REVIEW OF CIVIL LITIGATION COSTS

UKELA's RESPONSE TO THE PRELIMINARY REPORT

1. This is the response of the United Kingdom Environmental Lawyers Association to the Rt Hon Lord Justice Jackson's Preliminary Report concluded at the end of the first phase of his review of the rules and principles governing the costs of civil litigation[1].

2. UKELA is a registered charity the principal objects of which include the promotion, for the benefit of the public generally, of the enhancement and conservation of the environment in the UK, and, in particular, the advancement of the education of the public in all matters relating to the development, teaching, application and practice of law relating to the environment.

3. The Rt Hon Lord Justice Carnwath is UKELA's current President, having taken over the role in 2006 from the late Rt Hon Lord Slynn of Hadley. In addition to Lord Justice Carnwath, the Association's patrons are Baroness Young of Old Scone (former Chief Executive, the Environment Agency), Professor Sir Francis Jacobs KCMG, QC (Kings College London), Professor Richard Macrory (University College London) and Tom Burke CBE (Visiting Professor, Imperial and University Colleges, London).

4. Current membership (lawyers and non-lawyers) is in excess of 1,200.

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5. UKELA does not intend to add unduly to the already significant burden assumed by Lord Justice Jackson as a result of the consultation phase which follows publication of the Preliminary Report.

6. UKELA's underlying view is that the central approach of the costs rules themselves as set out in the CPR is correct, namely that costs should always be reasonable and proportionate but that those costs which have been necessarily incurred because of the conduct of the opposing party should be deemed to be proportionate (see *Lownds v. Home Office* [2002] EWCA Civ 365, [2002] 1WLR 2450). Overall costs are high in part a least because of the amount of work required by legal representatives properly to prepare proceedings as required by the CPR, for instance in respect of witness statements, disclosure, and expert evidence. UKELA welcomes any amendments to the CPR which reduce these costs whilst allowing cases to be tried justly.

7. UKELA's primary intention in this submission is to make representations about the means by which environmental litigation is funded, in particular in respect of private nuisance claims on the one hand and public law (judicial review) proceedings on the other. These are the specific matters which are discussed in Chapter 36 of the Preliminary Report (Volume One, p.332ff.). The Association has not made proposals as to the substantive areas of the CPR which might merit reform. Its resources have gone into addressing the costs and funding issues which it considers need a focused approach in the light of the obligations arising out of the Aarhus Convention. Reforms in other substantive areas contained in the CPR, on the other hand, are capable of a broader, non-subject specific approach.

Introductory

8. On 24 February 2005 the United Kingdom government ratified the UN Economic Commission for Europe's Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (The Aarhus Convention). The United Kingdom became a full party to the Convention 90 days later in May 2005.

9. As para.4.1 of Chapter 36 of the Preliminary Report notes, Article 9(3),(4) of the Aarhus Convention requires that in order to achieve access to environmental justice, members of the public must be able to obtain access to administrative or judicial procedures which enable them to challenge both acts and omissions by private persons and public authorities. The procedures available must enable members of the public to achieve adequate and effective remedies, including a right to injunctive relief when appropriate. Those procedures must be fair. They must be equitable, timely and not prohibitively expensive.

10. As the Court of Appeal observed in its Addendum to its judgment in *R (Sonia Burkett) v. Hammersmith & Fulham LBC* [2004] EWCA Civ 1342 (15th October 2004, unreported), there is a relatively small number of specialists practising in the area of environmental law and it is important those legal practices remain viable.

11. In *Burkett* the Court of Appeal specifically had in mind publicly funded litigation. The substantial replacement of civil legal aid by conditional fee agreements as a means of funding has resulted in the promotion of access to the courts by specialist environmental firms, even to some extent in judicial review cases. The uplifts earned from CFAs in such cases promote access to the courts by giving specialist firms the confidence and also the additional funding to take on a wider caseload of meritorious cases which may not be certain of

success. In judicial review cases the CFA has been a useful device to legitimise discounted fee agreements and what might previously have been described as 'speccing' arrangements.

12. UKELA welcomes the opportunity provided by Lord Justice Jackson's review to secure compliance with the Aarhus Convention by means of revised costs rules. These should preserve the position of claimants and their legal representatives who undertake private law cases which are CFA/ATE funded, and facilitate challenges in the public law area by doing as much as possible to ensure costs protection to claimants.

13. UKELA should like to take this opportunity respectfully to encourage Lord Justice Jackson and his assessors to make appropriate provision in the final report intended to promote access to the courts in environmental cases as a specialist area. There is every reason why specific rules should be made to cover distinct areas of legal practice. The policy considerations underlying costs and funding issues are different, and the rules should reflect this. A "one size fits all" approach is likely to result in inappropriate standardisation.

Private nuisance proceedings in the civil courts

14. Paragraph 5.1 of Chapter 36 of the Preliminary Report asks first for comments on the issues raised in respect of private nuisance proceedings.

15. There is no doubt that there has been a resurgence in the prosecution of private nuisance proceedings, made possible by means of CFA/ATE funding. CFAs have also become a standard means of funding for injurious affection claims in the Land Tribunal.

16. Characteristically, claimants in private nuisance cases primarily want an injunction to abate a nuisance inflicted on them by the operator of neighbouring installations, rather than damages. Private nuisance is a tort of strict liability and provides aggrieved claimants with a robust means of obtaining environmental justice. It is right that claimants should have the option of obtaining remedies themselves without having to rely on a regulatory body such as the Environment Agency.

17. The standard model of CFA/ATE funding in private nuisance cases seeks to ring-fence any damages recovered by clients at no costs risk to themselves (save for the possibility of non-cooperation with the legal representative or in the case of a serious dispute as to settlement). This is an aim which should be considered laudable.

18. In respect of private actions intended to remediate environmental damage, at least, the policy of successive governments of encouraging access to justice by means of CFAs has been remarkably successful and appears to be consistent with Aarhus.

19. Not only are claimants in such cases primarily interested in obtaining injunctive relief, but general damages in these cases, in particular in respect of transitory nuisances where an injunction might abate the problem, are typically small and are likely to be awarded by reference to the cost of a modest holiday (see *Dennis v. Ministry of Defence* [2003] EWHC 793 (QB), [2003] Env LR 34 and *Anthony v. The Coal Authority* [2005] EWHC 1654 (QB), [2006] Env LR 17). Save for exceptional cases such as *Dennis*, they are unlikely in most cases to result in an award of more than one or two thousand pounds per annum.

20. In these circumstances it would be impossible for a success fee (whether capped at 25% or otherwise) realistically to be recovered out of the client's damages.

21. In environmental cases UKELA's view is that the uplift should still be recoverable from the losing party. Abolition of the recovery of success fees would be a retrograde step and would put these specialist solicitors' practice models in jeopardy. Success fees are used by environmental lawyers as a means of funding other claims in the absence of an effective system of civil legal aid.

22. It should be pointed out that the use of CFAs in private nuisance claims can be differentiated from the effect of CFAs in other forms of litigation. In media proceedings the objection is understandably made that the recovery of uplifts can represent a 'chilling' effect on journalism. Private nuisance cases are unlike clinical negligence cases: opponents are generally private organisations and do not provide vital public services to individuals out of a taxpayer-funded budget. They are also unlike personal injury cases since damages are not the remedy ordinarily which claimants ordinarily seek, and because they are not pursued on such a large scale that it is possible to construct a Part 45 fixed costs regime allowing a 'swings and roundabouts' approach to the amount of recoverable uplifts.

23. UKELA also takes the view that to preserve clients' access to justice the appropriate uplift remains that which obtains in the present statutory instrument in respect of all types of proceedings, namely 100% (see s.i.2000/823 at para.4). Environmental lawyers tend to be 'committed' to their cause and are willing to take on cases which may not succeed. The uplift ensures that this is possible and that other deserving cases can be funded.

24. There are other potential problems in environmental cases which justify the recovery of a 100% uplift, including the significant problem of the solvency of defendants and defendants which are subsidiaries of foreign holding companies. Defendants in environmental cases tend not to have liability insurance in respect of environmental claims, and there is little prospect of recovery under the Third Parties (Rights Against Insurers) Act 1930.

25. Further, it is not unusual for claimant lawyers to find a well-resourced defendant pursuing a defence without regard to the commercial realities and in the face of reasonable offers of settlement. The words of Mr Justice Veale in the private nuisance case of *Halsey v. Esso Petroleum* [1961] 1 WLR 683 are still apposite: "This is a case, if ever there was one, of the little man asking for the protection of the law against the activities of a large and powerful neighbour". *Anthony v. The Coal Authority* [2005] EWHC 1654 (QB), [2006] Env LR 17 is instructive. In that case £21,500 in damages was awarded to six claimants after a ten day High Court trial, only a slighter more advantageous amount than was offered more than four years beforehand to the defendant under CPR Part 36. The claimants went on to receive interest on the damages as well as on the costs (which were ordered to be paid on an indemnity basis).

26. Cases which are pursued hard by defendants are problematic to claimant firms and require a very significant investment in time, personnel resources and funding (for instance in the funding of expensive disbursements such as experts). The risk of having to waive a large amount of unrecovered costs is a real one.

27. Should the recovery of a 100% uplift not recommend itself as just in all cases, then UKELA's alternative position is that (a) as part of CPR r.36.14 (costs

consequences following judgment), there should be an express provision allowing the Court to order the recovery of a 100% uplift where a claimant has obtained a judgment which is more advantageous than a previous Part 36 offer, and (b) section 11 of the Costs Practice Direction should be amended to give costs judges a wider discretion than that which they presently enjoy to intervene when assessing a 'reasonable' success fee.

28. As to possible amendments to section 11 of the Costs Practice Direction, one option would be to re-instate para.8(2), which was removed following the decision in *Ku v. Liverpool City Council* [2005] EWCA Civ 475, [2005] 1 WLR 2657. This was the paragraph which stated that:

> "(2) The court has the power, when considering whether a percentage increase is reasonable, to allow different percentages for different items of costs or for different periods during which costs were incurred".

If a current concern is that a defendant to a private nuisance action may be prohibited from litigating a meritorious case where there is a real point of fact or law in issue, then with some further amendments to this part of the Costs Practice Direction could enable a defendant paying party to submit to a costs judge that a lower uplift than that claimed should be allowed for different items of costs and for different periods. So too some consideration might be given to whether para.11.9 of the Costs Practice Direction should be revised (uplift irrelevant to the question of the proportionality of costs). The courts have accepted that the reasonableness of an uplift depends only on the legal representative's assessment of risk at the date on which the CFA is made, but para.11.8(1)(a) itself only makes that one factor to be taken into consideration. There is an argument that where the prospects of success vary during proceedings it is just that the amount of the recoverable uplift should fluctuate.

This would be a better outcome for access to the courts in environmental cases than that an uplift should not be recoverable at all from a losing defendant.

29. The review panel is respectfully reminded that the effect of s.58(4) and s.58A(3) Courts and Legal Services Act 1990 (as amended) is expressly to allow for different rules to be made in respect of different types of proceedings funded by CFAs and that this also allows different percentage uplifts to be recoverable in different classes of proceedings:

> 58(4) "The following further conditions are applicable to a conditional fee agreement which provides for a success fee –
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> ...
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> (c) [the] percentage [uplift] must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor.
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> ...
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> 58A(3) The requirements which the Lord Chancellor may prescribe under section 58(3)(c)-
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> …
>
> (b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not).

Whilst UKELA does not recommend this as a course, it would be possible in private nuisance cases (or in all environmental cases) for the relevant statutory instrument (s.i.2000/823) to permit a lower success fee than 100% to be recovered from a defendant. There should always be a provision in the statutory instrument allowing 100% to be recovered where this is payable as a sanction under r.36.14.

30. As to the recovery of ATE premiums, the panel should note that there are a wide variety of different types of policy which are available. Whilst all ATE policies insure claimants against the risk that they may have to meet an

opponent's costs, many also insure the claimants against the risk of having to pay their own disbursements in the event of failure. Indeed this is the industry-standard model in use in private nuisance actions. ATE premiums in environmental cases tend to be self-insuring and the payment of the premium is deferred until there is a successful outcome.

31. UKELA shares widespread concerns at the very high cost of ATE premiums. Moreover, these policies are not always easily available in environmental cases, so that, for instance, there are real difficulties in obtaining insurance in respect of generic issues where a claim is subject to a Group Litigation Order. That part of an ATE policy which is designed to guard against the risk of having to pay an opponent's costs is ultimately for the benefit of the defendant.

32. UKELA's view is that one-way cost shifting would not be appropriate because of the need to obtain insurance against the risk of meeting the claimant's own disbursements, which can be extremely high, especially where the defendant has insisted on a detailed examination of the underlying facts by means of expert evidence. Without recovery of a premium for this part of a policy it would be impossible to provide any level of service to clients. Putting it bluntly, without reassurance that this part of premium could be recovered from a defendant, private nuisance actions would become unworkable. The possibility must then also arise that the funding of private nuisance actions would not be Aarhus-compliant because few claimants would be able to assume the risk of having to meet their expert's costs in the event of failure.

33. UKELA is sceptical that in the present fragile ATE market it would be possible for insurers to sell policies which did not earn them premiums which met the risk of having to pay an opponent's costs. However, if that were possible, then a defendant might be invited to elect, when the claim is notified under the pre-

action protocol process, whether it accepts that one way costs shifting (in respect of this part of a premium only) should apply, or whether it requires the claimants to take out ATE insurance to meet its costs if the claimants fail. Defendants should not be able to insist on an ATE premium being obtained for the first time at any later date since it is very likely that a policy will not be available at all. The cost of a policy covering the risk of having to meet own side's disbursements should always be recoverable.

Judicial review proceedings in the administrative court

34. Paragraph 5.1 of Chapter 36 of the Preliminary Report goes on to ask for comments on the issues raised in respect of environmental judicial review cases.

35. Doubts about whether the costs regime under the CPR as it applies to public law proceedings preclude compliance with the UK's obligations under the Aarhus Convention are not new.

36. In October 2006 a Working Group was established under the chairmanship of the Hon Mr Justice Sullivan which, in May 2008, produced a report entitled "Ensuring Access to Environmental Justice in England and Wales" concerned with judicial review and the operation of the Administrative Court (this report is identified in the Preliminary Report at para.4.3 of Chapter 36 as "the Sullivan Report").

37. The Sullivan Report cited no fewer than eight earlier reports which covered the same or related topics, including the European Commission's report dated October 2007 which addressed the issue of access to environmental justice in all member states including the UK (para.3, section 1, "Background").

38. The Working Group concluded that "we doubt whether, for a significant number of non-legally aided claimants, the current procedures can be said to meet the general requirement that [procedures] are "not prohibitively expensive" (para.14).

39. Special problems face claimants contemplating challenges to public law decisions. These were canvassed in detail in the Sullivan Report, but they include: the risk of having to pay multiple costs, the difficulty of obtaining ATE insurance and the unpredictability attaching to the discretionary nature of the remedies available.

40. The authors of the Sullivan Report came to the conclusion that it is neither appropriate nor necessary – and not required in order to ensure for compliance with Aarhus – to abandon cost shifting, provided that the loser's potential liability does not make litigation prohibitively expensive (see section 7, "the 'loser pays' principle"). The conclusion was reached that a potential exposure to some risk was beneficial since it protected against frivolous claims and ensures a degree of 'commitment' with the claim.

41. UKELA sees no need to resile from this carefully-reasoned position, and concludes that a rule permitting one way cost shifting is not appropriate (subject to what is said below in para.42). The Aarhus Convention is considered by its signatories to contribute to a process of democracy, and it seems to UKELA that some cost shifting on a 'loser pays' basis also achieves this end. On the other hand, there should be no disincentive restricting judges in making orders which prohibit the recovery of costs from claimants in cases of "real public importance", should the facts of such cases make them fair and just (see the authorities referred to in para.4.6 of Chapter 36).

42. The key requirement which Aarhus demands, it seems to UKELA, then, is a requirement ensuring that access to the courts is not prohibitively expensive. This requirement can be satisfied by the making of a rule governing protective costs orders. So far as environmental cases are concerned, recent case law has highlighted difficulties caused by the requirement that a protective costs order should be made where the issues raised are issues of "general public importance" and where there is perceived to be some private interest in the outcome of the proceedings (see *Morgan v. Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 and paras.45 and 47 of the Sullivan Report).

43. UKELA has drafted (and incorporates herewith) a rule intended to govern the making of protective costs orders. It is modelled on the recent cost capping rules at CPR rr.44.19-20. Rule 44.21(5) would make protective costs orders the norm in all judicial review environmental cases on the application of the claimant without the need to demonstrate either that the proceedings concern matters of general public importance or that there is no private interest in the outcome. On the other hand, the rule is drafted so that an application for a PCO could be made either by a claimant or a defendant in *any* type of proceedings whatsoever and without strict demarcation between private or public law claims. However, more restrictive factors would apply in respect of those cases not caught by r.44.21(5), including the considerations whether or not a matter is a matter of general public importance and whether or not the applicant has a private interest in the outcome. A Practice Direction will be needed.

44. In UKELA's view the obligations arising under the Aarhus Convention demand special safeguards in environmental cases, so that it does not follow that costs rules in public law environmental cases should be harmonised with

other judicial review cases (contrary to para.4.9 of Chapter 36 of the Preliminary Report). On the other hand the draft PCO rule is intended to be of very broad application and may apply even in strictly private law proceedings so long as the issues raised are of general public importance.

Additional costs issues

45. UKELA's position is that the current costs rules including the rules relating to assessment are satisfactory and indeed well designed. A major factor leading to unreasonable and disproportionate costs has been the CPR and the burden in the preparation of paperwork required to litigate claims. UKELA hopes that revisions to parts of the CPR dealing in particular with experts, disclosure and witness statements will reduce the costs burden. The Association does not consider that its resources are best equipped to make detailed representations as to the correct approach to these various aspects of the CPR.

46. At the same time UKELA does consider that a defendant to a claim which can persuade a judge that for its defence to be properly considered it is necessary to place more material before the court than the matter might apparently warrant on grounds of proportionality, then it should be permitted to do so. This is in the wider interests of justice. A strict application of a costs-benefit rule should not be applied as a straight-jacket when a matter is case managed. The risk on costs, however, must be that of the defendant in the event that it loses. UKELA considers that its proposals as set out in the previous paragraphs in respect of both private nuisance and judicial review environmental claims appropriately balances the costs risks in such cases.

47. UKELA would like to comment on some ancillary matters.

48. First, the review panel should be very cautious about encouraging expensive costs procedures which generate satellite litigation. These dangers are particularly evident in costs capping applications. There should be few claims which cannot be adequately case managed to avoid unnecessary costs, including proceedings governed by a Group Litigation Order. Moreover, when claims are properly case managed, then the process of detailed assessment is likely satisfactorily to control the extent of recoverable costs.

49. Further, the review body should be cautious to ensure that cost capping developments do not introduce cost budgeting by the back door.

50. Secondly, the use of precedent H estimates of costs should not be over-encouraged. These are very expensive to produce when they are required to forecast the costs to be incurred in litigation.

51. Thirdly, UKELA tentatively asks whether a source of the increase in costs has not been generated by the abandonment of the former A+B valuation of hourly rates in favour of consolidated rates. Whilst it may be useful to produce guideline consolidated rates for the benefit of judges summarily assessing claims for costs, the use of such rates makes it easier for inflation to creep into claims for hourly rates. The use of a B factor allows a costs judge to assess the level of care and conduct truly merited by a particular case. The fixed A factor is only subject to inflationary pressures caused by 'external' pressures and does not allow a firm to raise its hourly rates without reference to an underlying justification. A receiving party should be permitted by the rules to place its A+B factors before a judge on a confidential basis (as approved in *Higgs v. Camden & Islington Health Authority* [2003] EWHC 15 (QB), [2003] 2 Costs LR 211).

52. Fourthly, there should be a presumption that private nuisance claims are dealt with outside the courts' non-specialist lists. In particular they should generally not be dealt with in the TCC, where the detailed procedures are likely to run up extra costs. Few private nuisance claims require detailed consideration of the working operations of the installation in question. This is because the court is only interested in how the nuisance has been caused to the extent that the installation is in fact responsible for the interferences sustained by claimants. A detailed examination as to why the nuisance has been occasioned is rarely required. Paragraph 1.3.1 of the TCC Guide should be emended to remove nuisance claims from the list of types of claims which are appropriate to be brought in the TCC. There are other factors set out in the Guide which would make some complex nuisance cases suitable for determination in the TCC.

53. Fifthly, those claimant firms undertaking private nuisance claims under the umbrella of a GLO seek the assistance of the panel in resolving a difficulty caused by the effect of the indemnity principle on generic work. In cases where there are many solicitors with many individual claimants, and where there are no retainers between the solicitors handling the generic work and individual claimants, it is difficult to see the current legal basis on which solicitors handling the generic work are entitled to be paid for the proportion of generic costs attributable to those claimants. It would be preferable for the indemnity principle to be waived in such cases and for the entitlement to costs to arise out of orders for costs made by the court. Such a procedure would also have the advantage that individual solicitors would not have to surprise those clients who have entered into a simplified CFA by having to warn them (as required by the Solicitors Code of Conduct 2007) that they may be liable to a share of generic costs where the GLO has been made subsequent to the original retainer. This suggestion was dismissed when made to the Court of Appeal in *Sayers v. Merck SmithKline Beecham plc* [2001] EWCA 2017, [2002] 1 WLR

2274 (at para.29), but urgently needs reconsideration. Primary legislation is no longer needed by reason of the amendment effected to s.51(2), Supreme Court Act 1981 effected by the Access to Justice Act 1999) but a specific rule will need drafting (possibly by way of an amendment to r.48.6A).

UKELA's recommendations

54. In private nuisance claims:

54.1 success fees should continue to be paid by losing defendants;

54.2 recoverable success fees should be allowed at up to 100% as at present. *Alternatively* a claim to a 100% uplift should be permitted as one of the sanctions under CPR r.36.14, and a more flexible approach to assessing the reasonableness of a success fee should be permitted by section 11 of the Costs Practice Direction than that which is currently applied by the courts;

54.3 one way costs shifting is not workable since claimants must be able to protect themselves against the risk that they may not be able to recover the cost of disbursements from successful defendants, and this part of the premium at least must be recoverable in order for any workable terms of engagement to be made available to clients.

55. As to environmental judicial review claims:

55.1 costs shifting should continue to apply;

55.2 PCOs should be the norm to ensure compliance with the Aarhus Convention, the draft submitted herewith being considered appropriate (see para..44.21(5)).

56. In addition, UKELA suggests that:

56.1 cost capping applications should be the exception rather than the norm;

56.2 the preparation of Form H estimates of costs should not be required during proceedings unless the need substantially outweighs the cost;

56.3 the use of A+B assessments of hourly rates should be expressly permitted by the rules (on a confidential basis to the judge) as a cross-check on claims to hourly rates;

56.4 there should be a presumption that private nuisance claims are to be brought outside the specialist lists, in particular outside the TCC, and the TCC Guide should be amended accordingly;

56.5 a rule needs inserting into the CPR (at r.48.6A) permitting the strict application of the indemnity principle to be waived in respect of generic costs claimed under a GLO where there is no retainer between the solicitors undertaking the generic work and individual claimants.

57. UKELA would of course be very pleased to provide any further assistance which Lord Justice Jackson or his assessors may request.

20th July 2008

DRAFT CPR AS TO PROTECTIVE COSTS ORDERS

Protective Costs Order – General

44.21 (1) A protective costs order is an order limiting or extinguishing the amount of costs (including disbursements) which that party may otherwise be liable to pay pursuant to an order for costs subsequently made.

(2) Subject to sub-paragraph (5) below, the court may at any stage of proceedings make a protective costs order in favour of all or any of the parties, if –

(a) it is in the interests of justice to do so;

(b) the issues raised are of general public importance;

(c) the public interest requires that those issues should be resolved; and

(d) the applicant would probably discontinue the proceedings and would be acting reasonably in so doing were the court not to make the order.

(3) In considering whether to exercise its discretion under sub-paragraph (2) above, the court will consider all the circumstances of the case, including:

(a) (i) the nature and extent to which the applicant has any private interest in the outcome of the proceedings, and in particular:

(ii) whether or not the private interest of the applicant is consistent with the wider public interest in the resolution of the issues raised by the proceedings;

(iii) whether the grant of a protective costs order would deprive the respondent of the protection otherwise afforded to it by the costs rules ordinarily applicable in private law proceedings;

(b) the extent to which the applicant is entitled to recover its costs at the conclusion of the proceedings, including the question whether or not

the applicant has waived its entitlement to costs arising out of s.194, Legal Services Act 2007 (payments in respect of pro bono representation);

(c) whether it is fair and just to make the order.

(4) A protective costs order may be made subject to conditions, including a condition limiting the total amount of costs recoverable by the applicant inclusive of any additional liability (a "costs limitation order").

(5) The court shall make a protective costs order at any stage of proceedings on the application of the claimant if the claimant satisfies the court that the proceedings in respect of which the order is sought are governed by Part 54 and involve a matter of environmental law.

Application for a protective costs order

44.21 (1) An application for a protective costs order may be made:

(a) on the initiating claim form where the application is made at the commencement of the procedure governed by Part 54;

(b) save as aforesaid, on notice in accordance with Part 23.

(2) An application for a protective costs order shall be supported by evidence and shall include an estimate of costs substantially in the form illustrated in Precedent H in the Schedule of Costs Precedents annexed to the Costs Practice Direction.

(3) Where the application is commenced in accordance with sub-paragraph (1)(a), the following provisions shall apply:

(a) the respondent and any interested party shall set out its grounds of resistance or any grounds in support of any conditions in its acknowledgement of service;

(b) the judge shall determine without a hearing whether to grant the application and on what conditions when giving permission to proceed under rule 54.12;

(c) where an application for a protective costs order is refused or made subject to conditions without a hearing, then:

(i) if the respondent or any interested party has sought an order for costs against the applicant in resisting the application its acknowledgment of service, then the court may make an order that the applicant pays the respondent's and any interested party's costs in a sum which should not exceed £1,000 per party;

(ii) the provisions of rule 54.12(2)-(5) shall be applied by the court in such a way that the "decision" of the court shall include a reference to the court's determination of the application for a protective costs order and in such a way that a "hearing" shall include a reconsideration of the application;

(iii) if the application is refused or refused in part at a hearing then the court may make a further order that the applicant pays the respondent's and interested party's costs in a sum which may should not exceed £2,500 per party;

(d) where an application for a protective costs order is granted without a hearing, then:

(i) the respondent or any interested party may apply to set aside or vary the order and any conditions by filing a request for the decision to be reconsidered at a hearing within 7 days after service of the notice granting the order;

(ii) the claimant and any other party who has filed an acknowledgment of service will be given at least 2 days' notice of the hearing date;

(iii) the court will only exercise its powers where there is a compelling reason for doing so;

(iv) if the respondent's or any interested party's request is refused then the applicant's costs are to be paid in any event on an indemnity basis unless the interests of justice require some other order to be made.

(e) Where an order for costs is made in favour of a respondent and any interested party in respect of any amount payable as specified by this rule, then save for those circumstances in which separate representation is justified or in which the interests of justice require some other order to be made, any order for costs shall not exceed the amount payable to one respondent and to one interested party in total.

(4) Where the application is commenced in accordance with paragraph (1)(b), the court shall give effect to the factors set out in the Practice Direction in determining whether the order should be made and on what conditions (if any) including any order as to costs.

Application to set aside or vary a protective costs order

44.21 (1) Any party may apply to set aside or vary a protective costs order or any conditions to which the order is subject.

(2) Any application under this rule must be made promptly and on notice in accordance with Part 23.

(3) The court will only exercise its powers under this rule where there is a compelling reason for doing so.

(4) If an application under this rule is refused or refused in part then the court shall consider making any costs order payable on the indemnity basis and in any event.