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Talking Point--scope of environmental law

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Environment analysis: Our panel of experts gives its views on the scope of environmental law.

The experts

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Emma Feeney, Bond Dickinson

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How would you define the scope of environmental law?

Simon Tilling: What makes this area of law so interesting is that it defies exact definition and its scope is always changing. I always think of Albert Einstein's definition: 'The environment is everything that isn't me'. Its scope is driven by advances in scientific understanding and changes in public attitudes--the law is always playing catch-up. Environmental law used to be local (land contamination, water quality) but now it is also global (climate change, product stewardship across global supply chains), and its scope is increasingly driven by Europe and the wider world.

Robert Biddlecombe: With some difficulty--it is such a broad field of law. There does not seem to be a great deal of agreement among academics and professionals as to what 'environmental law' is precisely. After all, it is still a relatively young area--probably only coming to the fore in the last 50 years--compared to land law or the law of trusts which can trace their roots to the Norman conquests.

Furthermore, it keeps widening to reflect the topics which are of concern to society, such as sustainability, energy, climate change, etc. Also, its precise borders are not well defined and there is very often overlap between environmental law and other areas of law, most notably:

- o health and safety law (eg in relation to chemicals regulations)
- o property law (eg in relation to nuisance issues)
- o planning law (eg in relation to habitat protection and contaminated land)
- o criminal law (eg in relation to enforcement issues)

As a result, environmental lawyers tend to have some additional expertise in at least one of those other areas.

Professor Karen Morrow: While Albert Einstein is famously quoted as saying that 'the environment is everything that isn't me', I take the view that we humans are very much part of our environment as integral

and very powerful actors within a biosphere upon which we depend and that we are in a unique position to shape and influence for both good and ill.

With this in mind, I would define environmental law as law which governs our interactions with the world around us, including one another, with a view to achieving a sustainable and healthy biosphere that will secure the necessary conditions to promote the ongoing flourishing of both human and non-human life on our planet. In practical terms, this means environmental law is necessarily cross-cutting, embracing aspects of public and private law and functioning at all levels from the local to the international.

Gordon Nardell QC: Increasingly, questions that seem at first blush to belong to pure contract or commercial law will either turn on the issues of environmental regulation or have the capacity to impact significantly on the operation of environmental policy and legislation. Take the English Commercial Court's 2012 decision in *Deutsche Bank AG v Total Global Steel Ltd* [2012] EWHC 1201 (Comm), [2012] All ER (D) 264 (May). This was about 'recycling' of already-surrendered certified emissions reductions (CERs) under the EU emissions trading scheme. Allowing these CERs to be re-traded would hopelessly undermine the environmental objects of the scheme. The Commission prohibited the practice. Recycled CERs have zero environmental value. The court accepted that selling recycled CERs was a breach of contract, but when assessing damages held that they nevertheless had at least some value because someone, somewhere might buy them. A decision ostensibly about contract law has an impact on the effectiveness of a key element of the EU environmental regime. So we need to get used to the idea that, in a sense, we're all environmental lawyers now.

Emma Feeney: At its core, environmental law aims to manage the impact of human activities on air, water and land. Generally speaking, environmental law is treated as a regulatory matter. However, the remit of this practice is hard to capture--we as lawyers can find ourselves working across a range of areas--such as reviewing environmental statements in planning, negotiating clauses in real estate transactions, advising on breach of permits, defending an environmental prosecution or advising on carbon trading agreements.

As well as legislation and judicial precedent there is also the proliferation of other sources of information which we have to use to help us interpret the 'law', for example codes of practice, government guidance, circulars and other policy documents. The continually changing scope of environmental law means that it is increasingly affecting a wide range of companies and individuals alike.

Catherine Davey: I think everyone would agree that it is a distinct body of law. In a nutshell, it covers the legal and governance mechanisms required to achieve the protection of the natural environment and the sustainable management of natural resources.

Interviewed by Nicola Laver.

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