the SST had not unlawfully failed to take into account the Paris Agreement, the Net Zero duty and the carbon budgets.

No breach of the requirement in s.3(5) of the Infrastructure Act 2015 to have regard to the effect of the strategy on the environment (which does not specifically include effect on climate change).

Recent cases

R (ClientEarth) v SSBEIS [2021] PTSR 1400

Decision to grant development consent for two gas-fired generating units at an existing power station was based on a lawful interpretation of the Overarching National Policy Statement for Energy ("EN-1") as not requiring a quantitative assessment of need. The weight to give to GHG emissions impact is a matter for the decision-maker, and SoS was entitled to regard it as not being determinative in the balancing exercise.

Recent cases

R (Vince & Others) v SSBEIS (CO/1832/2020)

JR claim against unlawful failure by SoS to review the Energy NPSs designated in 2011 in the light of changes in climate change policy, including Net Zero.

Settled prior to hearing due to announcement by SoS that it would consult on revised Energy NPSs.

Consultation commenced on 6 September 2021 (and closes on 29 November 2021): https://www.gov.uk/government/consultations/planning-for-new-energy-infrastructure-review-of-energy-national-policy-statements.

Recent cases

R (Elliott-Smith) v SSBEIS [2021] EWHC 1633 (Admin)

The UK Emissions Trading Scheme ("ETS"), which replaced the EU ETS after Brexit did not unlawfully fail to take account of the Paris Agreement (albeit not expressly referencing it), and served the statutory purpose in CCA 2008 s.44 of "limiting or encouraging the limitation of activities" causing GHG emissions.

Pending / future cases

R (Plan B Earth & Others) v SSBEIS (CO/1587/2021)

Judicial review claim alleging a failure by the Government to take practical and effective measures to comply with the Paris Agreement and the CCA 2008, and alleging that inaction on climate change has breached human rights under Articles 2 (right to life), 8 (right to private and family life) and 14 (prohibition on discrimination).

Permission refused on the papers (subject to a right to renew application at an oral hearing): 4 October 2021 - https://planb.earth/wp-content/uploads/2021/10/PR-4-Oct-21.pdf.

Pending / future cases

Landmark Chambers

Good Law Project “expect to issue proceedings promptly” to challenge an alleged failure to review/update the Airports NPS in light of the Net Zero commitment and other recent climate change developments.

In a letter dated 6 September 2021, SST decided that it was not appropriate to review the ANPS under section 6 of the Planning Act 2008. Although the changes “represent a significant and unforeseen change in circumstances”, ”it is not possible to conclude properly that any of the policy set out in the ANPS would have been materially different had these circumstances been anticipated at the time of designation”.

https://goodlawproject.org/update/government-legal-commitment/

Pending / future cases

R (Finch) v Surrey CC [2021] PTSR 1160

Court of Appeal hearing on 16-18 November 2021

JR against the grant of planning permission for 4 new oil wells.

The issue is whether the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 required an environmental impact assessment ("EIA") to assess the effects of GHG emissions resulting from future combustion of oil produced by the development, typically as a fuel for motor vehicles.

High Court (Holgate J) held that they do not.

Landmark Chambers

Air Quality and the Bill

Jenny Wigley QC

Air Quality and the Bill

Landmark Chambers

- How Air Quality fits into the Bill;
- Specific air quality provisions in the Bill;
- Recent air quality news and litigation.

How does air quality fit into the Bill?

Landmark Chambers

- It is one of the five ‘priority areas’ in clause 2;
- Meaning that regulations setting a long term target (> 15yrs) in at least ‘one matter within’ air quality must be made (Gov’t intention is it will be a ‘PERT’);
- A separate specific requirement under clause 3 to set a target (of less than 10 micro grams per m3) in relation to fine particulate matter (PM2.5) (to be achieved by 2030) (NB tougher parameters inserted by HL);
- Duty of S of S to ensure targets are met (clause 6);
- Requirements to set interim targets (clause 12(2)(a)).

Any specific provisions on air quality?

Landmark Chambers

- Yes – Part 4 - clauses 73 to 79 and Schedules 11 and 12;

- The specific provisions fall into four broad categories:

  - Amendments to the local air quality management framework;
  - Smoke control and enforcement;
  - Protection of pollinators from pesticides;
  - Environment recall of motor vehicles etc

Amendments to Local Air Quality Management Framework

Landmark Chambers

- Schedule 11 sets out amendments to Part 4 of the Environment Act 1995
- Increased requirements on Secretary of State to review national air quality strategy and to report on progress annually;
- Requirements for increased cooperation at local level, broadened range of organisations with shared responsibility for tackling air pollution.

Smoke Control and Enforcement

- Clause 74 and Sch 12 making amendments to Clean Air Act 1993;
- Provision for imposing financial penalties for the emission of smoke in smoke control areas in England;
- Creating offences relating to the sale and acquisition of types of solid fuel in England;
- Provision for applying smoke control orders to vessels;
- Provision for authorised fuels and exempted fireplaces to be listed in Wales.

Protectors of Pollinators from Pesticides

Landmark Chambers

- Clause 75 which is stated to come into force on 1 February 2023
- Ban on competent authorities from authorising pesticides for use unless satisfied no significant short term effect and no long term negative effect on the health of honeybees or wild pollinator populations;
- Requirement for publication of a pollinator risk assessment report to be published by an expert body;
- Expert body must not have vested interests and must be independently appointed;
- Public consultation and other consultation requirements on competent authority’s decision making.

Environment Recall of Motor Vehicles Etc

Landmark Chambers

- Clauses 76 to 78
- Provision for S of S to make regulations about the recall of relevant products that do not meet relevant standards;
- Relevant products include mechanically propelled vehicles, its parts and engine.

Recent developments in Air Quality

Landmark Chambers

- Coroner's report – Ella Kissi-Debrah
- CJEU decision – European Commission v. UK (4 March 2021)
- Recent domestic litigation relevant to air quality

Coroner's Report – Ella Kissi-Debrah

Landmark Chambers

- Ella suffered severe asthma and in February 2013 died with the cause of death recorded as respiratory failure;
- In 2015 a leading expert on asthma and air pollution identified that the type and severity of Ella's asthma were directly linked to exposure to air pollution (PM2.5 and NO2)
- Analysis of medical records and air pollution monitors near her home (25m from the South-Circular)
- Monitors showed consistent exceedances of EU limits for 3 years prior to death
- Following 10 day inquest, on 16 Dec 2020, coroner concluded that a failure to reduce air pollution contributed to her death, as did failure to provide her mother with information about effects of air pollution
- Coroner's report called for reduction in PM2.5 targets

CJEU Decision on 4 March 2021

Landmark Chambers

- Commission v. UK – C - 664/18 (Action under Article 258 TFEU – 23 Oct 2018)

- Breach of Article 13(1) and Annex XI of the EU Directive by ‘systematically and persistently exceeding’ the annual limit for Nitrogen Dioxide, as well as the hourly limit value for NO2 in Greater London;

- Breach of Article 23(1) by failing to adopt as from 11 June 2010 appropriate measures to ensure compliance, and particular to ensure that the period of exceedance of limit values is kept as short as possible;

- Fact other countries in breach – irrelevant

- No passing of the buck back to the EU re: VW cheat devices

Some recent litigation relevant to Air Quality (1)

R (United Trade Action Group Ltd) v. TfL and Mayor of London [2021] EWCA Civ 1197

- Challenge by taxi drivers to ‘London Streetspace Plan’
- Included grounds relating to:
  - breach of legitimate expectation
  - human rights, A1P1
  - irrationality
- Public interest / proportionality balance considered by the Judge and Streetspace Plan decision quashed;
- Overturned by Court of Appeal.

Some recent litigation relevant to Air Quality (2)

Landmark Chambers

Gladman Developments Ltd v. SSCLG [2020] PTSR *128*:

- Challenge to dismissal of appeals for two residential developments in AQMAs;
- Inspector found limit values would be exceeded;
- Relevance of ClientEarth litigation and Gov't's policy and plans;
- Beware 'token' mitigation – are contributions shown to translate into actual measures likely to reduce the use of private petrol and diesel vehicles?
- Requirement of consistency with local air quality action plan.
- Status of air quality statutory regime – not a 'parallel permitting regime' that can be relied on to deal with specific planning impacts.

Some recent litigation relevant to Air Quality (3)

R (oao Mathew Richards) v. The Environment Agency [2021] EWHC 2501

- Five year old boy with respiratory problems exposed to hydrogen sulphide emissions from a landfill site;
- Inevitable precursor to serious illness reducing life expectancy;
- Court held EA's positive operational duties were triggered under ECHR Art 2 and Art 8;
- Whilst no current breach, Court declared that to comply with its legal obligations EA was required to implement recommendations given by Public Health England in order to reduce off-site odours and daily hydrogen sulphide concentrations to specified levels.

Landmark Chambers

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.

Your speakers for Session 4…

Tim Mould QC (Chair)
Landmark Chambers

David Elvin QC
Landmark Chambers

Topic:
The Environment Bill: nature conservation issues (excluding biodiversity net gain)

Richard Turney
Landmark Chambers

Topic:
Biodiversity net gain in the Environment Bill

Dominic Woodfield
Bioscan

Topic:
Biodiversity net gain in Practice

Landmark Chambers

Biodiversity net gain in the Environment Bill

Richard Turney

Where are we with “net gain”?

Landmark Chambers

- Environment Bill (3rd Reading in HL this week)
- NPPF: “policies and decisions should contribute to and enhance the natural environment by… minimising impacts on and providing net gains for biodiversity” (174); “pursue opportunities for measurable net gains” (179); integrate biodiversity “especially where this can secure measurable net gains” (180)
- Natural Environment PPG
- NPSs and draft NPSs

The Bill: architecture

- Clauses 99-102 and Schedules 14 and 15 make provision for “biodiversity gain”
- Schedule 14 inserts a new s 90A into the Town and Country Planning Act
- Schedule 15 amends the Planning Act 2008

Planning permission under TCPA 1990

Landmark Chambers

- Substantive provisions in new Schedule 7A TCPA 1990, “biodiversity gain in England”

- Paragraph 13 of Sch 7A will provide that all permissions are subject to a condition requiring the submission and approval of a **biodiversity gain plan**

- The BG plan must explain the steps taken to minimise adverse effects; the pre-development biodiversity value; post-development biodiversity value on site; any registered offsite gain; any purchased biodiversity credits; other prescribed matters

Planning permission under TCPA 1990 (2)

Landmark Chambers

- BG plan may only be approved if (para 15(2)):
  - Satisfied pre/post development value is correct
  - Any offsite gain has been allocated (and correct)
  - Any credits have been purchased
  - The biodiversity gain objective has been met (see below)
- Regulations about determinations may be made under para 16

Biodiversity gain objective (1)

Landmark Chambers

- Biodiversity gain objective: “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”

- Biodiversity value is:
  - the post-development biodiversity value of the onsite habitat,
  - the biodiversity value, in relation to the development, of any registered offsite biodiversity gain allocated to the development, and
  - the biodiversity value of any biodiversity credits purchased for the development

Biodiversity gain objective (2)

- The relevant % is 10%
- Value is calculated by reference to the biodiversity metric, published by S/S
- Provision for establishing the date “pre-development biodiversity value” to ensure that activities for which planning permission was not required have not been used to reduce that value
- Post-development value is the projected value “at the time the development is completed”
- “Value” can only be taken into account if satisfied that it will be secured for at least 30 years

Biodiversity gain objective (3)

Landmark Chambers

- Offsite gains can be counted so long as:
  - Enhancement required under a planning obligation or conservation covenant
  - The enhancement is recorded in the biodiversity gain site register

Exceptions

- Planning permission granted by development order (para 17)
- Urgent Crown development (para 17)
- Other specified development (para 17)
- Exclusion of “irreplaceable habitat” by regulations (para 18)
- Modifications by regulations for phased developments, retrospective permissions (para 19/20)

Biodiversity credits

- Section 102 of the Bill
- S/S may make arrangements for the use of credits to meet the gain objective, including the price to be paid
- Payments may be used to carry out works, purchase land and administer arrangements

BNG & NSIPs

- Recent amendments to Environment Bill contemplate BNG obligations being placed on schemes consented under the PA 2008
- Provision anticipates that such changes may take place outside of the NPS designation process through a “biodiversity gain statement”
- The BGS will set a % for net gain for a type or types of project and specify the manner in which that can be met
- BGS will then be given effect through changes to the determination provisions PA 2008

Conclusions on the Bill

Landmark Chambers

- Fairly radical change to the planning system
- Regulations will be key to various aspects… beware the lessons of CIL!
- For NSIPs, the biodiversity gain statements will serve some of the purposes of the regulations anticipated for TCPA applications – expect a lot of detail, and potentially multiple BGSs
- Ultimately substantive impact on developments will turn on the application of the metric, availability of offsite habitat, and pricing of credits

Risks in implementation

- Timing is unclear
- Sch 7A TCPA anticipates a “front loading” which may be unfamiliar for biodiversity issues
- LPA resource issues
- Delivery and enforcement

BNG in Practice

Dominic Woodfield

Quantifying the unquantifiable

- In order to understand whether BNG is delivered by land-use changes, biodiversity needs to be measured and quantified.
- An ecosystem, being the complex interaction of potentially millions of biotic and abiotic factors, does not lend itself readily to this.
- Ecological impact assessment has traditionally been the preserve of educated guesswork and no small amount of gut feeling.
- In the context of planning decisions, this does not lend itself to repeatability, consistency and transparency.

Enter the Metric!

- Biodiversity metrics first formally used in UK around a decade ago and have become more and more influential in development design and planning decisions since that time.

- 2019: Environment Bill proposes delivery of 10% net gain as a mandatory requirement of development.

- This underlined the need for standardisation. The release of the Beta Test ‘Metric 2.0’ in July 2019 together with the progress of the Environment Bill towards law, saw a further acceleration of uptake.

- Metric 3.0 published July 2021 and now expected to be the system used by developers and planning authorities going forward to measure compliance with both policies and future legislation requiring the delivery of net gain in biodiversity.

HOW IT WORKS:

A-1 Site Habitat Baseline

Condense / Show Columns | Condense / Show Rows

Main Menu | Instructions

	Habitats and areas			Distinctiveness		Condition		Ecological baseline
Ref	Broad habitat	Habitat type	Area (hectares)	Distinctiveness	Score	Condition	Score	Total habitat units
1	Grassland	Modified grassland	5	Low	2	Poor	1	10.00
2								
3								
4								
5								
6								
7								
8								
9								
10								
11								

HOW IT WORKS:

A-1 Site Habitat Baseline

Condense / Show Columns | Condense / Show Rows | Main Menu | Instructions

	Habitats and areas			Distinctiveness		Condition		Ecological baseline
Ref	Broad habitat	Habitat type	Area (hectares)	Distinctiveness	Score	Condition	Score	Total habitat units
1	Grassland	Modified grassland	5	Low	2	Poor	1	10.00
2	Woodland and forest	Other woodland; broadleaved	2	Medium	4	Moderate	2	16.00
3								
4								
5								
6								
7								
8								
9								
10								
11								
			7.00					26.00

HOW IT WORKS:

A-2 Site Habitat Creation

Condense / Show Columns | Condense / Show Rows

Main Menu | Instructions

Broad Habitat	Proposed habitat	Area (hectares)	Distinctiveness		Condition		Habitat units delivered
			Distinctiveness	Score	Condition	Score	
Urban	Developed land; sealed surface	2.5	V.Low	0	N/A - Other	0	0.00
Urban	Vegetated garden	2	Low	2	Poor	1	3.86
Urban	Allotments	0.5	Low	2	Good	3	2.90
Total area		5.00				Total Units	6.76

Headline Results

Return to results menu

Oops!

On-site baseline	*Habitat units*	26.00
	Hedgerow units	0.00
	River units	0.00
On-site post-intervention (Including habitat retention, creation & enhancement)	*Habitat units*	22.76
	Hedgerow units	0.00
	River units	0.00
On-site net % change (Including habitat retention, creation & enhancement)	*Habitat units*	-12.48%
	Hedgerow units	0.00%
	River units	0.00%
Off-site baseline	*Habitat units*	0.00
	Hedgerow units	0.00
	River units	0.00
Off-site post-intervention (Including habitat retention, creation & enhancement)	*Habitat units*	0.00
	Hedgerow units	0.00
	River units	0.00
Total net unit change (including all on-site & off-site habitat retention, creation & enhancement)	*Habitat units*	-3.25
	Hedgerow units	0.00
	River units	0.00
Total on-site net % change plus off-site surplus (including all on-site & off-site habitat retention, creation & enhancement)	*Habitat units*	-12.48%
	Hedgerow units	0.00%
	River units	0.00%
Trading rules Satisfied?	No - Check Trading Summary	

Options

Sacrifice on-site

Compensate off-site

On-site delivery of BNG

Offsite approaches

Delivery mechanisms

NOW….

- Planning conditions (on-site)
- S106 agreements
- Independent legal agreements
- CIL
- Habitat banking initiatives

AFTER EB BECOMES LAW….

- Conservation Covenants
- Planning conditions?
- Independent agreements?
- S106?
- CIL?
- Habitat banking initiatives?

Issues for LPAs and developers

- Will the supply be there to meet a rush of demand?
- Is there enough land relative to housing need?
- Will this drive up agricultural land prices?
- Where supply is short, driving up the purchase price of conservation credits/biodiversity units.
- Ownership/lease models.
- Monitoring who will pay/enforce?
- Competition between offset sites and other land uses.
- Land banking risk in housing stressed areas?
- Ransom risk?
- LPA resourcing – £9.5m/yr

Issues for landowners

- Potentially bound in for 30+ years.
- What happens then?
- How does this affect rural payments / agri-environment grant eligibility?
- Will I be able to return the land to farming?
- What happens if my land is designated?
- Land banking opportunity in housing stressed areas?
- Habitat banking systems – problems with delay.

MISUSE OF METRICS:

A-2 Site Habitat Creation

Condense / Show Columns | Condense / Show Rows

Main Menu | Instructions

Broad Habitat	Proposed habitat	Area (hectares)	Distinctiveness		Condition		Habitat units delivered
			Distinctiveness	Score	Condition	Score	
Urban	Developed land; sealed surface	2.5	V.Low	0	N/A - Other	0	0.00
Grassland	Lowland dry acid grassland	2	V.High	8	Good	3	5.07
Urban	Allotments	0.5	Low	2	Good	3	2.90
	Total area	5.00					7.96

Total on-site net % change plus off-site surplus (including all on-site & off-site habitat retention, creation & enhancement)		
	Habitat units	-7.84%
	Hedgerow units	0.00%
	River units	0.00%

And what about us?!









Low value/high value?

Ranscombe Farm

- Site of Special Scientific Interest
- IPA (Important Plant Area)
- Plantlife Reserve
- Nationally rare species
- Legally protected plant species

BUT……

- Very low score on BNG Metric!

Thoughts to take away

- Mandatory 10% net gain looks good on paper, and it could be a game changer, but who's measuring, and who's checking the measurements?
- The statutory and policy framework cannot be relied upon to ensure that weight placed on ecological resources in decision making is always proportionate to their actual importance.
- The Environment Bill doesn't suddenly change that and nor does the use of metrics.
- Being cognisant of these problems helps to ensure that development designs and planning decisions have the best chance of securing BNG in reality, not just 'on paper'.
- Do not assume that metrics, statutory bodies or *even experts!!* always have the right answer.
- Don't be afraid to get that second or third opinion! Stay sceptical!

Thank you

Landmark Chambers

The Environment Bill: nature conservation issues (excluding biodiversity net gain)

David Elvin Q.C.

Outline

Environment Bill as amended at the HL Report stage (15.9.21) (expl notes 26.5.21). Third Reading due 13 October

- Conservation covenants
- Habitats
- Conservation strategies – local nature recovery, species and protected site strategies
- Trees

Defra policy statement reissued 6 Sept 2021 - *September 2021: Nature and conservation covenants (parts 6 and 7)* - *https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-nature-and-conservation-covenants-parts-6-and-7*

Conservation Covenants: Part 7 of the Bill

Landmark Chambers

- These are a form of legally binding agreement which take effect as land charges between a landowner and a "responsible body" designated by the SoS (and including the SoS) intended to include conservation charities, public bodies or or other bodies for a "conservation purpose" i.e. a purpose of conserving the natural environment, natural resources or artistic, cultural or heritage features of the land (cl. 120(3)).
- Conservation includes "protecting, restoring or enhancing" (cl. 120(4)).
- "Conservation covenant agreements" can contain positive and/or negative obligations (cl. 120(2)) which have "a conservation purposes" and which are "intended by the parties to be for the public good" (cl. 120(1)(a)). The latter requirement (cl. 120(1)(a)(iii)) appears superfluous.
- They apply where the landowner holds a qualifying estate which is not only a freehold interest but a leasehold interest granted for a term of more than 7 years "from the date of grant" but adds to the latter "in the case of which some part of the period for which the terms of years was granted remains unexpired" – which is unclear as to whether it means a shorter remaining term will qualify, which does not appear consistent with the intention to creat "long-lasting benefits" (Defra policy paper Parts 6 & 7, 6.9.21)

Conservation Covenants (2)

Landmark Chambers

- The mechanism used then gives "statutory effect" (cl. 121(1)) as a "conservation covenant" to so much of a conservation covenant agreement as cl. 120 specifies i.e.
  - Within cl. 120(1)(a) and ancillary provisions to any provision within cl. 120(1)(a)
  - Public access arrangements to land in the agreement which meets 120(1)(a) are deemed to be ancillary to them (cl. 121(3))
- The mechanism appears clumsy. Why have separate definitions for conservation covenant agreements and conservation covenants?
- The covenant takes effect as a local land charge (cl. 123(1)) and will run with the land and the exclusion of covenants made between lessor and lessees form local land charges is disapplied to conservation covenants (Cl. 123(2)). Obligations may be owed to and by the responsible body (cls. 125(1), 126(1)). Cls. 125(2)-(5) and 126(2) specifically bind or benefit successor landowners (including those deriving title) with the exceptions in 125(4) and (5) and 126(3).
- CCs have effect for a default period (cl. 124) unless the covenant provides otherwise
  - Indefinitely in the case of freeholds
  - For the remainder of the term in the case of leaseholds
- Could CCs be used instead of planning obligations? Would the CIL Regs reg. 122 apply?

Conservation Covenants (3)

Landmark Chambers

- Probably unnecessarily, cl. 127 provides that breaches of obligation are doing something prohibited, allowing another to to something prohibited or not performing an obligation
- Enforcement may be via specific performance, injunction, damages (including exemplary damages) or order for the payment of sums due under the obligation as the court considers appropriate taking into account "any public interest in the performance of the obligation concerned" (cl. 128). The limitation period is that of simple contract (cl. 128(5)) i.e. 6 years even though the agreement must be signed as a deed under cl. 120(1)(c).
- Cl. 129 set out defences (a) breaches beyond the defendant's control (b) acting in an emergency to prevent loss of life or personal injury or (c) where the land is within an area designated for a public purpose (after the covenant was created), that compliance would have breached any statutory control applying as a result of the designation providing that where the only reason was a failure to obtain authorisation that all reasonable steps to obtain it had been taken
- Cls. 130-133 provide for modification and discharge by agreement or by the Upper Tribunal (See Schedule 18) by disapplying s. 84 of the Law of Property Act 1925. The Court or UT may declare whether the agreement is a conservation covenant and on whom it is binding: cl. 138
- Cls. 134-5 provide for replacement of the responsible body or the RB ceasing to be such.

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Habitats: cls. 113-115

Habitats clauses 113-115 (1)

- Cl. 115 introduced at the Report stage – seeks to control any amendments to the Habitats Regulations 2017 that have only been adjusted to reflect Brexit
- How will any changes introduced focused on overall net gain balance against the existing approach which protects the most important habitats and species?
- Clauses 113-115 of which in many respects 115 is the most restrictive
- Cl. 113 permits amendment to the 2017 Regs for the purposes in cl. 113(2) and also for those matters in (3)-(5) (to clarify the scope of reg. 9)
  - "(a) to require persons within regulation 9(1) of the Habitats Regulations to exercise functions to which that regulation applies—
  - (i) to comply with requirements imposed by regulations under this section, or
  - (ii) to further objectives specified in regulations under this section, instead of exercising them to secure compliance with the requirements of the Directives;
  - (b) to require persons within regulation 9(3) of the Habitats Regulations, when exercising functions to which that regulation applies, to have regard to matters specified by regulations under this section instead of the requirements of the Directives."

Habitats (2)

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- Reg. 9 of the 2017 Regulations is a general duty to secure compliance with "the Directives"
  - "(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives."
  - Reg. 9(2) sets out a non-exhaustive list of functions to which 9(1) applies "in particular"
  - "(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions."
- The reference to "the Directives" is to the Habitats and Wild Birds Directive as modified post-Brexit by reg. 3A for the national site network and its management objectives (reg. 16A).
- The Defra policy paper (6.9.21) states confidently -
  - "This power will enable alignment of the Regulations with our new world leading targets, particularly the 2030 species abundance target, and our binding international obligations."

Habitats (3)

- 113(3) and (4) state that regulations may impose requirements with regard to biodiversity, environmental improvements, or any other requirements/objectives relating to "the conservation or enhancement of biodiversity" that the SoS thinks appropriate
- 113(6) requires SoS making regulations to "*have regard to the particular importance of furthering the conservation and enhancement of biodiversity*"
- 113(5) allows amendments to other provisions in the 2017 Regs which "refer to requirements, objectives or provisions of the Directives"
- Procedural requirements including not permitting regulations under cl. 113 to come into force before 1.2.23
- Cl. 114 permits amendments to Part 6 of the Habitats Regs but within the context that it again requires the SoS to "*have regard to the particular importance of furthering the conservation and enhancement of biodiversity*"
- 114(3) only permits regulations if SoS "satisfied that the regulations do not reduce the level of environmental protection provided by the Habitats Regulations" and (7) requires an explanation of this to be laid before Parliament

Habitats (4)

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- The September 2021 policy paper notes -
  - "Where the evidence suggests that amending the Regulations can improve the natural environment, make the processes clearer and more legally certain to help recover the condition of our sites, we will have the means of doing so swiftly. Defra plans to publish a Nature Recovery Green Paper before the end of the year. The paper will set out our approach to driving nature recovery and provide the primary vehicle for developing and engaging on our future plans and proposals."
- See also Expl Notes §956. It is not clear what is legally uncertain about Part 6. The provisions are very rigorous (***R. (Champion) v North Norfolk DC*** [2015] 1 W.L.R. 3710) and have generated issues e.g. with regard to new development and nutrient impacts on protected waters (e.g. ***R (Wyatt) v Fareham BC*** [2021] EWHC 1434 (Admin)), but the issue does not appear to be one of legal certainty.
- Contrast the Government's *Report of the Habitats and Wild Birds Directives Implementation Review* (March 2012) which focused on streamlining the procedure. Para 11 noted:
  - "11. It is vital that we maintain the integrity of the purpose of these Directives. In the vast majority of development cases, where major problems do not arise, it is important that the authorisation process under the Directives is as easily understood, accessible and efficient as possible. In those relatively few cases in which problems arise, for one reason or another, there can be unwelcome delays and additional costs for developers, uncertainty for the local communities and the environment, and a risk of clouding the reputation of the Directives as a whole..."

Habitats (5)

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- Cl. 115 introduced on the last day of the Report Stage by Lord Krebs and seeks to impose a further non regression restriction to permit regulations only to be made under 113 and 114:
  - "(a) for the purposes of—

    (i) securing compliance with an international environmental obligation, or

    (ii) contributing to the favourable conservation status of species or habitats or the favourable condition of protected sites;
  - (b) if the regulations do not reduce the level of protection provided by the Habitats Regulations, including protection for protected species, habitats or sites; and
  - (c) following public consultation and consultation with—

    (i) the Office for Environmental Protection,

    (ii) Natural England,

    (iii) the Joint Nature Conservation Committee, and

    (iv) other relevant expert bodies."
- The Government opposed cl. 115

Habitats (6)

- **Lord Krebs**
  - "Amendment 99 would replace this subjective test, whereby Ministers mark their own homework, with an objective requirement. The Minister pointed out that the Secretary of State's judgment could be challenged in the courts, but that seems to me to be setting up a system that would generate money for lawyers and take up large amounts of time with uncertain outcomes. Why not simplify with Amendment 99? The Minister said that the Government would consult the office for environmental protection before making any changes to the habitats regulations. Amendment 99 extends the consultation requirement to include other relevant bodies. He also referred to a review led by the noble Lord, Lord Benyon, but did not tell us who was consulted in this review and what its impact will be."
- **Lord Goldmsith,** opposing the amendment
  - "A clearer, quicker and more easily understood process will support environmental protection by focusing on the issues that really matter for protected sites. I am reminded that Lord Justice Sullivan, when the regulations were formulated, recommended that we needed a system that was simple and not too full of hurdles that could end up causing excessive battles in the courtrooms. It feels to me that, in part, that is where things have ended up.

Habitats (7)

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- He added:
  - “However, I can commit to this House that no changes will be made without extensive consultation and strong parliamentary scrutiny. Consultation will include the office for environmental protection and statutory nature conservation bodies. It will also include key environmental NGOs, farmers and land managers to name a few. Those commitments are reinforced in Clauses 108(5) and 109(3), so that, in making regulations using these powers, Ministers must be satisfied that they do not reduce existing protections. In addition, we have added a specific requirement that Ministers justify to Parliament that any new regulations using these powers meet the test. This is a meaningful scrutiny mechanism with strong safeguards ensuring that we will not reduce the level of environmental protection.”
- But –
  - “have regard” duty – a weak duty
  - SoS “satisfied” though has to explain why – what if protection of specific habitats, species or sites may be eroded through the adoption of a different approach?
  - Regulations to guide the making of regulations
  - Interrelationship with new conservation strategies?
  - How far can you go in simplifying ecology and science in any event?

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Conservation strategies: Part 6 cls. 105-112

Local nature recovery strategies: cl. 105-109

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- Cls. 105-109 Local nature recovery strategies
- Cls. 105 - 6
  - Together are to cover whole of England
  - Published by whichever “responsible authority” appointed by SoS (local authority, mayors, NPA, Broads A, Natural England
  - To be reviewed from time to time
  - Regulations to provide procedure
- Cl. 107 Content – biodiversity priorities for the strategy area (see 107(2) and local habitat map(s) of national conservation sites, nature reserves and ay sit which are or could become of particular importance for biodiversity or where recovery or enhancement of biodiversity could make a particular contribution to other environmental benefits (107(3))
- Duty to have regard in making to any SoS guidance as to information to be included within a strategy or as to other matters to be included in it

Species conservation strategies: cl. 110

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- Defra Policy Note - "a new mechanism to safeguard the future of particular species at greatest risk. The strategies will find better ways to comply with existing legal obligations to protect species at risk and to improve their conservation status.".
- SCS may be published by Natural England (and reviewed subsequently) with regard to any species of flora or fauna and may (cl. 110(4))
  - Identify areas or features in the strategy area of importance to conservation of the species
  - Identify priorities regarding conservation or enhancement of habitats
  - How NE proposes to exercise its functions in the area to improve the conservation status of the species
  - Include NE's opinion on
    - the giving of approvals or consents by other public authorities which might affect the conservation status of the species within the area
    - Measures appropriate to take to avoid, mitigate or compensate for adverse impact of the conservation status of species in the area that "might arise from a plan, project or other activity"
- LPAs and any prescribed authority must cooperate with NE in the preparation and implementation of SCSs so far as relevant to their functions (110(6)). Does "cooperation" include compliance with advice regarding approvals and measures? Relationship to local plans? SoS may given guidance as to the discharge of this duty (110(7)).

Protected site strategies: cl. 111

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- Similar to cl. 110, NE given wide powers in respect of local area issues. NE may publish (and amend) a strategy to improve the conservation and management for a protected site to to manage the impact of plans, projects or other activities (wherever undertaken) on the conservation and management of the protected site. The Expl Notes give SANGS as an example (§917).
- Protected sites (England only) = European sites, SSSIs, marine conservation zones
- PSS may include NE's opinion on
  - (a) include an assessment of the impact that any plan, project or other activity may have on the conservation or management of the protected site (whether assessed individually or cumulatively with other activities),
  - (b) include Natural England's opinion on measures that it would be appropriate to take to avoid, mitigate or compensate for any adverse impact on the conservation or management of the protected site that may arise from a plan, project or other activity,
  - (c) identify any plan, project or other activity that Natural England considers is necessary for the purposes of the conservation or management of the protected site, and
  - (d) cover any other matter which Natural England considers is relevant to the conservation or management of the protected site.
- Consultation under 111(5) with public bodies, only with the public or a section of it if NE considers they should be consulted (111(5)(g)). Contrast mandatory consultation with landowners for SSSIs under WCA 1981.

Protected site strategies (2)

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- Bodies consulted must cooperate in the preparation of a PSS so far as relevant to their particular functions (111(7)). SoS may give guidance on the discharge of that duty to cooperate
- 111(10) "A person must have regard to a protected site strategy so far as relevant to any duty" under the Habitats Regs 2017, ss. 28G-28I WCA 1981 and ss. 125-128 Marine and Coastal Access Act 2009.
- The new strategies are potentially more far-reaching that the policy or notes suggest, these confer a greater extent of power on NE in respect of decisions respecting species, and protected sites, which are intended to be more influential on local authority decision and plan making than at present. The various duties to cooperate (not a particularly successful concept in plan-making) given rise to a number of uncertainties and scope for dispute and the effect on local decision-making may be significant. See the new duty on public authorities in cl. 103, adding s. 40(A1), (2A)-(2B) NERCA 2006.
- Appear to place greater burdens on LAs and NE whenever current circumstances suggest that this is unwise unless the strategies are seen as a means for NE to give their views for a local area in an omnibus form to dictate the course of decisions and plans – though with an apparently lesser degree of accountability than at present. It appears to permit the imposition of more control with regard to SSSIs than under the WCA
- The relationship between the new strategies and existing species and habitats protection is not clear and the new may presage a reduction in the manner of protections afforded by the existing mechanisms given the apparent overlap in concepts in cl. 110 and 111 and the powers under cls. 113-115 under the guise of finding a "better way".

Trees: Part 6 cls. 116-118

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- Cl. 116 Controlling tree felling – Sched 16 amends the Forestry Act 1967
- Cl. 117 Enhanced protection standard for ancient woodland to be implemented by Government which must set out the steps necessary to prevent further loss of ancient woodland in England which includes refusing development that cases direct loss of ancient woodland unless there are “wholly exceptional reasons” and for the creation of buffer zones (20m minimum) and protection of ancient or veteran trees
- Cl. 118 Consultation with the public before highway authorities feel street trees. New duty on highway authorities (s. 96A Highways Act 1980) to consult with local communities before felling street trees, unless the trees qualify for certain exemptions, e.g. the tree is dead, it is of limited size, required to be felled under the plan Heath Act 1967 or for other purposes e.g. to make reasonable adjustments or to avoid discrimination under the Equality Act 2010 because the tree is causing an obstruction
- Guidance is to be be provided for local highway authorities with regard to their consultation duty.

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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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