Designation of third party structures & features for flood and coastal erosion risk management purposes (Schedule 1 & Section 30 of the Flood and Water Management Act 2010): Appeals Process proposals, 7 December 2011

Response by the UK Environmental Law Association

1. The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

2. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the water working party.

3. UKELA makes the following comments on the proposed appeals process.

General

4. We welcome the opportunity to comment on the proposals at this stage. The proposals are, of course, set out in general terms and we have commented on that basis.

Question 1: Are you satisfied with the proposed procedures for appeals? If not why not

5. We read this question as dealing with "procedures" in the broad sense of the overall features of the proposed appeal route. That contrasts with Q2 which deals with the narrower question of the suitability of a particular set of procedural rules.

6. Question 1 therefore raises three discrete questions:
    a. The destination for appeals
    b. The width of the appeal tribunal's jurisdiction
    c. The procedure to be followed on appeals

Destination

7. We agree that the First-tier Tribunal (FTT) would be an appropriate level of jurisdiction to consider appeals. Specifically, we consider the First Tier Tribunal (Environment) a suitable destination. UKELA has long supported the accumulation of expertise on environmental issues (in the broadest sense) in a single decision-making body. The FTT (Environment) has already taken on appeals for environmental civil sanctions and, in our view, would lend itself well to appeals under the 2010 Act. As we understand it, the FTT (Environment) applies the GRC rules of procedure.

Width of jurisdiction

8. We view it as important that appeals under the 2010 Act should involve consideration of the overall merits of a case, and not just narrow questions of law. Sch. 1 para. 15 requires the Minister by regulations to "provide a right of appeal". Where legislation refers to an "appeal" in these open-ended terms, the appeal is generally treated as a review of the original decision, with the appellate body free to allow the appeal where it considers that "reason compels a different view" (*Subesh & others v. Secretary of State for the Home Department* [2004] EWCA Civ 56, [2004] INLR 417; *Bradley Fold Travel Limited v. Secretary of State for Transport* [2010] EWCA Civ 695). The appeal is not confined to points of law (by contrast with an onward appeal from the FTT to the Upper Tribunal), but nor is it a complete re-hearing of the case from scratch.

9. The starting point for the appeal is an examination of the original decision. While the appeal tribunal can receive evidence in accordance with its own rules of procedure, it will not generally admit fresh evidence without good reason (for example, if the evidence was not readily available at the time of the original decision; or if the evidence is designed to draw attention to some unfairness or other procedural defect in the decision).

10. We consider that a *Subesh*- type jurisdiction is appropriate for an appeal under Sch. 1. It is important that administrative costs are not unnecessarily increased by treating the appeal as a complete re-taking of the decision from scratch. A "true" appeal by way of review of the original decision would encourage parties to put their whole case and evidence forward at the first instance stage, and would reduce the incidence of disappointed parties simply "taking a punt" on appeal. It would also encourage designating agencies to provide proper and adequate reasons for their decisions. However, designations of third party assets under the 2010 Act raise important questions for those whose property is affected by a decision.

The essence of such decisions will be a balance between individual rights and the public interest. So it is important that review by the tribunal should be capable of embracing the whole range of issues -- factual, legal, policy and discretion – raised by the original decision.

11. As we explained in our consultation response at the pre-legislative scrutiny stage of the Bill, designation raises (among others) human rights issues. Article 1 of the First Protocol will be engaged in every or nearly every case. Where the asset in question forms part of a person's home Article 8 will be engaged too. The decision-making process itself will attract Article 6. In any event, human rights issues aside, we consider it good practice that an appeal from an administrative decision that has not itself involved a hearing should take the form of a broad merits review, and should not be confined to artificially narrow grounds.

12. It is important that the regulations also give the FTT sufficient power to give effect to its decision on the merits of the appeal. Usually an appeal tribunal would be empowered to affirm, set aside, remit or vary the original decision; such a range of powers would be appropriate here. If the FTT decided to allow the appeal in principle, it would have a choice whether to send the matter back to the designating authority for a fresh decision, or to take a decision itself so long as the material before it enabled it to do so confidently.

13. Clearly much will depend on the detail of the regulations conferring the right of appeal. We trust, therefore, that there will be an opportunity at a later stage to comment on draft regulations. We consider that an essential stage in the consultation process, allowing us and other consultees to consider matters of detail that may have significant implications for the effectiveness and fairness of the appeal machinery. We would expect a formal 12 week consultation on draft regulations, and any associated proposed guidance, under the Code of Practice on Consultation.

Appeal procedure

14. We deal with this under Q2. We appreciate that this question is asked on behalf of the Tribunal Procedure Committee, but our answer is also relevant to Defra's approach to the appeal process.

Question 2: Do you consider that the General Regulatory Chamber rules will suit the handling of appeals against designations and the associated circumstances? If not, why not?

15. On the assumption that the FTT (Environment) will operate under the GRC rules, we are content that those rules will suit the handling of Sch. 1 appeals. The rules allow the FTT flexibly to control the proceedings to suit the precise nature of the issues before it. It has wide powers, for example, to determine which witnesses are called and the scope of their evidence (rule 15). We also consider the costs powers under rule 10 appropriate to this sort of case. The FTT can award costs incurred as a result of a party's unreasonable conduct. That avoids unnecessarily deterring access to the appeals machinery while at the same time incentivising proper behaviour by the parties and their representatives. Rule 10 matches the practice in many existing appeals in the environmental field which are determined by the Secretary of State or an appointed person (usually an inspector). So practitioners in this area will be aware of the need to avoid behaviour that might result in a costs award.

16. We note that Sch. 1 para. 15(2)(b) requires the regulations "to make provision about procedure". However, that does not mean they need to make free-standing provision of their own. It would enough to provide generically that the appeal would be governed by the rules applicable to the EC for the time being. We can see no obvious need for the regulations to modify the application of any aspect of the current GRC rules.

UKELA Water Working Group
on behalf of the UK Environmental Law Association
10 January 2012