Environmental Law
2023

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UK: Law and Practice & Trends and Developments
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1 Crown Office Row
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1. Regulatory Framework and Law

1.1 Environmental Protection Policies, Principles and Laws

The UK continues to be at the forefront of environmental protection and climate action standard-setting.

There are numerous environmental laws in the UK that cover everything from fly-tipping to littering, pollution, wildlife, conservation, climate change, noise and planning. They can be summarised into the following main categories.

- **Pollution environmental laws:**
  (a) the Control of Pollution Act 1974, which deals with environmental issues such as air, noise, water and atmospheric pollution, as well as waste on land; and
  (b) the Environmental Protection Act 1974, which deals with waste management and emissions into the environment.

- **Wildlife environmental laws:**
  (a) the Wildlife and Countryside Act 1981, which complies with the European Council directives on the conservation of wild birds;
  (b) the Weeds Act 1959, which deals with the prevention of injurious weed species on private lands in the UK and primarily targets species such as broad-leaved dock, common ragwort, creeping whistle and spear thistle;
  (c) the Protection of Badgers Act 1992, which makes it illegal to attempt to kill, injure or interfere with badgers without a valid licence and consolidates the Badgers Act 1973, 1991 and the Badgers (Further Protection) Act in 1991; and
  (d) the Hunting Act 2004, which makes it illegal to use dogs to hunt mammals such as foxes or hare in the UK.

- **Conservation environmental laws:**
  (a) the Planning (Listed Buildings and Conservation Areas) Act 1990, which deals with the protection of listed buildings and conservation areas in the UK;
  (b) the National Parks and Access to the Countryside Act 1949, which establishes English Nature – a UK government agency to create national parks and areas of outstanding beauty – as well as addressing public rights of way;
  (c) the Ancient Monuments and Archaeological Areas Act 1979, which protects buildings and structures classed as monuments; and
  (d) the Countryside and Rights of Way Act 2000, which provides for the freedom and right to roam uncultivated areas of the UK, such as mountains, moors and heaths.

- **Climate change environmental laws:**
  (a) the Climate Change Act 2008, which deals with the reduction of carbon dioxide emissions in the UK – binding targets have been set that will reduce these emissions from levels recorded in 1990 by at least 80% by 2050;
  (b) the Planning and Energy Act 2008, which enables planning authorities in England and Wales to impose requirements on local planning applications regarding energy use and efficiency;
  (c) the Energy Act 2020, which requires energy providers to meet certain energy efficiency requirements when providing energy to consumers – obligations include carbon emissions reductions and home heating cost reductions; and
  (d) the Environment Act 2021, which is an important piece of legislation that establishes a post-Brexit environmental and climate action framework in the UK.
and deals with matters such as:

(i) improving the natural environment;
(ii) waste and resource efficiency;
(iii) air quality and environmental recall;
(iv) water;
(v) biodiversity;
(vi) local nature recovery strategies;
(vii) conservation; and
(viii) tree felling and planting.

As well as introducing legally binding targets for air quality, nature, water, resource and waste efficiency, the Environment Act 2021 also introduced a new Office for Environmental Protection. The enforcement powers of the new Office for Environmental Protection cover all climate change legislation and hold the government to account on its commitment to reach net zero emissions by 2050.

In addition to the foregoing matters, the current legislative framework governing environmental and climate regulation consists of a combination of international, EU (notwithstanding the UK’s exit from the EU (Brexit) on 31 January 2020) and domestic instruments, including the following.

• The Control of Pollution Act 1974 was passed to cover a number of environmental issues, such as air, noise, water and atmospheric pollution, as well as waste on land.
• The Environmental Protection Act 1974 controls waste management and emissions into the environment.
• The Energy Act 2020 relates to UK enterprise law, which requires energy providers to meet certain energy efficiency requirements when providing energy to consumers.
• The Environmental Permitting Regulations 2010 provide:
  (a) a system for permitting specified environmentally significant operations;
  (b) a system for consenting to water discharges;
  (c) a groundwater permitting system; and
  (d) a system for radioactive substances regulation.

• The Environmental Protection Act 1990 establishes legal responsibilities for pollution control for land air and water. It also covers waste disposal and statutory nuisance, such as noise or smells.
• The Environment Act 1995 provides for the establishment of a number of new agencies and sets new standards for environmental management.
• The Industrial Emissions Directive 2010 aims to achieve a high level of protection of human health and the environment taken as a whole by reducing harmful industrial emissions across the EU – in particular, through better application of best available techniques.
• The Water Resources Act 1991 aims to prevent and minimise pollution of water, whereby it is an offence to cause or knowingly permit any poisonous noxious or polluting material or any solid waste to enter any controlled water.
• The Water Industry Act 1991 sets out the main powers and duties of the water and sewerage companies – thereby replacing those set out in the Water Act 1989 – and defines the powers of the director general of water services.
• The Environmental Change Act 2008 is designed to reduce carbon dioxide emissions in the UK. Binding targets have been set that will reduce these emissions from levels recorded in 1990 by at least 80% by 2050.
• The REACH Enforcement Regulations 2008 govern the registration, evaluation, authorisation and restriction of chemicals. They impose duties primarily on the manufacturers and importers of chemical substances.
The Waste Regulations 2011 and the Hazardous Waste Regulations 2005 require organisations that produce any form of hazardous waste to register with the Environment Agency. They aim to protect human health and the environment by preventing or reducing the adverse impacts of waste management and generation.

2. Enforcement Authorities and Mechanisms

2.1 Regulatory Authorities
The UK is made up of four countries, each of which has its own public body for administering and enforcing environmental law. The Environment Agency is the executive, non-departmental public body for England and regulates major industry and waste, the treatment of some contaminated law, water quality, flooding, and certain aspects of conservation.

Another key environmental regulator in England is the Department for Environment, Food and Rural Affairs (Defra). This central government department acts not only for England, but on behalf of the UK in an international context. Other government departments can also contribute to environmental policy, including:

• the Department for Business, Energy and Industrial Strategy (BEIS), which leads on energy, climate change and clean growth; and
• the Department for Transport (DfT), which is responsible for reducing transport pollution.

Northern Ireland has an executive agency within Defra called the Northern Ireland Environment Agency. The purpose of this body is enhancing Northern Ireland’s environment, delivering health and well-being benefits, and supporting economic growth. This is different to the values highlighted by Wales through Natural Resources Wales, which seeks to promote the interests of its own natural resources – namely, timber and forest products. There is less of an emphasis on environmental and climate regulation and this may be explained by the fact that Wales is the smallest devolved power.

In contrast, Scotland is the largest devolved power and exercises the most power of the devolved administrations. This is evidenced in their referendum attempts to become an independent country. As of 1 October 2021, Environmental Standards Scotland (ESS) was established as the new environmental governance body for Scotland. This was brought in under the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. The purpose is to prevent enforcement gaps arising from the UK leaving the EU.

2.2 Co-operation
Post-Brexit, the UK government and devolved administrations remain committed to improving environmental protection. The UK–EU Trade and Co-operation Agreement commits both parties to non-regression on levels of environmental and climate protection. This includes associate targets that existed when the UK left the EU. The Trade and Co-operation Agreement allows both parties to take measures where divergence in environmental protections impacts trade. It acts as a check on the UK lowering levels of environmental protection.

Domestically, the maintenance of UK environmental protections in relation to international trade are found in the Trade Act 2021 and the Agriculture Act 2020. In implementing “continuity agreements”, the Trade Act requires that regulations must be consistent with maintaining
UK levels of statutory protection in respect of human, animal and plant life or health, animal welfare and environmental protection.

3. Environmental Protections

3.1 Protection of Environmental Assets
There are a number of regimes that seek to protect the UK’s environmental assets. The Environmental Permitting Regime (EPR) regulates a great deal of these assets.

Air
The EPR regulates emissions into the air for most polluting installations. Emissions of sulphur dioxide, carbon monoxide, nitrogen oxide and particulate matter are subject to controls imposed by the EPR.

Certain energy and other industrial activities fall within the EU emissions trading scheme and require a greenhouse gas permit.

For non-EPR activities, the Clean Air Act 1993 may be relevant. The Environment Act 2021 will implement a system of financial penalties for emission of smoke in smoke control areas.

Water – Fresh and Sea

Habitats and Biodiversity
The key regimes affecting development projects are the habitats and birds regimes, originally regulated in the UK under the Habitats Directive ((EU) 92/43) and Birds Directive ((EU) 2009/147). These regimes are now implemented under the Conservation of Habitats and Species Regulations 2017 (SI 2017/1012) and the Conservation of Offshore Marine Habitats and Species Regulations 2017 (SI 2017/1013).

Sites that are considered to be of special interest owing to their wildlife, geology or landform are protected by designation as Sites of Special Scientific Interest by Natural England or Natural Resources Wales per the Wildlife and Countryside Act 1981.

3.2 Breaching Protections
Depending on the regulation or regime which has been breached, there are penalties such as fines (fixed or unlimited) and summary convictions.

4. Environmental Incidents and Permits

4.1 Investigative and Access Powers
The Environment Agency has wide investigatory powers when it comes to environmental incidents. These powers are conferred on them under Section 108 of the Environment Act 1995.

Under the Environmental Permitting (England and Wales) Regulations 2016 (as amended) (the “EP Regulations”), a person may be required to provide as much information as the regulator considered reasonably necessary for the purposes of its investigation. The Environment Agency further has powers to conduct interviews under caution (in accordance with the Police and Criminal Evidence Act 1984).

4.2 Environmental Permits/Approvals
The EP Regulations govern environmental permitting in England and Wales. The EP Regulations combine a number of historic permitting and licensing regimes, and introduced a more streamlined regime.
An “environmental permit” (EP) may be required for activities that:

- pollute the air, water or land;
- increase flood risk; and
- adversely affect land drainage.

A single EP can cover multiple activities. They are required for:

- installations (eg, of an industrial facility or manufacturing site);
- waste operations;
- mining waste operations;
- combustion plants;
- small waste incinerations plants;
- mobile plants; and
- solvent emissions activity.

4.3 Regulators’ Approach to Policy and Enforcement

The Environment Agency has an Enforcement and Sanctions Policy, which implements an “outcomes-focused” approach to enforcement. The key outcomes of the policy are:

- stopping illegal activity from occurring or continuing;
- putting right environmental harm or damage;
- bringing illegal activity under regulatory control; and
- punishing and deterring offenders.

The EP Regulations’ SI 2016/1154 sets out the framework for environmental permits, enforcement actions and offences, public registers and the powers and functions of the regulator.

4.4 Transferring Permits/Approvals

Environmental permits (EPs) can be transferred from one holder to another, subject to conditions. They can be transferred in whole or in part. The process for making a transfer depends on the type of EP in question – for example, transferring an installation permit is more complicated than the application to transfer a water discharge-related EP.

4.5 Consequences of Breaching Permits/Approvals

Breach of environmental law is a matter of criminal law in the UK. This means that the ultimate sanction would be prosecution before the courts.

Civil sanctions may be used by the regulator in certain situations – namely, where there is an option for an enforcement undertaking to be issued. An enforcement undertaking is where the business initiates an offer in the first instance to undertake to put in place certain measures (eg, to put right the effects of their offending). If the enforcement undertaking is accepted, the regulator can no longer prosecute. These are usually accepted where it would not be in the public interest to prosecute.

5. Environmental Liability

5.1 Key Types of Liability

Criminal and civil liabilities can be imposed on parties that have caused environmental damage or breached environmental law.

Criminal prosecution is available to regulators where it is in the public interest to prosecute. This applies to the more serious offences where there has been harm and/or culpability.

Civil sanctions are imposed by the regulator and include:

- fixed and variable monetary penalties;
- compliance notices;
5.2 Disclosure
There is no general duty to report all pollution incidents; however, duties can arise for certain categories of harm or be imposed under an EP. EP conditions may require notification to the regulator in the event of a permit breach or on the occurrence of an incident that may cause significant pollution or other adverse effects to health, safety or the environment.

The Control of Major Accident Hazard Regulations 2015 (COMAH) aim to limit the consequences of major accidents involving hazardous substances to humans and the environment. Operators of COMAH sites (ie, businesses that deal with dangerous substances) are required to keep local authorities informed about the hazardous substances and about possible major accidents and their consequences. Operators must inform the relevant authority of a major accident as soon as is practicable.

6. Environmental Incidents and Damage

6.1 Liability for Historical Environmental Incidents or Damage
The principle under the contaminated land regime is that the “polluter pays”. The contaminated land regime is the statutory framework set out in Part IIA of the Environmental Protection Act 1990.

Liability is determined according to a hierarchy. First, liability is imposed on those who caused or knowingly permitted the contaminating substances to be present (“Class A” person). If no Class A person can be found, then liability will pass to the current owner or occupier of the site (“Class B” person).

6.2 Reporting Requirements
Please refer to 5.2 Disclosure.

6.3 Types of Liability and Key Defences
As mentioned in 5.1 Key Types of Liability, there are both criminal and civil liabilities for environmental incidents or damages.

The defences available will vary depending on the nature of the liability and breach. Although the majority of offences are strict liability offences, there a few offences where it will be for the defence to demonstrate that reasonable precautions and appropriate due diligence was carried out. Other defences include “best practicable means”, which is a widely used defence that is available against statutory nuisance actions.

7. Corporate Liability

7.1 Liability for Environmental Damage or Breaches of Environmental Law
A corporate entity is a legal person and subject to the rules that relate to legal and natural
persons in respect of the environment. Further ESG standards impose obligations on corporate entities in respect of the environment.

By way of example, section 78F of the Environmental Protection Act 1990 defines who may be an “appropriate person” for the purposes of liability – that is, a person liable to remediate environmental damage, particularly in the form of contaminated land. In short, a person is liable if it “caused or knowingly permitted” the contaminating substance(s) “to be in, on or under” the land in question. If, “after reasonable inquiry”, no such person can be found, the responsibility for remediation falls to the owner or occupier of the land.

The person that either caused or knowingly permitted the contamination is liable. Such a person is categorised as a Class A person. If no Class A person can be found, the current owner or occupier of the site becomes liable and is categorised as a Class B person. A Class B person need not have been aware of the contamination occurring in order to be liable for it. Given the potential scale of remediation costs, the process of identifying the presence of contaminated land is a key issue in property transactions and corporate acquisitions involving the transfer of land. Where multiple Class A or Class B persons exist, the enforcing authority will apportion liability according to the rules set out in the Environmental Protection Act 1990.

7.2 Environmental Taxes
Environmental taxes, commonly known as “green taxes” in the UK, are taxes and schemes that apply to businesses to encourage more environmentally friendly practices. The UK government has different types of green taxes, depending on the business industry and size.

There are several green taxes in the UK that promote green trading:

- Climate Change Levy (CCL);
- Aggregates Levy;
- Landfill Tax;
- EU Emissions Trading System;
- Carbon Price Support; and
- Plastic Packaging Tax.

**Climate Change Levy**
This tax aims to encourage energy efficiency and reduce gas emissions to make businesses more environmentally responsible.

The CCL is made of two rates:

- the main levy rate – applies if a business pays the standard rate of VAT; and
- Carbon Price Support rate – applies to owners of electricity-generating stations and operators of combined heat and power stations.

Businesses will most likely have to pay the CCL if they operate in the following industries:

- industrial (eg, machinery and tool manufactures);
- construction;
- commercial;
- agricultural; and
- public services.

7.3 Incentives, Exemptions and Penalties
In the 2021 Spring Budget, the UK government announced the introduction of two new measures to support green investment and the decarbonisation of buildings. The first measure provides an exemption from business rates for eligible plant and machinery used in on-site renewable energy generation and storage.
The exemption provides business with an incentive to continue to invest in green energy technologies. It took effect on 1 April 2022 and will last until 31 March 2035, for business premises situated in England.

The second measure allows 100% rate relief for eligible low-carbon heat networks that have their own rates bill.

7.4 Shareholder or Parent Company Liability
Shareholders in a limited liability company normally have their liability limited to the unpaid amount of the nominal value of their shares. However, Section 157 of the Environmental Protection Act 1990 (EPA) can render a company’s shareholders liable “where the affairs of a body corporate are managed by its members”.

A parent company is not responsible for the acts or omissions of its subsidiary merely because of its role as parent. However, its actions can lead to the assumption of responsibilities.

A parent company may owe a duty of care to safeguard the environment and those who depend on it from the actions of its subsidiaries where it has publicly undertaken to do so. This may be the case where the parent company has issued public statements and reports.

7.5 ESG Requirements
Climate-focused corporate governance is rapidly becoming a key focus for businesses. There is no single piece of legislation or regulation in the UK that addresses ESG. The main sources include:

- the Paris Agreement on Climate Change 2015 (which came into force on 4 November 2016);
- the UK Corporate Governance Code 2018 (UKCGC);
- the Companies Act 2006;
- the UK Stewardship Code 2020 (UKSC); and
- the Climate Change Act 2008.

The result of ESG being derived from several legislative and regulatory sources is that the UK’s ESG legal landscape is fragmented. This fragmentation results in a broad spectrum of laws and regulations.

The UKCGC and the UKSC are integral parts of the UK’s corporate governance regime.

The UKCGC provides that companies must report on how they have assessed opportunities and risks relevant to the future success of their business.

Businesses will need to assess the systemic risk of climate change and develop appropriate strategies for managing it. Climate-focused corporate governance will continue to evolve. The younger, “millennial” investors, consumers and broader stakeholders are generally climate change-focused and support businesses with a strong climate element in their corporate governance strategy.

ESG reporting is a requirement in the UK following the mandatory Task Force on Climate-Related Financial Disclosure (TCFD)-aligned reporting requirements that were introduced on 6 April 2022.

7.6 Environmental Audits
For new projects, the local planning authority may perform environmental impact assessments (EIAs), which are required under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the “EIA Regulations”).
This is to ensure that the authority accounts for the relevant environmental information and the effects of a proposed development before giving consent. An EIA must be carried out if a development falls within Schedule 1 of the EIA Regulations. These are generally developments over a certain size, such as power stations and motorways.

8. Personal Liability

8.1 Directors and Other Officers
Generally, directors will not be liable for the acts or omissions of a company acting in the ordinary course of business. However, personal liability may arise for environmental offences where the director has committed the offence themselves. In such cases, the company and the director will be jointly charged with the offence and the director will be considered liable as a principal offender or accessory.

Directors may also become personally liable under certain environmental regimes where an offence is committed by the company with the consent of the director or where the offence can be attributed to the neglect of the director.

8.2 Insuring Against Liability
Directors’ and officers’ liability insurance (D&O insurance) is offered by insurance companies and is intended to cover liability incurred by a director in the course of their normal duties. D&O insurance will most likely not cover pollution incidents, although it may cover defence costs or shareholder claims alleging a fall in value of the company due to a pollution loss.

9. Insurance

9.1 Environmental Insurance
Environmental insurance is not a large proportion of the insurance market in the UK. Where an environmental issue is a key consideration, insurance policies do tend to provide a solution. Increased competition in the market is helping to drive down premiums and make environmental insurance more accessible.

Environmental Liability Insurance (ELI) is available both for costs arising from common-law claims and claims arising from both UK and EU legislation. The Association of British Insurers notes that types of ELI on the market can cover:

- both sudden pollution and gradual pollution;
- first-party (own site) clean-up costs imposed by regulatory authorities (ie, regulatory contaminated land liabilities);
- third-party liability including impact on property value;
- nuisance claims; and
- legal costs and expenses.

10. Lender Liability

10.1 Financial Institutions/Lender Liability
Contaminated land lenders generally seek to manage their risk of lending to a company by putting in place security over its assets. Security often takes the form of floating and/or fixed charges, and may result in the lender becoming an owner or occupier of the land.

Lenders may incur a form of indirect liability where remediation is carried out by an enforcing authority under Section 78N of the Environmental Protection Act 1990. The enforcing authority
may secure recovery of its costs by means of a charge under Section 78P. The charge is on the premises and, in accordance with Westminster City Council v Haymarket, would take priority over any existing or future incumbrances. It is possible, depending on the amount of control exercised by a lender, that indirect liability might arise if the lender is considered to be a shadow director of the company.

10.2 Lender Protection
As a consequence of the potential environmental liabilities that lenders may attract, it is important that they carry out adequate environmental due diligence prior to taking security. Lenders should also revisit the position before enforcing security. Lenders have been pursued in these circumstances. In Bank Lending and Environmental Liability (BRASS Centre 2005, p 12) Robert Lee and Tamara Egede refer to a case in which Midland Bank (now HSBC) was served with a remediation notice, having taken possession of a site that had been contaminated by the disposal of tyres on it.

11. Civil Liability

11.1 Civil Claims
English common law provides for circumstances in which proceedings can be brought against a person who controls a substance that has escaped and caused damage – see Rylands v Fletcher (1868) LR 3 HL 330.

Part IIA of the Environmental Protection Act 1990 sets out the process for determining liability. Please see 12.1 Transferring or Apportioning Liability for further details.

11.2 Exemplary or Punitive Damages
As a general principle of English law, damages are intended to compensate not to punish. There are certain limited exceptions; advice should be sought on the particular facts of each case.

11.3 Class or Group Actions
A claim against Severn Trent Water for allegedly misleading regulators about the number of times it discharged sewage into waterways has been brought in the Competition Appeal Tribunal (CAT) on behalf of the company’s eight million customers. It is the first time the “opt-out” collective action regime established by the Consumer Rights Act 2015 has been used to bring an environmental claim and marks a significant development in the ESG litigation landscape in the UK.

This case is the first of six parallel claims to be brought against water companies on behalf of more than 20 million customers across the UK. It is alleged that the companies abused their dominant position in the market to overcharge customers. It is also alleged that by failing to properly report sewage spills to the Environment Agency and Ofwat, the companies evaded penalties that would have affected the price they could charge customers – with customers instead paying water bills on the basis that the companies were meeting required standards. If successful, the claims could require the defendants to pay compensation to anyone who has paid a water bill to any of these companies since April 2020. Total compensation arising from the six cases could potentially amount to more than GBP800 million.

11.4 Landmark Cases
In February 2023, ClientEarth – as a shareholder – filed a case against Shell’s Board of Directors for failing to move away from fossil fuels. They
argued that this meant that they were failing to properly manage climate risks and that the directors were in breach of their duties. In March 2023, the UK High Court dismissed the case; however they have since granted ClientEarth an oral hearing, in which they will have the opportunity to ask the judge to reconsider. This was the first example of an activist shareholder applying established general principles of company law to the ESG arena in the courts of England and Wales.

12. Contractual Agreements

12.1 Transferring or Apportioning Liability

It depends on the breach in question and the nature of the person committing the breach in the context of its regulatory obligations. As a general principle, in suitable cases, indemnities and other contractual agreements may be used to transfer or apportion liability for incidental damage or breaches of law. Illegality of the contract or the impossibility of the performance of it may limit or place exceptions on such arrangements. Arrangements made between private parties generally do not bind regulators. There may be exceptions where the regulator has been closely involved in any transfer of obligations and where undertakings may have been given to place the buyer in the seller’s position vis-à-vis the regulator, which the regulator has approved. Each case should be looked at on its own specific facts and merits and advice sought sooner rather than later.

Part IIA of the Environmental Protection Act 1990 sets out the process for determining liability. Section 78F(7) deals with the determination of the appropriate person to bear responsibility for remediation and provides that “where two or more persons are appropriate persons in relation to any particular thing which is to be done by way of remediation, they shall be liable to bear the cost of doing that thing in proportions determined by the enforcing authority in accordance with guidance issued for the purpose by the Secretary of State”.

12.2 Environmental Insurance

Environmental impairment liability covers claims for:

- personal injury;
- damage to property;
- clean-up expenses;
- legal expenses; and
- fines that have been incurred as a result of pollution.

Often property and liability insurance policies have exclusions relating to pollution, which means that additional insurance for pollution-related damage is still required. Given that the extent of the pollution exclusions varies from policy to policy, numerous different types of environmental insurance policies have been developed by insurance companies to cover them.

Environmental insurance is a risk transfer solution to indemnify the insured against losses arising as a result of potential environmental liabilities. In the case of property-based coverage, the insured can be the buyer or seller of a property (or often both).

A separate environmental insurance policy is often required because public liability insurance typically excludes environmental liabilities, with the exception of sudden, unintended and unexpected pollution incidents. Public liability insurance will only provide cover for third-party dam-
ages and not for the remediation of the property of the insured.

Lloyd’s of London – the oldest and most sophisticated insurance market in the world – and a number of other insurers provide environmental insurance.

13. Contaminated Land

13.1 Key Laws Governing Contaminated Land

The contaminated land regime is set out in Part 2A of the Environmental Protection Act 1990. Other key legislation includes:

• Contaminated Land (England) Regulations 2006 (SI 2006/1380);
• Contaminated Land (Wales) Regulations 2006 (SI 2006/2989);
• Radioactive Contaminated Land (Modification of Enactments) (England) Regulations 2006 (SI 2006/1379); and
• Radioactive Contaminated Land (Modification of Enactments) (Wales) Regulations 2006 (SI 2006/2988).

The contaminated land legislation must be read in conjunction with the following statutory guidance:

• Defra’s Contaminated Land Statutory Guidance (April 2012);
• BEIS’ Radioactive contaminated land: statutory guidance (June 2018);
• Welsh Government’s Contaminated Land Statutory Guidance (April 2012); and

The Environmental (Amendment etc) (EU Exit) Regulations (SI 2019/458) were made on 27 February 2019 and came into force at the end of the transition period. The Regulations (as amended) make technical amendments to a range of environmental legislation to correct deficiencies that would otherwise result from Brexit, including the Contaminated Land (England) Regulations 2006 relation to the pollution of controlled waters to enable the regime to continue to operate. They removed references to EU legislation or obligations, and where appropriate, replace them with references to retained EU law and obligations.

13.2 Clearing Contaminated Land

For most sites, the local authority is responsible for requiring remediation. Where land has been identified as contaminated land, the enforcing authority is under an obligation to serve a remediation notice to the relevant appropriate persons.

The contaminated land regime imposes liability for the remediation of contaminated land as follows.

• Class A persons – in the first instance, liability is imposed on those who caused or knowingly permitted the contaminating substances to be present in, on or under the land. The 2006 Contaminated Land Circular (now obsolete) stated that, for a person to knowingly permit contamination, they must have known about the contamination and had the power to do something about it. This means that the person must have had the ability to take steps to prevent or reasonably remove the contamination and had a reasonable opportunity to do so. The enforcing authority will serve the remediation notice on any Class A persons first.
• Class B persons – if no Class A person can be found, liability passes to the current owner or occupier of the site (regardless of whether it was aware of the contamination). However, a Class B person will not be liable for water pollution (Section 178 of the Environmental Protection Act 1990).

13.3 Determining Liability
Defra’s Contaminated Land Statutory Guidance (2012) set out a defined procedure for the enforcing authority to determine who is liable for contaminated land.

There are several stages to the procedure:

• Stage 1: Initial Identification of Liable Persons – the enforcing authority must identify all potential appropriate persons and should consider whether any appropriate persons are exempt at this stage;
• Stage 2: Characterising Remediation Actions – where there is more than one significant contaminant linkage, the enforcing authority must decide how each remediation action that is needed relates to the different significant contaminant linkages;
• Stage 3: Attributing Responsibilities Between Liability Groups – where one remediation action will be part of the remediation of several significant contaminant linkages, the enforcing authority must determine how to attribute responsibility for the remediation action between the different liability groups that are responsible for the separate significant contaminant linkages;
• Stage 4 – Excluding Members of a Liability Group; and
• Stage 5: Apportioning Liability Between Members of a Liability Group – the enforcing authority needs to divide the costs of remediation between the appropriate persons left in each liability group after the exclusion tests have been applied.

13.4 Proceedings Against Polluters
There are multiple causes of action potentially available for bringing proceedings against polluters. Depending on the value of the claim, these can be brought in the county court or the High Court.

13.5 Rights and Obligations Applicable to Waste Operators
A duty of care applies to anyone that imports, produces, carries, keeps, treats or disposes of controlled waste or to any dealer or broker that has control of controlled waste (referred to as a “waste holder”). The following are included in the definition of a waste holder.

• Waste producer – any person whose activities produce waste, including:
  (a) private sector businesses such as shops, offices, factories and tradespersons (eg, electricians, builders, glaziers and plumbers);
  (b) public sector services such as schools, hospitals and prisons;
  (c) charities and voluntary and community groups; and
  (d) permitted operations or exempt facilities that produce waste as part of their activities.

Anyone that carries out a waste operation that changes the nature or composition of the waste is regarded as a producer of the waste. Waste producers play a key role under the duty of care requirements, as they are in the best position to identify the nature and characteristics of the waste.
The duty of care requirements apply to household, industrial and commercial waste, also known as “controlled waste”. Whether a substance or object is waste is determined on a case-by-case basis.

The following definitions describe common waste operations and processes.

- **Recovery** – any operation that has the main result of waste serving a useful purpose by replacing non-waste materials that would otherwise have been used to fulfil a particular function. Examples include incineration for energy recovery.
- **Preparation for reuse** – the operation or process of checking, cleaning or repairing products that have previously been discarded so that they can be reused without any other pre-processing. Examples include repairing bicycles, furniture, or electrical or electronic equipment that have been previously discarded by the owner.
- **Recycling** – any operation through which waste is reprocessed into products, materials or substances, whether for its original or other purposes (e.g., crushed glass graded for blasting or playground surfaces constructed from waste tyres).
- **Disposal** – any operation that is not recovery, even where the operation has a secondary consequence of reclaiming substances or energy (e.g., landfill).
- **Treatment** – any recovery or disposal operation, including preparation prior to recovery or disposal.

Waste holders have a responsibility to take all reasonable steps to ensure that when waste is transferred to another waste holder, the waste is managed correctly throughout its complete journey to disposal or recovery. This can be done by:

- checking that the next waste holder is authorised to take the waste;
- asking the next waste holder where it is going to take the waste and checking that the intended destination is authorised to accept that waste; and
- carrying out more detailed checks if it is suspected that the waste is not being handled in line with the duty of care – for example, requesting evidence that waste has arrived at the intended destination and has been accurately described.

Waste holders with a duty of care must:

- prevent unauthorised or harmful deposit, treatment or disposal of waste;
• prevent a breach by any other person to meet the requirements to have an environmental permit or prevent a breach of a permit condition;
• prevent the escape of waste from one’s control;
• ensure that any person to whom the waste will be transferred has the correct authorisation; and
• provide an accurate description of the waste when it is transferred to another person.

13.6 Investigating Environmental Accidents
The Control of Major Accident Hazards Regulations 2015 require that businesses take all necessary measures to prevent major accidents involving dangerous substances and limit the consequences to individuals and the environment of any major accidents that occur.

The COMAH-competent authority undertakes investigations. The investigation may be concerned with issues related to COMAH or another legislative regime, such as the Health and Safety at Work Act or the EP Regulations.

14. Climate Change and Emissions Trading
14.1 Key Policies, Principles and Laws
The Climate Change Act 2008 is the UK’s legal foundation for its approach to addressing and responding to climate change. The main objectives are:

• to make the UK’s voluntary national targets for the reduction of greenhouse gas (GHG) emissions legally binding;
• to provide a long-term framework for UK climate change policy; and
• to enable the UK to drive international negotiations on a post-Kyoto Protocol agreement.

The Climate Change Act 2008 applies to the whole of the UK, including the devolved administrations, subject to the provisions set out in Section 99. The Kyoto Protocol informed the Climate Change Act. Under the Climate Change Act, it is the Secretary of State’s duty to ensure that the UK’s net carbon account for 2050 is at least 100% lower than the 1990 baseline, in line with the Kyoto Protocol target.

The UK maintains a commitment to international and national targets for reducing GHGs – namely, signatories to the Kyoto Protocol were required to cut GHG emissions by 18% by 2020. In order to achieve this, the UK government recognised the need to implement domestic frameworks to reduce GHGs.

Earlier policy laid the groundwork for the materialisation of the Climate Change Act. The Department of Energy and Climate Change (DECC) was created in 2008.

In July 2016 the functions of the DECC were transferred to BEIS, which leads on policy for reducing emissions and is responsible for promoting action on climate change domestically and internationally. This meets the mitigation requirement under Article 4 of the Paris Agreement, which provides that developed countries party to the Paris Agreement will undertake economy-wide reduction targets.

On 3 February 2023, the Climate Change (Targeted Greenhouse Gases) Order 2023 (SI 2023/118) came into force. This Order widened
the scope of GHGs under that Climate Change Act to also include nitrogen trifluoride.

Future UK Climate Change Policy
The UK’s climate change policy continues to evolve.

On 11 January 2018, the government published A Green Future: Our 25 Year Plan to Improve the Environment (the “25-year plan”). The 25-year plan is directly informed by the national and international multilateral legal regime and makes the following commitments:

• to ensure the UK continues to lead the world in delivering on climate change commitments – this includes fulfilling environmental aspects of the UN Sustainable Developments Goals in compliance with the UNFCCC Paris Climate Agreement;
• to implement sustainable and effective National Adaptation Programmes, which are required under Section 58 of the Climate Change Act 2008;
• to introduce a reporting framework for businesses; and
• to assist the UK in introducing a Forest Carbon Guarantee scheme.

The 25-year plan commits Defra to helping developing nations protect and improve the environment.

In June 2022, the House of Commons European Scrutiny Committee launched an inquiry into regulating after Brexit. This included exploring diverging from EU law on certain areas of environmental law, such as:

• environmental impact assessments;
• protection of habitats and biodiversity;
• regulation of chemicals; and
• through the implementation of the Environment Act 2021.

14.2 Targets to Reduce Greenhouse Gas Emissions
The United Nations Framework Convention on Climate Change
The global multilateral climate change legal regime is set out in the United Nations Framework Convention on Climate Change (1992) (UNFCCC). This international environmental treaty unites the majority of the world’s countries through a collective agreement that climate change is a vital issue, which must be addressed. The UNFCCC seeks to combat climate change by stabilising emissions of greenhouse gases (GHGs).

There are several main commitments under Article 4 of the UNFCCC that parties to the agreement are obliged to carry out in order to mitigate climate change. These include the following:

• to develop and provide a regularly updated national inventory of GHG emissions and removal by carbon sinks (carbon sinks remove carbon dioxide from the atmosphere and include vegetation and the ocean) – these updates are to be reported to the annual UNFCCC Conference of the Parties (COP);
• to draw up and implement national programmes that set out measures for mitigating climate change;
• to develop and transfer technologies to reduce GHGs;
• to conserve and enhance carbon sinks;
• the integration of climate change into social, economic and environmental policy; and
• information sharing and training.
Kyoto Protocol and Paris Agreement
The Kyoto Protocol 1997 imposed legally binding commitments on certain parties to the UNFCCC in order to achieve GHG reduction targets. The Paris Agreement was adopted by 196 Parties at COP21 on 12 December 2015. It sets out two main objectives:

• to combat climate change by ensuring that by the end of this century global temperatures do not increase by more than 1.5°C above pre-industrial levels; and
• to achieve zero net emissions by the second half of this century.

Under Articles 3 and 4 of the Paris Agreement, Parties are obliged to make and communicate “nationally determined contributions” (NDCs). These are national climate change action plans that set out a signatory’s aim to address climate change. NDCs demonstrate a signatory’s highest level of ambition towards meeting the goals of the Paris Agreement.

The UK is a signatory to the UNFCCC. The UK ratified both the Kyoto Protocol and the Paris Agreement. The Greenhouse Gas Emissions (Kyoto Protocol Registry) Regulations 2021 (SI 2021/511) came into force in the UK on 1 May 2021. These regulations provide a clear legal basis for the UK to operate the new UK Kyoto Protocol registry separately from the EU software platform following Brexit.

UK Ten Point Plan
In November 2020, Boris Johnson – then the UK’s Prime Minister – set out a Ten Point Plan for a green industrial revolution. The Ten Point Plan detailed a number of targets for investment in sustainability and developments to the economy to support a Green Industrial Revolution by 2030. The aim is that by achieving these targets, the UK will be able to achieve net-zero GHG emissions by 2050.

In December 2020, Boris Johnson announced that the government would increase the UK’s GHG reduction target to reduce emissions by 68% by 2030. This target is the latest part of the UK’s NDC under the Paris Agreement. In December 2020, the UK government published the:

• Adaptation Communication to the UNFCCC;
• NDC Communications to the UNFCCC; and
• Biennial Finance Communication to the UNFCCC 2020.

These publications demonstrate the UK’s obligations to adopt primary negotiation issues such as mitigation, adaptation and finance pillars of the Paris Agreement.

The UK actively encourages the creation of environments and partnerships that will provide financial and technical enabling mechanisms to other nations in order to aid them in taking action on adaptation, loss and damage. In September 2019, the UK launched its Call for Action on Adaptation and Resilience at the United Nations Climate Action Summit. The UK built on this and launched the UN Group of Friends on Adaptation and Resilience. This platform allows members to share knowledge and best practices in connection with climate change.

The UK co-operates with a wide range of global partners to determine how to deliver climate finance in a responsive manner. As part of the UK’s G7 Presidency in 2021, the UK encouraged members to increase commitments to the financing of international adaptation and resilience.
COP26
In October and November 2021, the UK (in partnership with Italy) hosted the UNFCCC COP26 in Glasgow. The outcome was the Glasgow Climate Pact and the completion of the Paris Handbook.

The Glasgow Climate Pact formalised the agreements between almost 200 countries that the 1.5°C target of the Paris Agreement remains in sight and that action on dealing with climate impacts will increase dramatically. This can only be achieved if every country delivers on what they pledged at COP26.

The Glasgow Climate Pact will drive global action through four main pillars:

• reducing emissions (mitigation);
• helping those already impacted by climate change (adaptation);
• enabling countries to deliver on their climate goals (finance); and
• working together to deliver even greater action (collaboration).

Decisions related to the foregoing fall under three UN climate treaties: the COP, the Kyoto Protocol and the Paris Agreement. The Glasgow Climate Pact is manifested across all three.

15. Asbestos

15.1 Key Policies, Principles and Laws Relating to Asbestos
It is illegal to use any form of asbestos in the construction or refurbishment of any building in the UK.

The Control of Asbestos Regulations 2012 (SI 2012/632) (CAR) impose an obligation on the “dutyholder”, in relation to non-domestic premises, to:

• determine whether asbestos is present in a building or is likely to be present; and
• manage any asbestos that is or is likely to be present.

Failure to comply with CAR constitutes a criminal offence. It is advised to read CAR in conjunction with the Approved Code of Practice published by the Health and Safety Executive. Other guidance includes the guidance note published by the Royal Institute of Chartered Surveyors (RICS), Asbestos: Legal Requirements and Best Practice for Property Professionals and Clients (September 2022).

16. Waste

16.1 Key Laws and Regulatory Controls
Waste is a heavily regulated area in the UK and every stage of the waste life cycle is controlled. Waste management is regulated under the EP regime.

The EU Waste Framework Directive 2008 (2008/98/EC) (WFD) is the key EU Directive regulating waste and it forms the basis of waste law in the UK through retained EU law.

The WFD has two main objectives:

• protection of human health and the environment; and
• conservation of raw materials and strengthening the economic value of waste.

The WFD does the following:

• defines waste;
• requires waste disposal and recovery to be permitted;
• defines hazardous waste and brings its control within a single waste management framework;
• sets out a hierarchy of how waste should be managed and specifies that the waste hierarchy will apply as a priority order in all waste prevention and management legislation;
• requires EU member states to establish waste prevention programmes by December 2013 and requires the EC to set waste prevention objectives for 2020; and
• sets recycling targets and requires member states to take measures to encourage re-use and recycling, including setting up separate collections for paper, metals, plastics and glass; and
• clarifies:
  (a) when a substance or material should be treated as a by-product, rather than waste;
  (b) when waste ceases to be waste; and
  (c) the meaning of recovery and disposal operations.

25-Year Plan to Improve the Environment
As mentioned in 14.1 Key Policies, Principles and Laws, in 2018, the UK government published its 25-year plan to improve the environment in England. It was the first environmental improvement plan under the Environment Act 2021. The 25-year plan indicated that, in 2018, the government would publish a new Resources and Waste Strategy aimed at making the UK a world leader in resource efficiency.

Environment Act 2021 Binding Waste Targets
The Environment Act 2021 requires the government to introduce and implement legally binding long-term targets for water, air quality, biodiversity and waste. On 31 January 2023, the Environmental Targets (Residual Waste) (England) Regulations 2023 (SI 2023/92) came into force. It will implement the resource efficiency and waste reduction targets so that, by the end of 2042, the total mass of residual waste for the calendar year 2042 does not exceed 287 kilograms per head of population in England.

Resources and Waste Provisional Common Framework
The Resources and Waste Provisional Common Framework is a command paper that sets out how the UK government and devolved governments propose to work together on resources and waste policy areas. The Provisional Common Framework has received ministerial approval from all four governments. It was laid in the UK Parliament to enable parliamentary scrutiny to begin in December 2022.

Resources and Waste Strategy for England
The Resources and Waste Strategy for England (December 2018) sets out how the government proposes to:

• preserve the stock of material resources by minimising waste, promoting resource efficiency and moving towards a circular economy based on the principles of re-use, remanufacture, repair and recycle;
• minimise the damage caused to the natural environment by reducing and managing waste safely and carefully; and
• deal with waste crime.

Waste Prevention Programme for England
In July 2023, Defra published its updated waste prevention plan (WPP), Waste Prevention Programme for England: Maximising Resources, Minimising Waste, together with the summary of responses to its 2021 consultation on the WPP. The WPP sets out the UK government’s inten-
tions on waste prevention across seven key sectors: construction, textiles, furniture, electronics, food, road vehicles, and plastics and packaging.

16.2 Retention of Environmental Liability
Defra has issued detailed guidance in the form of Waste Duty of Care: Code of Practice, which should be consulted on a case-by-case basis.

16.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods
The UK has an Extended Producer Responsibility regime in force for the recycling of waste packaging. This means that all businesses that make or use packaging – excluding certain smaller companies – have a legal obligation to ensure that a proportion of what they place on the market is recovered and recycled. The regime came into force in 1997 and was updated in 2007 with the introduction of the Producer Responsibility (Packaging Waste) Regulations 2007. There have been a number of amendments to the regulations since 2007. Under the regulations, packaging producers can meet their recycling obligations by buying recycling evidence – known as packaging waste recovery notes or packaging waste export recovery notes (PERNs) – from accredited re-processors or exporters. The system is known in the industry as the PERN system.

17. Environmental Disclosure and Information

17.1 Self-Reporting Requirements
There is no general duty to report environmental incidents.

17.2 Public Environmental Information
The Environment Agency is obliged to maintain and make available for inspection public registers of information. Requests for information may be made under the Freedom of Information Act 2000, which provides for a public right of access to information held by public authorities.

The Environmental Information Regulations 2004 is a UK statutory instrument that provides a statutory right of access to environmental information held by UK public authorities. The regulations came into force on 1 January 2005.

17.3 Corporate Disclosure Requirement
The Task Force on Climate-Related Financial Disclosures (TCFD) is an industry-led initiative created to develop recommendations for voluntary climate-related financial disclosures.

From April 2022, the UK has introduced mandatory TCFD-aligned reporting requirements for the private sector. It is the first G20 country to make it mandatory for its largest businesses to disclose their climate-related risks and opportunities. These mandatory requirements apply to more than 13,000 of the largest UK-registered companies and financial institutions, in line with recommendations from the TCFD.

This mandate aims to increase climate-related engagement between investors and companies. Another benefit is that by measuring their climate impact, risks and opportunities, businesses may be compelled to increase their environmental initiatives and accelerate action.

The influence of the TCFD on UK policy will have an effect on investment and operational decisions. The TCFD framework provides the opportunity to test the resilience of an organisation’s strategy. Climate-related scenarios can provide
companies with a way to make more informed strategic plans to manage risks and opportunities.

The Financial Conduct Authority (FCA)’s policy statements, *Enhancing climate-related disclosures by asset managers, life insurers and FCA-regulated pension providers* (PS21/24) and *Enhancing climate-related disclosures by standard listed companies* (PS21/23), introduce recommendations consistent with those of the TCFD. Those recommendations were established by the Financial Stability Board in 2015 to create consistent climate-related financial risk disclosures for use by banks, companies and investors in providing information to stakeholders.

Mandatory climate-related disclosures will apply to most UK-registered companies by the end of 2023. Company directors should inform themselves of all relevant developments on an ongoing basis and take proactive steps to meet their evolving obligations.

### 17.4 Green Finance

In June 2021, the UK Debt Management Office and Her Majesty’s Treasury published the UK government’s Green Financing Framework. This framework describes how the UK government plans to finance expenditures through the issuance of green gilts and the retail Green Savings Bonds, which will be critical in tackling climate change and other environmental challenges – funding much-needed infrastructure investment and creating green jobs across the UK. It sets out the basis for the identification, selection, verification and reporting of the green projects that are eligible for financing from the proceeds of the UK government’s green gilt programme and the retail Green Savings Bonds. The framework aligns with the Green Bond Principles as published by the International Capital Market Association (ICMA).

The “green finance” arrangements in the UK are discussed here.

- **Green loans** – this is used as a generic term for any type of loan instrument whose proceeds are used to finance or refinance environmentally sustainable activity. In March 2018, the Loan Markets Association and the Asia Pacific Loan Market Association launched the Green Loan Principles with the support of the ICMA. The Green Loan Principles act as a framework of market standards and guidelines, with the aim of ensuring consistency in the methodology used across the green loan market. They are based on the ICMA’s Green Bond Principles, with the aim of producing uniformity across the financial markets. Demand for green loans has increased exponentially during the past few years, as companies seek to enhance their perceived green credentials and also in light of the anticipation of increased reporting and regulatory oversight in this area.

- **Sustainability-linked loans (SLLs)** – these loans present an alternative format of green or sustainable loan whereby the interest rate of the loan can be stepped up or down according to the borrower’s change in sustainability rating over the time period of the loan. While SLLs have been used for some years, publication of the Sustainability-Linked Loan Principles marks the first time that a set of sustainable finance principles from an industry body has deviated from the “use of proceeds” model.

- **Green bonds** – these are a natural source of financing for issuers that have a financing or refinancing requirement for a green project. There does not currently appear to be a pre-
mium for green bonds compared with non-green bonds of the same issuer. An issuer that will use the proceeds to finance projects towards its environmentally friendly programmes (eg, to reduce its carbon footprint or waste from its ordinary business activities) can also tap the market and further signal its commitment to its cause. Green bonds can be attractive to investors with the right balance of the green and commercial aspects.

• Sustainability-linked bonds (SLBs) – these are bonds whereby the proceeds from the issuance are not ring-fenced for green or sustainable purposes (unlike “use of proceeds” green bonds or sustainable bonds) and may be used for general corporate purposes or other purposes. Instead, the SLBs are linked to the performance of certain key performance indicators in achieving pre-defined sustainability performance targets; depending on whether this is achieved, certain characteristics of the SLBs may vary (eg, coupon ratchet). Therefore, issuers are committing explicitly to future improvements in sustainability outcomes with a predefined timeline. SLBs are a forward-looking performance-based instrument.

• Sustainable securitisations: Certain characteristics differentiate sustainable securitisations from conventional securitisations, as follows:

(a) the sustainability of the assets backing the securities;
(b) the potential to amalgamate sustainable assets into pools to fund sustainable structures;
(c) the sustainable use of proceeds of the securities (under the ICMA’s Green Bond Principles); and
(d) the constituents of the investor base.

Although the sustainable securitisation market has expanded during the past few years, much of its potential remains latent. This is due to a perceived lack of readily available sustainable assets to collateralise. However, there is now a critical mass of eligible assets – such as sustainable corporate loans, sustainable mortgages, and loans for hybrid and electric vehicles – to make sustainable securitisations viable and profitable. It is now just a question of market education and re-examination of potentially eligible assets for sustainability.

On 12 October 2021, the Geneva Association and the Organisation for Economic Co-operation and Development held a high-level meeting entitled “Future Proofing Technological Innovations for a Resilient Net-Zero Economy”. The main purpose of the meeting was to sketch out some of the discussions that took place at COP26 in Glasgow in November 2021.

The key messages from the meeting were as follows.

• Insurers will play a vital role in assessing, pricing, and managing risks relating to untested technologies for sectors to transition to net-zero emissions. Innovations in insurance products and services are needed to support adoption and large-scale deployment, where market conditions allow.
• Deeper cross-sectoral partnerships can fast track the de-risking and adoption of new technologies – particularly between insurers, carbon-intensive industries, technology and engineering companies, the financial sector and governments.
• Enhanced co-ordination of public and private investments, alignment of investors’ risk/return profiles and de-risking could enable
more sustained financing for the commercialisation of climate technologies.

• Governments can create an enabling environment to incentivise market development and boost demand for technological innovations in energy, transportation, food and water systems and other carbon-intensive sectors – as well as the greening of the public infrastructure.

18. Transactions

18.1 Environmental Due Diligence
In a transaction, a buyer will usually conduct environmental due diligence on the target asset or property and will seek environmental warranties from the seller. Seeking to formalise and document environmental representations and warranties can be an effective way of requiring a seller to disclose any environmental issues, as contractual remedies will be available if a representation is false or a warranty is breached.

18.2 Disclosure of Environmental Information
Caveat emptor is the legal doctrine that places the burden on the buyer to satisfy itself as to the condition of the property being acquired. There is no general duty on the seller to disclose environmental problems to prospective buyers.

19. Taxes

19.1 Green Taxes
The Climate Change Levy (CCL), adding approximately 15% to energy bills of businesses and public sector organisations, is a carbon tax designed to encourage both the use of energy from renewable resources and the use of less energy more generally. Four categories of taxable commodities are subject to the CCL:

• electricity;
• natural gas as supplied by a gas utility;
• petroleum; and
• hydrocarbon gas in a liquid state.

The Carbon Price Floor (CPF) places a minimum price on GHGs emitted by the power sector. The CPF is designed to supplement the EU Emissions Trading Scheme transposed into the UK’s domestic GHG Emissions Trading Scheme Regulations 2012, which require companies to buy permits to emit GHGs while generating electricity. Given that the price of these permits can fall, the incentive to reduce emissions decreases. The CPF therefore imposes a minimum price that companies must pay in order to pollute, thereby providing a baseline incentive for companies to cut emissions.

20. Disputes

20.1 Resolving Disputes
Environmental disputes are resolved in the UK through administrative action or private resolution between affected parties. ADR – an out-of-court alternative to litigation to resolve disputes between parties – is often used to resolve environmental disputes.

21. Reform

21.1 Legal and Regulatory Reforms
The Environment Act 2021 represents a significant change in UK environmental law. One of the Environment Act 2021’s objectives was to establish a framework to govern how environmental law will be created in an independent
UK. The focus is on the mechanisms for shaping future law rather than changing the substantive laws. The Environment Act 2021 provides mechanisms for the introduction of environmental targets by the Secretary of State and those targets are monitored and enforced by a new, independent Office for Environmental Protection (see 1.1 Regulatory Framework and Law). The Office for Environmental Protection should hold government and public bodies to account on their environmental obligations. It also provides the UK government with powers to create, adapt and change large areas of environmental law through “secondary legislation” (laws created through a fast-track system with less parliamentary scrutiny).

Another potential seismic change in UK environmental law could flow from the Retained EU Law (Revocation and Reform) Bill 2022–23 (the “Brexit Freedoms Bill”), which is currently moving through the UK parliamentary process. If enacted, the Brexit Freedoms Bill will automatically revoke all retained EU law within scope at the end of 2023, except where it has been preserved before then by means of a statutory instrument. This “sunset” deadline can be extended by statutory instrument, albeit to no later than the end of 23 June 2026. Defra has identified more than 1,000 pieces of environmental legislation within scope. While the latest messaging from Defra suggests it favours a “retain by default” approach, a significant amount of political capital has been invested in the idea that at least some of the retained EU law should be revoked within this extremely tight timeframe.
Trends and Developments

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1 Crown Office Row provides expert advocacy and advice to a diverse range of clients. It is recognised as one of the leading sets in the UK, particularly in the fields of civil and public law. Members practise in a broad range of civil law specialisms, including health law, public law, professional discipline, professional negligence, inquests, public inquiries, human rights, environmental law, immigration, tax and multinational torts. The set is at the forefront of the rapidly developing area of environmental law. Members appear in civil, regulatory and criminal proceedings and advise on transactional work – particularly environmental warranties and indemnities – involving UK and international risks. Clients include claimants, industry and regulators. 1 Crown Office Row is a member of the UK Environmental Law Association.

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COP27 and COP28
On 28 July 2022, the United Nations (UN) General Assembly passed a resolution declaring access to a clean, healthy and sustainable environment a universal human right. This set the background to the 27th United Nations Climate Change Conference (COP27), which took place between 6-20 November 2022 in Sharm El Sheikh, Egypt. The climate summit concluded with a breakthrough to help vulnerable countries deal with losses and damage arising from environmental disasters.

There were several key takeaways from COP27 – the progress of which will be reviewed at COP28 in Dubai in November 2023. The key takeaway themes from COP27 include:

• loss and damage fund;
• review of the 1.5°C limit;
• climate finance developments;
• food systems and climate change; and
• the ocean.

Loss and Damage Fund to aid vulnerable countries facing severe damage from climate change
The creation of a funding programme for countries bearing the brunt of the severe impacts of climate change became the litmus test for the success of COP27. Although climate change is experienced across the globe, some countries are more impacted than others. These tend to be the developing nations who lack the infrastructure and resources to effectively deal with effects of global warming.

The term “loss and damage” was first included in COP documentation at COP13 in 2007. Following this, it was not until COP21 that a specific article on loss and damage was included as part of the Paris Agreement. However, this article did not create any legal obligations for countries and did not include any sort of finance mechanism. This demonstrates the turning point at COP27 with the establishment of this fund.

The fund has been established in the wake of higher visibility surrounding the topic of climate justice, the continued efforts of NGOs to push for the fund, and the fact that the funding will come from a variety of sources (including public and private) rather than solely from the developed nations.

The Transitional Committee on the operationalisation of the Loss and Damage Fund was set up following COP27. It is composed of 24 member states and had its first meeting in March 2023. It is tasked with developing recommendations ahead of COP28. The detailed arrangements for the financing of the fund will be considered at COP28. In the meantime, the Transitional Committee continues to consult and carry out technical work.

Review of 1.5°C limit
COP27 resulted in only modest, incremental progress on emissions, despite a clear gap between current national plans and what is required to limit temperature rise to 1.5°C. Importantly, there was no agreement on phasing down fossil fuel production.

The chief of the International Energy Agency (IEA), Fatih Birol, recently stated that the prospects of meeting the 1.5°C limit on global heating are much better than previously thought at COP27. This is due to the significant growth of renewable energy and green investment during the past two years.

The IEA’s report, Net Zero Roadmap, stated that developed countries (including the UK) needed
to bring forward their 2050 net zero targets. Rishi Sunak, the UK’s Prime Minister, has confirmed his commitment to net zero by 2050 but reversed and delayed some key policies that would help to achieve this. The Prime Minister is also planning a large new round of North Sea oil and gas licences, despite clear advice from the IEA that no new upstream oil or gas projects should be built on the road to net zero.

One example of this is the UK’s recent approval of its largest untapped oil field, Rosebank. The UK’s oil and gas regulator has decided to grant Oslo-listed Equinor and the British firm Ithaca Energy permission to develop the oil and gas field in the North Sea.

The Energy Security Minister, Claire Coutinho, stated that Rosebank would not be as emission-intensive as older oil and gas developments. Crucially, she also stated that the development would grow the economy to help the UK deliver the transition to cheaper, cleaner energy.

The UK’s North Sea has historically been a main source for oil and gas output, although it has been in decline for the past two decades. Nonetheless, the industry remains a large contributor to the UK economy and it is expected to provide GBP50 billion in tax revenues throughout the next five years.

Despite the economic benefits of the development, burning Rosebank’s oil and gas production would produce 200 million tonnes of CO₂. The climate pollution from Rosebank’s reserves would be more than the combined CO₂ emissions of all 28 low-income countries in the world.

Climate finance developments
Alongside loss and damage, there are other important climate finance issues that require attention. The outcome of COP27 saw dissatisfaction at developed countries’ failure to reach the threshold of mobilising USD100 billion of public and private climate finance for developing countries. This threshold was pledged to be reached annually by 2020 but it remains unfulfilled.

Further climate finance initiatives have been established separately. Several Africa-led initiatives have arisen – for example, three financing partners of AFR100 announced a USD2 billion blended finance mechanism to support and accelerate locally led restoration. Similarly, the African Cities Water Adaptation Fund was launched at COP27. This enables African city leaders to access funding and technical support in relation to water issues. The fund will deliver USD222 million in grants, USD288 million in direct investments, and indirectly leverage USD5 billion in additional investments to help implement resilient water solutions in 100 African cities by 2032.

The Climate Finance Access Network (CFAN) is a cohort of dedicated climate finance advisers working in the Pacific. At COP27, funders announced support of CFAN and the network will be extending the tenure of its existing Pacific cohort, launching a second hub in the Pacific to support more island nations. With CFAN’s support, these countries will be able to unlock the finance needed to meet the challenges of climate change.

**Food systems and climate change**
The relationship between food and agriculture and the climate scene came to prominence in 2022, following the UN Secretary-General’s Food Systems Summit in 2021. Food systems generate up to one third of all greenhouse gases,
making the industry – along with agriculture – a primary point of topic at COP27.

Agriculture made it onto the list of thematic days for the first time at a COP event and several major international food and agricultural initiatives were established or strengthened at the summit. The include the Agriculture Innovation Mission for Climate (AIM for Climate), Egypt’s Food and Agriculture for Sustainable Transformation Initiative, and the US-led Global Fertilizer Challenge.

Over the course of 2023, the agriculture and food initiatives have been consolidated and expanded, ahead of COP28. The UN Food and Agriculture Organisation announced that it will develop a plan to reduce emissions from food and agriculture systems in line with the 1.5°C target ahead of the upcoming summit.

On 8 May 2023, the AIM for Climate initiative held a summit in Washington DC to discuss the progress of increasing investment in – and support for – climate-smart agriculture and food systems innovation. At the summit, AIM for Climate announced new investments, partners and resources to progress the initiative towards COP28 and these recommendations included:

• increased investment in climate-smart agriculture and food systems innovation to more than USD13 billion, exceeding the proposition by US Special Envoy for Climate John Kerry at COP27 to achieve USD10 billion by COP28; and
• new partners to the initiative, including the governments of Argentina, Fiji, Guatemala, India, Panama, Paraguay and Sri Lanka, which would bring the total number of governments and knowledge partners to more than 500.

The progress from the summit and AIM for Climate’s work is expected to feature prominently at COP28.

The ocean
COP27 furthered the focus on the ocean as part of climate action, renewing its commitment to a formal ocean/climate dialogue. This was a result of the many important conferences that took place in 2022 in relation to the ocean.

There are several summits and conferences that are now held yearly to discuss the ocean and the effects of climate change. These include the One Ocean Summit, the Our Ocean Conference, and the UN Ocean Conference. Together, these conferences highlight the critical role that the ocean plays in supporting human well-being, from food security to climate adaptation and mitigations. Governments, companies and civil society actors are committing themselves to address the full range of ocean challenges and provide the funding to take action.

In March 2023, the Our Ocean Conference took place in Panama. The conference consolidated the new and developing commitments to ocean conservation and action and critical meetings took place to determine whether the international maritime sector would be able to reduce emissions in line with the Paris Agreement targets.

The ocean will play a prominent role at COP28, especially given that the UAE is already highlighting the importance of the ocean and coastal ecosystems in mitigating and supporting adaptation to climate change. As part of its Net Zero 2050 Strategy, the UAE has enhanced and restored marine ecosystems, including mangroves, saltmarshes and seagrasses.
**Carbon Border Adjustment Mechanism**

1 October 2023 heralded the beginning of the transition phase of the EU’s Carbon Border Adjustment Mechanism (CBAM), with the first reporting period for importers ending on 31 January 2024. The CBAM will initially apply to the importing of the following carbon-intensive products into the EU – namely, cement, iron, steel, aluminium, fertilisers, electricity and hydrogen. UK businesses exporting into the EU should be mindful of the procedural and substantive requirements of the EU’s CBAM Regulation 2023/956. Depending on the existence or otherwise of a political consensus, it is likely that the UK, the USA and other parts of the world may adopt similar regulatory initiatives in the near future.

**Office for Environmental Protection**

As part of the Environment Act 2021 (EA), a new independent public body was set up to protect and improve the environment by holding government and other public authorities accountable. It has been established as the Office for Environmental Protection (OEP).

In April 2023, the OEP was granted permission by the Supreme Court to intervene in the appeal of R (Finch) v Surrey County Council. The purpose of the intervention was to emphasise the importance of clarity in the law to promote positive environmental decision-making.

The subject of the appeal was a judicial review concerning the grant of planning permission for new oil wells. The Supreme Court considered whether the appellants acted lawfully by not requiring the development’s environmental impact assessment (EIA) to assess the impact of greenhouse gas.

The submissions from the OEP highlighted their concern that the previous court decisions in the case left the law on EIAs in an uncertain position. This potentially has adverse effects on sound environmental decision-making and risks undermining environmental protection and improvement.

The OEP argued for the Supreme Court to take the opportunity presented by the appeal to clarify the law on assessing the indirect effects of developments in general. The OEP submitted that this could be done by taking a principled approach to the meaning of the term “indirect effect” in the relevant EIA legislation.

It is in this type of high-level strategic litigation that the OEP is likely to bring the most value in its interventions. It seeks to influence the development of the law through increasing clarity, particularly for public authorities, so that it is easier for them to comply with the law and ultimately improve environmental protection.

In February 2023, the UK Department for Environment, Food and Rural Affairs updated its summary of targets in the UK’s 25-year environmental plan, which includes commitments to:

- ensuring clean air, clean and plentiful water, thriving plants and wildlife;
- reducing the risks of harm from environmental hazards;
- using resources from nature more sustainably and efficiently;
- enhancing beauty, heritage, and engagement with the natural environment;
- mitigating and adapting to climate change;
- minimising waste; and
- managing exposure to chemicals and enhancing biosecurity.
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