

The Future of Energy – What is Green

29 November 2022

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Strategic Litigation to enforce the Paris Agreement

Jessica Crow
Independent Arbitrator

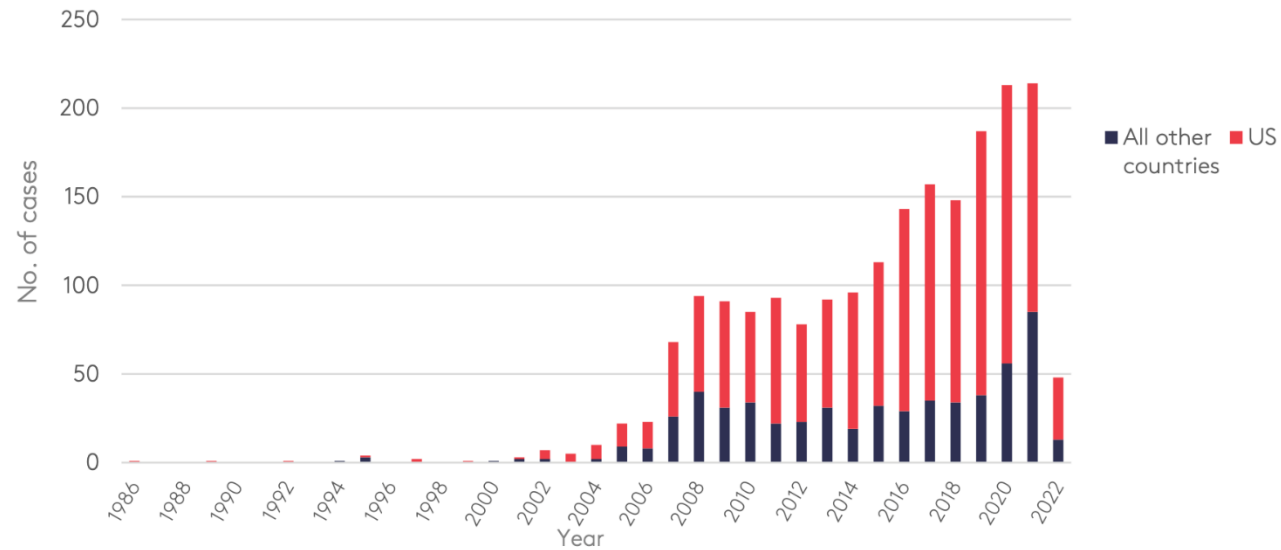
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Climate Cases: Overall Figures

Figure 1.1. Total climate change cases over time, US and non-US (up to 31 May 2022)



Source: Authors based on CCLW and Sabin Center data

Grantham Research Institute

- 2,002 cases have been filed around the world
- the number of climate cases has more than doubled since 2015
- Increase in cases brought by NGOs, individuals, or both acting together
- Governments are most common defendants, followed by energy (fossil fuel) corporates

Strategic Litigation: Trends in Focus

Governments	Governments & Corporates	Corporates
Domestic accountability for climate commitments	Enforcing climate standards and human rights law and due diligence	Greenwashing and climate misinformation
Challenging regulatory powers and compensation for stranded assets	Accountability for fossil fuel expansion and supply chains	Personal responsibility of directors to manage climate risk

Theories of Liability

Human and
Constitutional
Rights

**Urgenda
Foundation v.
Netherlands**

Corporate
Human
Rights Due
Diligence

**Milieudefensie
v. Shell**

Tort

**Sharma v MOE
Australia**

Directors'
Duties

**ClientEarth v
Board of
Directors of
Shell**

Unfair
Commercial
Practices

**Greenpeace v.
TotalEnergies**

Judicial
review

**Sierra Club
Canada v. MOE
Canada and
Equinor**

Fair and
Equitable
Treatment

**RWE v.
Netherlands**

Predictions: Future Trends



strategic, rights-based climate cases against companies and governments



litigation focused on personal responsibility, such as directors' duties to manage climate risk



litigation against governments and corporates that over-rely on GHG removals, negative emissions technologies, offsetting and carbon trading



More claims under investment treaties in relation to the implementation of climate policy and asset stranding

The Ten-Point Plan, REMA, new nuclear and other Net Zero developments in the UK

29 November 2022

Duncan Sinclair

Overview

- Net Zero 2050 (Paris Agreement, CCA 2008 as amended)
- Ten Point Plan (holistic), new nuclear (in train), Review of Electricity Market arrangements (REMA, Consultation stage)
- UK Electricity Generation net zero by 2035 (Government pathway)
 - Electrified heating and transport increases demand (**2x 2035 - 4.5x 2050** - BEIS high demand scenario)

Ten Point Plan for Green Industrial Revolution (Nov 2020)

High Level: 32 pages, covering:

Point 1: **Advancing Offshore Wind**

Point 2: **Driving the Growth of Low Carbon Hydrogen**

Point 3: **Delivering New and Advanced Nuclear Power**

Point 4: **Accelerating the Shift to Zero Emission Vehicles**

Point 5: Green Public Transport, Cycling and Walking

Point 6: Jet Zero and Green Ships

Point 7: Greener Buildings

Point 8: **Investing in Carbon Capture, Usage and Storage**

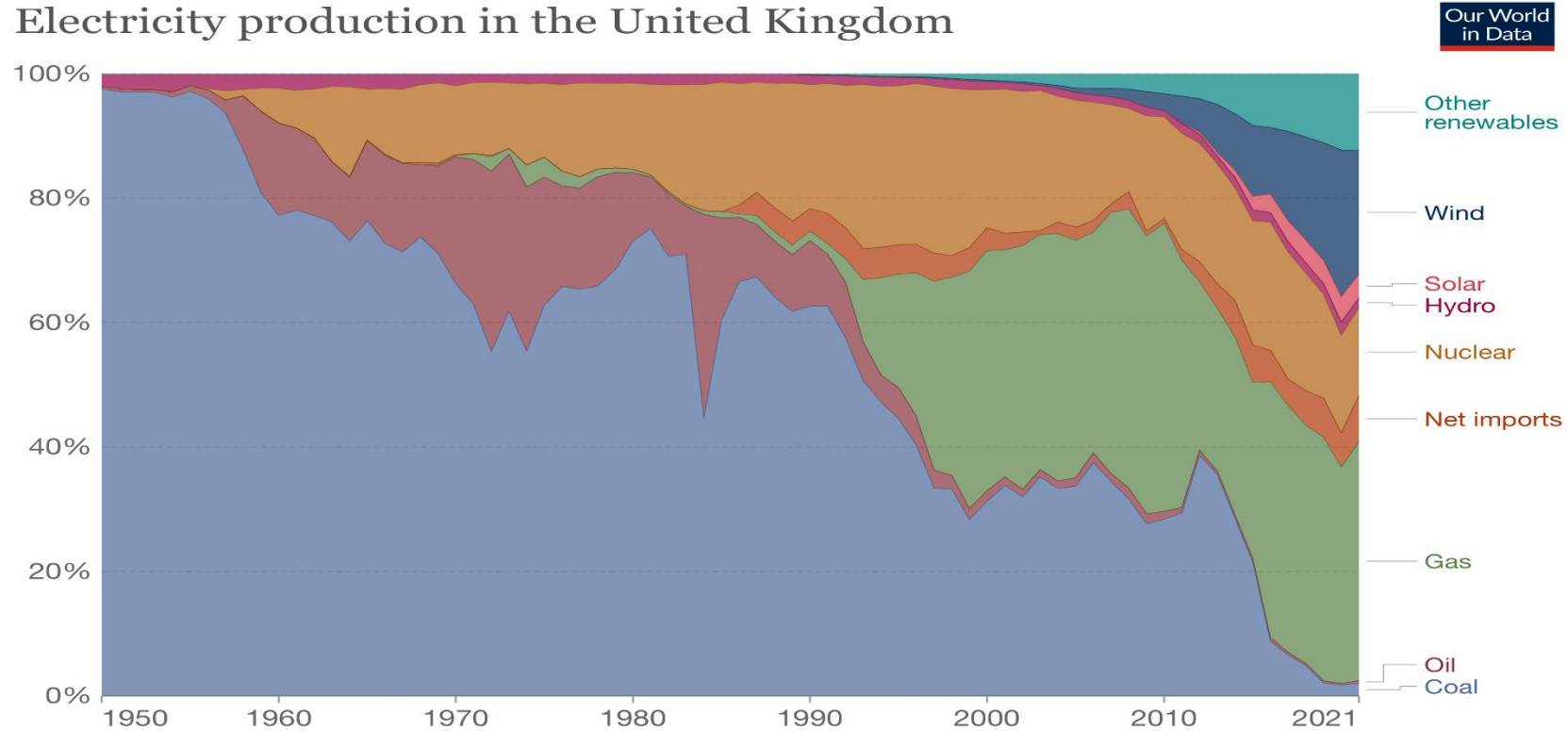
Point 9: Protecting Our Natural Environment

Point 10: **Green Finance and Innovation**

Electricity generation (and domestic gas) not inseparable; they also account for large % of UK emissions

Evolving Electricity Generation Fleet

Electricity production in the United Kingdom



Source: Digest of UK Energy Statistics (DUKES); BP; Ember

Note: Includes electricity generation (which may include electricity that is exported) plus net imports.

OurWorldInData.org/energy • CC BY

REMA Scope of consultation (!)

Wholesale market - location	National pricing		Zonal pricing		Nodal pricing		
Wholesale market - tech	Unified market			Split by characteristic			
Wholesale market - balancing	National			Local then national			
Wholesale market - price formation	Pay-as-clear			Pay-as-bid			
Wholesale market - dispatch	Self-dispatch			Central dispatch			
Mass low carbon power	Existing CfD	CfD with more price exposure	Deemed generation CfD	Supplier obligation	Revenue cap and floor	Dutch subsidy	Equiv. firm power auction
Flexibility	Optimised CM	CM with flex enhancements	Supplier obligation (inc. CPS)				
Capacity adequacy		Capacity payment	Centralised reliability option	Decentralised reliability option	Targeted tender	Strat. reserve	
Operability	BAU	BAU+	Local markets	Changes to CfD/CM design	Co-optimisation	Dedicated support scheme	

REMA – objectives and timeline

- REMA “Consultation Objectives” (pages 17-18)

Decarbonisation, Security of Supply, Cost-effectiveness

(....the (ahem) ‘energy trilemma’....)

- “...we are not proposing to group individual options into coherent policy packages in this consultation” (p.10) “There is a case for revolution... There is also a case for evolution” (p.57).
- REMA timeline
 - Report “this winter”
 - “Developing and determining reforms via engagement” 2022-23
 - Delivery plan and implementation “From the mid 2020’s”

How do you make God laugh?

“The United Kingdom is not afraid to lead the charge towards global net zero at COP26, because history has never been made by those who sit at the back of the class hoping not to be called on. Indeed, as we set an example to the world ...so the likes of China and Russia are following our lead with their own net zero targets.”

PM Boris Johnson, Net Zero Strategy presented to Parliament October 2021 pursuant to Section 14 of the CCA 2008

- Within a year 2 PMs (and 2 Secretaries of State) on...
- The NZS successfully judicially reviewed as the figures didn't stack up/insufficient evidence
 - Kwazi Kwarteng Secretary of State for BEIS
- Russia invades Ukraine, energy crisis, Rishi Sunak almost not attending COP27

The Commentator's Curse (Predictions)

- A (non-intermittent) replacement for gas – a dash for from gas – is needed: (battery) storage/biomass/DSR/CCUS
- Increased role CfDs (some changes) in preference to mooted approaches to a split wholesale market (e.g intermittent vs firm)
- Locational/temporal signals (by network charges and in balancing market in preference to nodal/zonal pricing (pro tem))
 - + BESS: updating planning National Policy Statements reflecting network 'blueprints' + increased local plans
- New Nuclear already underway – NDA and ONR roles

Some Examples of Successful Litigation

- CCA 2008 e.g. *R. (FOE, Client Earth, Good law Project and ors) v SSBEIS* [2022] EWHC 1841 (Admin):
 - failures re material considerations and reasons in publishing carbon budgets/report under CCA 2008
- *R (Friends of the Earth and ors) v SSECC* [2012] EWCA Civ 28 and the follow-on *Breyer* Litigation (see also *Infinis*)
 - Investor’s Contracts and (*Infinis*) legislative rights as protected property rights
- *Wood Boilers v GEMA (Ofgem)* 2020 EWHC 1578
 - Legitimate expectation as property right *even if against secondary legislation* ‘strongly arguable’

Investor and advisor/litigator impacts

- CFDs continue *at least* for now
- Contracts and other A1P1 property rights protected
- Massive investment in all renewables – not just wind/solar generation will be incentivized. CfD/CM Auctions.
- 2008 CCA is binding – litigation ultimate resort.
- New/Smart Tech (e.g. smart EV and grid/heating/tariffs)

Thank you...

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ANNEX – Document references

Ten Point Plan for a Green Industrial Revolution (November 2020)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/936567/10_POINT_PLAN_BOOKLET.pdf

British Energy Security Strategy (April 2022)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1069969/british-energy-security-strategy-web-accessible.pdf

Review of Electricity Market Arrangements (REMA) July 2022 consultation document closed 10 October

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1098100/review-electricity-market-arrangements.pdf

Also see Ofgem Net Zero Britain (Ofgem.gov.uk) 9 July 2022

Net Zero Strategy: Build Back Greener (report to Parliament pursuant to s.14 CCA 2008) 19 Oct 2021

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033990/net-zero-strategy-beis.pdf

NB held insufficient in parts in successful JR: *R. (FOE, Client Earth, Good law Project and ors) v SSBEIS* [2022] EWHC 1841 (Admin)

Keeping it Green: nature and biodiversity in the consenting process

29 November 2022

Victoria Hutton

Sizewell C



Site Context

- 19 National Site Network Sites screened in (SACs, SPAs, Ramsars)
- Numerous SSSIs in play
- Various protected species potentially affected



A number of relevant legal provisions

- Infrastructure Planning (Environmental Impact Assessment) Regulations 2017
- Conservation of Habitats and Species Regulations 2017
- Conservation of Offshore Marine Habitats and Species Regulations 2017
- Natural Environment and Rural Communities Act 2006
- Wildlife and Countryside Act 1981
- Water Environment (Water Framework Directive) (England and Wales) Regulations 2017
- Marine and Coastal Access Act 2009

A number of relevant policies

- Mainly EN-1 and EN-6 but also Marine Policy Statement, Marine Plans and other policies as material considerations
- Some key provisions include:
 - ‘Where proposed development on land within or outside an SSSI is likely to have an adverse effect on an SSSI (either individually or on combination with other developments), development consent should not normally be granted. Where an adverse effect, after mitigation, on the site’s notified special interest features is likely, an exception should only be made where the benefits (including need) of the development at this site, clearly outweigh both the impacts that it is likely to have on the features of the site that make it of special scientific interest and any broader impacts on the national network of SSSIs’ (5.3.11 EN-1)

Some Policy Tests (cont.)

- Ancient woodlands – ‘The IPC should not grant development consent for any development that would result in its loss or deterioration unless the benefits (including need) of the development, in that location outweigh the loss of the woodland habitat’ (5.3.13 EN-6)
- Biodiversity – requirement to ‘maximise’ opportunities for beneficial features (5.3.15 EN-6)
- Protected species – ‘The IPC should refuse consent where harm to the habitats or species and their habitats would result, unless the benefits (including need) of the development outweigh that harm.’
- Etc.!

What worked well at SZC?

- Long term preparation:
 - Assessments;
 - Design; and
 - Mitigation.
- Assiduous coordination of assessments and commitments
- Translation of mitigation and compensation into legal obligations/requirements

Focus on the Marsh Harrier



The Marsh Harrier

- Qualifying feature of Minsmere-Walberswick SPA and Ramsar Site
- Applicant's sHRA acknowledged that adverse impacts on integrity of those sites could not be ruled out due to potential impacts of noise and visual disturbance from construction activities on the breeding marsh harrier
- In those circumstances, regulations 64 and 68 Habitats Regulations 2017 provide consent may only be granted where:
 - Imperative reasons of overriding public interest
 - No alternatives
 - Compensation

The Marsh Harrier

- Clear case for IROPI accepted by ExA and SoS – SoS DL noted the ‘principal and essential benefit of the Proposed Development as a significant contribution to limiting the extent of climate change in accordance with objectives of the Paris Agreement’ (DL 5.35)
- ExA and SoS agreed that there were no alternatives

The Marsh Harrier

- Applicant proposed compensation at Abbey Farm
- Another proposed site 'in reserve' but would need CPO
- Key issue was whether wetland area of compensation would come forward prior to adverse impact occurring
- Between ExAR and SoS DL (following additional consultation by SoS) Applicant committed to amend excavation timetable to ensure that wetland would be in place prior to impact.
- Key to ensuring that compensation was legally adequate
- No need for reserve site, therefore CPO test not made out

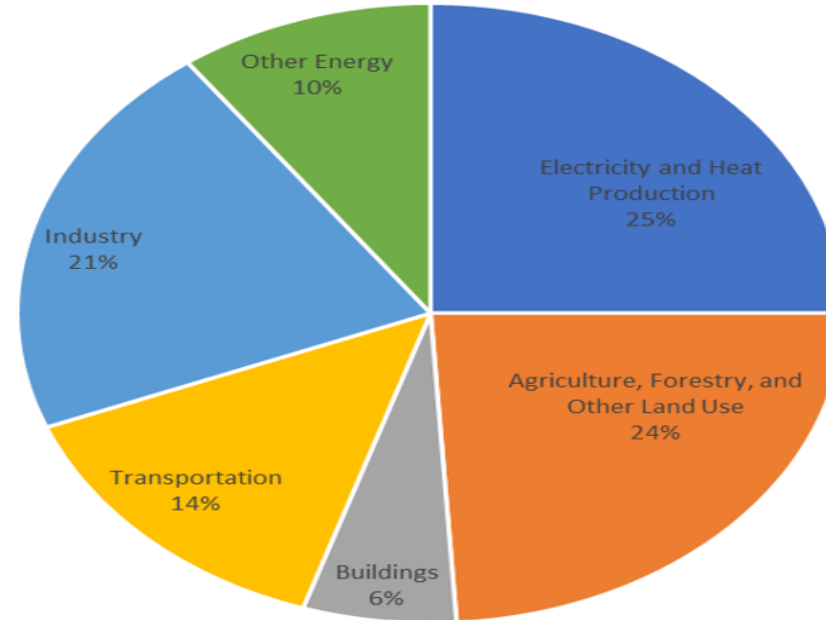


The Future of Energy Sector Construction Disputes and Combating Greenwashing

29 November 2022

Ruth Keating

Global Manmade Greenhouse Gas Emissions Estimates By Sector From The IPCC



GHG emissions

Energy transition is crucial to reducing green house gas emissions. Further, the construction industry itself is, when one dives into the figures, responsible for 39% of global energy related carbon emissions.

- 28% from operational emissions, from energy needed to heat, cool and power buildings; and
- the remaining 11% from materials and construction.

Old and new challenges



- Many projects experience common issues that have always arisen in large construction projects:
 - claims relating to time and delay;
 - defects;
 - quality and performance; and
 - payment and variation disputes.
- So some of the challenges in the future are not new – from a legal perspective.
- What is different, is that energy projects can often be more complicated than other construction projects.

Sweihan Photovoltaic Independent Power Project, UAE



- Covers an area of 7.8 square kilometers.
- Features 3.2 million solar panels.
- Innovative module layout design.
- High-efficiency monocrystalline solar modules.
- Advanced project maintenance.

Gansu Wind Farm, China



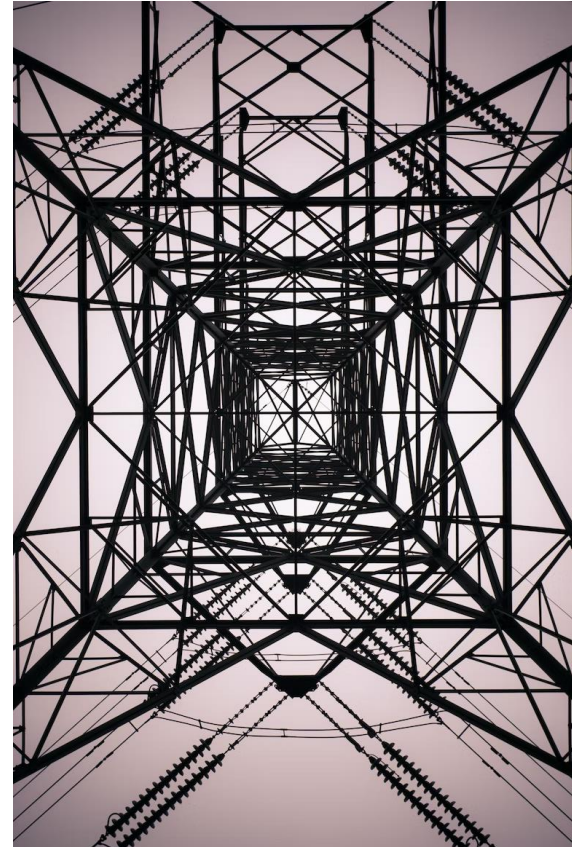
- Estimated to be worth 17.5 billion dollars.
- The theory behind the project was that it would produce enough energy to power a small country.
- According to the New York Times –adding wind turbines across the country at a rate of more than one per hour.
- In the case of Gansu it has not been the huge success.
- Gansu is a barren, mountainous province.
- Far from the booming cities of eastern China.

Challenges – technology and climate change



New technology and industry standards

- Claims arising where new technologies fail to perform.
- *MT Højgaard A/S v E.ON Climate & Renewables UK Robin Rigg East Ltd and another* [2017] UKSC 59.
- Lack of industry standard forms or settled interpretation of existing standard forms.



Climate change: impact on projects

 19 July 2022

Provisional max temps

Coningsby	40.3 °C
St James's Park	40.2 °C
Heathrow	40.2 °C
Gringley On The Hill	40.1 °C
Kew Gardens	40.1 °C
Northolt	40.0 °C

- Delay or disruption events.
- Design parameters and tolerances.
- Warranties, exclusions and indemnities.
- Force majeure provisions.

Greenwashing – HSBC



Greenwashing – HSBC

- The first poster featured an aerial image of waves crashing on a shore with text that stated “Climate change doesn’t do borders. Neither do rising sea levels. That’s why HSBC is aiming to provide up to \$1 trillion in financing and investment globally to help our clients transition to net zero”. (Ad (a).)
- The second poster featured an image of tree growth rings with text that stated “Climate changes doesn’t do borders. So in the UK, we’re helping to plant 2 million trees which will lock in 1.25 million tonnes of carbon over their lifetime”. (Ad (b).)
- On 19 October 2022, the Advertising Standards Authority’s handed down a landmark ruling in which it ruled that HSBC had failed to put its climate investments in the broader context of its contribution to carbon dioxide and greenhouse gas emissions.
- The ruling is worth reading but the point of general interest across the board is that the ASA emphasised that it did not think: “consumers would understand the intricacies of transitioning to net zero”.



Greenwashing – KLM

First greenwashing claim against an airline.

Environmental groups are suing over an advertising campaign they allege breaches European consumer law by misleading the public over how sustainable its flights are.

Greenwashing – construction and energy

- NEC Clause X29.
- FIDIC Red, Yellow and Silver Books.
- US Securities and Exchange Commission Proposed Rules to Enhance and Standardize Climate-Related Disclosures for Investors.
- The Task Force on Climate-related Financial Disclosures.



The Future

