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Quarterly Environmental Law Update Q2 2025

9 April 2025

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Meet the speakers

Richard Honey KC

Ned Westaway

Stephanie Bruce-Smith

Gabriel Nelson

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Climate litigation case update

Richard Honey KC

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Cases to cover today

- Friends of the Irish Environment v Minister for the Environment [2025] IEHC 61
- R (Vince) v Secretary of State for Transport [2024] EWHC 2936 (Admin)
- Petitions by Greenpeace & Uplift [2025] CSOH 10 – Rosebank & Jackdaw
- Amin v Information Commissioner [2025] UKFTT 00221 (GRC)

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Friends of the Irish Environment v Minister for the Environment [2025] IEHC 61

- Challenge to the Climate Action Plan 2023
- Follows the successful 2020 quashing of the earlier plan and the amendment of the Climate Action and Low Carbon Development Act 2015
- Grounds alleged failure to comply with amended 2015 Act
- Grounds on consultation, lack of reasons and failure to consider material considerations were easily dismissed

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Friends of the Irish Environment v Minister for the Environment [2025] IEHC 61

- Duty to produce CAP and update annually
  - consistent with UNFCCC and Paris Agreement
  - consistent with carbon budgets
  - set out roadmap of sector-specific actions required to comply with carbon budget and sectoral emissions ceilings
  - specify measures required for the first budget period
  - set out overview / outline of policies for periods beyond that
  - and other actions and measures reasonably necessary to support Government policy on climate change

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Friends of the Irish Environment v Minister for the Environment [2025] IEHC 61

- Main issue was the alleged lack of specificity in the plan as to how compliance with the climate targets and objectives would be secured, both quantification and the justification
- Level of quantification in the CAP or accompanying it must be such as to understand if the measures are realistic [73]
  - inform a judgement by a reasonable interested person [76]
- Level of specificity of reasons must be sufficient to allow evaluation of whether the CAP is realistic [117]

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Friends of the Irish Environment v Minister for the Environment [2025] IEHC 61

- Measures in the CAP have to *ensure* compliance with the carbon budget and explain how that is the case [79], [81]
  - 'ensure' requires an appropriately high level of confidence, but not scientific certainty [82]
  - one way to achieve such confidence is make provision for more than budget requires – safety net to allow for a shortfall [82]
  - 100 measures each with a 51% chance of achieving allocated saving means virtually zero chance of achieving the bottom-line saving [127]

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Friends of the Irish Environment v Minister for the Environment [2025] IEHC 61

- Cannot be purely narrative, qualitative assessment [94]
- Must have a numerical bottom line, even if estimated [94]
- Quantifiable measures have to be quantified [121]
- Some measures cannot yield an exact calculable impact in advance – provide a reasonable educated estimate [85]
  - reasonable attempt to quantify what's likely to happen [85]
  - can be based on a primarily qualitative assessment [91]

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Friends of the Irish Environment v Minister for the Environment [2025] IEHC 61

- Some measures do not "move the numbers" but are necessary [85]
- Estimates must be reasonably open on material available [91]
- Govt has a fair bit of discretion over the presentation, as long as the substance is there [94]
- FotIE had to demonstrate that the numbers in the CAP were insufficient – onus of proof on them [121], [124], [128]
- FotIE had not engaged with detail of CAP and no expert evidence [129], [134]

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R (Vince) v Secretary of State for Transport [2024] EWHC 2936 (Admin)

- JR of withdrawal of active travel guidance, including controversial "low traffic neighbourhoods" guidance
- Four grounds of challenge pursued – all unarguable
- (1) Not frustrating statutory purpose, as guidance non-statutory and not necessary to achieve statutory purpose
- (2) Not unlawful as disproportionate, as no general duty to act proportionately in public law – political judgement to move away from perceived "anti-motorist" measures

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R (Vince) v Secretary of State for Transport [2024] EWHC 2936 (Admin)

- (4) Not irrational, as elected Government entitled to change political priorities – does not meet high bar for irrationality
- (5) Not an unlawful failure to consult
  - no substantive or procedural legitimate expectation, as no representation for or past practice of consultation
  - not an exceptional case where it would be conspicuously unfair to act without prior consultation

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Petitions by Greenpeace & Uplift [2025] CSOH 10 – Rosebank & Jackdaw

- Common ground that consents were unlawful in light of *Finch* as environmental impact assessment did not cover downstream (Scope 3) emissions from combustion of oil and gas to be produced [3]
- Issue was what remedy should be granted
- Developers sought a declaration rather than quashing
- Court has a wide discretion to refuse a remedy in judicial review on equitable grounds [83], [88]

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Petitions by Greenpeace & Uplift [2025] CSOH 10 – Rosebank & Jackdaw

- **Public authorities must act in accordance with the law**
  - fundamental principle of the rule of law
  - normal remedy for an unlawful decision is to quash
  - refusal of quashing is exceptional
- **Practical effect of quashing**
  - unlawful decisions will stand
  - oil and gas will be extracted despite the consents being unlawful [102]

Petitions by Greenpeace & Uplift [2025] CSOH 10 – Rosebank & Jackdaw

- **Prejudice to public interests**
  - public interest in the rule of law and public authorities acting lawfully – a strong factor [107]
  - public interest in respect of climate change – weigh strongly in favour of quashing and re-making decisions on a lawful basis [114]
- **Public interest in good administration**
  - public interest in certainty and finality of decisions

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Petitions by Greenpeace & Uplift [2025] CSOH 10 – Rosebank & Jackdaw

- **Prejudice to private interests**
  - developers should have known the law was uncertain when the consents were granted – after the split CoA decision, and then after SC granted PTA [121]
  - works done by developers at the risk that SC might find downstream emissions had to be taken into account in EIA – took the risk of the consents might be quashed [125]
  - not entitled to rely on emails from OPRED on EIA scope as an accurate statement of the law [130]

Petitions by Greenpeace & Uplift [2025] CSOH 10 – Rosebank & Jackdaw

- **Consequences if Jackdaw / Rosebank do not proceed**
  - "If the consents are not granted on re-consideration, then that will be because the new decisions have been taken lawfully having taken into account all relevant factors and concerns, including the effect of downstream omissions"
  - potential consequences of a possible refusal at re-consideration stage do not justify refusing to quash [147]

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Petitions by Greenpeace & Uplift [2025] CSOH 10 – Rosebank & Jackdaw

- Balance lies in favour of quashing
- Public interest in authorities acting lawfully, and interest of members of the public in climate change, outweigh the private interest of the developers [151]
- Decisions quashed, to be taken again, taking into account downstream emissions [152]

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Amin v Information Commissioner [2025] UKFTT 00221 (GRC)

- Disclosure sought under Environmental Information Regulations of submission to Minister on Cumbria coal mine planning permission decision
- Disclosure had been refused by High Court in statutory challenge to permission: [2023] EWHC 3255 (KB) – in line with *Tweed v Parades Commission* [2006] UKHL 53
- Issue: public interest test balance for the internal communications exception (Reg12(4)(e))

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Amin v Information Commissioner [2025] UKFTT 00221 (GRC)

- FTT judged matters as at the time of DLUHC's EIR decision
- Since then, permission had been quashed and was live for re-determination – those circumstances were held irrelevant
- At the time of the EIR decision, the planning decision had been made and permission granted
- FTT therefore concluded the need for a safe space to protect internal discussions carried little weight at that time
- FTT held no prejudice to litigation on foot at that time, since the Ministerial submission was not relevant to that [84]

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Amin v Information Commissioner [2025] UKFTT 00221 (GRC)

- SoS made some (limited) reference to chilling effect – but put forward no evidence – and FTT rejected it [89]
  - Dept should expect Ministerial submissions are at risk of disclosure, especially in controversial cases
  - no material chilling effect if submission disclosed
- Important factor favouring disclosure: whether officials recommended granting or refusing permission [92]
  - and officials' reasons for that advice

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Conclusions

- These cases follow others recently eg *R (FoE, Jordan & Paulley) v SSEFRA* [2024] EWHC 2707 (Admin)
- Climate change increasingly a feature of public law litigation
- Widely-accepted importance of climate change is shaping the outcomes in public law cases
- Climate cases will help shape substance of public law in the future – as it is with human rights

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Environmental disputes under the Trade and Co-Operation Agreement

Initial reflections

Ned Westaway

Sandeels vs the EU: how the puffin's favourite food sparked first post-Brexit courtroom trade battle

Puffins fighting over sandeels on the Isle of May, Anstruther, Scotland. After a 25-year campaign by the RSPB, the UK government banned fishing for sandeels ir

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Treaty Series No.8 (2021)

Trade and Cooperation Agreement

between the United Kingdom of Great Britain and Northern Ireland, of the one part,
and the European Union and the European Atomic Energy Community,
of the other part

1. Recital (7)

2. RECOGNISING the Parties' respective autonomy and rights to regulate within their territories in order to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection and the promotion and protection of cultural diversity, while striving to improve their respective high levels of protection,

1. Art. 1

2. Purpose

3. This Agreement establishes the basis for a broad relationship between the Parties, within an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation, respectful of the Parties' autonomy and sovereignty.

1. Art. 516

2. WTO case-law

3. The interpretation and application of the provisions of this Part shall take into account relevant interpretations in reports of WTO panels and of the Appellate Body adopted by the Dispute Settlement Body of the WTO as well as in arbitration awards under the Dispute Settlement Understanding.

1. Opening positions on fisheries measures:

2. EU: New technical measures, or changes to existing technical measures shall be based on the best available scientific advice and shall be proportionate, non-discriminatory and effective to attain the objectives set out in Article FISH.1 [Objectives]. (Art. FISH.5)

1. Opening positions on fisheries measures:

2. EU: New technical measures, or changes to existing technical measures shall be based on the best available scientific advice and shall be proportionate, non-discriminatory and effective to attain the objectives set out in Article FISH.1 [Objectives]. (Art. FISH.5)

3. UK: Each Party shall manage its own fisheries independently and may take such measures in its relevant waters as it considers appropriate to ensure the rational and sustainable management of fisheries. (Art. 4(1))

1. Heading Five – Art. 493

2. Sovereign rights of coastal States exercised by the Parties

3. The Parties affirm that sovereign rights of coastal States exercised by the Parties for the purpose of exploring, exploiting, conserving and managing the living resources in their waters should be conducted pursuant to and in accordance with the principles of international law, including the United Nations Convention on the Law of the Sea.

1. Art. 494(1)-(2)

2. 1. The Parties shall cooperate with a view to ensuring that fishing activities for shared stocks in their waters are environmentally sustainable in the long term and contribute to achieving economic and social benefits, while fully respecting the rights and obligations of independent coastal States as exercised by the Parties.
3. 2. The Parties share the objective of exploiting shared stocks at rates intended to maintain and progressively restore populations of harvested species above biomass levels that can produce the maximum sustainable yield.

1. Art. 494(3)

2. The Parties shall have regard to the following principles:
3. (a) applying the precautionary approach to fisheries management;
4. (b) promoting the long-term sustainability (environmental, social and economic) and optimum utilisation of shared stocks;
5. (c) basing conservation and management decisions for fisheries on the best available scientific advice, principally that provided by the International Council for the Exploration of the Sea (ICES);
6. (d) ensuring selectivity in fisheries to protect juvenile fish and spawning aggregations of fish, and to avoid and reduce unwanted bycatch;
7. (e) taking due account of and minimising harmful impacts of fishing on the marine ecosystem and taking due account of the need to preserve marine biological diversity;
8. (f) applying proportionate and non-discriminatory measures for the conservation of marine living resources and the management of fisheries resources, while preserving the regulatory autonomy of the Parties;
9. (g) ensuring the collection and timely sharing of complete and accurate data relevant for the conservation of shared stocks and for the management of fisheries;
10. (h) ensuring compliance with fisheries conservation and management measures, and combating illegal, unreported and unregulated fishing; and
11. (i) ensuring the timely implementation of any agreed measures into the Parties' regulatory frameworks.

1. Art. 496(1)-(2)

2. (1) Each Party shall decide on any measures applicable to its waters in pursuit of the objectives set out in Article 494(1) and having regard to the principles referred to in Article 494(3).

3. (2) A Party shall base the measures referred to in paragraph 1 on the best available scientific advice.
4. A Party shall not apply the measures referred to in paragraph 1 to the vessels of the other Party in its waters unless it also applies the same measures to its own vessels.

Decision No 3/2022 of the Partnership Council established by the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part

of 21 December 2022

establishing a list of individuals who are willing and able to serve as members of an arbitration tribunal under the Trade and Cooperation Agreement

1. Role of *amicus curiae* submissions – Annex 48 Art. 40

2. Unless the Parties agree otherwise, arbitration tribunal may receive unsolicited written submissions from independent natural persons:

- Within 10 days of establishment
- No longer than 15 pages
- Directly relevant etc.
- Drafted in English

1. **III. Brief description of how the measure constitutes a breach of the TCA**
2. The EU considers that the sandeel fishing prohibition constitutes a breach of the UK's obligations under Articles 494(3)(c), 494(3)(f), 496(1) and 496(2) of the TCA.
3. Pursuant to those obligations, the EU and the UK shall base their respective conservation and management decisions for fisheries on the best available scientific advice and ensure that such measures are proportionate and non-discriminatory to a legitimate public policy objective.

...

1. … However: (i) the sandeel fishing prohibition is not based on the best available scientific advice within the meaning of Article 494(3)(c) and 496(2) of the TCA; (ii) constitutes a discriminatory measure within the meaning of Article 494(3)(f) of the TCA, given that it essentially affects EU vessels; and (iii) is not proportionate within the meaning of Article 494(3)(f) of the TCA, given that it is neither apt to achieve the objective pursued by the UK nor is it the least means to achieve that objective and other less restrictive alternatives exist.
2. As a result, the sandeel fishing prohibition also constitutes an unjustified restriction on the access of EU vessels to UK waters, and in particular an unjustified restriction of the right of full access of EU vessels to UK waters pursuant to Annex 38 of the TCA.

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1. Claim 1 – scientific advice
2. EU submissions para. 500
3. The EU does not, therefore, contest that there is a rational and objective relationship between the “scientific advice” invoked by the UK as the base for the sandeel fishing prohibition and a prohibition on sandeel fishing in UK waters of the North Sea coinciding spatially with the feeding range of the chick-rearing seabirds for which sandeels comprise a substantial proportion of their diet.

1. Claim 2 – proportionality
2. EU submissions para. 519
3. It follows that Article 496 TCA, read together with Article 494(3)(f) TCA, means that one of the principles to which a Party shall have regard when deciding on a fisheries management measure is that any “fisheries management” “measure” applied on the basis of Article 496(1) TCA must be “proportionate and non-discriminatory”.

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1. Reflections
2. (1) Use of dispute resolution mechanisms in the TCA

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1. Reflections

(1) Use of dispute resolution mechanisms in the TCA

(2) Wider implications for fisheries?

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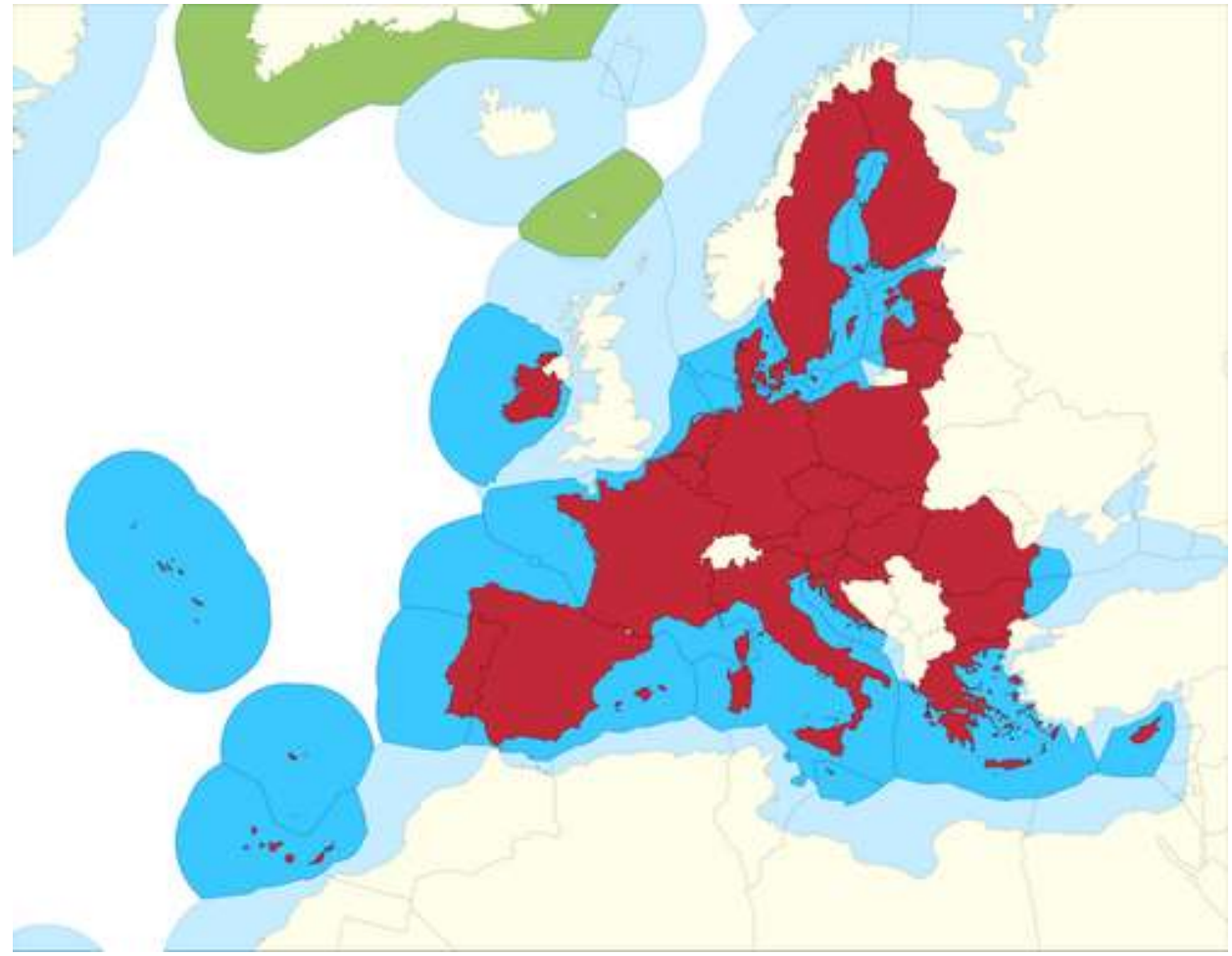

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1. Reflections

(1) Use of dispute resolution mechanisms in the TCA

(2) Wider implications for fisheries?

(3) cf. application domestically?

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1. Reflections

(1) Use of dispute resolution mechanisms in the TCA

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(3) cf. application domestically?

1. s.29(1) European Union (Future Relationship) Act 2020
2. *Lipton v BA Cityflyer Ltd* [2024] UKSC 24 paras. 79-80
3. *R (Blue Marine Foundation) v SSEFRA* [2025] EWHC 734 (Admin)

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1. Reflections

(1) Use of dispute resolution mechanisms in the TCA

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(3) cf. application domestically?

1. s.29(1) European Union (Future Relationship) Act 2020
2. *Lipton v BA Cityflyer Ltd* [2024] UKSC 24 paras. 79-80
3. *R (Blue Marine Foundation) v SSEFRA* [2025] EWHC 734 (Admin)
4. (4) Wider environmental and climate issues: Ch.7, Title XI, Heading One?

1. Art. 391(2)

2. A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection.

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Legislation Update

Water (Special Measures) Act 2025 & The Planning and Infrastructure Bill

Stephanie Bruce-Smith

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Water (Special Measures) Act 2025

Wider Context:

- Independent Water Commission established in 2024 to deliver recommendations to government on reforms to the water sector – due to report back Q2 2025
- Commission's focus = ensuring sufficiently robust and stable reg framework to:
  - Attract the investment needed for the future
  - Speed up infrastructure delivery
  - Restore confidence in the sector
- See Terms of Reference; purpose = to deliver necessary "reset" of water sector in E&W

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Water (Special Measures) Act 2025

Press release

New law to ban bonuses for polluting water bosses

The Water (Special Measures) Act 2025 has today received Royal Assent, boosting the powers of water sector regulators to tackle pollution.

From: Department for Environment, Food & Rural Affairs and The Rt Hon Steve Reed OBE MP

Published 24 February 2025

Major legislation to crack down on water bosses polluting Britain's rivers, lakes and seas has today been signed into law in the most significant increase to enforcement powers in a decade.

The Water (Special Measures) Act 2025 will give regulators new powers to take tougher and faster action to crack down on water companies damaging the environment and failing their customers.

The Act delivers on the manifesto pledges to clean up the water sector, including increasing the ability of the Environment Agency to bring forward criminal charges against water executives who break the law. It will create new tougher penalties, including possible imprisonment, for water executives who obstruct investigations.

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Water (Special Measures) Act 2025

Overview:

Amendments to existing legislation to provide:

- New rules about remuneration, governance & financial transparency (Sections 1 & 2)
- New duties in respect of sewage and water supply systems (Sections 3-5)
- New sanctions (civil & automatic penalties) (Sections 6-8)
- Amendments to regulatory functions and charges (Sections 10-12)

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Water (Special Measures) Act 2025

Remuneration: "Banning of bonuses" (Section 1)

- Gives Ofwat power to issue rules, which must be exercised to prohibit undertakers giving performance-related pay to chief exec & directors where undertaker fails to meet specified standards
- Coupled with obligation on Ofwat to make rules with standards relating to:
  - Consumer matters
  - Environment
  - Financial resilience of undertakers
  - Criminal liability of undertakers

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Water (Special Measures) Act 2025

Pollution incident reduction plans (Section 3)

- New duty to prepare and publish a pollution incident reduction plan outlining how the undertaker intends to reduce the occurrence of pollution incidents that are attributable to its system
- Must address:
  - Frequency & seriousness of pollution incidents in previous year
  - Maintenance steps undertaken to any structure / apparatus causing incidents
  - Measures intending to take to reduce occurrence
  - Impact undertaker considers such steps likely to have
  - Likely sequence & timing for implementing measures
- Implementation reports containing assessment of extent to which succeeded / failed in implementing planned measures during preceding yr & how avoid future failure

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Water (Special Measures) Act 2025

Emergency Overflows (Section 4)

- New reporting duty on discharge from emergency overflows
- Must report:
  - That there has been a discharge
  - Location
  - When discharge began (must publish within 1 hour of beginning)
  - When discharge ended (must publish within 1 hour of ending)
- Information must be in form which allows public to readily understand it & in way that makes it readily accessible

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Water (Special Measures) Act 2025

Sanctions: civil penalties (Section 7)

- Modification of standard of proof for fixed / variable monetary penalties under s.36 and s.62 of the Regulatory Enforcement and Sanctions Act 2008:
  - Section 7(2) of the W(SM)A 2025:
- *"In relation to an offence within subsection (3) that is committed by a water company, the powers may be exercised as if "on the balance of probabilities" appeared instead of "beyond reasonable doubt" in sections 39(2) and 42(2) of the 2008 Act"*

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Water (Special Measures) Act 2025

Sanctions: automatic penalties (section 8)

- Where relevant agency (EA or NRB for Wales) satisfied that it has the power to impose a fixed monetary penalty on a water company in respect of a specified offence, it must impose the penalty unless:
  - It considers there are exceptional circumstances that mitigate the culpability of the company; or
  - "alternative enforcement action" is in contemplation or in progress
- "Alternative enforcement action" defined as criminal proceedings or the imposition of a variable monetary penalty

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Planning and Infrastructure Bill 2025

Wider Context:

- Said to be "*central to government's plan to get Britain building again and deliver economic growth*"
- Main objectives:
  - speed up and streamline delivery of new homes and critical infrastructure;
  - supporting delivery of government's plan to build 1.5m homes;
  - "fast-tracking" 150 planning decisions on major economic infrastructure projects in this Parliament (i.e. determine 150 DCOs)
  - Support delivery of government's Clean Power 2030.

Planning and Infrastructure Bill 2025

"Environmental" elements?

Not *just* Part 3 – other chapters e.g.:

- NSIP
  - NPS; JR reform
- Electricity infrastructure
  - Connections, storage, consumer benefits
- Planning decisions
  - Fees, training and delegation

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Planning and Infrastructure Bill 2025

Part 3 – Development and Nature Recovery

- Problems identified with current approach:
  - Where development required to discharge environmental obligation relating to protected habitats or species, often little or no strategic coordination as to how obligations are / should be discharged;
  - Development often delayed until sufficient mitigation put in place – may take months / years (e.g. nutrient neutrality);
  - Assessing environmental impact of development requires high level of technical knowledge and bespoke assessment, even for small development –> must be linked to specific mitigation measures & no development where such measures unavailable.

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Planning and Infrastructure Bill 2025

Part 3 – Development and Nature Recovery

Proposed solutions:

- Establishment of a Nature Restoration Fund (NRF) as alternative approach for developers to meet certain environmental obligations relating to protected sites / species;
- Permits Nature England (or other designated body) to bring forward Environmental Delivery Plans (EDPs) that will set out the strategic action to be taken to address impact that development has on a protected site / species;
  - Where EDP in place and developer uses it, developer no longer required to undertake their own assessments / deliver project-specific interventions for issues addressed by the EDP
- *"The government believes this approach will facilitate a more strategic approach to the discharge of environmental obligations & result in improved environmental outcomes being delivered more efficiently"*

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Planning and Infrastructure Bill 2025

Environmental Delivery Plans (EDPs) (1)

Overview (Cl. 48)

- Plan prepared by NE and made by SoS outlining, in respect of the development to which it applies:
  - Environmental features likely to be negatively affected by the development;
  - Conservation measures to be taken by / on behalf of NE in order to protect those features;
  - Amount of nature restoration levy (NRL) payable by developers to NE to cover cost of those conservation measures; and
  - Environmental obligations in relation to development that are discharged, disapplied or otherwise modified if a developer pays the nature restoration levy in relation to the development.

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Planning and Infrastructure Bill 2025

Environmental Delivery Plans (EDPs) (2)

Further points:

- **Consultation requirements**: 28 days; must consult EA; JNCC; relevant LPAs & MMO where covers waters adjacent to England
- **Overall Improvement test (Cl.55):** prior to making the EDP, SoS must be satisfied that passes the "overall improvement test"
  - If SoS considers no longer passes overall improvement test, must revoke EDP, unless NE proposed amendments to result in test being passed (Cl.59(2))
  - May revoke on own initiative / if requested by NE. If does not revoke following request from NE, must publish notice with reasons for decision.
- **Implementation (Cl.71):** NE responsible for implementation of conservation measures in EDP. Also power to acquire land compulsorily.

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Planning and Infrastructure Bill 2025

Nature Restoration Levy (1)

Works in conjunction with EDPs:

- If there is a development to which EDP applies, developer may request to pay NRL ahead of development commencing
- Payment of NRL results in:
  - Environmental impact of development on protected feature of a protected site being disregarded for purposes of obligations under Habitats Regulations 2017 or Wildlife and Countryside Act 1981 and
  - Developer being treated as having been granted a licence under reg 55 of Habitats Regulations 2017; s.16 of WCA 1981 or s.10 of Protection of Badgers Act 1992
- NB: Option for EDP to make NRL mandatory

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Planning and Infrastructure Bill 2025

Nature Restoration Levy (2)

- Regulations about the levy (Cl. 62):
  - SoS may make regulations about NRL
  - In making regs, must aim to ensure that overall purpose of NRL = ensure that costs incurred in maintaining or improving the conservation status of environmental features can be funded (wholly or partly) by developers in a way that does not make development economically unviable.

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Planning and Infrastructure Bill 2025

Further Resources:

- On Part 3 of the Bill:
  - Esther Drabkin-Reiter & Michael Feeney, 'All change for nature recovery and habitats assessments? The Planning & Infrastructure Bill 2025' *FTB Environmental Law Blog,* 27 March 2025 https://www.ftbchambers.co.uk/elblog/view/all-change-for-nature-recovery-and-habitats-assessments-the-planning-infrastructure-bill-2025
- On the PIB more generally:
  - *Planning and Infrastructure Bill: getting Britain building?* FTB Breakfast Briefing, 19 March 2025: https://www.youtube.com/watch?v=DmhrYmB6cMk

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Quarterly Environmental Law Update Q2 2025

Mineral and Waste Plan (and Water) Law Update

Gabriel Nelson

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Contents

1. The National Farmers' Union v Herefordshire Council & Ors [2025] EWHC 536 (Admin)
2. Secretary of State for Environment, Food and Rural Affairs v R(on the application of Pickering Fishery Association) [2025] EWCA Civ 378

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The National Farmers' Union v Herefordshire Council & Ors [2025] EWHC 536 (Admin)

Facts

- The NFU brought a claim against Herefordshire Council and the Secretary of State. River Action, a charity that campaigns against river pollution, as intervener.
- Challenge to to the Herefordshire Minerals and Waste Local Plan, adopted in March 2024.
- Policy W3, proposals for livestock unit(s) on agricultural holdings must meet certain requirements:

a. they are required to provide waste management method statements; and

b. they are also required to demonstrate "at least nutrient neutrality" if they are within the River Wye or River Clun Special Areas of Conservation.

- Reason for policy was high level of pollution in Herefordshire's river network.
- Both River Clun SAC and part of the River Wye SAC are failing in respect of their water quality objectives. Largely due to poultry farming.

Grounds

1. Ground 1: unlawful extension of policy to address agricultural matter beyond the definition of "waste" in the Planning Acts.
2. Ground 2: irrational and/or improper extension of policy requirements to the whole agricultural unit within which development takes place.
3. Ground 3: irrational extension of nutrient neutrality requirements, not supported by Natural England.
4. Ground 4: procedural unfairness on the basis that the failure to consult the NFU at regulation 19 stage caused substantial prejudice.
5. Ground 5: failure to provide adequate reasons.

Law

- S.15 of the PCPA: LPAs must prepare and maintain a local development scheme, which must specify local development documents which are to be development plan documents.
- S.19(1): DPDs must be prepared in accordance with the LDS.
- S.19(1B): each LPA "must identify the strategic priorities for the development and use of land in the authority's area."
- S.19(1C) "Policies to address those priorities must be set out in the [LPA's DPDs] (taken as a whole)".
- Article 3(1) of the WFD defines "waste" as "any substance or object which the holder discards or intends or is required to discard". (see s.336 TCPA 1990)

Ground 1

- Two issues:

a. Narrow issue – definition of waste in the Planning Acts (and whether Policy W3 extends beyond this definition).

b. Broad issue – lawfulness of any extension.

- Lieven J found found that s.19(1) does not seek to limit the definition of "waste".
- As such, s.19(1) could not otherwise limit the LPA's powers.
- The name of the document also did nothing to restrict the MWLP to the scope of "waste" as defined in the Planning Acts; [80].
- Ground 1 therefore failed – Policy W3 could lawfully exceed definition of "waste" in the Planning Acts.
- Lieven J went on to consider narrow issue.

- Exceptions to definition in Article 3(1) WFD:

a. Article 2(1)(f) – "faecal matter… used in farming… through such processes or methods which do not harm the environment or endanger human health."

b. "By-products" under Article 5: "substance or object resulting from a production process the primary aim of which is not the production of that substance or object."

- 4 conditions to be satisfied:

i. further use of the substance is certain;

ii. the substance can be used directly without any further processing other than normal industrial practice;

iii. the substance is produced as an integral part of a production process; and

iv. further use is lawful.

- MWLP encompassed "agricultural waste."
- NFU's position: such waste is a by-product for the purposes of Article 5 WFD. Not discarded but rather used as a fertilizer in farming; [64]-[66].
- Further, parallel regulatory regimes (e.g. Farming Rules for Water) should be assumed to operate effectively. Therefore, no environmental harm arising such that chicken manure fell within the exception in Article 2(1)(f) WFD; [67].
- In both scenarios, Policy W3 went beyond scope of WFD.
- Lieven J found that it was "beyond any doubt [that the parallel regimes] had failed to protect the environment from harm"; [81]. Therefore, exemption in Article 2(1)(f) did not apply.
- Re whether chicken manure could be considered a by-product for the purposes of Article 5, Lieven J considered the CJEU cases of *Commission v Spain* [C-121/03] and *Brady v Environmental Protection Agency* [C-113/12].
- *Brady* confirmed that chicken manure could be classified as a by-product under Article 5, but only where there was "sufficient certainty" of re-use; [82].
- On the present facts, it could not be assumed the manure would be used in farming which causes no environmental harm; [76-77]).

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Ground 2

- Concerned requirements in Policy W3 that:

a. EIA development demonstrate that waste generated by the *whole agricultural unit* will be appropriately managed both on and off site through waste management method statements.

b. Proposals for livestock units must demonstrate "at least nutrient neutrality" if they are within the River Wye or River Clun Special Areas of Conservation.

- NFU argued that requirements breached principle in *Newbury v Secretary of State for the Environment* [1981] AC 578, i.e. do not fairly and reasonably relate to the permission sought.
- Lieven J found that requiring a method statement to address the "overall management of waste generated" amounted to "no more than considering the cumulative impacts" of what would be major development with significant likely environmental effects; [99].
- Regarding second requirement, Judge held that the wording of Policy W3 was clear that nutrient neutrality applies only to the proposal and not the entire unit; [100].

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Secretary of State for Environment, Food and Rural Affairs v R(on the application of Pickering Fishery Association) [2025] EWCA Civ 378

Facts

- Upper Costa Beck ("**UCB**") is one of the more than 1000 individual water bodies in the Humber River Basin District.
- Heavily polluted over a number of years, causing fish populations to decline.
- Covered by the Humber River Basin Management Plan ("**HRBMP**"), approved by SSEFRA on 14 December 2022.
- Respondent successfully challenged that decision in the High Court (Lieven J).
- Single ground of appeal: Lieven J misinterpreted the EU's WFD as transposed into national law by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 ("**the WFDR 2017**").

Law

- Legislation addressed in detail at [14]-[41].
- By Regulation 12 of the WFDR 2017, the EA is required to prepare and submit to the Secretary of State proposals for:

a. Environmental objectives ("**EOs**") for each river basin district, and

b. A Programme of Measures ("**PoM**") to be applied in order to achieve those EOs.

- Those EOs are defined in regulation 13 by reference to each water body within a river basin district. The EOs and PoM must be periodically reviewed, and, where appropriate, updated.
- Content of RBMPs determined by regulation 27. Includes a summary of the programme of measures to be applied.
- The UCB is classified as a "heavily modified water body" under Regulation 15. By regulations 13 and 16, the (extended) EOs for UCB are to achieve "good ecological potential by December 2027.
- Currently, UCB's ecological potential is only "moderate."

Main Issue

- Lieven J at [8]: "whether and to what degree, the HRBMP or any other documents produced by the EA pursuant to the WFDR 2017 must set out information at the level of the individual water body, as opposed to at river basin district level, or even national level." "The information in question is what measures are going to be taken to achieve the EOs."
- The Secretary of State and the EA submitted that a PoM is not required to include measures for each water body. A PoM and RBMP are high-level or strategic documents. A PoM may contain measures which relate to the whole of a river basin district or the nation.
- Pickering and the Office for Environmental Protection ("**the OEP**"), which intervenes in these proceedings, submit that the PoM is required by law to identify measures for each water body.
- SSEFRA stated the High Court decision "fundamentally changes [the] operation of the scheme of legislation."

Judgment

- 4 sub-headings:

a. What do the PoMs approved by the Secretary of State set out to do?

b. Is a PoM intended to be only a high-level, strategic document?

c. What is the relevance of other regimes for identifying water-body-specific measures?

d. The interpretation of the term "Programme of Measures."

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PoMs approved by Secretary of State

- Clear distinction between RBMPs and PoMs in WFD and WFDR 2017; [101]-[105]. Same in the SSEFRA's River Basin Planning Guidance (2021) and the RBMPs themselves.
- Revealed in evidence that the Secretary of State had not approved any separate PoMs, despite text of RMBPs giving that impression; [109]. Wasn't clear to the Court whether the SSEFRA himself was aware of this fact.
- Rather, only Summary PoMs had been produced, as set out in each RBMP. Were intended to act as PoMs.
- Court held PoMs and RBMPs must be prepared and approved as separate documents. The Summary PoM presupposes the existence of a lawful PoM.
- SSEFRA and EA's "fundamental self-misdirection" meant that appeal would fail on that ground alone.
- Addressing the summary PoMs themselves, the Court found that they were only focused on national/generic measures; [122].

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PoMs as high-level strategic documents?

- There is nothing in the WFD or in relevant policy documents to indicate that measures need only relate to national level or for a river basin district or river basin; [131].
- Substantial parts of the WFD impose specific, detailed requirements for water bodies. They are not of a high-level or strategic nature. [132] The EOs required under Article 4 are specific to individual water bodies. [133]
- The WFD involves a series of interconnected stages concerned with identifying and implementing the measures necessary to achieve the EOs for each water body. The preparation and approval of a PoM under Article 11 serves that purpose [134]-[140]
- The requirements in Article 11 for a PoM are not high-level or strategic. They are specific and measurable. They are required to achieve the EOs under Article 4 for each water body. [141]
- Nor is a RBMP a purely strategic or high-level plan. It may include strategic and high-level material, but it is not so limited. [144]

Relevance of other regimes for identifying water-body-specific measures?

- The Secretary of State submitted that his approach allowed for other regulatory regimes to deal with the need for actions on the ground as well as economic and financial factors, e.g. the Environmental Permitting (England and Wales) Regulations 2016 and the Water Industry Act 1991; [146].
- No merit in this argument:
- (1) Other legislation which any national legislature chooses to enact provides no guide to the meaning or scope of an EU Directive; [147]
- (2) The WIA 1991 and the EPR 2016 do not cover all the actions needed to achieve the EOs under Article 4 and to comply with the WFD and the WFDR 2017; [148]
- (3) The WFD and the WFDR 2017 also have regard to economic and financial issues; [150]
- (4) Although Article 11 allows a PoM to rely upon "measures following from legislation adopted at a national level", it is insufficient for a PoM simply to rely upon the mere existence of that legislation. The document needs to explain how such legislation would be applied to a water body so as to achieve its EOs; [148].

Interpretation of the term "Programme of Measures"

- "Programme" refers to a planned series of activities or events.
- "Measure" refers to a plan or course of action intended to attain some object; [151].
- The Court rejects the submission of the Secretary of State and EA that EOs and PoMs are "merely aspirational". Their objective is to achieve the appropriate status for each water body; [153]
- Natural reading of Article 11 of the WFD is that a Member State must establish a PoM at the same level as the EOs which are to be achieved, i.e. at the level of individual water bodies. The measures must either be specific to a water body or, if generic, related to the achievement of the EOs for each water body; [154]-[170].
- The Court's analysis of those provisions applies equally to the WFDR 2017; [171]
- The Secretary of State's own guidance on river basin planning accords with the Court's interpretation of the WFD and the WFDR 2017, in particular on the obligation to include water-body-specific measures in PoMs; [174]-[183].

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