Our better nature: why strong environmental protections matter

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All due care has been taken to ensure the accuracy of this briefing, including review, but ultimately any errors or unintended omissions are our own.

About Unchecked UK

Unchecked UK makes the case for common-sense protections which help keep people safe and allow businesses to thrive.

We are a rapidly growing network of leading and diverse civil society organisations who see sensible, properly-enforced protections as the framework for a decent society – where the food we eat and the things we buy can be trusted, the natural environment is protected, our homes and workplaces are safe, and our rights are safeguarded.

We carry out research and investigations to highlight the loss of protection for the UK public that results from the erosion of important regulations and of the public bodies which enforce them. Through public insights research, we shape new positive narratives about our shared protections and the enforcement teams who work hard to keep us safe. We run campaigns to show how important strong rules are to everyday life, and work with our civil society partners to develop policy alternatives to the deregulation approach.

Ultimately, Unchecked UK aims to shift the political dynamic around regulation, and to build momentum for proper investment in strong rules and the public bodies which defend them. We are a non-partisan organisation, incubated as a project of The Ecology Trust.

Find out more about our work:
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Executive Summary

Looking back

The weakening or removal of regulation, the failure to regulate, and the stripping back of enforcement capacity has directly undermined the achievement of government policy goals. This has contributed to adverse social or environmental outcomes.

Water quality, air quality, the decarbonisation of the housing sector and the protection of nature conservation sites have all been undermined by deregulation and the erosion of enforcement capacity. While not all deregulatory approaches are bad – some have undoubtedly conferred benefits in the form of simplified compliance and the reduction of genuine burdens – we believe the deregulation pendulum has swung too far.

We find that deregulation of environmental rules has not only had a huge impact on public health and the economy, but shifted costs from the private sector to wider society. Poor air quality causes around 40,000 premature deaths in the UK, while rivers across the country face increasing sewer overflows and a burden from heavy metals and other toxic contaminants. The cancellation of the Zero Carbon Homes policy has cost more than £2bn in wasted energy, driving up household energy bills by £200 a year. Meanwhile, years of planning deregulation has left a nationwide legacy of poor quality housing.

Time and time again, environmental deregulation has failed to deliver the intended outcomes of cost reduction, simplification and policy efficiency. Instead, deregulation initiatives have often added procedural complexity.

Our research refutes the frequent assertion that deregulatory drives reduce bureaucracy and costs for businesses, which in any case tend to be overestimated.[1] In truth, well-designed environmental regulations can deliver a wide breadth of positive economic outcomes for businesses, without any loss in productivity. Robust policies and regulations around low emissions vehicles, waste reduction, low carbon power and sustainable construction have already benefited UK industries, creating jobs and making these industries increasingly competitive in growing international markets.[2]

Beyond the narrow focus on the relative costs of regulation, the wider socio-economic and environmental benefits of good regulations are clear. Numerous reviews of environmental legislation at both the UK and EU level have clearly demonstrated its efficacy in delivering better outcomes for nature and the environment.[3,4] In short, history shows us that strong, well-enforced rules will be crucial to achieving our environmental objectives.

Looking forward

The Government has set out strong ambitions with respect to the environment, with a net zero emissions target for 2050, and targets for biodiversity and nature in its flagship Environment Bill. We hear repeated pledges that Brexit will not result in a lowering of environmental ambition, while calls for a post-pandemic green recovery have won broad political support.

However, as the Government faces the challenges of rebuilding our economy after Covid-19, negotiating trade deals, and delivering on 'levelling up' promises to newly-won constituencies, there remains a danger political expediency could trump environmental concerns.

The REACH chemical safety regime is undergoing huge change, the Habitat Regulations are attracting deregulatory interest, and plans to scale back the planning system are gaining momentum.

We believe that political moves to weaken environmental rules will be out-of-step with public opinion. Public consultations aiming to give voice to perceived popular dissatisfaction with over-regulation have generally fallen flat, with many participants expressing a desire for stronger rules.[5,6]

Nature protections in the UK have strong public support, with 93% of Conservative voters opposed to weakening these protections.[7] Polling in March 2020 by Ipsos MORI for Unchecked UK found that 81% of younger Leave voters would like to keep or increase environmental rules, including EU rules such as bathing water standards and legal protections for wildlife.[8]

In the context of Covid-19, when many people have experienced a renewed appreciation of nature, support for environmental protections is likely to be stronger than ever. As the UK stands on the brink of huge change, we believe the time is ripe for a reappraisal of the politics of deregulation. The Westminster debate must move away from the consideration of regulatory value solely in the light of costs to businesses, and towards what really works in terms of achieving long-term environmental policy goals.

The huge advances in environmental protection over the last three decades have come about largely due to regulatory intervention. Ultimately, if the UK is to establish its place as a world-leader in environmental protection, we must learn the lessons from history, and work to strengthen, not weaken, the rules and the institutions which underpin our environmental goals.

Introduction

The topic of regulation has long divided opinion. Proponents hold that regulation protects the public from market failure, helps businesses to do the right thing, and creates competitive markets and long-term investment certainty. Opponents hold that regulation stifles economic growth and restricts individual liberty, and advocate the deregulated market as the only legitimate means through which desired social outcomes can be achieved.

Although different critics sit at different intervals along this continuum, participants in the de/regulation debate generally self-identify as part of either the 'more' or the 'less' camp. The questions of what constitutes the 'right' amount of regulation, and which regulatory interventions and enforcement models are best placed to bring about beneficial outcomes, are often contested.

The reality is, of course, that proportionate, well-designed regulation can deliver diverse social, environmental and economic benefits, while poorly-designed, excessive or insufficient regulation can lead to the opposite.[1]

This nuance has, however, been largely absent from the UK's de/regulation debate. The narratives which have accompanied political moves (by successive governments dating back to the 1980s) to reduce regulation are pervasive, compelling and visceral. Regulation has been portrayed as an assault on fundamental British values, a threat to individual freedom, an insult to 'common sense'.

The cultural power of the deregulation narrative has been remarkable. It has altered the way people think and feel about rights, freedom, personal responsibility and the role of the state. Tropes such as 'red tape' have infiltrated everyday public discourse.

This cognitive capture has been mirrored by institutional and political capture. Deregulatory infrastructure has been systematically embedded across Whitehall; from the creation of the Enterprise and Deregulation Unit in 1986, to the (still-running) Better Regulation Executive in 2005. Deregulation has been 'baked in' to policy making, with departments obliged to constantly work to reduce the UK's regulatory stock, meet deregulation targets, and cut costs for businesses.

Deregulation and the environment

Environmental law has certainly not been exempt from deregulatory drives. A series of reviews over the years, originating from both the UK Government and the EU, have included environmental legislation within their scope (or targeted it specifically). Domestic reviews include the Coalition Government's 2011 Red Tape Challenge – which resulted in proposals to abolish 67 environmental regulations;[2] the 2012 Review of the Implementation of the Birds and Habitats Directives in England;[3] and the 2015 Cutting Red Tape Reviews – which looked at regulations and their enforcement across key sectors, including waste, minerals extraction and energy.[4]

Alongside other regulators, environmental watchdogs have been required since 2008 to adopt a business-friendly approach to their work. In 2013, the Coalition Government introduction of a Growth Duty placed fresh emphasis on the need for regulators to "have regard to the impact of their actions on economic growth" and to ensure regulatory activity, including enforcement, is "proportionate".[5]

Defining deregulation

Deregulation as a policy instrument can be characterised as encompassing several different components. While some are more explicitly part of the deregulation project, others produce a deregulatory effect. We consider the following policy approaches to fall within the scope of deregulation, and explore a range of these within this briefing:

- The reduction of regulatory stock; through regulatory reform initiatives such as Red Tape Challenges, via Business Impact Targets or post-implementation reviews, and through more recent routes such as the transposition of EU retained law into domestic law via secondary legislation.
- The stemming of regulatory flow; through policies such as 'one-in-three-out'.
- The effects of regulatory 'chill'; the failure to regulate in the face of clear evidence, the scaling down of ambition, or the moving of regulatory goalposts. Certain trade provisions, such as those on Investor-State Dispute Settlement or regulatory co-operation, have also been shown to have a 'chilling effect' on the introduction of environmental regulations.
- The erosion of enforcement capacity; through the reduction of regulators' funds, powers or independence.
- The transformation of regulatory delivery, governance and oversight; with policies like the Growth Duty and the Regulator's Code complementing a shift towards self-regulation, charging schemes, voluntary approaches and third-party assurance.

Environmental deregulation – looking back, looking forward

As the Government considers how to rebuild after the Covid-19 pandemic, there will be pressure on policy makers to roll back some environmental protections in order to stimulate the economy. Combined with the challenge of securing post-Brexit trade deals, the post-pandemic response has the potential to accelerate what many see as the UK's environmental protection problem.

In the context of the difficult decisions currently facing the UK, we think it is important to see what lessons can be learnt from history. In this briefing, we begin to explore the extent to which deregulation has undermined the achievement of environmental objectives, created negative externalities, or contributed to adverse environmental or societal outcomes.

Our hope is that, by highlighting the lessons to be learnt from the past, we will help to make the case for a protective approach to environmental policy making, which places strong environmental rules at the heart of the UK's post-pandemic recovery program.

Looking back: the impacts of environmental deregulation

The last few decades have been characterised by successive waves of deregulation, many of which have included environmental protections within their scope; from the 2011 Red Tape Challenge and Defra's 2012 Smarter Environmental Regulation Review, to the 2012 Review of the Implementation of the Birds and Habitats Directives in England and the recent Regulatory Reform Initiative.

Over this period, the UK has also experienced a substantial loss of environmental enforcement capacity. From 2009 to 2019, real terms funding for the environmental protection work of the key national and local regulators fell on average by 41% in real terms, and enforcement activity has plummeted (see pg31).

Few would disagree that governments should work towards smarter, more effective regulation. But deregulatory drives have largely come about as an often knee-jerk response to recession, growing anti-EU sentiment and the powerful influence of industry lobbies, rather than from the genuine identification of excessive regulatory bureaucracy. Indeed, the explicit aim of deregulatory initiatives has been to remove 'burdens' from British businesses, or as explained by (then Business Secretary) Sajid Javid in 2015, "to set them free from heavy-handed regulators."[1]

In the absence of an equal appraisal of the costs and benefits of regulation, this approach risks creating a shadow economy of negative externalities, with the environment, communities and citizens left with the consequences of weak regulation and unrestricted business activities. One of the most devastating examples in recent years of the human costs of systemic regulatory failures is, of course, the Grenfell Tower tragedy, which claimed the lives of 72 residents, leaving a further 74 hospitalised and many more traumatised.[2,3]

In wider planning policy, the ditching of both the ambitious Code for Sustainable Homes and the 2016 target for achieving zero carbon status in new build has led to slippage in meeting the UK's tough carbon budgets, as well as heavy job losses in the sustainable building sector and a legacy of drafty newbuilds with high heating bills.

> *"Deregulatory drives have largely come about as an often knee-jerk response to recession, growing anti-EU sentiment and the powerful influence of industry lobbies."*

In the cases of air and water quality, previous gains have been jeopardised by weak enforcement and low regulatory ambition, with poorly-sited housing developments, road infrastructure and airport expansion all worsening pollution impact. The public health costs of poor air quality in the UK are now £20bn a year.[4] Water bodies across England are failing to meet water quality objectives, with only 16% of England's rivers, lakes and coastal waters close to their natural state just as pressure on these resources from climate change, housebuilding and other land uses increases.[5] The consequences of successive government's failures to meet targets to halt and reverse the loss of biodiversity have been appalling, with 15% of species now at risk from extinction in Great Britain.[6]

While some efficiencies have undoubtedly been found through regulatory reform, lack of effective regulation, implementation failures and weak enforcement have had a detrimental effect on the environment, people, the emerging green economy and jobs. In this section we look at four such cases; air quality, water quality, low-carbon homes, and planning (in particular permitted development rights).

Case study 1:

Deregulation and air quality

The UK's air pollution problem

The UK has a long history of air pollution, driven primarily by its industrial and fossil fuel power generation legacy (notably provoking lethal smog in the 1950s) and augmented more recently by growing road traffic, intensive farming, aviation and shipping. Poor air quality is having a huge impact on human health, the economy and environment, with an estimated 40,000 premature deaths and £20bn a year costs in the UK alone.[1]

Despite the risks of air pollution being widely recognised for decades, governments have failed to tackle the problem. After early improvement due to abatement technology and the 1990's dash-for-gas, the UK's air quality overall is no longer improving. The Natural Capital Committee recently noted that: "Progress on air pollutant reductions has stalled following significant reductions between 1990 and 2011. Although there has been a decline in sulphur dioxide and nitrogen oxides…emissions of fine particulate matter and non-methane organic compounds have levelled off and ammonia has increased."[2, 3]

Data published by the Department for Environment, Food and Rural Affairs (Defra) in 2019 revealed that 83% of reporting zones showed illegal levels of air pollution, with no substantial improvement since 2010.[4] This prompted comment by ClientEarth that: "Almost ten years after legal limits should have been met, it is astounding that only 7 out of 43 zones have legal levels of air pollution."

Even much-vaunted falls in air pollution due to the Covid-19 lockdown have already largely evaporated on easing of restrictions, with reports in July 2020 that 1,360 sites across England still exceed safe limits for nitrogen dioxide (NO_2).[5]

It is not only traffic and industrial pollution that are threatening air quality. The Clean Air Strategy reveals that ammonia emissions from intensive agriculture continue to grow, accounting for 88% of the total load, damaging sensitive habitats and adding to particulate pollution.[6] New regulations from 2020 now require farmers to use low emissions farming techniques, with controls on slurry and overuse of fertiliser, and extend environmental permitting to beef and dairy farmers. But the scale of the problem remains vast.

Too little, too late

Despite the emergence of ever-more research strengthening the links between air pollution and ill-health, successive UK governments' approaches to tackling air pollution have been characterised by low ambition and insufficient support for Local Authority level action. Policy makers have also been shown to be susceptible to industry lobbying against more stringent emissions regulations, with the UK one of three European countries pushing the EU to water down a proposed cap on nitrogen oxide in the wake of the Volkswagen emissions scandal.[7] This resulted in a doubling of emission limits for diesel vehicles until 2021, a decision that was subsequently found to be illegal.

"Almost ten years after legal limits should have been met, it is astounding that only 7 out of 43 zones have legal levels of air pollution."

The most serious issue in recent years has been the consistent failure by the UK to meet key EU ambient air quality targets, much of this due to diesel. These are set in the EU Air Quality Directive 2008, complemented by Directive 2004/107/EC, both transposed in the UK through the Air Quality Standards Regulations 2010, and now in the Air Quality (Amendment of Domestic Regulations) (EU Exit) Regulations 2019. The National Emissions Ceiling Directive (implemented in domestic law via the National Emission Ceilings Regulations 2018) sets complementary targets for the reduction of sulphur dioxide, nitrogen oxides, non-methane volatile organic compounds, ammonia and fine particulates.

A key requirement of the air quality standards regulations is that the UK must implement national air quality plans to reduce pollutant concentrations in the event that legal limits are missed. But the UK's lamentable performance in relation to the 2008 Directive has led to three high-profile legal challenges against the UK Government by ClientEarth. The first of these, in 2015, focused on the UK's failure to comply with limit values for NO_2 in 16 zones, within the timeframe required by the Directive. The plans were recognised as inadequate by the Supreme Court, and the Government was mandated to produce new proposals.[8]

A year later, the new plans were again rejected as inadequate by the High Court, on the grounds that they would not bring the UK into compliance on NO_2 until 2020 (2025 for London).[9] The case found that ministers had knowingly relied on over-optimistic pollution modelling. The plan also revealed that proposals for a network of Clean Air Zones in 16 UK cities had been watered down to six cities, due to cost-related objections from the Treasury. The Government was again asked to submit a revised plan, which was ruled unlawful for the third time in the final High Court case; not least because it lacked measures to require 45 councils to tackle illegal NO_2 levels in their area.[10]

Meanwhile, Defra's Clean Air Strategy 2019, while being broadly welcomed, has resulted in little concrete action and has been criticised for lack of ambition, in part for its failure to commit to the World Health Organisation's (WHO) guideline exposure level of 10 micrograms of fine particulates per cubic metre.[11] The Natural Capital Committee has raised concerns about Defra's general vagueness in criteria and objectives, making it hard to assess if any progress has occurred.[12] Defra's refusal in June 2020 to bring forward review of the Clean Air Strategy by two years has now led to notice of a legal challenge from law campaign The Good Law Project.[13]

Another contributor to continuing air quality failures has been the UK's repeated delays in fully implementing the EU Industrial Emissions Directive (2010/75/EU) which regulates emissions from potentially polluting industries, requiring installations to adopt 'Best Available Techniques' (BAT) for pollution control. The UK bought four and a half years of extra time for large combustion plant to meet tighter emissions limits by opting for a pollution trading scheme, the Transitional National Plan (TNP). The TNP has been widely criticised for setting emission allowances far in excess of the amount emitted. In 2016, the EU Court ruled that the UK Government had unlawfully allowed Aberthaw power station to emit illegal volumes of pollution under the scheme.[14,15]

Local challenges

Following ClientEarth's legal challenges, the task of implementing the network of Clean Air Zones (as outlined in Defra's new air quality plans) has been handed to local lawmakers, with 63 councils across England and Wales tasked with developing plans to tackle illegal levels of NO_2 in their areas.[16]

This represents a huge transferral of procedural responsibility from national to local government, and means Local Authorities could face legal challenges for failures. Many councils have expressed concerns that, after decades of cuts, they do not have the resources they need to implement and enforce the scheme. Others point to the lack of a clear framework, and the limited practical, legislative and financial support from central Government. The £220m Clean Air Fund to support Local Authorities falls short (and pales in comparison with the funding allocated to road building).[17] Meanwhile, the reluctance of the Government to include trunk roads and motorways within the scope of local Clean Air Zones risks undermining the steps taken by councils.

As a result, progress is painfully slow. Local plans have been repeatedly delayed (with further delays due to Covid-19) and most councils are still breaching legal air pollution limits.

Cleaning up our act

The post-Brexit period is shaping up to be one of high risk for air quality regulation, with deregulatory pressures looming. UK steel producers have already called for more flexibility due to economic pressures from Covid-19,[18] while a potential dispute is emerging over UK Government plans for a new Best Available Technology (BAT) definition.

The Environment Bill outlines an obligation to set legal targets for air pollution, but these fall short of what is required. Katie Nield of ClientEarth notes that: "The rules for what [the Government] must do to deliver this new target are much weaker than those in existing clean air laws. Currently, where pollution targets are missed, ministers are required to do everything they can to achieve legal limits in the shortest time possible. These requirements are conspicuous by their absence in the Bill, which instead risks us going backwards".[19]

The Government has confirmed a two-year delay before binding environmental targets – including air pollution thresholds – are formally set, with interim targets non-legally binding,[20] and is continuing to resist widespread cross-party calls to commit to achieving WHO guidelines for PM2.5 pollution by 2030. Meanwhile, the new Office of Environmental Protection remains far from ready, risking a damaging interregnum, with pending Court of Justice of the EU cases now moribund.[21]

Furthermore, other public policies appear to be out-of-step with the imperative to improve air quality. The Government's £27bn five-year Road Investment Strategy, announced as part of the Covid-19 economic recovery package in March 2020, has already attracted a warning of legal challenge by campaigners Transport Action Network on air quality and climate grounds.[22]

Air quality has been a topic of renewed interest recently, with many people noticing cleaner air and clearer skies during the Covid-19 lockdown. In the light of this, levels of public support for action on air pollution are likely to be high, providing a key opportunity for the Government to redouble its efforts to clean up our air as part of post-pandemic recovery plans.

Winners

Car manufacturers, who successfully lobbied for new limits for nitrogen oxide emissions from diesel cars, allowing new vehicles to greatly exceed agreed EU limits (until the decision was ruled illegal and annulled).[23] Also heavy industry resisting the modernisation and closure of combustion plant.

Losers

The millions of UK citizens who suffer the effects of air pollution and the 40,000 who die as a result. The NHS, which picks up the annual £20bn tab for the health costs of air pollution.

Case study 2:

Deregulation and water quality

Troubled waters

A wide variety of (mostly EU-derived) law protects water quality. These regulations, alongside industrial change and the massive investment they drove, are widely credited with turning the tide against decline, transforming many UK rivers since the low point of the 1950s. The asset value of UK fresh water now stands at £39.5bn.

Water quality is clearly in decline. The UK has faced – and continues to face – difficult challenges in dealing with its industrial water pollution legacy, and the overall picture is currently one of deterioration. The Environment Agency concedes surface waters are in a poor state, with 90% of wetland habitats lost over the last 100 years. The agency recognises that a "huge gap is opening up between the outcomes we want to achieve and our ability to achieve them", and estimates that "at the current rate of progress it will take over 200 years to reach the Government's 25-Year Environment Plan target of at least 75% of waters to be close to their natural state."[1]

Beaches have been the poster children of clean-up of the UK's environment during its membership of the EU through the iconic Bathing Water Directive. But here too, performance has been mixed.[2,3] In 2019, 66.1% of England's bathing waters were of excellent quality, way below the European average of 84.6%, leaving the UK 25th out of 30 states assessed.[4,5]

Why do UK regulators appear to be unable to reverse the decline of our water bodies? We suggest that progress has been undermined by a combination of factors: a failure to regulate firmly; the shifting of regulatory responsibility to the private sector; the deferral of key targets; the decline in reporting frequency; and the rolling-back of monitoring programmes. This 'deregulation by default' approach is largely the result of prolonged austerity, which has dramatically reduced enforcement activity.

Deregulation by default

Under the Water Framework Directive (WFD), which applies to the UK until the end of the transition period, all UK water bodies were supposed to have been brought up to 'Good Status' in terms of chemical and ecological status by 2015. However, the target has been repeatedly delayed, most recently to 2027, a date that Environment Agency chief executive James Bevan has stated will not be met either.[6]

"At the current rate of progress it will take over 200 years to reach the Government's 25-Year Environment Plan target of at least 75% of waters to be close to their natural state."

The last UK water quality assessment in 2016, mandated under the WFD, revealed that just 14% of rivers and 16% of lakes achieved Good Status, declining each year thereafter.[7] The WFD requires Member States to report on progress annually, but UK reporting frequency has declined to once every three years at best. On this basis, the next report was due in 2019, but Defra has indicated it will again be delayed until autumn 2020. Water quality sampling and frequency have also both been downgraded, with a sharp reduction in operational monitoring sites.

The Environment Agency has been taking a similarly hands-off approach to monitoring the chemical status of water bodies.[8,9] Since 2015, the Environment Agency has moved to a resource-light, risk-based approach to identifying water bodies to be checked for 'priority' chemicals, substances which pose the greatest risk to people and the aquatic environment. Under this approach, the Environment Agency reclassified water bodies deemed at lower risk as having "good chemical status with low confidence [and] without further monitoring". This resulted in "a large increase in the proportion of surface water bodies classified as good" – effectively removing them from the scope of the monitoring regime. In practice, this has resulted in a significant reduction in the number of water bodies being monitored for priority substances.

Poor regulatory oversight and insufficient monitoring is also undermining implementation of the Nitrates Directive – designed to protect aquifers and rivers from infiltration or excess runoff of nitrate fertiliser from surrounding fields. The 2019 EU implementation review found several shortcomings in the UK's performance, including poor monitoring.[10] Both diffuse run-off and major incidents involving soil, agrochemicals and slurry (due to intensive cropping and inappropriate management of livestock and slurry) are leading to serious deterioration – even to designated zones of rivers such as the Wye and Axe.[11,12] New regulations came into force in 2020 aimed at controlling these diffuse sources, but despite continuing incidents there have been no civil sanctions.[13]

Meanwhile, regulators appear to be taking a selective approach to regulating bathing water quality. The Environment Agency recently disclosed that it is excluding up to 15% of samples from its statistics during predicted periods of poor quality, a practice which distorts the overall picture by removing the worst incidents from official data.[14] This approach is echoed by Defra's policy of removing some beaches with poor water quality from the list of designated bathing waters, often in the face of strong public objections, rather than dealing with water quality problems.[15]

Many of the regulatory failures above can be linked to the deep cuts the Environment Agency has faced in recent years, which has undermined its ability to fulfil its core duties as well as its independence as a regulator.

Industry self-regulation

Under the Operator Self-Monitoring (OSM) programme, responsibility for sampling was taken out of the hands of the Environment Agency and handed to sewerage companies at the beginning of 2009.[16,17] This move was heavily opposed by NGOs such as the Angling Trust and Salmon and Trout Conservation, who cautioned strongly that OSM was open to abuse.

These warnings now appear to have been vindicated.[18] The move to self-monitoring has been accompanied by several recent cases of persistent, systematic offending by water companies. Southern Water was hit with a record £126m penalty in 2019 for releasing pollution and falsifying records over several years, and Thames Water was fined £19.75m in 2017 for six offences between 2012 and 2014 involving "systemic" management failures leading to millions of tonnes of raw sewage entering the Thames.[19,20]

Emma Montlake, director of casework at the Environmental Law Foundation notes that "water quality monitoring duties were removed from the Environment Agency and vested with the water utility companies themselves… This I would say has been the worst environmental deregulation example".

The Environment Agency itself has suggested that the shift to self-monitoring and light-touch regulation has gone too far and that it is looking at tighter regulation with larger fines. In its 2018 summary, the agency stated: "Overall in 2018, water company performance has deteriorated compared with 2017", reversing "a trend of gradual improvement" since 2011.[21] Defra recently challenged water companies on their poor performance, and urged them to do more to protect the environment.[22]

Brexit effect

Most of the regulatory and deregulatory issues affecting the water industry are long-standing. But here too Brexit is set to have a major impact.

In August 2020, Environment Agency chief executive James Bevan defended good regulation, but noted more deregulation to come, including a looser approach to the WFD.[23] Despite confirming the benefits it had brought, he called for its "thoughtful reform" outside the EU. He argued that "across England, 79% of the individual WFD indicators are at good status", but that due to the Directive's strict 'one out, all out' rule, many waters were classed as poor because they failed on just one indicator. Prime Minister Boris Johnson himself has indicated that there may be a departure from WFD rules.

Already, the EU target for achieving 100% clean-up of surface waters has been downgraded to 75% in the 25-Year Environment Plan.[24, 25] Dr Tom West of ClientEarth notes: "This risk is exacerbated by clause 81 (ex clause 79) of the Environment Bill, which gives powers to change water quality targets, or how they are measured."

As this report went to press, long-delayed data on water quality sampled in 2019 released by Defra on 17 September 2020 revealed the situation had deteriorated sharply since 2016, with not a single water body meeting legally required chemical status, compared to 97% last year.[26] Ecological status remained as poor as in 2016, with just 16% of water bodies achieving Good Status.

With a cash-strapped Environment Agency clearly struggling to hold the line on river pollution, let alone ensure restoration of water bodies to their former glory, future deregulation could lead to serious decline.

Without strong action, including funding for tougher regulation of waters and catchments, greater fines or civil sanctions, and restoration of wider regulatory independence for the Environment Agency, the UK risks stalling or even reversing decades of progress on freshwater quality, and continuing to live up to its reputation as the lazy man of Europe on bathing water quality.

Winners

Water companies, who were given responsibility for monitoring their own environmental performance under the Operator Self Monitoring scheme, making it easier for them to cover up pollution incidents.

Losers

England's water bodies, which, at current rates of progress, will have to wait 200 years or more before they are returned to their natural state. Wetland habitats, 90% of which have been lost. Wild swimmers, bathers, anglers and any individual who appreciates our water assets.

Case study 3:

Deregulation and green housing

Climate-ready housing?

Decarbonisation of the domestic housing stock is recognised as crucial to the achievement of the UK's 2050 net zero emissions target. However, serious doubts have been cast on the readiness of the UK housing sector for the climate challenges ahead.

The Committee on Climate Change's 2019 report 'UK housing: Fit for the future?' found that greenhouse gas emission reductions from UK housing have stalled, with energy use levels increasing between 2016 and 2017. It stated that many new homes are being built only to minimum standards for water and energy efficiency, and warned that new builds and retrofits often fall short of design standards, resulting in an unacceptable 'energy performance gap' and extra cost to households.[1]

Over the years, successive administrations have outlined ambitious plans to drive low carbon measures and improve energy efficiency in the built environment. However, these have been systematically watered down or scrapped under recent governments, and ambition on energy efficiency has stalled. Attempts to regulate have been met with fierce opposition. In 2013, for example, the Coalition Government put forward planned changes to Part L of the Building Regulations, which introduced an obligation on homeowners undertaking significant home improvements to make upgrades to energy efficiency at the same time. After spiralling into a 'conservatory tax' row in the tabloids, the policy was swiftly abandoned.[2]

Policy makers have tended to view low-carbon measures as being in opposition to the political imperative to build more homes, despite claims from more progressive housebuilders and developers that low carbon policies can drive investment in low carbon innovation, improve resilience to future shocks, and support sustainable growth and job creation.[3]

Below we look at the Zero Carbon Homes policy, announced under Labour in 2006 and initially adopted by the Coalition Government, which set out an ambition for all new homes to be carbon neutral from 2016, and the Code for Sustainable Homes (the code), also launched in 2006 under Labour in order to drive innovation in sustainable home building.

Rolling back regulations

The Code for Sustainable Homes provided councils in England, Wales and Northern Ireland with a standardised way of rating and certifying the sustainability performance of new homes.[4] The code covered a range of environmental categories; including water usage, waste, pollution, CO^2 emissions, ecology and land use. It was widely used by councils to drive up sustainability standards, notably on carbon emissions reductions. In 2013, around 50% of Local Authorities referred to the code in their Local Plans.

The Zero Carbon Homes policy was set to drive substantial progress in UK housing.[5] It would have ensured that, from 2016, new homes would avoid or offset carbon dioxide emissions generated during day-to-day running through measures such as much greater energy efficiency, on-site use of renewables, and abatement projects. The policy was to apply from 2019 for non-domestic buildings.

In March 2014, the Coalition Government announced that it was winding down the code, effective from March 2015.[6, 7, 8] This was just one outcome of the Housing Standards Review, which was introduced on the back of the 2012 Red Tape Challenge and aimed to "achieve tangible deregulation, to enable quality and sustainable housing developments to be brought forward more easily."[9]

The scrapping of the code and the consolidation of its requirements into the Building Regulations ticked various deregulatory boxes; qualifying as an 'OUT' within the (then) 'One In Two Out' policy, and contributing to the Housing Review's estimated savings to businesses of £127.9m per year (2015 prices).[10]

The end of the road for Zero Carbon Homes followed in 2015 – just months before it was due to come into force. The surprise move was announced in the newly-elected Conservative Government's report, 'Fixing the foundations: creating a more prosperous nation', which outlined plans for improving Britain's productivity.[11]

The Government promoted the move as a way to lower the financial barriers to new home building, stating: "The zero-carbon standard would have placed a significant regulatory burden on housebuilders and developers…we are giving the industry some breathing space." While some industry players had lobbied hard for the removal of Zero Carbon Homes, this was opposed by many housebuilders and developers, who had been preparing for the policy for nine years.

"The cancellation of Zero Carbon Homes has cost more than £2bn in wasted energy, with annual household energy bills more than £200 higher than they would have been under the policy."

An attempt to reintroduce the requirement for Zero Carbon Homes via an amendment to the Housing and Planning Bill 2015-16, tabled in the House of Lords, was narrowly defeated in the House of Commons in 2016. Instead, the proposals were watered down to a vague commitment to review energy standards under the Building Regulations.[12] This marked the end of the 2006 Zero Carbon Homes policy.

Costs and consequences

Loss of the Code for Sustainable Homes and the Zero Carbon Homes initiative has impacted profoundly on sustainability performance of newbuilds, through higher energy use, carbon emissions, water use and embedded carbon in building fabric. These decisions leave many new homes ill-prepared for water efficiency targets proposed by the Committee on Climate Change, and threaten to undermine the UK's progress towards meeting legally binding carbon budgets. In the absence of the Zero Carbon Homes initiative, it is estimated the UK's housing stock will generate an extra 43 million tonnes of CO^2 by 2050.[13]

According to the Energy & Climate Intelligence Unit, the cancellation of Zero Carbon Homes has cost more than £2bn in wasted energy, with annual household energy bills more than £200 higher than they would have been under the policy. This adds up to £1bn in total to bills by 2020 alone.[14]

If we are to see similar build rates to the period since 2007, there could be more than 3.5 million new homes needing costly retrofit by 2025, undermining limited recent progress on retrofits in existing homes. In 2018, two years after the Zero Carbon Homes target date, just 1% of new homes achieved Energy Performance Certificate A; 12% received C, while 7% were rated D or below, thanks to loopholes in new permitted development rights (see case study 4).[15]

Back on track?

In October 2019, the Ministry of Housing, Communities and Local Government (MHCLG) launched a major consultation on part L of the Building Regulations – the first since 2013 – and set out plans for a Future Homes Standard. This has been described as the most pivotal consultation to date on achieving net zero.[16]

However, the ambitions set out remain well below what is necessary to achieve net zero newbuild by 2025, in line with the Government's overall net zero target, and many of the deregulatory proposals it contains appear deeply regressive. The Future Homes Standard would not come into force until 2024 at least, a decade after Zero Carbon Homes was axed, and the energy efficiency upgrade proposed (either 20% or 31% compared to current regulations) falls well short of the +50% needed.[17]

Another major concern is the proposal to scrap the crucial Fabric Energy Efficiency Standard, which sets standards around the insulation and airtightness of building fabric, helping to prevent leaky homes. This poses a real risk that new homes will be less well-insulated – and therefore less energy-efficient – than homes built under the 2013 building regulations.

The consultation also proposes to remove the right of councils that have declared climate emergencies to set higher targets locally. It justifies this as removing local market distortion and confusion for developers as overall standards rise. But this curb on local ambition has drawn an objection from the Committee on Climate Change amid concerns that it will stifle innovation.[18]

According to MHCLG, ambition on carbon neutral homes is very much alive. It states, in its recent 'Planning for the Future' white paper: "from 2025, we expect new homes to produce 75-80% lower CO^2 emissions compared to current levels". It says these will be "zero carbon-ready" as the grid decarbonises, "without the need for further costly retrofitting", implying little further effort ahead of the 2050 goal.

This does little to reassure those who recall all too well where previous government ambitions on greening UK housing ended up. As Tom Fyans, deputy chief executive of the Campaign to Protect Rural England (CPRE), says: "The Government's aim to deliver carbon neutral new homes by 2050 is pitiful and represents 34 lost years – given that the Code for Sustainable Homes aimed to achieve the same thing by 2016 and was dropped. If this government is serious about tackling the climate emergency, it needs to be much, much more ambitious on new builds."[19]

Winners

Housebuilders like Persimmon, who lobbied for the scrapping of Zero Carbon Homes, and saw a 75% housebuilding boost as a result. Persimmon bosses, who enjoyed £600m bonuses in 2018 (a sum which would have more than covered the cost of building all Persimmon's new homes to zero carbon standards).[20]

Losers

The climate, which in the absence of the Zero Carbon Homes initiative will have to deal with an extra 43 million tonnes of CO^2 by 2050. UK consumers, who are paying £200 more in household energy bills each year.

Case study 4:

Deregulation and planning (permitted development rights)

Houses, houses, houses

Planning deregulation is a popular political drum to beat. Planning reform, particularly for house builders, has been a core objective of successive UK governments and has featured as a central theme in deregulation drives – often as a reaction to recession, always underpinned by a stated need to remove planning barriers to new homes and other developments. The political tendency to see the planning system as inherently anti-competitive is encapsulated by former Prime Minister David Cameron's description of planning as the "enemy of enterprise".[1]

Deregulation of planning gained momentum under the Coalition Government. This was kicked off by the abolition of several key planning and sustainability advisory bodies, not least the Sustainable Development Commission in 2010.[2] The following years saw a period of radical reform and deregulation – via the new National Planning Policy Framework (NPPF) for England, published in 2012. This streamlined planning guidance "from over 7,000 pages to a simple online guide" and introduced a 'presumption in favour of sustainable development'; the introduction of 'permission in principle'; the fast-tracking of smaller developments; and new powers for the Government to grant automatic consent for allocated land in development plans, leaving only technical details to councils.[3]

It is widely accepted that, to tackle the UK's housing crisis, we need to build more homes. However, there is a risk that this comes at the expense of the environment. In the countryside, development pressure was intensifying sharply even before Covid-19. Between 2012 and 2017, Areas of Outstanding Natural Beauty (AONBs) saw an 82% increase in often inappropriate new housing approvals to satisfy targets, and a 161% rise in approvals within 500 metres of boundaries.[4] Deep cuts to staff and budgets in AONBs, National Parks, Natural England and Defra have reduced the ability to manage these pressures.

Failure to afford the highest level of protection to these designated areas has been heavily criticised, touched on in the 2019 Glover Review.[5] In the words of Shaun Spiers, executive director of Green Alliance: "housing numbers have trumped everything."

Since the 1960s, many policy measures have been brought forward to 'simplify' the planning system. We focus here on permitted development rights, a key focus of deregulation drives over recent years.

What are permitted development rights?

Certain forms of development and activities, known as permitted development rights (PDR), are exempted by Parliament from the need for local planning permission. They have traditionally covered a wide range of usually minor, uncontroversial alterations below specified thresholds and changes of use, with rights differing between residential and commercial properties. These general rights are restricted in some cases, for example in 'designated areas' such as a Conservation Area or National Park. Councils or the Secretary of State can also issue a direction under Article 4 of the Town and Country Planning (General Permitted Development) (England) Order 2015, for example to protect the character of a non-listed building.

A decade of deregulation

In line with deregulatory trends in planning generally, PDRs have been controversially extended since 2008, with the need to revitalise the local economy and boost activity during recession often cited. Passage of the Localism Act 2011, the NPPF the following year, the Growth and Infrastructure Act 2013 and General Permitted Development Order 2013 marked a significant shift to the PDR framework. Between them, these enabled greater deregulation of PDR through secondary legislation, which 'temporarily' relaxed controls on use of PDR for conversion of rural buildings, offices and other commercial uses to residential use, through a 'light-touch' process of prior approval. Permissible home extension area was doubled.

2013 was a busy year for PDR deregulation in other areas too. The Growth and Infrastructure Act 2013 not only initiated a wave of PDR conversions, with mixed results, but also allowed public rights of way protection to be overridden by development applications, and curbed local rights to designate village and town greens to allow for development.

The Housing and Planning Act 2016 introduced follow-up secondary legislation that confirmed restrictions on PDRs would be permanently relaxed.

The Budget Statement 2017 pushed the boundaries of PDR deregulation further, allowing full demolition of commercial buildings in favour of new housing construction, with more deregulation announced in 2019.[6, 7]

In his speech on 30 June 2020, Prime Minister Boris Johnson announced forthcoming plans to further deregulate change-in-use of buildings and land in town centres, with "total flexibility" under PDR to convert commercial property into residential housing, café or office (with the exception of "pubs, libraries, village shops and other types of uses essential to the lifeblood of communities").[8]

What are the negative impacts?

A wide range of environmental professionals, planners, surveyors and campaigners identify restrictions on PDR as one of the areas most immediately under threat from planning deregulation. This could have serious consequences for society and the environment, with unnecessary and poor-quality redevelopment potentially affecting both street scenes and carbon footprints.[9, 10]

Some PDR developments are of a high standard, but a study of five councils in England and Scotland by the Royal Institution of Chartered Surveyors (RICS) revealed a wide range of negative impacts. In high value commercial property locations such as Camden, there was a "loss of occupied employment space", particularly affecting small businesses and workshops, pushing up commercial rents. Across London, 55% of PDR schemes involve occupied buildings.[11] The Greater London Authority estimates that "over 30,000 jobs have been disrupted, with the overwhelming majority of these being in SMEs occupying economically-priced space which might be hard to replace…a significant disruption to the small business community."[12]

Developments rejected as unsuitable for planning permission have gone ahead through PDR, undermining the planning system's ability to safeguard quality, and bypassing democratic accountability. The RICS report highlights some appalling cases: "One of the worst examples is at Ilford, East London, where a commercial block was converted into homes measuring as little as 13m^2, compared to the national minimum standard of 37m^2 for a one-bed flat. Other examples include flat conversions with no windows." Conversion to residential use has also taken place on industrial estates, with no access to open space and amenities.

The extension of PDR in homes was presented in the 2013 impact assessment as a £0.5m cost saving on planning permission, but it made no mention of the added fuel costs and emissions due to the removal of accompanying consequential improvement obligations, let alone lack of payment for community services and infrastructure.[13] Overall, the move has contributed to undermining progress towards meeting carbon budgets and Zero Carbon Homes (see case study 3).

Slums of the future

Applied well, PDR can enhance employment activity and business agility in the local economy, reduce pressure on greenfield sites, and productively convert underused office and other space to residential uses (a potentially sensible move in the wake of a post-Covid shift to homeworking). PDR has allowed fast roll-out of vital EV street charging points, and could provide the more flexible planning policy required by larger fast-charge points.

But overall, increased PDR has delivered poorer outcomes than equivalent planning applications, and many are calling for a halt. The RICS report found that "overall, office-to-residential PDR has been a fiscal giveaway from the state to private sector real estate interests, while leaving a legacy of a higher quantum of poor quality housing than is seen with schemes governed through full planning permission".

"We have a choice. Do we want to build the slums of the future or create places that actually enhance people's lives?"

Under the simplified zonal planning system proposed in the Government's planning white paper in August 2020, PDR will continue apace in areas designated for renewal, and to some extent in areas protected for conservation reasons, and will be a major feature in areas designated for growth, with a minimal role for environmental assessment (see case study 7).[14]

Hugh Ellis, interim chief executive of the Town and Country Planning Association, sums it up: "Permitted development is toxic and leads to a type of inequality not seen in Britain for over a century. Vulnerable people are stripped of any right to light and space, with their children forced to play in active car parks, and no contribution to local services such as doctors surgeries or local schools. We have a choice. Do we want to build the slums of the future or create places that actually enhance people's lives?"

Winners

Housebuilders (again), who have benefitted from £127.9m of annual savings from deregulatory initiatives. Housebuilding bosses, who are getting ever-richer.

Losers

Areas of Outstanding Natural Beauty, which have seen an 82% increase in new housing units given planning permission, attractive streetscapes. Inhabitants of PDR dwellings, living in cramped, low-quality, windowless conditions.

Looking forward: future deregulation risks

Since 2016, enormous political capital has been expended on the task of repatriating a complex body of EU environmental law and developing a domestic legal framework almost from scratch. While the Government has provided repeated assurances that ambition on the environment remains strong, there are fears that Brexit-related pressures – and the devastation of Covid-19 – will result in a weakening of environmental regulations and enforcement.[1]

While opinions differ on the extent to which Brexit and Covid-19 will disrupt environmental progress, it is clear that the UK is falling short on many environmental policy areas, with all eight indicators monitored by Greener UK's Risk Tracker now flashing red.[2]

The current Government has taken some welcome and ambitious steps, not least in the form of the 2050 net zero target, and the Environment Bill (backed by the 25-Year Environment Plan for nature recovery and underpinned by the promised new Office of Environmental Protection). But concerns remain. Environmental targets are far from finalised, and will not be set in law until after expert consultation in 2022, while environmental principles could yet be downgraded.[3,4] The 25-year plan lacks detail and targets, while the Agriculture and Fisheries Bills have been criticised for weak ambition. Lastly, questions still remain about the Office of Environmental Protection's independence and vulnerability to the political cycle.

"If we get the green post-Covid recovery package right, there are huge opportunities to accelerate the shift to a low carbon, greener economy."

EU-driven UK regulations, previously bolstered by EU directives, will now exist only as secondary legislation under sole control of the relevant Secretary of State, with 'Henry VIII' powers through the Withdrawal Agreement Act to amend with minimal scrutiny. This has already resulted in the removal of the ban on pesticides with endocrine (hormone) disrupting properties (following legal action the Government claimed this was a 'drafting error' and reinstated the ban) and a weakening of regulatory oversight in transposing EU REACH chemicals regulations into UK law.[5]

The Government has made no secret of its intention to diverge from many inherited EU regulations after the transition period; not least the Water Framework Directive and the Strategic Environmental Assessment Directive, while the REACH regime is undergoing fundamental change and the Habitat Regulations are attracting deregulatory interest from environment secretary George Eustice.[6,7] The net zero home requirement for 2025 has been watered down, and the August planning white paper – announced shortly after Prime Minister Boris Johnson's claim that "newt-counting delays in our system are a massive drag on the productivity and the prosperity of this country" – has triggered major concerns.[8]

The environmental policy stakes have never been higher. With renewed risk of a No Deal Brexit, the economic impacts of Covid-19, delays in the establishment of a new domestic environmental framework and threats to judicial review, the risks of policy hiatus and deeper deregulation are high.[9] This is set against a backdrop of rising tensions between the nations of the UK, as devolved Governments resist Westminster proposals to unilaterally set food and environmental standards after the transition period.[10]

At the same time, if we get the green post-Covid recovery package right, there are huge opportunities to accelerate the shift to a low carbon, greener economy, unlocking an unprecedented surge in sustainable public and private finance in all sectors.[11] This will need to be built on smart regulation that sets a clear, predictable direction of travel; interim targets, gradually tightening over time; and a finance system that rewards transparency and sustainable long-term perspectives.[12]

The fate of the UK's green recovery remains on a knife edge. In this section we take a look at some areas of environmental policy most at risk from future deregulation (or already subject to regulatory reform); focusing on regulation of hazardous chemicals, the protection of precious habitats, and the role of environmental assessment in ensuring sustainable planning decisions.

Case study 5:

Habitat and Wildlife Protection

Which legislation protects natural assets?

Nature conservation in the UK has long been one of the most important areas of public interest. Not surprisingly, it is regulated by a large body of law, much of it recent and devolved, with well over 30 acts and regulations in England and Wales alone.

Two key domestic laws dominate nature protection in England and Wales. The first is the Wildlife and Countryside Act 1981, the primary mechanism for protection of British wildlife, wild birds, eggs and nests, plants, nature conservation, National Parks, Sites of Special Scientific Interest (SSSIs) and public rights of way.[1] It is complemented by the Countryside and Rights of Way Act 2000, which strengthened legal protection for SSSIs as well as broadening countryside access rights.[2]

European law has driven the largest changes to both legislation and practice, through the Habitats Directive, which covers the conservation of natural habitats, wild fauna and flora, and the Birds Directive, which protects 500 species of wild birds, and covers sustainable hunting and trade.[3,4] After the Brexit transition period, the Conservation of Habitats and Species Regulations 2019 and exit equivalent aims to enable a smooth transition to domestic law for the EU habitats and wild bird directives.[5]

"In the large majority of cases the implementation of the Directives is working well, allowing both development of key infrastructure and ensuring that a high level of environmental protection is maintained."

Deregulatory concerns

Over the years, nature law has frequently been singled out for deregulatory drives, launched with the aim of reducing burdens on business. For the most part, however, nature regulations have been found to be fit for purpose.

The 2012 Review of Implementation of the Birds and Habitats Directive in England, introduced by the then Chancellor George Osborne to address "ridiculous costs" on British developers, concluded that: "in the large majority of cases the implementation of the [Birds and Habitats] Directives is working well, allowing both development of key infrastructure and ensuring that a high level of environmental protection is maintained".[6,7]

Nevertheless, deregulatory momentum continues. There are three key deregulatory threats to nature conservation at present. The first and most immediate is the long-standing squeeze on regulatory resources. The second arises from the potential disruption and uncertainty due to Brexit. The third comes from a new wave of deregulation aimed at boosting post-Covid economic recovery.

Funding cuts

Funding and staff cuts to natural capital, environmental regulators and planning departments in the austerity years have continued (see pg31). The overall effect is one of *de facto* deregulation, since law enforcement and other key objectives can no longer be fully delivered. This has led to delays in decision-making and declines in the status of many protected habitats. It has also effectively ended ambitious outreach programmes by Natural England, National Parks and Areas of Outstanding Natural Beauty aimed at enhancing biodiversity and landscapes.[8]

Natural England is widely believed to be unable to meet its full legal obligations due to funding cuts of 64% in the decade to 2018/19.[9] The savage and prolonged squeeze has meant that only the most serious transgressions are likely to be followed up, with comprehensive monitoring programmes no longer possible.[10] The agency itself recently referred to plans to become "conveners and enablers rather than enforcers".[11]

Natural England's alleged failures to meet its oversight obligations have attracted legal challenges over the state of protected sites and appropriateness of cull licensing. The regulator has also been criticised for lack of significant progress over the last decade on terrestrial, freshwater and wetland SSSI status.[12] The Government's Biodiversity 2020 conservation strategy calls for at least half of these 4,126 sites to be in favourable condition, but the latest data shows only 39% as favourable, compared to 37.5% in 2013. Just 32% of nature reserves in National Parks are in good condition, and many iconic bird species have disappeared.[13] According to Defra, the UK is currently on track to miss 14 of 20 biodiversity goals, the Aichi targets, set out in the Convention on Biological Diversity.[14] But as this briefing went to press, a report by the RSPB claimed the situation was worse, with the UK failing on 17 out of 20 targets and going backwards on six in a "lost decade for nature".[15]

Ironically, for a government keen to accelerate planning application decisions, these cuts have had the reverse effect, with the number of pre-application consultation requests from developers and Local Authorities not dealt with within agreed deadlines jumping by over 148%, between 2013 and 2019 (see pg31).

Brexit pressures

Long-standing tensions between deregulatory proponents and those calling for stronger nature protection have heightened since the 2016 EU referendum. The Government maintains that nature protections will survive Brexit, with key legislation transposed onto the UK statute book.[16] But many uncertainties remain; from the lack of clear targets in the Environment Bill, to the worrying reliance on secondary legislation, with minimal scrutiny of detailed policy and technical issues.[17]

Growing pressure for post-Brexit deregulation is compounded by the absence of the European Commission as a restraining influence and source of valuable case law. According to Richard Barlow, partner at Browne Jacobson LLP: "A big element of deregulation is the loss of the future acquis of the European Court of Justice post us leaving the EU – a massive loss in nature conservation law particularly."

Much of the current activity is about repurposing imported EU directives, mostly through secondary legislation, to make sure they work in a UK context. Campaigners have raised concerns about deregulatory changes being made as part of this process. The updating of the 2017 Conservation of Habitats and Species Regulations led to the Government inserting two potentially deregulatory clauses in relation to the conservation of the Natura 2000 sites; a network of protected areas across Europe. A new power to "where necessary, adapt" the national network of Natura sites, together with a new requirement to maintain and restore these sites only "so far as is proportionate", sparked concerns that the duty to protect these areas was being weakened.[18]

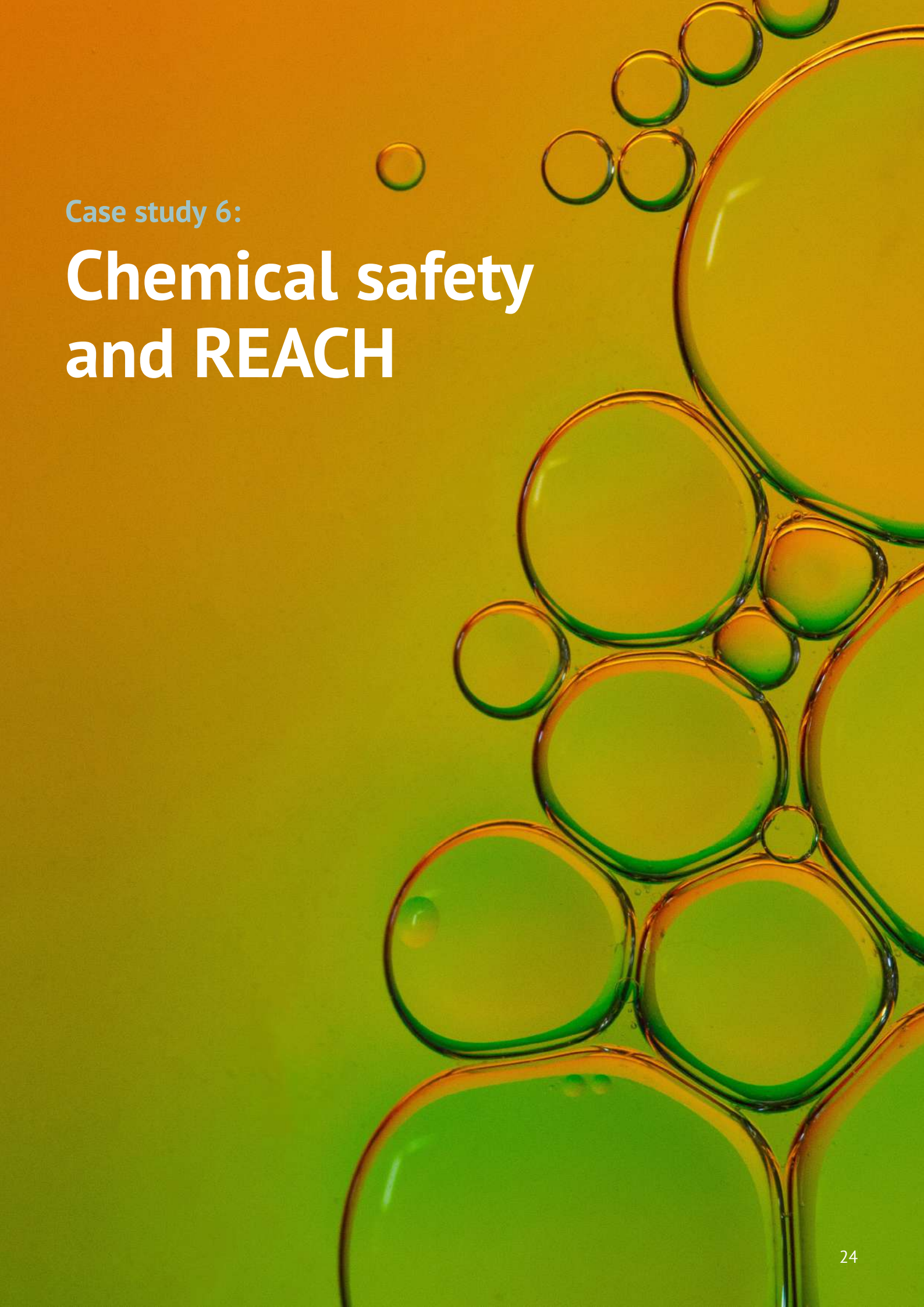
This new wording was challenged by ClientEarth and the Marine Conservation Society through judicial review.[19] The High Court allowed the changes, but made it clear any attempt to use the relevant provisions to water down protection of habitats and species in the Natura 2000 network would likely be unlawful.

Post-pandemic deregulation

The advent of Covid-19 has heightened concerns about future deregulation of nature protection laws; with the Government's economic recovery package set to kick-start huge new infrastructure development such as ports and roads.

Policy proposals are already outlining a troubling loosening of controls on housing development. The August 2020 planning white paper, based on simple zonation of land use into growth, renewal or protected areas, has caused considerable concern.[20] Forthcoming proposals by Defra to simplify environmental assessments after the EU transition period and to remove Strategic Environmental Assessments for local plans have also led to concern about how this would affect planning decisions for habitats.[21] (see case study 7).

The 25-Year Environment Plan sets out a goal to restore 75% of protected sites to favourable condition (albeit with no clear baselines or target date.)[22] But with key nature protections thought to be in the firing line and with Natural England struggling to fulfil its enforcement duties, huge uncertainty remains for habitats and wildlife.



Case study 6:

Chemical safety and REACH

What is REACH?

REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals) is the 2006 EU regulation governing the production and use of chemicals, and their potential impact on human health and the environment. [1,2]

The EU REACH regime is one of the most important pieces of EU and global environmental law. It regulates more than 22,000 economically important but potentially hazardous substances, efficiently sharing information and costs between member states.[3] It is managed by the European Chemicals Agency, and enforced in the UK by the Environment Agency, and the Health and Safety Executive.[4]

Chemical trade between the UK and EU amounts to €44bn a year.[5] It therefore matters hugely, both economically and environmentally, how efficiently these chemicals are managed post-Brexit, with any deregulation or divergence likely to have highly disruptive economic and environmental consequences.

How is it changing in the UK?

Despite industry and NGO concerns, the Government has confirmed that the UK (other than Northern Ireland under the current Withdrawal Agreement) will leave EU REACH and withdraw as a member of the European Chemicals Agency after the end of the Brexit transition period (31 December 2020). It will instead set up its own parallel regulatory system.

The new UK regime will retain REACH in domestic legislation, and repurpose it for a UK-only context via a series of three statutory instruments, with further back-up provisions in the Environment Bill.[6,7,8,9] Responsibility for regulation of UK REACH will lie with the Health and Safety Executive, with the Environment Agency as a lead adviser, supported by the Scottish Environment Protection Agency and Natural Resources Wales. UK manufacturers and exporters dealing with the EU will have to re-register with EU-REACH indirectly through an EU-based manufacturer or importer, or appoint a representative in the EU.[10] Northern Ireland is intended to remain within EU REACH post-transition, albeit with no policy influence.

The other element informing the regime will be a comprehensive Chemicals Strategy promised in the 2018 25-Year Environment Plan, now delayed due to the Covid-19 crisis.[11,12,13] The brief remains vague, but includes the possible development of an early warning system, international work to standardise chemical safety assessments and plans to track chemicals in the supply chain.

Damaging deregulation – leaving the door open?

The Government holds that the move away from EU REACH will enable quicker decisions and potentially better solutions that do not conflict with its wider global trading arrangements, while retaining the high safety and environmental standards the UK currently enjoys. However, many leading businesses and NGOs have voiced concerns that the transition to a UK chemicals regime risks a combination of poor regulation and damaging deregulation by default, risking legal challenges.[14,15]

Many of the biggest concerns centre around the transfer of the European Commission's powers of oversight – with its many checks and balances – to the UK Secretary of State. The Environment Bill provisions controversially give the Secretary of State wide-ranging powers to amend parts of the UK REACH regime, although key articles will be protected. Greener UK has expressed concern at "such a sweeping power to amend the main UK REACH text" which could be used to deregulatory effect "to reduce the level of protection for the public and the environment".[16]

"Creating a parallel UK regulatory regime for chemicals will, in our view, bring no commercial or environmental benefit and could put businesses and jobs at risk right across the country."

The post-EU framework strips out current supporting expert and policy committees, representing the loss of an important mechanism for democratic oversight and peer review of key decisions around chemical authorisation and restriction.[17,18] Instead, it will be up to the Secretary of State as to what advice to seek, and he/she will have the power to override it, meaning accountability and transparency could be undermined. The Government states that these powers are necessary in case intervention is needed to ensure a smooth transition, and to ensure against obsolescence over time relative to other jurisdictions. However, critics are concerned that they leave the door open for the Government to move the goalposts on chemical safety, and risk the UK becoming a dumping ground for hazardous chemicals that are banned in the EU.

Enforcement and governance challenges

Yet again, the effectiveness of the regulatory framework risks being undermined by poorly resourced regulators and weak enforcement. In common with other aspects of post-Brexit environmental policy, there are many unresolved concerns about the role of the Office of Environmental Protection in terms of its governance, independence, transparency and legal clout.

There are real practical issues of resourcing and skills facing both the Health and Safety Executive and the Office of Environmental Protection. The European Chemicals Agency took five years to get up and running, with a budget of €100m a year and a workforce of 400, while the UK regulator will need to regulate a similar number of chemicals but with a promised budget of £13 million a year.[19] This institutional unreadiness means the sector could face the uncertainties of a prolonged enforcement and governance gap. Concerns were reinforced by the revelation in September that deadlines for submitting chemical data to the regulator will be extended by secondary legislation.[20] In some cases, firms will have up to seven years from now for full registration, posing safety and environmental concerns in the interim.

Slipping standards

Advocates for EU REACH hold that, with the best will in the world, leaving the regime is a high risk strategy that may result in the loss of important social and environmental protections.[21] The sudden loss of access to and influence in the most advanced chemical safety regime and database in the world is likely to present huge challenges.

Steve Elliott, chief executive of the Chemical Industries Association, warns that duplicating EU REACH could cost the sector £1bn, stating: "creating a parallel UK regulatory regime for chemicals…will, in our view, bring no commercial or environmental benefit and could put businesses and jobs at risk right across the country". The Government has recognised that the cost of taking on the roles currently provided by the European Chemicals Agency could be in the "tens of millions of pounds".[22]

Meanwhile, timing issues threaten to undermine regulatory progress. There were already doubts over whether the UK's REACH scheme would be ready in time for the end of the transition period. While parts of the legislation are in place, discussions over these continue, and provisions in the Environment Bill may now not be finalised this year.

Case study 7:

Planning and environmental assessment

What is environmental assessment?

EU environmental assessment requirements have long been a cornerstone of UK environmental regulation. They have evolved into powerful tools for analysing the impact of large developments on environment and sustainability. This is through Environmental Impact Assessment (EIA), which ensures decision makers consider the environmental impacts of large projects such as airports and motorways, and Strategic Environmental Assessment (SEA), often known as sustainability appraisal in the UK, which covers major plans and programmes such as local development plans.

EIA is a mandatory requirement under EU Directive 2011/92/EU, transposed most notably as the Town and Country Planning Regulations 2017 in England, while the SEA Directive is transposed as the Environmental Assessment of Plans and Programmes Regulations 2004.

Why is it important?

EIA and SEA have become two of the most far-reaching, influential tools for ensuring development proposals are compatible with environmental objectives in virtually every sector from nature conservation to transport in the EU and UK, with over 800 EIAs being carried out annually by 2015.[1]

"The 'simplification' of environmental assessments could undermine an already stressed, chronically underfunded planning system, with hugely detrimental consequences for nature and wildlife."

A comprehensive analysis of attitudes to EIA between 1999 and 2015 found that: "EIA has maintained and on occasion even strengthened its role in influencing the decision-making process and changing values of stakeholders" and in "delivering higher levels of learning".[2] The EU's 2019 REFIT regulatory review found that the SEA "brings multiple benefits to the EU, contributing to wider goals on attaining the sustainable development goals and environmental protection", without "disproportionate costs for the national administrations".[3]

There is consensus that EIA and SEA could be made to work better for both environment and planning applicants with a few improvements.[4] While few would suggest the system is perfect, its rigorous, systematic approach has been proven to ensure environmental issues and wider sustainability concerns are embedded or considered in developments and programmes in a way that might otherwise not happen.

Surviving previous deregulatory drives

Development delays have often been blamed on planning and environmental assessment, usually following economic downturns, yet the EIA and SEA regime has survived several deregulatory drives with a largely clean bill of health.

However, the UK EIA and SEA regime has not had an entirely smooth run. Some planning authorities have side-stepped assessments, making the claim that environmental issues were implicitly considered in planning decisions, while others sought to 'salami slice' applications into smaller units below the assessment threshold.[5] Lack of resources in planning departments and lack of expertise has also been an issue affecting the quality and speed of EIAs.

In 2015, EIA thresholds – at which housing development projects would require screening – were raised from 0.5ha to 5ha. This change aimed to reduce the cost and time taken by developers to get planning permission for projects under the threshold, and qualified as an 'OUT' measure under the deregulatory one-in-three-out policy.

Additionally, SEA requirements have already been side-stepped for some large projects, notably the controversial £106bn HS2 project, which was approved instead through a Parliamentary hybrid bill (despite the fact that it will damage several European sites, 108 ancient woodlands and various other protected sites).[6,7] An unsuccessful 2012 judicial review challenge led by HS2 Action Alliance alleged that the Department for Transport had failed to satisfy the SEA directive by assessing full impacts and alternatives.

An uncertain future for environmental assessment

Despite a broadly supportive evidence base, an assault on environmental assessment and more widely on planning regulations seems to be gaining momentum. Pre Covid-19, there were signals that the Government would substantially reform the regime, with Brexit offering the opportunity to diverge from EU environmental assessment rules. In the wake of the Covid-19 slump, all the indications suggest that heavy deregulation is just around the corner.[8]

In a speech on plans for the post-Covid recovery that alarmed wildlife groups, Prime Minister Boris Johnson promised he would "build, build, build" with a radical reform of planning.[9]

In a major policy speech along similar lines presented during a Green Alliance webinar on 20 July 2020, Environment Secretary George Eustice announced "a new consultation on changing our approach to environmental assessment and mitigation in the planning system" to be held in the autumn.[10,11] This will look at how to "front-load ecological considerations in the planning development process" so as to "protect more of what is precious". This has raised red flags for those who think that any new environmental impact assessment process should be strengthened, not weakened.

Shaun Spiers, executive director of the Green Alliance, considers it is "a perfectly reasonable question" to ask if things could be done differently now the UK has left the EU. But he adds that he is struggling to see evidence that fundamental change is needed or of the case for "slash and burn of EIA, particularly if the Government is serious about delivering its 25-Year Environment Plan."

Brief comments in the long-anticipated planning white paper in August have only increased concerns.[12] They confirmed the Government's intention to abolish environmental assessment of local plans, in favour of a new streamlined process for assessing environmental impacts. The white paper provides no guarantee that the simplified assessment will offer the same level of environmental protection, nor does it clarify whether EIA will be used in the more detailed development application stage.[13]

MHCLG holds that, while environmental considerations are an important part of planning, assessments can be overly long and complex, inhibiting transparency and quicker decisions. Many agree there is room for constructive debate on this. Yet there is concern at Secretary of State Eustice's preference for disruptive deregulation, and that the 'simplification' of environmental assessments could undermine an already stressed, chronically underfunded planning system, with hugely detrimental consequences for nature and wildlife.

The UK's environmental enforcement gap

A central tenet of the wider deregulation approach has been the systematic erosion of enforcement capacity across the UK. Environmental regulators have not been spared. The loss of resources within key national and local regulators has been staggering, and has been accompanied by declines in almost every metric of enforcement activity.

The erosion of capacity has led to a shifting of the relationship between the regulated and the regulator, as watchdogs augment their funding gap with chargeable services and cost-recovery programmes. This relational shift was codified in the Cabinet Office's 2017 Regulatory Futures Review, which encouraged a transition towards 'regulated self-assurance' and a greater role for the private sector through the transferral of enforcement responsibilities.[1]

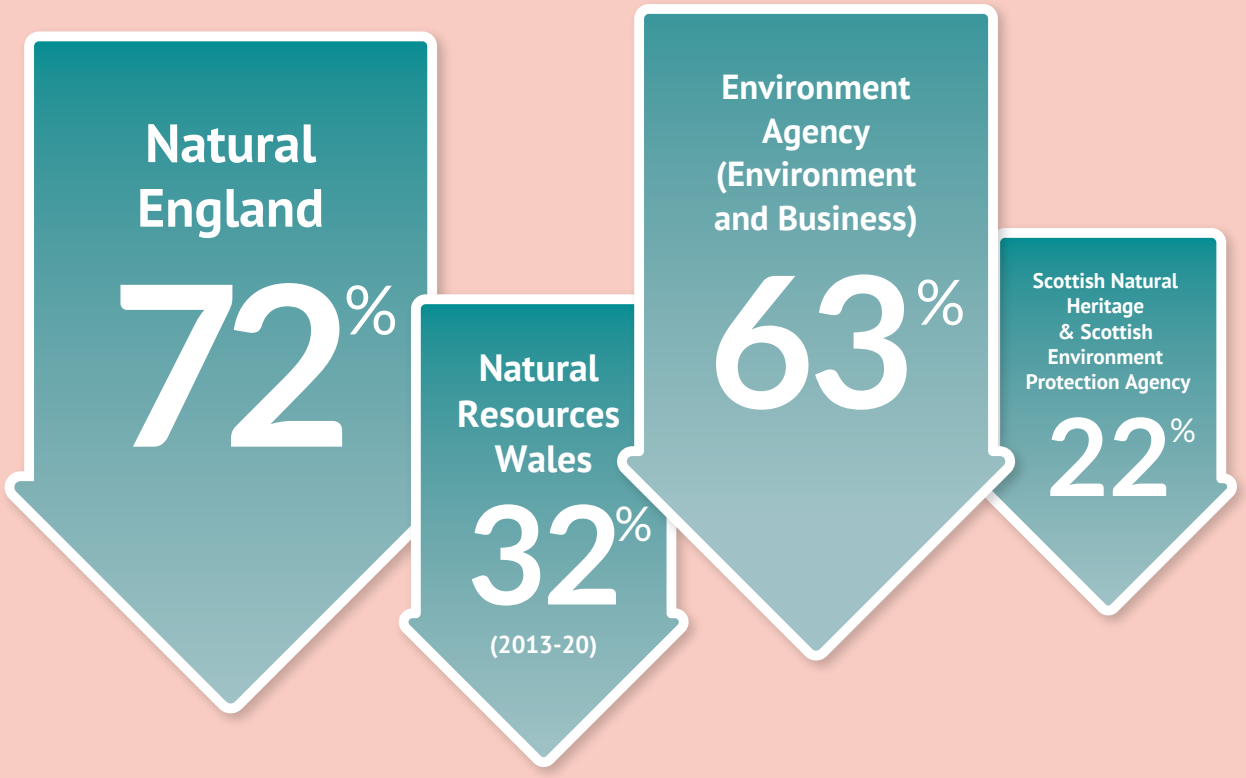
Dwindling enforcement capacity, and the associated shifting of regulatory governance and oversight, means that the implementation and enforcement of environmental laws is falling short of what is required to address the challenges ahead.

This should be taken seriously. A 2019 report from the UN Environment Programme found that, despite a 38-fold increase in environmental laws put in place globally since 1972, failure to fully implement and enforce these laws is one of the greatest challenges to mitigating climate change, reducing pollution and preventing widespread species and habitat loss.[2]

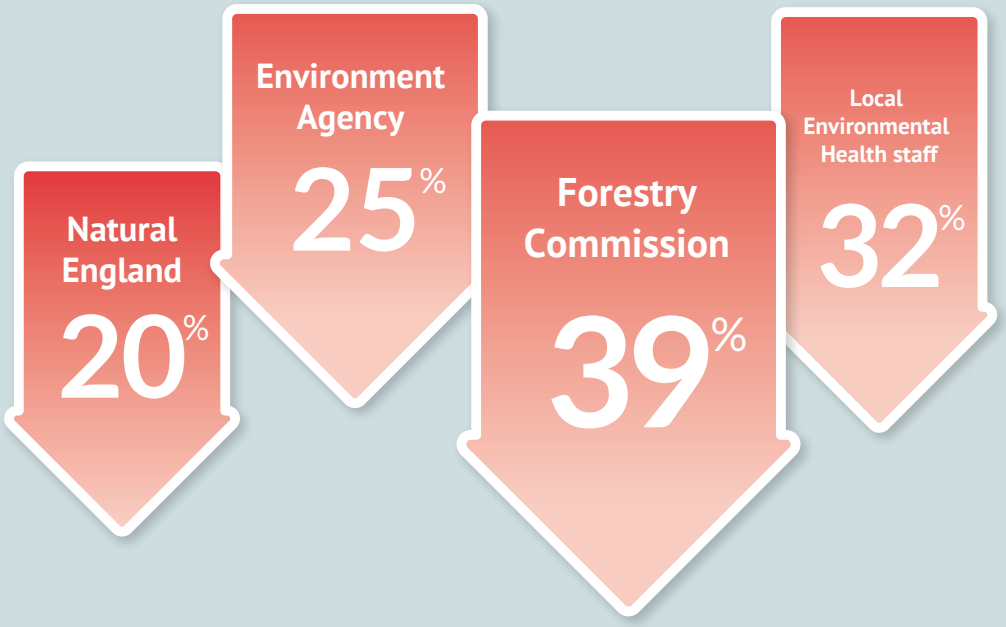
In October 2020, Unchecked UK published a report detailing the declines in enforcement activity across public life. Below are a few examples of our findings. The full report can be found here: www.unchecked.uk/research/the-uks-enforcement-gap-report

Funding % falls

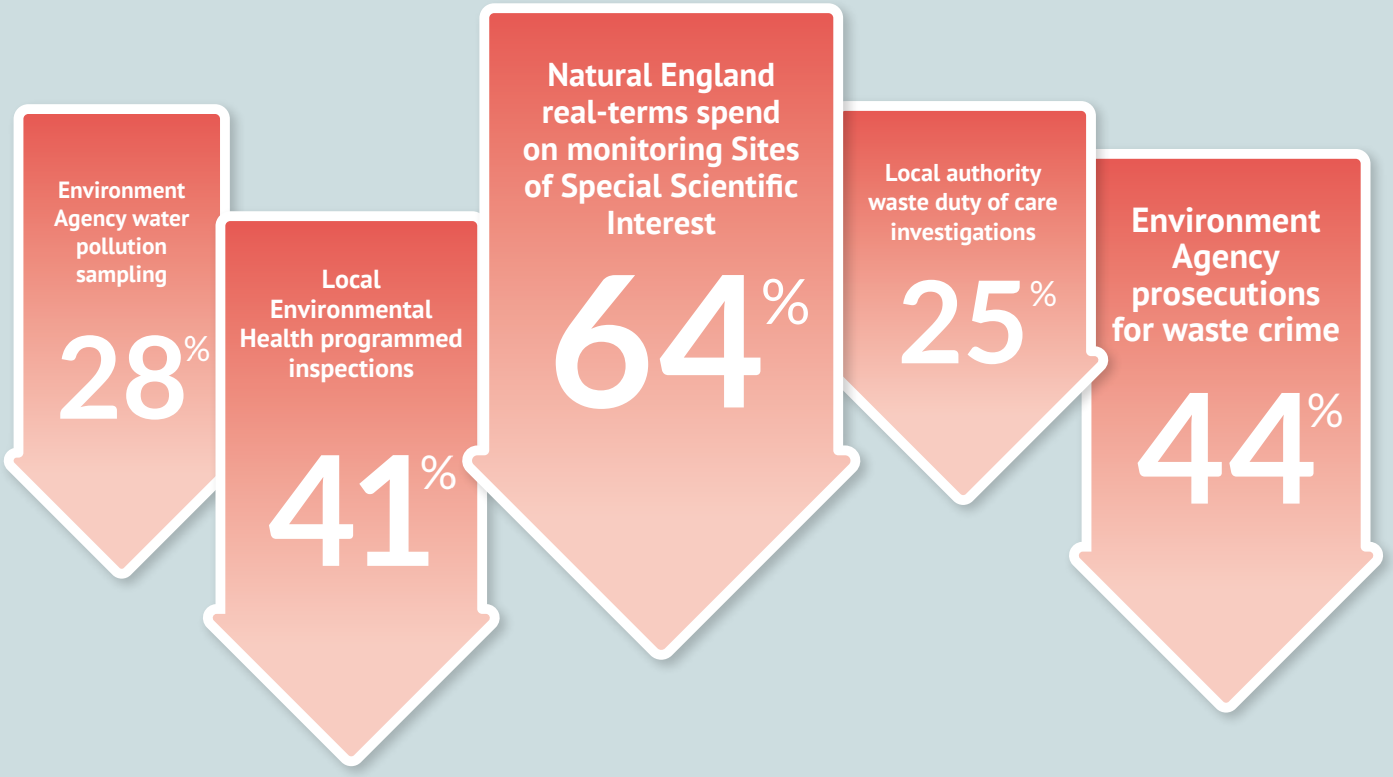
2009-19 (2019 prices)



Staff % falls
2009-19



Enforcement % falls
2009-19



Conclusion

Regulatory policy making is a tricky business. It requires balancing the needs of competing stakeholders: the interests of UK industry and their right to operate without excessive interference, versus the interests of the public and environment and their right to be protected from harm.

The desire to reduce unnecessary regulatory costs and administrative burdens for business is, on its own merit, defensible (although questions remain on whether this is indeed the true motivation behind deregulatory drives).[1] The key question, of course, is whether reductions in regulation or the stripping back of regulatory enforcement compromises regulatory goals, or leads to societal or environmental harm.

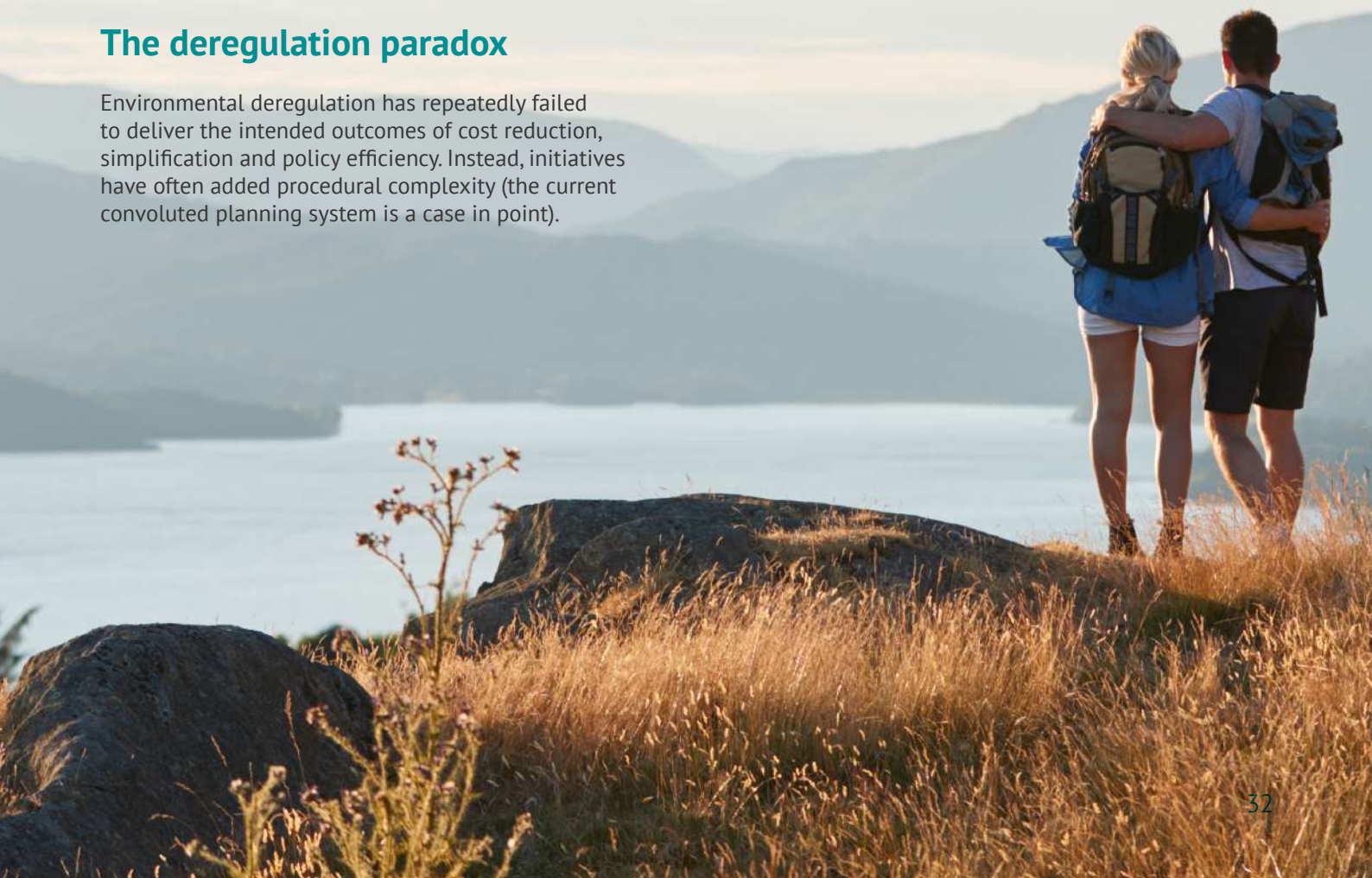
We find that, across the areas considered in this briefing, the weakening or removal of regulation or the failure to regulate has contributed to adverse social or environmental outcomes, in many cases directly undermining the achievement of specific policy goals. While some efficiencies have no doubt been achieved over the years, Unchecked UK believes the deregulation pendulum has swung too far.

When assessing the Coalition Government's 'red-tape cutting' initiatives the think-tank Reform concluded that: "instead of saving £1.5 billion, the Coalition has in fact increased the regulatory burden on business by at least £3.1 billion. Against an ambition of removing at least £1 of regulation for every £1 it introduces, the Government has actually introduced at least £3.50 of regulation for every £1 it has so far removed."[2] The National Audit Office calculates that initiatives brought forward by the 2010-15 government saved the average UK business just £400.[3]

Meanwhile, a growing body of evidence shows that good environmental rules can deliver positive economic outcomes without any loss in productivity. A 2017 report by the Aldersgate Group found that UK businesses see the impact of environmental regulation as "positive overall. The costs of compliance – be they taxes or increased design fees – are more than offset by gains in improved quality, performance and competitiveness or are absorbed in some other way."[4] Business groups consistently state that regulatory certainty is more important than a reduction in regulation.[5, 6]

The deregulation paradox

Environmental deregulation has repeatedly failed to deliver the intended outcomes of cost reduction, simplification and policy efficiency. Instead, initiatives have often added procedural complexity (the current convoluted planning system is a case in point).



The true cost of deregulation

The commitment to the deregulation project has been centred on the perceived need to reduce administrative and cost burdens for businesses. This, however, risks missing the point of environmental regulation – and indeed all regulation – which is to ensure the achievement of outcomes which would not otherwise be delivered by the market. Rules which place costs on companies are often those which deliver the greatest public benefit, not least because they contain harmful business activities. As such, most worthwhile environmental regulations will necessarily carry substantive costs for businesses.

When seeking to assess whether environmental rules are justified it would be wise to talk to those who have witnessed the consequences of regulatory failure. The individual who has witnessed the appalling decline of their local river; the family who have experienced first-hand the squalid conditions of a home built under Permitted Development Rights; residents of rural towns who have watched the rise in waste crime and fly-tipping; the many, many people in cities around the UK who are suffering the effects of poor air quality. This, alongside the decline of cherished British landscapes, habitats and wildlife species, constitutes the true cost of deregulation.

A view from the electorate

A number of polls carried out in recent years have found strong support among the British public for environmental protections.[7, 8, 9] Polling in March 2020 by Ipsos MORI for Unchecked UK, carried out with Leave voters under the age of 48, found that 81% of these voters would like to keep or increase environmental regulation, with just 7% stating that they want less regulation of large businesses.[10]

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"These unusual times offer an unparalleled opportunity for the UK Government to learn the lessons from the past, and to show true leadership on the environment."

Political appetite for deregulation has long been out-of-step with public opinion. A number of previous public consultations have found that there is little public appetite for deregulation. The main studies which have analysed public responses to the 2011 Red Tape Challenge, for example, find that the majority of participants (75-80% in some analyses) wanted to maintain or strengthen existing protections, and that the majority of the remaining participants were unclear in their view.[11]

With awareness of nature's importance likely to be sharpened further by the Covid-19 lockdown, it is unlikely that there will be public support for a bonfire of environmental protections going forward.[12]

The road ahead

Since the Covid-19 pandemic there has been welcome support, across political parties, for a green recovery. The regular reassurances that Brexit will not be used to lower standards are equally welcome. But, against a backdrop of no-deal warnings and downward pressure from a potential future US trade deal, and with non-regression clauses absent from both the Environment Bill and Withdrawal Agreement, there are still concerns that we will see a weakening of environmental standards.

These unusual times offer an unparalleled opportunity for the UK Government to learn the lessons from the past, and to show true leadership on the environment. With the weight of evidence, business ambition and public opinion now cohering firmly around a pro-protection approach to environmental regulation, these efforts will be warmly received.

References

Available at www.unchecked.uk/research/ourbetternaturereferences

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LET'S PROTECT WHAT MATTERS MOST