

AN ANALYSIS OF THE CONSULTATION ON AN ENVIRONMENTAL PRINCIPLES AND GOVERNANCE BILL: PART I

Perhaps unnoticed, as people head to the beach in August, Defra's consultation on ['Environmental Principles and Governance after the United Kingdom leaves the European Union'](#), which closed on 2 August 2018, is probably the most important consultation affecting environmental laws to be introduced for at least the last ten years. It goes right to the heart of how environmental laws will, or should, or may not be, enforced, after the UK leaves the EU.

It proposes a new Bill, to set up a new body with the essential task of holding government and public bodies to account for environmental law enforcement, in place of enforcement of EU law by the European Commission and Court of Justice of the European Union.

The [Bill will also address](#) how the key environmental principles which underpin EU environmental laws should be reflected in UK laws after Brexit. The new Bill will only apply to England, as responsibility for the environment is a devolved matter, but similar issues will arise for each devolved administration. Debates continue over the workability of having four separate enforcement bodies, or a single body for the UK applying consistent standards but (and this is now a pressing need) taking real and full account of the concerns in each of the UK's constituent parts.

In this article, the author argues that given the current failures of enforcement under existing legal structures, there now needs to be a legal duty upon all levels of government "to secure the effective enforcement of environmental laws" for which they are responsible. He also argues that government and public bodies must, as a minimum, have regard to environmental principles when discharging their functions, and must commit not to dilute the existing application of those environmental principles where already reflected in EU law; and that it is time to introduce the principle of environmental justice to UK law.

Issues of non enforcement of existing EU environmental laws

The consultation does not address the really serious issue of non-enforcement of existing EU laws under existing structures. Examples of this are as follows.

Volkswagen and 'defeat devices'

Volkswagen placed 590,000 vehicles containing defeat devices to mislead emissions tests on the US market. After investigations by Congress, State Attorneys General, the FBI, the Department of Justice, the State of California, Volkswagen in 2017 [agreed to plead guilty](#) and to pay \$4.3 billion in criminal and civil penalties, (\$2.8 billion criminal and \$1.5 billion civil penalties). Six executives and employees were named and indicted.

Volkswagen placed 1.2 million cars fitted with similar devices on the [UK market](#). Initially, the then Transport Secretary [wrote to the European Commission](#) saying that he hoped they would "investigate this matter thoroughly and take appropriate action to avoid a recurrence". On 8 December 2016, the European Commission opened [infringement proceedings](#) against 7 states, including the UK and Germany "for failing to set up penalties systems to deter car manufacturers from violating car emissions legislation, or not applying such sanctions where a breach of law has

occurred.” Since that time, it does not appear that any UK enforcement authority has taken any enforcement action of any description against Volkswagen for this matter.

Air quality and the ClientEarth cases

The UK’s non- compliance with EU air quality legislation, and the *ClientEarth* series of cases in different jurisdictions to try to enforce it, are a matter of record. Successive UK governments must know quite well what EU laws require on air quality; but *ClientEarth* has been obliged to go [back and back to court](#) to obtain one ruling after another that the UK government is in breach.

Illegal waste sites

It is becoming clear that in parts of the UK there may be [hundreds of illegal waste sites](#) that are not yet being tackled by the environmental regulators, who are somewhat given to complaining that they simply lack the resources to do more to enforce existing laws in the area. This gives rise to two questions. First, is there the will to enforce existing law? Secondly, if the issue is really about resources, what can and should be done, for example, to share more of the proceeds of crime recovered in waste cases with the regulatory agencies, instead of with the Treasury?

Enforcement of river pollution incidents

The current [referral to the European Commission](#) by Afonydd Cymru of the inactions by the NRW in enforcing existing river and nitrate legislation underlines both the availability at present of a European remedy to breaches of EU environmental law, and the importance of oversight of environmental regulators as a practical issue for environmental law enforcement.

Failure to enforce existing environmental laws, at a time when the UK is, on Brexit, removing many of the most effective powers and means for their enforcement, risks sending a signal that pollution pays, that compliance with environmental laws is for the little people, not large companies, and that regardless of public concern, there isn’t the political will to make enforcement effective. Again, if environmental laws are not going to be effectively enforced, it doesn’t greatly matter what they say.

What is needed to make enforcement of environmental laws effective is -

- (i) clearly drafted laws;
- (ii) a strong political message, from the top, that environmental laws are there to do an important job, and will be enforced, against individuals, and companies of all sizes;
- (iii) a proper statement of enforcement policy by regulators;
- (iv) properly resourced, adequately informed and skilled, independent, robust and capable regulators; and
- (v) a legal duty on all levels of government “to secure the effective enforcement of environmental laws” – something which the new environmental regulator can focus on, and support.

The follow-up to this article will address losses the UK may suffer in terms of environmental law enforcement once it leaves the EU, as well as the likely aims of bodies set up under the Environmental Principles and Governance Bill and environmental justice concepts in operation in the USA.

About the Author

William Wilson is a specialist environmental, regulatory and nuclear lawyer with over 25 years experience in government, private practice and consultancy. He worked as a senior lawyer at the UK Department of the Environment/DETR/Defra, and helped to build up the environmental and nuclear practices at another major law firm, as well as running his own environmental policy consultancies. William has experience of all aspects of environmental law, including water, waste, air quality and industrial emissions, REACH and chemicals regulation, environmental protection, environmental permitting, litigation, legislative drafting, managing primary legislation, negotiating EU Directives and drafting secondary legislation.

Prospect Law is a multi-disciplinary practice with specialist expertise in the energy and environmental sectors with particular experience in the low carbon energy sector. The firm is made up of lawyers, engineers, surveyors and finance experts.

This article remains the copyright property of Prospect Law Ltd and Prospect Advisory Ltd and neither the article nor any part of it may be published or copied without the prior written permission of the directors of Prospect Law and Prospect Advisory.

This article is not intended to constitute legal or other professional advice and it should not be relied on in any way.

For more information or assistance with a particular query please in the first instance contact Adam Mikula on 020 7947 5354 or by email on adm@prospectlaw.co.uk.

Prospect Law Ltd

23 Berkeley Square, London W1J 6HE
T +44 (0)20 7947 5354

Regus House, Pegasus Business Park, Castle
Donington, Derbyshire DE74 2TZ
T +44 (0)1332 818 785

 @prospectupdate
E info@prospectlaw.co.uk
www.prospectlaw.co.uk