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Talking Points--are you concerned by recent developments?

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Environment analysis: Our panel of experts gives its views on recent developments in environmental law that might give rise to concerns.

The experts

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Is there a recent development in environmental law and practice that concerns you?

Simon Tilling: There is continuing concern over a UK 'energy gap'. There is a loud discussion (and seemingly little agreement) over how to power the future and how to incentivise investment but much less noise about the closure of our existing fleet. In February 2013, the Industrial Emissions Directive 2010/75/EU came into force through amendments to the Environmental Permitting Regulations 2010, SI 2010/675 and there have been a number of announcements about the closure of fossil-fuel fired power stations as a result.

Decommissioning of power stations are complex projects and this will be an area of specialism for environment and energy lawyers in 2014 and beyond. Because the life of most generation stations has been extended over the last decade, there are only a handful of firms with genuine expertise in power station closures and decommissioning. There is also a significant 'second-hand' market for the relocation of UK power generation equipment to other countries and we are acting on a number of significant asset sales in this market.

As for the energy gap, the issue has become even more acute since events in Crimea. The answer must be that we need a mix of technologies utilising a diverse range of energy sources to replace what is due to close over the next ten years.

Helen Simm and Victoria Turner: The Sentencing Council published its guideline on environmental offences on 26 February 2014. The guideline comes into effect on 1 July 2014 and it specifically covers a variety of offences related to the disposal of waste, waste handling and disposal offences which carry a risk of pollution or harm to people's health, breach of permits and nuisance offences.

The Sentencing Council carried out a review of current sentencing practices and determined that some fines given for environmental offences were too low and did not sufficiently reflect the seriousness of the offences committed. It is expected that fines for corporate offenders will increase dramatically once the new guideline

comes into effect, with those found guilty in the Crown Court of serious offences, expected to be subject to fines in the hundreds of thousands pounds--ranging up to a maximum of £3m for large corporate offenders who carry out the most serious and deliberate offences which result in harm.

This is concerning as fines of the levels stated in the guideline could mean financial ruin for companies which are found guilty of these offences.

Emma Feeny: Recent announcements of spending cuts directed at local authorities have raised considerable concerns among environmental lawyers. One area of particular concern is the contaminated land regime, where the Contaminated Land Capital Grants Scheme will cease from 1 April 2017. From that date onwards, local authorities will have to rely on the general funding provided by the Department of Communities and Local Government in order to discharge their responsibilities to inspect and identify contaminated land in their vicinity. This is expected to shift the burden of remediating contaminated land to the already overburdened planning system.

John Bates: The effect of the new rules about proportionality in the Civil Procedure Rules 1998, SI 1998/3132 is of concern. Damages in nuisance are low--at best £2,000 a year for the worst cases. Where a defendant fights a nuisance claim the costs are bound to be disproportionate. If this means that nuisance claims will become unviable for solicitors then nuisance claimants will be shut out of the courts. In addition it may be a breach of the Aarhus Convention, art 9 as it would be a denial of access to justice.

Professor Karen Morrow: Although not a specific environmental law issue, the government's further proposed reform of judicial review (though now less draconian than originally envisaged) does, I think, give environmental lawyers real cause for concern. In particular the changes envisaged on costs will do a great deal to retard the real progress that has been made in airing matters of public concern pursuant to the Aarhus Convention.

While the latter should ensure that protective costs orders will remain broadly viable in the environmental sphere, these will always remain comparatively rare (though an even more restrictive approach is in prospect in other areas of law). Issues of greater concern in the environmental sphere are further restrictions on legal aid, the prospect of non-party costs orders, allowing costs claims to be made in respect of oral permissions hearings which are all likely to have a chilling effect on litigation--particularly by NGOs.

Robert Biddlecombe and Anita Lloyd: In recent years, there has been an increasing use of confiscation orders under the Proceeds of Crime Act 2002, Pt 2 (POCA 2002) following convictions for regulatory offences. Although confiscation orders are designed to deprive wrongdoers of the benefit that they have derived from their criminal lifestyle, defendants may be surprised to discover how wide POCA 2002 defines--and how widely the courts interpret--the terms 'criminal lifestyle' and 'benefit'. Far from being confined to serious, organised crimes (such as drug dealing and people trafficking), POCA 2002 confiscation orders are now being granted in the High Court following convictions for what are sometimes known as 'quasi-criminal' offences, such as breaches of environmental permitting and planning regulations, that do not require a mens rea on the part of the offender. Furthermore, the amount of the order can be draconian.

The case of *R v Morgan* [2013] EWCA Crim 1307, [2014] 1 All ER 1208 provides a salutary example. Mr Morgan was convicted of tipping nearly 9,000 cubic metres of waste at his farm without the necessary permit. The confiscation order that was imposed on him (£156,500) was calculated by reference to the pecuniary advantage that he had obtained (ie the money that he had saved from not having paid the necessary permit fee, surveyors and engineers fees, landfill tax, etc). This is despite the fact that Mr Morgan had not actually received any payment from the persons whose waste he had agreed to dispose of. Persons tempted to run the risk of committing even 'technical breaches' of the law should be alive to the fact that enforcing regulators may retain up to 50% of the order, so it is not surprising (particularly given the continuing restrictions on the public purse) that they are becoming increasingly popular options in order to help plug public funding gaps.

Interviewed by Nicola Laver.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.