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Contents

Chairman's Report

The UKELA Council meeting held on 24th April dealt with a number of significant issues. Not least, the forthcoming Conference to be held in Sheffield, 28-30th June 2002 under the auspices of Nabarro Nathanson with the support of Certa. The effort that goes into organising a UKELA Conference should not be underestimated and I would like to take this early opportunity of thanking Nabarro Nathanson for the effort that Luke Bennett has made in order to ensure that the UKELA 2002 Conference is to be a success. It is entitled “Facing the future; listening to the past “ which is entirely apposite to the point we are at in addressing environmental problems. I understand that the Conference is proving to be very popular (not surprisingly) and that places are being taken up rapidly. I look forward to seeing you there.

In the meantime, UKELA has had considerable success in persuading the Law Society that there should be a dedicated environmental law seat on the Law Society Council and it is entirely due to UKELA’s representations that this has been brought about. Solicitor members of UKELA will be receiving their ballot papers in the near future.

Having highlighted current successes of UKELA, a major concern is the position of

the regional groups within the entity of UKELA as a whole. It is quite clear that some regions are burgeoning- and congratulations to them -but worryingly, others are not. We will need to address this over the next year so that the important role of regional groups is clarified, that problems are identified and that UKELA does indeed become a truly integrated national organisation.

R (on the application of Friends of the Earth and another) v Secretary of State for the Environment, Food and Rural Affairs and others - [2001] 50 EG 91, Court of Appeal

Martha Grekos, Barrister, Research Assistant to the Chairman of the Law Commission

The appellant, an environmental protection charity, was opposed to a proposal by the third respondent, BNFL, a nuclear power company, to construct a plant at Sellafield to recycle used plutonium into mixed oxide fuel (MOX). The first and second respondents, the Secretaries of State, were responsible for approving such proposals. In deciding whether approval should be granted, they were required to apply Directive 96/29/Euratom.

Under Article 6.1 of that Directive, the practice of manufacturing MOX had to be *"justified in advance of first being adopted or first approved by their economic, social or other benefits in relation to the health detriment they may cause".* The Government's White Paper "Review of Radioactive Waste Policy" of July 1995 stated that *"applicants might be encouraged to apply for an authorisation…at an early stage in a project so that justification could be considered fully, before major capital investment had taken place".* A Communication from the European Commission concerning implementation of Directive 96/29, expressed the view that determination of justification *"should take place before the introduction of the class or type of practice and as early as possible to reduce the influence of the already incurred costs in balancing economic and social factors against health detriment".*

The Secretaries of State approved the plant proposal after finding that its economic benefits were sufficient to justify it. In assessing those benefits, they did not take into account the costs of construing the plant incurred prior to the application for approval. No account was taken of the costs of construing the plant incurred prior to the application for approval, as BNLF had submitted its proposal for approval at a late stage when construction of the plant was near completion.

The appellant brought judicial review proceedings. The court held that the Secretaries of State had been right to disregard costs that had already been incurred.

The appellant appealed, saying that:

1. The decision as to whether to approve a new practice ought not to depend upon when, in relation to the capital costs, that decision was taken; and

2. Since the Directive took a "generic" approach to justification, it was impermissible to ignore the costs that had already been incurred in a particular project when making the assessment, as this would mean that the decision would permit the practice at other plants whose capital costs had not been incurred already.

The Court of Appeal dismissed the appeal. It held that:

1. BNFL's plant had been the sole plant under construction for approval by the Secretaries of State. Article 6 did not require them to take into account the costs already incurred in building it, which could not be recovered and were not going to be incurred anywhere else. It would have been absurd for the Secretaries of State to bring into account costs that had already been incurred on the fictional basis that the approval might be invoked in relation to other operations in the future. The conclusion the Secretaries reached was one that was open to them.

The appropriate general approach was that the capital costs inherent in a new type of practice were a cost of the practice and relevant when evaluating the overall economic benefit or detriment likely to result from it. Such costs could not be ignored when considering whether to give approval for plants that had not yet been built. The question was what was to happen in a case where the capital costs had already been expended. The White Paper and the Commission's Communication were not helpful to the appellant's arguments on this matter.

COMPLIANCE CLASSIFICATION SCHEME PROPOSED BY THE ENVIRONMENT AGENCY

The Environment Agency has issued a consultation document on a proposed new scheme for classifying non-compliance with the permit conditions for activities regulated by the Agency. Responses are due by 14th June 2002.

The proposals are intended to apply to the following regimes where the Environment Agency sets permit conditions:

- Authorisations under Integrated Pollution Control.
- Integrated Pollution Prevention and Control.
- Authorisations and registrations under the Radioactive Substances Act 1993.
- Consents to discharge the water.
- Waste Management Licences.

At a later date it may also apply to licences to abstract water.

The intention is to establish a Compliance Classification Scheme (CCS) which will classify a non-compliance with permit conditions according to its seriousness. The aim is to establish a consistent and transparent means of classifying across the regimes regulated by the Agency. This will help the Agency direct its resources at real risk, and the classification will also be used in reports on the performance of permit holders and industry.

The new scheme will apply to both numeric and non-numeric conditions. Numeric conditions are those which deal with measured or calculated quantities like concentration, amount, flow, temperature and residence time. They involved comparing numeric data and statistics with quantitative limits for permitted releases or environmental impacts. Non-numeric conditions deal with equipment and conduct, and the supervision of a permitted process. These involve comparing actions with descriptive requirements.

Reference will also be made to the Agency's Common Incident Classification Scheme (CICS), which categorises incidents of actual pollution according to their seriousness.

Until now the Agency has not always taken into account the margin of uncertainty associated with measurements in deciding whether there has been a failure to meet a particular

condition. It is now proposed that this should become more the norm.

Principles of the Compliance Classification Scheme

Three classes are proposed:

- Class A – Substantial Numeric or Non-numeric Non-compliance.
- Class B – Other Non-compliance with Non-numeric Permit Conditions.
- Class C – Other Non-compliance with Numeric Limits.

This classification will be reflected in appropriate enforcement action by the Agency. Non-compliance in Class A would be considered for Formal Caution or Prosecution (which of these is preferred may depend, in part, on whether the actual or potential environmental impact would correspond to Category 1 or Category 2 in the Common Incident Classification Scheme). Class B or C would, more typically, result in a Formal Warning.

It is also proposed that there should be a separate Class D, to keep records of numeric values that are greater than a limit, but which lie within the uncertainty of measurement. These entries would not be regarded as "non-compliant" within the Scheme, but they could be referred to if there were further evidence of non-compliance.

The consultation paper includes examples of non-compliance for each Class, both generally and by reference to specific regulatory regimes.

Examples of Class A across all regimes include:

- Any non-compliance leading to, or having the potential to lead to, an incident classed as categories 1 or 2 under CICS.
- Any non-compliance leading to, or presenting an unacceptable risk of leading to, a breach of a statutory Environmental Quality Standards.
- Any emissions substantially exceeding its limit (eg for spot samples a value greater than double an absolute limit), due allowance having been made for uncertainty.
- Failure to carry out monitoring to the Agency's specified requirements or to report required information.

Classes B and C cover non-compliance where there is lesser or no actual or assessed potential risk of environmental harm and includes such matters as:

- (Class B) – monitoring data records.
- (Class B) – minor delays in supplying monitoring returns.
- (Class C) - Any non-compliance leading to, or potentially leading to, less important incidents than for Class A.

Publicising compliance

The consultation paper also seeks comments on how far the Agency should go in publicising compliance in terms of what they say, how often it is updated, and how the information should be provided. The Agency is looking here for a balance between the cost of doing this and the need for people to know what is going on.

NOTE: *The consultation paper can be accessed through the Agency's website, www.environment-agency.gov.uk/yourenv/consultations.*

PAVING THE WAY: CONSENTING PROCESSES FOR OFFSHORE RENEWABLE ENERGY

by
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and
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The environmental imperative which has driven national renewable energy policy over the past decade has been thrown into sharper focus more recently as the rate of climate change accelerates. The consequent requirement to reduce the emissions of greenhouse gases and acid rain gases and to move towards a more sustainable energy generation future has been recognised by successive UK Governments since the late 1980's. National Renewable Energy Policy is to encourage the exploitation of renewable resources "wherever economically attractive and environmentally acceptable".

Of all the renewable technologies – windpower has emerged as the technology with the best prospects of competing competitively with fossil fuels. The 1990's saw the deployment of onshore wind turbines in the UK. However, despite the fact that the UK enjoys Europe's largest wind resource (the available wind resource of Scotland alone is considered to be sufficient to generate power for most of Western Europe) other European Countries generate considerably more power from the wind than the UK. Current UK Government policy is to achieve the generation of 10% of electricity requirements from renewable sources by 2010. The Royal Commission on Environmental Pollution advises a target cut of 60% in UK greenhouse gas emissions by 2050 and a far greater role in our energy portfolio for wind energy. The review of UK energy policy produced by the Cabinet's Policy and Innovation Unit in February 2002 recommended the setting of a new renewable energy target for 2020 at 20%. The contribution played by wind energy in UK energy generation needs to significantly increase.

Despite the advantages offered by wind power: a means of generating electricity that does not produce emissions of greenhouse gases or acid rain gases, does not produce toxic waste products, and is not dependent on finite reserves of fossil fuels, the planning system, for a number of reasons, has posed a number of challenges for onshore wind farms. The need for the deployment of many further wind turbines onshore will remain, but the technological advances made over the past decade have led to a new generation of wind power: off-shore.

Just as onshore wind power generation raised new planning issues for the long established regime of the Town & Country Planning Act, so, too, off-shore wind turbines for the various relevant consenting regimes. A number of the issues which need to be addressed for on-shore wind turbines are just as pertinent for off-shore wind turbines, for example visual effects (albeit in the context of the seascape rather than the landscape) and ecology. However, off-shore wind energy generation gives rise to new issues, not least the potential interference with the public right of navigation. These have necessitated a review not simply of substantive "planning" issues but of the very consents which can be given for off-shore windfarms. Of course, other developments take place below mean low water, for example, port developments and oil and gas platforms. When consideration was first given to the consenting processes necessary to proceed with an off-shore wind farm seven separate consents were identified:

- A consent from the Secretary of State (DEFRA) under Section 34 Coast Protection Act 1949 for the construction of works below mean high water springs if they will cause or are

likely to cause an obstruction to navigation;

- A Licence from DEFRA under Section 5 of the Food and Environment Protection Act 1985 for the placing of structures below mean high water springs to ensure protection of the marine environment;

- A grant of occupational rights (a statutory consent) by the Crown Estate Commissioners for the purpose of placing structures on or passing cables over the seabed or foreshore belonging to the Crown under Section 3 Crown Estates Act 1961.

- The consent of the Secretary of State (DTI) under Section 36 of the Electricity Act 1989 for an off-shore wind farm which will have an export capacity of more than 1 MW.

- A separate consent from the Secretary of State (DTI) for the installation and maintenance of poles and wires constituting the dry land grid connection for the off-shore wind farm;

- Planning permission under Section 57 of the Town & Country Planning Act 1990 for cables and grid connections above mean low water; and

- A consent from the Environment Agency under Section 109 of the Water Resources Act 1991 for the erection of structures (including cables) in any watercourse which is part of a designated main river.

On top of these consents an appropriate assessment may be required under the Conservation (Natural Habitats BC) Regulations 1994 for off-shore wind farms which lie either within or close to a European Site. (A Special Protection Area under the Wild Birds Directive or a Marine Special Area of Conservation under the Habitats Directive). A further process is that of environmental impact assessment. Wind energy development is listed within Annex 2 of the EC Directive on environmental impact assessment as a type of project for which environmental impact assessment will be required if there is likely to be a significant environmental impact. Save for that part of the wind farm which lies above mean low water, none of the consents identified require environmental impact assessment for those parts of the off-shore wind farm which lie below mean low water.

The seven consents identified suffer one significant deficiency: none expressly authorise interference with the public rights of navigation and fishing or enable any restrictions to be placed on the exercise of these rights. Attention then turned to the use of Orders under the Transport & Works Act 1992, which can grant authority to interfere with the public rights of navigation and fishing and remove the need for separate applications for some other statutory consents.

The Crown Estate Commissioners have, so far, granted occupational rights for 18 off-shore wind farms, lying off the coasts of Wales, Scotland and England. All off-shore wind farms proposed to date lie within the territorial seas of the United Kingdom. This article will go on to look at the legal consents and orders which could be obtained by those promoting off-shore wind farms within the Territorial Seas of England and Wales.

The components of an off-shore wind farm comprise the wind turbines themselves, cables, a grid connection and anemonetary masts. The wind turbines are likely to be in excess of 110 metres in height with rotor diameters of 100 metres, with a rated (or installed) capacity of 2.5 – 3.5 MW. Installed capacity is the power a wind turbine would generate, if the wind blew constantly at the optimum wind speed. The actual power produced by the wind turbine (the declared net capacity) will be determined by the wind regime within which the turbine operates. Turbines will generally have tapered tubular towers and 3 blades attached to a nacelle in which the generator, gearbox and other operating equipment will be

located. The foundations of the wind turbines will be installed in the seabed using a piling method. Cables will link the wind turbines and the wind farm will be connected to the on-shore electricity grid by an under sea cable. Wind farms are likely to include permanent anemometry masts to monitor wind speeds during the operation of the wind farm. Once operational, wind turbines will be controlled using remote diagnostic and control systems, requiring perhaps one or two maintenance visits each month. The construction of each off-shore wind farm will involve the use of construction barges, supported by hydraulic legs extending to the seabed, with the sub-sea cabling being installed using floating plant.

An Order under Section 3 of the Transport & Works Act 1992 will authorise both the works involved in constructing the wind farm within the territorial seas of England and Wales (but not Scotland) and the maintenance of these works until their removal on decommissioning. In contrast to the requirement to obtain planning permission, there is no legal requirement for a developer to make an application for an Order under Section 3 of the Transport & Works Act 1992 ("TWA"). However, such an Order has the following advantages over other consenting processes:

(i) A TWA Order provides a defence of statutory authority against actions in public nuisance for interference with the public rights of navigation and fishing.

(ii) A TWA Order allows restrictions to be imposed on navigation and fishing by third parties in the vicinity of the wind farm. This is of particular utility when a wind farm is under construction.

(iii) The process of environmental impact assessment under Council Directive 97/11 is fully incorporated within the TWA Order application process (under the TWA (Applications and Objections Procedure) (England & Wales) Rules 2000).

(iv) The TWA application process provides for structured and adequate consultations and the notification of statutory bodies and others.

(v) A TWA Order removes the need for separate applications for other statutory consents (other than a Licence under the Food & Environment Protection Act 1985). This is because it can disapply the provisions of Section 109 of the Water Resources Act 1991 in the case of development taking place in a main river (including the laying of cables), leaving to the Environment Agency the right to approve the details of the works. It can also disapply the requirement to obtain consents under Sections 36 and 37 of the Electricity Act 1989. It will also be unnecessary to make any application for consent under Section 34 of the Coast Protection Act 1949.

(vi) A TWA Order can authorise not only the off-shore works but also on-shore grid connections and sub-stations, including the compulsory acquisitions of rights in land required for those works. The Secretary of State can grant deemed planning permission for these works at the same time as making the TWA Order, thus removing the need to submit a planning application to the local planning authority.

Despite the advantages offered by the use of a TWA Order, it does not offer a "one stop shop" for an off-shore wind farm. It will still be necessary to apply for a Licence under Section 5 of the Food & Environmental Protection Act 1985. Furthermore, for a variety of reasons, developers may wish to secure consents under Sections 36 and 37 of the Electricity Act 1989 and the Town & Country

Planning Act 1990, using the TWA Order route to secure statutory authority for interference with the public rights of navigation and fishing.

At the very least, two consenting processes must therefore be followed. The processes for both the TWA Order and a FEPA Licence are summarised on the accompanying flow charts. In the case of off-shore wind farms the application for a TWA Order will be made to the Secretary of State for Trade & Industry and the procedure is set out in the Transport & Works (Applications and Objections Procedure) (England & Wales) Rules 2000 and the Transport & Works (Inquiries Procedure) Rules 1992. Once an Application has been submitted to the Secretary of State, together with the draft TWA Order and Environmental Statement, there is a consultation period of 6 weeks. The Secretary of State may hold an inquiry and must hold an inquiry or hearing if either any person whose land is being compulsorily acquired or any local authority in whose area works are being constructed require this. A special provision exists for schemes of national significance to be debated in both Houses of Parliament, although it is not anticipated that off-shore wind farms would fall within this category. In the event of a TWA Order being proposed which includes the compulsory acquisition of public open space, common land or inalienable land of the National Trust then Special Parliamentary Procedures must be used unless approval of the Secretary of State is sought for the terms of the proposal.

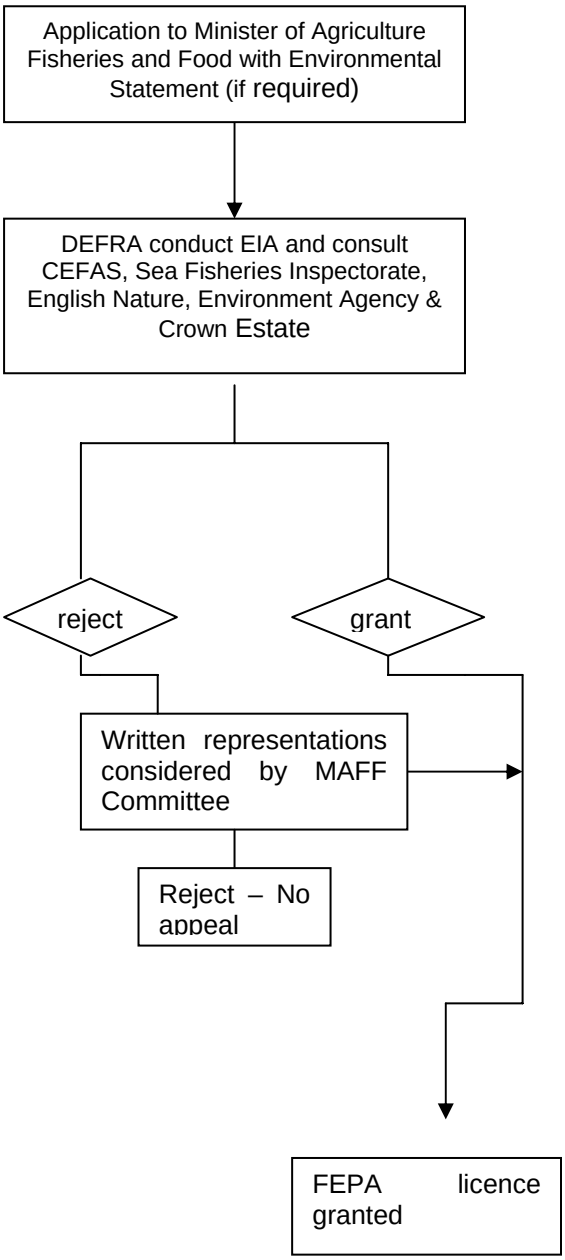
The application for a FEPA Licence is rather different, being directed to an entirely different Department. Although there are no statutory requirements for consultation, the Minister may require applicants to supply such information and to permit such tests as may be expedient or necessary in order for the Minister to make a decision. The Guidance Notes for Off-shore Windfarm Developments 1998 issued by the Marine Consents Unit (of DEFRA and DTLR) indicate that expert advice will be sought from the Centre for Environment, Fisheries and Agricultural Science (CEFAS) and from the Sea Fisheries Inspectorate and that English Nature, the Environment Agency and the adjacent local planning authorities and the Crown Estate will be consulted. There is no provision for a public inquiry but an applicant may make written representations in the event of a refusal or the imposition of unacceptable provisions in a Licence. A FEPA Licence would be required for wind turbine foundations, the drilling of boreholes and the placing anemometry masts, but not for cables (which are expressly exempted). The scope of the FEPA Licence is to protect the marine environment and living resources which it supports and the scope of the Minister's evaluation is therefore focused on this objective rather than the wider issues which will be evaluated under the TWA Order process.

Despite the rather more complex consenting processes through which off-shore wind farm proposals must go, the time taken to secure these consents should be no greater than those currently experienced for onshore wind farms where public inquiries are held. Applicants are still required to pay an application fee: for a TWA Order this will be calculated on the areas required for the location of each wind turbine and the laying of cables on the seabed. This is different from the calculation of a planning application fee under the Town & Country Planning Act 1990 where undeveloped areas within the application site are normally included within the area of land calculation on which the fee is based.

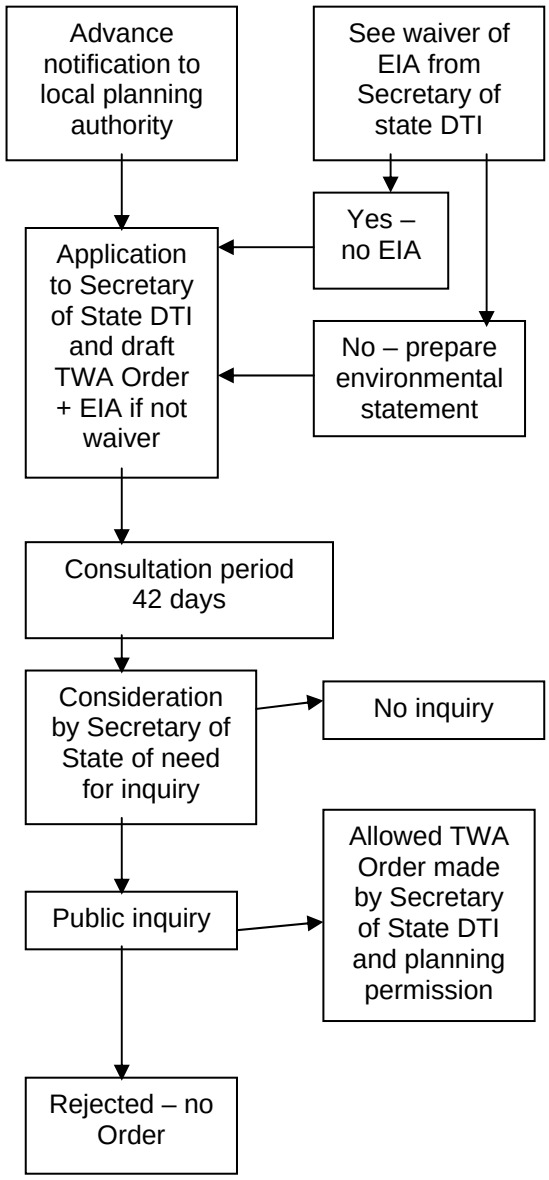
The UK is not the only Country to be promoting off-shore wind power. Almost 100 MW of off-shore wind power has been built so far in Europe, primarily off the coasts of Denmark, the Netherlands and Germany. A further 15,000 MW of off-shore capacity is currently going through permitting processes. The European Wind Energy Association has set a target of 50,000 MW of off-shore wind power by 2020. There are both technological and environmental hurdles to be overcome if

off-shore wind power generation on this scale is to be achieved. However, with the firming-up of the political will to increase the role of wind power within the UK energy portfolio it seems likely that wind energy will play an increasingly significant role, both on and off-shore. The signing of the Renewables Obligation 2002 by Energy Minister, Brian Wilson on 28 March means that from 1 April the proportion of power which electricity companies must purchase from renewable sources at a premium price will rise to 10% by 2010. Both on-shore and off-shore wind energy will need to make large contributions to ensure the Renewables Obligation can be achieved.

Flow Chart for Licence under Food & Environment Protection Act 1985



FLOW CHART FOR APPLICATION FOR ORDER UNDER SECTION 3 TRANSPORT AND WORKS ACT 1992



CONTAMINATED LAND WORKING PARTY

COMMENTS ON THE DRAFT PLANNING TECHNICAL ADVICE (DEVELOPMENT ON LAND AFFECTED BY CONTAMINATION)

Introduction

1. The United Kingdom Environmental Law Association ("UKELA") is an Association open to all persons who are interested in the formulation and application of environmental laws. It seeks to promote effective legislation and the effective implementation of environmental policy through the law. Its members include lawyers (engaged in private practice, industry, government and academia) as well as consultants, academics and others who have an interest in environmental law. UKELA was closely involved in the development of Part IIA of the Environmental Protection Act 1990 ("Part IIA") and Circular 2/2000 and made numerous detailed representations to the Government on the proposals for the new regime.

2. UKELA welcomes the opportunity to comment on the proposed Planning Technical Advice ("Advice") and recognises it as an important step in clarifying the respective roles of the planning regime and Part IIA in securing the remediation of contaminated land. Our comments below focus on ensuring that the Advice provides the certainty necessary to ensure the overlap between these regimes is clearly defined rather than on the Government's policy behind the Advice.

General comments

3. We would make the following general comments:

(i) the Advice is welcomed as an important step in clarify the relationship between Part IIA and the planning regime and the role each regime should play in addressing contamination;

(ii) we note that the final status of the Advice has not yet been settled in light of the proposed changes set out in the Planning Green Paper (*Planning: delivering a fundamental change* (DTLR, December 2001)). In the interests of clarity, we consider it preferable to have a single document containing the requisite planning advice on contaminated land rather than a slimmed down PPG23 together with a supporting "daughter document". The legal status of the revised guidance/Advice should also be confirmed in light of the outcome of the planning review (although we see no reason why it should not be afforded the same legal status as the existing PPG23);

(iii) the Advice acknowledges that it is simply advice which aims to develop existing guidance (and that existing planning policy on contamination remains largely unchanged). However, the Advice does set out a basis on which local planning authorities ("LPAs") should require the clean-up of contamination at the time of the redevelopment of a site, which represents a move away from the risk-based system for clean-up which has operated in the UK through a number of legal regimes (such as Part IIA, for which, see paragraph (iv) below). As such, the Advice goes beyond merely technical advice;

(iv) the Advice states that where there exists any "*unacceptable risks*" arising from contamination, these should be identified and dealt with through the development process. Adopting this approach represents a move away from the risk-based (pollutant linkage) approach implemented by Part IIA. The threshold for defining an "*unacceptable risk*" is likely to be higher than the "*suitable for use*" test applied under the Part IIA. If this is the intention behind the Advice, this should be made clearer and perhaps given more focus within the document itself. It would also be helpful to have a more detailed explanation of what are likely to be considered as unacceptable risks (and how this will differ to the test of significant harm or the significant possibility of significant harm as set out in section 78A of the Environmental Protection Act 1990);

(v) we welcome the development of standard conditions and obligations to be included within planning permissions and planning agreements for the development of contaminated sites;

(vi) on a general note, the Advice would benefit from a clearer layout and structure (perhaps including flow diagrams etc).

Comments

4. One of the aims of the Advice, in clarifying the role of the planning system in dealing with contamination, should be to facilitate the redevelopment of brownfield sites (rather than simply prohibit development on contaminated land). This point should be generally made in the introduction to the Advice (although it is noted that a reference is made to it in paragraph 10).

5. The Advice states (in paragraph 9) that "*land contamination, or the <u>possibility</u> of it, is therefore a material planning consideration in the preparation of development plans and the decisions on planning applications*". Further guidance should be provided on the extent to which planning authorities should consider the *possibility* of contamination. For instance, is it intended to cover the possibility of contamination arising from the permitted future uses of the site and/or the possibility of contamination arising from adjoining sites? If it is the former, it is questionable how far the planning regime is intended to regulate contamination arising from the on-going operations conducted at a site. Alternatively, is this simply intended to ensure that LPAs consider the future impact of contamination which is present at the site at the time of the development but which did not require remediation (which would appear to be the more logical approach)?

Unacceptable risk standard

6. The key policy principal behind the Advice appears to be that the planning system should determine whether land is causing an "*unacceptable risk*" given the proposed use of the land concerned. This test appears to represent a shift in policy away from the approach which underpins Part IIA (and which we believe was the approach adopted in practice by developers and LPAs alike). The risk-led approach in Part IIA is based upon there existing *significant harm or the significant possibility of significant harm to the environment*. This standard is likely to be quite different to the standard of there being an unacceptable risk (and the latter standard is anticipated to be

greater than merely the test of significance). If this change of policy is intended, it should be made clear in the Advice and a more detailed commentary provided on what developers and authorities should consider represent unacceptable risks. If it is the intention that LPAs should not depart from the Part IIA risk-based approach, the Advice should make this clear to avoid any confusion over whether additional factors need to be considered when assessing the risks from contamination in the context of redevelopment.

7. This distinction is also important when considering the extent of any clean-up which should be carried out at the time of the redevelopment. In essence, the principal adopted in Part IIA is to remediate contamination in order to remove the pollutant linkage (by the removal of the source of, or pathway for, the contamination). The Advice should confirm whether a similar approach is to be taken in the context of a redevelopment. If not, the additional requirements of a planning led clean-up of contamination should be made clear.

8. It should also be noted that, under Part IIA, the regulatory authorities are under a duty to exercise their regulatory powers to ensure a clean-up of contamination where they are aware that some contamination presents, in general, a significant risk. The reference to "unacceptable risks" in the planning regime suggests that merely significant risks may be ignored (for the time being at least) which will not be the case.

Environmental information

9. The Advice acknowledges that the environmental health departments of local authorities are the enforcing authorities under Part IIA and that LPAs are responsible for the control of development. A considerable amount of environmental information may be generated to support a planning application (and to subsequently comply with any planning conditions). The extent to which there will be an exchange of that information between the different regulatory authorities is unclear at present. Is it the intention, for instance, that planning authorities will, as a matter of good practice, forward copies of any environmental investigations to relevant environmental health departments and the Environment Agency? The advice should specifically state whether information released to LPAs in support of a planning application will be passed to environmental health departments (of local authorities) and/or the Environment Agency (and, if this is the case, the legal basis on which the information will be circulated in this way by LPAs).

10. In addition, the legal basis on which LPAs are able to request applicants prepare Phase I and Phase II audits together with any subsequent environmental information (including monitoring results collated after the development) should be confirmed and stated in the Advice. Likewise, the Advice should make clear whether it is intended that such information will be placed on the public register and provided to statutory consultees (and the legal basis on which this will be done).

Other considerations

11. In paragraph 24 of the Advice, it is noted that LPAs should consider whether development plans or local development frameworks should set out briefly the considerations to be applied when determining planning applications in cases where land contamination is thought to be a significant issue. To ensure consistency, the Advice may take one further step and suggest whether LPAs should, in fact, be identifying those considerations (and perhaps provide a number of suggested considerations).

12. The Advice also states (paragraph 49) that the LPA should refuse the grant of a planning permission if it is not satisfied that the development would be appropriate. This will include cases where "*circumstances clearly suggest [a] potential risk, and no information has been provided or obtained which excludes the reasonably possibility of such risk*". There may be a considerable number of sites that represent a potential risk and, as with Part IIA, it is a question of how acceptable the risk is likely to be for the regulatory authorities and any landowner/developer in light of existing legal regimes and guidance. The approach set out in the Advice in this regard may serve to unduly restrict LPAs from granting permissions on the basis that an insignificant level of risk exists.

Pre-application discussions

13. We welcome the suggestion that informal pre-application discussions between LPAs and prospective applicants should take place. The Advice notes that these discussions should only take place "*where practicable*". This caveat is important. There may be circumstances where the timetable for the development does not allow for these discussions (particularly where there may be some delay in facilitating the discussions or in obtaining a response from the LPA). Further guidance should be given as to when it may not be practicable to enter into pre-application discussions and perhaps a timeframe in which these discussions are to take place should be suggested.

Other considerations

14. The Advice should clearly define the extent to which the effects of any contamination are considered. We understand from the Advice that LPAs should seek to identify specific risks arising from contamination through, and as a result of, the redevelopment rather than the general impact any contamination may have on the *amenity* of the land. This distinction (and the need for LPAs to consider the former rather than the latter) should be made clear in the Advice.

15. The Advice should add further guidance to the circumstances in which LPAs should consider the possibility of contamination when reviewing a planning application (and whether there are any circumstances where LPAs do not need to take this into account). A decision based flow diagram may be helpful to explain this process.

Site investigations

16. The Advice recommends that, as a minimum, a desk study should be carried out to assess the possibility of contamination at a site. Further (intrusive) investigations may be necessary in light of the findings of the desk study. Most Phase I or Phase II environmental reports will assess the significance of contamination using a risked-based

approach (and whether there is a pollutant linkage present). As such, the desk studies will provide a conclusion on the basis of a risk assessment (largely governed by potential liabilities arising under Part IIA). It is unclear whether the Advice envisages that a similar approach will be adopted in site investigations submitted in support of planning applications or in the discharge of planning conditions. Given the guidance provided in relation to the clean-up of contamination, it would follow that the traditional "significant risk" approach adopted by consultants may now be insufficient for planning purposes. If this is the intention, the Advice should confirm this to be the case and provided details of what additional work or analysis may be expected.

Standard conditions

17. The development of standard planning conditions to deal with site investigations, remediation and monitoring is welcomed. The Advice should recommend that LPAs use these conditions unless there are clear circumstances where a departure from these is justified.

18. In paragraph 42, the Advice states that, where appropriate, conditions should be attached to permissions to ensure that the development proposed does not present any unexpected financial risks in ways that impact on land use. It is unclear as to precisely what risks this is intended to guard against (is it, for instance, the risk of a future clean-up of the site which may impose financial pressures upon the liable person?). Further explanation on the policy behind this suggestion would be helpful.

19. Paragraph 42 also states that conditions should be attached to permissions to ensure that unacceptable concentrations of contaminants are not left in place and pollutant pathways are not left open. Again, the approach adopted in Part IIA is to impose a liability to clean-up contamination where a pollutant linkage exists. If the Advice is suggesting that action be taken in the absence of any pollutant linkage, this should make this clear.

20. It is envisaged that planning conditions may be imposed relating to the future monitoring of contamination. In the event that the monitoring detects contamination, what steps should the LPA take in order to remedy this? Is it envisaged that LPAs simply refer the matter to the relevant authority under Part IIA or will they seek to use their existing planning powers to ensure a clean-up is carried out? Clarification on this point would be useful.

21. One of the practical difficulties arising from planning conditions is the willingness (and ability) of LPA's to provide an effective sign-off against each condition in order that a site can maintain a "clean" planning history. The Advice should make clear that, as a matter of good practice, LPA's should provide written confirmation that specific conditions have been satisfied and that such a sign-off is provided promptly. If LPAs are unwilling to provide this confirmation clear reasons why this is the case should be provided.

Reliance on environmental reports

22. The Advice stipulates (in paragraph 58) that LPAs may need to rely on developers' environmental reports in order to determine a planning application. We presume it is intended that LPAs are able to place legal reliance on the reports

(such as through collateral warranties or other forms of reliance agreement). If so, this should be made clear. To reflect normal commercial practice, LPAs seeking such reliance may be required to pay a one-off fee to the relevant consultant. It will clearly be a matter for negotiations between the applicant and LPA as to who, in fact, meets this cost. However, the advice should usefully alert LPAs to the fact that such a fee may be payable.

Appendices

23. The Appendices to the Advice contain a range of background details on contamination, historical site uses, Part IIA etc. It would also be helpful to provide details within the appendices on the types of remediation which can be carried out (and perhaps refer to projects which are ongoing in this area such as the CL:AIRE project). This should also provide a guide to some of the technical language associated with clean-up projects together examples of circumstances where different clean-up techniques may be employed.

24. The Advice states that LPAs may wish to impose a condition placing a developer under a positive obligation to report contamination identified during the course of development. At present, this does not contain any risk analysis or threshold test such that all contamination identified needs to be reported. This has the potential to significantly impact upon the timescale and costs of any development. One approach may be to require the reporting of information only in circumstances where the contamination discovered materially alters the conclusions of any earlier reports (in the absence of such reports, the significance of the contamination will obviously need to be assessed). The Advice goes on to state that developers can otherwise confirm to LPAs, at completion, the absence of any further contamination. It is extremely unlikely that any developer will be in a position to provide such confirmation (at best, the developer may be able to confirm that there are no material changes to the conclusions of the earlier site investigation reports). This also gives rise to the question of what an LPA should do with the information once it is received. Is it intended that the LPA will review the information and request further remedial works before the redevelopment continues or is the information intended merely as a record as to what has been found?

25. The Advice also notes that planning conditions should be used to confirm, amongst other things, that no "*significant contamination*" is present. How this relates to the "unacceptable risk" test or requirements of Part IIA is unclear. It is important that the Advice is consistent in the application of this standard. Likewise, in paragraph C4, it is noted that the remediation scheme must be sufficient to make the site suitable for its intended development end-use. Again, this reflects a Part IIA approach to remediation. This needs to be reconciled with the approach set out in the body of the Advice.

26. It is acknowledged that the monitoring of contamination may be necessary following the completion of the development. This has the potential to impose onerous (and costly) obligations on a landowner. The Advice should confirm the precise basis on which LPAs have the legal right to request such monitoring and the circumstances in which it should be

required. The question also arises as to what LPAs will do with regular monitoring data once received. Is it intended that this information is provided to environmental health departments and/or the Environment Agency as a matter of practice? If so, this should be made clear in the Advice.

Bibliography

27. We consider that it would be useful to include a bibliography of relevant source materials, legislation, guidance (etc.)

Human Rights and the Environment: A Comment on 'Hatton' and 'Marcic'[1]

Martha Grekos
Barrister and Research Assistant, Law Commission of England and Wales

In a case commentary in the February 2002 issue of this journal,[2] it was reported that the European Court of Human Rights (Third Section, 2 October 2001) in *Hatton and Others v United Kingdom*, had held by five votes to two that there had been a violation of Article 8 of the European Convention on Human Rights. It was held that, in relation to noise levels generated from Heathrow Airport, the UK Government had failed to strike a fair balance between the United Kingdom's economic well-being and the applicants' effective enjoyment of their rights to respect for their homes and their private lives. It was also held by six votes to one that there had been a breach of Article 13 ECHR, as UK law did not provide the applicants with an effective remedy for the breach of Article 8.

It was also mentioned in that issue that the UK Government had sought a referral to the Grand Chamber of the European Court of Human Rights, the argument centring on the extent to which the signatory states must provide a detailed justification for interference with rights, and the extent to which it must be shown that all steps have been taken to minimise the level of such interference. Under Article 43(1) of the ECHR, where a decision has been made by a chamber of the court (consisting of seven judges), any party to the case may request that the case be referred to the Grand Chamber consisting of 17 judges. The request has to be made to a panel of five judges and Article 43(2) provides that they shall accept the request 'if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance'. The UK Government's request has now been accepted and the case has now been referred to the Grand Chamber.

The case commentary expressed support for what might be called the 'pan-European' approach adopted in *Hatton*. One of the most complex features of European human rights law is the challenge of applying European human rights norms in the particular national contexts in which they must be applied. Aligned with this is the

[1] This article was first published in *Env. Liability*, vol. 10, [2002] Issue 2, published by Lawtext Publishing, www.lawtext.com

[2] Martha Grekos in [2002] 1 *Env. Liability*, at 46.

delicate task of handling the tension between effective European supervision and primary domestic socio-cultural choices and contexts. This involves keeping a balance between objective discernible standards and the recognition of the subjectivity of factual contexts.

Why, then, was the court in *Hatton* so quick to give weight to a narrow residential interest and reject the weight afforded by the UK Government to broader interests, after having purported to have had regard to all material considerations? The answer lies in the concept of 'proportionality'.

Moreover, it is significant to note that *'Hatton*-style proportionality' is more radical and 'rights-centred' than has hitherto been articulated by the European Court of Human Rights. According to that court, the UK Government had not only to strike a balance between competing interests, having regard to the 'margin of appreciation' customarily afforded to states; it also had to minimise as far as possible the interference with individual human rights – by seeking to find alternative solutions, and by seeking to achieve its aims in the least onerous way as regards interference with human rights.

In previous case law, such as in *Powell and Rayner v United Kingdom*,[3] a wide margin of appreciation had become coterminous with maximum state discretion, which in turn invariably became translated into unsuccessful petitions on the part of individual applicants and an erosion of the substantive impact of the particular Convention rights in question.

In contrast, a narrow margin of appreciation, as seen in *Hatton*, accords with a stricter scrutiny and the adoption of what may be called 'autonomous interpretation' on the part of the court, with a consequent tendency to find more willingly in favour of individual applicants.

We must await the decision of the Grand Chamber in *Hatton*. However, for the moment it is significant to note that a similar approach has been adopted in the recent UK Court of Appeal case, *Marcic v Thames Water*.[4] This decision suggests that the approach of the English courts may now also be that an activity of social utility can produce harm, which under human rights law must be compensated if the excessive effects of the individual are not justified.

The facts of the *Marcic v Thames Water* can briefly be stated. Mr Marcic owned residential property, which was periodically and seriously affected by flooding. The flooding was a consequence of a failure to have taken certain actions on the part of Thames Water, the defendant sewerage undertaker. Marcic had spent £16,000 in attempting to protect his property. Thames had done nothing to remedy a drainage problem, which had worsened over the years, and was unlikely to opt to take the necessary action in the foreseeable future.

At first instance Marcic's case against Thames for nuisance, negligence and breach of statutory duty was dismissed. It was held that the common law did not offer any relief.

[3] (1990) 12 EHRR 345

[4] [2002] 2 AII ER 55; [2002] EWCA Civ 65; case commentary, Camilla Copeland [2002] 1 *Env. Liability,* at 42.

Havery J did, however, hold that Thames had interfered with Mr Marcic's human rights by its failure to have carried out the works necessary to have abated the continuing nuisance it was causing. Thames had therefore interfered with Mr Marcic's rights in relation to Article 8(1) and Article 1 of the First Protocol of the ECHR. The case of *Guerra v Italy*[5] was cited where the European Court of Human Rights had held that:

…although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private and family life.

Marcic's only remedy was, however, limited to the time period from which the Human Rights Act 1998 had come into force. This left him uncompensated for the flooding he had suffered prior to that period.

Subsequently, the Court of Appeal, on the human rights point, was unequivocal in its support for the decision of Havery J at first instance. Thames Water had argued that Havery J had been correct in examining the balance between the protection of Marcic's rights and the general interest of the community, but the water company argued that the statutory scheme incorporated within itself a mechanism to ensure that the proper balance would be achieved. This was to be found in the statute's provision for a person to make a complaint to the Director General of Water Services that the water supplier had not properly performed its statutory duty. If the complaint was proved, an enforcement order would result and any person who was then affected by breach of the enforcement order would be able to claim compensation. Furthermore, the Director General of Water Service's decision was subject to judicial review.

The Court of Appeal did not accept this submission made by Thames Water. In its view this argument could only succeed if Marcic had been solely concerned with a breach of statutory duty by Thames. Here, though, Mr Marcic was alleging something more fundamental:

…interference with his human rights as an incident of the performance by Thames of its statutory duty.

The scheme in the statute did not apply to such a situation, as it conferred 'no right to compensation for acts or omissions which predate an enforcement notice, even if these constitute a breach of statutory duty'.

The court concluded that a sewerage undertaker would be liable if it operated a system that resulted in foreseeable nuisance (unless excused by way the defence of statutory authority). It would not be just that liability of the sewerage undertaker should depend on whether or not there existed steps that it could have reasonably taken to abate the nuisance. For example, if a house was regularly at risk of some flood damage a relatively large investment to abate the risk might not necessarily be economically justified. On the other hand the householder should not be left uncompensated.

[5] [1998] 26 EHRR 357.

The court said that a fair balance had to be struck

…between the individual and the general community; those who pay to make use of a sewerage system should be charged sufficient to cover the cost of paying compensation to the minority who suffer damages as a consequence of the operation of the system.

Lord Phillips MR concluded, more generally, that where community interests were served by the operation of a public authority of a particular undertaking, it may be necessary in achieving the right balance between 'individual rights' and 'community benefit' to order compensation to individuals whose rights are affected.

CONCLUSION

Even though it is highly significant that the European Court of Human Rights in *Hatton* has provided a resounding endorsement of an aggressive, highly interventionist version of the 'margin of appreciation', *Marcic* indicates that the English courts are becoming increasingly ready also to address the competing claims of individuals against the wider public interest: the need for compensation to be ordered, to balance the community and individual co-existence.

Marcic, however, is not as interventionist as *Hatton*. The former case contains stronger reminders that judges should, and do, incline to defer to their own governments on policy issues. This is evident from the very notion that the availability of compensation is an important factor in the drawing of balance between the demands of the general interest of the community and the requirement to respect the individual's fundamental rights. The requirements, for example, under Article 1, Protocol 1 and under Article 8, can on this basis generally be satisfied by the payment of monetary compensation.

Hatton went rather further. The UK Government was held not to be required to have struck a balance between competing interests, having regard to the state margin of appreciation, but had also to minimise as far as possible the interference with these rights by trying to find alternative solutions and seeking to achieve their aims in the least onerous way as regards human rights. Monetary compensation in this context was not enough.

The issues, which now await resolution, may perhaps be reduced to two:

First, will the Grand Chamber of the European Court of Human Rights uphold the bold approach shown by the 'lower' tribunal in *Hatton*?

Second, how will the English judges continue to interpret and apply the much quoted, but apparently cautionary, words of Hope LJ in the House of Lords in *R v DPP ex parte Kebeline*?[6] In that case he explicitly recognised that there will be areas of judgment within which the judges will defer on democratic grounds to the considered opinion of the elected governmental body whose acts or omissions are in issue:

By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be

[6] [1999] 3 WLR 972, pp 993-4.

applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than a set of mere rules. The question which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality. In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention… [T]he area in which these choices may arise is conveniently and appropriately described as the 'discretionary area of judgment'. It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection.

It remains to be seen how these words will continue to be applied in the light of the Court of Appeal's decision in *Marcic* and the final outcome in *Hatton.* There would seem to be some scope for the practice of the judges to alter, and a somewhat more interventionist approach to be adopted, whilst still not departing from the essential message within Hope LJ's speech.

UKELA calls for a "substantial rethinking" of the draft Statutory Guidance for the Environment Agency

The UKELA Working Party on Sustainable Development has submitted detailed comments on the draft revised statutory guidance to the Environment Agency, to be issued under section 4 of the Environment Act 1995. We welcome this consultation exercise, as this is one of the most important documents concerning environmental law in the UK. However, the draft Guidance does require some substantial re-thinking. Although the consultation draft contains much that is valuable, the guidance should not be adopted in its current form.

There are two main concerns on its substance - that the guidance lacks any definition of sustainable development and that it demonstrates a lack of any long-term thinking. The guidance also needs to address the trans-boundary and international nature of the Agency's role. The Working Party was also concerned to see that draft sets priorities for the Agency, despite the fact that there is no power in the Act to do so and the Agency is a statutory body in its own right. If priorities are to be included, it is thought that the appropriate starting point would be an overall environmental priority. The document also fails to address the fact that the Agency is not accountable solely to the Secretary of State and the executive, but also to the public, the ombudsmen

and to Parliament. The remainder of the Response deals with a series of detailed comments on the substance of the guidance.

The Consultation Paper - *The Environment Agency's Objectives and Contribution to Sustainable Development* – was published on 25th January 2002 (on the web at http://www.defra.gov.uk/corporate/consult/current.htm.) DEFRA invited comments on the draft document by 18th April 2002. UKELA's Response was drafted following a series of working party meetings, including one addressed by Chris Newton, the Head of Sustainable Development at the Environment Agency. It is now available on the UKELA website. Any queries regarding this consultation response should be addressed to the Convenor of the Working Party, William Upton (Barrister, 6 Pump Court, London; e-mail: wupton@compuserve.com).

Regional Groups

The South West Group – The next meeting will be a site visit to Callow Rock Quarry, situated in the Mendips AONB near Cheddar, on 11 July at 15.00hrs. Places will be allocated on a first come first served basis and anyone wishing to attend should contact the secretary sholmes@bondpearce.com.

The North West Group held its AGM on 7 May. The list of officers for the next year is as before, Nick Webb (nick.webb@environment-agency.gov.uk) continues as chairman, David Blackmore of Platt & Fishwick as vice-chairman, Malcolm Pratt of Entec-UK as treasurer and Clare Simmons of Wake Dyne Lawton as minutes/meetings/membership secretary.

The group held a meeting on 7 May, on the subject of environmental searches, with speakers from Entec UK Ltd and Wake Dyne Lawton solicitors.

The South East Group – Catherine Davey of Stevens & Bolton (catherine.davey@stevens-bolton.co.uk telephone 01483 734234) and Heidi Copland of DMH, Brighton (heidi.copland@dmh.co.uk telephone 01273 744457) are trying to resurrect the South East Regional Group.

The first meeting is likely to take place in DMH's offices at Crawley in early October (date to be confirmed) and will take the form of the seminar on contaminated land.

If anyone is interested in getting involved (simply by attending, offering to speak or providing a venue for future meetings) will they please contact Catherine or Heidi by e-mail.

TRAINING CONTRACT SOUGHT

Ian Hunt, age 24 of 5 Mill Farm Nurseries, Swaffham, Norfolk PE37 7PJ seeks a training contract.

Degree:	BSc Environmental Sciences 2:2
LPC :	University of Northumbria, Newcastle Upon Tyne, expected result Distinction.

Report on UKELA Working Parties

Biotechnology Working Party
Joint Convenors: Daniel Lawrence and Martha Grekos
daniel.lawrence@freshfields.com
martha.grekos@lawcommission.gsi.gov.uk

Daniel Lawrence and Martha Grekos have recently agreed to act as joint Convenors

of the UKELA Biotechnology Working Party, taking over from Rachel Devine.

Our initial step is to raise the BWG's reputation as a body which can be consulted upon by various institutions and committees (be it Governmental/NGOs/Business Groups etc), focusing on the group's energy, experience and expertise on current and important issues/debates.

The group is currently focusing on responding to the Agriculture and Environment Biotechnology Commission's (AEBC) *Consultation Paper on future scenarios for the uptake of GM in agriculture*. Draft comments and responses are being prepared by group members with a view to scheduling a meeting come June and providing an overall response to the AEBC by 9th July.

Discussion on the question which was addressed in the previous meeting (as mentioned in issue 8 of the UKELA e-journal), "Does English law properly address the deliberate destruction of GM crops?", will continue with a possible view to arranging a seminar.

Working Party on Sustainable Development
Convenor - William Upton (Barrister, 6 Pump Court, London; e-mail: wupton@compuserve.com).

UKELA calls for a "substantial rethinking" of the draft Statutory Guidance for the Environment Agency
The UKELA Working Party on Sustainable Development has submitted detailed comments on the draft revised statutory guidance to the Environment Agency, to be issued under section 4 of the Environment Act 1995. We welcome this consultation exercise, as this is one of the most important documents concerning environmental law in the UK. However, the draft Guidance does require some substantial re-thinking. Although the consultation draft contains much that is valuable, the guidance should not be adopted in its current form.

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SITUATIONS VACANT

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E – LAW

The editorial team want letters, news and views from you for the next edition due to go out in July 2002.

All e-law contributions, be they letters, articles, book reviews, case reports etc should be dispatched as soon as possible (and in any event by 22 July) by email to :
Catherine.Davey@stevens-bolton.co.uk
Letters to the editor will be published, space permitting
Environmental Law aims to update readers on UKELA news and to provide information on new developments. It is not intended to be a comprehensive updating service. It should not be construed as advising on any specific factual situation

Changing Places

UKELA Council Member, and the Convenor of the UKELA Sustainable Development Working Group, William Upton has just moved Chambers after 10 years at Eldon Chambers/Serjeants Inn. As from June 5, he will be practising from 6 Pump Court (Chambers of Stephen Hockman QC). Pump Court has a number of leading barristers in environmental, planning and local government law, and combines this with a wider spread of work across its membership. His contact details are now: William Upton, Chambers of Stephen Hockman QC, 6 Pump Court, Temple, London EC4Y 7AR.
(DX 293 London/Chancery Lane; Tel: 0207797 8400; Fax: 020 7797 8401) His direct e-mail remains wupton@compuserve.com.

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See also the web site at
www.ukela.org
for more information about working parties and events, including copies of all recent submissions.