

CRIME & CLIMATE

After COP26, what can criminal law do for the environment?

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(1) INTRODUCTION – LAW & CLIMATE



1. Between 31st October 2021 and 12th November 2021, the UK hosted the 26th UN Climate Change Conference of the Parties ('**COP26**') in Glasgow. Law was central to the summit. There was a keen focus on evaluating the past legal arrangements of the Paris Agreement and UN Framework Convention on Climate Change at this year's conference. In addition, the main outcome of the summit was in the form of a new legal instrument - the Glasgow Climate Pact.¹
2. There have been a number of recent developments in the interaction of environment and the law. Considerations about the use of law to address environmental issues often focus upon civil law actions and remedies. For example, in the judicial review of decisions with environmental impact in *R v Secretary of State for Transport* [2014] UKSC 3 regarding HS2 (high speed rail) and in *R v Heathrow Airport Ltd* [2020] UKSC 52 regarding a third Heathrow runway.
3. On 9th November 2021 the Environment Act 2021 was enacted. It establishes the Office for Environmental Protection (the 'OEP') – a body that can hold government and public authorities to account in environmental law and further develops the regulatory framework for monitoring environmental 'priority areas'.²

¹ United Nations Decision CP.26 Glasgow Climate Pact (2021)
https://unccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf.

² Environment Act 2021.

(2) THE ENVIRONMENTAL – CIVIL – TRIBUNAL

4. There have also been growing calls for specialist tribunals and court services to deal with environmental issues in England and Wales. In 1992, Lord Woolf, then Lord Chief Justice, delivered a lecture on the topic 'Are the Judiciary Environmentally Myopic?' and advocated for a 'multi-faceted, multi-skilled body which would combine the services provided by the existing courts, tribunals and inspectors in the environmental field. It would be a 'one-stop shop' which would lead to faster, cheaper, and more effective resolution of disputes in the environmental area'.³
5. In 2010 an 'environmental tribunal' was established in England and Wales. This First-tier (Environmental) Tribunal initially had the jurisdiction to consider civil sanction appeals, though between 2010- 13 the Tribunal did not hear any such appeals and was largely inactive.⁴ However, in 2013 the remit of the tribunal was extended to include appeals regarding greenhouse emission trading, marine licensing and plastic bag charges though not criminal matters.

(3) CLIMATE & CRIME

6. In criminal practice, there is an increasing awareness of the role that the law may play in addressing issues. At a national level, evaluation of crime and the law has involved the review of pre-existing specific offences (such as for pollution and waste) and the consideration of how complementary civil, criminal and regulatory action can be taken to address the growing proceeds of environmental crime from illegal waste trafficking, forestry and mining – which is now estimated to account for at least \$110 billion in criminal benefit per year.⁵
7. At an international level, in June 2021 a panel of lawyers proposed that the Rome Statute of the International Criminal Court (ICC) should be amended to include 'ecocide' as a fifth international crime.⁶

(4) ENVIRONMENTAL OFFENCES

8. The Sentencing Council has issued guidelines in respect of certain offences related to the environment including those prosecuted by the Environment Agency:

³ Lord Woolf, 'Are the Judiciary Environmentally Myopic?' (1992) Volume 4 Journal of Environmental Law 1; Richard Macrory 'Environmental Courts and Tribunals in England and Wales – a tentative new dawn' (2010) 3 Journal of Court Innovation 61.

⁴ Richard Macrory, 'Environment Tribunal in England and Wales Gaining New Powers', *UCL Centre for Law and Environment* (11 February 2013) < [Environment Tribunal in England and Wales Gaining New Powers | UCL UCL Centre for Law and Environment](#)> accessed 2.11.21.

⁵ INTERPOL, *World Atlas of Illicit Financial Flows* (2018); The Financial Action Task Force *Money Laundering from Environmental Crimes* (2021).

⁶ Stop Ecocide Foundation *Independent Expert Panel for the Legal Definition of Ecocide Commentary and Core Text* (2021) < [SE+Foundation+Commentary+and+core+text+revised+\(1\).pdf \(squarespace.com\)](#)> accessed 4.11.21.

Subject of offence	Nature of offence	Statutory provision
WASTE	Transporting controlled waste without registering It is an offence for any person who is not a registered carrier of controlled waste...to transport any controlled waste to or from any place in Great Britain.	Section 1 Control of Pollution (Amendment) Act 1989
WASTE	Breach of duty of care for waste disposal Section 34 creates a duty of care in respect of waste to ensure that their waste is disposed of correctly. This duty applies to both individuals and businesses.	Section 34 Environmental Protection Act 1990
NUISANCE	Breach of an abatement notice for nuisance Section 80 gives a local authority the ability to serve a notice (an abatement notice) on a business or person that is committing a statutory nuisance including accumulation of waste, smells from industry, trade or business, smoke from premises or noise from premises, vehicles, equipment or machinery in the street.	Section 80 Environmental Protection Act 1990
SEWERS	Restriction on use of public sewers Section 111 makes it an offence to throw, empty or turn...into any public sewer, drain or sewer communicating with a sewer any matter likely to injure the drain or sewer	Section 111 Water Industry Act 1991
WASTE	These offences relate to the export of waste from the UK and set out penalties and designates the responsible enforcement authorities.	Offences under the Transfrontier Shipment of Waste Regulations 2007

9. Enforcement of environment related offences is often led by the Environment Agency which will consider all other options (including civil sanctions). Prosecution by way of criminal proceedings led by the Environment Agency is considered a 'last resort'.⁷

⁷ Environment Agency, *Enforcement Options* (2019) < <https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy>> accessed 4.11.21.

10. When last resort prosecution does occur in the Magistrates' Court, agent prosecutors for the Environment Agency may prosecute on its behalf, as well as instructed counsel in Magistrates' and Crown Court cases.⁸ The Environment Agency divides the offences that it oversees into 13 areas outlined in 'Offence Response Options' (ORO) documents.⁹

(5) ENVIRONMENTAL GUIDELINES – INDIVIDUALS & ORGANISATIONS

A. INDIVIDUALS – STEPS 1 - > 12

11. The Sentencing Council published a guideline effective from 1 July 2014 for waste offences: 'Individuals: Unauthorised or harmful deposit, treatment or disposal of waste/Illegal discharges to air, land and water'.¹⁰ This guideline illustrates the approach taken for sentencing individuals or organisations for environmental crime.
12. **Step 1 – Compensation** – The court must consider making a compensation order requiring the offender to pay compensation for any personal injury, loss or damage resulting from the offence, in such an amount which the court considers appropriate.
13. **Step 2 – Confiscation (Crown Court only)** – Confiscation must be considered if either the Crown asks for it, or the court thinks it may be appropriate. It must be dealt with before any other fine or financial order (except compensation).
14. **Step 3 – Determining the offence category** – The court should determine the offence category using culpability and harm factors that the Sentencing Council lists.

CULPABILITY: DELIBERATE – > LOW/NO CULPABILITY

- **Deliberate** – Whether the offender intentionally breached, or flagrantly disregarded, the law.
- **Reckless** – Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken.
- **Negligent** – Offence committed through act or omission which a person exercising reasonable care would not commit.
- **Low or no culpability** – Offence committed with little or no fault, e.g. by accident or despite preventative measures.

⁸ Environment Act 1995, s.54.

⁹ Environment Agency, *Offence Response Options* (2019) <<https://www.gov.uk/government/publications/offence-response-options-environment-agency>> accessed 3.11.21.

¹⁰ The Sentencing Council for England and Wales, *Individuals: Unauthorised or harmful deposit, treatment or disposal of waste/Illegal discharges to air, land and water* (effective from 1 July 2014) <<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/individuals-unauthorised-or-harmful-deposit-treatment-or-disposal-etc-of-waste-illegal-discharges-to-air-land-and-water/>> accessed 9.11.21.

HARM: CATEGORIES 1 – > 4

Category 1 – MAJOR HARM

- Polluting material of a dangerous nature, e.g. hazardous chemicals or sharp objects.
- Major adverse effect or damage to air or water quality, amenity value or property.
- Polluting material was noxious, widespread or pervasive with long-lasting effects on human health or quality of life, animal health or flora.
- Major costs incurred through clean-up, site restoration or animal rehabilitation.
- Major interference with prevention or undermining of other lawful activities or regulatory regime due to offence.

Category 2 – SIGNIFICANT HARM

- Significant adverse effect or damage to air or water quality, amenity value, or property.
- Significant adverse effect on human health or quality of life, animal health or flora.
- Significant costs incurred through clean-up, site restoration or animal rehabilitation.
- Significant interference with or undermining of other lawful activities or regulatory regime due to offence.
- Risk of category 1 harm.

Category 3 – MINOR HARM

- Minor, localised adverse effect or damage to air or water quality, amenity value, or property.
- Minor adverse effect on human health or quality of life, animal health or flora.
- Low costs incurred through clean-up, site restoration or animal rehabilitation.
- Limited interference with or undermining of other lawful activities or regulatory regime due to offence.
- Risk of category 2 harm.

Category 4 - RISK of category 3 harm

15. **Step 4 – Starting Points & Category Range** - Having determined the category, the court refers to the starting points to reach a sentence within the category range.

Aggravating and mitigating factors are tailored to the nature of environmental crime – factors unique to these guidelines are set out below.

Environmental aggravating factors:

- History of non-compliance with warnings by the regulator
- Location of the offence e.g. near housing, schools, livestock or environmentally sensitive sites.

Environmental mitigating factors:

- Compensation paid voluntarily to remedy harm caused.
- Evidence of steps taken to remedy problem.
- One off event not commercially motivated.
- Self-reporting, co-operation and acceptance of responsibility.

16. **Step 5 – The court should remove any economic benefit derived.**

17. **Step 6 – The court should consider any other factors** that are relevant to ensuring that the proposed fine is proportionate.

18. **Step 7 – Other factors which may indicate a reduction**, such as prosecution assistance.

19. **Step 8 – Any reduction for guilty pleas** by reference to the reduction guideline ¹¹

20. **Step 9 – Ancillary orders** - This may include disqualification of a director or disqualification from driving/forfeiture of a vehicle (where used in commission).

21. **Step 10 – Totality principle; Step 11 – duty to give reasons; Step 12 – consideration of time spent on bail** – standard concluding steps across all offence guidelines.

B. ORGANISATIONS

22. The differences in relation to whether the offender is an organisation mainly relate to **Step 4 – obtaining financial information and step 7 – consideration of other factors in relation to the proposed fine.** ¹²

23. **Step 4 – Obtaining financial information** - Offenders who are companies, partnerships or bodies delivering a public or charitable service, are expected to provide **comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status.** Where a company's turnover or equivalent greatly exceeds the threshold for large companies it may be necessary to move outside the suggested range to achieve a proportionate sentence.

¹¹ The Sentencing Council of England and Wales, *Overarching Guideline: Reduction in Sentence for Guilty Plea* (2017); 'Credit for Plea' (2021) <<https://static1.squarespace.com/static/5a5f29cbe5dd5bbc01b25732/t/616ed57bbb2f2173b98d5c83/1634653563982/2HB+Digital+-+Credit+for+Plea+-+Page+Nyame.pdf>> accessed 5.11.21.

¹² The Sentencing Council for England and Wales, *Organisations: Unauthorised or harmful deposit, treatment or disposal of waste/Illegal discharges to air, land and water* (effective from 1 July 2014) <<https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/organisations-illegal-discharges-to-air-land-and-water-unauthorised-or-harmful-deposit-treatment-or-disposal-etc-of-waste/>> accessed 3.11.21.

24. **Step 7 – Consider other factors that may warrant adjustment of the proposed fine -**
Where the fine will fall on public or charitable bodies, the fine should normally be substantially reduced if the offending organisation is able to demonstrate the proposed fine would have a significant impact on the provision of their services.

(6) GAPS AND OPPORTUNITIES FOR CRIMINAL LAW?

25. The current statutory regime in England and Wales – largely focused on waste – fails to address more prevalent environmental crimes globally – such as wildlife crime, illegal logging, illegal fishing, illegal mining and the proceeds from those crimes that enter England and Wales.¹³
26. Many legal actions – civil and criminal – may arise from a single environmental incident, as has been evident from air pollution claims involving inquests, civil actions and criminal prosecutions.
27. Yet the avenues for criminal prosecutions currently are limited – and whilst there are important considerations for whether or not there is overreach in criminalisation - it is also important that criminal law plays a complementary role alongside other legal and non-legal instruments to prevent environmental issues from arising and appropriately respond to the consequences when they do.

¹³ UN Environment 'The State of Knowledge of Crimes that have Serious Impacts on the Environment' (11 July 2018) <https://wedocs.unep.org/bitstream/handle/20.500.11822/25713/knowledge_crime_envImpacts.pdf?sequence=1&isAllowed=y> accessed 5.11.21.