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 few decades, growing public awareness of environmental issues has led to increased demand for legal protection of the natural world. In response to this growing pressure, governments began to show concern for the environment, beginning in the 1960s by introducing laws and regulations to combat pollution and protect certain regions. At the same time, they established special administrations to more effectively preserve human quality of life. State laws began to follow the lead of these international laws, reflecting a growing consensus to prioritize environmental management. Today, national and international environmental law is complex and vast, with thousands of rules aimed at protecting both biotic and abiotic elements of the environment. These laws tend to focus on humanity's two biggest impacts on nature: overuse of resources, and pollution.

Environmental Legislation in the UK

A large amount of **environmental legislation** in England and Wales originates from EU law, which is directly applicable or implemented through national legislation. The principal focuses of these are:

- The 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, safety and planning matters are regulated separately from environmental matters, but they are still closely connected. For example, the cleaning-up of contaminated land is generally required under the planning laws (during redevelopment) rather than the laws on contaminated land.

The UK government passes legislation for England, and for Wales (on some matters). For Welsh laws not covered by the UK government, there is the National Assembly for Wales. 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. Except in cases where the UK **Environment Agency (EA)** steps in, the Welsh government is responsible for environmental legislation in Wales. The **Natural Resources Wales (NRW)** is the main body in Wales responsible for issuing permits and enforcement, although in some cases the local authority carries out these functions instead.

Environmental liability can arise under:

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

Criminal Law

Generally, punishment for breaking environmental laws leads to prosecution. The maximum penalties include:

- Lower courts: £50,000 (about $72,000 in USD) and/or 12 months' imprisonment. Unlimited fines for offences committed after 12 March 2015.
- Higher courts: unlimited fines and/or five years' imprisonment.

Company directors and officers can be prosecuted if the crime was committed with their consent or knowledge, or if it was allowed to happen due to their neglect. **The Legal Aid, Sentencing and Punishment of Offenders Act of 2012** states that whenever the punishment for a crime might amount to a fine of £5,000 or more, judges can now assign a fine of any amount.

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 which is intended to help clarify and correct any inconsistencies in sentencing and ensure that the punishments fit the crimes. In particular, “starting points” for sentences will distinguish between:

- Micro companies (annual turnover up to £2 million).
- Small companies (annual turnover of between £2 million and £10 million).
- Medium companies (annual turnover of between £10 million and £50 million).
- Large companies (annual turnover of £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 stated that fines must be high enough to send a strong message about the importance of fulfilling one’s environmental responsibilities. They suggested that fines amounting to millions of pounds are fitting for serious environmental offences, pointing out that similar punishments have been deemed proper when applied to financial crimes of comparable seriousness.

Civil Law

Private individuals 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 injunctions.

Public or Administrative Law

Regulators can serve **enforcement notices** on operators. These notices essentially require the operators to repair whatever damage they have done as a result of breaking an environmental law. Failure to do so

is a crime. In some cases, regulators can shut down operations until the operator fulfils the obligations listed in the notice.

Third parties, including non-governmental organizations (NGOs), can challenge the validity of a public authority's decision through a judicial review. They have the right to request that regulators take action if there is either environmental damage or an imminent threat of environmental damage.

Company Law

Company law requires 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. Should a director fail to do this, company shareholders may be able to legally retaliate, even if the director's failure to obey this law has not benefited him/her.

The Integrated Environmental Permitting Regime (EPR)

There is an **integrated environmental permitting regime (EPR)** which came into force on 6 April 2008. The EPR automatically converted the previous PPC permits and waste management licences into Environmental Permits. Exactly two years later, water discharge activities, groundwater discharge activities, and radioactive substances registration and authorization 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. This directive combined a number of earlier EU directives and requirements into one. Two years later, the 2015 EP Amendment Regulations (SI 2015/918) amended the EPR again, transferring in requirements that originally came under the 2012 Energy Efficiency Directive.

The key activities regulated under the EPR are:

- Schedule 1 EPR listings (these include a wide range of power generation activities, as well as installations covered by the Integrated Pollution Prevention and Control legislations of the IED)
- Waste operations, including mining waste and small waste incineration plants
- Mobile plants
- Water discharge
- Radioactive substances activities
- Groundwater activities
- Emission activities

The activities are regulated to different degrees. The activities that create more pollution, known as Part A (1) and Part A (2) installations, are regulated in terms of their total emissions and energy efficiency. Part B installations – that is, activities which generate less pollution – are regulated only in terms of their air emissions.

Water Pollution

Water discharge activities and **groundwater discharge activities** are permitted through the EPR. 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 or polluting matter, waste matter, trade waste, or sewage waste. A groundwater discharge activity includes the discharge of a substance that can directly or indirectly lead to pollution of groundwater.

Participating in these activities without an environmental permit is prohibited. Penalties can be issued by regulators under the EPR or requested under the Environmental Damage Regulations in England.

Air Pollution

Emissions of sulphur dioxide, nitrogen oxides and particulate matter from large combustion plants (over 50 megawatts) are regulated by the EPR and EU Directives related to air pollution. Additionally, certain energy and metal ore activities fall under the EU emissions trading scheme and require a greenhouse gas permit.

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

An offence is punishable with the following.

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

Waste

Waste management activities are regulated under the 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.

The EA or NRW can add conditions to environmental permits involving waste activities related to a site's operation, management and restoration. Large landfills, waste incinerators and waste recovery installations are regulated by the IPPC sector of the EPR. However, a duty of care and fit and proper person test still applies.

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

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

Special Rules for Certain Waste

A separate regime in Wales and England for control of wastes classified as hazardous is set out under each country's **Hazardous Waste Regulations of 2005** (HWR).

Hazardous waste cannot generally be removed unless the EA/NRW is notified. Recipients of hazardous waste must:

- Provide the EA/NRW with quarterly returns and list consignments received
- Record the location of the deposited waste
- Make sure hazardous waste is not mixed with the following (unless they are specifically instructed otherwise): other hazardous waste, non-hazardous waste, or any other materials.

Hazardous waste must also be properly packaged and labelled.

Various European Directives have provided for specific regimes to deal with waste in the form of packaging, old vehicles, electrical and electronic equipment, batteries and accumulators. These directives have been inserted into UK law and include various obligations regarding take-back, recovery and recycling of waste.

Most offences under the waste regime are punishable by fines 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

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

Part IIA of the Environmental Protection Act 1990 aims to ensure that contaminated land which poses an unacceptable level of threat or risk to humans or the environment is both identified and dealt with. The ED Regulations also focus on the prevention and reduction of environmental damage. The ED Regulations, however, only apply to very serious cases. In 2015, they were extended to cover marine waters through the Offshore Safety Directive.

The principal enforcement authority is the relevant local authority. 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 organization responsible to the Secretary of State for Environment, Food and Rural Affairs) also has enforcement powers. The EA, Marine Management Organisation and the Secretary of State are responsible for English marine waters. The enforcing authority responsible for dealing with environmental damage to Welsh marine waters is the Welsh Ministry.

Under the Part IIA regime, contaminated land is land that has either been significantly damaged or is at high risk of suffering significant damage. 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 will be recognized as

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

Local authorities must respect their boundaries when identifying contaminated land. They, along with the EA/NRW, must keep public registers of such land. If contaminated land is found, a **remediation notice** must be served to the appropriate persons. This notice will require the recipients to take action to reduce or eliminate contaminants and repair the damage caused by them.

Under the ED Regulations, operators must do everything in their power to prevent environmental damage. If damage has already occurred, they must do whatever is necessary to prevent further damage. For damage to sites of special scientific interest (SSSIs), EU species and habitats, and water, the following steps may be required:

- Remediation of the resource
- Other measures which recognize that actual remediation of the resource is not possible. This may include compensation for temporary loss of a resource.

For land contamination, remediation requires the removal or control of contaminants so that risks are reduced to acceptable levels, and/or the taking of reasonable measures to remedy harm or pollution that has been caused by significant contamination.

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.

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

DEFRA published Statutory Guidance for England for dealing with contaminated land (especially of the radioactive variety) in 2012. The Welsh government published a similar Statutory Guidance later that year.

Operator Criteria

A permit holder must be the operator and must also show that they are a “fit and proper” person. To determine this, it is necessary to consider the operator’s criminal record (if applicable), their technical competence, and whether or not they have access to sufficient financial resources to be able 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.

Climate Change, Renewable Energy and Energy Efficiency

Emissions Targets

The UK is subject to greenhouse gas (GHG) emissions reduction goals from several sources, including the Kyoto Protocol. The **Climate Change Act 2008**, for instance, commits the UK to a 34% reduction in GHG emissions by 2020 and an 80% reduction in GHG emissions by 2050 (as compared to 1990 levels) (sections 1 and 5).

In December 2008, the EU undertook to cut 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 to reduce GHG emissions by 40% of 1990 levels by 2030. The UK government's 2011 **Carbon Plan** outlined a strategy for reducing GHG emissions, along with other climate change-related goals.

Increasing Renewable Energy

Directive 2009/28/EC, the Renewable Energy Directive, requires renewable energy to account for 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 requires member states (including the UK) to ensure that at least 10% of overall fuel consumption is based on renewable resources, such as biofuels.

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

There are no instructions for the use of renewable resource technologies. Instead, there is a general policy aimed at encouraging research and development in this area. **The Renewable Energy Roadmap** (2011) outlined plans for achieving goals related to renewable energy, including the roles of various technologies in meeting 2020 targets. Additional strategies for encouraging bioenergy and low carbon heat were published in April 2012.

Money is often used to encourage renewable energy usage. In particular, the government is pursuing an electricity reform program focused on sustainable energy and increasing renewable generation capacity. As part of this, a “carbon price floor” was created in April 2013. In 2015, certain feed-in tariffs started encouraging electricity generation from low-emission sources by offering financial subsidies. An Emissions Performance Standard was also introduced. This standard limits carbon emissions from new or altered fossil fuel-based plants of 50 MW or over to 450g/kWh.

Increasing Energy Efficiency

On 25 October 2012, the EU adopted Directive 2012/27/EU on energy efficiency. This directive establishes a common framework of measures for promoting energy efficiency. It lays down rules designed to remove obstacles to energy efficiency in the market and to overcome past failures. In

particular, it establishes a mandatory requirement for large companies to be subject to energy audits every four years.

Member states were required to make or enforce whatever laws were necessary to ensure compliance with the directive by June 2014. In response, the UK took various actions to meet this requirement. Later, in July 2014, the European Commission adopted an Energy Efficiency Communication. This communication proposed a goal of 30% energy savings by 2030.

There are no specific national standards for energy efficiency in buildings. However, there are a number of policies aimed at achieving this particular goal. 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 were to be achieved partly through changes to legally-binding building regulations. Such regulations are one of the most common ways of establishing energy efficiency standards. Recently, however, plans to make new homes zero-carbon by 2016 have been abandoned.

One of the major policy measures taken to increase energy efficiency was the **CRC Energy Scheme** of 2012, developed by the Energy Efficiency Deployment Office.

Another major policy was the **Green Deal**, which was intended to help homeowners and businesses become more energy-efficient by spreading the cost of the transition over a number of years. However, the future of the Green Deal is uncertain. In 2015, the government announced that funding for the Green Deal would no longer be provided, because it did not appear to be worth the amount of taxpayer money being spent on it. Other options are being considered to replace it.

Further Reading:

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