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1 Context and Contradictions

There are contradictions and tensions in the UK approach to energy policy and renewables. The 1980s saw major privatization of the gas and electricity industry, both generators and suppliers, and as a result energy policy and investment for the next fifteen years was largely determined by the market and short-term investment decisions, with the role of government regulation mainly focussed on preventing consumer exploitation. The reliance on the free market to determine strategy was symbolized by the abolition in 1992 of the Department of Energy, originally created as a response to the 1973 oil crisis. There was a rapid expansion of gas fired power stations (over 50% of gas is now imported from abroad), a decline of the UK coal industry, no new nuclear build (currently around 20% of electricity generation from aging stations), a marginal investment in renewables, and a lowering of energy prices to the consumer. Low cost, low risk fossil fuel generation trumped those technologies with high up front capital costs and higher risks.

Government now accepts that energy security and climate change creates an important role for government policy which the market cannot by itself deliver. The reorganization of government departments can sometimes simply be a distraction from policy change but in 2008 a significant change took place with the creation of a new central Government Department, the Department of Energy and Climate Change (DECC). The creation has undoubtedly helped to provide a strong focal point for the development of energy policy which reflects climate change - and has been strengthened by being led by two powerful Secretaries of State who have been fully intellectually and policy engaged (first, under Labour, Ed Miliband who is now leader of the Labour party and currently Chris Hulne, a senior Liberal member of the Coalition).

A long term legal target is provided by the Climate Change Act 2008 which requires Government to achieve an 80% reduction of CO2 by 2050 (discussed below at 10). Under Directive 2009/29/EC the UK has a target of 15% of energy from renewables by 2020, which implies a 7 fold increase from 2008 levels in less than a decade, and is said by Government to be the most challenging of any EU Member State. The 2009 Directive has provided a hard edged focus for policy development, and achieving the

targets will require a range of instruments. Here there can be seen particular tensions and challenges. Government still prefers market solutions if at all possible, yet has to keep changing and adapting the tools used when they do not achieve desired policy goals. The present Coalition Government favours more local empowerment, yet at the same time has accepted that infrastructure (including renewables) may be completely blocked by local opposition, and has therefore at the same time endorsed a more centralized approach to securing planning approvals for large scale infrastructure of national importance. Every month seems to bring a new set of policy initiatives or policy revisions, not all consistent with each other.

A final added piece of complexity relates to devolution. The United Kingdom now has four devolved regions (England, Wales, Scotland and Northern Ireland) but with an asymmetric division of powers. Essentially, though, energy largely remains a matter of national policy, though aspects of energy policy such as energy conservation and building standards have been devolved. However, environment policy as such and land-use planning policies have been largely devolved, allowing for different variations and emphasizes taking place at regional level,[1] but within overall national frameworks. The United Kingdom as a whole therefore has certain renewable targets but each devolved administration has in addition set its own - currently the Scottish Government has a target of generating 31% of Scotland's electricity from renewable energy by 2011 and 50% by 2020; the Welsh Government aims for Wales to be more than self-sufficient in renewable energy by 2025; and the Northern Irish Government has a target for 12% of electricity to be generated from renewable sources by 2012 and 40% by 2020.

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2 Directive 2009/29 (Q 1)

The Directive is not transposed into a single national law, but in 2009, following extensive consultation, the DECC published its **Renewable Energy Strategy** designed to show how the UK would achieve its renewable targets. The Government still largely expects the private sector to determine and implement choices but against the background of economic regulation and fiscal incentives created by Government - as the Strategy states, *The precise breakdown of the 2020 renewable energy target between technologies will depend on how investors respond to the incentives we put in place*.

Under the Strategy, the headline figures for 2020

[1] For example, in March 2009 the Scottish Government issued its own response to the European Commission's consultation on its Green Paper for a Secure Sustainable and Competitive European Energy Network

- +30% of electricity from renewables (compared to 5.5% today)
- 12% heat from renewables
- 10% transport energy from renewables (currently 2.6%)

3 Policy Instruments (Question 2)

In an ideal world Government would have hoped that the price of carbon under the Emissions Trading Regime would force the pace of investment needed, but it accepts the emissions trading regime cannot be relied to deliver what is needed in the time-scales required. There are therefore various instruments, mainly of a fiscal nature, which the Government intends to deploy in addition in order to achieve these policy goals. The very challenging targets now imposed has required a substantial rethink and strengthening of these instruments. In relation to renewables there are three key instruments deployed at present - Renewable Energy Obligation, Feed in Tariffs, and the Climate Change Levy.

(**a) Renewables Energy Obligation** - introduced in 2002 and based on a tradable certificate scheme designed to make investment in renewables attractive. Until 2010 the Government rejected the used of Feed in Tariffs, despite their apparent effectiveness in many other countries, on the grounds that they were financially inefficient while the UK approach was designed to create a market incentive to find the most cost-effective way to generate renewable electricity.
Renewable Generators are issued Renewable Obligations Certificate (ROCs) based on the amount of energy they produce. Electricity suppliers are legally obliged to purchase a number of Renewable Obligations Certificate each year from these generators (representing an increasing proportion of their electricity, starting at just over 3% in 2002/3 and rising currently to 11.1%) . Generators of renewable energy are therefore able to sell not just their electricity, but also the ROCs accredited to them providing a double incentive to produce. Where suppliers do not have sufficient ROCs to meet their obligations, they must pay an equivalent amount based on buy-out prices set by Government into a fund, the proceeds of which are paid back on a pro-rated basis to those suppliers that have presented ROCs. The floor price of the ROC is set by Government but there is no ceiling price which depends on the excess of demand for ROCs over supply.

Originally all renewables received the same amount of ROCs regardless of the type of technology which meant that it encouraged investment in mature technologies. The Government felt the scheme was not encouraging a sufficient diversity of renewable and in

particular failed to properly incentivize off-shore wind. Variable banding was therefore introduced in 2009 based on four broad categories of technology - Technologies in the Established Band (0.25 ROCs/MWh); in the Reference Band (1 ROC/MWh); in the Post-Demonstration Band 1.5 ROCs/MWh Technologies in the Emerging Technologies Band (2 ROCs/MWh). To give examples, offshore wind installations received 2 ROCs per MWh;[onshore wind installations receive 1 ROC per MWh and sewage gas-fired plants receive half a ROC per MWh.

(b) **Feed-in Tariffs** For many years the UK government rejected Feed-In Tariffs as imposing too great a constraint on the market. But while there was a base price for ROCs, the uncertainty of the upper end of the tradable price created real uncertainties in predicting income streams, especially for the smaller investor. In April 2010 a Feed-In Tariff (FITs) scheme was introduced, designed to encourage for micro- and small generators, with a maximum of 5MW. Generators over 5MW stay within the original ROC scheme. FITs were geared to meet the needs of non-energy professionals who are not suited to operate in the wider electricity market.

The feed-in tariff varies according to technology and has had a dramatic impact especially on the installation of domestic photovoltaics since it was introduced. Under the former ROCs scheme a domestic installation would take around 25 years to cover its investment, but under FITs the figure is about 7 years, giving a higher rate of return on savings than investment in a bank. FITS are guaranteed for 25 years. Companies have sprung up who providing householders with free installation in return for a proportion of the income, effectively renting roof space.

But in less than twelve months the Feed-In Tariff has been a victim of its own success. Over 21000 installations have taken place since its introduction. The new Coalition Government is now seeking enormous cuts in public spending, and in February of this year Government announced comprehensive review of FITs in order to achieve 10% annual savings. At the same time there has been the development of large scale industrial solar farms on agricultural land, still below the 5MW limit and taking advantage of FITS, but drawing very large sums of subsidy. This year the Government announced a comprehensive review of the FITS scheme giving a clear indication that the high FITs rates were really intended for the domestic installer (despite the fairly high 5 MW limit) rather than large-scale solar farms. There is currently a lot of heated discussion in the press with those promoting large scale farms (including local authorities) arguing the Government announcement of a review has now stalled further investment into

large scale installations. They have threatened legal action against the Government, presumably based on principles of legitimate expectation.

(c) Climate Change Levy

Introduced in 2001 as part of the UK's commitment under the Kyoto Protocol to reduce emissions, the levy is a tax on non-domestic energy use, and designed to promote energy efficiency and reduce greenhouse gas emissions.[2] Businesses that have Climate Change Agreements with the Government get an 80% reduction on the levy (to be reduced to 65% in April 2011). Renewable electricity and electricity produced from some Combined Heath and Power Plants are exempt from the Levy.

(d) Electricity Market Reform currently being considered

In December 2010 the Government launched a consultation on the fundamental Reform of the Electricity Market. The underlying rationale is a view that the current market arrangements while delivering secure sources of energy at low cost cannot handle future demands including the Government's obligation under the Climate Act 2008 to reduce greenhouse gases by 80% by 2050. The key objectives of the reforms are to achieve security of supply, decarbonization (including largely decarbonizing the electricity sector by 2030) , and to minimize cost increases to consumers. Renewables play a significant part in the strategy but the Review recognizes the challenges of the technologies - high capital costs, intermittent generation (especially wind), or inflexibility in having to run continuously for technical reasons - *"These characteristics of low-carbon plant mean that the system will require flexible capacity that is able to respond to demand spikes or supply shortfalls from intermittent plant. While existing and new thermal plant will still be needed to provide reliable generation, the system will also need technologies such as demand side response, storage, interconnection and new thermal plant to fulfill this vital role"*

Four key proposals are made to improve investment in lower carbon technologies more attractive, and ensure greater revenue certainty :

(i) Government support for the carbon price, ensuring that whatever the market price under emissions trading , it is maintained at a minimum floor level. The costs are likely to passed through to the electricity consumer and is in effect a form of carbon tax. The International Emission Trading Association (IETA) the lead business organization on emissions trading, has recently responded : "*IETA does not understand why a government that has championed free*

[2] 2010/11 rates are electricity - 0.470p/kWh (pence per kilowatt hour);gas - 0.164p/kWh ; coal - 1.281p/kg (pence per kilogram); Liquid petroleum gas 1.050p/kg.

markets and open trade, and lent strong support to the European Commission in the use of trading mechanisms to reach climate objectives, is now seemingly turning its back on emissions trading as a policy instrument. IETA believes that the UK proposal for a carbon price support mechanism..... shows a serious lack of trust in the EU ETS which is the cornerstone of the EU's strategy for fighting climate change".[3]

(ii) A contract for difference feed-in tariff, under which the Government will guarantee greater revenue certainty for low carbon in the form of a top up payment if the wholesale price is below the feed-in tariff, and a potential claw back for consumers if wholesale prices are above the contracted tariff. The Government would calculate average electricity prices each month, but contracts would be auctioned. This would extend FITs from small generators as currently introduced in 2010 across the sector, and would replace the ROCs system in 2017. The proposals follow the FITs model used in the Netherlands for renewables ('shifting premium') and in Denmark for off-shore wind. The immediate reaction from many in the renewables industry has been a concern about the lack of detail in the proposals and the uncertainties they may create for investment.

(iii) Additional payments to encourage the construction of reserve plants or demand reduction measures. Capacity payments will create an adequate safety cushion of capacity as the amount of intermittent and inflexible low carbon generation increases.

(iv) Emission performance standards for coal fired power stations in addition to the current policy that no new power station can be built without capacity for carbon capture and storage.

4. Sustainability Requirements for Biomass (Q 2)

Sustainability reporting for biomass was introduced in the Renewable Obligations Order in 2009, but the 2011 Order will introduce eligibility standards starting from 2013. They include a minimum 60% lifecycle greenhouse gas (GHG) emissions savings threshold for solid biomass (including energy crops) and biogas, as compared to the European Union's (EU) recommended comparator figure for EU fossil-fuelled electricity generation of 712.8 kgCO2/MWh; and a restriction on raw materials from land with a high bio-diversity value, or carbon stock such as wetlands or primary forest. Importantly, the criteria will not apply to biomass or biogas made from waste, or generators below I MW.

A stricter set of criteria are applied to bioliquids because of concerns that some are not sustainable. Eligibility criteria for these start immediately in 2011 rather than 2013. The same

[3] IETA (2011) *Response to UK Carbon Price Support Mechanism* 11 Feb 2011

land restrictions apply, but there is no exemption for waste, and a Greenhouse Gas savings threshold will apply, in accordance with the Renewable Energy Directive. Tthe requirement for GHG savings will start at 35% and increase in stages to 60% by 2018. The "mass balance system" set out in the Renewable Energy Directive will be applied by generators to determine compliance.

Guarantees of Origin (Q 7)

The Electricity (Guarantees of Origin of Electricity Produced from Renewable Energy Sources) (Amendment) Regulations 2010 came into effect in December 2010 implementing Art 15 of the Directive.

5 Court Cases (Q 3)

There have been a large number of cases (over 50 in the last ten years) concerning the legality of planning permissions for on-shore wind-farms, generally brought by neighbours or local amenity groups. In these cases, the courts are concerned with whether the decision is legally correct, implying that either there is a procedural flaw or that the judgment of the decision-maker is manifestly unreasonable. Very few cases are successful.

Highlighted are two recent ones.

Derbyshire Dale v Secretary of State and Carshington (High Court 2009) (4 turbine wind-farm effecting National Park). The key question was whether a planning authority considering a proposal for wind farm is legally obliged to consider alternative sites. The court held there was nothing in UK land use planning law that required alternative sites to be considered – sometimes alternative sites will be relevant but this largely a matter of planning judgment. The position would be different if any relevant national or local policy guidance expressly required alternative sites to be considered - relevant national planning policy on renewable energy required proposals to demonstrate how social and environmental impacts “have been minimized through careful consideration of location, scale, design and other measures.” This was not equivalent to requiring alternative sites to be considered.

R on application of Friends of Hethel v South Norfolk District Council and EcoTricity (Court of Appeal 2010).
3 wind turbines with a max height of 120m near village with historic houses. The Environmental Statement produced by the developer estimated that the view from some 11 historically listed

buildings within 5km would be affected. The local authority granted permission. The Environmental Assessment regulations require a planning authority to consult English Heritage (the national body dealing with historical buildings) where the proposal would affect the "setting" of a listed building. The Court accepted that this issue was mainly a matter of planning judgment by the local authority. But where, as in this case, the Environment Statement produced by the developer expressly indicated an effect, a planning authority had to explicitly state why they disagreed to justify non-notification to English Heritage. Here they had not done so, and simply asserted there would be no effect - the decision was therefore quashed.

Validity of Renewable Obligation Certificates

Last November the High Court considered for the first time the validity of ROC assignments. In 2009 the Government introduced ROC banding for different renewables. In *Tate & Lyle v Secretary of State for Energy and Climate Change* (Nov 2010), the company operated a biomass fired combined heat and power boiler which received a low allocation of 1 ROC/MWh, and argued that the state of the technology and pay-back rates meant the technology should have received 1.5 ROCs/MWh. The Government carried out a special review of just that technology, and found that it had indeed miscalculated capital costs, justifying a higher band. But since wholesale electricity prices had risen in the meantime beyond predictions, the figures balanced out, and ithe Government therefore stuck to its original banding. Tate and Lyle argued this was unfair as the wholesale prices had risen for all competing technologies and these had not been reviewed. The Court accepted that there should be no undue discrimination in the scheme, but all the technologies under ROCs were to be reviewed by 2013 and the system could not work if figures were being continuously updated. The Government could not legally ignore the effect of increased electricity prices they had discovered in this case but this did not mean they had to then not to open up everything at this stage.[4]*."*

6 National Debate (Q 4)

On-shore wind has probably created the most public controversy arousing vociferous local objections since the first wind farm was built in 1991, and with major national environmental groups such as Friends of the Earth and the Council for the Protection of Rural England frequently opposed to each other on the issue (see further para 7 below). Scepticism about climate change amongst the general public has grown in general terms with the BBC in 2010

[4] In a commentary on the case, I noted, *"The case underlines the extent to which regulatory regimes based on economic instruments are often in reality rather cruder and broader-brush than their advocates sometimes contend* - ENDS Report Nov. 2010 Issue 430 72-73

reporting that over the past 12 months there had been a swing of 9% towards people believing that climate change was not taking place. Allowing for those who believe climate change is taking place, the total number of the general public who believe it is a scientific fact that climate change is largely man-made has dropped from two-fifths (41%) to a quarter (26%). Government to date, however, has not reacted to these shifts by weakening policies on climate change, and there has been cross-party support for the Climate Change Act 2008.

Despite the commitments being made by Government concerning renewables, there is a reasonable level of political debate as to the costs and realism of the targets being proposed, although this still probably largely remains within an expert elite. The Parliamentary Select Committee on Energy and Climate Change is currently conducting an inquiry into the Government's proposal for reforming the electricity market, and is hearing from a wide range of witnesses. A number of the leading academic energy experts question the amount of investment that will go towards off-shore wind in particular (perhaps £10 billion a year over nine years) and whether this is the best use of such money, especially set against an expanding market of gas.

7 Public acceptability and planning (Q 5)

A report released by the wind industry at the end of 2010 stated that the approval rate for new on-shore wind farms had fallen to 55% in 2010 from 83% in the previous year - in 2009 for example, there were 1203 applications approved and 747 refused.[5] But analysis suggests that the current rate of approval will still allow the UK to meet its 2020 renewable target though there is much newspaper debate as to whether the planning system is the real cause of delay. In February this year the umbrella group for the wind industry announced a new protocol under which the industry would pay local communities a minimum of just over 1000 Euros per year per megawatt of capacity over 20 years. The Government has supported this approach arguing that too often local communities see what they lose by such developments but not what they might gain. But the national coalition of action groups against wind-farms has dismissed these proposals as mere bribes.

Some examples of refusals of permissions for wind farms include:[6]

> Ten wind turbines, each with a 60m tall mast and maximum rotor diameter of 80m, in

[5] Renewable UK (2010*) State of the Industry 2010*

[6] House of Commons Briefing Note *Consents for Wind Farms - Onshore* SN/SC/4370 11 February 2011

Lincolnshire - much taller than any other man-made structure in the area and the nearest village would be unacceptably harmed by the proximity of two turbines (2006)
A major wind farm with 24 turbines, just outside the boundary of the Lake District National Park was refused consent because the adverse impact on the landscape (2006).

Six wind turbines in Norfolk were rejected because the landscape setting of listed buildings within 2.5km of the turbines would be seriously harmed by such uncompromisingly modern structures. (2006)

Scottish Ministers rejected a proposal at the Isle of Lewis for an enormous 181-turbine wind farm to generate 651MW of electricity because of the potential impact on wildlife.These areas were of international importance for a range of wild birds, including golden eagles (2008)

Public concerns over on-shore wind farms has encouraged the Government to promote the case for off-shore, though there has been considerable opposition in a number of cases of near-off shore development, where this was thought to blight the coastline. In 2009 the Government announced that the bulk of licences for the next round of off-shore wind-farms would be generally some 22 km from the coast.

There are also potential contradictions in the Government's own proposals to reform the planning system. Planning decisions for development have generally always been initially taken by local planning authorities but with the developer having a right of appeal to Central Government to reconsider the decision. Central Government both through its appeals procedures and the issuing of planning policy guidance has therefore exercised a strong influence on the system. The Planning Act 2008, introduced by the previous government and largely endorsed by the current government, introduced procedures decided to speed up decision-making for major infrastructure projects of national significance including generating stations of over 50 MW whether renewable or not. The key provisions in the legislation provide for the making of National Policy Statements in different areas which are approved by Parliament and essentially then must be followed by the decision-maker (this is designed to curb excessive opening up of fundamental policy issues when individual applications are handled); applications for major infrastructure projects are handled directly by Central Government, and while involving public participation the issues to be discussed are largely determined by a government planning agency and largely unconstrained cross-examination of witnesses by lawyers representing developers, local authorities, and amenity groups (a hall-

mark of previous public inquiries) is curbed. . We have yet to see one of the new style inquiries.

In 2009 the Government published a draft **National Policy Statement on Renewables**, a revised version of which was presented to Parliament at the end of last year, along with a suite of other energy Policy Statements. These have still not been finally approved. All of the energy Statements were subject to an Appraisal of Sustainability incorporating the requirements of the regulations that implement the Strategic Environmental Assessment Directive and Habitats Regulations. These include an broad-scale consideration of high level alternatives including : securing low cost energy; reducing greenhouse gas emissions and reducing other environmental impacts of energy infrastructure development. For the Renewables Statement in particular the two key alternatives considered were:
(a) adopting a policy that would be less tolerant of the adverse visual, noise and shadow flicker impacts of onshore wind farms;
(b) adopting a policy that would mean consents set more stringent criteria for the fuel for biomass/waste combustion facilities based on sustainability considerations. Both were rejected in favour of the proposed policy.

A Parliamentary Committee reported on the draft National Policy Statements in January of this year[7]. The Committee generally endorsed the approach being taken but argued that the Government had not sufficiently indicated the choices for approval of types of new capacity required, and there was a danger of a second 'dash for gas' by investors looking for cheap and easy solutions.

The Planning Act is concerned with major infrastructure projects in the national interest. At the same time the present Coalition Government has recently proposed giving greater power to local Communities under a new Localism Bill. These include powers for local Parishes and similar authorities (about a small town or village size) to develop neighbourhood land use plans which eventually must be included in district local plans. Plans do not as such grant development rights nor are they absolutely binding when dealing with an individual application (but the burden on the applicant to justify departure). It is possible under these provisions that local communities could develop plans to try and prohibit, say, small local wind farms in their locality.

[7] Select Committee on Energy and Climate Change Third Report - the Revised Draft National Policy Statements on Energy January 2011

8 Strategic Environmental Assessment (SEA), Environmental Assessment, and Habitats Protection (Q 6)

SEA

Government departments have carried out a variety of SEAs in relation to renewable energy. From around 2002, there have been 8 SEAs in relation to assessing the implications of further rounds of offshore wind farm leasing in the UK Renewable Energy Zone and the territorial waters of England and Wales. The Northern Irish Government is currently carrying out a Strategic Environmental Assessment in developing a Strategic Action Plan for On-Shore renewables. In 2009 The Scottish Government carried out an SEA of its proposed Renewables Action Plan.

The 2009 National Policy Statements on Energy were subjected to Strategic Environmental Assessment but one of the Parliamentary criticisms of the initial drafts of National Policy Statements was that they had failed to adequately address alternatives as required under the Directive. Revised Statements were issued in 2010, and in 2011 a Parliamentary Committee noted that the SEA had contained a wider range of alternatives, but some environmental groups argued they were still treated in a superficial way contrary to the requirements of the Directive. The Committee was clearly a little uneasy on this issue and recommended that in future greater attention be paid to alternatives : *We recommend that to avoid charges of non-compliance in the future, the Government publish guidelines on how, in carrying out Appraisals of Sustainability for future National Policy Statements, it intends to ensure fulfillment of the requirements of the Strategic Environmental Assessment Directive. It should then consult separately on this statement of principles and practice. For the present, we consider that the Appraisals of Sustainability will pass muster. (para 28).*

Environmental Assessment of Projects

When the original 1985 Environmental Assessment Directive was agreed, it did not include wind farms within a project category. Interestingly, in transposing the Directive it was one of the few examples of the UK Government 'gold-plating' in that, following extensive lobbying from conservation groups, it included wind energy farms under the list of discretionary projects. Under the current The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, threshold criteria apply to certain categories of discretionary projects - for renewable energy, the two thresholds are : hydroelectric (0.5 MW

plus) ; wind-farms (more than 2 turbines or where structure exceeds 15 metres).[8]. Projects above the thresholds will then be subject to screening to decide whether they should be subject to environmental assessment, but projects below are exempt from screening unless they are in a 'sensitive area' (basically conservation protected areas, including National Parks).

Habitats Protection etc.

There has been no explicit shift of policy giving renewables priority over the protection of habitats and other designated areas, and the Renewables Energy Strategy 2009 expressly states that the new Strategy does not change existing environmental protections. Planning policies relating to renwables tend to reiterate the requirements of the Habitats Directive. The 2008 decision of the Scottish Government to reject an enormous on-shore wind-farm on the Isle of Lewis (see 7 above) because it would be incompatible with European designation is probably to biggest renewable casualty to date. In relation to off-shore wind-farms, sites are licenced by competitive tender by the Crown Estate (essentially the public body responsible for managing government owned resources including the sea-bed). The Crown Estate was criticized in early rounds for being insufficiently environmentally senstive, but it has clearly worked much harder for Round 3, begun in 2010, and rcontaining none zones, potentially the largest area of marine resources yet opened up to off-shore wind. The main government agency for nature protection, Natural England, which is in the process of designating new Natura 2000 marine protected agencies, praised Crown Estates for their more robust approach in Round 3.[9] In 2009 Natural England began holding workshops with the wind industry to ensure it fully understands the interactions between offshore windfarms, the possible Special Areas of Conservation and potential Special Protection Areas and the existing designated sites within the Natura 2000 network.

9 New Legislation relating to Directive 2009/28/EC (Q 7)

As indicated above, there is no single piece of legislation transposing the Directive but increasingly it can be seen to be driving new legislative and policy initiatives. An Energy Department statement in Parliament on 8 Dec 2010 listed the Directive as one of seven 2009 energy directives awaiting transposition, though regulations have been made concerning the

[8] Proposed new regulations will lift this to 18 metres

[9] according to Natural England's chief executive, *"We are pleased to have been fully engaged in the Round 3 process so far, advising on known areas of sensitivity which are best to avoid or will require careful consideration from an environmental perspective"*
http://www.naturalengland.org.uk/about_us/news/2010/080110a.aspx

guarantee of origin (see above). It is not yet clear how many provisions of the Directive will need to be transposed into formal national law.

The Directive's most immediate impact is probably to be seen in national or regional policy statements which underpin and help drive individual land use planning decisions, For example, the new 2009 Northern Irish Planning Policy Statement 18 on Renewable Energy expressly refers to the Directive as a key obligation forming the backdrop to the Policy Statement. In March 2010 the Dept of Communities and Local Government (England) consulted on a new draft Planning Policy Statement - *Planning for a Low Carbon Future in a Changing Climate* - which would replace existing policy statements on renewable energy and climate change. The Directive is quoted at the beginning of the document as one of the significant recent legal changes requiring a new Statement. In July 2010 the Welsh Government consulted on new changes to their Planning Policy relating to renewables, and again expressly quote the Directive as one of the drivers for the need to update their policy.

10 **Climate Change legislation (Q 8)**

The Climate Change Act, which came into force in November 2008, creates a new legal framework for the UK to reduce greenhouse gas emissions to at least 80% below 1990 levels by 2050. The Government is required to set five-year carbon budgets, which place binding limits on greenhouse gas emissions and define the trajectory towards the 2050 target.

An important element of the new legislation was the setting up of an independent expert Committee on Climate Change which provides regular advice and monitoring of government progress. Following advice received in December 2008 from the Committee the Government announced the level of the first three carbon budgets (2008-2012, 2013-2017, and 2018-2022) and published its response to the Committee on Climate Change's advice alongside the Budget on 22 April 2009. The levels of the first three carbon budgets were approved by Parliament in May 2009, and are now set in law. They require greenhouse gas emissions to be reduced by at least 34% in the third budget period, relative to 1990 levels.

In 2009 the Scottish Parliament passed the Climate Change (Scotland) Act 2009, clearly modelled on the 2008 Act but in some ways enhancing its provisions. It repeats the 80% reduction by 2050 but includes an interim target of a 42% reduction for Scotland by 2020. A Scottish Committee on Climate Change is set up with a similar role to the UK Committee.

A distinctive feature of the Scottish legislation is a general duty placed on all public bodies requiring them to exercise their functions so as best to ensure delivery of the targets The Scottish Government must issue guidance to public bodies concerning their duties and in Sept 2010 issued a draft for consultation.

The unusual features of both these Climate Change Acts are their expression of precise long term targets as a legal duty. This is coupled with largely procedural requirements ensuring that the Government of the day is kept to task in accounting for progress in meeting the targets, particularly to Parliament. It is difficult to see how the long-term target duty could be enforceable by the court in any meaningful way but the duties to report by specific dates clearly are judicially enforceable. Furthermore we are already seeing a number of cases where the existence of the Act has had an impact - for example, the failure of the Government to reassess its policies on the expansion of London airport was held illegal in a 2009 decision of the High Court. The fact that these duties and goals are expressed in primary legislation mean that they are difficult to modify or weaken in the absence of express amendments by Parliament to the legislation, and to date the legislation has received cross-party support. . It is all too easy for governments to change or diminish commitments expressed merely as policy, far less so where commitments are contained in legislation.