

Brexit and the UK Water Environment

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Introduction

- UK Brexit Referendum took place on 23 June 2016
- 52% voted to leave and 48% to remain in EU (of 72% turnout)
- UK European Union (Notification of Withdrawal) Act 2017
- Allowed Article 50 of the EU Treaty to be invoked on 29 March 2017
- UK on course to leave the EU in March 2019.
- This involves repeal of the UK European Communities Act 1972 and the enactment of a EU Withdrawal Act so that the UK will cease to be subject to the EU Institutions from Brexit day.
- EU-UK negotiations on Brexit continue!
- Implications of Brexit for UK environmental law and policy?
- Particularly, the EU Water Framework Directive 2000/60/ EC (WFD)?

Brexit and the Environment: Threat or Opportunity?

- United Kingdom Environmental Law Association (UKELA) view: “a unique and critically important opportunity for the UK Government and devolved administrations to explore ways of *improving and strengthening* environmental regulation.”
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- The ‘glass half empty’ perspective: a return to poor environmental standards the title of ‘the dirty man of Europe’.
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- The ‘glass half full’ perspective: the seemingly firm commitment of the present Government to environmental *improvement*.

The Government White Paper on Withdrawal from the EU

- *Legislating for the United Kingdom's withdrawal from the European Union*, March 2017:
- 1/ to repeal the European Communities Act 1972;
- 2/ to convert all EU law, at the point of exit, into UK law; and
- 3/ to create powers to make secondary legislation to facilitate corrections to laws that would no longer operate appropriately and to allow national law to reflect the content of any withdrawal agreement under Article 50 of the Treaty on European Union.

- Leaving the EU will mark the end of the jurisdiction of the Court of Justice of the EU in the UK.
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- Supreme Court would have the power to depart from past decisions of the EU Court ‘where it appears right to do so’.
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- EU Withdrawal Bill seeks to ensure that existing EU environmental law continues to have effect in UK law.
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- Thus, the longer term status of EU environmental law in the UK is left, perhaps purposefully, uncertain.

Environmental Concerns

- House of Commons Environmental Audit Committee undertook an inquiry on the *EU and UK Environmental Policy* (2016) to inform the Referendum debate, offering a generally positive view of EU membership in respect of environmental policy.
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- But noted the lack of any plans for environmental law in the event of a vote to leave the EU and difficulties that this would present on various fronts.
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- “Despite the key role that the EU has played in UK environmental policy, relatively little appears to have been done by way of planning in the case of the UK leaving There are, therefore, significant unanswered questions about what relationship a UK outside the EU would have with it and with the rest of the world, just as there are unanswered questions as to how our relationship with the EU might develop.”

- International environmental obligations arising outside EU law and unaffected by Brexit:
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- OSPAR Convention on Protection of the Marine Environment of the North-East Atlantic and its Hazardous Substances Strategy, seeking to achieve the elimination of priority hazardous substances and contribute to achieving concentrations in the marine environment near background values for naturally occurring substances.
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- Procedural environmental obligations that arise under the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental matters to which both the EU and UK are a party.
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- Customary international law obligations between member states of the EU, such as those concerning the internationally coordinated management of transboundary waters under the Water Framework Directive

Post-Brexit UK Environmental Legislation and Governance

- Post-Brexit, in the view of the Government, continuity in environmental protection will be achieved by repatriation of legislation, without changing its substantive regulatory content, in the short term at least.
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- The big questions: what has EU law has contributed to environmental law in the UK and whether this contribution is capable of being faithfully replicated in national law?

- Lee and Fisher:
- “Much of what is commonly, but broadly, termed ‘environmental law’ is actually about ‘environmental governance’. The legal rules that set obligations for environmental and ecological quality standards and measures actually presuppose an ‘environmental infrastructure’ of responsible public bodies with a range of powers and duties which provide the context in which the substantive rules operate.”
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- “EU law relies upon the capacity of private parties to scrutinise and challenge governments, the powers of domestic courts to ensure implementation of law, the overseeing role of the Commission as the ‘watchdog’ of the treaties and the role of the Court of Justice to determine violations and to impose sanctions in certain cases.
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- In ‘taking back control’ “we forget in the infrastructure of environmental accountability at our peril”.
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- (M. Lee and L. Fisher, ‘Environmental Governance after the EU: the Need for Accountability: An Expert Review’, *OUPblog*, 28 November 2016)

EU Water Legislation after Brexit

- The EU Water Framework Directive 2000/60/EC sets out broad strategic objectives for the chemical, physical and ecological state of diverse natural waters within its scope, particularly the need to meet the environmental objective of 'good status'.
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- The breadth of the WFD, both in terms of the range of assessment, planning and operational activities that must be undertaken and duration of implementation obligations, some of which require actions extending into the indefinite future, make this directive a good 'case study' to illustrate particular aspects of Brexit in a specific environmental context.
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- UK WFD 'Implementing Regulations' establish a division of responsibility between the operational functions, allocated to the Environment Agency in England, and the executive role of the Government ministers acting as the 'appropriate authority'.

- Some WFD Directive obligations are of a continuing kind, in requiring things to be done at future dates, which lie beyond Brexit such as periodic reviews at six year intervals *after* 22 December 2015 – does this involve ongoing commitments to environmental improvements post Brexit extending into the indefinite future?
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- The *dynamic nature* of the Directive? (with successive modifications over time)
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- Is the UK Government proposing to commit itself to “the Directive” as it stands at the point of Brexit, or the evolving EU version, which will become increasingly different over time?
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- The uncertain status of future (post Brexit) guidance formulated at EU level under Common Implementation Strategy even after the UK ceased to be a party to this.

Reporting Obligations

- Certain requirements of a Directive that do not need to be transposed into national law where they are directly binding upon the Government of the member state.
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- The existence of these ‘un-transposed’ obligations under the WFD raises particular problems for post-Brexit continuity, particularly reports to the Commission on implementation etc.
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- The UK position on reporting post-Brexit – it will be necessary to put in place a transparent national system for formally reporting and monitoring environmental information, but how this will link to the EU is unclear.

Conclusion

- To what extent can EU environmental and water protection law be replicated in UK national law?
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- Beyond technical challenges, it is difficult to see how the environmental governance infrastructure that will be lost on Brexit could be matched by national measures to ensure government accountability post Brexit.
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- ‘Environmental pollution (and other kinds of environmental harm) does not respect national boundaries’. If so, a *supra-national* approach is needed in which environmental and ecological problems are identified and addressed by law and other mechanisms subject to international coordination.

- “The UK Government is about to replace the culture of consensus-building and mutuality between nations by a culture of national isolation in which the UK will ‘go it alone’ in redefining environmental problems and regulatory responses independently from its neighbours and without the possibility supra-national scrutiny. If it is true that environmental law is inherently multi-level, polycentric and transnationally coordinated, then the UK seems set to spectacularly unlearn the lessons of the last thirty years.”
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- See W. Howarth, 2017 ‘Brexit and the United Kingdom Water Environment’ 14/3-4 *Journal of European Environmental and Planning Law* pp.294 to 314.