

Conservation newsletter - August 2019

Welcome to Browne Jacobson's August 2019 conservation newsletter, looking at climate change, bird netting, Oak Processionary Moth, recent case law and legislation updates.

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News in Brief

Overseas aid – putting climate crisis and the environment first

In July, the UK government announced an 'ethical' development policy putting the climate emergency and environmental protection at the centre of overseas aid. In the first initiative, an expected £190m will be spent directly on climate related issues.

The announcement is in keeping with the suggestions of the international development select committee which, in its May report, urged the government to put climate change at the heart of its aid strategy.

It is understood that of the initial sum, approximately £100m will be spent on low-carbon energy projects to cut carbon emissions in the developing world with the remainder split among projects to help developing countries adapt to the effects of global heating. It is expected that some of the funds will be spent in the UK, as institutions around the world will be invited to bid to undertake research and development to aid such projects.

The future of the focus on climate change remains uncertain, however, as a new international development secretary (Alok Sharma MP) was appointed on 24 July 2019.

The rise in climate action lawsuits

New analysis shows that climate action lawsuits against governments and corporations have spread across 28 countries with more than 1,300 legal actions concerning climate change being brought since 1990.

The majority of the cases (1032) were brought in the US, however a significant number have also been brought in the UK, Australia, New Zealand, Germany, Brazil and Spain.

A key case brought in Pakistan in 2015 established the right to challenge the failure to act on climate change as a human rights issue. A farmer in the south Punjab region of Pakistan was successful in his claim that the government was violating his human rights through its failure to tackle the effects of climate change. He alleged that his leaders were failing to ensure water, food and energy security in the face of the challenges posed by climate change.

In the UK, Client Earth has won court actions against the British Government for its failure to act on illegal levels of air pollution.

Combined with increasing client activism such as Extinction Rebellion and the school climate strikes, climate action lawsuits appear to be becoming an increasingly prevalent way of forcing governments to address the issue of climate change.

RSPB calls for restrictions on bird netting

Wildlife campaigners are calling for stricter regulations on nets installed over trees and hedgerows in areas where building work is planned. It is an offence to destroy an active nest but there are currently no laws to prevent the installation of the nets.

Developers have stated that use of the nets is “standard practice,” for use on trees and hedges that might be damaged by works but the RSPB says they should only be used in exceptional circumstances, and has issued a joint statement with the Chartered Institute of Ecology and Environmental Management calling for stricter controls.

They say that the use of netting could be avoided with advice from a trained ecologist and that the nets should only be used if there is no other option, and only once planning permission has been granted.

A petition has been set up to try to make the practice illegal and a crowdsourced map that allows people to post where they have seen the nets recorded sightings in Scotland, England and Wales.

Restricting Oak tree Imports

Imports of Oak trees have been restricted to prevent the import of the Oak Processionary Moth. These measures mean that only oak trees from: Oak Processionary Moth-free countries, designated pest free areas including Protected Zones and those that have been grown under complete physical protection for their lifetime. This comes after 2 findings of Oak Processionary Moth in Wales on Oak trees that have been recently imported from Europe. Furthermore, if Oak Processionary Moth is suspected by members of the public they have been urged to not try and move/destroy the moth as it can prove harmful to humans.

Lesley Griffiths, the Minister for Environment, Energy and Rural Affairs said:

“Oak trees are Great Britain’s most important tree for species biodiversity, supporting over 2000 species of bird, mammal, fungi, invertebrate, bryophyte and lichen. It is crucial we do all we can to protect this iconic tree and the value we derive from this natural asset.

Following the recent cases of OPM in Wales, it is essential we further strengthen our import controls on oak trees. These new restriction will help us reduce the impact of the oak processionary moth and give robust protection for our oak trees”

Twenty-fold increase in climate laws recorded

A new report published by Clyde and Co. has revealed that there are now over 1,500 laws and executive acts addressing climate change in the UK, compared to just 70 in 1997. The report comes after the UK Government outlined its expectation for all listed companies and large asset owners to report their vulnerability to climate risks. Nigel Brook, Partner at Clyde and Co, said *“companies that fail to adjust to the changing risk landscape might be unable to attract investment, lose competitiveness, and fall below best practice standards”*. This comes after the UK government outlined its expectation for all listed companies and large asset owners to report their vulnerability to climate risks, as well as threatening legal action if they don’t.

Take a Closer Look

Committing to Net Zero

In June 2019, following the Government’s advisory Committee on Climate Change (CCC) report urging the Government to commit to cutting greenhouse gases by 100% by 2050 when compared to 1990 emissions, the Government pledged its commitment to achieving that goal.

This legally binding commitment will be introduced by amending section 1 of the Climate Act 2008, so that in subsection 1, 80% is substituted for 100%. The amending SI is intended to be the “The Climate Change Act 2008 (2050 Target Amendment) Order 2019”. Whilst this statement is a simple one, in practice significant change to policies and budgets will be needed in order to meet this requirement.

In the CCC’s report, “Net Zero, The UK’s contribution to stopping global warming” dated May 2019; numerous features were identified as key to achieving the target whilst reinforcing the feasibility and cost effectiveness of doing so. The report identified the need to ‘ramp up’ policy efforts across sectors in order to meet the target.

The need for societal shifts is a key element in the push for a carbon neutral UK. The report identified the need to move towards:

- a. a shift towards diets which reduce the consumption of beef, lamb and dairy products;

- b. full utilisation of public transport systems and car clubs, where a car is required;
- c. the minimisation of long haul flights where possible;
- d. an end to traditional gas boilers;
- e. a switch from petrol to electric vehicles;
- f. green electricity improvements in the home;
- g. elimination of food waste and mandatory separation of waste at home; and
- h. an increased uptake of walking and cycling activities as the primary means of transport.

Many societal trends such as a move towards vegetarianism and veganism are already contributing to the required shifts. Veganuary 2018 has had a record breaking year with over 150,000 participants signing up. According to the [Ethical Consumer's Markets Report 2018](#), ethical food and drink saw a 16.3% growth last year where conventional foods were struggling. The uptake of fair trade produce is on the increase and use of single-use plastics is reducing drastically. Additionally, there are new entrepreneurs entering the market for lifestyle, beauty and fashion brands with an ethical focus. However, it is clear that more work is required in order to solidify society's commitment to the above changes.

As well as lifestyle changes, some of the key issues for government will be ensuring the appropriate infrastructure is in place to support reaching the target. Carbon capture was described as 'crucial' to the delivery of the target. The CCC has previously recommended that the UK's first carbon capture and storage cluster be operational by 2026, with two clusters, capturing at least 10MtCO₂, operating by 2030. The CCC highlights the need for Government to take the *"lead on infrastructure development, with long-term contracts to reward carbon capture plants and encourage investment"*.

Similarly, a push to ensure that charging infrastructure for electric cars will be required to meet the proposed target of electric or hydrogen vehicles. A continued expansion of low-carbon power is also recommended alongside funding to incentivise industries to reduce emissions.

It is clear from the CCC's report that significant change is going to be required to meet the net zero carbon emissions target by 2050. Public bodies are likely to have a key role to play in this. Whilst private individuals and businesses can help drive change, public bodies will be required to incentivise and provide the infrastructure to allow this to happen. For example planning authorities have a key role in approving charging points for electric cars and ensuring that new buildings are 'de-carbonised'.

There is however likely to be conflict with existing policy objectives. For example the government's current drive for housing may come into conflict with the requirement to make those new homes greener. There will need to be a balance between the number of homes being built and the green credentials of those homes.

Accordingly, now maybe a sensible time for public bodies to consider how they can assist the government in reaching this target, and the funding required to do so, so that they can input in any future spending review. Greater Manchester combined authority has placed an ambition to become carbon neutral by 2038 at the heart of its industrial strategy which was launched earlier this year. It is likely that public bodies will require similar ambitions in their strategic planning documents, to pave the way for policies to reach the national target. The pledge to have net-zero carbon emissions by 2050 is certainly a headline grabber but is currently short on detail as to how this will be met. What is certain is that this is going to create new challenges for public bodies and is something that public bodies should follow closely. Public bodies should take steps (such as responding to consultations) to ensure that the government is aware of the effect of the new policy and the resources required to implement the policy.

Case Law

ClientEarth v European Chemicals Agency T-108/17, General Court of the European Union

By the adoption of Implementing Decision C(2016) 3549 final, the European Commission had granted three waste recycling companies an authorisation for uses of bis(2-ethylhexyl) phthalate (DEHP) under Regulation (EC) No 1907/2006. ClientEarth unsuccessfully sought an internal review of the authorisation decision.

ClientEarth then sought annulment of the Commission's decision to reject its internal review request and annulment of the authorisation decision. The General Court of the European Union dismissed ClientEarth's action on the basis that all the arguments relied on by ClientEarth in support of its application were unfounded.

R (on the application of Langton) v Secretary of State for Environment, Food and Rural Affairs and another [2019] EWHC 597 (Admin)

This case concerned the judicial review of Natural England's grant of eight badger control licences in 2017. In assessing the ecological impact of granting badger control licences on Sites of Special Scientific Interest (SSSI), Natural England needed to take into account the impact on the special interests of the SSSI which led to the site notification.

It was identified that this task would not always be straightforward. This is because SSSI citations contained not just the special interest features that led to the site notification, but also other valuable features.

Due to the significance of harming special interest features (it can be a criminal offence) it had to be apparent from the citation whether or not a feature was a special interest feature. Other interpretive methods, such as a Natural England guidance and practice, should not be taken into account.

The case is useful as it gives some assistance on how to interpret SSSI citations, in particular older citations.

R. (on the application of Spurrier) v Secretary of State for Transport [2019] EWHC 1070 (Admin)

The court rejected four claims for judicial review of the Secretary of State for Transport's Airports National Policy Statement (ANPS), designating a third runway at Heathrow as the preferred scheme for meeting the need for new airport capacity in southeast England. Whilst the claims involved underlying issues on which the parties, and many members of the public, held strong and sincere views, the hearing had been concerned only with the legality, and not the merits, of the ANPS, and its designation as a national policy statement under the Planning Act 2008 s.5(1) was lawful.

This is a reminder of the limits of judicial review. The primary focus is on the process followed rather than the merits of the outcome.

This case is currently being appealed.

Mott and another v Environment Agency [2019] EWHC 1892 (Admin)

The Environment Agency has been ordered to pay compensation of £187, 278 (plus interest at approximately 4%) following an earlier finding regarding its decisions to impose conditions on the first claimant's licence to fish for salmon in the river Severn using a putcher rank. The conditions limited his permitted catch and were found to be unlawful in the absence of compensation, by reason of their interference with his right to property under art 1 of the First Protocol to the European Convention on Human Rights.

This marks the end of a difficult case for the Environment Agency, and one which public bodies should consider when proposing action which interferes with property rights.

Legislation updates

Reservoirs (Flood Risk) Bill 2019 (HC Bill 424)

This bill, which had its first reading on 17 July 2019 will grant the Environment Agency additional powers to require water companies to manage reservoirs to mitigate flood risk. The bill is a Private Members Bill introduced under the Ten Minute Rule. Its second reading is scheduled to take place on a date to be announced.

East Anglia THREE Offshore Wind Farm (Amendment) Order 2019 (SI 2019/997)

This Order came into force on 7 June 2019. It amends the The East Anglia THREE Offshore Wind Farm Order 2017, a development consent order under the Planning Act 2008, following an application made in accordance with the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 for a non-material change under the Planning Act 2008 Sch.6 para.2. Amendments to the Order include changes to the detailed offshore design parameters and an increase to the maximum generating capacity permitted for the development to 1,400mw.

Marine Licensing (Exempted Activities) (Amendment) Order 2019 (SI 2019/893)

This order came into force on 31 May 2019. The Order was accompanied by an explanatory memorandum and amends the Marine Licensing (Exempted Activities) Order 2011 (SI 2011/409).

Amendments to the marine licencing regime in the UK include:

- The creation of three new exemptions for recovery of marine litter and abandoned, discarded or lost fishing gear by recreational divers; use of vehicles or vessels to routinely remove marine debris by a harbour authority; and in-water hull cleaning of lightly-fouled recreational vessels.
- Clarification of the current exemptions for shellfish propagation and cultivation.
- Amending existing exemptions for maintenance of coast protection, drainage and flood defence works; emergency work in response to flood or flood risk; use of vehicles to remove litter, seaweed or dead animals; moorings and aids to navigation; temporary markers; diver trails within restricted areas; and authorised emergency inspection or repair of cables and pipelines.

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