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Article for *Journal for European Environmental and Planning Law* 2017

“Brexit and the United Kingdom Water Environment”

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Introduction

The legal factual background to this discussion of Brexit (the UK’s departure from the European Union) may be stated concisely. On 23 June 2016, a referendum was conducted in the UK, under the European Union Referendum Act 2015. The Referendum question was: “Should the United Kingdom remain a member of the European Union or leave the European Union?” The outcome of the Referendum was that about 52% voted to leave the European Union and 48% to remain. Following legal proceedings in the UK Supreme Court,¹ the Government secured authority to initiate withdrawal proceedings under the European Union (Notification of Withdrawal) Act 2017. On 29 March 2017, the UK Government invoked Article 50 of the Treaty on European Union, setting the UK on course to leave the EU in March 2019. The precise terms of the departure and the future relationship between the EU and the UK are presently the subject of negotiations. Brexit will almost inevitably involve repeal of the UK European Communities Act 1972, which serves to incorporate EU law into UK national law and to make the UK subject to EU institutions. The effect of this will be that post-Brexit EU legislation (adopted after Brexit) will not apply in the UK, but the precise status of existing (pre-Brexit) EU legislation in the UK and the form of the continuing relationship between the EU and UK remains to be determined.

It can be no understatement to say that the implementation of Brexit in the UK is a matter of considerable political controversy and uncertainty. Widely divergent proposals are being proposed and considered, particularly on continuing access to the EU single market, the control of movement of persons and the future jurisdiction of the Court of Justice of the EU in respect of the UK. Given this indecision, some degree of speculation is unavoidable, but the earlier part of the discussion that follows seeks to offer commentary on the most likely legal form of Brexit and the implications of this for environmental law and policy. Taking the EU Water

This paper has been prepared from materials available to the author on 31 August 2017, the date of first submission to the *Journal of European Environmental and Planning Law*. As a postscript, it should be noted that the submission date precedes the second reading of the European Union (Withdrawal) Bill in the UK Parliament, on 11 September 2017, giving effect to provisions in the UK Governments *Brexit White Paper*, discussed below. For details of the ongoing progress of the Bill, see the UK Parliament Website at <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>. This source was accessed on 5 October 2017. All the other web sources referred to in this article were accessed at the same date.

¹ *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

Framework Directive² (WFD) as a focus for consideration, the main aim of the later part of the discussion is to assess whether the contribution of EU laws for the protection of the water environment in the UK can be maintained or enhanced through national laws and administrative measures post-Brexit. Setting aside the momentous social, political and economic implications of Brexit, the much narrower question to be addressed here is: can (or to what extent can) EU water protection measures be effectively replaced by national laws and administrative measures?

For the most part, the “national laws” under discussion here are UK-wide laws or laws specifically relating to England. The devolution of environmental powers to legislative and executive bodies in Scotland, Wales and Northern Ireland³ means that there is already some divergence in environmental law between the different jurisdictions, though within the overall framework provided by EU environmental law. Removal of the need for the devolved administrations to adhere to EU law, following Brexit, may have the consequence that increasingly divergent approaches may be adopted within the different jurisdictions, depending upon the arrangements that are put in place. Although, the internal UK aspects of Brexit are contentious and important from a devolution perspective, the discussion which follows focusses upon the UK-wide aspects of Brexit and the environment, and particularly those aspects concerned with the water environment.⁴

Brexit and the Environment: Threat or Opportunity?

The relatively small majority in favour of Brexit in the Referendum seems to be generally regarded as decisive. The main political parties are, at the time of writing, of the view that a conclusive democratic mandate exists for Brexit to proceed, though the precise form and timetable for this are the source of seemingly intractable political debate. Amongst environmental law commentators (discussed below) there seems to be little appetite to challenge the fact of Brexit. Nonetheless, the view is widely shared by commentators that post-Brexit UK environmental law should not involve a deterioration of environmental regulatory standards or implementation and enforcement mechanisms. The general focus of discussion seems to be upon

² Directive 2000/60/EC Establishing a framework for Community action in the field of water policy.

³ Originally, under the Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998, though these statutes have been extensively amended.

⁴ For further discussion of the devolution aspects of Brexit and the environment, see C. Reid, ‘Brexit and the future of UK environmental law’ 2016 34 *Journal of Energy & Natural Resources Law* 407; Law House of Lords, European Union Committee, *Brexit: environment and climate change*, 12th Report of Session 2016-17 (2017) HL Paper 109, *Chapter 9: Devolution and the Environment*; R. Lee, ‘Always Keep a Hold of Nurse: British Environment law and Exit from the European Union’ 2017 29 *Journal of Environmental Law* 155; UK Government, *Legislating for the United Kingdom’s Withdrawal from the European Union*, Cm 9946, March 2017 available at <https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union> (the UK Government’s *Brexit White Paper*) *Chapter 4: Interaction with the Devolution Settlements*; and V. Heyvaert and A. Čavoški, *Environmental Law Post Brexit*, Ch.6 in M. Dougan (ed.) *The UK after Brexit: Legal and Policy Challenges* (2017) and more generally J. Hunt, *Devolution*, Ch.2 in the same collection.

seeing Brexit (whatever its inherent merits) as an opportunity for maintaining or improving environmental law, as opposed to those who might see it as a means of advancing a seriously deregulatory environmental agenda.⁵ In that vein, the United Kingdom Environmental Law Association (UKELA) takes the position that: “The development of a post-Brexit framework of environmental legislation presents a unique and critically important opportunity for the UK Government and devolved administrations to explore ways of improving and strengthening environmental regulation.”⁶

Certainly, Brexit provides almost unlimited opportunities to improve and strengthen all aspects of environmental law and policy in the UK, but it might equally be seen as a threat to the many achievements secured as a result of EU membership. It is matter of whether the glass is seen as half full or half empty: whether, and how, the present Government and future governments will actually use the freedoms gained by Brexit to improve and strengthen environmental protection or whether environmental protection will be allowed to decline below present or future EU standards.⁷

The ‘glass half empty’ perspective is illustrated by reminders of the poor environmental performance of the UK prior to joining the EU and before the adoption of most of the key environmental directives.⁸ Hence, a group of leading environmentalists warned, prior to the Referendum, of the prospect of a return to filthy beaches, foul air and weak conservation laws, recalling the days when the UK was dubbed with the title of ‘the dirty man of Europe’. Other commentators have drawn attention to the laggard status of the UK Government in respect of implementing EU environmental legislation: of the 34 environmental cases brought against the UK before the Court of Justice by the European Union, 30 resulted in judgments against the UK.⁹ Topically, the recalcitrance of the UK Government towards EU ambient air quality standards is cited as evidence of national unwillingness to observe EU environmental standards without the threat of sanctions being imposed by the Court of Justice.¹⁰ As it has been put, “having long sought to

⁵ See I. Johnston, ‘145 MPs pledge to make UK greenest country in the world after Brexit’ *The Independent*, 8 December 2016; E. Scotford and M. Bowman, ‘Brexit and Environmental Law: Challenges and Opportunities’, 2016 27(3) *Kings Law Journal* 416; C. Puthuppally, ‘Brexit – threat or opportunity for the environment?’ *Elaw* (the Journal of UKELA) July/August 2017 p.19; and R. Lee, ‘Always Keep a Hold of Nurse: British Environmental Law and Exit from the European Union’ 2017 *Journal of Environmental Law* 155.

⁶ See UKELA website at <https://www.ukela.org/UKELAPosition>.

⁷ V. Heyvaert and A. Čavoški, *Environmental Law Post Brexit*, Ch.6 in M. Dougan (ed.) *The UK after Brexit: Legal and Policy Challenges* (2017)

⁸ J. Vidal, ‘Brexit would return Britain to being the ‘dirty man of Europe’’, *The Guardian* 3 February 2016.

⁹ House of Lords, European Union Committee, 12th Report of Session 2016-17, *Brexit: environment and climate change*, 2017 (HL Paper 109) para.69

¹⁰ E. Scotford, ‘Air Quality law in the United Kingdom at a Crossroads’, *OUPBlog*, 3 October 2016 and House of Lords, European Committee, 12th Report of Session 2016-17, *Brexit: environment and climate change*, 2017 (HL Paper 109) 2017 paras.29 and 68 to 71, quoting observations by Alan

dilute [EU] air quality laws and being embarrassed by their breach, can one really suppose that UK governments will be minded to retain them?”¹¹

On the other hand, the ‘glass half full’ perspective is buttressed by the seemingly firm commitment of the present Government to environmental improvement. The Conservatives’ manifesto incorporated the pledge to ensure “we become the first generation to leave the environment in a better state than we found it” and this has been reaffirmed in relation to the environmental aspects of Brexit.¹² Some certainty as to future environmental protection is offered by the prospect of a 25 Year Plan for the English environment. This will ‘help ensure the environment is appropriately maintained and improved so it flourishes and continues to underpin our economic success and wellbeing’ and offers a range of long-term commitments to support this (though it should be noted that the timetable for the publication of the plan has slipped somewhat).¹³ In addition, the supposed laggard reputation of the UK in respect of the environment might be seen as contradicted by measures which show environmental leadership on the part of the UK, with a particular example of this in the Climate Change Act 2008. Certainly, the House of Commons Environment Audit Committee has taken the view that the UK is widely regarded as one of the most influential member states in shaping the EU’s environmental policies.¹⁴

Clearly, Brexit might be used as an opportunity for enhancement of environmental law if the ostensible green-mindedness of the present Government, and future governments, translates into appropriate actions, but whether this will prove to be the case is unknowable. The best that can be done is to look at the initial indications of what Brexit may hold for environmental and water protection.

The White Paper on Withdrawal from the EU

Andrews of ClientEarth, an organisation that has brought important legal proceedings to expose the legal failings the UK Government, see *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC28.

¹¹ C. Puthuppally, ‘Brexit – threat or opportunity for the environment?’ *Elaw* (the Journal of UKELA) July/August 2017 p.20.

¹² I. Johnston, ‘Environmentalists voice concerns over Theresa May’s Great Repeal Bill’, *The Independent*, 30 March 2017; The Conservative and Unionist Party Manifesto 2017, *Forward Together – Our Plan for a Stronger Britain and a Prosperous Future*, at <https://www.conservatives.com/manifesto>; and UK Government, *Legislating for the United Kingdom’s Withdrawal from the European Union*, Cm 9946, March 2017, p.17 (the Brexit White Paper) available at <https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union>.

¹³ See Department for Environment, Food and Rural Affairs, *Single Departmental Plan: 2015 to 2020*, at <https://www.gov.uk/government/publications/defra-single-departmental-plan-2015-to-2020/single-departmental-plan-2015-to-2020>.

¹⁴ House of Commons, Environmental Audit Committee, Third Report of Session 2015-16, *EU and UK Environmental Policy* (2016) HC537, 23 March 2016 para.18 available at <https://publications.parliament.uk/pa/cm201516/cmselect/cmenvaud/537/537.pdf>, and see written evidence to the Committee by R. Andreas Kraemer, arguing that the UK has had a strong role in shaping European environmental policy and offers several examples to illustrate this, including “the 2000 Water Framework Directive, which built mainly on UK (and French) practices of managing water resources in river basin administrations”.

At the time of writing the most authoritative statement of the UK Government's aims for implementing Brexit are to be found in the *Brexit White Paper, Legislating for the United Kingdom's withdrawal from the European Union*.¹⁵ This envisages the enactment of a 'Great Repeal Bill' (subsequently termed the 'European Union (Withdrawal) Bill') which will seek to secure an orderly transition by converting the *acquis* of EU law into UK national law and the repeal of the European Communities Act 1972. The intention is that this translation will involve essentially the same rules and laws being retained, but with EU provisions replaced by corresponding national laws. However, it is recognised that a significant amount of 'EU-derived law' will cease to have its intended effect after departure, where, for example, the involvement of an EU institution, regime or system is anticipated. In summary, the purpose of the Great Repeal Bill is to do three things: 1/ to repeal the European Communities Act 1972; 2/ to convert all EU law, at the point of exit, into UK law; and 3/ to create powers to make secondary legislation to facilitate corrections to laws that would no longer operate appropriately and to allow national law to reflect the content of any withdrawal agreement under Article 50 of the Treaty on European Union.

The effect of the Great Repeal Bill will be that the treaties that serve as the primary sources of EU law will become inapplicable in the UK after it departs from the EU, but may continue to be used in the interpretation of EU-derived law that is preserved in the form of UK law. Leaving the EU will also mark the end of the jurisdiction of the Court of Justice of the EU in the UK,¹⁶ though reference may be made to the case law of the Court at the time of Brexit in interpreting EU-derived law and pre-Brexit EU case law will be given the same binding status as decisions of the Supreme Court. Nonetheless, following Brexit, the Supreme Court would have the power to depart from past decisions of the EU Court 'where it appears right to do so'.¹⁷

The White Paper provides a pertinent discussion of how these mechanisms will operate in relation to environmental law. In respect of this, the current legislative framework for the environment, including EU measures, is recognised to have delivered tangible benefits. Accordingly, the Great Repeal Bill will ensure that the whole body of existing EU environmental law continues to have effect in UK law. It is envisaged that this will provide businesses and stakeholders with maximum certainty as the UK leaves the EU. However, over time the possibility of change in

¹⁵ UK Government, *Legislating for the United Kingdom's Withdrawal for the European Union*, Cm 9946, March 2017 available at <https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union>.

¹⁶ For a subsequent UK Government statement on the role of the Court of Justice of the European Union see *Enforcement and Dispute Resolution: a future partnership paper* (UK Government proposals on CJEU) 2017 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf.

¹⁷ House of Lords, Practice Direction of 1966 ([1966] 3 All ER 77) to the effect that precedent would be departed from in order to achieve justice, adopted by Supreme Court 2010 see UKSC Practice Direction 3 available at <https://www.supremecourt.uk/docs/practice-direction-03.pdf>.

environmental legislation is envisaged to ensure delivery of the Government's commitment to improve the environment within a generation. Thus, the longer term status of EU environmental law in the UK is left, perhaps purposefully, uncertain.

Environmental Concerns about Brexit

The commitment to retaining EU environmental legislation post-Brexit was foreshadowed by a general consensus of approval and support for environmental measures adopted at EU level. However, the broad endorsement of EU environmental law seemed less influential in the minds of those casting their votes in the Referendum than issues like sovereignty, control of immigration and economic impacts, or combinations of these factors captured in the Brexit campaign's slogan, 'take back control'.¹⁸ Nonetheless, for the purpose of informing the debate on the referendum on membership of the EU, the House of Commons Environmental Audit Committee undertook an inquiry on the *EU and UK Environmental Policy*.¹⁹ This inquiry confirmed a generally positive view of EU membership insofar as environmental policy was concerned. The general view of witnesses who gave evidence before the Committee was that EU membership had been beneficial for the UK environment. The Inquiry provided a forum for the airing of diverse concerns, relating to the need for more rigorous national implementation of EU measures and the need for more efficient regulation in terms of reducing burdensome costs upon business.²⁰ However, the overwhelming majority of those giving evidence took the view that membership of the EU had improved environmental protection in the UK.

The Environmental Audit Committee's Report noted however, the lack of any plans for environmental law and policy in the event of a vote to leave the EU and difficulties that this would present on various fronts.

"Despite the key role that the EU has played in UK environmental policy, relatively little appears to have been done by way of planning in the case of the UK leaving There are, therefore, significant unanswered questions about what relationship a UK outside the EU would have with it and with the rest of the world, just as there are unanswered questions as to how our relationship with the EU might develop. Nonetheless, two points were made to us repeatedly. Firstly, the UK would still need

¹⁸ See the *Daily Express* coverage at <http://www.express.co.uk/news/politics/681706/Boris-Johnson-vote-Brexit-take-back-control> but contrast *The Independent* at <http://www.independent.co.uk/news/uk/politics/momentum-launches-campaign-take-back-control-brexit-from-right-jeremy-corbyn-a7440061.html>.

¹⁹ House of Commons, Environmental Audit Committee, Third Report of Session 2015-16, *EU and UK Environmental Policy* (2016) HC537, 23 March 2016 available at <https://publications.parliament.uk/pa/cm201516/cmselect/cmenvaud/537/537.pdf> and see the Government Response HC 644, 7 September 2016 available at <https://publications.parliament.uk/pa/cm201617/cmselect/cmenvaud/644/644.pdf>.

²⁰ Although a dissenting Report by one member of the (15-member) Committee, Peter Lilley, should be noted. He maintained that the Committee's conclusions were mutually contradictory, not based on adequate research and ignored some of the evidence, but these views were rejected by other members of the Committee, *Ibid.* Environmental Audit Committee p.31.

to meet international environmental commitments made in the UN and elsewhere, many of which are reflected in EU law. Secondly, a UK outside the EU would still have to comply with some aspects of EU environmental legislation, particularly if it wishes to secure preferential access to the Single Market, but with significantly less ability to influence the process of its development.²¹

These observations proved remarkably prescient. At the time of writing, the precise terms of controversial post-Brexit UK-EU trade relations lie some way over the horizon, but there are many examples of EU environmental legislation giving effect to obligations under international conventions to which the UK is a party. Although the UK may be leaving the EU, it remains subject to important international environmental obligations arising outside EU law which will be unaffected by Brexit.²²

By way of illustration, the EU Water Framework Directive may be seen to be giving effect to various international obligations. First, the Directive may be seen as giving effect to the OSPAR Convention²³ and its Hazardous Substances Strategy²⁴ insofar as its aim is to achieve the elimination of priority hazardous substances and contribute to achieving concentrations in the marine environment near background values for naturally occurring substances.²⁵ A second example of overlapping international and EU obligations from the WFD is its treatment of public access to information and consultation and “encouraging the active involvement of all interested parties in the implementation of this Directive” with regard to all aspects of river basin management planning.²⁶ This is an EU water management application of the procedural environmental obligations that arise under the Aarhus Convention,²⁷ to which both the EU and UK are a party.²⁸ A third example arises where the WFD may serve to formalise customary international law obligations between member states of the EU by ensuring the internationally coordinated management of

²¹ Ibid para.64.

²² R. Churchill, ‘Continuing obligations: International and Trade Constraints on Regulatory Choices’ A paper delivered as part of the UKELA Brexit Seminar, Bristol, 18 November 2015, slides available at <https://www.ukela.org/content/page/5580/4%20Churchill%20.pdf>; C. Reid, ‘Brexit and the future of UK environmental law’, 2016 *Journal of Energy & Natural Resources Law* 407 and R. Macrory, ‘Brexit unlikely to give UK free rein over green laws’ *ENDS Report* 499 September 2016 p.22.

²³ The 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic, see OSPAR Commission website at <https://www.ospar.org/convention/text> and see WFD Recital 21.

²⁴ https://www.ospar.org/site/assets/files/1428/hazsub_strategy.pdf.

²⁵ WFD Recitals 22 and 27 and Art.16.

²⁶ WFD Recital 46 and Art.14.

²⁷ The United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental matters, done at Aarhus, Denmark, on 25 June 1998 at <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> and see EU webpages on the Aarhus Convention: <http://ec.europa.eu/environment/aarhus/>.

²⁸ No amendment was made to the WFD to give effect to Aarhus obligations because it was thought that this Directive was already compliant with the Aarhus obligations in respect of public participation in decision making. See para.3.5 European Commission, COM 2000 839 final, *Proposal for a Directive of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC*.

transboundary waters.²⁹ In the event of difficulties in reaching agreement on coordinated measures between different member states sharing an international river basin, the Directive provides for referral of issues which cannot be resolved to the Commission and for the Commission to make recommendations to the member states concerned.³⁰ Insofar as this applies to river basins shared by the UK and the Republic of Ireland³¹ it is unlikely that the Commission would have a role to play in resolving disputes following Brexit, but there would still, arguably, be customary international obligations to cooperate on measures to avoid environmental harm to a neighbouring country irrespective of the future repeal of any duties set out in the Directive.

Beyond these three instances, there may be many other examples of EU environmental law mirroring international obligations that will remain important following Brexit. The issues identified by the Environmental Audit Committee remain relevant and the decline of EU environmental law, so far as the UK is concerned, may well be matched by an increase in the significance of other kinds of international environmental law.³²

Post-Brexit UK Environmental Legislation and Governance

The fact that environment protection did not seem to feature as a prominent issue in determining the outcome of the Referendum³³ may account for the lack of planning for post-Brexit environmental measures noted by the Environmental Audit Committee. Nonetheless, the impending reality of Brexit means that environmental law and policy outside the EU must now be provided for. As has been noted, the most authoritative indication of how this is to be done is provided in the Government's White Paper on withdrawal from the EU. In the view of the Government, continuity in environmental protection will be achieved by repatriation of legislation, without changing its substantive regulatory content, in the short term at least. Whether this vision can be achieved or not is a matter of debate. The essence of this debate is the question as to what EU law has contributed to environmental law in the UK and whether this contribution is capable of being replicated in national law.

The Environment Minister, Andrea Leadsom, giving evidence before a Parliamentary committee,³⁴ took the view that about two-thirds of EU environmental legislation can

²⁹ WFD Recital 35 and Art3(3).

³⁰ WFD Art12.

³¹ See the Water Environment (Water Framework Directive) Regulations (Northern Ireland) 2017/81, particularly Regs. 3 and 4. Areas named as "Neagh Bann", "North Western" and "Shannon" are identified as international river basin districts.

³² See n.22 above on sources relating to relevant international law provisions.

³³ D. French, 'Alternate Realities: Brexit and Pokémon', *OUP Blog* 10 October 2016.

³⁴ House of Commons, Environmental Audit Committee, *The Future of the Natural Environment after the EU Referendum*, Sixth Report of Session 2016-17, HC599 2017, particularly evidence given on 25

be brought into UK law with mere technical changes, but this will not be possible for the remainder. This means that continuing work is needed to ensure that those measures that are difficult to transpose into national law continue to function effectively after leaving the EU. However, the Minister was rather unspecific on the reasons why the problematic third of EU environmental legislation was difficult to transpose. Nevertheless, the general view of the Government seems to be that transposition is a matter of lesser or greater technical ‘difficulty’, rather than something which raises insuperable issues of legal principle.

Some useful insights into the challenges in transposing EU law are offered by Lee and Fisher,³⁵ who draw attention to the combination of substantive and procedural considerations that arise in securing satisfactory levels of environmental and ecological protection. The point is well made by these authors that much of what is commonly, but broadly, termed ‘environmental law’ is actually about ‘environmental governance’. The legal rules that set obligations for environmental and ecological quality standards and measures actually presuppose an ‘environmental infrastructure’ of responsible public bodies with a range of powers and duties which provide the context in which the substantive rules operate. That is, the functioning of environmental laws requires or presupposes the existence of public institutions that have appropriate responsibilities for directing, regulating, authorising, guarding and being subject to duties in respect of securing environmental protection. Not least significant amongst the diverse bundle of environmental governance obligations is the range of measures that may be applied to call public bodies to account for shortcomings in the performance of their environmental protection roles.³⁶

When the significance of environmental *governance* is appreciated, it is apparent that in leaving the EU it is not just about the substantive environmental laws that need to be translated into national legislation. It is also about the national replication of environmental infrastructure that accompanies EU environmental measures and, not least important, the range of mechanisms for securing institutional accountability. As Lee and Fisher put it,

“EU law imposes obligations on Member States to plan publicly for implementation, to report publicly and to the Commission and other Member States on how they’re doing, to explain failures to comply, or the lawful use of derogations and exceptions, and to explain how compliance will be achieved in the future.”

Beyond that, EU law relies upon the capacity of private parties to scrutinise and challenge governments, the powers of domestic courts to ensure implementation of

October 2016, <http://parliamentlive.tv/Event/Index/6d126351-67a1-4c19-a757-14b5215776d4> and <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/environmental-audit-committee/the-future-of-the-natural-environment-after-the-eu-referendum/oral/42022.html>.

³⁵ M. Lee and L. Fisher, ‘Environmental Governance after the EU: the Need for Accountability: An Expert Review’, *OUPblog* 28 November 2016,

³⁶ See also M. Lee, ‘Brexit: Environmental Accountability and EU Governance’, *OUPblog* 17 October 2016 and M. Lee, ‘Accountability for Environmental Standards after Brexit’, 2017 *Environmental Law Review* 89.

law, the overseeing role of the Commission as the ‘watchdog’ of the treaties and the role of the Court of Justice to determine violations and to impose sanctions in certain cases.

Against this environmental governance background, Lee and Fisher identify three matters that must be provided for if there is to be no diminution in environmental governance as a result of Brexit. First, in respect of planning and reporting obligations, responsible governmental bodies should explain how specified levels of environmental quality are to be secured, to report on progress in securing these, and be subject to public scrutiny and legal challenge where these obligations are not discharged transparently. Second, in respect of adjudication, there is a need for appropriately empowered courts to ensure that relevant public bodies properly meet their environmental obligations and stay within their legal responsibilities. Third, the important overseeing role of the European Commission, in ensuring that Member States fulfil their EU environmental obligations, needs to be met by a suitable replacement body, perhaps an enhanced ombudsman of some kind, with comparable powers to call the UK Government to account. As the authors put it, in ‘taking back control’ “we forget in the infrastructure of environmental accountability at our peril”.

The realisation that the most challenging aspects of Brexit are actually about institutional responsibilities and safeguards rather than about transposition of substantive rules of environmental law is also taken as key focus of the UKELA Report, *Brexit and Environmental Law: Enforcement and Political Accountability Issues*.³⁷ This is concerned with the post-Brexit environmental duties of government and public bodies, particularly how these might change to encompass the supervisory, reporting and enforcement roles of the European Commission and the adjudicative and sanctioning roles of the Court of Justice of the European Union.

A particular difficulty is seen to arise in securing accountability of government and public bodies and in providing a national counterpart of the citizen’s complaints procedure that arises under EU law. To some extent, the national enforcement of public duties with regard to the environment can be secured by judicial review proceedings, but the limitations of this are manifold. Not least, this is because judicial review is concerned with the legality and/or procedure of decision making by public bodies. It is not generally available to challenge the *merits* of a decision: which is exactly what is sought in many instances. Beyond that, judicial review proceedings usually need to be instigated by environmentally concerned individuals or environmental campaigning bodies, potentially at considerable expense.³⁸

³⁷ UKELA July 2017, available at <https://www.ukela.org/content/doclib/317.pdf>.

³⁸ This gives rise to an apprehension that “people with a genuine concern will be discouraged from pursuing it in the courts” see UKELA Report p.10 Ibid. quoting from the House of Lords Statutory Instrument Committee.

Beyond the obstacles to legal proceedings to challenge the Government and public bodies for their environmental failings, is the question of what national law remedy could be given where there has been found to be a breach of legal requirements. There is no national counterpart of the power the Court of Justice of the EU to impose financial sanctions on governments for violations of public duties.³⁹ The point may fairly be made that the sanctioning power of the Court has been sparingly used in environmental contexts, with only 11 environmental cases up until 2015. Nonetheless, the deterrent effect of the prospect of financial penalties must be considerable in environmental, as in other, contexts. As the UKELA Report notes, the sanctioning power of the Court of Justice will cease to apply on Brexit and it is difficult to see what national provisions could be put in place to serve as a counterpart.

The particular concerns about the loss of supervisory control over implementation of EU environmental law after Brexit arise because of the peculiar role of environmental law as contrasted with other fields of law that will be repatriated. In many areas of EU law there are bodies with vested commercial interests in ensuring compliance, such as competition law, for example, where economic competitors will be vigilant to raise objections to infringements that are seen as involving unfair competition. By contrast, environmental law is characterised as ‘vulnerable’ because of the largely ‘unowned’ status of the environment and because environmental harms are so diffusely spread that individuals rarely have a good commercial reason to pursue enforcement proceedings. In the UKELA Report this vulnerability of the environment is seen as a reason why a specialised national body should be established to oversee the implementation of environmental law and to replace the supervisory role of the European Commission as the ‘guardian of the treaties’. However, what legal form the post-Brexit environmental supervisory body should take is not apparent and the Report offers a useful survey of various ombudsman and parliamentary commissioner roles, and specialised environmental courts, from different jurisdictions that might serve as models for the UK and/or devolved administrations to adopt in post-Brexit environmental contexts.

EU Water Legislation after Brexit

Most of the published commentary of the legal aspects of Brexit has been pitched at a fairly high level of generality, offering observations only in respect of EU environmental law as a whole, without detailed consideration of the impacts in particular spheres of environmental regulation. Recognising the uncertainties, the following discussion offers some more specific observations on what Brexit might mean for EU water legislation or at least a centrally important measure in this field: the EU Water Framework Directive. This Directive is commonly seen as a key EU measure in relation to the water environment because it sets out broad strategic

³⁹ Under Art.260 Treaty on the Functioning of the European Union.

objectives for the chemical, physical and ecological state of diverse waters within its scope, particularly the need to meet the requirement of ‘good status’. Alongside the statement of strategic environmental objectives, the Directive sets out a range of activities for the assessment and purposive management of waters to achieve good status. These activities involve formulating programmes of measures, set out in river basin management plans, established at a national level or internationally. The breadth of the WFD, both in terms of the range of assessment, planning and operational activities that must be undertaken and duration of implementation obligations, some of which require actions extending into the indefinite future, make this directive a good ‘case study’ to illustrate particular aspects of Brexit in a specific environmental context.

In relation to the WFD, the general approach set out in the Government’s White Paper would mean the preservation of national implementing legislation, subject to any corrections of this needed to recognise Brexit. Separate implementing legislation is in place to implement the Directive in different jurisdictions within the UK, but in respect of England and Wales the key provisions are the WFD ‘Implementing Regulations’.⁴⁰ Broadly, these Regulations establish a division of responsibility between the operational functions, allocated to the Environment Agency in England, and the executive role of the Government ministers acting as the ‘appropriate authority’. Hence, it is for the appropriate authority formally to approve draft river basin management plans, to give guidance and, where necessary, directions for the purpose of implementing the Directive. It is for the Agency to undertake operational activities such as the analysis of the characteristics of river basin districts, reviewing impacts on water, monitoring and formulating environmental objectives and programmes of measures, preparing, reviewing and amending river basin plans. These exercises must be undertaken subject to deadlines and procedural requirements concerning public consultation and other matters.

In many respects, the WFD Implementing Regulations restate, as national law requirements upon the Environment Agency and the Secretary of State, obligations that arise under the WFD. So, for example, the duties of the Agency in respect of river basin characterisation, economic analysis, identifying protected areas and monitoring are formulated in a way that directly corresponds with provisions under the Directive and need to be accomplished by deadlines corresponding to those in

⁴⁰ Originally, the Directive was implemented in England and Wales by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 (SI 2003/3242) but these regulations were amended to accommodate amendments to the Directive and have now been replaced by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 (SI 2017/407). Regulation 38 of the 2017 Regulations contains a transitional provision ensuring that things done under the 2003 Regulations (for example, the various analyses and assessments, and the programmes of measures required under the Directive) continue to have effect as if done under the 2017 Regulations. Separate Regulations provide for the implementation of the WFD in other jurisdictions within the UK.

the Directive. In respect of environmental objectives, programmes of measures and draft river basin management plans the duties of the Agency again correspond to requirements of the Directive. In many respects these obligations are ‘historic’ in the sense that the activities have already been accomplished by the deadlines required by the Directive. In other instances the Directive obligations are of a continuing kind, in requiring things to be done at future dates, which lie beyond Brexit. Specifically, the duties in respect of environmental objectives, programmes of measures and formulating draft river basin management plans, require the appropriate authority to ensure that these are periodically reviewed at six year intervals after 22 December 2015.⁴¹

The status of continuing provisions of this kind raises significant questions about the UK’s post-Brexit commitment to the Directive: is the UK committing itself solely to the obligations under the Directive as they exist at the point of Brexit or does the UK intend to remain bound to the ongoing commitments to environmental improvement under the Directive, even where these may require substantially new measures to be taken after Brexit and involve obligations that may extend into the indefinite future?

Similar kinds of question may be raised about the general duties that are provided for under the national Implementing Regulations. These require the Secretary of State and the Environment Agency to exercise their relevant functions so as to secure compliance with the Directive, particularly in relation to the achievement of the environmental objectives of the Directive through programmes of measures coordinated for river basin districts.⁴² This means that powers and duties under the Regulations and other statutory and secondary legislation must be used purposively, with the need to secure compliance with the Directive as an objective. Up until the time of Brexit, the meaning of this is reasonably clear, but post-Brexit various interpretations seem possible. First, do the obligations to secure compliance with the Directive mean “the Directive” as it was at the point of Brexit, as opposed to modifications which might take place after this? Second, does the reference to “the Directive” include non-legally binding guidance on its implementation and, if so, does this encompass only guidance issued before Brexit or also guidance issued afterwards?

The question about accommodating post-Brexit modifications to the WFD in UK law is more than a purely hypothetical concern. The WFD has actually been modified a number of times since its adoption.⁴³ The prospect of further amendments arises as a consequence of European Commission's Regulatory Fitness and Performance

⁴¹ Similarly, the WFD provides for continuing periodic reviews and updates in relation to characteristics, impacts and economic analysis of river basin districts (Art.5(2)); protected areas (Art.6(3)); programmes of measures (Art.11(8)); and river basin management plans (Art.13(7)).

⁴² Reg.3 National Implementing Regulations 2017 (SI 2017/407).

⁴³ See the European Commission, Training Package on EU Water Legislation web pages setting out quite a lengthy list of directives that have amended or modified the operation of the WFD, at http://ec.europa.eu/environment/legal/law/7/library_documents.htm.

Programme (REFIT) which seeks to simplify or withdraw EU laws, to ease the burden on businesses and facilitate implementation. Amendments may well follow if screening of the effectiveness, efficiency, coherence, relevance and added value of the Directive shows that it is not delivering as expected.⁴⁴ Beyond the prospect of amendments of the Directive to reduce ‘red tape’, is the certainty that it will be reviewed by the Commission within 19 years of its entry into force and that the Commission will propose any necessary amendments.⁴⁵ The upshot of these factors is that the WFD might best be seen as a fairly ‘dynamic’ piece of legislation which has been modified, and will probably continue to be modified, over time. If the UK Government is proposing to commit itself to “the Directive” as it stands at the point of Brexit, there is the prospect that this will quite soon be superseded by changes at EU level and the UK will become insulated from those changes, so that the UK’s historic time-of-Brexit version of “the Directive” and the evolving EU version will become increasingly different over time.

On the question of whether “the Directive” should continue to be interpreted in the light of guidance, the answer seems to be inevitably in the affirmative, given the technical complexity of many water management issues and the need for a consistent understanding of how Directive obligations should be interpreted and applied in practice. However, the issues of continuity of substantive legal provisions are paralleled by questions about the status of guidance following Brexit.

Insofar as nationally promulgated guidance is concerned,⁴⁶ this is not likely to be immediately problematic: there is no reason why the national guidance should not continue to operate after Brexit. However, it should be appreciated that the implementation of the WFD is peculiar in respect of the role of EU-level guidance on its practical interpretation and application.⁴⁷ For the purpose of providing this guidance, a Common Implementation Strategy⁴⁸ (CIS) was established at EU level, involving working groups of experts and stakeholders from member states producing

⁴⁴ European Commission - Press release, *Official launch of REFIT Platform: New approach brings together stakeholders for better regulation and better results*, 29 January 2016, at http://europa.eu/rapid/press-release_IP-16-188_en.htm; COM(2015) 215 final, European Commission, *Better regulation for better results - An EU agenda*, http://ec.europa.eu/smart-regulation/better_regulation/documents/com_2015_215_en.pdf; and see European Commission web pages, Refit – making EU law simpler and less costly, https://ec.europa.eu/info/law/law-making-process/overview-law-making-process/evaluating-and-improving-existing-laws/reducing-burdens-and-simplifying-law/refit-making-eu-law-simpler-and-less-costly_en.

⁴⁵ WFD Art.19(2).

⁴⁶ For England and Wales see, Department for Environment, Food and Rural Affairs and Welsh Government, *River Basin Planning Guidance*, July 2014, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/339471/river-basin-guidance-final.pdf.

⁴⁷ See WFD Recital 49, concerning the adoption of guidelines by the Commission to promote a thorough understanding and consistent application of the criteria for characterisation of the river basin districts and evaluation of water status.

⁴⁸ See European Commission, web pages on Implementing the EU Water Framework Directive, at http://ec.europa.eu/environment/water/water-framework/objectives/implementation_en.htm.

a series of documents on key aspects of implementation of the Directive.⁴⁹ Although the CIS guidance documents are expressly stated not to be legally binding, it is difficult fully to understand the practical implications of many Directive obligations without making reference to these documents.

The critical question, therefore, is whether the rolling over of the substantive requirements of the WFD into national law will also encompass the existing EU CIS guidance. Beyond this is the issue of whether the continuing status of EU guidance in the UK will also encompass CIS documents issued after Brexit. If so, it would be reasonable for UK bodies to have an input into the preparations future guidance documents, but, paradoxically, this is just the sort of UK engagement with EU institutions and bodies that Brexit might seek to curtail. Clearly, there are some momentous issues remaining to be resolved as regards the functioning of non-legal materials relating to the operation of “the Directive”.

Reporting Obligations under the WFD

Another problematic aspect of seeking to insure post-Brexit legislative continuity by the rolling over of national legislation implementing EU directives is the doubtful supposition that EU directives and national implementing legislation are co-extensive. On this, it may be recalled that EU directives are stated to be “addressed to Member States”,⁵⁰ meaning that the ultimate responsibility for compliance falls upon the particular member state and not upon national bodies such as competent authorities. A consequence of this is that there can be requirements of a Directive that do not need to be transposed into national law as this would be superfluous because they are directly binding upon the Government of the member state and do not need to be imposed upon competent or other public bodies.⁵¹ The existence of these ‘un-transposed’ obligations under the WFD raises particular problems for post-Brexit continuity.

A good example of an un-transposed obligation arises in respect of reporting obligations under the WFD. The European Commission is required to publish reports on the implementation of the Directive 12 years after its entry into force and every six years thereafter, reviewing progress on implementation, the status of waters, a survey of river basin management plans and other matters. For this purpose, a summary of information provided by member states is to be included in

⁴⁹ See European Commission, Water Framework Directive Guidance Documents web pages at http://ec.europa.eu/environment/water/water-framework/facts_figures/guidance_docs_en.htm. Note particularly Guidance Document No.1, *Economics and the environment - The implementation challenge of the Water Framework Directive* (2003) which sets out some general principles concerning the role of guidance in the implementation of the Directive. See also the further national guidance provided by the UK Technical Advisory Group (UKTAG) for Water Framework Directive on UTAG, <https://www.wfduk.org/>.

⁵⁰ See Art.26 WFD.

⁵¹ See Case C-29/84, *Commission v Germany*, 1985 *European Court Reports* p.1661.

the Commission's reports.⁵² In order to enable the Commission to do this, an obligation is imposed upon member states to send copies of river basin management plans and updates of these to the Commission along with other information relating to water analyses and monitoring, and implementation of programmes of measures that need to be undertaken under the Directive.⁵³

The general position with regard to obligations of the UK to send information to EU institutions post-Brexit is considered, in outline at least, under the UK Government's Brexit White Paper.⁵⁴ In respect of reporting of the kind envisaged under the WFD, it is suggested that there should be no legal barrier to continuing to do so. However, where the UK had not explicitly agreed to continue to provide information, in Brexit negotiations, it is suggested that there may well be reasons why the UK would no longer wish to send information and there may be situations where it would make sense to amend legislation to avoid previously reciprocal arrangements becoming one-sided. How this might apply to reporting arrangements under the Directive is far from clear, but the serious possibility remains that the UK might decide to cease providing water information post Brexit. Given this possibility, the observations of UKELA on the need to implement a transparent national system for formally reporting and monitoring environmental information, noted above, seem particularly pertinent.⁵⁵

Conclusion

The discussion must conclude by revisiting the introductory question on Brexit: to what extent can EU water protection law be replicated in UK national law? On this, it has been seen that different aspects of EU pose different challenges, but the UK Government's present intention, to translate EU obligations into national law, may still fail to capture some key elements of EU environmental and water law. Certainly there are many practical aspects of this regulatory translation that are technically challenging and will demand major innovations in the national approach to environmental protection. Beyond that, commentators have drawn attention to the environmental governance infrastructure that will be lost on Brexit, including the need for careful consideration of national measures to ensure government accountability post Brexit.

⁵² Art.18 WFD.

⁵³ Art.15 WFD.

⁵⁴ UK Government, *Legislating for the United Kingdom's Withdrawal from the European Union*, Cm 9946, March 2017 p.21, available at <https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union>.

⁵⁵ Note that environmental reporting is extensively undertaken for purposes relating to the provision of environmental information to the European Environment Agency, see <https://www.eea.europa.eu/>. The implications of Brexit for the UK's membership of this Agency are beyond the scope of this paper, but it is certainly possible that the UK might continue to participate as a cooperating member of the Agency (which has several non-EU members as 'cooperating countries') and provide water and other environmental information accordingly.

Further beyond the need for appropriate environmental laws and governance infrastructure is the more nebulous, but no less important, aspect of the supra-national ethos in which environmental and ecological problems are characterised and addressed by law and other mechanisms. The often-repeated saying is that 'environmental pollution does not respect national boundaries'. This has as its counterpart the need for transboundary cooperation between polluters and recipients of pollution or environmental degradation of any kind. Developing a regional international consensus about environmental problems and common regulatory solutions to these might be seen as the greatest achievement of the EU in respect of the environment. The UK Government is about to replace this culture of consensus-building and mutuality between nations by a culture of national isolation in which the UK will 'go it alone' in redefining environmental problems and regulatory responses independently from its neighbours and without the possibility supra-national scrutiny. If it is true that environmental law is inherently multi-level, polycentric and transnationally coordinated, then the UK seems set to spectacularly unlearn the lessons of the last thirty years.⁵⁶

⁵⁶ L. Fisher and J. Harrison, 'Beyond the Binary: Brexit, Environmental Law and an Interconnected World', *OUPBlog* 19 September 2016.