



Environmental Law

Learning Outcomes

By the end of this unit the learner will be able to:

- ✓ Outline the statutory regimes for the control of pollution
- ✓ Describe the main legal requirements for the management of waste.
- ✓ Describe the main legal requirements for the management of water.

Environmental Law

Introduction

Over the past several decades, growing public awareness of threats to the environment, informed by warnings of scientists, has led to demands that law protect the natural surroundings on which human well-being depends. Under growing pressure from national and international public opinion, governments began to demonstrate concern over the general state of the environment during the 1960s and introduced legislation to combat pollution of inland waters, ocean, and air, and to safeguard certain cities or areas. Simultaneously, they established special administrative organs, ministries or environmental agencies, to preserve more effectively the quality of life of their citizens. Developments in international environmental law paralleled this evolution within states, reflecting a growing consensus to accord priority to resolving environmental problems. Today, national and international environmental law is complex and vast, comprising thousands of rules that aim to protect the earth's living and non-living elements and its ecological processes. Environmental problems stem from two main categories of human activities:

- a. Use of resources at unsustainable levels, and
- b. Contamination of the environment through pollution and waste at levels beyond the capacity of the environment to absorb them or render them harmless.

Environmental regulatory framework In The UK

A significant proportion of environmental legislation in England and Wales originates from EU law, which is directly applicable or implemented through national legislation. The principal environmental regimes are:

- Environmental Permitting Regime (EPR), combining the pollution prevention and control (PPC) regime and waste management licensing and industrial emissions.
- Water
- Waste
- Contaminated land
- Conservation of nature, wildlife and habitats.
- Environmental impact assessments (EIAs)

Health and safety and planning matters are regulated separately from environmental matters, but are interlinked. For example, the clean-up of contaminated land is generally required under the planning regime (during redevelopment) rather than the contaminated land regime

The UK government passes legislation for England, and on some matters in Wales. For all remaining matters in Wales, the National Assembly for Wales has powers to legislate. In England the main body

responsible for developing environmental policy and drafting environmental legislation is the Department for Environment, Food and Rural Affairs (DEFRA) although the Department of Energy and Climate Change (DECC) generally handles issues relating to climate change. Apart from where the UK government has competence, the Welsh government develops environmental policy for Wales.

The Environment Agency (EA) (in Wales, Natural Resources Wales (NRW)) is the main body responsible for issuing permits and enforcement, although in some cases the local authority (LA) carries out these functions.

Environmental liability can arise under:

- Criminal law.
- Civil law.
- Public or administrative law.
- Company law.

Criminal law

The sanction for breach of most environmental laws is prosecution of an individual or company by the relevant regulator in the criminal courts. The maximum penalties are usually as follows:

- Lower courts: GB£50,000 and/or 12 months' imprisonment. Unlimited fine for offences committed after 12 March 2015.
- Higher courts: unlimited fine and/or five years' imprisonment.

Company directors and officers can be prosecuted if the criminal offence was committed with their consent or connivance, or was attributable to their neglect.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 was passed in May 2012. It provides that wherever a statute or common law offence could result in a fine of GB£5,000 or more (the current amount established as level five on the standard scale), magistrates can now apply a fine of any amount (that is, unlimited).

In July 2014, the Independent Sentencing Council issued guidelines for sentencing those found guilty of environmental crimes. The guidelines introduce a 12 step sentencing process for organisations intended to reduce inconsistencies in sentencing and ensure that sentences match the seriousness of the offence, the harm caused, the culpability and will seek to remove any gain realised through commission of the offence. In particular, "starting points" for sentences will distinguish between:

- Micro companies (annual turnover up to GB£2 million).
- Small companies (annual turnover of between GB£2 million and GB£10 million).
- Medium companies (annual turnover of between GB£10million and GB£50 million).
- Large companies (annual turnover of GB£50 million and over).

The first case to be considered under the guidelines was *R v Thames Water Utilities Ltd* [2015]. The Court of Appeal suggested that fines in the millions of pounds would be appropriate for serious environmental offences stating that fines must be high enough to send a strong message to company directors and

shareholders about their environmental obligations. The Court made a direct comparison with fines applied to financial services market regulation breaches finding that, where harm has been caused by deliberate action or inaction, fines equal to a substantial percentage (up to 100%) of the company's pre-tax net profit for the relevant year could be imposed, even if this results in fines in excess of GB£100 million.

Civil law

Private persons can bring civil law claims for harm caused by environmental matters, usually under the common law of nuisance or negligence. Claims are usually for damages, but the courts can also grant an injunction.

Public or Administrative Law

Regulators can serve enforcement notices on operators requiring them to rectify breaches of environmental law. Failure to comply with enforcement notices can constitute a criminal offence. In some cases, regulators can shut down an operator's activities until the breach has been rectified.

Third parties, including non-governmental organisations (NGOs), can challenge the validity of a public authority's decision through judicial review and have an express right to request that regulators take action if either:

- Environmental damage is occurring.
- There is an imminent threat of environmental damage.

Company Law

Company law imposes a duty on directors to promote the company's success for the benefit of its members as a whole, taking into account the effect of the company's operations on the community and the environment. If a director breaches this duty, shareholders may be able to bring a derivative action on behalf of the company against the director, even if he has not benefitted from the breach.

Environmental Permits

Integrated/Separate Permitting Regime

There is an integrated environmental permitting regime (EPR) which came into force on 6 April 2008. On that date it automatically converted the previous PPC regime permits and waste management licences into Environmental Permits (EP). On 6 April 2010, water discharge activities, groundwater discharge activities and radioactive substances registration and authorisation were also brought under the EPR and existing consents were automatically converted.

In 2013, the EPR was amended to implement Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) (Industrial Emissions Directive) (IED), which consolidated a number of earlier EU Directives and requirements. In 2015, the EP Amendment Regulations 2015 (SI 2015/918) amended the EPR, transposing requirements under the Energy Efficiency Directive 2012

The key activities regulated under the EPR are:

- Activities or specified installations listed in Schedule 1 to the EPR (these cover a wide range of industrial and power generation activities and include installations covered by the Integrated Pollution Prevention and Control (IPPC) regime under the IED).
- Waste operations.
- Mobile plant (used to carry on either one of the Schedule 1 activities or a waste operation).
- Mining waste operations.
- Water discharge activities.
- Radioactive substances activities.
- Groundwater activity.
- Small waste incineration plant.
- Solvent emission activity.

The activities are regulated to differing degrees. The more polluting industries (known as Part A (1) and Part A (2) installations), including some waste management operations such as landfills and large incinerators are regulated in terms of all their emissions and energy efficiency, while lesser-polluting activities (known as Part B installations) are regulated only in relation to their air emissions.

Water Pollution

Permits and Regulator

Water discharge activities and groundwater discharge activities are permitted through the environmental permitting regime (EPR)

Prohibited Activities

A water discharge activity covers a number of activities including discharge or entry into inland waters, freshwaters, coastal waters or territorial waters of any poisonous, noxious or polluting matter, waste matter, trade effluent or sewage effluent.

A groundwater discharge activity includes the discharge of a pollutant that results in the direct input, or can lead to the indirect input, of that pollutant into groundwater. Undertaking these activities without an environmental permit (EP) is prohibited.

Clean-up/Compensation

The regulator can exercise the relevant powers and apply the available penalties, under the EPR or request action under the Environmental Damage (Prevention and Remediation) (England) Regulations

Penalties

It is an offence to cause or knowingly permit a water discharge activity or groundwater activity except under, and to the extent authorised by, an EP.

Permits and Regulator

The environmental permitting regime (EPR) regulates emissions into air for the most polluting installations. Emissions of sulphur dioxide, nitrogen oxides and particulate matter from large combustion plants (over 50 megawatts) are subject to controls imposed by the EPR and EU Directives on the limitation of emissions of certain pollutants into the air from large combustion plants.

Certain energy and metal ore activities fall within the EU emissions trading scheme and require a greenhouse gas permit

Prohibited Activities

For non-EPR activities, it is an offence to emit "dark smoke" from industrial or trade premises (*section 2, Clean Air Act 1993*).

Penalties

An offence is punishable with:

- On summary conviction: an unlimited fine and/or 12 months imprisonment. Offences committed prior to 12 March 2015 will only receive a fine not exceeding GB£50,000 and/or 12 months imprisonment.
- On indictment: an unlimited fine and/or an imprisonment term not exceeding five years.

Climate Change, Renewable Energy and Energy Efficiency

Emissions Targets

The UK is subject to greenhouse gas (GHG) emissions reduction targets from several sources. It is subject to Kyoto Protocol targets

Domestically, the Climate Change Act 2008 commits the UK to a 34% reduction in GHG emissions by 2020 and an 80% reduction in GHG emissions by 2050 (in each case as against 1990 levels) (*sections 1 and 5, Climate Change Act 2008*).

The government's Carbon Plan published in December 2011 sets out its strategy on reducing GHG emissions (and other climate change related actions).

In December 2008, the EU unilaterally committed to cut EU GHG emissions by at least 20% of 1990 levels by 2020. As part of the 2030 Climate and Energy Policy Framework, the European Commission and European Council have agreed a commitment to reduce GHG emissions by 40% of 1990 levels by 2030.

Increasing Renewable Energy

Directive 2009/28/EC on the promotion of the use of energy from renewable sources (Renewable Energy Directive) requires renewable energy to form 20% of total EU energy consumption by 2020. The UK's contribution to the EU-wide target is 15% by 2020. In addition, the Renewable Energy Directive imposes

an obligation on member states (including the UK) to ensure that at least 10% of overall transport fuel consumption comes from renewable sources (largely to be met by increasing the use of sustainable biofuels). Various UK regulations implement these requirements into domestic law.

In the 2030 Climate and Energy Policy Framework, the European Commission and European Council have agreed to increase the 20% renewable energy requirement to 27% by 2030 (on a binding basis at EU level, but not binding against individual member states). This requirement will be reviewed in 2020 and may be increased to 30%.

There are no prescriptive requirements for the deployment of certain renewable technologies, instead there is a general policy aim to encourage development of renewable generation capacity. The Renewable Energy Roadmap (published in July 2011 and subsequent updates) sets out the pathway by which the renewable energy targets will be met and it describes the role that various technologies will play in meeting the 2020 targets.

There are various financial incentives to encourage the deployment of renewable energy generation. In particular, the government is pursuing a programme of electricity reform aimed at ensuring security of electricity supply and increasing renewable generation capacity.

As part of this programme, a "carbon price floor" was implemented from 1 April 2013. Feed-in tariffs based on contracts for difference started operating in 2015 to incentivise electricity generation from low-emission sources through financial subsidies. An Emissions Performance Standard has also been introduced, limiting carbon emissions from new or altered fossil fuel generating plant of 50 MW or over to 450g/kWh.

Additional strategies on bioenergy and low carbon heat were published in April 2012. There are financial incentives to encourage the uptake of renewable heat both domestically and non-domestically.

Increasing Energy Efficiency

On 25 October 2012, the EU adopted the Directive 2012/27/EU on energy efficiency. This Directive establishes a common framework of measures for the promotion of energy efficiency within the EU. This is to ensure the EU achieves a 20% headline target on energy efficiency by 2020 and to lead the way for further energy efficiency improvements beyond that date. It lays down rules designed to remove barriers in the energy market and to overcome market failures that hinder efficiency in the supply and use of energy. In particular, the Directive provides for the establishment of indicative national energy efficiency targets for 2020 and a compulsory requirement for large companies to have energy audits every four years.

Member states are required to bring into force the laws necessary to comply with the Directive by 25 June 2014 (*Article 28(1)*). Various measures have been introduced in the UK to implement this Directive. In July 2014, the European Commission adopted an Energy Efficiency Communication proposing a 30% energy savings target by 2030.

There are no specific legally binding national targets for increasing energy efficiency of buildings. However, there are a number of policy measures designed to achieve this objective.

The government hopes that the following types of new building will be zero-carbon:

- Non-domestic buildings from 2019.
- Public sector buildings from 2018.
- Schools from 2016.

These targets will be achieved partly through changes to legally binding building regulations, which are one of the principal methods of establishing energy efficiency standards for buildings. However the government recently scrapped its policy to make new homes zero carbon by 2016.

One of the major policy measures to increase the energy efficiency of existing buildings is the CRC Energy Efficiency Scheme. The government has set up the Energy Efficiency Deployment Office to develop its energy efficiency strategy, which was published in November 2012. Another mechanism put in place is the Green Deal which was intended to enable homeowners and businesses to undertake energy efficiency works to their properties and spread the cost over a number of years. However, the future of the Green Deal is currently in doubt since the Government's July 2015 announcement that it would no longer provide financial support for the Green Deal as it no longer believed the scheme offered good value for taxpayer money. The Government is now considering other options.

Waste

Waste management activities are regulated under the environmental permitting regime (EPR). The regulator is always the Environment Agency (EA) or Natural Resources Wales (NRW), even when the waste operation is a Part A(2) or Part B installation.

Permits and Regulator

The EA or NRW can impose conditions on environmental permits (EPs) involving waste activities relating to the operation and management of the relevant site and its restoration at the end of operations. Large landfills, waste incinerators and waste recovery installations are regulated by the IPPC part of the EPR. However, a duty of care and fit and proper person test still applies.

Prohibited Activities

All persons involved in activities involving waste are under a duty of care in relation to the waste. It is an offence to:

- Treat, keep or dispose of waste either:
 - without an EP;
 - in a manner likely to cause pollution of the environment or harm to human health.
- Fail to comply with conditions of an EP.
- Otherwise breach the duty of care.

Operator Criteria

The permit holder must both:

- Be the operator.
- Show that it is a fit and proper person. This involves consideration of the applicant's:
 - criminal record;
 - technical competence;
 - financial resources to comply with the conditions of an EP.

The EA can require financial provision, such as a guarantee or insurance, to ensure that responsibilities under an EP can be met.

Special Rules for Certain Waste

A separate regime for control of wastes classified as hazardous is set out under the Hazardous Waste (England and Wales) Regulations 2005 and Hazardous Waste (Wales) Regulations 2005 (HWR).

Hazardous waste cannot generally be removed from premises unless the location of the premises is notified to the EA/NRW (except where the premises are exempt). There are requirements on all parties involved in the production, transportation and receipt of hazardous waste to complete consignment notes. Recipients of hazardous waste must:

- Provide the EA/NRW with quarterly returns and list consignments received.
- Record the location of the deposited waste.
- Unless specifically permitted, hazardous waste cannot be mixed with:
 - Other hazardous waste.
 - Non-hazardous waste.
 - Any other materials.

Hazardous waste must also be properly packaged and labelled. Failure to comply with the HWR is an offence, subject to fines and/or imprisonment.

Producer Responsibility Regimes

Various European Directives have provided for specific regimes to deal with waste packaging, end-of-life vehicles, waste electrical and electronic equipment and waste batteries and accumulators. The directives have been implemented into UK law and provide various obligations including take-back, recovery and recycling of the relevant products when they are disposed of.

Penalties

Most offences under the waste regime are punishable by fine and/or imprisonment. The levels depend on the actual offence and its seriousness. The regulator can also recover the costs of clearing the waste from the offender.

Contaminated Land

Regulator and Legislation

There is an overlap of legislation related to the clean-up of contaminated land between the Environmental Protection Act 1990 and the Environmental Damage (Prevention and Remediation) (England) Regulations 2015 (ED Regulations).

Part IIA of the Environmental Protection Act 1990 aims to ensure that contaminated land identified and remediate where it poses unacceptable levels of risk. It is not an offence under the Part IIA regime to pollute or contaminate land.

The ED Regulations relate to the prevention and remediation of environmental damage, being damage to species, habitats, sites of special scientific interest, surface water or groundwater, and land. The ED Regulations only apply to the most serious cases of environmental damage. The ED Regulations were extended to cover marine waters from 19 July 2015, through the implementation of the Offshore Safety Directive 2013 (2013/30/EU).

The principal enforcement authority is the relevant local authority (LA). However, certain types of sites or offences are regulated by the Environment Agency (EA)/Natural Resources Wales (NRW). In addition, Natural England (which is an executive non-departmental public body responsible to the Secretary of State for Environment, Food and Rural Affairs) also has enforcement powers. In English marine waters, the enforcement authority is allocated to the EA, Marine Management Organisation and the Secretary of State. The enforcing authority responsible for dealing with environmental damage to Welsh marine waters is the Welsh Ministry.

Investigation and Clean-Up

Under the Part IIA regime, contaminated land is land that is in such a condition that significant harm is being caused, or there is a significant possibility of such harm being caused to the environment (including human health). Harm is assessed by reference to the land's current use. The mere presence of contaminants on a site does not necessarily mean that it is contaminated land.

Land also qualifies as contaminated if contaminants present on the land are causing or are likely to cause significant water pollution or the significant possibility of such pollution.

LAs must inspect their areas to identify any contaminated land. LAs and the EA/NRW must keep public registers of contaminated land. If an LA or the EA/NRW identifies any contaminated land, it must serve a remediation notice on the appropriate persons requiring them to remediate the contamination, unless those persons are willing to carry out the remediation voluntarily.

Under the ED Regulations, an operator must take all practicable steps to prevent environmental damage if that operator causes an imminent threat of damage. If environmental damage has already occurred, the operator must take all practicable steps to prevent further damage. If the regulator considers that environmental damage has occurred, it can serve a remediation notice on the responsible operator setting out the measures that must be taken.

For damage to sites of special scientific interest (SSSIs), EU species and habitats, and water, steps required to be taken can include:

- Remediation of the resource.
- Other measures which recognise that actual remediation of the resource is not possible or that compensation should be made to account for temporary loss of a resource, complementary remediation and/or compensatory remediation.

For land contamination, remediation requires the removal or control of contaminants so that risks are reduced to below an unacceptable level, and/or to take reasonable measures to remedy harm or pollution that has been caused by a significant contaminant linkage.

If a planning application is made to develop a site with contaminated land, planning authorities can impose conditions in the planning permission requiring remediation to be carried out before the development starts. This is how most contaminated sites are dealt with.

Statutory Guidance for England on dealing with contaminated land and radioactive contaminated land was published by the Department for Environment, Food and Rural Affairs (DEFRA) in 2012. Statutory Guidance was published by the Welsh Government in the same year in relation to contaminated land in Wales.

Penalties

Failure to comply with a remediation notice without a reasonable excuse is a criminal offence punishable by a fine. The regulator can carry out the remediation itself and recover the costs from the relevant parties.

Further Reading:

- ✓ *Environmental Law, By Kathryn L Schroeder, (2007)*
- ✓ *Environmental Law, By Elizabeth Fisher, Elizabeth Charlotte Fisher, Bettina Lange, Eloise Scotford, (2013)*