



# New Environmental Watchdogs in the post-Brexit UK

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# Brexit

- UK left EU on 31 January 2020
- Currently in transition/implementation period until 31 December 2020, with little change
- Then - ??????
  
- Devolution dimension
- Environmental law a heavily devolved area
- But interplay with notion of UK internal market and obligations under international trade agreements



## Environmental Law post-Brexit

- Existing EU law, and domestic law based on it, rolled-over
  - Includes case-law of CJEU
- Becomes “retained EU law”
  - European Union (Withdrawal) Act 2018
  - European Union (Withdrawal Agreement) Act 2020
- Many detailed amendments to remove role of EU bodies and references to EU and its processes



## Future changes to retained EU law

- 2018 Act gives Ministers wide power
  - deal with “any failure of EU retained law to operate efficiently or any other deficiency”
- Also can be changed by ordinary legislation
  - (subject to any “level playing field” agreement)
- CJEU case-law remains binding, but can be departed from
  - Under 2018 Act could be overridden only by Supreme Court, on same basis as their own decisions
  - Under 2020 Act, regulations being made to allow Appeal Courts to do so as well



## Accountability

- Loss of European Commission's oversight
- Ultimately CJEU's power to compel compliance and impose sanctions
  
- In addition to formal processes
  - Routine overview through reporting requirements
  - Cost-free route for complaints
  - Lots of cases dealt with informally
  
- UK administrative law system not accustomed to duties placed on Government to meet targets etc.
  - Climate Change Acts
  - If target not met, who can sue, when, with what remedy?



## Plans for future watchdogs

- England will have Office for Environmental Protection
  - Environment Bill
  - Bill also has substantive measures on principles and air, water, waste, resource efficiency, biodiversity net gain and conservation covenants
- Northern Ireland will also be covered by OEP
  - Environment Bill
- Scotland will have Environmental Standards Scotland
  - UK Withdrawal from the European Union (Continuity) (Scotland) Bill
  - Bill also provides for principles and wide power to keep in step with EU law
- Wales appointing Interim Environmental Protection Assessor
  - Legislative measures deferred until after May 2021 elections
  - “a platform whereby possible instances of failure to implement or non-compliance with environmental law in Wales may be reported”



# Oversight issues

- Independence
  - Impossible to match the independence of an external, powerful body as within EU
- Resources and capacity
- Role
  - Complaints or review; advisory
  - Non-compliance or wider issues
- Scope
- Accessibility
  - Easy and free to complain to Commission - very different from cost of legal actions
- Remedies
  - Need to be effective, whether formal or informal
- Links with EU and other international bodies
  - Continuation within networks and access to data and standard-setting



## England and UK matters

- Office for Environmental Protection
  - Monitor progress on environmental improvement plans and targets
  - Advice to government
  - Monitor implementation of environmental law
    - “legislative provisions”, so not international obligations
  - Oversight of non-compliance
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- Must act objectively and impartially, and with regard to the need to act proportionately and transparently



# Office for Environmental Protection

- Appointed by Secretary of State
- SoS can issue guidance on enforcement policy and functions that OEP must have regard to
- Duty on SoS to pay such sums as considered “reasonably sufficient” to enable the OEP to carry out its functions
- Can look at some climate matters, but Memorandum of Understanding with Committee on Climate Change
- Must produce Strategy



## Northern Ireland

- OEP will oversee devolved matters in NI as well
- Essentially same as for England
  - One NI member appointed by NI Government and future chairs jointly and other members with consultation
  - NI Government to contribute to resources
  - No power for NI Government to issue guidance on exercise of functions
- Independent Environment Agency promised in *New Decade, New Approach* (the deal to re-establish NI Assembly and Government)



## OEP - Enforcement

- Complaints from public of serious failure by public authority to comply with environmental law
  - Also on own initiative
- Information notice where has reasonable ground to suspect breach
  - Authority must provide information requested
- Decision notice
  - Satisfied on balance of probabilities that failure to comply and it is serious
  - Set out steps required - remedy, mitigate or prevent reoccurrence
  - Authority must respond within 2 months
- Environmental review
  - After time for response, refer to court whether original conduct in breach of law
  - Statement of non-compliance
  - Apply judicial review principles and remedies, but not damages
  - Can go directly to judicial review in urgent and serious cases



# Scotland

- Environmental Standards Scotland
- Function to monitor
  - - public authorities' compliance with environmental law
  - - effectiveness of environmental law and how it is implemented and applied
    - Includes implementation of international obligations
- Not to deal with particular instances
  - the exercise of ... regulatory functions in relation to a particular person or case (for example, a decision on an application for a licence or a decision on regulatory enforcement in a specific case)



# Environmental Standards Scotland

- Appointed by Scottish Ministers, with approval of Scottish Parliament
  - Initial non-statutory appointees can be carried over
- Express provision that not subject to direction or control of Government
  - Unless contrary is provided
  - Power for Ministers to revise functions
- Must produce Strategy
- Scope does not extend to climate change targets



## ESS - Enforcement

- Information notices
  - Non-compliance reported to court as contempt of court
- Improvement reports
  - Based on non-compliance or lack of effectiveness
  - Made to Scottish Ministers who must publish report and respond
  - Improvement plan must be produced – Scottish Parliament can reject
- Compliance notice
  - Failure to comply where continuing or may be repeated and actual or likely environmental harm
  - Authority can appeal to sheriff court
  - Failure to comply is referred to Court of Session, to be dealt with as if contempt of court
- Can seek judicial review in serious cases



## The future

- Welcome that something being done to fill a big gap
- Cannot replace power of EU institutions
- Notable differences across the UK
  - Much stronger enforcement powers in Scotland
- Concerns over extent of ministerial influence
- Much will depend on culture and approach
  - Intention to allow for informal resolution without recourse to legal procedures
- How serious are the governments about delivering on their environmental rhetoric?



# University of Dundee

Reid: Mapping post-Brexit Environmental Law

*ERA Forum* – open access

<https://rdcu.be/b7nq7>