

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

Perhaps unnoticed, Defra's consultation on ['Environmental Principles and Governance after the United Kingdom leaves the European Union'](#), 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.

The second part of this series addresses 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.

### What the UK will lose in terms of environmental law enforcement on leaving the EU

On top of the existing failures to deliver effective enforcement of existing laws, the U.K. will now, after Brexit, lose:

- Treaty obligations reinforcing environmental laws;
- enforcement by the European Commission;
- enforcement by the Court of Justice of the European Union;
- the ultimate sanction of Member States risking fines for continuing breaches of EU law;
- the legal requirement upon government to ensure that penalties for breaches are "effective, proportionate and dissuasive"; and
- the right of individuals to activate enforcement of EU environmental laws, at no cost, by raising complaints with the European Commission.

### Environmental governance

Any body, or set of bodies, set up, under the U.K. government's proposed *Environmental Principles and Governance Bill* and/or parallel legislation in the devolved Parliaments will need to aim to deliver a consistent approach to environmental law enforcement across the UK; to be independently financed, established by statute and answerable to Parliament(s); to have the right to take up and investigate individual citizen complaints of breaches or non-enforcement of environmental laws without the prohibitive costs of judicial review; and to be able to hold government and public bodies to account.

### Issues of Environmental Principles

With respect to the principles covered by section 16 of the European Union (Withdrawal) Act 2018, as a minimum:

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(a) government and public bodies at all levels should have regard to them when discharging their functions; and

(b) where they are already embedded in retained EU law, there should be a commitment by government to reflect that, and not to dilute their application.

## Environmental Justice

In America, there are much better developed concepts of environmental justice in the way in which environmental laws and regulation are applied. As an example, the Presidential Executive Order for 1994 stated that:

*...to the greatest extent practicable and permitted by law...each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing as appropriate disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations or low-income populations."*

Another way that this was explained to the author of this article, by Professor Robert Kuehn of Tulane University Law School was as follows:

*"The observation that most community environmental struggles are not won solely through the hands of lawyers is profoundly accurate. If equal enforcement of environmental laws is to be achieved, then all aspects of the enforcement process need to be opened up to residents of affected communities – their participation in making enforcement decisions must be sought out, their opinions and desires respected and addressed, and their ability to protect their own communities and police the facilities in those communities enhanced."*

Concepts of environmental justice, and the approach to law making and enforcement recommended there by Professor Kuehn, might well have helped to avoid some of the worst aspects of the Grenfell fire disaster. It may be time to consider what lessons there are to learn from American approaches to environmental justice when considering environmental governance in the UK.

The fundamental structures of enforcement of environmental laws are being re-designed from scratch. At a time of some legislative and constitutional turmoil, environmental lawyer, and those interested in effective environmental laws, need to identify what really matters, and to speak up for it.

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*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.*

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