

COUNTRY REPORT: UNITED KINGDOM

Energy, Badgers and Noise Pollution

REBECCA BATES*

Introduction

This Country Report on the United Kingdom focuses on three main issues. Firstly, it considers the *Energy Bill (2012)* and the Government's attempt to 'decarbonise' the country's energy sector and increase the inclusion of gas within the energy mix. Secondly, the Report returns to the issue of badger culling, this time in connection with a cull order for parts of West Somerset and West Gloucester. Thirdly, it considers the recent case of *European Metal Recycling Limited v The Environmental Agency* [2012] EWHC 2361 (Admin).¹ Each of these developments is considered in turn below.

Energy Bill 2012 (UK) and the Gas Generation Strategy – 'Decarbonisation' and Shale Gas Exploration

On 29 November 2012, the Department of Energy and Climate Change (DECC) released its long awaited *Energy Bill (2012)*. The Bill is at the core Government's wider climate change strategy and will put in place measures to replace current energy generation capacity and improve the grid to meet rising demand.² In particular the Bill focuses Energy Market Reform (EMR),³ which aims to transform the UK's current energy sourcing from being predominantly carbon reliant to a wider mix, including renewables. This 'decarbonisation' of Britain's energy sector will however come at a significant cost, an estimated £110 billion over ten years, a large part of which is expected to be born by consumers.

* Lecturer, Brunel Law School, United Kingdom. Email: Rebecca.bates@brunel.ac.uk.

¹ *European Metal Recycling Limited v The Environmental Agency* [2012] EWHC 2361 (Admin).

² Department of Energy and Climate Change (DECC), 'Energy Bill, Summary Aide Memorie' (available at <http://www.decc.gov.uk/assets/decc/11/policy-legislation/Energy%20Bill%202012/7087-summary-aide-memoire-energy-bill-2012.pdf>).

³ Ibid.

At the core of the *Energy Bill*, is the objective of Energy Market Reform (EMR), which was originally set out in the *Energy Market Reform White Paper* (2011).⁴ According to the Explanatory Memorandum of the *Energy Bill*, the core EMR objectives are:

‘...the carbon reduction targets as set out in the Climate Change Act 2008 which include a 34% reduction of carbon by 2020 and a 80% reduction by 2050; to ensure the security of energy supply...[and] to take into account the cost to consumers ; and to the legally binding EU targets of 15%of UK energy to supplied from renewable sources from 2020.’⁵

The purpose of EMR is to ensure that these objectives are met through the ‘incentivisation’ of the market to meet increasing demand through low carbon energy production. At present one fifth of the UK’s energy generation’s capacity is timetabled to close over the next ten years, while at the same time demand for electricity is predicted to double from its current level by 2050.⁶ The *Energy Bill* aims to achieve this objective through a number of measures including providing long-term ‘Contract(s) for Difference’ (CFD) to generate low carbon investment supported by contributions from licensed energy suppliers⁷ and the introduction of a capacity market intended to ensure the continuity of supply through a forecasting and bidding system aimed at providing ‘reliable electricity supplies at an affordable price’.⁸ Moreover, as part of this transition, the Bill aims to increase wind and nuclear generation to provide an enhanced mix of intermittent and inflexible generation.⁹ This shift will be supported by a ‘renewables transition’ designed to promote investment in this area and an ‘Emissions Performance Standard (EPS)’ which will impose an ‘emission limit duty’ on new operators of fossil fuel plants.¹⁰ Initially, the EPS annual limit will be equivalent to 450g of CO₂ per kilowatt hour of electricity for a plant operating at baseload.¹¹ Many of these initiatives will be financed through changes in consumer energy pricing. Most significantly the levy charged to consumers for clean energy projects will increase over time. Whilst the final figure for the levy is yet to be determined, the Committee on Climate Change estimates that the average energy bill will increase by £110 per year.¹²

⁴ Department of Energy and Climate Change (DECC), *Electricity Market Reform (EMR) White Paper* (available at http://www.decc.gov.uk/en/content/cms/legislation/white_papers/emr_wp_2011/emr_wp_2011.aspx).

⁵ Energy Bill 2012, Explanatory notes, paragraphs 6 and 7.

⁶ Department of Energy and Climate Change (supra note 2).

⁷ Energy Bill 2012, Explanatory notes (supra note 5), chapter 2.

⁸ Energy Bill 2012, Explanatory notes (supra note 5), chapter 3.

⁹ Ibid.

¹⁰ Energy Bill 2012, Explanatory notes (supra note 5), chapter 8.

¹¹ Ibid.

¹² Committee on Climate Change, *Household Energy Bills – impacts of meeting carbon budgets* (December 2011) (available at

The Bill also contains provisions for the creation of an 'Office for Nuclear Regulation' (ONR). These changes follow the 2008 government review of nuclear regulation, chaired by Dr Tim Stone. The review made a number of recommendations, including the restructuring of the then Nuclear Directorate with an independent nuclear regulator. In February 2011, the Government announced its intention to create the ONR and has already established the agency as part of the Health and Safety Executive (HSE) pending the legislation. The *Energy Bill* provides the formal legislative framework for the operation of the new nuclear regulator.¹³

However, it is perhaps the most controversial part of the *Energy Bill* that is the least defined. The Bill, as part of its objective to 'decarbonise' Britain's energy supply, supports the expansion of gas exploration and the increased use of gas within the energy mix.¹⁴ This expansion is supported by Government's *Gas Generation Strategy* that was announced in December 2012. The Strategy aims to add 26GW of gas generating capacity to the grid by 2030.¹⁵ The *Energy Bill* is intended by the DECC to provide 'certainty' for this market change. However, as part of its statements surround the Strategy, the DECC has announced its support of shale gas exploration as a potential means of diversifying energy supplies and meeting this target.¹⁶ In a related measure, on 13 December 2012, the DECC announced the resumption of exploratory hydraulic fracturing (fracking) for shale gas. 'Fracking' involves the setting of underground explosions which are injected with water and chemicals designed to release the gas contained within the shale rock cavities, a process that is currently used widely in the United States.¹⁷ The process has previously been used in Britain, however was halted in 2011 after it was believed to have caused two minor earthquakes near Blackpool.¹⁸ The exploration firm Cuadrilla owns four sites in Lancashire, which are licensed to drill for shale gas. It is likely that following the Government's announcement that these activities will resume. The DECC has stressed that the resumption of shale gas mining is to be

http://downloads.theccc.org.uk/s3.amazonaws.com/Household%20Energy%20Bills/CCC_Energy%20Note%20Bill_bookmarked_1.pdf.

¹³ Department of Energy and Climate Change (DECC) 'Changing ONR' (available at <http://www.hse.gov.uk/nuclear/ndchanges.htm>); Energy Bill 2012, Explanatory notes, Part 2.

¹⁴ Department of Energy and Climate Change (DECC) 'Gas Strategy will Support Decarbonisation of Energy Mix' (5 December 2012) (available at http://www.decc.gov.uk/en/content/cms/news/pn12_157/pn12_157.aspx).

¹⁵ Ibid.

¹⁶ Department of Energy and Climate Change (DECC), *Gas Generation Strategy* (December 2012) (available at <http://www.decc.gov.uk/assets/decc/11/meeting-energy-demand/oil-gas/7165-gas-generation-strategy.pdf>).

¹⁷ L. Horsburgh, 'Fylde Fracking: The new Aberdeen or toxic gamble?' BBC News (Lancashire, 13 December 2012) (available at <http://www.bbc.co.uk/news/uk-england-lancashire-20627877>).

¹⁸ Ibid.

undertaken with additional controls designed to minimise the seismic risks that may arise as a result of the exploration.¹⁹ Significant concern however exists relating to the potential environmental and seismic impacts of these activities.²⁰

The utilisation of fracking as part of the Government's energy market reform highlights the challenges involved in transitioning from a coal based economy. While the *Energy Bill* (2012) supports the increased use of renewables, its focus on gas and nuclear is evidence of another missed opportunity to shift the British energy sector onto a 'clean' and sustainable path. Whilst enhancing the role of gas in the energy mix must be welcomed from a climate change perspective, it remains to be seen whether reliance on shale gas exploration provides another set of environmental challenges.

Biodiversity and Farming: Badger Cull – West Somerset and West Gloucestershire

The issue of badger culling and the management of bovine tuberculosis (TB) in cattle has 'spread' from Wales to England over recent months. A proposed cull in Wales was abandoned last March following a significant public outcry and a judicial review of the cull order.²¹ Since this time, the Welsh Assembly has authorised a trial vaccination in the cull area in West Pembrokeshire, which is currently ongoing.²² However, despite these developments and the vaccine trial, another controversial cull order has been issued in neighbouring West Somerset and West Gloucestershire.

The West Somerset and West Gloucestershire cull (the West Somerset cull) was authorised by an order made by the Government Agency, Natural England on 4 October 2012. Natural England granted the licence following an application made by a company representing 'farming and land management' interests in the cull area. The licence itself permits the undertaking of 'control measures' within the 'West Somerset Pilot Area' that covers an area of approximately 400 square miles.²³ The control measures were authorised under the

¹⁹Department of Energy and Climate Change (DECC), 'New Controls Announced for Shale Gas Exploration' (13 December 2012) (available at http://www.decc.gov.uk/en/content/cms/news/pn12_164/pn12_164.aspx).

²⁰ P. Ekins, 'The UK's new Dash for Gas is a Dangerous Gamble' New Scientist (6 December 2012) (available at <http://www.newscientist.com/article/dn22594-the-uks-new-dash-for-gas-is-a-dangerous-gamble.html>).

²¹ See *Badger Trust v the Welsh Minister* [2010] EWCA Civ 807.

²² BBC News, 'More than 1,400 badgers vaccinated against TB in Wales' (28 November 2012) (available at <http://www.bbc.co.uk/news/uk-wales-20534842>).

²³ T. Feilden, 'Badgers Back in the Firing Line' BBC News (2 October 2012) (available at <http://www.bbc.co.uk/news/science-environment-19921298>).

licence for one annual six-week period over the next four years.²⁴ The issue of the licence met with substantial public concern and reignited the debate regarding the effectiveness of culling as a means to manage the problem of bovine TB. It has also produced the single largest animal rights campaign seen since the introduction of the fox hunting ban.²⁵ It again, as in the instance of the proposed Welsh cull, raises issues concerning the protection of endangered species in the face of agricultural and economic imperatives. Badgers are protected in England under the *Protection of Badgers Act* (1992), which prohibits the killing, injuring or taking of the animal and any form of interference with a badger 'sett'.²⁶ The Act defines a 'sett' to be 'any structure or place which displays signs, indicating the current use by a badger'.²⁷ However, despite these protections the Act also allows for activities to be conducted under licence which impact badgers and/or their setts provided that there is 'suitable justification' for the actions and the issue is not able to be resolved through other means.²⁸

In 2011, 3,741 farms in England suffered from outbreaks of bovine TB and 34,183 cattle were slaughtered as a result of the infection.²⁹ While the link between badger populations and the incidence of bovine TB is well established, there is much less consensus regarding the effectiveness of culling as a means to controlling infection. The widest study on the issues, undertaken by Sir John Krebs in 1996, found that while culling badgers could reduce the incidence of infected cattle in the cull area, that the movement and/or displacement of the remaining badgers increased the incidence of disease in surrounding areas. In light of these findings the report held that the benefit in terms of infection rates was minimal and given the significant costs associated with culling, that overall it was not economically viable.³⁰ With respect to the proposed West Somerset cull, Britain's leading animal disease scientists have, in an open letter to The Observer newspaper,³¹ criticised the Government's decision to adopt cull measures as a means to manage bovine TB in cattle. The Department of Environment, Food and Rural Affairs (DEFRA) has despite these concerns asserted its intention to continue with the planned cull and to 'maximise the benefits shown in previous

²⁴ Natural England, 'Badger Control Licence issued in West Somerset' (available at http://www.naturalengland.org.uk/about_us/news/2012/041012.aspx).

²⁵ Damian Carrington & Jamie Doward, 'Badger Cull 'Mindless', says Scientists', The Observer (13 October 2012) (available at <http://www.guardian.co.uk/environment/2012/oct/13/badger-cull-mindless>).

²⁶ *Protection of Badgers Act* 1992 (UK).

²⁷ *Ibid.*

²⁸ Natural England, 'Badgers' (available at <http://www.naturalengland.org.uk/ourwork/regulation/wildlife/species/badgers.aspx#legal>).

²⁹ Feilden, (supra note 23).

³⁰ *Ibid.*

³¹ Open Letter, 'Culling Badgers could Increase the Problem of TB in cattle', The Observer (14 October 2012) (available at <http://www.guardian.co.uk/theobserver/2012/oct/14/letters-observer>).

trails'.³² There is however no denying that the issue has become one of a highly political nature, with a number of Members of Parliament, including the Prime Minister David Cameron, commenting on the proposed cull actions.³³

In the face of substantial public outcry the Government announced in October 2012, that it was to delay the proposed cull until 2013. This decision was based upon the timing of the cull and the risk that in its current form an extended cull may encroach on the December breeding season.³⁴ In another action related to public concern, the House of Commons was required to debate the proposed measures as a result of receiving a petition containing over 150,000 signatures. In a non-binding vote the House of Commons rejected the cull measures 147 to 27 in favour.³⁵ The majority of the House instead argued for vaccination, improved testing and stronger biosecurity measures to be adopted to manage cattle infections.³⁶ The debate proved to be highly divisive demonstrating the deep divisions between the Environment Secretary, farming advocates and the majority of Parliament. At the time of writing, the cull is planned to proceed in 2013.³⁷ However it is likely that significant opposition will continue to be expressed regarding the proposed actions.

The badger is an iconic British species and it is perhaps due in part to this status that such heated debate has emerged over the proposed cull and the wider issues associated with the management of TB in cattle. However, outside the headline making debate lies a fundamental conflict between species protection and agriculture. The legal protection afforded to badgers, under the *Protection of Badgers Act* (1992) clearly contains provision for substantial exceptions to be made under the Act. The West Somerset cull, if it goes ahead in 2013, will aim to eradicate approximately 70% of badgers in the cull area.³⁸ Clearly, the capacity for such an exception to be made under the Act raises serious concerns regarding its efficacy and compatibility of licences and the objectives of the Act. More widely the West Somerset cull and the unwillingness of the Government to consider the more costly

³² Department for Environment, Food and Rural Affairs (DEFRA), 'Badger Cull to Proceed Next Year' (23 October 2012) (available at <http://www.defra.gov.uk/news/2012/10/23/badger-cull/>); Carrington et al (supra note 25).

³³ Ibid.

³⁴ R. Prince, 'Badger Cull is Shelved – to Fury of Farmers' The Telegraph (23 October 2012) (available at <http://www.telegraph.co.uk/earth/earthnews/9627264/Badger-cull-is-shelved-to-fury-from-farmers.html>).

³⁵ D. Carrington, 'Badger Cull: MPs vote 47 to 28 for Abandoning Cull Entirely' The Guardian (25 October 2012) (available at <http://www.guardian.co.uk/environment/2012/oct/25/badger-cull-vote-government-defeat>).

³⁶ BBC News, 'MPs Reject Government Plans for Pilot Badger Cull' (25 October 2012) (available at <http://www.bbc.co.uk/news/world-20085441>).

³⁷ Department for Environment, Food and Rural Affairs (DEFRA), (supra note 32).

³⁸ BBC News, 'Badger Cull: Government Delays Scheme Until Next Year', (23 October 2012) (available at <http://www.bbc.co.uk/news/uk-politics-20039697>).

vaccination option again raises concerns regarding the environmental agenda of the Coalition Government and their capacity to balance ecological and economic imperatives.

Noise Pollution: *European Metal Recycling Limited v The Environmental Agency* [2012] EWHC 2361 (Admin)³⁹

This case concerns noise pollution and provides important insights into the interpretation of the recently enacted *Environmental Permitting (England & Wales) Regulations* (2010). The claimant, European Metal Recycling Limited (EMR), operated a metal waste disposal and reclamation yard in Stoke-on-Trent, Staffordshire. The operations on the site are regulated under the *Environmental Permitting (England & Wales) Regulations*. The site operating permit was originally issued to the site's previous operator and was transferred to EMR on 19 July 2010. EMR, upon taking control of the site substantially increased its 'commercial activity' leading to a number of noise complaints from surrounding residents.⁴⁰ The complaints resulted in the regulator, the Environmental Agency, varying the conditions of the permit taking effect from 31 August 2011. The varied conditions required that:

'emissions from all activities shall be free from noise and vibrations at levels likely to cause pollution outside the Site...unless the operator has used appropriate measures, including but not limited to those specified in any approved noise and vibration management plan to prevent or where it is not practical to minimise the noise and vibration'.⁴¹

However, despite the changes made to the licence the complaints continued and the Agency initiated an investigation. Following the investigation and discussions between the parties, on 20 February 2012 the Agency served EMR with a notice under regulation 37, 'Enforcement notice of Suspension and Requirement to take steps'. A notice under regulation 37(4) requires a suspension notice to (i) specify the risk of serious pollution and (ii) the steps required to remove such a risk.⁴²

At issue before the High Court was the Environmental Agency's conclusion of the presence of a 'risk of serious pollution' and compliance of the notice with regulation 37(4)(ii). The claimant EMR, argued that it failed to define the steps required to remove the risk and how compliance was to be realised and that the 'threshold for compliance' was otherwise

³⁹ *European Metal Recycling Limited v The Environmental Agency* (supra note 1).

⁴⁰ At paras 1-5, per HH Judge Pelling QC.

⁴¹ At para 2.

⁴² At para 3 and 6.

imprecise and vague. EMR, following the issue of the notice, applied and was granted an interim injunction from the High Court.⁴³

There were thirteen grounds of challenge put forward by EMR.⁴⁴ Of particular interest was the risk of 'serious pollution'. The Noise Impact Assessment conducted by the Environmental Agency found that the weekday noise levels on the site were generally between 51 dB(A) and 58 dB(a) increasing at times to 62 dB(A). There was agreement between the parties that noise pollution was capable of being classified as 'serious pollution' under regulation 37, however EMR disputed that that their operations on the site had posed such a risk in light of the time that lapsed between the commencement of their operations at the site and the issue of the enforcement notice. Judge Pelling QC however dismissed these objections asserting that the question as to the existence of such a risk is 'manifestly' one for the judgement of the [Environmental Agency].⁴⁵ His Honour also noted the only potential means of challenging the Agency's decision was on the basis of irrationality. This ground of appeal was not however open to EMR in this instance as the evidence before the Court demonstrated that the Agency had adequately considered the evidence before them, including the Noise Impact Assessment, and were clearly within the scope of their discretion to conclude that the risk of serious pollution has been established. Moreover, the Court held that the failure of the Agency to notice the risk during their early investigations into residents' complaints also did not support the argument that there was no formal basis for their conclusion.⁴⁶

The second substantial ground of appeal related to EMR's assertion that wording of the enforcement notice did not comply with regulation 37(4)(2) as it failed to define the steps required to remedy the pollution risk. Also in light of regulation 37(4)(2) it was asserted that the notice also failed to provide a 'defined threshold' under which compliance may be satisfied as was 'otherwise vague and imprecise'.⁴⁷ Specifically, Schedule 2 of the enforcement notice issued by the Environmental Agency provided steps required to 'design and implement measures that eliminate the risk of serious pollution from noise'. Following a consideration recent case law⁴⁸ regarding the wording of abatement and suspension notices, the Court held that regulation 10 placed a 'mandatory requirement' on the Agency 'to specify what steps had to be taken in order to remove the risk that triggered the service of the

⁴³ At paras 16-32.

⁴⁴ At para 16.

⁴⁵ At para 17-20.

⁴⁶ At para 18-19.

⁴⁷ At para 21.

⁴⁸ See *R v Falmouth & Turo Port Authority Ex p. South West Water Limited* [2001] QB 445.

notice'. Judge Pelling asserted that this requirement could be met by providing 'an outcome or outcomes rather than by steps in the sense of specifying works to be undertaken on the site'. The Agency was not however permitted to require the elimination of the risk of serious pollution without identifying how this objective was to be realised. The Court held that on this ground alone that the notice was invalid and EMR was entitled to a quashing notice.⁴⁹

European Metal Recycling Limited v The Environmental Agency provides important insights into the scope of discretionary powers of the Environmental Agency and the operation of regulation 37.

⁴⁹ *European Metal Recycling Limited v The Environmental Agency* (supra note 1), para 30.