THE LAWYER AWARDS 2018
LAW FIRM OF THE YEAR

Environmental Law Update

Claire Gregory - Legal Director
James Parker - Solicitor

Pinsent Masons

Topics

- Enforcement
- Legal Privilege & Investigation Reports
- Interviews under caution
- Streamlined Energy Carbon Reporting (SECR)
- Japanese Knotweed
- Environmental Principles and Governance Bill

Enforcement (1)

- Environmental Sentencing Guideline for environmental offences have seen a sharp rise in the level of fines.
- Guideline now been in force 4 years
- Organisations and individuals (also JVs / group companies)
- Culpability – 4 bands
- Harm – 4 categories
- Turnover – micro, small, medium, large, VLO
- Range of factors that increase or reduce seriousness
- The level of fine imposed on an organisation should *'reflect the extent to which the offender fell below the required standard. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence.'*

Enforcement (2)

- **Thames Water – record fine of £20m in March 2017**
  - £19,750,000 fine and costs of £611,140 – six offences
  - "systemic" management failures that polluted the Thames and surrounding areas with 1.9billion litres of raw sewage between 2012 and 2014
  - "It should not be cheaper to offend than to take appropriate precautions"
  - Managers repeatedly ignored warnings/risks

- **Severn Trent – biggest fine of 2018**
  - fined £350,000 and ordered it to pay costs of £68,003
  - hazardous chemical leak from a treatment works killed 30,000 fish and damaged 5km of ecology along a Derbyshire river
  - "To have no policy whatsoever when dangerous chemicals could have leaked out in any number of ways is highly negligence. The size and success of STW makes it even more astonishing."

Enforcement (3)

Alternatives to Prosecution

- In 2008 **Regulatory Enforcement and Sanction Act (RESA)** Part 3 came into force on 1 October 2008
- In 2010 **the Environmental Civil Sanctions (England) Order 2010 (ECSO)** introduced civil sanction powers for the EA – 6 April 2010.
- In 2012 **the Environmental Permitting Regulations 2012** introduced civil sanctions in respect of permit breaches including water pollution offences previously dealt with under the WRA 1991
- In 2015 **the Environmental Permitting (England and Wales) (Amendment) Regulations 2015** introduced enforcement undertakings for environmental permitting offences in England

Enforcement (4)

- Give the EA the power to accept EUs (but not other civil sanctions)
- Covers all main EP offences (save for breaches of enforcement notices and those involving deception or fraudulent mis-reporting)
- Must be clear recognition of any failings or harm caused by the relevant person
- Regulator will look for director or board level commitment to restoration and future compliance

Enforcement (5)

Enforcement Undertakings what are they?

- Offered by the Offender
- Using a prescribed form
- Accepted/rejected by EA
  - No/little negotiation
  - No formal requirement for third party consultation
- Once accepted legally binding
- Publicised
- Completion Certificate issued by EA
- If implemented: prevents further enforcement action.

Enforcement (6)

- June 2018, Wessex Water Services Limited, £200,000 to Severn Estuary Partnership/Cardiff University, South Gloucestershire Council and FWAG SW for operating without or other than in accordance with a permit.

- February 2017, Northumbrian Water, £375,000 to Tyne Rivers Trust, Northumberland Rivers Trust, Wear Rivers Trust, Tees Rivers Trust and Groundwork following pumping of raw sewage into a tributary of the river Tyne.

- February 2014, HiPP UK Ltd, £414,960 to the Woodland Trust, Yorkshire Dales Millennium Trust and the Bumblebee Conservation Trust for breaching packaging waste rules.

Enforcement (7)

EUs – Practical Considerations

- When:
  - Earliest opportunity
  - Appropriate offences only – Cat 1, intent, significant harm (ED Regulations and EU Directive on Environmental Crime)
  - Not following NoI for VMP

- What:
  - Prevention, restoration, compensation
  - Careful consideration of terms:-
    - Limited negotiation
    - EA reserve right to take further action for matters not "expressly dealt with" by the EU
    - Do not over promise and under deliver
    - Publication – third party liability

Legal Privilege & Investigation Reports (1)

Legal Privilege

- What is legal privilege?
  - **Legal Advice Privilege** – broadly speaking this protects advice given by lawyers to their client, including advice given in correspondence and other written communications; or
  - **Litigation Privilege** – this has a wider scope than legal advice privilege in that it not only protects correspondence passing between the lawyer and client but also documents that have been created or come into existence for the purpose, or dominant purpose, of litigation which is either ongoing or contemplated.
- Why is it important?
- Recent developments:
  - ENRC v SFO

Legal Privilege & Investigation Reports (2)

- **ENRC v SFO (Court of Appeal), September 2018 – key points**
  - Companies faced with allegations of wrongdoing can conduct investigations with greater confidence that documents relating to the investigation will be protected by litigation privilege under English law. It is in the public interest for companies to be able to investigate allegations prior to reporting to a prosecutor without losing the benefit of legal professional privilege.
  - The decision does not mean there is blanket protection for internal investigations: the party asserting litigation privilege will still have to show that the dominant purpose of the communication in question related to adversarial litigation that is in progress or reasonably in contemplation.
  - Documenting the purpose and scope of an internal investigation and the justification for documents being covered by privilege is vitally important at the outset of and throughout an investigation.

Legal Privilege & Investigation Reports (3)

Key Tips

- Involve your lawyers as soon as possible and ensure the accident investigation team is properly instructed. Written instructions to prepare the report should be provided from external or in-house lawyers. Establishing privilege will depend on being able to demonstrate that the dominant purpose of the report was litigation.
- Care should be taken to ensure in-house communications and instructions do not extinguish privilege.
- Identify the investigation team, record their names and inform your lawyers. This will help establish who the client is and maximise the chances of establishing legal advice privilege.
- Internal procedures should be appropriately worded to ensure privilege is not lost.
- Limit circulation and dissemination of the accident report in order to avoid the waiver of privilege. Wide circulation of the report will lose confidentiality and runs the risk of also losing privilege. Care should be taken when circulating the accident report and it should only go to those who really need to see it.
- Manage documents effectively. Maintain separate files for privileged and non-privileged documents to avoid inadvertent disclosure.

Interviews under caution

- Cause of incident/suspects – sufficient evidence
- Interview under caution
  - PACE 1984 Code C
  - Formal notice
    - Alleged offence
    - Timing
    - Legal representation
    - Who/what?
    - Advance disclosure
  - Attend or not?
  - Written questions?

Interviews under caution (2)

Tips:

- Attend or not?
- Importance of legal representation – your role
- Preparation is key
- Use of written statements as aide memoir/prompt
- No throw away comments
- Seating arrangements
- Letter of authorisation
- Follow up

Interviews under caution (3)

Decision Making:

- EA Officer – prepares case file/makes recommendations
- Review by Enforcement Panel
- Decision based on:
  - The Code for Crown Prosecutors
  - Regulators Compliance Code
  - EA:
    - Enforcement and Sanctions Statement
    - Enforcement and Sanctions Guidance
    - ORO (always check you are using the latest version !)

Interviews under caution (4)

Outcomes:

- No action
- Warning – offence committed but decided not in PI to pursue
- Caution – written acceptance that offence committed
- Impact of a warning or a caution:
  - Procurement risk?
  - PR?
  - Future offences?
- Accept or not?
- PROSECUTION

Streamlined Energy Carbon Reporting (**SECR**) (1)

The Government is introducing a new Streamlined Energy and Carbon Reporting framework (SECR) from 1 April 2019.

It will apply, subject to exemptions and exclusions, to:

- quoted and unquoted companies and limited liability partnerships (LLPs) in the United Kingdom;
- with financial years beginning on or after 1 April 2019;
- that consume more than 40,000 kilowatt hours (kWh) of energy in a financial reporting year.

Streamlined Energy Carbon Reporting (**SECR**) (2)

- The introduction of SECR neatly dovetails with the end of the Carbon Reduction Commitment (CRC), on 1 April 2019.

- Quoted and unquoted companies and LLPs impacted by the SECR will need to prepare for its application and put in place monitoring and reporting systems capturing relevant energy information in time for the start of the scheme.

Streamlined Energy Carbon Reporting (**SECR**) (3)

Who will SECR apply to?

- The SECR obligations will be imposed on:
  - quoted companies (subject to the exemptions and exclusions set out below); and
  - unquoted companies and limited liability partnerships (LLPs) in the United Kingdom, subject to the same exemptions and exclusions, that pass two (or more) of the threshold tests, which are:

Criteria	Threshold
Turnover	More than £36 million
Balance sheet total	More than £18 million
Number of employees	More than 250

Streamlined Energy Carbon Reporting (**SECR**) (4)

New requirements

- Quoted companies - Required to make statements in the directors' report concerning the company's energy use from:
  - (a) activities for which the company is responsible – namely the combustion of fuel and operation of any facility; and
  - (b) purchases of electricity, heat, steam or cooling for its own use; and
  - (c) action taken to increase its energy efficiency.

- Unquoted companies – Required to make statements in the directors' report concerning the company's greenhouse gas emissions, energy use and action taken to increase energy efficiency within the UK. Where large unquoted companies' activities consist wholly or mainly of offshore activities, the company must also include certain activities in the offshore area – as a result, these obligations will obviously introduce new difficulties for oil and gas companies.

- LLPs – Required to prepare an energy and carbon report each year, which must be a consolidated report. In the case of large LLPs, the energy and carbon report must include statements concerning the LLPs' greenhouse gas emissions, energy use and action to be taken to increase energy efficiency in the same manner as is required of unquoted companies.

- Energy reporting information for subsidiaries that are unquoted companies, quoted companies or LLPs must be reported by their parent companies and there are various provisions relating to how this works set out in the SECR that we will not go into in detail here.

Streamlined Energy Carbon Reporting (**SECR**) (5)

Areas of concern in the draft legislation, which we've been discussing with Government leads on the SECR.

- The differences in the reporting requirements for organisational groupings for SECR as opposed to those established and agreed for CRC;
- The scope of emissions covered by SECR, which is much broader than CRC and other carbon reporting schemes and will cause an increased administrative burden on companies that will not necessarily save a single kWh;
- The lack of a de minimis for emissions, once companies pass the thresholds for the scheme;
- The lack of a standard 'registry' meaning that every company will need to decide which reporting methodology to use and devise its own method of reporting its emissions; and
- The lack of appropriate expertise in the firms that currently 'audit' company (financial) reports to verify and assure the emissions.

Japanese Knotweed (1)

- **Network Rail Infrastructure Ltd v Williams & Anor [2018]**

- A Court of Appeal judgement handed down on 03 July 2018 has confirmed that landowners are entitled to sue if Japanese knotweed enters their property from a neighbouring piece of land held by another party.

- The owners of two bungalows neighbouring a property owned by Network Rail won almost £31,000 in damages on the grounds that knotweed encroachment constituted a "private nuisance" that affected their ability to fully use and enjoy their land.

- Court of Appeal clarified that, where Japanese knotweed is encroaching on their land, landowners do not have to wait until physical damage to their properties occurs before bringing an actionable claim in private nuisance.

- The judgment brings clarity to the law of private nuisance; the implications extend far beyond Japanese knotweed. It is now clear that any interference (e.g. by an invasive plant, dust, fumes or noise) can give rise to an actionable claim, even if it is yet to cause physical damage to a landowner's property, as long as the amenity value of the land has been diminished.

Japanese Knotweed (2)

6 Things to take from this ruling

1. Expect more legal action on knotweed

- Floodgates?

2. Knotweed need not have caused economic damage to provide grounds for legal action

- The judges ruled that the claimants had suffered "an unreasonable interference" with their enjoyment of their properties that was not dependent upon economic damage.

3. "Private nuisance" does not extend to a loss in a property's value

- The Court of Appeal rejected the idea that a diminution in land value constitutes private nuisance.

4. Claimants still have to prove a loss of amenity value

5. The case adds weight to previous rulings on contaminated land

- The judgement strengthens earlier rulings that landowners can be held liable for contaminants encroaching onto adjoining properties.

6. The case could lead to underwriters issuing pre-emptive warnings against neighbouring landowners

- the ruling may strengthen the hand of landowners concerned about encroachment. They could instruct their underwriter to warn an adjoining owner to take action against a knotweed infestation or face the possibility of legal action if the plant encroaches onto their property.

Environmental Principles and Governance Bill (1)

25 Year Environmental Plan

- Outlines how the Government intends to enhance our environment.
- Includes goals and actions to monitor our progress over time.
- Commits government to report regularly on progress on the implementation of the plan

- Consult on setting up a new independent body to hold government to account and a new set of environmental principles to underpin policy making.

Environmental Principles and Governance Bill (2)

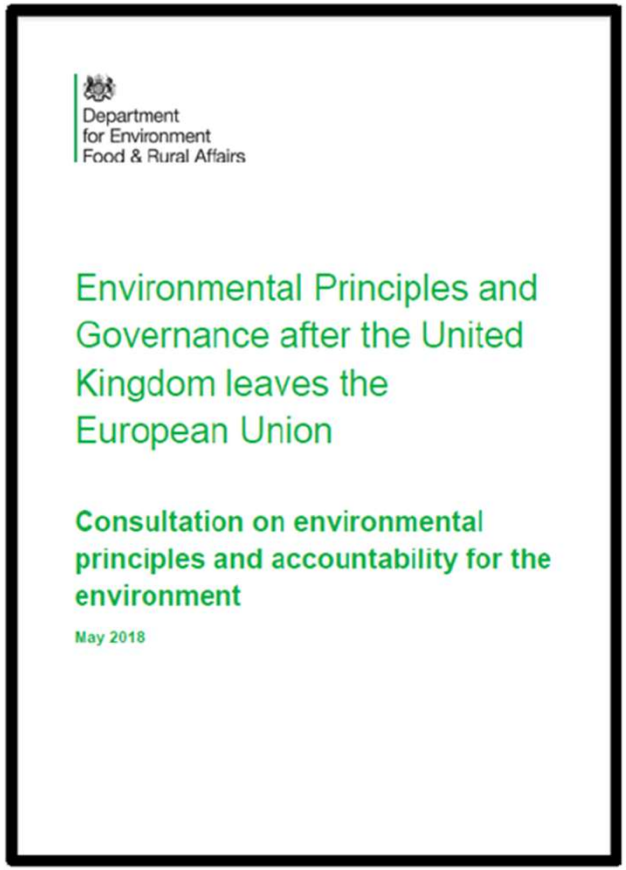
Environmental Principles and Governance

Environmental Principles

- Used to guide and shape domestic policy.
- A new policy statement to underpin future environmental policy-making and legislation.

Governance Body

- A new body to ensure that environmental law are upheld after we leave the EU,
- and to scrutinise and advise Government on environmental law and policy.


Department
for Environment
Food & Rural Affairs

Environmental Principles and Governance after the United Kingdom leaves the European Union

Consultation on environmental principles and accountability for the environment

May 2018

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Environmental Principles and Governance Bill (3)

Environmental Principles Policy Statement

- Government will produce a statutory policy statement on environmental principles explaining how those principles will be interpreted and applied in the making and development of policies.
- Policy statement will set out how the environmental principles will be considered in the context of the government's wider policy objectives.
- The policy statement will need to be consulted upon and presented to Parliament for scrutiny before it comes into effect.
- New environmental body will scrutinise proper application of environmental principles and policy statement by Government

Environmental Principles and Governance Bill (4)

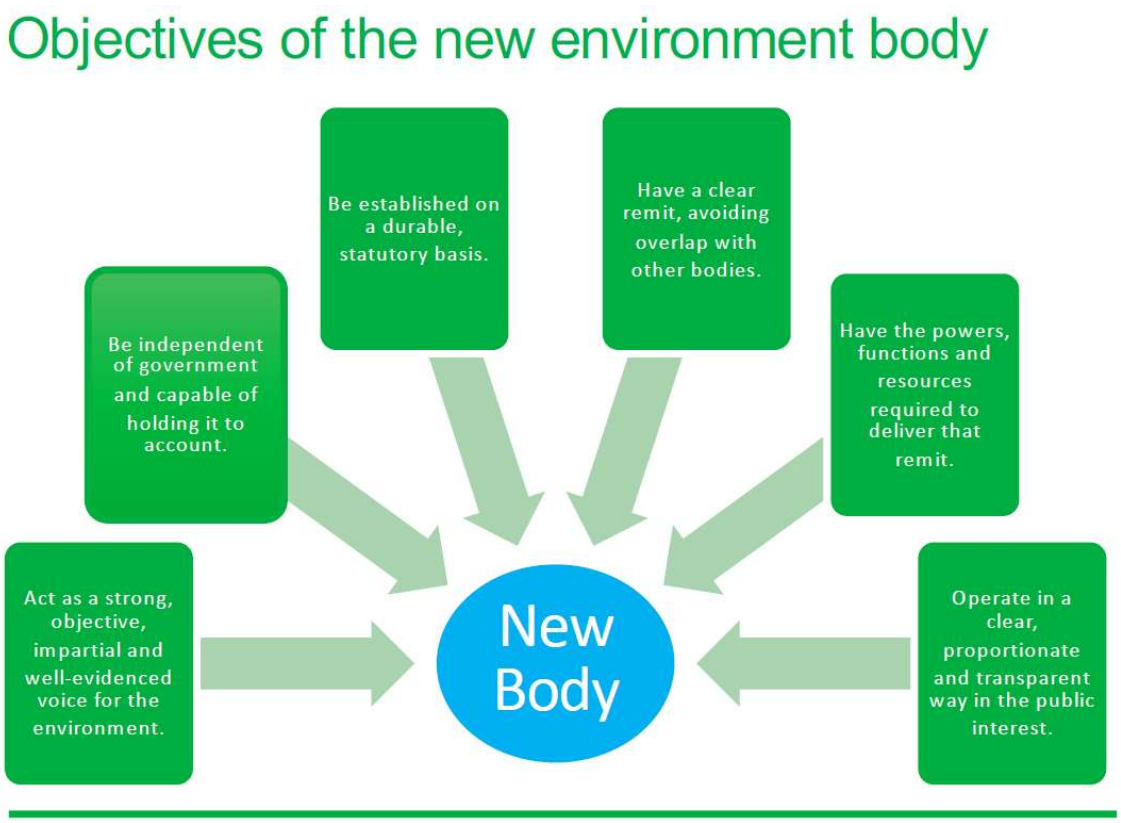
Governance Body

- Much of the legislation that we rely on to keep our water's clean and our wildlife protected has been developed in the EU and while it was the UK's Government's responsibility to implement it the European Commission had a key role in checking up on what had been done.

- In leaving the EU we are taking control of our own environment. But without the EU holding the government to account on cleaner water and cleaner air, the public needs a strong and fully independent statutory body in its place.

- In the recently published 25-year plan for the environment Mr Gove stated that it would be a "world-leading, independent, statutory body to hold the government to account", but the delay in bringing that to public notice is raising alarm.

Environmental Principles and Governance Bill (4)



Environmental Principles and Governance Bill (5)

Criticism

Independence

- At present we don't know if the watchdog will be fully independent. Imagine an environmental body designed to monitor government performance on the environment, but it's full of government ministers or their close political contacts! The watchdog should be accountable to Parliament, and transparent in its decision making.

Legal authority

- Environment Minister Michael Gove said that the watchdog would have teeth, declaring that it would "give the environment a voice and hold the powerful to account… we are in no doubt that it must have real bite." But the government's proposal says nothing about the watchdog having any legal power whatsoever.

Public complaints

- Under the EU it is possible for members of the public to make complaints about public bodies breaching environmental law – it's free, accessible, relatively quick and effective in getting public authorities to comply with the law. But the government's proposal doesn't currently back this idea, ignoring the vital role society plays in the enforcement of such laws.

Resource

- The government's proposal hasn't committed any particular funding for the watchdog as yet, but one thing is certain. The environmental watchdog must be properly funded with access to the experts it needs.

Thank you for listening

Any questions?