

Conservation newsletter - November 2020

Covering the latest conservation law updates including legislation and case law.

23 November 2020

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News in brief

Net Zero Commitments: impact of Covid-19

We have seen from the Court of Appeal's decision in the Plan B Earth v Secretary of State for Transport [2020] EWCA Civ 214 ('the Heathrow case') earlier this year the importance of the UK's legal commitments towards climate change and the significance of the obligations set out under the Climate Change Act 2008 in order to achieve Net Zero by 2050. But how will Covid-19 impact the UK's ability to meet Net Zero commitments?

We have seen a huge shift in how the pandemic has altered the way in which we live (working from home, reduced use of vehicles and public transport) and this has resulted in positive environmental changes, for example a reduction in the levels of air pollution. The public opinion on climate change has also shifted since the start of the pandemic and we have seen more focus on a 'green recovery' as we emerge from lockdown restrictions. There has been a real push for the government to seize this opportunity to tackle the climate crisis and we have already seen recommendations and plans being put forward around the introduction to systems like solar farms, district heating, synthetic fuels, hydrogen powered/electric vehicles and sensor operated lights.

The Government is expected to announce shortly whether it is going to bring forward the ban on sale of new petrol, diesel and hybrid cars and vans to 2030. If a report commissioned by Greenpeace is correct, bringing forward the date from which sales of new petrol, diesel and hybrid cars and vans will be banned could generate 32,000 new jobs and provide a £4.2 billion boost to the economy.

The question is, will the Government seize the opportunity to turn this pandemic into a defining moment in the fight against the climate crisis?

The review of Judicial Review: what does this mean for environmental cases?

On 7th September 2020 Lord Faulks QC issued a call for evidence for analysis by the Independent Review of Administrative Law (IRAL) in consideration for the reform to the judicial review ('JR') process. The review has raised concerns amongst environmental organisations as they question how the planned reform of the JR process will impact their ability to challenge the decisions of public bodies if it is considered those decisions are illegal, unfair, in breach of a legitimate expectations and so on.

The purpose of the review is to consider one key question: 'Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?'. As it stands, environmental NGO's are able to rely on JR as a means of challenging the decision-making process of the government and public bodies. We have seen organisations such as ClientEarth successfully use the JR process to contest decisions made on policies such as air quality. The IRAL will submit recommendations to the Lord Chancellor and Michael Gove by the end of 2020.

Mayor of London withdraws incinerator judicial review

The Mayor of London has withdrawn his claim for judicial review in relation to plans for a new incinerator to be built in Belvedere in South East London. This is despite the High Court granting Mr Khan's judicial review application, which was expected to commence in October.

Following a Government Inquiry in 2019, the Secretary of State for Business granted approval for the incinerator to be built that would be capable of dealing with 805,000 tonnes of waste a year and producing 96 megawatts of electricity. However, the Mayor of London applied for a judicial review on the basis of the project's environmental impact on Rainham town centre and its approval process.

The Mayor has now confirmed that he is dropping the challenge as a result of the potential significant costs that would be incurred if the case were to proceed to a full hearing. The challenge had been supported by the two local MPs, who have raised the prospect of using local fundraising and financial assistance from national environmental groups to continue with the judicial review.

Whether the MPs are successful or not, it seems clear that the financial impact on local government, as a result of the Coronavirus pandemic, has now extended into the environmental arena as well.

Chancellor mulls carbon tax

The Chancellor is considering introducing a carbon tax with the aim of increasing government revenue while encouraging investment in decarbonisation. Currently, the European Union's emissions trading scheme (ETS) applies, where companies can purchase or sell emission allowances; however, this is due to end once the transition period finishes.

The government's options include crafting its own scheme, introducing taxes or creating a hybrid system. The Treasury's reported preference is for a carbon tax scheme, which could help repay the current annual deficit that is projected to reach £400 billion this year. The Department for Business, Energy and Industrial Strategy, however, is in favour of emissions trading and is pushing back against the Treasury's proposals. It is also currently preparing its own UK ETS for when the transition ends, having published proposals on 1st June. The Prime Minister is expected to decide on which proposal goes ahead by December 12th 2020 when he will co-host a UN climate action meeting.

Whether the Treasury wins the fight with the BEIS might, however, ultimately depend on the current EU negotiations: any carbon tax proposal would have to be agreed as part of the UK's trade deal with the EU. Although the government is negotiating for a UK ETS to be pegged with the EU ETS, the UK can still create the former if negotiations fail on this point or the UK does not agree a trade deal with the EU.

Businesses may have to wait until the end of the year to find out what the UK's new carbon regime will be.

Taking a closer look

[The Government's proposes consultation on Environmental Impact Assessment](#)

Whether there will be a weakening of the regime or not, it seems clear that the government intends to facilitate and simplify the EIA process.

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[Pushing water uphill? Water Quality and the 25 Year Environment Plan](#)

The government has outlined an ambitious target for improving the quality of water, and based on its own progress report and the Environment Agency's results, it faces an increasingly uphill challenge to meet these goals.

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Legislation

1. Waste (Circular Economy) (Amendment) Regulations 2020 (2020/904)

This instrument came into force on 1 October 2020 and it transfers six directives of the EU's 2020 Circular Economy Package, including the waste framework directive, the landfill directive and the packaging directive, into UK law. It will ensure that the UK embraces a more circular economy as resources are used for as long as possible and waste is minimised. 2. Climate and Ecology Bill 2019-21 This Bill had its first reading in the House of Commons on 2 September 2020 with a second reading due on 12 March 2021. It will impose an obligation on the government to achieve certain climate and ecology objectives and will impose a duty to implement a strategy to achieve those objectives.

3. Fisheries Bill 2019-21

The third reading of this bill took place in the House of Commons on 13 October 2020. The Bill provides a legal framework for the UK to operate as an independent coastal state outside of the EU following the Brexit transition period.

4. Environment bill 2019 – 2021

There have been some significant proposed amendments to the Environment Bill. The most significant being the proposal to give the Secretary of State powers to issue guidance to the Office for Environmental Protection (OEP) regarding its enforcement policy. The stated reason for this is to protect the OEP's ability to consistently focus its attention and resources on the most serious cases. However there is real concern that this could erode the independence of the OEP before it even comes into existence.

Another change is the proposal to limit the OEPs powers to bring judicial review proceedings against public bodies to 'urgent cases'. Whilst in practice it was always likely that the OEP will only bring judicial reviews in the most serious of cases, it is concerning that the government is introducing more curbs to its powers.

In connection with the proposed planning reforms, the government has proposed 'species conservation strategies' and 'protected sites strategies'. The strategies propose a more holistic approach to particular species and protected sites. In theory they are positive because the focus is on the cumulative effect of development rather than the effect on individual cases. However there is a real concern about the resources needed to effectively create, implement and keep up to date the strategies.

Case law

1. R. (on the application of Walker) v Bath and Somerset Council [2020] EWHC 1836 (Admin) (Judgement date: 9th July 2020)

The claimant's application for judicial review of a decision made by the defendant in granting planning permission for a development at the Belvoir Castle in Bath was successful. It was concluded that the defendant (i.e. the Local Authority) had not provided sufficient grounds for granting planning permission within the world heritage site and therefore, the defendant's decision would be quashed.

2. Patricia Stubbs (on behalf of Green Lanes Environmental Action Movement) v Lake District National Park Authority v Cumbria County Council, National Trust for Places of Historic Interest or Natural Beauty, The Trail Riders Fellowship [2020] EWHC 2293 (Admin) (Judgement date: 21st August 2020)

Claims brought on behalf of Green Lanes Environmental Action Movement (GLEAM), who campaign to protect green lanes and the rights of walkers and others to use such lanes without danger, difficulty or inconvenience, were dismissed by the court. GLEAM challenged the

decision made by the Lake District National Park Authority to not impose a traffic regulation order ('TRO'), which would put a stop to off-road driving in certain areas of the Lake District. GLEAM had brought three grounds of challenge relating to TRO's, the first of which relates to the Sandford Principle pursuant to s.11A(2) of the National Parks and Access to the Countryside Act which states that "*where irreconcilable conflicts exist between conservation and public enjoyment, then conservation interest should take priority*". GLEAM's claim questioned the lawfulness of the Lake District National Park Authority's (LDNPA's) decision not to seek TRO's. However, the judge dismissed the claim on the basis that he was satisfied with the approach taken and the procedures followed by LDNPA. He then proceeded to dismiss the other two grounds of challenge which also related to the TRO procedure. Following this decision, GLEAM have confirmed that they are considering whether there are grounds for appeal. Dr Mike Bartholomew, chairman of GLEAM said "*off-roading in Little Langdale is damaging the natural beauty of this part of the National Park...*"

3. R. (on the application of Packham) v Secretary of State for Transport [2020] EWCA Civ 1004 (Judgement date: 31st July 2020)

The Court of Appeal refused to grant permission for judicial review to an environmental campaigner allowing them to appeal or apply for judicial review in respect of the decision made earlier this year, which allowed for the implementation of the HS2 rail link project to proceed. It was held that the claim had not been brought promptly following the decision in February 2020. It was also found by the court that in matters of national political significance, of which this case was, the exercise of the secretary of state's functions were not constrained by legislation and a challenge by way of judicial review could be made only on irrationality grounds.

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