



Francis Taylor Building

FTB Quarterly Environmental Law Update

14 October 2021



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Environmental law – quarterly update
14 October 2021

ENVIRONMENT BILL – UPDATE AND OVERVIEW OF PROVISIONS ON AIR QUALITY

Ned Westaway



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk

Outline

- What is happening with the Bill
- Discussion of Lords amendments
- Air quality
 - Existing legal framework
 - Proposals in the Bill
- Reflections

Environment Bill – update

- Introduced 30 January 2020
- Third reading in HL – 13 October 2021
- Current version of the Bill has 14 amendments from HL Report stage
- Must go back to Commons before Royal Assent
- Risk to the Bill?
- Convention of “double insistence”



Amendment 1

New clause:

“Purpose and declaration of biodiversity and climate emergency

- (1) The purpose of this Act is to address the biodiversity and climate emergency domestically and globally.*
- (2) As soon as reasonably practicable and no later than one month beginning with the day on which this Act is passed, the Prime Minister must declare that there is a biodiversity and climate emergency domestically and globally.*
- (3) The Government must have regard to this purpose and declaration when implementing the provisions of this Act.”*

Amendment 1

New clause:

“Purpose and declaration of biodiversity and climate emergency

(1) The purpose of this Act is to address the biodiversity and climate emergency domestically and globally.

(2) As soon as reasonably practicable and no later than one month beginning with the day on which this Act is passed, the Prime Minister must declare that there is a biodiversity and climate emergency domestically and globally.

(3) The Government must have regard to this purpose and declaration when implementing the provisions of this Act.”

Ping pong prospects: **low**

Amendment 2

Insert new priority area for long-term and interim targets:

“(e) soil health and quality.”



Amendment 2

Insert new priority area for long-term and interim targets:

“(e) soil health and quality.”

Ping pong prospects: **low-medium**



Amendment 4

Amend clause on PM2.5 target to stipulate:

“The PM2.5 air quality target must—

(a) be less than or equal to 10µg/m³,

(b) so far as practicable, follow World Health Organization guidelines, and

(c) have an attainment deadline on or before 1 January 2030.”



Amendment 4

Amend clause on PM2.5 target to stipulate:

*“The PM2.5 air quality target must—
(a) be less than or equal to 10µg/m³,
(b) so far as practicable, follow World Health Organization guidelines, and
(c) have an attainment deadline on or before 1 January 2030.”*

Ping pong prospects: **low-medium**



Amendment 11

New provision, extending the duty on the Secretary of State to ensure that:

“(d) interim targets are met.”

Amendment 11

New provision, extending the duty on the Secretary of State to ensure that:

“(d) interim targets are met.”

Ping pong prospects: **low**

Amendment 24

Omit provision for Secretary of State guidance on OEP’s enforcement policy and functions and insert new clause:

“OEP independence

(1) The OEP has complete discretion in the carrying out of its functions, including in—

- (a) preparing its enforcement policy,*
- (b) exercising its enforcement functions, and*
- (c) preparing and publishing its budget.*

(2) At the start of each period of multi-annual funding and no later than 1 April 2023, the Secretary of State must lay before Parliament, and publish, a statement setting out the multi-annual budget which they intend to provide to the OEP.

(3) The Secretary of State must lay before Parliament, and publish, a statement responding to any request from the OEP for additional funding due to a change in the body’s responsibilities or functions, within three months of that request being received.

(4) In making or terminating appointments under paragraph 1 and paragraph 5 of Schedule 1, the Secretary of State must obtain the consent of the Environment, Food and Rural Affairs and Environmental Audit Committees of the House of Commons.”

Amendment 24

Omit provision for Secretary of State guidance on OEP's enforcement policy and functions and insert new clause:

"OEP independence

(1) The OEP has complete discretion in the carrying out of its functions, including in—

- (a) preparing its enforcement policy,*
- (b) exercising its enforcement functions, and*
- (c) preparing and publishing its budget.*

(2) At the start of each period of multi-annual funding and no later than 1 April 2023, the Secretary of State must lay before Parliament, and publish, a statement setting out the multi-annual budget which they intend to provide to the OEP.

(3) The Secretary of State must lay before Parliament, and publish, a statement responding to any request from the OEP for additional funding due to a change in the body's responsibilities or functions, within three months of that request being received.

(4) In making or terminating appointments under paragraph 1 and paragraph 5 of Schedule 1, the Secretary of State must obtain the consent of the Environment, Food and Rural Affairs and Environmental Audit Committees of the House of Commons."

Ping pong prospects: **medium**

Amendment 27

Omit from OEP/environmental review clause:

"(8) Where the court makes a statement of non-compliance it may grant any remedy that could be granted by it on a judicial review other than damages, but only if satisfied that granting the remedy would not—

- (a) be likely to cause substantial hardship to, or substantially prejudice the rights of, any person other than the authority, or*
- (b) be detrimental to good administration."*

Amendment 27(2)

Substitute:

“(8) Where the court makes a statement of non-compliance it may grant any remedy that may be granted by it on a judicial review other than damages.

(8A) In determining whether it would be in the interests of justice to grant a remedy, the court must have regard to—

(a) the nature and consequences of the authority’s failure to comply with environmental law, and

(b) the likelihood that the grant of a remedy would cause—

(i) substantial hardship to, or substantial prejudice to the rights of, any person other than the authority, or

(ii) any detriment to good administration.”

Amendment 27(2)

Substitute:

“(8) Where the court makes a statement of non-compliance it may grant any remedy that may be granted by it on a judicial review other than damages.

(8A) In determining whether it would be in the interests of justice to grant a remedy, the court must have regard to—

(a) the nature and consequences of the authority’s failure to comply with environmental law, and

(b) the likelihood that the grant of a remedy would cause—

(i) substantial hardship to, or substantial prejudice to the rights of, any person other than the authority, or

(ii) any detriment to good administration.”

Ping pong prospects: **medium-high**

New clause:

“Habitats Regulations: limits on powers to amend

(1) The Secretary of State may only make regulations under section 108 or 109—

(a) for the purposes of—

(i) securing compliance with an international environmental obligation, or

(ii) contributing to the favourable conservation status of species or habitats or the favourable condition of protected sites;

(b) if the regulations do not reduce the level of protection provided by the Habitats Regulations, including protection for protected species, habitats or sites; and

(c) following public consultation and consultation with—

(i) the Office for Environmental Protection,

(ii) Natural England,

(iii) the Joint Nature Conservation Committee, and

(iv) other relevant expert bodies.”

New clause:

“Habitats Regulations: limits on powers to amend

(1) The Secretary of State may only make regulations under section 108 or 109—

(a) for the purposes of—

(i) securing compliance with an international environmental obligation, or

(ii) contributing to the favourable conservation status of species or habitats or the favourable condition of protected sites;

(b) if the regulations do not reduce the level of protection provided by the Habitats Regulations, including protection for protected species, habitats or sites; and

(c) following public consultation and consultation with—

(i) the Office for Environmental Protection,

(ii) Natural England,

(iii) the Joint Nature Conservation Committee, and

(iv) other relevant expert bodies.”

Ping pong prospects: **low-medium**



Amendment 100

New clause:

“Duty to implement an enhanced protection standard for ancient woodland in England

(1) The Government must implement an enhanced protection standard for ancient woodland, hereafter referred to as the “ancient woodland standard” in England as set out in subsections (2), (3) and (4) and this must have immediate effect.

(2) The ancient woodland standard must set out the steps necessary to prevent further loss of ancient woodland in England.

(3) The ancient woodland standard commits the Government to adopting a standard of protection which must be a requirement for all companies, persons or organisations involved in developments affecting ancient woodlands in England.

(4) This standard must be that—

(a) any development that causes direct loss to ancient woodland or ancient woodland and ancient and veteran trees must be refused unless there are wholly exceptional reasons and, in addition, a suitable compensation strategy must be in place prior to development commencing,

(b) any development adjacent to ancient woodland must incorporate a minimum 50-metre buffer to provide protection, reduce indirect damage and provide space for natural regeneration,

(c) any ancient or veteran trees must be retained within a development site, including a root protection area and appropriate buffer zone.

(5) This buffer zone must be whichever is greater of—

(a) an area which is a radius of 15 times the diameter of the tree with no cap, or

(b) 5 metres beyond the crown.”



Amendment 100

New clause:

“Duty to implement an enhanced protection standard for ancient woodland in England

(1) The Government must implement an enhanced protection standard for ancient woodland, hereafter referred to as the “ancient woodland standard” in England as set out in subsections (2), (3) and (4) and this must have immediate effect.

(2) The ancient woodland standard must set out the steps necessary to prevent further loss of ancient woodland in England.

(3) The ancient woodland standard commits the Government to adopting a standard of protection which must be a requirement for all companies, persons or organisations involved in developments affecting ancient woodlands in England.

(4) This standard must be that—

(a) any development that causes direct loss to ancient woodland or ancient woodland and ancient and veteran trees must be refused unless there are wholly exceptional reasons and, in addition, a suitable compensation strategy must be in place prior to development commencing,

(b) any development adjacent to ancient woodland must incorporate a minimum 50-metre buffer to provide protection, reduce indirect damage and provide space for natural regeneration,

(c) any ancient or veteran trees must be retained within a development site, including a root protection area and appropriate buffer zone.

(5) This buffer zone must be whichever is greater of—

(a) an area which is a radius of 15 times the diameter of the tree with no cap, or

(b) 5 metres beyond the crown.”

Ping pong prospects: low

Air quality – existing legal framework

- Complex and fragmented
 - Directive 2008/50/EC and Ambient Air Quality Standards Regulations 2010
 - Directive 2016/2284/EU and National Emission Ceilings Regulations 2018
 - Other point source controls: e.g. industrial emissions (EPR), furnaces and chimneys (Clean Air Act 1993)
 - Local air quality management (Part IV of the Environment Act 1995)
- ClientEarth litigation (2010-2018)
- Government directions under EA 1995 to meet AAQ Regulations

Air quality – proposals in the Bill

- Part 1 – binding long term targets on air quality and PM2.5, interim targets in environmental improvement plan, reporting and OEP scrutiny
- Part 4/Schedule 11 – amendments to LAQM
 - Regular review of National Air Quality Strategy (new s.80(4A)) and annual reporting (s.80A)
 - Express duty to have regard to NAQS (s.81A)
 - Co-ordination between local authorities (s.82(4)-(5)) and duty to co-operate (s.85A)
 - Improved co-ordination in the development of action plans (ss.85A and 83B)
- Part 4/Schedule 12 – amendments to Clean Air Act 1993
- Part 4 – environmental recall
(NB amendment 53 on pollinators/pesticides)



Francis Taylor Building

Thanks for watching

ned.westaway@ftbchambers.co.uk



The oral presentation including answers given in any question and answer session (“the presentation”) and this accompanying paper are intended for general purposes only and should not be viewed as a comprehensive summary of the subject matters covered. Nothing said in the presentation or contained in this paper constitutes legal or other professional advice and no warranty is given nor liability accepted for the contents of the presentation or the accompanying paper. Ned Westaway and Francis Taylor Building will not accept responsibility for any loss suffered as a consequence of reliance on information contained in the presentation or paper. We are happy to provide specific legal advice by way of formal instructions.



Francis Taylor Building

**Environmental law – quarterly update
14 October 2021**

ENVIRONMENT BILL – LOCAL NATURE RECOVERY STRATEGIES

Jonathan Welch

Outline

- What does the Bill contain?
- Local Nature Recovery Strategies
- Consultation



Part 6: Nature and Biodiversity

- Biodiversity gain in planning
- General duty to conserve and enhance biodiversity
- Biodiversity reports
- Local Nature Recovery Strategies
- Tree felling and planting

- N.b. Part 7 – Conservation Covenants



Part 6: Nature and Biodiversity

- Biodiversity gain now familiar to all. Beginning to be adopted by LPAs anyway as required for developments.
- Discussions ongoing as to method/metric.

BD Duty - Problem; Objective

- Nature is in decline – much of England’s wildlife deteriorating, and many ecosystems are degraded
- Existing legislation:
 - S.40 Natural Environment and Rural Communities Act 2006
- Weak duty?

Revised Section 40 NERC 2006:

A “general duty to conserve and enhance biodiversity”

- The “general biodiversity objective” is “the conservation and enhancement of biodiversity in England through the exercise of functions in relation to England”
- “A public authority which has any functions exercisable in relation to England must from time to time consider what action the authority can properly take, consistently with the proper exercise of its functions, to further the general biodiversity objective.”
- “From time to time”: the first time must be completed within one year of the Environment Act coming into force, and then every five years
- In complying with these new duties, “the authority must in particular have regard to any relevant local nature recovery strategy”

A requirement on local authorities (and any other designated authorities) to publish “biodiversity reports”.

- Summarise actions already taken to comply with new duties in relation to the biodiversity objective, and proposed actions, and report on biodiversity gains.
- First report must cover a period of no longer than three years, starting with the day on which the authority becomes subject to the reporting duty.
- Subsequent reports must cover a period of no longer than five years.
- Regulations may require reports to include specified quantitative data.

LNRs

- Notes the inadequacy of existing spatial planning framework to achieve these.
- LNRs requirement in Bill will put spatial planning for LNRs on statutory footing.
- Emphasis on consistent mapping and seeking of opportunities to create or restore habitat.
- Integration with Biodiversity Net Gain identified need for local plans for nature to target biodiversity increases.
- LNRs to help support delivery of a Nature Recovery Network by acting as a tool to help partners better direct investment and action.

Creation of LNRs – s.105

- To apply to all of England. No gaps.
- SoS to determine areas to be covered by LNRs.
- Indication that these will be focused on common features that help define ecology of an area.
- Alignment with existing administrative boundaries: generally no splitting.
- LNRs must be had regard to by all public authorities in any exercise of their functions.

Preparation of LNRs – s.106

- To be prepared by “Responsible Authorities”.
- To be kept under review.
- Regulations to deal with timing of review, LNRs involving multiple authorities, and consultation with members of the public.

Content of LNRs – s.107

- Statement of biodiversity priorities for the area.
- Local habitat map for full extent of area.
- Biodiversity opportunity mapping.
- Lots of ideas – how to ensure consistency?
- Cross-dependencies?

Role of SoS – s.108

- Requirement for Secretary of State to provide certain information to Responsible Authorities preparing LNRS.
- Publication of new map/information may trigger RA to have to review their LNRS.
- Secretary of State may suggest areas that could be of greater importance or contribute to establishing broader networks.

Consultation – 45 questions

- DEFRA: opened 10 August, closes 2 November
- [Local Nature Recovery Strategies: how to prepare and what to include - Defra - Citizen Space](#)
- Heavy focus on process
- Which groups essential for preparation of LNRSs?
- Encouragement of broad involvement

- Cross-boundary working
- Local consultation
- Landowner power?
- Dispute resolution
- Independent sign off/examination
- Secretary of State power of sign off/modification?
- Variation of LNRs
- Review method and timing

- Consistency of data and information
- Further detail on content of LNRs
- Integration of priorities into other environmental spatial plans
- Freedom and scope of RAs to choose what measures to take
- Should regulations require RAs to designate/identify a certain proportion of their area as of potential importance to BD?



Francis Taylor Building

The end

Local Nature Recovery Strategies

Jonathan Welch

Jonathan.welch@ftbchambers.co.uk

DISCLAIMER NOTICE The oral presentation including answers given in any question and answer session ("the presentation") and this accompanying paper are intended for general purposes only and should not be viewed as a comprehensive summary of the subject matters covered. Nothing said in the presentation or contained in this paper constitutes legal or other professional advice and no warranty is given nor liability accepted for the contents of the presentation or the accompanying paper. Jonathan Welch and Francis Taylor Building will not accept responsibility for any loss suffered as a consequence of reliance on information contained in the presentation or paper. We are happy to provide specific legal advice by way of formal instructions.

Francis Taylor Building

T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk

41



Francis Taylor Building

Climate Change Litigation

Mark Westmoreland Smith

Francis Taylor Building

T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Introduction

(1) *Elliott-Smith v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWHC 1633 (Admin)

- Mr Justice Dove
- 15 June 2021

(2) *R (on the application of Transport Action Network Ltd) v Secretary of State for Transport* [2021] EWHC 2095 (Admin)

- Mr Justice Holgate
- 26 July 2021

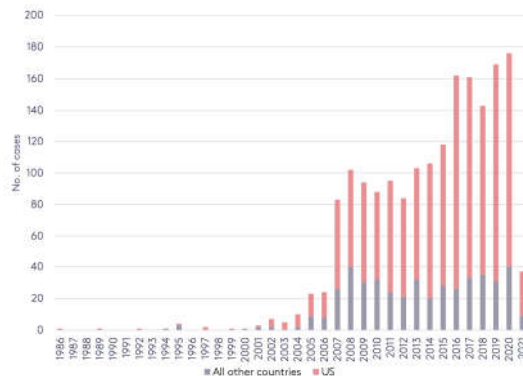


Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Growth in climate change cases to May 2021



Source: *Global trends in climate change litigation: 2021 snapshot*, Joana Setzer ad Catherine Higham

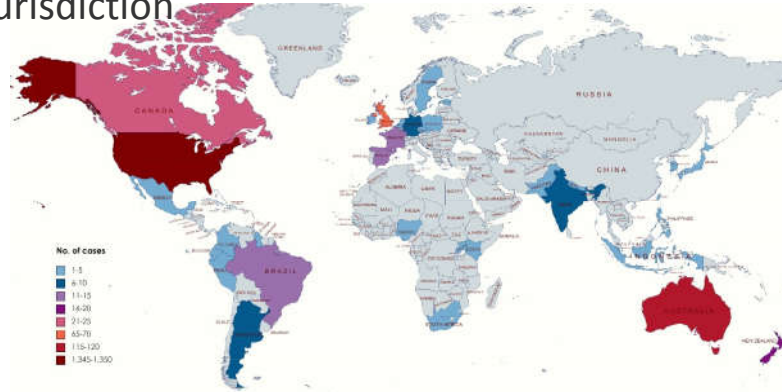
Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk





Francis Taylor Building

Cumulative climate change cases to May 2021 by jurisdiction



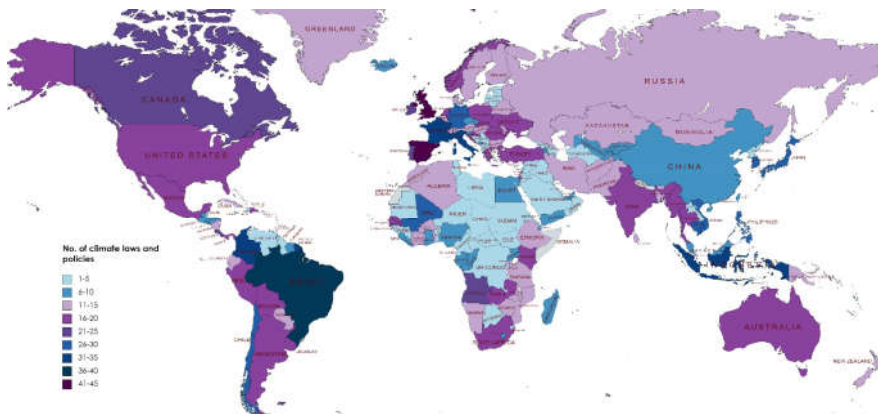
Source: *Global trends in climate change litigation: 2021 snapshot*, Joana Setzer ad Catherine Higham

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Climate laws and policies by jurisdiction



Source: *Global trends in climate change litigation: 2021 snapshot*, Joana Setzer ad Catherine Higham

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Heathrow

- *R (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52
 - Was the Paris Agreement and statements made by two Government Ministers in relation to it, “Government policy” for the purposes of section 5(8) of the Planning Act 2008?
 - The Court said that the meaning of “Government policy” is a matter of interpretation of the statutory provision.
 - Needs to be construed relatively narrowly to allow section 5(8) to operate sensibly. If not, a “bear trap” for civil servants and ministers
 - “Government policy” in the context of section 5(8) refers to carefully formulated written statements of policy which have been cleared by the relevant departments.
 - The statements of the Government Ministers did not meet this minimum standard. They were not clear, did not refer to the Paris temperature targets at all and did not explain how the Paris Agreement goal of net zero emissions would be incorporated into UK law.
 - International treaties are binding only as a matter of international law and do not have an effect in domestic law.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Elliot-Smith (1)

- Claim for judicial review of a decision of the SoS on the appropriate design of the new UK Emissions Trading Scheme.
- UK ETS is a replacement for the EU ETS which the UK left on 31 December 2020.
- Annual starting cap on emissions allowances of 156m tonnes of CO₂:
 - 5% below the UK's expected notional share of the EU ETS cap for Phase IV of the EU ETS (2021 to 2030)
 - Considerably above projected emissions which range from c.126 – 131 MtCO₂e (the “business as usual” emissions).
- In March 2020 the Climate Change Committee criticised the proposed UK ETS cap saying it would be inconsistent with the UK's Net Zero ambitions.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Elliot-Smith (2)

- Two grounds:
 - (1) in approving the UK ETS with the cap and auction reserve price proposed, the Government had failed to have regard to a material consideration, namely the requirement in Articles 2 and 4(1) of the Paris Agreement on climate change to take urgent action to limit greenhouse gases.
 - (2) the UK ETS did not fulfil or serve the statutory purpose under the Climate Change Act 2008 s.44 of "limiting or encouraging the limitation of activities" causing or contributing to greenhouse gas emissions. This is the first judgment that deals with the scope of section 44 of the Climate Change Act 2008.
- Ground 1:
 - True contention was that Government failed to take into account an aspect of Article 4 of Paris Agreement, namely the requirement for urgency.
 - The Court held this was an issue of interpretation of the agreement.



Elliot-Smith (3)

- Dove J at [55]:
 - *"In my view it is not for this court to resolve definitively any questions of construction in relation to an unincorporated international treaty for the reasons set out in the earlier authorities. The Paris Agreement is an international instrument to which 197 states are parties. It contains a mechanism for enforcing the implementation of the Agreement within article 14 of its text, along with other mechanisms for dispute resolution. There are, therefore, strong policy reasons as well as practical considerations which clearly militate against the court embarking on an exercise of construing the terms of the Paris Agreement. At most, in accordance with the approach set out in the authorities set out above, the court should assess whether or not the defendants' view of the Paris Agreement was one which was tenable in examining the question posed by the claimant."*
 - Government's interpretation was not only tenable but entirely appropriate.
 - The interpretation *"does not deny the urgency of the need to address climate change and involves the recognition that in order to meet the long term requirements of the Paris Agreement action is required now. Taking measures in the short term is an essential part of achieving the longer term objective, and that approach is clearly tenable in the light of the provisions of article 4.1."* [56]



Elliot-Smith (4)

- Section 44, “Trading schemes”, of the CCA 2008:
 - (1) *The relevant national authority may make provision by regulations for trading schemes relating to greenhouse gas emissions*
 - (2) A “trading scheme” is a scheme that operates by—(a) *limiting or encouraging the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions, or*
 - (b) *encouraging activities that consist of, or that cause or contribute, directly or indirectly, to reductions in greenhouse gas emissions or the removal of greenhouse gas from the atmosphere.*
- The Judge held that a trading scheme within the definition provided by section 44(2)(a) of the CCA 2008 did not necessarily have to achieve a reduction.
- A lawful ETS could be designed to place a limit upon or encourage the limitation of activities leading to GHG emissions, rather than requiring them to be reduced.



Transport Action Network (1)

- Judicial review of the Secretary of State for Transport's decision to make the Road Investment Strategy 2020-2025 (“RIS2”).
- RIS2 maintained funding for schemes committed during the first Road Investment Strategy – which covered the period 2015-2020 and contained 100 schemes of which 55 were completed and 45 rolled over into 2020-2025 – and commits to a further five new road schemes.
- Section 3(5) of the Infrastructure Act 2015 Act required the secretary of state, when setting a RIS, to have regard to the effect of the strategy on the environment.
- The Claimant argued that the Secretary of State had not complied with this obligation in that he had failed to take into account Article 4 of the Paris Agreement, net zero and the carbon budgets.
- The Secretary of State argued that there was no obligation on the Secretary of State to consider those matters because they were not obviously material to the duty under section 3 of the Infrastructure Act 2015. Alternatively, he had had regard to these matters in any event.



Transport Action Network (2)

- In relation to the Paris Agreement, the Court held that the claim could not succeed in light of the Supreme Court's judgment in the Heathrow case:
 - The Supreme Court had decided that the Paris Agreement was not an *obviously* material consideration and as such that the Secretary of State had had a discretion as to whether or not to take it into account.
 - The Judge held that it was implicit in the Supreme Court's reasoning that the "urgency" objective in Article 4.1 of the Paris Agreement was also not an obviously material consideration.
 - He said that there was no reason for reaching a different conclusion in the context of the 2015 Act.
- The Court was satisfied that the Secretary of State had sufficient regard to net zero and carbon budgets:
 - In setting RIS 2, the Secretary of State must be treated as having had knowledge of RIS 1, the NPS and the policy documents referred to in it.
 - He must also be taken to have known about the framework of, and relevant targets in, the Climate Change Act 2008, i.e. net zero and the carbon budgets).



Transport Action Network (3)

- The Court was satisfied that the Secretary of State could be taken to be aware of the challenges facing the road transport sector regarding climate change, that there is no sectoral target for transport, or any other sector, and that emissions in one sector, or in part of one sector, may be balanced against better performance in others.
- The Judge said at [127]: "*[a] net increase in emissions from a particular policy or project is managed within the government's overall strategy for meeting carbon budgets and the net zero target as part of "an economy-wide transition"*"
- The Court alternatively concluded that the impact of RIS2 on the net zero target and carbon budgets was de minimis (the five new schemes to be funded by RIS2 were assessed to generate approximately 0.075 MtCO₂e or about 0.1% of the reduction in carbon emissions between 2020 and 2050), and for this reason these matters were in any event not obviously material to the Secretary of State's decision.



Francis Taylor Building

Conclusions

- These cases sit in a wider growth trend of climate change litigation.
- The courts are being used an instrument to make Governments go further in taking and implementing measures to mitigate against climate change.
- Even where a particular case is not successful in terms of legal outcome, the effect can be to increase the pressure on the Government which may be effective in a time where climate policy is developing fast.
- Where cases are failing, it is often now on technical legal points. These two cases being examples.
- Moreover, the threat of litigation, allied with developing policy, in the context of individual projects is being felt by developers.
- It is also having an effect on decision-makers who are having to grapple with climate change issues and in particular arguments about cumulative effects.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Mark Westmoreland Smith

mws@ftbchambers.co.uk

The oral presentation including answers given in any question and answer session (“the presentation”) and this accompanying paper are intended for general purposes only and should not be viewed as a comprehensive summary of the subject matters covered. Nothing said in the presentation or contained in this paper constitutes legal or other professional advice and no warranty is given nor liability accepted for the contents of the presentation or the accompanying paper. Mark Westmoreland Smith and Francis Taylor Building will not accept responsibility for any loss suffered as a consequence of reliance on information contained in the presentation or paper. We are happy to provide specific legal advice by way of formal instructions.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

QUARTERLY CASE LAW UPDATE

Michael Brendan Brett

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Air quality

R (on the application of Richards) v Environment Agency and Walleys Quarry Limited [2021] EWHC 2501 (Admin) Fordham J

- Facts:
 - Landfill site near Newcastle-under-Lyme
 - hydrogen sulphide emissions exceeding WHO guidelines
 - Abatement notice (under appeal) under section 80 EPA.
 - 5 year old boy with significant health issues
- Two main grounds:
 - Breach of section 6 HRA duty to protect claimants rights under Article 2 and Article 8
 - Irrationality and failure to take reasonable steps to acquaint itself with relevant information

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



- Detailed consideration of when a public authority's *positive obligations* under Article 2 and Article come into play
- Did not find a *current* breach by the EA of its legal obligations under the HRA and ECHR,
- BUT he was not satisfied that EA had (yet) done what compliance with these obligations required ([63]; in particular there was no evidence that the EA had planned (or created a "flight path") towards reaching an appropriate level of emissions from the site
- Usually therefore granted a declaration setting out what he considered the EA needed to do moving forward to comply with ECHR duties



"In order for the Environment Agency to comply with its legal obligations, the Agency must implement the advice of Public Health England as expressed in the Fourth PHE Risk Assessment (published 5 August 2021), by designing and applying and continuing to design and apply such measures as, in the Agency's regulatory judgment, will and do effectively achieve the following outcomes in relation to emissions of hydrogen sulphide from Walleys Quarry Landfill Site:

- (1) the reduction of off-site odours so as to meet, as early as possible and thereafter, the World Health Organisation half-hour average (5PPB); and
- (2) (2) the reduction of daily concentrations in the local area to a level, from January 2022 and thereafter, below the US EPA Reference Value (1PPB) as the acceptable health-based guidance value for long-term exposure."



Francis Taylor Building

Air quality (2)

Horrendous Hackney Road Closures v Hackney [2021] EWHC 2440 (Admin)

- Facts:
 - Low traffic neighbourhoods in Hackney brought in as part of the response to the COVID pandemic via ETROs
 - Previous policy in 2015 (Transport Strategy; Liveable Neighbourhoods Plan, Air Quality Action Plan)
 - Air quality worst along the borough's busiest main roads
- Ground 3 related to air quality: defendant had failed to address impacts of LTNs on the air quality on main strategic roads (where AQ issues lay)

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

- Sought support in section 82 Environment Act 1995
 - “cause a review to be conducted of the quality for the time being, and the likely future quality within the relevant period, of air within the authority's area”
 - Judgement on this ground:
 - Accepted material consideration but in circumstances the defendant's treatment was reasonable
 - ETROs, justified by MHCLG's Covid-19 Guidance, and followed by monitoring including of air quality – this ongoing monitoring key
- “I have no doubt that bearing in mind the existence of the AQMA and the evidence in relation to poor air quality in and adjacent to the borough's main strategic highways this is an issue which will require detailed scrutiny in the ongoing evaluation of any temporary scheme.” [62]

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Procedure/water

WWF v Secretary of State Environment, Food and Rural Affairs [2021] EWHC 1870 (Admin), Lang J

- Application for a declaration that defendant had breached a consent order in respect of earlier JR proceedings
- Facts:
 - Previous JR in 2015 had alleged breach of obligations under Water Framework Directive 2000/60/EC, by failing to create Water Protection Zones
 - Settled by consent order; detailed schedule; liberty to apply to enforce the terms of the schedule

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

- Consent order:
 - Evaluate the potential for measures to achieve the objections for each Natura 2000 site to be included in a WPZ; and
 - Set out the evaluation in Diffuse Water Pollution Plans for each Site “as soon as reasonably practicable”
- Defendant argued as a preliminary point that consent order could not be enforced in this way. Lang J rejected this argument. The terms of the order were clear that it could be so enforced like a Tomlin Order and there could be no objection in principle.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

- Declaration refused however – centered on what was “reasonably practicable”, and in the light of five specific factors, court was not satisfied that terms of consent order were breaches:
 - scale and complexity of the task;
 - lack of additional funding for the task;
 - significant reductions to the budget;
 - the resource implications of Brexit; and
 - the resource implications of COVID.
- Does this case show what Fordham J was nervous of in Richards? Are those nerves justified?

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Information

Heathrow Airport Ltd v ICO, EA/2020/0101 (FTT)

- Appeal against decision of ICO
- Is HAL a “public authority” for the purposes of the EIR Regulations?
- Reg 2(2):
 - “(c) any other body or other person, that carries out functions of public administration”

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Parties agreed that the test was: whether or not HAL ([51])
“(a) had been “entrusted” under national legislation;
(b) was performing services that are in the public interest;
(c) those public interest services relate to the environment;
(d) it has been vested with “special powers for the purposes of performing those public interest services”; and
(e) standing back in all the circumstances of the case the combination of factors identified in (a) to (d) above results in the appellant being a functional authority (“cross-check”).”

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

- Appeal allowed by UTJ Rintoul
- There was nothing to suggest that HAL had been “entrusted”: – “there must be a discrete legislative or executive measure by which a legal person is empowered by the state to act on its behalf.” HAL operates airport under authority given by S of S: but that authority facilitates the essential private operation of the airport and its services.
- HAL was not performing services of public administration: it is running an airport. It is in the regulatory function which is the public administrative function, not the the running of the operations.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

- Went on to consider other limbs, even though not necessary
- Re: limb (d), noted that powers such as those that HAL have of compulsory purchase and to make byelaws constitute “special powers”
- Interesting for its careful exploration of the edges of the “public authority”, given the expansive way in which it is framed in the EIR



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Look out for...

- West Cumbria Coal mining call-in decision
- Pending appeal against R (Finch) v Surrey County Council [2020] EWHC 3566 (Admin) Holgate J



Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

Thank you for listening!

The oral presentation including answers given in any question and answer session (“the presentation”) and this accompanying paper are intended for general purposes only and should not be viewed as a comprehensive summary of the subject matters covered. Nothing said in the presentation or contained in this paper constitutes legal or other professional advice and no warranty is given nor liability accepted for the contents of the presentation or the accompanying paper. Michael Brendan Brett and Francis Taylor Building will not accept responsibility for any loss suffered as a consequence of reliance on information contained in the presentation or paper. We are happy to provide specific legal advice by way of formal instructions.

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

elb Environmental Law Blog

ELB seeks to provide regular posts on developments in environmental law and policy, from the forthcoming Environment Bill to recent climate litigation to developments in environmental policy both domestically and internationally.

Subscribe at: www.ftbchambers.co.uk/elb

Francis Taylor Building
T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk



Francis Taylor Building

FTB Quarterly Environmental Law Update

14 October 2021



Francis Taylor Building

T: 020 7353 8415 | E: clerks@ftbchambers.co.uk | www.ftbchambers.co.uk