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United Kingdom

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Legislation

1 Main environmental regulations

What are the main statutes and regulations relating to the environment?

The scope of UK environmental law is very broad and has expanded rapidly since the early 1990s, largely as a result of legislative and policy developments at an EU level. As a result, this is a heavily regulated area, with detailed, complex and often overlapping regimes. The main statutes and regulations (as amended from time to time) we discuss in this chapter are:

- the Environmental Permitting Regulations 2010 (EPR), which is the main regulatory regime concerning the control of environmentally impacting activities and implements in England and Wales, the Integrated Pollution Prevention and Control (IPPC) Directive (see question 2);
- the Environmental Protection Act 1990 (EPA), which, among other things, implements the UK's contaminated land, statutory nuisance and overarching waste regimes (see questions 3, 4 and 10);
- the Waste (England and Wales) Regulations 2011, which implement the revised Waste Framework Directive;
- the Hazardous Waste (England and Wales) Regulations 2005 and the List of Wastes (England) Regulations 2005;
- Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (EIA), which implement the EIA Directive into law in England (see questions 18 and 19);
- the Environmental Damage (Prevention and Remediation) Regulations 2009 (EDR), which implement the Environmental Liability Directive into English law (see questions 3 and 11). Similar Regulations apply in Wales, Scotland and Northern Ireland;
- the Water Resources Act 1991; and
- the Control of Major Accident Hazards Regulations 1999 (COMAH Regulations).

In addition to the above, the UK also has introduced a number of laws and regulations to control and respond to the effects of climate change as well as to implement EU derived producer responsibility regimes (such as WEEE and RoHS).

2 Integrated pollution prevention and control

Is there a system of integrated control of pollution?

Yes. As noted above, the EPR implement the Integrated Pollution Prevention and Control (IPPC) Directive into law in England and Wales (different provisions apply in Scotland and Northern Ireland). They also implement a number of other EU Directives, including the Mining Waste Directive.

The EPR created a single regulatory framework by streamlining and integrating Waste Management Licensing, Pollution Prevention and Control, Water discharge Consenting, Groundwater Authorisations, and Radioactive Substances Regulation.

Under EPR, environmental permits are required for a wide range of business and commercial activities, from energy production through to intensive pig and poultry farming.

Depending on the activities undertaken at the regulated facility, the environmental permit will include specific conditions with respect to issues such as:

- raw material and energy use;
- how the site operates and the technology used;
- emissions to air, water and land;
- how any waste produced is managed; and
- accident prevention.

Operators are also obliged to operate their facilities using best available techniques (BAT), ie, the most cost-effective way, or ways, to prevent or minimise negative environmental impacts.

In December 2010, the Directive on industrial emissions (integrated pollution prevention and control) (Recast), was published in the EU's Official Journal. The directive, which must be transposed into UK law by 6 January 2013, combines seven pre-existing directives, including the Waste Incineration Directive, Large Combustion Plant directive, IPPC Directive and the Solvent Emissions directive (SED), into one. The new regime will be implemented in stages and a consultation on draft regulations is expected in early in 2012.

3 Soil pollution

What are the main characteristics of the rules applicable to soil pollution?

Part IIA of the EPA sets out the UK's statutory Contaminated Land Regime. It provides a risk-based approach to the identification and remediation of land where contamination poses an unacceptable risk to human health or the environment. The regime is jointly regulated by local authorities and the Environment Agency (EA) (or in Scotland, the Scottish Environmental Protection Agency (SEPA)), although local authorities will, in the first instance, take the lead role.

Under the regime, local authorities are required to inspect their areas to identify any land that should be classified as contaminated.

Once land is identified as being contaminated, the local authority (or EA, in the case of 'special sites') must then consider what, if anything, is to be done by way of remediation to reduce the associated risks to acceptable levels. In reaching its decision the regulator must take into account what is reasonable having regard to the likely costs involved and the seriousness of the harm. If the regulator considers that action is required, it will serve a remediation notice on those deemed responsible. Failing to comply with a remediation notice is a criminal offence.

The regime places primary liability on those who caused or knowingly permitted the presence or continued presence of the substances concerned. If no such persons are found, liability may, in very limited circumstances, attach to the current owner or occupier of the site. It should be noted, however, that owners and occupiers

may attract liability in their capacity as 'knowing permitters' of the presence or continued presence of the substances which have led to actual or threatened contamination, depending on the factual circumstances. The effect of this is that a knowing permitter can in some circumstances be found liable for substances in the ground before 1990 (when the contaminated land regime entered into force) and/or before they took over operations at the site.

There is also considerable overlap between the contaminated land regime and similar cleanup provisions under the WRA (see question 7).

It is important to note that sites regulated under EPR are not subject to the contaminated land regime for any contamination arising during the term of the environmental permit; this will instead be a breach under EPR. Additionally, at the end of the term of an environmental permit the operator will be required to return the site to a satisfactory state (at least to the state it was in before operations began). These conditions are potentially more stringent than those under the contaminated land regime, where, as noted above, remediation is only required where necessary to reduce the risks associated with the presence of substances to acceptable levels.

Additionally, the EDR, which transpose the Environmental Liability Directive, are also relevant. The EDR establish a regime for the prevention and remediation of certain specified types of environmental damage (serious damage to surface or ground water, land contamination resulting in significant risk to human health and serious damage to certain protected habitats, species or sites). However, the EDR are of more limited application than the contaminated land regime since they apply only in respect of damage which has occurred since the regulations entered into force in 2009.

For certain industrial activities (such as those regulated under the IPPC Directive) liability is strict but, for all other activities that cause or threaten environmental damage, liability is fault-based.

Under EDR, if an operator's activities threaten to cause (or have caused) environmental damage, the operator must take all practicable steps to prevent that damage (or further damage) from occurring and, unless the threat has been eliminated, inform the appropriate authority.

The EDR give the appropriate authorities (generally the EA or local authority) powers to serve prevention and remediation notices. Remediation requirements are broad and may include: primary remediation to restore the damage; complementary remediation to compensate where primary remediation does not fully restore the damage; and compensatory remediation for the loss of natural resources while the damage is restored. In some circumstances, the authorities may carry out work themselves and recover the costs of doing so from the relevant operator.

4 Regulation of waste

What types of waste are regulated and how?

Waste legislation in England and Wales is extensive. The definition of 'waste' is that provided in the EU Waste Framework Directive (revised in 2008), which describes waste as any substance or object that the holder discards or intends or is required to discard. However, difficulties with the definition ocften arise, particularly when determining the point at which waste ceases to be waste.

The EPA imposes a statutory duty of care on all those who produce, import, carry, hold, treat or dispose of 'controlled waste' (commercial, industrial or household waste) to take all reasonable steps to ensure that waste is managed properly. Additionally, an EPR permit is required for most waste operations involving the treatment, disposal, recovery or transfer of controlled waste. Exemptions for some low risk waste handling operations are set out in schedules 2 and 3 to the EPR.

Additional requirements apply in relation to hazardous waste under the Hazardous Waste (England and Wales) Regulations 2005. These include requirements to notify the Environment Agency of premises where hazardous waste is produced and to keep records. The List of Wastes (England) Regulations sets out wastes that are to be considered hazardous.

The 2008 revisions to the Waste Framework Directive, which sets requirements for the collection, transport, recovery and disposal of waste, have been implemented in England and Wales through the Waste (England and Wales) Regulations 2011 (WR). The WR require businesses to apply the waste management hierarchy, which ranks waste management options according to what is best for the environment, namely: prevention; re-use; recycling; other recovery; and disposal, when transferring waste and to include a declaration of compliance on their waste transfer note or consignment note. The regulations also require businesses collecting, transporting or receiving waste paper, metal, plastic or glass to ensure separate collection from 1 January 2015.

Additionally, 'producer responsibility' regimes exist, which require businesses to reuse, recover and recycle waste which comes from products they produce (for example, there are regimes which cover packaging waste, waste electrical and electronic equipment (WEEE), batteries and end of life vehicles). In the case of WEEE, there are also complementary regulations restricting the use of certain hazardous substances in electrical and electronic equipment placed on the market (RoHS). Producer responsibility is an extension of the 'polluter pays' principle and is intended to ensure that businesses who place products on the market take responsibility for those products once they have reached the end of their life.

5 Regulation of air emissions

What are the main features of the rules governing air emissions?

Emissions to air are primarily regulated through environmental permits under EPR (see question 2) or equivalent regimes (in Scotland and Northern Ireland, the permit will be under the Pollution Prevention and Control regime). Permits contain emission limit values and other conditions based on the application of BAT. EPR and PPC permits govern most gases other than carbon dioxide, which is governed separately by greenhouse gas emissions permits under the GHG Regulations (see questions 6). Emission limit values are set in the permit and emissions must be monitored and reports made against the emission limit values. A breach of the permit is a criminal offence, but note that operators may also be subject to civil penalties as an alternative under the Environmental Civil Sanctions (England) Order 2010 (see question 24).

Enforcement of air pollution standards may also be undertaken by local authorities under the Environment Act 1995, which requires those authorities to review and assess compliance with the UK Air Quality Strategy (which consolidates European and international air pollution standards) in their area. If the standards are not being met, local authorities may designate air quality management areas and implement remedial action plans.

6 Climate change

Are there any specific provisions relating to climate change?

Yes. The EU's Emissions Trading Scheme (EU ETS) is one of the measures introduced to help the EU meet its greenhouse gas emissions reduction target under the Kyoto Protocol. It is a cap and trade system which obliges participating installations to purchase allowances equal to their carbon dioxide emissions each year (one allowance represents one tonne of carbon dioxide equivalent). The EU ETS currently applies only to carbon dioxide emissions, but emissions of further greenhouse gases are due to be included when phase 3 of the scheme commences in January 2013 .

An overall cap on the total amount of emissions allowed from participating UK installations (those carrying out activities listed in Annex I of the EU ETS Directive) is set each year. Installations required to participate in the scheme include those conducting energy

activities, production and processing of ferrous metals, mineral industries and pulp and paper manufacture.

The allocation of allowances is carried out in accordance with the requirements of the UK's National Allocation Plan (NAP). Allocated allowances are distributed free of charge. At the end of each year, operators are required to ensure they have enough allowances to cover their installation's emissions for that year. They can meet this obligation by buying additional allowances (on top of their free allocation) or by selling any surplus allowances generated from reducing their emissions. All transactions and surrendering of allowances take place on the UK's national registry. Failure to surrender the requisite number of allowances at the end of a compliance year can lead to a fine of €100 for each tonne of carbon dioxide.

The UK also has a legally binding target under the Climate Change Act 2008 to reduce its greenhouse gas emissions by 80 per cent by 2050 and the following schemes are fundamental to the government's strategy for achieving this:

Carbon Reduction Commitment Energy Efficiency Scheme

The Carbon Reduction Commitment Energy Efficiency (CRC) Scheme is a mandatory scheme aimed at improving energy efficiency and cutting emissions in medium to large public and private sector organisations (see also question 12). Special rules (due to be simplified) apply to emissions already covered by the EU ETS or Climate Change Agreements (see below) to reduce double accounting. Organisations (including groups of companies) qualify as a CRC participant based on their half-hourly electricity usage. Participants must monitor their energy use and purchase allowances for each tonne of carbon dioxide they emit. Additionally, at the end of each year a league table, indicating each participating organisations performance, is published.

The Climate Change Levy (CCL)

CCL is a tax on the use of energy in industry, commerce and the public sector. The aim of the CCL is to encourage businesses to become more energy efficient and reduce their greenhouse gas emissions, so electricity generated from renewable energy sources is exempt, as is good quality combined heat and power (see question 12 for more information). Climate Change Agreements provide a mechanism for energy-intensive businesses to receive a discount (currently 65 per cent) under CCL. These voluntary agreements commit energy-intensive installations and facilities to targets for improved energy efficiency and reduced carbon dioxide emissions.

Renewables Obligation Order 2009 (as amended)

The Renewables Obligation Order 2009 (as amended) requires suppliers of electricity to source an increasing proportion of their electricity from eligible renewable sources each year. Suppliers must either demonstrate compliance to the authority (Ofgem) by submitting renewable obligation certificates (ROCs) obtained from eligible renewable energy generators or pay a 'buy-out price' to cover the shortfall.

Renewable Transport Fuel Obligations Order 2007

The Renewable Transport Fuel Obligations Order 2007 requires certain suppliers of fuels to ensure that a percentage of the fuel that they supply each year is a renewable transport fuel (RTF) such as bioethanol or biodiesel. Compliance is demonstrated by accumulating sufficient RTF certificates from the Renewable Fuels Agency to cover the obligation. RTF certificates can be traded and if a supplier does not meet its obligation for a compliance period it may either buy RTF certificates from the market or pay a 'buy-out price' to cover the shortfall.

Feed-in tariffs (FITs)

FITs, which came into force on 1 April 2010 under powers derived from the Energy Act 2008, are financial incentives to encourage deployment of small scale (less than 5MW) low carbon electricity generation in the UK and are complementary to ROCs. Under the scheme, operators of qualifying installations are guaranteed a specified tariff for each kilowatt hour they generate and export to the grid. As with other European jurisdictions, the UK's feed-in tariffs are currently the subject of government review and cuts.

7 Protection of fresh water and seawater

How are fresh water and seawater, and their associated land, protected?

The Water Resources Act 1991 (WRA), Food and Environment Protection Act 1985 (FEPA), EPR, Contaminated Land Regime and the EDR all impact to some degree on the protection of fresh and seawater. In addition, a number of other regimes control activities that have the potential to impact on these resources.

However, the WRA primarily regulates water pollution in England and Wales. It covers discharges to surface water and groundwater, estuaries and coastal waters, and controls abstracting and impounding water. It is a criminal offence to cause or knowingly permit any polluting matter to enter controlled waters except and to the extent authorised by an environmental permit.

Under the WRA, a works notice may be served to remedy or prevent any actual or likely water pollution. There is considerable overlap between these provisions and the contaminated land regime (see question 3). In practice, such a notice is only likely to be relevant in the case of a clean-up of water pollution which has already occurred and where further entry from the land concerned is unlikely to occur (otherwise the contaminated land regime will generally apply).

The marine licensing system under the Marine and Coastal Access Act 2009 (MCAA) has been in force since 6 April 2011. A marine licence is required for many activities involving the deposit or removal of a structure or object (such as a wind farm, for example) below the mean high water springs mark or in any tidal river to the extent of the tidal influence.

8 Protection of natural spaces and landscapes

What are the main features of the rules protecting natural spaces and landscapes?

There is significant overlap between UK laws protecting amenity and landscape and those protecting wildlife. The rules set out in question 9 that relate to site protection will also protect the relevant natural spaces. In addition, the UK's detailed planning regime is relevant.

Sites may also be designated as national parks or areas of outstanding natural beauty (AONB). National parks are areas protected because of their beautiful countryside, wildlife and cultural heritage. AONBs are areas of high scenic quality that have statutory protection from development in order to conserve and enhance their natural beauty (which includes landform and geology, plants and animals, landscape features and the rich history of human settlement over the centuries).

9 Protection of flora and fauna species

What are the main features of the rules protecting flora and fauna species?

There are numerous laws protecting flora and fauna in the UK. Some are species specific (such as those protecting badgers, for example), while others have more general application, such as EDR. The EU Natura 2000 programme, which implements the Habitats and Birds Directives at EU level, has resulted in the designations of Special Areas of Conservation (habitat specific) and Special Protection Areas (bird specific) in the UK. Most terrestrial Natura 2000 sites in the UK are also protected under Sites of Special Scientific Interest (SSI) legislation.

The Habitats and Birds Directives are transposed into UK law through the Conservation of Habitats and Species Regulations 2010. The Directives are also implemented offshore (beyond 12 nautical

miles) by virtue of the Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007 (as amended). They protect flora and fauna by requiring plans or projects in the designated areas to undergo an appropriate assessment for any adverse effects. In practice this obligation is discharged though the environmental impact assessment (see questions 18 and 19).

Flora, fauna and habitats protected under both the Natura 2000 and SSSI regimes are afforded specific protection under the EDR (see question 3). In cases of serious environmental damage to protected areas operators may be liable for remediation, including undertaking primary remediation to restore the damage, complementary remediation to compensate where primary remediation does not fully restore the damage and compensatory remediation for the loss of natural resources while the damage is restored.

In addition to national nature reserves, the national conservation agencies are responsible for enforcing the rules that protect other protected sites such as SSSIs. Activity that is adverse to the flora and fauna protected by an SSSI can be prohibited, but permission can be granted subject to certain conditions (pursuant to the Wildlife and Countryside Act). A further measure was introduced by the Natural Environment and Rural Communities Act 2006 whereby enhanced conservation management agreements can result in payment being made to the landowner.

10 Noise, odours and vibrations

What are the main features of the rules governing noise, odours and vibrations?

In addition to permit restrictions that may be imposed on installations under EPR, there are also statutory, public and private nuisance regimes (see also question 28). The question of what remedies are available to those affected, and the defences or grounds of appeal available to an operator who finds itself on the receiving end of proceedings, will be a question of the individual facts and circumstances in each case.

EPA 1990 codifies the law on statutory nuisances (which include noise, odours and/or vibrations). Where a statutory nuisance has been determined, local authorities must serve an abatement notice on the person responsible for the nuisance (or, where they cannot be found, the owner or occupier of the premises). Failure to comply with an abatement notice is an offence.

Additionally, the Control of Pollution Act 1974 (COPA) allows local authorities to designate noise abatement zones where specific noise restrictions apply.

Private nuisance enables a person who typically has an exclusive right to possession of land to bring an action in the case of an unlawful interference with that person's use and enjoyment of that land (including noise, odours and/or vibrations) by bringing a claim against the person who has caused the interference.

Public nuisance, which can be a criminal offence, provides a private right of action where an unlawful act or omission endangers or interferes with the lives, comfort, property or common rights of the public (again, this could include noise, odours and/or vibrations).

11 Liability for damage to the environment

Is there a general regime on liability for environmental damage?

There are multiple UK regimes governing liability for environmental damage. To a certain extent, the appropriate regime will depend on the type of environmental damage that has occurred. See questions 3, 7 and 9 for a discussion of the contaminated land, water and flora and fauna regimes respectively. It may also depend on the severity of the damage. For example, the EDR covers serious environmental damage to surface water, groundwater, land, sites of scientific interest, protected species and natural habitats (see question 3). In other cases, the appropriate regime will relate to the permitted activity itself (under EPR, for example).

12 Environmental taxes

Is there any type of environmental tax?

Yes. The most commonly encountered examples of UK environmental taxes include the landfill tax and Climate Change Levy (CCL). In addition to taxes, other fiscal measures include exemptions or relief from certain taxes and levies. Additionally, CRC and EU ETS (see question 6) are often compared to environmental taxes.

Landfill tax was introduced in 1996 and is currently subject to annual escalation as the UK strives to reduce its dependency on landfill. The tax is charged per tonne of waste landfilled and the standard rate is due to rise from £56/tonne to £64/tonne in April 2012. Higher rates are payable for hazardous waste. Some types of waste are exempt or reduced (such as mining and quarrying waste, for example).

The Climate Change Levy (CCL) is a tax on the use of energy in industry, commerce and the public sector. The aim of the CCL is to encourage businesses to become more energy efficient and reduce their greenhouse gas emissions, so electricity generated from renewable energy sources is exempt, as is good quality combined heat and power. The levy is applied as a specific rate per nominal unit of energy. There is a separate rate for each category of taxable commodity based on its energy content; in kilowatt-hours (kWh) for gas and electricity and kilograms for liquid petroleum gas and other taxable commodities. Discounts on the levy are available for energy intensive sectors if they enter into climate change agreements whereby they commit to reducing their emissions.

Hazardous activities and substances

13 Regulation of hazardous activities

Are there specific rules governing hazardous activities?

Yes. In addition to the permitting regimes already outlined, 'hazardous activities' may be covered by the Control of Major Accident Hazards Regulations 1999 (COMAH). COMAH implement the Seveso II Directive, except for provisions relating to land-use planning. The COMAH Regulations impose a general duty on operators to prevent major accidents arising from the use of dangerous substances and mitigate their effect on human health and the environment.

Operators of all installations affected by COMAH must notify certain details about themselves, the site, the dangerous substances held, site operations and environmental issues to the competent authority (the HSE and the EA in England and Wales). Additionally, all operators are required to prepare a document setting out their policy for preventing major accidents (a major accident prevention policy or MAPP). Top-tier operators are also required to submit safety reports and emergency plans to competent authorities to demonstrate that all measures necessary for the prevention and mitigation of major accidents have been taken.

14 Regulation of hazardous products and substances

What are the main features of the rules governing hazardous products and substances?

In addition to the regulatory regimes already discussed, there is a multitude of regulation governing the control of hazardous products and substances in the UK, much of which is derived from EU law. Some of the key provisions are listed below.

The Control of Substances Hazardous to Health Regulations 2002 (as amended) (COSHH) define hazardous substances as substances (including preparations) which are designated as very toxic, toxic, harmful, corrosive or irritant under the EU's Classification, Labelling and Packaging of Substances and Mixtures (CLP) Regulation; that the HSE has approved a workplace exposure limit for; that are biological agents (such as germs); that are inhalable or respirable dust; or which, because of their chemical or toxicological properties and the way they are used or are present at the workplace, create a

risk to health. Under COSHH, all employers are required to control substances that are hazardous to health to protect their workforce, contractors, visitors and customers. Failure to comply with these obligations may result in criminal liabilities.

CLP came into force in 2009 and implements in the EU the globally harmonised system on the classification and labelling of chemicals and places obligations on chemical suppliers. Failure to comply with these obligations may result in criminal liabilities. The UK is currently in a transitional phase between the Chemicals (Hazard Information and Packaging for Supply) Regulations 2009 (CHIP) and the CLP Regulation. The transitional period ran to 1 December 2010 for substances, and continues until 1 June 2015 for mixtures (preparations).

The EU REACH Regulation (REACH) concerns the Registration, Evaluation, Authorisation and restriction of Chemicals. It came into force on 1 June 2007 and replaced a number of European Directives and Regulations with a single system. REACH applies to chemical substances, preparations and articles that are manufactured or imported into the EU in quantities of 1 tonne or more per year. Manufacturers, importers, distributors and professional users that market or use chemicals (on their own, in mixtures and/or in some cases in products) covered by REACH must ensure, where necessary, those chemicals are registered with the European Chemicals Agency (ECHA). Registration requires the provision of information on the environmental and human health properties of the chemical substance and an assessment to ensure that the risks arising from its use are properly managed. Some substances which are deemed particularly harmful to human health and/or the environment require authorisation for use or are banned outright. REACH also places specific notification, communication and other obligations on producers, manufacturers and importers. Failure to comply with these obligations may result in criminal liabilities.

The Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2008 (RoHS) implement the RoHS Directive in the UK. RoHS bans the placing on the EU market of new electrical and electronic equipment containing lead, cadmium, mercury, hexavalent chromium, polybrominated biphenyl (PBB) and polybrominated diphenyl ether (PBDE) flame retardants in amounts in excess of defined maximum concentration values. Failure to comply with these obligations may result in criminal liabilities. It should be noted that the RoHS Directive has been recast and is expected to be transposed into UK law by 2 January 2013.

The storage of hazardous substances is governed by the Planning (Hazardous Substances) Act 1990. If a hazardous substance is stored on a site above a specified quantity (known as the controlled quantity) then it is necessary to obtain consent from the hazardous substances authority. Failure to comply with these obligations may result in criminal liabilities.

The Control of Asbestos Regulations 2006 (CAR) prohibit the importation, supply and use of all forms of asbestos. They also impose a positive duty on duty holders (owners, landlords, tenants, management companies who control premises) to manage the risks from existing asbestos in non-domestic premises. Essentially, the duty holder must take reasonable steps to find out if there are asbestos containing materials (ACMs) on site and, if so, in what amount, where and in what condition. The duty holder is also obligated to make (and keep up-to-date) a record of the location and condition of the ACMs and develop an ACM management plan that sets out in detail how associated risks are managed. Failure to comply with these obligations may result in criminal liabilities. Additionally, employees who suffer illnesses caused by the inhalation of asbestos fibres may also bring a claim in negligence for personal injury. Damages in respect of a successful claim may be a material liability.

Industrial accidents

15 Industrial accidents

What are the regulatory requirements regarding the prevention of industrial accidents?

There is an extensive body of health and safety law that governs activities in the workplace and beyond. The primary legislation is the Health and Safety at Work etc Act 1974 (HASAWA), which sets out the general duties which employers have towards employees and members of the public, and employees have to themselves and to each other. HASAWA is then supplemented by extensive regulation, approved codes of practice and guidance. Key regulations include the Management of Health and Safety at Work Regulations 1999, which set out the requirement on employers assess the risks posed to workers and any others who may be affected by their work or business and COSHH (see question 14). The most hazardous activities are governed by COMAH Regulations (see question 13). Employers should also take note of the Corporate Manslaughter and Corporate Homicide Act 2007, which places a duty of care on senior management not to be negligent in organising or managing its activities. Gross breach of that duty can leave a company open to unlimited fines, remedial orders and publicity orders. Additionally, the company and individuals can be prosecuted for separate health and safety offences.

Environmental aspects in transactions

16 Environmental aspects in M&A transactions

What are the main environmental aspects to consider in M&A transactions?

Environmental risks and opportunities arising in an M&A transaction will vary depending on the nature of the target business or asset to be acquired and the structure of the transaction itself. However, one key point is whether the transaction is a share or asset sale. On a share sale, all of the target company liabilities, including in relation to remediation and clean-up obligations and any current or historical breaches of environmental law, will remain with that entity. On an asset sale, any pre-acquisition liabilities associated with the assets generally remain with the seller. However, it should be noted that the buyer may still acquire liability under the contaminated land regime as a knowing permitter (see question 3). Care should therefore be taken to evaluate the risks of each transaction on a case-by-case basis. Warranty protection and, in some cases, an environmental indemnity or insurance, may need to be considered to adequately manage the risks associated with certain environmental liabilities.

In short, the key issues on any transaction are likely to include:

- the existence, transferability and validity of permits;
- historical or ongoing breaches of environmental law and/or operating permits which could give rise to material remediation costs, enforcement action and/or criminal or civil liability (for example, in relation to exposure injuries);
- onerous or expensive upgrade works or mitigation steps required to maintain compliance with environmental law or permits;
- onerous planning restrictions, permissions or agreements which could impede future operations and/or expansion;
- known or suspected future changes to environmental legislation which could impede future operations and/or expansion;
- conservation and protected habitats or sites;
- historical liabilities (for example, associated with former sites) that may give rise to material remediation costs or business interruption (such as contaminated land issues); and
- third party complaints and claims.

17 Environmental aspects in other transactions

What are the main environmental aspects to consider in other transactions?

In financing transactions, environmental liabilities can affect lenders by reducing the creditworthiness of the borrower (a facility shutdown could impact the borrower's ability to meet its repayment obligations, for example), reducing the value of any security (through land contamination, for example) and/or, in certain limited circumstances, result in the possibility of direct lender liability. In addition to the issues raised in our answer to question 16, these specific areas will need to be addressed (to the extent possible) by undertaking due diligence and giving consideration to appropriate provisions and protections in the facility and security documents. Additionally, before exercising any form of control over a borrower's operations or enforcing security, the lender should carry out a thorough risk assessment to ensure that it will not incur liability (such as under the contaminated land regime.

Corporate restructuring and insolvency present risks for buyers and administrators that are again dependent on the specific transaction. For example, where an entity that has caused land contamination is wound up, responsibility for remediation may pass to the current landowner under the contaminated land regime (see question 3). On real estate transactions, environmental liabilities that attach to the property, such as clean up costs, will be central to the valuation.

Environmental assessment

18 Activities subject to environmental assessment

Which types of activities are subject to environmental assessment?

Environmental assessment in England is largely governed by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (EIAR), which implements the Environmental Impact Assessment Directive (EIA Directive). There are separate, parallel regimes that apply to projects falling outside the Town and Country Planning regime, such as marine and harbour works. Under EIAR, an environmental assessment must be undertaken for certain development proposals specified in schedules 1 and 2 of the EIAR before planning permission is granted. For schedule 1 projects (those deemed to have a significant environmental impact such as oil refineries, power stations and motorways) an environmental impact assessment (EIA) is mandatory. For schedule 2 projects (such as certain industrial, agricultural and mining activities), an EIA is necessary only when significant environmental effects are likely due to factors such as their nature, size or location. It is important to note that the EIA is not a licence for development, it is merely a procedural requirement of the development consent process (albeit and important one). Operators may need to apply separately for operational permits.

The strategic environmental assessment (SEA) of plans and projects is governed in England by the Environmental Assessment of Plans and Programmes Regulations 2004, which implement the Strategic Environmental Assessment Directive. SEA is intended to increase the consideration of environmental issues during decision making related to strategic documents such as plans, programmes and strategies. The SEA identifies the significant environmental effects that are likely to result from the implementation of the plan or alternative approaches to the plan.

19 Environmental assessment process

What are the main steps of the environmental assessment process?

First, for schedule 2 projects (see question 8), there is a screening phase to determine whether an EIA is required (an EIA is mandatory for schedule 1 projects). During this phase, the developer can choose to request the opinion of the local planning authority on whether an EIA is necessary. Alternatively, the local planning authority may receive an application without an EIA which it determines will have a significant impact on the environment and therefore requires an EIA. Second, the developer may obtain guidance from either the LPA or the Secretary of State on the scope of the environmental statement in the form of a scoping opinion or direction. Third, the EIA is undertaken and an environmental statement prepared. Finally, the environmental statement is submitted along with the planning application. There is an enhanced procedure for planning applications that include EIAs to ensure suitable public participation and involvement of the various statutory consultees (such as the local council, Natural England and the EA).

Regulatory authorities

20 Regulatory authorities

Which authorities are responsible for the environment and what is the scope of each regulator's authority?

In England and Wales the EA has primary responsibility for environmental law enforcement in the UK (and local equivalents in Scotland and Northern Ireland). There is also a degree of overlap with other regulators such as local authorities and the Health and Safety Executive.

Local authorities are responsible for the lower-tier facilities under EPR and also have primary responsibility for the Contaminated Land Regime. They are also responsible for local development control and air quality management.

The HSE is primarily responsible health and safety law enforcement, but it also regulates COMAH sites and has responsibility for REACH and nuclear matters.

Natural England, Scottish National Heritage and the Countryside Council for Wales have responsibility for biodiversity, species and habitats conservation and general nature conservation.

Additionally, the Marine Management Organisation has responsibility for marine licensing and conservation (among other things).

21 Investigation

What are the typical steps in an investigation?

Generally, breach of environmental law will be a criminal offence and incidents will be investigated accordingly. The authorities have wide powers under specific environmental statutes, such as the EPA, which are broadly equivalent to those under the Police and Criminal Evidence Act (PACE), to obtain information, search premises, conduct sampling and interview persons in the course of their investigations. Refusal to cooperate is a criminal offence. Interviews must be held under caution and interviewees must be permitted to have legal representation if answers are to be used against them in court. On completion of the investigation the authorities will consider what, if any, enforcement action is necessary. Sanctions for criminal prosecutions may result in fines and, in extreme cases, the imprisonment of individuals if the offence was committed with their consent or connivance, or was attributable to their neglect.

22 Powers of regulatory authorities

What powers of investigation do the regulatory authorities have?

As noted above (see question 21), authorities have wide powers under the Police and Criminal Evidence Act (PACE) to obtain information, search premises, conduct sampling and interview persons in the course of their investigations. The EA, in particular, has a range of powers including, for the purposes of establishing whether there have been breaches of environmental law, the power to enter premises at any reasonable time (including by force where there is an emergency situation), take samples and photos, question employees, install bore holes and monitoring equipment and take steps to abate or control an emergency situation.

23 Administrative decisions

What is the procedure for making administrative decisions?

The EA has adopted an enforcement and prosecution policy and supporting guidance to help it decide when and what type of enforcement action is necessary. The HSE has a similar enforcement policy. These documents set out the factors that will be taken into account when making enforcement decisions. The regulator will examine incidents on a case by case basis and use sanctions in a manner that is appropriate to the offence. If an operator is not complying with the law the EA will normally provide advice and guidance to help them do so. Where appropriate, the EA will agree solutions and timescales for making any improvements with the operator. The use of formal enforcement powers and sanctions may also be necessary, however. Enforcement action (specifically the imposition of a sanction) can normally be appealed either through the criminal court process or as a result of specific appeal provisions. Once all other appeal avenues have been exhausted, the lawfulness of administrative decisions may be challenged by judicial review (see question 26).

24 Sanctions and remedies

What are the sanctions and remedies that may be imposed by the regulator for violations?

The EA and local equivalents in Scotland and Northern Ireland have a wide range of enforcement powers and sanctions available to them. Additionally, the Environmental Civil Sanctions (England) Order 2010, which came into force on 6 April 2010, gave new powers to the EA and Natural England to impose civil sanctions for breaches of certain environmental laws. The sanctions now available to the EA include:

- enforcement notices and works notices (to prevent or remedy a contravention);
- prohibition notices (where there is an imminent risk of serious environmental damage);
- suspension or revocation of environmental permits and licences;
- variation of permit conditions;
- injunctions;
- carrying out remedial works (the regulator will seek to recover the full costs incurred from the responsible party);
- criminal sanctions, including prosecution; and
- civil sanctions, including financial penalties.

The EA also publish statistics on legal compliance and details of enforcement and successful prosecutions. As noted above, if a breach has been identified and criminal action is considered, the EA will apply the enforcement and prosecution policy to decide when and what type of enforcement action is necessary.

25 Appeal of regulators' decisions

To what extent may decisions of the regulators be appealed, and to whom?

As noted above, enforcement action (specifically the imposition of a sanction) can normally be appealed either through the criminal court process or as a result of specific appeal provisions. Rights of appeal are subject to time limits and to specified grounds; although these will often be fairly broad. In the majority of cases, an appeal is made to the secretary of state, who has the power to appoint an appropriate person to hear the appeal.

Once all other appeal avenues have been exhausted, the lawfulness of administrative decisions may be challenged by judicial review (more below).

Judicial proceedings

26 Judicial proceedings

Are environmental law proceedings in court civil, criminal or both?

Legal action for an environmental incident may involve criminal or civil proceedings. For breaches of most environmental laws in England and Wales, the sanction is prosecution by the relevant regulator in the criminal courts. The penalties are usually a fine and, in extreme cases involving individuals, imprisonment.

Additionally, in some circumstances, an environmental claim can be brought under civil law (see questions 10 and 28).

Judicial review can also be used to challenge a decision of a public body or regulator if there is no other available remedy or all other appeal avenues have been exhausted. The main grounds of judicial review are that the decision maker has acted outside the scope of its statutory powers, that the decision was made using an unfair procedure, or that the decision was an unreasonable one. However, it is important to note that judicial review is a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached.

27 Powers of courts

What are the powers of courts in relation to infringements and breaches of environmental law?

As noted above, in the case of a criminal prosecution, the penalties are usually a fine and, in extreme cases involving individuals, imprisonment. Less serious environmental cases are tried in the Magistrates' Court, where the maximum fine is generally £50,000 with up to two years' imprisonment. More serious environmental cases will be tried in the Crown Court, where the maximum penalty is an unlimited fine and up to five years' imprisonment.

If it can be demonstrated that an offence by a company was committed with the consent or connivance of a director or senior manager, or was attributable to their neglect, the regulator may also, in these more extreme cases, seek to prosecute those individuals in addition to the company.

When deciding on appropriate sanctions, the courts can consider a number of aggravating or mitigating factors, including the economic value of the damage, the previous convictions and culpability of the defendant and their behaviour before and after the incident. The defendant may also have to pay a contribution towards the prosecution's costs (and even the costs of investigating the incident in question) and compensation to anyone who directly suffered from the offence.

In the case of a civil claim, the usual remedy is damages, although the courts also have the discretion to grant injunctions where this is considered more appropriate.

28 Civil claims

Are civil (contractual and non-contractual) claims allowed regarding breaches and infringements of environmental law?

Generally, contractual claims in the UK may only follow a breach of environmental law if it is also a breach of an environmental warranty or it triggers an indemnity. Non-contractual civil claims may be brought in nuisance (including the rule in *Rylands v Fletcher*) (see question 10), trespass (strict liability), negligence (fault based) or for breach of statutory duty.

As noted above, in the case of a civil claim, the usual remedy is damages, although the courts also have the discretion to grant injunctions where this is considered more appropriate.

Update and trends

Despite the UK Environment Agency having had powers to impose civil sanctions for breaches of certain environmental laws for over a year (see question 24), we have yet to see significant use of them. However, the prevailing trend over recent years has been for increased regulatory action by the EA and HSE, sometimes with significant reputational and financial consequences for operators. For example, in September 2011, a leading UK retailer was fined £1m for failing to protect customers, staff and workers from potential exposure to asbestos.

More generally, UK environmental policy has seen rapid change over the last 12 months, particularly in respect of incentive based policy and regulation. These areas have been heavily impacted by the government's efforts to control its finances in the face of challenging economic conditions. For example, it was announced in late 2010 that revenues from the CRC energy efficiency scheme would no longer be recycled to participants and, more recently, the UK's Feed in Tariffs have been the subject of significant cuts. It seems likely that incentive based environmental regimes will continue to be reined back over the coming years.

In summary, non-compliance with environmental laws is now more likely to result in significant sanctions, while doing the right thing will not be as well rewarded as in years gone by.

29 Defences and indemnities

What defences or indemnities are available?

In many cases, breach of environmental law will be a strict liability offence (there is no need for the regulator to establish fault). However, some environmental regimes do include statutory defences. For example, under EPR, it is a defence to show that the breach resulted from acts taken in an emergency in order to avoid danger to human health and that the defendant took all reasonably practicable steps to minimise the pollution and provided particulars of the acts to the EA as soon as reasonably practicable.

Additionally, recent case law indicates that, in certain circumstances, compliance with an environmental permit may be a defence to an action in nuisance (see *Barr and Others v Biffa Waste Services Ltd* (No 3) [2011]).

There are no statutory indemnities or 'safe harbour' provisions under UK law. Indemnities are contractual remedies which, as a matter of public policy, will generally be unenforceable against criminal liabilities. The statutory limitation period (six years for contract claims and 12 years for claims in respect of deeds) runs from the time the loss is suffered and not from the time of the event which causes the loss.

In certain circumstances a defendant may have a statutory right to claim for contribution from another person where they are jointly or otherwise liable for the same debt or damage.

30 Directors' or officers' defences

Are there specific defences in the case of directors' or officers' liability?

No. If it can be demonstrated that an offence by a company was committed with the consent or connivance of a director or senior manager, or was attributable to their neglect, the regulator may seek to prosecute those individuals in addition to the company.

31 Appeal process

What is the appeal process from trials?

In the civil courts, the appellant will usually make an oral application for 'permission' to appeal to a higher court. Appeals will be based on a point of law, against a finding of fact, against the exercise of judicial discretion or against the remedy awarded.

In the criminal courts, the appellant's right of appeal generally depends on their original plea. If a not guilty plea was entered, the appellant has the right to appeal to the higher court against conviction and sentence. If a guilty plea was entered, the appellant may generally appeal their sentence only. It should be noted that, in the case of an appeal from Crown Court, the appellant must apply to the Court of Appeal for leave of appeal (there is no general right of appeal). In any case, there must be proper grounds for making an appeal and there are strict time limits within which to do so.

International treaties and institutions

32 International treaties

Is your country a contracting state to any international environmental treaties, or similar agreements?

Yes. Some of the key international environmental treaties ratified by the UK include:

- the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998);
- the Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997);
- the Montreal Protocol on Substances that Deplete the Ozone Layer (1987);
- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989); and
- the Convention on Long-range Transboundary Air Pollution (1979).

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33 International treaties and regulatory policy

To what extent is regulatory policy affected by these treaties?

International pressure and consensus on issues such as climate change have had a significant impact on the regulatory policy of the EU and the UK. The Kyoto Protocol, for example, has led to a significant body of EU and UK law (see question 6).

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