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## Taking the government to court over environmental governance

Why Friends of the Earth has taken the government to court over the new national planning policy.

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**“Our natural environment is our most precious inheritance.”**

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These words could be the slogan of an environmental activist. But they're not.

They're the first sentence of the UK government's [25-year plan for the environment](#), produced by Defra (Department for Environment, Food and Rural Affairs).

Governments are good at making impressive statements. But as anyone in the environmental movement knows, they don't always convert into action.

While the UK government may sign up to great-sounding environmental protection initiatives, it's equally capable of fighting tooth and nail to avoid giving them practical effect.

This is exactly what happened in the judicial review brought by Friends of the Earth over the government's new national planning policy.

## The National Planning Policy Framework

Friends of the Earth's case was about the importance of good environmental governance when developing the revised National Planning Policy Framework, adopted in July 2018.

The Framework is the national planning rule book. It directs and influences how communities are developed and how we use land throughout England at both town and county level.

Its implications for the environment and for all of us are huge. It sets out how we value, promote and protect green spaces for children to play in.

It has a bearing on the level of protection for nature sites and the green-belt – and influences new home building and other forms of development.

It also promotes or discourages activities such as fracking<sup>1</sup> or onshore wind. It's a strategic document that sets the guidelines for land use and development throughout the entire country.

## A high level of protection for the environment?

Through the Strategic Environmental Assessment Directive (SEA)[2](#), the UK government has signed up to assess plans and programmes which may have significant effects on the environment.

The Directive is implemented in domestic law via the The Environmental Assessment of Plans and Programmes Regulations 2004. The objective is to ensure a “high level of protection for the environment” (Article 1 of the Directive).

Back to the Framework. As stated, it's integral to the English planning system and has huge implications for the environment. But despite this, James Brokenshire, the Secretary of State for Housing Communities and Local Government (SSHCLG), adopted it **without any environmental assessment at all**.

This deprived the public of meaningful engagement on the environmental implications of the rules (good or bad). And whether there were better, less damaging alternative policies to consider.

## The Framework can and should be improved

While there are positive aspects, Friends of the Earth considers that the Framework is environmentally damaging in many respects.

For example, it leaves the door open to more dirty coal projects and creates obstacles for onshore wind development.

An environmental assessment could identify ways of securing more protection for the environment – including how to better achieve the UK's climate emission targets. This is urgently needed given the climate emergency and urgent action required to slash emissions and avoid dangerous levels of warming.

The [Intergovernmental Panel on Climate Change \(IPCC\)](#) report published in October 2018 sets out the catastrophic impacts of 2 °C degrees of warming. We're currently on course for more than 3 °C.

## The court case

The court hearing was in December 2018 in the High Court.

Represented by our barristers Richard Kimblin QC and Nina Pindham, both of No. 5 Chambers, Friends of the Earth sought a declaration that the Framework was unlawfully adopted, as no environmental assessment had been undertaken.

The government had persisted in arguing from the start of the legal proceedings that the Framework was merely high-level policy guidance and of little real consequence. Therefore (among other reasons) it didn't qualify for environmental assessment.

## Government undermines its own policy

It continued to advance this peculiar argument at the court hearing. Rather odd for the government to seek to undermine the importance of its own flagship policy for land use and development in England. But that's what it did.

It also, extraordinarily, maintained that the Framework didn't have a significant effect on the environment and was so high level that it couldn't be subjected to an environmental assessment in any meaningful way.

Friends of the Earth's case was supported by Dr Riki Therivel, the leading academic and practitioner on environmental assessment. Dr Therivel has published extensively on SEA, including producing guidance for the government on this topic.

Dr Therivel and Kate Gordon, senior planner at Friends of the Earth, gave evidence on the impacts of the Framework on planning decisions, and on the benefits of the process of environmental assessment. Our barristers used this evidence to convince the court of the substantive merits of our case.

We successfully argued that the Framework:

1. Had a real, determinative impact on individual planning decisions and local plan making
2. Had a significant effect on the environment
3. Was capable of environmental assessment.

As the objective of the Directive is to provide a high level of protection for the environment, it begs the question – why didn't we win? The answer is that the government got off on a technicality.

## The gaping loophole to good environmental governance

This case really amounts to one step forward, two steps back.

We convinced the court of the substantive impact of the Framework. One step forward.

But the government successfully argued on the basis of Article 2 of the Directive that the Framework didn't require an environmental assessment, because its production was not formally and expressly "required by legislative, regulatory or administrative provisions". Two steps back.

It's true that there's no explicit statutory obligation for the government to create a national planning policy framework. But here's the rub – the whole system needs one to function coherently.

## **Why we think the NPPF qualifies for environmental assessment**

In our view, dismissing the Framework as a qualifying plan on that analysis is incorrect.

To do so ignores the reality of the English planning system, which is unlike others on the European continent. It's a highly discretionary system, with relatively few express statutory provisions governing it.

The obligation to create national planning policy (ie the Framework) originates under English law, via an implied statutory power, not an express statutory obligation. And it's an implied power that's used because other parts of the statutory system depend on and need the Framework to operate.

Secondly, dismissing the Framework runs counter to the spirit and whole purpose of the Directive – to achieve a high level of protection of the environment.

Thirdly, and linking to the second point, it's incompatible with established caselaw from the European Court of Justice (ECJ), by which the government remains bound.

The ECJ has determined these cases in a purposive way, by reference to the objective of the Directive. This ensures that governments are required to achieve the objectives of the Directive and aren't able to get off on technicalities.



## Political climate

Of course, court cases aren't decided in a vacuum. There's always the potential for the political climate to influence decisions.

Given Brexit and the uncertainty surrounding it, it may be that the court was unwilling to adopt a purposive interpretation of the Directive, as directed by the ECJ.

We still don't know what's going to happen with Brexit, and what relationship the UK will have with the EU and the ECJ going forwards.

Ultimately, our future relationship with the ECJ shouldn't be the point. The SEA Directive has already been transcribed into domestic law, so we won't lose this legislation following Brexit.

The point is we signed up to these laws and the objective, to avoid gaps in the assessment of planning frameworks to secure environmental protection. The government then seeks to avoid giving effect to these laws.

## **Court recognises the impact of the Framework on the environment**

The public wants and needs high environmental standards. It was vitally important that Friends of the Earth took this case.

We did it to stand up for the rights of citizens to have a meaningful say on the planning rule book, which has such a pervasive impact on communities and our environment across the country.

And we did it because we believe that a commitment to good environmental governance must be more than words – it must be central to how the planning system works.

Through this case, we've obtained a court ruling that explicitly recognises the impact the Framework has on the planning system and its significance for the environment.

The government had refused, point blank, to accept either of these points until now.

But if its commitment to sustainable development and the environment is to be seen as credible, it must engage with these facts constructively.

If it doesn't want to environmentally assess the framework under the Directive, then what will it do to ensure we don't needlessly destroy "our most precious inheritance"?

At the moment, there appears to be a disconnect between Defra's objective in its 25-year plan and the approach of the SSHCLG to the Framework.

## We need good environmental governance, not empty words

We think it's fundamentally and morally wrong for the government to avoid its responsibilities. Such a situation leaves good environmental governance high and dry.

This is a dangerous ruling from the court.

The message to the government is: if you don't formalise how a plan or programme is created, then – no matter how significant its effects on the environment you won't have to environmentally assess it and engage with the public and environmental expertise through that process.

But surely that's not treating our environment as our “most precious inheritance”?

The writing is on the wall. It's high time the government gave good environmental governance some teeth.



Katie de Kauwe from the Friends of the Earth Legal Team  
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## Notes

[1.](#) NB: Talk Fracking recently brought a successful Judicial Review action against the government over the adoption of its pro-fracking policy within the Framework.

[2.](#) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment