*u.k. environmental law association e-journal*

e - law

*www.ukela.org* *Issue 10 – September 2002*

Contents



## Chairman's Report

I am very gratified that the election for an environmental seat at Law Society Council has attracted four candidates, three of whom are members of UKELA. It was only through strong representation by UKELA that the seat was allocated and it will surely be viewed as a major step towards the acceptance of environmental law as a mainstream subject.

Those who attended the Sheffield Conference would appear to be unanimous in declaring it an outstanding success and congratulations have been showered - quite rightly – on Nabarro Nathanson and in particular Luke Bennett for their powers of organisation and their ability to 'make things happen' at relatively short notice. The keynote speaker at the Saturday dinner held in the magnificent Cutlers Hall was the Chairman of the Environment Agency, Sir John Harman who chose to speak on, amongst other things, problems associated with the plethora of environmental regulation and its satisfactory enforcement. Also at the dinner I awarded the first prize for the Andrew Lees essay competition to Alexandra Brown and I look forward to this initiative gaining popularity year on year.

Any concerns that the Conference might have clashed with the World Cup final were allayed by masterly control of the

Sunday morning proceedings so that they ended in good time to view the final on the big screen.

Looking forward to the future, next year's Conference is set to be held in Plymouth (watch for details) and looking back to last year, papers from the Cardiff Conference have now been published and each UKELA member will be receiving a copy free of charge.

There was a buoyant mood at the Council meeting on 17th July reflecting the optimism that is now within UKELA: regional groups and working parties are very active, stimulating seminars have been planned in London and elsewhere and UKELA membership is on a sharp increase!

We are looking forward to a busy period for UKELA. Members are organising a wide range of seminars and meetings and arrangements are in hand for the prestigious Garner Lecture and next year's Conference.

A major target is to expand the membership especially to those interested in environmental law from the public sector and from industry. It is also hoped that there will be a vigorous response to the Council elections so that Council will be an accurate reflection of the wide range of interests within UKELA.

On behalf of Council I would like to thank Catherine Davey for producing and editing this journal and look forward to many more articles.

Pamela Castle, Chairman

**UKELA ANNUAL CONFERENCE**

*"Facing the future; Listening to the past"*

Sheffield 28 – 30 June 2002

Reflections of a conference organiser: Luke Bennett, Nabarro Nathanson

This year's conference was closely connected with its host city. Sheffield is a city of contrasts: a prosperous industrial past but now looking for sustainable future for the 21st century and beyond. The conference echoed this challenge – Environmental Law is rooted in both dealing with the legacy of the past (contamination and dereliction) and securing a less environmentally damaging future that can also meet our social and economic aspirations.

The tension between the economic, social and environmental elements of sustainability were revealed (though at all times with good humour) throughout the conference – and particularly in the conference's first session – a panel debate considering the question "Should the law set tighter limits to environmental protest?". The theme was then taken up again in the session on corporate governance and continued over (via disaster management) into the session on the aftermath of the foot & mouth crisis on Sunday morning. It even emerged in the midst of the urban regeneration session – with Charles Pugh's light hearted synopsis of case law pointing to the possibility of urban regenerators finding themselves liable in nuisance for the rowdy revelry of "fooligans" attracted back into the centre of the regenerated and repopulated "24 hour city".

Set in the leafy and genteel western Victorian suburbs overlooking the city centre, safely away from such intrusions, the conference was based at the University of Sheffield's Tapton Hall of Residence, with lecture facilities in the nearby Law Faculty Building.

The social programme included a Friday evening barbecue (bossa nova anyone ?), trips to the Peak District, a former Steel Works, local art galleries and a brewery tour – hopefully something for all tastes. The Gala Dinner and reception was held in the ornate surroundings of The Cutlers' Hall: a fabulous building but with acoustics that didn't do justice to our after dinner speaker, Sir John Harman, Chief Executive of the Environment Agency (sorry).

The UKELA Conference thrives because it has the support of sponsors. For the second year running the Conference's Main Sponsor was Homecheck.co.uk and this year Homecheck also kindly sponsored the delegate bags. Specific conference events were also sponsored by:

- LexisNexis Butterworth Tolleys – Friday evening drinks reception and barbecue
- Certa UK Limited – Gala Dinner (Venue)
- Environ UK Limited – Gala Dinner (Reception)

The last nine months have been an interesting and challenging time for me as conference organiser. Taking the event from "blank sheet" to final event is a long journey. But it is not one that I have travelled alone and I would like to record my thanks and appreciation to my colleagues at Nabarro Nathanson and also to colleagues at Certa (UK) Ltd, Conference 21 (Sheffield Hallam University), the University of Sheffield and UKELA Executive Committee and Council who all helped in their own valiant ways to deliver this event in a "shorter than normal" timescale.

I would also, of course, like to thank the array of speakers and chairmen who agreed to present at the Conference. They had to put up with their fair share of hounding from me.

There was a lot of interest in this year's conference and it became fully booked two weeks before the event. I hope that everyone found the weekend both enjoyable and rewarding.

## Human Rights and the Environment: Hatton and Others v United Kingdom; Marcic v Thames Water Utilities Ltd – Reproduced with Consent from [2002] 2Env. Liability 95

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

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

It was also mentioned that the United Kingdom Government sought a referral to the Grand Chamber of the ECtHR, the argument centring on the extent that the Member States must provide a detailed justification of interference and the extent to which it must be shown that all steps have been taken to minimise the level of interference. Under Article 43 of the ECHR, where a decision has been made by a chamber of the court (consisting of seven judges), Article 43(1) gives any party to the case, the right to request the case to be referred to the Grand Chamber consisting of seventeen 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 United Kingdom Government's request has been accepted and the case has now been referred to the Grand Chamber (April, 2002).

The case commentary was in favour of the pan-European approach adopted in *Hatton*. One of the most complex features of European human rights law is the challenge of balancing European human rights norms and the particularity of the contexts in which their application arises. Aligned to this is the delicate task of mediating the tension between effective European supervision and the upholding of established human rights norms on the one hand, and primary domestic responsibilities and socio-cultural choice and contexts on the other. The balancing involves the problems of objective and discernible standards as well as the recognition of the subjectivity of contexts and facts.

Why, then, was the Court in *Hatton* so quick to attribute weight to a narrow residential interest and reject the weight apportioned to broader interests by the United Kingdom Government, having regard to all material considerations? The answer is to do with "proportionality". *Hatton*-style proportionality is more radical and right centred than has hitherto been articulated by the ECtHR. The United Kingdom Government had not only to strike a balance between competing interests, having regard to the State margin of appreciation, but 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.

In previous case law, such as in *Powell and Rayner v UK*, a wide margin of appreciation had become conterminous with maximum state discretion, which in turn invariably translated into unsuccessful petitions on the part of individual applicants and an erosion of the substantive import of the particular rights in question. This is reminiscent of the overriding weight given to liberal trade by the Appellate Body of the World Trade Organisation where a similar "minimum-rights impact" principle has been turned against those with an interest in environmental protection. For instance, the Appellate Body of the WTO seems willing to interpret the exceptions widely under Article XX(b) and Article XX(g) of the GATT so the lack of an explicit reference to "protection of the environment" is somewhat mitigated. Clean air and turtles have, for example, already been acknowledged to be 'exhaustible natural resources': *US-Standards for reformulated and Conventional Gasoline*, WT/DS2/R and *Shrimp/Turtle case*, WT/DS58/AB/R.

Conversely, a narrow margin of appreciation, as seen in *Hatton*, accords with a stricter scrutiny and the adoption of "autonomous interpretation" on the part of the Court with a tendency to find in favour of individual applicants. Even if the Grand Chamber overturns the decision, domestic implications of *Hatton*, as seen in the recent Court of Appeal case of *Marcic v Thames Water* [2001] 3 AII ER 698, indicate that it might not be such a huge disappointment because the underlying thinking is still there. That being that an activity of social utility can produce compensatable harm if excessive effects on the individual are not justified.

The facts of *Marcic* were as follows: Mr Marcic owned residential property which was periodically and seriously affected by flooding. The flooding was caused by Thames, the defendant sewerage undertaker. Mr Marcic had spent £16,000 in attempting to protect his property. Thames had done nothing to remedy the problem which had worsened over the years and was unlikely to do so in the foreseeable future. At first instance, Mr Marcic's case against Thames for nuisance, negligence and breach of

statutory duty was dismissed. It was held that the common law was unable to offer any relief to Mr Marcic. The first instance judge, Havery J, did however hold that Thames had interfered with Mr Marcic's human rights by its failure to carry out the necessary works to abate the continuing nuisance it was causing. Thames had 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* (1998) 26 EHRR 357 was cited where the ECtHR 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". Mr Marcic's only remedy was limited to the time period from when the Human Rights Act 1998 came into force. This effectively left him uncompensated for the flooding he had suffered prior to that period. This highlighted the injustice of being left without a remedy for the loss suffered over a considerable time period, as a result of the omission of Thames to act.

The Court of Appeal, on the human rights point, was unequivocal in its support for the decision of Havery J at first instance. Thames had argued that Havery J had been correct in examining the balance between the protection of Mr Marcic's rights and the general interest of the community, but Thames further argued that the statutory scheme incorporated a mechanism to ensure that the balance would be achieved. This was because there was provision for a person to make a complaint to the Director General of Water Services that the undertaker had not properly performed it 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. The Director General of Water Services's decision was subject to judicial review. The Court of Appeal did not agree with the submission made by Thames as this would only be relevant if Mr Marcic had been solely concerned with a breach of statutory duty by Thames. Here, though, Mr Marcic was alleging "interference with his human rights as an incident of the performance by Thames of its statutory duty". The scheme in the statute did not remedy such a situation. As it "confers 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 construed a system that resulted in foreseeable nuisance, unless excused by way of operation of the statutory authority. However, it would not be just that liability of the sewerage undertaker would depend on whether or not there existed steps that it should have reasonably taken to abate the nuisance. For example, if a house was at risk of flooding regularly, but not frequently, a large investment to abate the risk might not be justified. But, the householder should not be left uncompensated. The Court said that a fair balance has 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 Philips 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 and community benefit to pay compensation to individuals whose rights are affected.

So, even though it is highly significant that the ECtHR in *Hatton* has (so far) provided such a resounding endorsement of an aggressive, highly interventionist version of this doctrine within Convention jurisprudence, *Marcic* also indicates that courts are becoming involved to address the competing claims of individuals against the wider public interest: the potential need for compensation to

balance out community and individual co-existence. The activity of a social utility can produce compensatable harm if excessive effects on the individual are not justified.

*Marcic*, though, is not as interventionist as *Hatton* given that there is an element in *Marcic* that judges should, and do, defer to their own government for policy issues. This is evident due to the mention that the availability of compensation is an important factor in the balance between the demands of the general interest of the community and the requirements of the individual's fundamental rights. The requirements, for example under Article 1, Protocol 1 and Article 8, can therefore be satisfied by the payment of monetary compensation. *Hatton* went further as the United Kingdom Government had not only to strike a balance between competing interests, having regard to the State margin of appreciation, but had to also 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 was not enough.

Lord Hope in the House of Lords in *R v DPP ex parte Kebeline* [1999] 3 WLR 972 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 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 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 as a set of mere rules. The questions 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."

The importance of such claims to environmental litigants is that it enables them to raise directly against a government or a public authority issues which would have often failed at common law because a court would have found no duty of care to exist. However, just as a Convention right may entitle a claimant to escape some restrictive rule of the common law, so the derogations (such as under Article 8(2)) entitle the respondent authority to defend on a front much broader than that allowed by domestic law and that the competing claims of individuals against the wider public interest might only be addressed by providing monetary compensation.

# OFFSHORE WIND 2: INTER- AND TRANS-NATIONAL LEGAL ASPECTS OF CONSENTS, ENVIRONMENTAL ASSESSMENT AND SEA-USE ACCOMMODATION

Glen Plant Barrister and Consultant (glenplant1@aol.com)

This is the second in a series of two articles on offshore wind farm development. The first[i] dealt with domestic aspects. This one deals with the public international and EC law aspects.

While many wind-generated sources of renewable energy are land-, shore- or 'near shore'- based, many of the best sources lie 'offshore' in open marine waters, sometimes within but often beyond States' territorial waters.[ii]

In addition, while near-shore pilot wind farm projects have been operating since 1990, and several 21st Century examples employ 'offshore-size' turbines, the only project that can be said to operate in a truly 'offshore' environment is the 4 MW, two-turbine 'Blyth Offshore' farm, erected 1 km off the English North Sea coast in 2000. Indeed, present installed capacity at sea is a mere 86 MW, located in the territorial waters of a handful of North European States, and no major wind farm has yet been completed beyond territorial waters.

Offshore wind farms are, however, likely to multiply during this decade.

First, proposals are in the pipeline in a baker's dozen or more European and North American States for offshore, as well as near-shore, wind farm projects within territorial waters having an aggregate installed capacity exceeding 5,000 MW.[iii]

Second, wind farms beyond territorial waters are starting to emerge.[iv] In April 2002, work started on Denmark's first commercial-sized offshore wind farm, at Horns Rev in the North Sea, which, like the second such farm to be built, at Rødsand, in the Baltic Sea, will extend beyond territorial waters and into the Danish Exclusive Economic Zone (EEZ).[v] Perhaps more significant[vi] is that at least one half of the 29 outstanding offshore wind farm consent applications being considered by the German Federal Maritime and Hydrographic Agency (BSH) relate to *EEZ*, rather than territorial waters, sites.[vii] Indeed, the first offshore consent that the BSH granted, in November 2001, was to the initial pilot phase of an *EEZ* project, Prokon Nord's 'Borkum West' farm.[viii] Approvals for further EEZ projects are expected during 2002. The BSH is approaching early marine consents cautiously, envisaging at present a maximum wind farm size of 80 turbines and the imposition of strict conditions while their effects on the environment, shipping and other interests are monitored. The pilot projects are, nevertheless, widely seen to herald major offshore development.[ix] This German 'rush to offshore wind' is impelled largely by the Federal Government's supported target that 20% of all German electricity production will come from renewable sources by 2010, much of it from offshore wind.[x] The Dutch Government, which aims to build marine wind farms with a total of 6,000 MW installed capacity by 2020, has, moreover, recently given approval to a single commercial-sized, 120 MW EEZ wind farm.[xi]

Others of the baker's dozen might soon follow. Supporters of British offshore wind energy development have been calling for a 'strategic approach' similar to Germany's and the Netherlands', involving the development of farms made up of hundreds of large turbines located further offshore than the initial 18 English and Welsh territorial waters projects.[xii] Many regard this as 'essential to allow the industry to prosper beyond the seven or eight initial projects likely to receive capital grants'.[xiii] Adoption by the Government of the recommendation of the Cabinet Office's Policy Innovation Unit (PIU) that renewable energy targets be extended to 20% of all UK electricity production by 2020[xiv] would, as in Germany's case, serve to accentuate this need to move offshore.

The location of wind farms in open waters, including seaward of territorial waters poses new legal challenges. Just as the technological challenges become greater as one moves into more open, deeper and further distant waters, so the legal challenges grow as one passes beyond territorial waters. This is because, generally speaking, international interests become greater and national interests less as one moves offshore. These challenges relate, therefore, to public international and EC law, as much as to national law.

Development of Land and Sea Areas

Any development involving a fixed use of a land or sea area must go through some form of consent process in a State with jurisdiction over the area, not least because it is often exclusive of other uses (including non-fixed, and so non-exclusive, uses) and because of its potential environmental and other adverse impacts. This is of particular importance in the cases of fixed uses that might (unlike the extraction of oil and gas ('petroleum')) become 'permanent', such as uses of non-exhaustible renewable energy. The consents process should cater for international, as well as national, interests in these matters, or at least those that are protected by public international or EC law. A choice must be made: either development may be refused in favour of other uses, or non-use, or it may be permitted, with or without conditions placed upon it. This is as true at sea as on land, despite the fact that controls are necessarily more sectoral than spatial in orientation.[xv]

Development of *onshore* wind power generation potentially interferes with essentially *national* land use and other interests, the main exceptions being international (including EU) interests in minimising environmental impacts and protecting terrestrial wildlife habitats and other sites of environmental or cultural importance.[xvi] The new legal issues it has raised, therefore, have related primarily, but not exclusively, to the operation of national planning laws, which have generally had a retarding influence upon development everywhere.

The Territorial Sea

*Introduction*

Trinnick and Holmes explain[xvii] that off-shore wind farms in UK territorial waters have similarly raised new issues with respect to national planning regimes and the protection of environmental interests (including the above-mentioned international interests). They add that windfarms are obliged to accommodate additional interests, peculiar to the marine medium, the exercise of the public rights of navigation and fishing.

It should be understood that, *in the territorial sea*, the public right of navigation extends to the exercise by *foreign*-registered ships of the public international law right of innocent passage.[xviii] This right permits continuous and expeditious passage both 'laterally' through the territorial sea and to and from port and extends to stopping and anchoring where this is incidental to ordinary navigation, or is enforced by *force majeure* or distress.[xix] The coastal State is entitled to prescribe laws and regulations governing its exercise, in order *inter alia* to ensure safe navigation and to protect offshore installations and cables.[xx] It also has in principle plenary jurisdiction[xxi] to *enforce* those laws and regulations, but should be restrained in exercising this *at sea*[xxii] (where collision might result). It must, indeed, not act in such a way as to deny or impair the right.[xxiii] In essence, the size, location, construction, operation and regulatory protection of territorial sea wind farms must be reasonable *vis-à-vis* foreign ships passing on the surface.

Developers might note with relief that foreseeable territorial waters wind farms are likely to be located in relatively shallow water normally frequented by relatively small craft.[xxiv] They might also be relieved to learn that the right of innocent passage does not extend to overflight by foreign aircraft, nor to submerged passage by foreign submarines. In addition, foreign fishermen have no right to fish within territorial waters, except where traditional fishing rights have been preserved by treaty.[xxv]

There are, therefore, three consents-related processes through which offshore wind farm developers must pass to obtain leases in the UK territorial sea: choice of the optimum procedural route to obtain statutory consents; environmental 'assessments'; and use-accommodation. The first Trinick and Holmes have ably dealt with.[xxvi] The others will be discussed here, in reverse order.

*Use-Accommodation: Foreign Ships' Rights of Innocent Passage*

Before permitting development or imposing any TWA Order restrictions on navigation rights, the authorities are bound to consider whether or not this would have the practical effect of denying or impairing foreign ships' right of innocent passage.[xxvii] Bearing in mind that territorial sea windfarms are unlikely to be erected in deep water, factors nevertheless to consider in deciding whether or not either would be reasonable include: existing traffic patterns; the proximity of port facilities or roadsteads; the positions of shipping channels and fairways; and the location of ships' routeing and other ship traffic systems. To the extent possible, wind turbines should be located so as to minimise interference to shipping, bearing in mind that the establishment of a wind farm might itself affect traffic patterns and that it is reasonable to expect ships to make minor diversions, or to amend routeing systems, around prime wind-resource sites where this can be done safely. A major wind farm development might even give rise to the need for new ships' routeing systems.[xxviii]

The 1982 UN Convention on the Law of the Sea (UNCLOS) expressly authorises coastal States to require foreign ships in innocent passage to use[xxix] 'sea lanes' or 'traffic separation schemes (TSSs)'.[xxx] In principle, however, coastal States' powers to regulate innocent passage, including in the vicinity of a wind farm, are not limited to the operation of such 'positive' routeing systems, but comprehend *any* reasonable 'traffic' measures, whether mandatory or voluntary for foreign ships.[xxxi] These might include: International Maritime Organization (IMO)-approved forms of 'ships' routeing', like TSSs,[xxxii] 'No Anchoring Areas'(NAAs)[xxxiii] or possibly even small 'Areas to be Avoided' (ATBAs);[xxxiv] measures analogous to routeing, like 'fairways' through areas crowded with offshore platforms or installation 'safety zones';[xxxv] ship reporting systems (SRSs); or even vessel traffic services (VTS), which variously offer either information, advice or movement instructions to vessels within a prescribed and remotely-monitored zone.[xxxvi]

It would be possible, for example, to route passing ships[xxxvii] away from wind farms by means of mandatory TSSs, to place (remote) SRS or VTS facilities aboard turbines,[xxxviii] or to establish 'no anchoring', 'no fishing' or even small 'areas to be avoided' or 'safety zones' (i.e. 'prohibited zones') around turbines or turbine clusters. An important *caveat* is that, in principle, prohibited zones *deny* rather than regulate the right of innocent passage,[xxxix] so that the prohibition against entry ought to be subject to reasonable exceptions, such as *force majeure*, and their size kept to a minimum. The UK, for example, normally limits territorial sea 'safety zones' to a maximum of 500m from the outermost point of installations, by analogy with the internationally-accepted normal maximum for continental shelf/EEZ safety zones.[xl]

*Environmental Assessments: EU Environmental Protection Interests*

Trinick and Holmes remind us that a wind farm development in English or Welsh (as in other EU) territorial waters must also, in appropriate cases, satisfy two 'assessment' processes required under EC law:

- An environmental impact assessment (EIA) under Council Directive 85/337/EEC, as amended by 97/11/EC ('EIA Directive').[xli] In addition, Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ('SEA Directive') will, effective 2004, require the Government to conduct strategic environmental

assessment ('SEA') *at the planning and programme level* of offshore wind farm development; and

- an 'appropriate assessment' of its impacts upon wild birds and wild species' habitats, under Council Directives 79/409/EEC and 92/43/EEC, as amended by 97/62/EC, ('Wild Birds' and 'Habitats' Directives).[xlii]

Wind farms are listed in Annex 2 to the EIA Directive as a type of project for which EIAs will be required if they are likely to have a 'significant effect' on the environment. The competent authority will determine whether EIA is required on a case by case basis and in accordance with screening criteria provided in the Schedule 3 of the Directive. The developer's Environmental Statement should cover the impact of the whole development, including the cabling and on-shore site, and consider all potential effects. EIA is likely to be required of all early projects. Once the environmental impacts of offshore windfarms are better understood, however, EIA might cease to be required of certain developments, such as smaller ones whose visual impact at the shore is low.[xliii] This is, however, never likely to be true of sites covered by the other two Directives.[xliv]

As to these, while the EIA Directive merely requires information to be given on alternatives considered by the applicant, the Habitats and Wild Birds Directives actually *prevent* development likely to adversely affect the integrity of a site they protect,[xlv] unless there is no alternative to it.

The Secretary of State (DEFRA)) is required, before undertaking or consenting to a plan or project that (either alone or in combination with other plans or projects) is *likely* to *have a significant effect* on a marine 'Special Area of Conservation (SAC)' under the Habitats Directive, or a marine 'Special Protection Area (SPA)' under the Wild Birds Directive, and which is unrelated to that area's management, to make an 'appropriate assessment' to establish whether it is *likely* to *adversely affect* the *integrity* of such a 'European marine site' (emphasis added).[xlvi] A project in or near such a site may not be consented to nor undertaken if it will adversely affect the integrity of such a site, unless the Secretary of State is satisfied (after public consultation 'if appropriate') that: (i) there are 'imperative, over-riding reasons of public interest' to permit it, which (except where the site concerned hosts a priority natural habitat type and/or a priority species[xlvii]) may be of a *social or economic* nature); and (ii) that there is no alternative. If he is so satisfied, 'compensatory measures' should be taken, in order to safeguard the integrity of the network of European sites as a whole.

To date, the UK has established some 133 coastal and marine SPAs and identified some 151 candidate marine SACs extending over its territorial waters[xlviii] in what the European Commission regards as only a partially completed process.[xlix] The Commission is watching the SAC identification and designation process closely and might press the UK for additional site identifications within territorial waters where these are revealed to be necessary.[l] Unfortunately, the implementation of the Habitats Directive is fraught with difficulties that do not aid forward planning of offshore wind developments.[li] First, the terms highlighted above, 'likely', 'significant effect', 'adversely affect' and 'integrity', are open to widely differing interpretations, and authoritative guidance is at present limited. Second, there is a problem with how the effects of projects, including wind farm projects, might be mitigated. If a proposed wind farm scheme would result in a European marine site's loss of integrity, and mitigation *within its boundaries* is considered to be impossible, so that a developer has to establish a case of overriding public interest in order to obtain consent to proceed, he might incur considerable cost and delay in then producing a set of 'compensation measures' that prove to be essentially the same as the rejected 'mitigation measures'. Third, the phrase 'in combination with other plans or projects' requires the *cumulative* impacts of

projects to be considered early in each assessment process, but the parameters within which such a judgement should be made remain unclear. Bearing in mind that the locations and sizes of European marine sites might change over time (not least as climate change increasingly affects wildlife populations and habitats), developers are well-advised to act early and avoid *prospective* as well as identified European marine sites.

Beyond Territorial Waters

Wind farms beyond territorial waters must be erected and operated (and, where appropriate, decommissioned) with 'due [i.e. reasonable] regard' for third States' freedoms there. Within EEZs these are essentially communications freedoms, notably navigation, overflight and laying submarine cables and pipelines. On the high seas proper, they also include the natural resource and economic rights reserved, within the EEZ, to the coastal State.[lii]

Unlike the other concerned States, the UK has declared only a 200 NM Exclusive *Fisheries* Zone (EFZ) around its metropolitan territory. It has not, however, regarded the absence of a formal EEZ claim as an impediment to its claiming and exercising environmental protection[liii] and certain other powers[liv] within that zone, which will thus be referred to below as the '200 NM zone'. On the other hand, it has not claimed, as it is entitled to do,[lv] the exclusive right to exploit the renewable marine resources within its 200 NM zone. It has claimed only the rights to the *natural resources on and under the continental shelf* (which lies under and extends beyond the zone).

The rights to explore and exploit the shelf's *hydrocarbon* resources are subject to specific statutory regimes. All other 'rights exercisable by the United Kingdom outside territorial waters with respect to the sea bed and subsoil and their natural resources.. are vested in "Her Majesty" by virtue of Section 1(1) of the Continental Shelf Act 1964',[lvi] and '[t]hese rights fall under the management of the [Crown Estate] Commissioners who exercise them by grants of licences for such activities as aggregate dredging and the laying of cables and pipes of various kinds'.[lvii]

It might appear, *prima facie*, that exploration for and the exploitation of 200 NM zone renewable resources will fall naturally under the Crown Estate Commissioners' control. Their exact role and powers are, however, unclear. According to the First Commissioner in 1992, 'there does not need to be a landlord in the sense that the sea bed has got to be in the ownership of some body; and the Royal Prerogative decrees that in the main it should be the Crown Estate and the Commissioners are appointed as if in effect they were trustees. We are very nearly administering the Estate on behalf of the State in the shape of Her Majesty the Queen'.[lviii] On the one hand, the Commissioners appear to act as owners and landlords of the 200 NM zone seabed and subsoil for the purposes of granting marine works licences (and placing environmental or other conditions on their issue) and of 'measures for enhancement of the environment or [protection] of wildlife habitats where appropriate';[lix] on the other, they leave the obtaining of statutory consents for and environmental assessments of installations and works to the Government[lx] and have no powers over uses of the waters and superjacent air space of the 200 NM zone, except incidentally in relation to their powers in respect of the sea bed and sub soil. Their primary task and concern is to administer Crown lands so as to maximise returns from them consistently with good and environmentally sound management, not to manage a marine regulatory regime. Further clarification of their legal role within the 200 NM zone would appear to be a matter for resolution, in the first instance, by the Law Officers.

Since the UK has claimed neither a metropolitan EEZ nor a particular right to exploit renewable energy resources within the 200 NM zone, it appears at first sight to have left the enjoyment of those rights to the first comer from *any* State, in accordance with the principle of freedom

of the high seas. Although the controls over installations and works on the UK continental shelf, discussed above and below, render unauthorised exercise of the rights in question impracticable, it is perhaps time for the Government to claim a metropolitan EEZ, or at least those specific rights. This might be so even if it requires primary legislation and gives rise to fresh international maritime zone delimitation tasks.

While the UK has over four decades of experience with licensing and regulating offshore petroleum platforms on its continental shelf, wind farms will involve different spatial, locational and environmental impacts, and in any event require legislation specific to the 200 NM zone. It follows that windfarms beyond territorial waters are likely to require an entirely new set of domestic consenting, use-allocation and environmental protection regulations, or at least a substantial recasting and extension of relevant hydrocarbons legislation. The three issue-areas identified above are also relevant here.

*Statutory Consents- England and Wales*

UK legislation permitting the regulation of wind farms beyond the 12 NM limit reveals large gaps. Quite correctly, a sectoral approach has, been taken to the extension of legislative provisions beyond land territory, but in at least one sectoral Ministry there has, perhaps, been a lack of foresight that future development of renewable energy resources might extend beyond territorial waters. Neither the Electricity Act nor the Transport and Works Act appear to apply beyond those waters.[lxi] The DTI would, therefore, act *ultra vires* were it to permit wind turbines within the 200 NM zone to feed into the national electricity grid or to issue a TWA Order placing restrictions on the exercise of public rights of navigation or fishing around them.[lxii]

Only FEPA applies to the whole 200 NM zone. In addition, S. 4 Continental Shelf Act ('CSA') 1964 effectively extends the application of Part II Coast Protection Act ('CPA') 1949[lxiii] 'in relation to any part of the sea bed in a designated area [of the continental shelf[lxiv]] as it applies in relation to the sea shore', and so effectively to *all* types of installation (and not merely petroleum installations) sitting on or attached to the sea bed within a large proportion of the (windiest) waters of the 200 NM zone. It is unlikely that these provisions alone, coupled with the use-allocation regulations discussed below, are able to provide a sufficient legal base for confident 200 NM zone wind development to proceed.

It is, therefore, difficult to see how fresh primary legislation might now be avoided.

*Environmental Assessments*

The EIA, SEA, Habitats (and, apparently, Wild Birds) Directives also apply in the 200 NM zone.[lxv] The EIA Directive was applied to petroleum activities in 1997,[lxvi] and, following the decision in *R. v. Secretary of State, ex parte Greenpeace*,[lxvii] the Government prescribed regulations[lxviii] to give effect to the Habitats Directive on and above the UK continental shelf in respect of petroleum activities. No UK SACs have yet been identified beyond territorial waters, but a list of criteria to be taken into account has been drawn up.[lxix] DEFRA, having prepared regulations to transpose the EIA and Habitats Directives to marine aggregates extraction from the shelf,[lxx] plans to consult shortly on regulations to implement the Habitats and Wild Birds Directive with respect to other non-petroleum activities in the 200 NM zone.[lxxi] While, however, the Secretary of State certainly has powers to do this, it is difficult to see how such regulations might extend to govern offshore renewable energy developments in the 200 NM zone unless the Electricity and/or Transport and Works Acts are extended first.[lxxii] As to SEA, since the Government is already, in advance of the Directive's entry into force, conducting a five year assessment at the planning and programme level of the entire UK continental shelf to ensure that future petroleum licensing rounds are carried out on a sound and informed basis,[lxxiii] it should perhaps take full account of wind generation possibilities too *ab initio.*

When passed, the regulations will aim to reflect a precautionary and ecosystems-based approach and are likely to follow fairly closely the guidance given in the equivalent petroleum regulations, as these come themselves to be adapted to more fully reflect such an approach.[lxxiv] At the very least, this will mean that DEFRA will seek the advice of the Joint Nature Conservancy Council at an early stage of any licensing process and will work with it where it is necessary to produce an 'appropriate assessment' under the Directive(s).[lxxv]

It is, on the other hand, unlikely that wind farm licensing will occur in 'rounds', as does petroleum licensing. While, moreover, the discussion above suggests that the protection afforded 'European marine sites' will be strong, it is possible that wind farm operations will be permitted in or near such sites for over-riding reasons of public interest. In any event the availability to an offshore petroleum operator of a general 'incidental actions' defence to a charge of degrading or destroying habitats was expressly accepted by the High Court in the *ex parte Greenpeace* case as compatible with the Directive. This is likely to be reflected in the proposed regulations on renewable energy.

In conclusion, it appears that an entirely new system of licensing, environmental assessment and statutory consents needs to be constructed for UK wind farms beyond the territorial sea. Lessons might be learnt from other countries going through the same process, especially Germany and the Netherlands, as well as from the UK continental shelf petroleum block licensing procedures, including the modified consultation procedure adopted for the 19th and 20th Rounds.[lxxvi] Petroleum Licenses may, for example, be subject to the application of environmental conditions, which may restrict activity within the area or limit the time during which particular activities can be undertaken. All applicants should also pass threshold tests on technical competence, financial capability and environmental performance.

*Sea-Use Allocation*

Wind farms in the 200 NM zone will, like those in territorial waters, have to compete with other sea uses, including navigation, overflight, the laying of submarine cables and pipelines, fishing and hydrocarbons and aggregates extraction. In avoiding conflicts and effecting appropriate use-accommodation, coastal States will encounter particular difficulty *vis-à-vis* international navigation rights, which are thus examined below.

The potential of wind farms to interfere with navigation is greater in the 200 NM zone than in territorial waters, because, as has been explained, windfarms there are likely to be both larger and erected in deeper waters. For the foreseeable future, moreover, they will in the main keep to the relatively shallow areas, shallower than 20 or 30m, just outside the territorial sea, and so in or near coast-wise shipping lanes.

The freedom of navigation enjoyed by ships of third States extends to submerged navigation and is a broad freedom *in fact*.[lxxvii] A ship is free, for example, to move, stop or anchor at will as long as she does so with reasonable regard for third States' communications rights and for the coastal States' economic and other rights. Her freedom comprehends, indeed, 'other internationally lawful uses of the sea related to [it], such as those associated with the operation of ships [and including, for example, reasonable naval manoeuvres and exercises].., and compatible with the other provisions of [UNCLOS]'.[lxxviii] She remains, moreover, subject to the exclusive jurisdiction of her flag State, with the exception of limited coastal State jurisdiction over merchant vessel-source pollution.[lxxix]

On the other hand, the coastal State has, in its 200 NM zone, the exclusive rights, *inter alia*, to exploit its renewable resources and to construct and to authorise and regulate the construction, operation and use of artificial islands and of installations and structures ('platforms') to exploit those resources. It also has exclusive jurisdiction over those platforms[lxxx] and the right, 'where

necessary', to establish 'reasonable' safety zones around them,[lxxxi] in which it may take 'appropriate measures to ensure the safety both of navigation and of [the platforms]'[lxxxii] and which ships are required to 'respect'.[lxxxiii] The vagueness of this language, as it appeared in UNCLOS's predecessor,[lxxxiv] encouraged a number of States, led by the UK,[lxxxv] to make very broad claims of jurisdiction within *continental shelf* safety zones,[lxxxvi] but meant that the legality of many of these was formerly open to doubt. Fortunately, a requirement was added to UNCLOS's provisions on 200 NM zone (as well as continental shelf[lxxxvii]) safety zones that ships 'comply with generally accepted international standards ('GAIS') regarding navigation in the vicinity of [platforms] and safety zones'.[lxxxviii] The GAIS developed by the IMO recommend Governments to 'take all necessary steps to ensure that, unless specifically authorized, ships flying their flags [including vessels engaged in fishing[lxxxix]] do not enter or pass through duly established safety zones'.[xc] The UK now provides for the *automatic* establishment of safety zones around petroleum production platforms in place on the continental shelf,[xci] and for a power to establish them for a reasonable period in advance of and during construction.[xcii] It prohibits entry into and navigation in them by passing vessels and the regulation of exempted traffic exceptionally present in them.[xciii] It might be possible to extend these powers to non-petroleum platforms without primary legislation,[xciv] but if such legislation is found to be required in relation to other aspects of renewable energy development in the 200NM zone, it would be preferable to extend the powers by means of that legislation.

It is doubtful, however, that safety zones (combined, of course with notice and installation marking requirements[xcv]) are an adequate protection against ship-platform allision.[xcvi] Each zone's design is required to be 'reasonably related to the [platform's] nature and function', and its extent is limited to a maximum of only 500m measured from each point of its outer edge,[xcvii] except where 'authorized by [GAIS] or as recommended by the [IMO].'[xcviii] Even with these restrictions, moreover, there have been many complaints of safety zone infringements, and flag State action against infringers has often been inadequate.[xcix] More importantly, safety zones (like the platforms they surround) must not be established 'where interference may be caused to the use of *recognized sea lanes essential to international navigation*. (emphasis added)',[c] and abandoned or disused platforms must be removed 'to ensure safety of navigation',[ci] taking into account GAIS developed by the competent international 'organization'.[cii]

In the context of petroleum platforms, these requirements have formed part of a putative use-allocation arrangement whereby a fixed but *temporary* sea use of an *exhaustible* natural resource is accommodated with non-fixed non-exhaustive sea uses, such as navigation and fishing,[ciii] in the process perhaps being treated in principle, though rarely in practice,[civ] as marginally subservient to one of these, international navigation. Where, as in the case of renewable energy, a fixed use is of a *non*-exhaustible resource, and platforms are likely to be quasi-permanent, it is arguably even more important to ensure that platforms and safety zones do not interfere with 'recognised sea lanes essential to international navigation'.

It is, however, far from easy to identify such sea lanes or, conversely, areas within 200 NM zones where the risks of ship/turbine allision, and of serious consequent environmental damage, would be 'acceptably' low. Short of finding a reliable method for locating wind farms sufficiently far from shipping routes to remove any serious threat,[cv] the best means of controlling the risks appears to be the employment of 'traffic measures' additional to safety zones. Most useful, because most likely to assist in the identification of (or even to embody, at least in part) 'sea lanes essential to international navigation', are likely to be 'positive' ships' routeing systems, such as TSSs, or analogous systems.[cvi]

In principle, routeing systems beyond territorial waters are not binding upon

passing foreign ships, but since 1997 a coastal State has been able to seek IMO adoption of mandatory systems.[cvii] Several IMO-adopted TSSs and related non-mandatory routeing measures, as well as the 'Mandatory Route for Tankers from North Hinder to the German Bight and *Vice Versa*',[cviii] lie over parts of the crowded southern North Sea continental shelf.

Ship reporting systems, which may be made mandatory, with IMO permission, under similar conditions to ships' routeing systems,[cix] might also enhance wind farm safety. Of 'SRS'[cx] systems that extend over areas of the (as yet-undelimited) UK 200 NM zone, the Anglo-French SRS 'In the Dover Strait/Pas de Calais' and the French systems 'Off Ushant' and 'Off Casquets' are IMO-adopted mandatory systems.[cxi]

The criteria for IMO adoption of mandatory routeing systems and SRSs are, however, strict and aimed primarily at environmental protection rather than ship or platform safety *simpliciter*.[cxii]

It is, moreover, difficult both to identify high collision/allision-risk areas (or 'recognised sea lanes essential to international navigation') and to put in place appropriate traffic solutions without extensive and continuing monitoring and analysis of traffic patterns and of the effects of offshore development on ship behaviour. In the past, the UK has supplemented these with a 'clearway' system. Clearways (areas believed to coincide with the main shipping routes across the shelf) were an administrative device to assist the offshore licensing process.[cxiii] Where, moreover, IMO-adopted routeing systems lay within clearways, there was a presumption against licensing. When, however, in 1995, it became clear that the clearways were 'not necessarily a sufficient or accurate guide to the presence, absence or level of likely obstruction or danger' to navigation[cxiv] the UK switched to the present system of case by case assessment. Significantly, the presumption against licensing in the areas of IMO-adopted routeing systems is nevertheless retained,[cxv] and is coupled with efforts to establish as far as possible a general definition of those areas where danger or obstruction to navigation is likely to be most significant.[cxvi]

There is still insufficient information on traffic patterns in waters off the UK to ascertain whether petroleum licenses have been awarded in the safest locations or not.[cxvii] The same problem (and liability insurance-related consequences) might well come to dog offshore wind farms. It is, perhaps, significant that the German and Dutch Governments have already launched inter-Departmental processes to identify 'potentially suitable' or 'priority' (i.e. low use-conflict) EEZ areas for wind farm development.[cxviii] Perhaps the UK Government should do the same, employing computer-based systems as far as possible.[cxix]

Conclusions

While there is no 'one-stop shop' and some potential for delay, the consents and environmental assessments processes in UK territorial waters are arguably adequate to facilitate at least limited development of offshore wind and other renewable energy resources there.

There will be an increasingly pressing need, however, with respect to renewable energy development in the UK 200 NM zone, and wind energy development in particular, for the Government to: claim the exclusive right to use the renewable energy resources; develop a fresh set of (non-FEPA) licensing and consents procedures; identify 'potentially suitable' development areas and an acceptable (non-'rounds'-based?) method for allocating specific sites as between rival applicants; extend environmental assessment procedures to renewable energy projects; identify 'European marine (wildlife) sites'; extend safety zones regulations to non-petroleum platforms; and prescribe, obtain IMO adoption of and implement any ships' routeing or ship reporting system (including any necessary mandatory systems), or indeed any voluntary VTS system, that would reduce the risks of ship-platform allision.

The DTI has recently started examining the consents issue and has announced a consultation to take place between

September 2002 and early 2003. DEFRA is looking at environmental assessments beyond territorial waters. The sooner all the relevant Departments act on these issues the better, especially as competition among wind farm developers to secure the best sites early is likely to grow apace, and as primary legislation appears to be inevitable. It is to be hoped too that any consultation processes will be *international*, and not inward-looking, in their orientation.

[i] M. Trinick and Sarah Holmes, 'Paving the Way: Consenting Processes for Offshore Renewable Energy', in this journal (9 May 2002 ed.), 5. As their title suggests, the development of other marine forms of renewable energy, including wave, current and tidal energy and ocean thermal energy conversion, is likely to involve similar consents (and indeed other legal) considerations. This piece discusses only wind energy, however, since to date no water-based marine renewable energy generating plant has passed beyond the shore or 'near-shore' pilot phase, and only wind energy is set to 'take off' commercially offshore.

[ii] 'Territorial waters' is generally used in modern parlance to denote both a State's internal (or 'inland') waters, which lie landward of the baseline from which is calculated the breadth of the territorial sea, and the territorial sea, a maritime zone extending to a maximum of 12 nautical miles (NM) seaward of that baseline. The baseline is normally the low-water line (*cf.* Art. 3 1958 Convention on the Territorial Sea and Contiguous Zone (CTS); Art. 5 1982 UN Convention on the Law of the Sea (UNCLOS)), but see *infra* n. 18. The legal regime of internal waters may be assimilated to that of land territory, where the coastal State has plenary jurisdiction over wind farm operations. The territorial sea is also part of the coastal State's sovereign territory, but the State's plenary jurisdiction is qualified by the right of innocent passage enjoyed there by foreign ships: see *infra*.

[iii] *Cf. New Energy*, 6/2001.

[iv] Trinick and Holmes suggest that a total of 15,000 MW offshore installed capacity is passing through permitting processes: *loc. cit.,* p. 9. Most of this, it seems, lies beyond territorial waters.

[v] The EEZ is a zone extending up to 200 NM from the territorial sea baseline (see n. 2 *supra*), in which the coastal State has: sovereign rights for the purposes of exploring and exploiting, conserving and managing its natural resources 'and with regard to other activities for the economic exploitation and exploration of the zone, *such as the production of energy from the water, currents and wind* (emphasis added)'; and jurisdiction with regard to, *inter alia*, the establishment and use of artificial islands, installations and structures and marine environmental protection: Art. 56(1) UNCLOS. Third States retain international communication rights over these waters, notably the freedoms of navigation, overflight and laying of submarine pipelines and cables (*cf*. Art. 58 UNCLOS). Each State, in exercising its own rights and performing its own duties, is required to have 'due regard' to the rights and duties of other States, i.e. it must act 'reasonably' in relation to their interests in using the sea. See further text below.

[vi] The new Liberal/Conservative Danish Government has revoked the Executive Order to the Danish power companies to build a further three offshore wind farms during the period 2004-08, on the controversial ground that 'the Danish wind energy programme is several years ahead of schedule'.

[vii] A*liter*, *New Energy***,** 2/2002, p. 62, which refers to 30 *EEZ* projects. If completed, the 30 wind farms will have an aggregate installed capacity exceeding 50,000 MW.

[viii] Conditional upon securing a regional government license for submarine cabling, installation is scheduled to start in 2003, initially of 12 turbines in an area 5.6km$^2$ approximately 45 KM north of Borkum and at a water depth of about **30m.**

[ix] According to the German Wind Energy Association's President, Peter Ahmels, however, 'Only with the government's [continuing] help can the goal of 80 to 90 billion kWh from offshore wind power by the year 2030 be reached. To achieve that, around 5,000 turbines would be needed, each with a rated capacity of five MW, covering an area of about 2,100 square kilometres': cited in *New Energy*, 6/2001.

[x] It hopes to have 500 MW installed offshore capacity by 2006, 2-3,000 MW by 2010 and 20-25,000 MW by 2025 or 2030, when offshore wind should supply 15% of national energy needs: *New Energy*, 2/2002, p. 62.

[xi] E-Connection, Shell, Nuon, NEG Micon and Noordzee Wind's 'Q7-WP Offshore' site, in water depths of 20-23m. A three year moratorium on further development will ensue, however, in order to permit adequate permitting procedures to be put in place: N. Martin, 'Identifying Commercial Sites', *Windpower Monthly*, May 2002, 31-32.

[xii] In Scotland, where different procedures apply, Talisman has commenced a feasibility study into the building of a 500 MW, 120-turbine wind farm over the Beatrice oil field in the inner Moray Firth: M. Nicholson 'Offshore wind farm plans', *Financial Times*, 14 June 2002.

[xiii] 'Offshore developers aim for huge turbine clusters', *ENDS Report* 323 (Dec. 2001), 8. In the first round, in April 2001, of Crown Estate pre-leasing allocations of 18 wind farm sites up to 10km$^2$, in 13 areas 1.5 to 10 km off the coast in English and Welsh territorial waters, each developer was restricted to a single project of up to 30 turbines.

The reference to 'seven or eight initial projects' is explained by the restriction of capital grants available for first round projects from the public funds pledged to date (£74ml.) to a maximum of £10ml per project and by the fact that such grants are unlikely to be made available to subsequent projects: the Cabinet Office's Policy Innovation Unit (PIU) expects the initial grants to 'generate

sufficient early momentum for offshore wind to play its full part in meeting the 2010 target' of generating 10% of UK electricity requirements from renewable sources: PIU, 'Renewable Energy in the UK – Building for the Future of the Environment,' Oct. 2001, para. 4.1, available on-line at <http://www.cabinet-office.gov.uk/innovation/2001/energy/Renewener.shtml> (visited 27 April 2002). The reference assumes, of course, that no more than 10 or 11 projects are defeated by objectors, including the Ministry of Defence (MOD). It objects to the use of 5 (originally all 13) of the areas in view of potential interference with air transport radar and exercising low-flying military aircraft: *cf.* 'MoD safety fears frustrate wind power industry', *ENDS Report* 328 (May 2002), p. 5.

[xiv] PIU, *loc. cit.*, para. 3.3.

[xv] 'Below the [low-water line] different areas may be more or less subject to particular uses, but division along rigid boundaries is impractical. The Crown Estate Commissioners are the landlord of the [UK] sea bed, but the sea itself is owned by no one. Regulation is therefore generally targeted on particular activities rather than on defined areas. This is practicable because there is much smaller variety of development below the [low-water line], and less direct conflict between competing uses for available space. Furthermore [navigation] is unique to the sea. Controls ensuring safety of navigation therefore apply to all activities': Memorandum by the DoE, MAFF, the Home, Scottish, Welsh and Northern Ireland Offices, the Departments of Energy, Transport and Education and Science, the Treasury and the Crown Estate Commissioners, 'COASTAL POLICY' (*'Government Memo.'*), H.C. Environment Committee, *Inquiry into Coastal Zone Protection and Planning*, Parliamentary Papers. 1991-92, H.C, Paper 17-II (*H.C. Inquiry)*, 1, 6, para. 42.

[xvi] E.g. under the EC 'EIA', 'Habitats' and 'Wild Birds' Directives, discussed below, as well as the 1971 Ramsar and 1972 World Heritage Conventions (the Conventions on Wetlands of International Importance especially as Waterfowl Habitats and for the Protection of the World Cultural and Natural Heritage). As to the 155 UK Ramsar sites (a number very likely to grow soon), see <http://www.ramsar.org/profiles_uk. htm>. As to UK world heritage sites, including three coastal/island sites, see < http://www.unesco.org/heritage.htm#debut> (sites visited 24 June 2002).

[xvii] *Loc. cit.*, 4th and 5th paras.

[xviii] See Part I, Section III CTS; Part II UNCLOS. The navigation-related treaty provisions referred to in this paper are generally accepted to represent customary international law binding on all States, whether they are Parties to the treaties or not (with the notable exception of Part III UNCLOS, discussed below, the legal status of which remains controversial).

Foreign ships also enjoy the right of innocent passage in waters formerly high seas but now enclosed, as internal waters, within straight baselines drawn between the outermost points of deeply indented or island-fringed coastlines, where use of the low-water line as the baseline is impracticable (*cf.* Arts. 4 and 5 CTS; Arts. 7 and 8 UNCLOS), such as off NW Scotland (see Territorial Waters Order 1964, as amended).

Finally, in certain navigationally important straits used for international navigation lying within territorial waters, third States' ships and aircraft arguably enjoy a right of *transit passage* that is broader than the right of innocent passage (though less broad than the freedoms of navigation and overflight they enjoy beyond territorial waters): see Part III UNCLOS. The Government has stated that this regime applies to certain straits lying within UK territorial waters. In addition, special (and often liberal) passage regimes apply in certain straits used for international navigation by virtue of long-standing international conventions. The establishment of large wind farms in straits with 'transit' or other liberal passage regimes is more likely to meet with (international) objections on grounds of potential interference with navigation than such establishment elsewhere in the territorial sea. Spain nevertheless has plans to build a wind farm in the Strait of Gibraltar and Sweden in the Sound.

[xix] Art. 14 CTS; Art. 18 UNCLOS.

[xx] See esp. Arts. 21-23 and 27-28 UNCLOS.

[xxi] Foreign warships, however, and other government ships operated for non-commercial purposes, enjoy immunities: Arts. 22 and 23 CTS; Arts. 30-32 UNCLOS.

[xxii] *Cf.* Art. 19 CTS; Art. 27 UNCLOS.

[xxiii] Art. 15 CTS; Art. 24 UNCLOS.

[xxiv] They should note, however, the growing numbers of ever-larger non-displacement ('high-speed') craft and wing-in-ground ('WIG) vessels, which can operate in shallow waters.

[xxv] This might change within the EU, however, under the new EC Common Fisheries Policy to be agreed upon by the end of 2002.

[xxvi] *Loc. cit*. This writer disagrees, however, with their opinion that the CPA 1949 (which is administered by DfT, not, as they state, DEFRA) does not provide a defence to an action in nuisance for interference with the public rights of navigation or fishing.

[xxvii] In principle too, a court should consider whether or not denying a remedy in nuisance for interference with that right would have the same effect.

[xxviii] As have, for example, the Bass Strait offshore petroleum installations and their surrounding Area to be Avoided ('ATBA').

[xxix] I.e. to divert to use, to stay within and to follow the requirements of such routeing systems, except where this would conflict with fundamental safety considerations.

[xxx] Art. 22. The English, French and Arabic (but not the Chinese, Russian and Spanish) texts of UNCLOS add the condition, 'where necessary having regard to the safety of navigation'. That such 'routeing systems' may nevertheless be prescribed primarily for the purpose of *protecting the marine*

*environment* from ship-source pollution (including that arising from ship-turbine allision) follows from the fact that the best way to effect this is to preserve the safety and integrity of the ship.

Unlike TSSs, 'sea lanes' are not IMO-adopted routeing measures: see further Plant, 'International Traffic Separation Schemes in the New Law of the Sea' 9 *Marine Policy* (1985), 134, 136, n. 17.

[xxxi] *Cf*., e.g., the broader wording of Art. 21 UNCLOS.

[xxxii] A 'routeing measure aimed at the separation of opposing streams of traffic by appropriate means and by the establishment of traffic lanes': IMO, *Ships' Routeing*, 7th ed. (1999), Part A, para. 2.1.3. TSSs are akin to 'dual-carriageways' at sea and governed by a special rule of the Rule 10 of the 1972 International Regulations for the Prevention of Collisions at Sea (COLREGS) as amended (and sometimes by 'associated rules').

[xxxiii] Areas 'where anchoring should be avoided by all ships or certain classes of ships (*sic*), except in cases of immediate danger to the ship or persons on board': *Ships' Routeing, ibid.*, para. 2.1.14.

[xxxiv] An ATBA is a 'routeing measure comprising an area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by all ships, or certain classes of ship': *ibid.*, para. 2.1.13. In principle, such areas should be non-mandatory, as otherwise tending to *negate* rather than regulate the right of innocent passage, although Canadian legislation contradicts this.

[xxxv] As to both of these, see below.

[xxxvi] See further Plant, 'International Legal Aspects of Vessel Traffic Services', 14 *Marine Policy* (1990), 71. Variations on (radio- or automatic identification system (AIS)-based) VTS include compulsory pilotage or tug-escort for ships.

[xxxvii] I.e. all non-service or support craft, with the possible exceptions of small ships able to move between the turbines in relative safety: *cf*. US safety zone regulations.

[xxxviii] As is required, as a licensing condition, of a number of offshore petroleum platforms on the North Sea continental shelf: Plant, *loc. cit*., *supra* n. 36, p. 78.

[xxxix] *Supra* n. 34.

[xl] *Cf.* S. 21(5) Petroleum Act 1987.

[xli] See TWA (Applications and Objections Procedure) (England & Wales) Rules 2000, as amended, or the Electricity Works (Environmental Impact Assessment) Regulations 2000.

[xlii] The Marine Wildlife Conservation (Private Member's) Bill, at present before the House of Lords, having passed its Commons stage, will, if passed, seek to extend protection within territorial waters to 'Marine Sites of Special Interest' for *national* reasons. This has been opposed by wind farm developers, and a Government amendment referring to the desirability of 'sustainable *development*' (my emphasis) suggests that it will in fact pose limited impediments to offshore wind farm development: 'Marine wildlife Bill passes to the Lords', *ENDS Report* 326 (Mar. 2002), p. 42. At present the only statutorily-'protected' marine area of national interest is the Lundy Marine Nature Reserve, which extends up to 3 NM offshore and is designated under S. 36 Wildlife and Countryside Act 1981.

[xliii] *Cf.* DETR Circular 02/99, *Environmental Assessment*.

[xliv] *Cf.* PPG 9.

[xlv] If, however, the adverse effect can be avoided by placing conditions upon statutory consents, this may be done.

[xlvi] Art. 6(2) Habitats Directive, as implemented by Reg. 48 Habitats Regs. Marine SACs might include, for example, reefs and other natural sub-sea structures and '[f]or aquatic species which range over wide areas.. clearly identifiable area[s] representing the physical and biological factors essential to their life and reproduction' (Art. 4 (1) Directive).

[xlvii] Art. 6(2) Habitats Directive; Reg. 49 Habitats Regs. In such a case, 'the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest': *ibid.* Priority species include all forms of cetacean and several species of marine fish.

[xlviii] 'Offshore wind industry objects to marine conservation Bill', *ENDS Report* 322 (Nov. 2001), p. 33.

[xlix] The target year for setting all SACs in place is 2004.

[l] As they were, for example, off the Canary Islands, following a pilot study and seminar held for the Macaronesian Region of the EU.

[li] See, e.g., I. Townend, 'Industry: An Overview of Some of the Port Issues', in Clare Coffey/CEC DG-XI (eds.) 'Implementing the Habitats Directive in Marine and Coastal Areas', Proceedings of a Seminar held at Morecambe Bay, England, 22-24 June 1997, EC doc. CR-16-98-239-EN-C, 49, 51-53.

[lii] It is conceivable that renewable energy projects will be established beyond the 200 NM limit: see, e.g., the US Ocean Thermal Energy Conversion Research, Development and Demonstration Act 1980, which makes provision, *inter alia*, for licensing conditions to ensure that OTEC facilities are constructed and operated with reasonable regard for other uses, as well as specific provision for ensuring navigational safety in their vicinity: §§ 9119 and 9118. See further n.87 *infra*.

[liii] As a signatory to the 1992 Paris Declaration by North Sea States on Co-ordinated Extension of Jurisdiction in the North Sea (23 *UN Law of the Sea Bulletin* (1993), 65), the UK has undertaken to maximise the permissible scope of its environmental protection jurisdiction in the zone. As to jurisdictional controls over dumping and deposits on the sea bed, see FEPA 1985 as amended, and as to ship-source pollution see S. 129 MSA and the several Prevention of Pollution Orders made under it.

[liv] With respect to research, see, e.g., S. x CSA 1964, S. 2(6) Fishery Limits Act 1976.

[lv] See *supra* n. 5. As a matter of constitutional law, it is likely that the Monarch may make such a claim exercising the Royal Prerogative, but primary legislation will almost certainly be needed to establish a workable exploration and exploitation regime based on sound management and a precautionary and ecosystems-based approach, as is Government policy: see *Safeguarding our Seas, loc. cit.*, and text *infra*.

[lvi] 'Supplementary Memorandum and Statement by the Crown Estate Commissioners' ('*CE Memo.*') to *H.C. Inquiry, loc. cit., supra* n. 20, 179, 180, para. 10.

[lvii] *Ibid.*

[lviii] Evidence given on 5 Feb, 1992 by Lord Mansfield, to *H.C. Inquiry*, *loc. cit*., 184, 186, para. 469.

[lix] *Stewardship in Action*, *A Crown Estate Policy Statement*, para. 4, appended to *CE Memo, loc. cit.*

[lx] In the context of marine aggregates extraction, the Second Commissioner in 1992 stated that 'as landowner we rely upon a potential user of the sea bed.. to obtain the necessary consents that they (*sic*) require under statute from existing bodies that have statutory powers [and only then] we would grant him a licence or a lease on the assumption that he had received a valid approval from the relevant statutory body.. [I]t is rather difficult to impose covenants over certain aspects. But what we try to do and where we go close to being a quasi-regulator is this: where there are environmental aspects in connection with marine aggregate extraction then we incorporate within our [licence] conditions and covenants to ensure that dredging companies adhere to the terms of their licence and adhere to any environmental aspects that the Government has seen as appropriate': evidence of the then Mr. Howes to *H.C. Inquiry, loc. cit.*, 190, para. 485. The present informal Government View Procedure, under which the Government in practice dictates environmental protection conditions, will shortly be replaced by a statutory 'environmental assessment' procedure under which it will, one presumes, dictate them *in law*: *Safeguarding our Seas, loc. cit.,* p. 52, para. 6.34.

[lxi] If this was perhaps understandable in 1989 and 1992, when those Acts were passed, it was less so in 2000, when the Electricity Act 1989 was amended by the Utilities Act.

[lxii] Or, it seems, an Order purporting on its face to provide them with a defence to any action in nuisance for interference with navigation or fishing that might be brought in the English or Welsh civil courts. The common law jurisdiction in nuisance is in principle geographically unlimited and may be invoked by mariners or fishermen, whether British or foreign, against any owner or operator of a British-registered or licensed platform in the 200 NM zone on whom legal process can be served, on the basis of the 'nationality' principle of jurisdiction. This might, however, be affected by the 1968 and 1988 Conventions on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (the Brussels and Lugano Conventions), as implemented by the Civil Jurisdiction and Judgements Act 1982, as amended.

[lxiii] The S. 34 requirement for consent to the deposit of materials on the sea bed is not extended, but this matter is now governed by FEPA.

[lxiv] Designated, in connection with the 20 successive petroleum licensing rounds, under S. 1(7) CSA 1964.

[lxv] *Cf*.: Art. 299 EC Treaty, as amended; the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 (the 'CS EIA Regs.'); the Response of Mrs. Bjerregaard on behalf of the Commission to the written question E-3529/96 by D. Eisma, MEP, to the Commission, OJ C 138 5 May 1997, p. 74; and *R. v. Secretary of State, ex parte Greenpeace* (QBD, 5 Nov. 1999, reported in *ENDS Report* 299 (Dec. 1999), p. 54.

[lxvi] By the CS EIA Regs*., loc. cit.*

[lxvii] *Loc. cit., ibid.*

[lxviii] The Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 (the 'C S Habitats Regs.').

[lxix] *Ibid.*, Appendix A.

[lxx] Draft Environmental Impact Assessment and Habitats (Extraction of Minerals by Marine Dredging) Regulations 2002.

[lxxi] *Safeguarding our Seas, loc. cit.,* p. 10, para. 1.34.

[lxxii] The equivalent petroleum regulations refer extensively to the equivalent for such operations, the Petroleum Act 1998.

[lxxiii] *Safeguarding our Seas, loc. cit.*, *supra* n. 21, p. 45.

[lxxiv] I.e. to the extent that the five year SEA (*supra* text at n. 73) shows it to be necessary.

[lxxv] See also text at n. 76 *infra*.

[lxxvi] See: (i) Art. 4 Hydrocarbons Licensing Regulations 1995, which, together with the Petroleum (Production) (Seaward Areas) (Amendment) Regulations 1995, in effect implements at sea the EC Hydrocarbons Directive (94/22/EEC); (ii) the CS EIA and Habitats Regs., *loc. cit*.; and (iii) the model licensing conditions prepared from time to time.

[lxxvii] The same is true of the freedoms of overflight and laying submarine cables or pipelines.

[lxxviii] Art. 58 UNCLOS.

[lxxix] See Arts. 211 and 220 UNCLOS.

[lxxx] Art. 60(1) and (2) UNCLOS.

[lxxxi] I.e. in the case of wind farms, around turbines and their bases and anemometer masts, but *not* cables (although Norway has declared 'areas with prohibition against anchoring and fishing' in corridors along the routes of certain pipelines on its continental shelf). Submarine cables are nevertheless afforded other forms of international legal protection, some of which are enacted into UK law by S. 8 CSA 1964 as amended.

[lxxxii] Art. 60(4) UNCLOS.

[lxxxiii] Art. 60(6) UNCLOS.

[lxxxiv] 1958 Convention on the Continental Shelf (CCS) (in Art. 5).

[lxxxv] See S. 2(1) CSA 1964, now repealed and superseded.

[lxxxvi] As to the UK's present claims, see, e.g.: Part II Petroleum Act 1998; the Civil Jurisdiction (Offshore Activities) Order 1987; and the Criminal Jurisdiction (Offshore Activities) Order 1987.

[lxxxvii] There is no provision specifically permitting the establishment of safety zones around *high seas* renewable energy installations. On the other hand, UNCLOS is also silent on the issue of safety zones around high seas military operations and platforms and hunting operations, but there is some State practice supporting *their* establishment (details on file with author).

[lxxxviii] Arts. 60(6) and 80 UNCLOS.

[lxxxix] Fishing vessels are the most frequent violators of safety zones (*cf.* IMO Res. A.671(16), 19 Oct. 1989, 9th preambular para.), since platforms provide good habitats for fish.

[xc] Except in cases of distress or *force majeure* or 'for the purpose of saving or attempting to save life or property': *ibid.*, para. 1(d) and (e).

[xci] S. 21 Petroleum Act 1987.

[xcii] S. 22 *ibid.*

[xciii] S. 23 *ibid.,* and relevant regulations.

[xciv] E.g. by using powers given under the Merchant Shipping Act 1995.

[xcv] See Art. 60(3) UNCLOS.

[xcvi] Early UK safety zones were established more for protection against harassment by Soviet intelligence-gathering ships and terrorist threats than against allision.

[xcvii] This may include the water column as well as the surface: S. 21(5) Petroleum Act 1987. It might also include the superjacent airspace: *cf*. relevant French law. The rotor and blades of a wind turbine raise interesting questions about the relationship of the zone to the turbine's nature and function and to the location of its 'outer edge'. It seems reasonable to take the full span of the circuit described by the blades when in motion to represent the relevant part of that outer edge.

[xcviii] Art. 60(5) UNCLOS. In practice most States, including the UK, restrict 200 NM zone safety zones to 500m.

[xcix] IMO Res. A.671(16), 9th and 11th preambular paras., and Annex 2, para. 2.

[c] Art. 5(2) CCS; Art. 60(7) UNCLOS.

[ci] While also having 'due regard to fishing, the protection of the marine environment and the rights and duties of other States': Art. 60(3) UNCLOS. This provision resulted from a UK proposal, in 1980, motivated by growing concern over the potentially huge costs of complete removal of North Sea installations (which was required by the CCS). See now S. 29 Petroleum Act 1998.

[cii] In fact, IMO GAIS is relevant, as well as OSPAR's.

[ciii] Once the resource is exhausted, the intention is essentially to remove the platform (partly or completely) in such a manner as to permit the non-exhaustive uses to resume as unconstrained as before and in safety.

[civ] Few States have incorporated the duty to avoid interference with recognised sea lanes into their laws, and a number of States have permitted petroleum development to predominate over navigation interests, notably the USA through its western Gulf of Mexico fairways system: see, e.g. J. Calvert, 'Navigation and Offshore Oil', *World Petroleum* (Nov. 1964), 44, 44-46. The IMO (then 'IMCO') dropped mention of 'fairways' from the third (1973) and subsequent editions of *Ships' Routeing*, as the US system did not sufficiently follow the routeing principles it was developing. But see now Paton, 'Navigation and Offshore Oil', 38 *JoN* (1985) 305, 316, and 33 *C.F.R.* § 166.

[cv] In the process of obtaining BSH consent to the 'Borkum West' farm, which will be sited between the two main East-West ships' routeing systems into and out of the environmentally sensitive German Bight, Prokon Nord commissioned Germanischer Lloyd to prepare a collision/allision-risk assessment. The BSH's Director concluded that '[t]he probability of a wind farm causing a shipping accident with a subsequent discharge of hazardous materials is one in 112,000 years in the case of an oil tanker and one in 28,000 years in the case of a freighter', and added, 'We think that's a reasonable level': *New Energy*, 3/2001 (May 2001). Whether or not a statistically-defined risk analysis is acceptable in principle and whether or not the particular statistically-determined risks in this case are acceptable are matters of political and professional judgement.

[cvi] Indeed, thought was given to adopting routeing systems in the North Sea as soon as the first offshore petroleum exploration operations began there. In 1965, a marine insurance congress in Lucerne recommended that 'access channels' be adopted; and, in 1966, a joint working group of the British, French and German institutes of navigation suggested that shipping patterns be studied at an early stage of exploitation and extensive consultation be undertaken preparatory to adopting routeing measures over shelf areas: 'The Separation of Traffic at Sea', 19 *Jo. Ins. Navigation* (1966), 414, 418.

[cvii] Under SOLAS Reg. V/10, implemented in the UK by the Merchant Shipping (Mandatory Ships' Routeing) Regulations 1997.

[cviii] IMO, *Ships' Routeing*, *loc. cit.*, Part G, p. II/1.

[cix] Under SOLAS Reg. V/11, and see the Merchant Shipping (Mandatory Ship Reporting) Regulations 199x, , and Plant, 'The Relationship between International Navigation Rights and Environmental Protection: A Legal Analysis of Mandatory Ship Traffic Systems', in Ringbom H. (ed.) Competing Norms in the Law of Marine Environmental Protection, Kluwer, London, The Hague, Boston, 1997, 11, 17-19.

[cx] They in fact resemble VTS systems (which, however, must be voluntary: SOLAS Reg. V/12): see Plant, *ibid.*, 19-21 and 24, and 'Legal Environmental Restraints upon Navigation Post-*Braer*', 9/10 *OGLTR* (1992), 245, 255-56. As to the possibility of establishing mandatory compulsory pilotage or tug escort, see *ibid.*, pp. 265-66.

[cxi] See IMO, *Ships' Routeing*, *loc. cit.*, Part G, pp. I/2, and /3 (also IMO docs. NAV 47/14, para. 5.12-.13) and IMO Res. MSC.100(73), 1 Dec. 2000.

[cxii] See, e.g., Plant, *loc. cit., supra* n. 109, esp. pp. 11-13, 16-18 and 24-29. It follows that the IMO is likely to adopt a mandatory traffic system primarily aimed at guarding against ship-platform allision only where such allision would give rise to high risks of environmental pollution, e.g. where wind turbines are erected in environmentally sensitive waters frequented by tankers.
The situation might soon become complicated by the advent of 'Marine Environmentally High Risk Areas' (MEHRAs). These were proposed by *Safer Ships and Cleaner Seas: the Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping* (17 May 1994, Cm. 2560) as 'comparatively limited areas [extending along no more than 10% of the UK coast] of high [environmental] sensitivity which are also at risk from shipping': see paras. 14.119-125. Accepted in principle by the UK Government, these are to be marked on charts in order to inform ships' masters of areas 'where there was a real prospect of a problem arising'. They are conceived as voluntary measures, albeit with the option of moving to mandatory routeing if monitoring shows that shipping is not keeping clear of them. See further Plant, 'A European lawyer's view of the Government response to the Donaldson Report', 19 *Marine Policy* (1995) 453, 459-60. Following a consultation exercise based upon a report by Safetec ('Identification of [MEHRAs] in the UK', 7 Dec. 1999: reproduced at: <http://www.defra.gov.uk/environment/consult/mehra> (visited 19 Nov. 2001)), the Government intends to hold a further consultation on proposals to designate individual MEHRAs: *ENDS Report* (2000:39). A particular conundrum will be what to do about areas found to qualify for MEHRA status in which IMO-adopted routeing measures are established and recommended for use by ships or certain classes of ship: the area of the IMO-adopted deep-water route for tankers 'West of the Hebrides' (*Ships' Routeing*, Part B, p. II/ ) is a real possibility. The Government has been accused of dragging its feet: 'Ecosystems approach promised in marine stewardship report', *ENDS Report* 328, May 2002, p. 48.
[cxiii] They were guides to those areas where the Government could reasonably issue licenses, with or without conditions, for petroleum exploration or exploitation, having regard to whether or not this would cause or be likely to cause obstruction or danger to navigation (*cf.* S. 34 CPA 1949), and where licensee oil companies were required to give six months' notice, through notices to mariners, before establishing platforms.
[cxiv] DoT Guidance, *Coast Protection Act 1949: Consent to Locate Offshore Installations*, Aug. 1995, para. 1.14.
[cxv] *Ibid.*, para. 1.10.
[cxvi] *Ibid.*, paras. 1.14 and .1.
[cxvii] A 1984 study of the UK North Sea shelf suggested that 'if a platform is near a route likely to be used by passing traffic in significant numbers, the risk of a collision between a passing vessel and the platform is high, and a matter of major concern': Technica Ltd. Report to the DoT, 'Risk of Collision between Passing Vessels and Platforms in the UK Sector of the North Sea', 1984. A gas platform in the Rough Field was struck by a ship as recently as 8 May 2002: *Daily Telegraph*, 9 May 2002, p. 2. On the other hand, in recent years better traffic data have been compiled, and computerised collision/allision frequency prediction models developed, such as Safetec's 'COLLIDE' and Technica's 'CRASH'. See too *infra* n. 119.
[cxviii] Germany has already identified areas of the North Sea north of Borkum and west of Sylt and of the Baltic Sea north of Rügen and west of Adlerrund, capable of accommodating up to 6,500 MW installed-capacity by 2010, and is looking at other North Sea areas capable of adding up to 35,740 MW to this: *New Energy*, 2/2002, p. 62.The Netherlands has identified some 10,500km$^2$ of priority areas: Martin, *loc. cit.*, supra n. 11, at 31.
[cxix] The Dutch Government is using GIS-based software developed by the Netherlands Energy Research Centre (ECN) to aid the location of optimum offshore wind development sites. The Crown Estate and British Wind Energy Association have recently developed a computerized database for UK waters. In addition, the EU and OSPAR are likely to develop a comprehensive set of criteria for successful wind farm development: North Sea Ministerial Declaration, Bergen, March 2002.



## NEW ELECTRONIC INFORMATION – CONSERVATION AREAS

A new electronic information resource, 'The Habitats Directive: Selection of Special Areas of Conservation in the UK', which describes sites in the United Kingdom recognised as internationally important for habitat and species conservation at European level, has been launched by the Joint Nature Conservation Committee (JNCC). It replaces a JNCC report published in 1997, since when the number and extent of Special Areas of Conservation (SACs) has increased substantially.

The information is now on JNCC's website at www.jncc.gov.uk/SACselection and will be updated whenever the UK submits new data about candidate SACs to the European Commission. As well as up-to-

date details of the selected sites throughout the UK, users will be able to find out about the SAC selection process, and the habitats and species represented by SACs. It is now possible to search for information in various ways, for example by feature name, site name, or geographically.

The pages have links to other information from JNCC and elsewhere on the web, and also include a range of supplementary material, with a downloadable spreadsheet allowing users to answer complex queries themselves.

If you require further information please contact.

Colin McLeod
International Designations Officer
Joint Nature Conservation Committee
Monkstone House
City Road
Peterborough
PE1 1JY
UK

Tel.: 01733 - 866 811 (direct)
Fax.: 01733 - 555 948
mailto:Colin.McLeod@JNCC.gov.uk

## REGIONAL GROUPS

**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 now likely to take place in DMH's offices at Brighton in early November (date to be confirmed) and will take the form of the seminar on contaminated land.
If anyone else is interested in getting involved (whether by attending, offering to speak or providing a venue for future meetings) will they please contact Catherine or Heidi by e-mail.

## MEMBERSHIP PROFESSIONS

The following chart provides a breakdown of membership professions as indicated by members as at July 2002

| DESCRIPTION | NUMBER |
|---|---|
| Solicitor | 297 |
| Consultant | 81 |
| Barrister | 60 |
| Others | 50 |
| Academic | 40 |
| Lawyer | 34 |
| Student | 26 |
| Engineer | 17 |
| Planner | 11 |
| Scientist | 11 |
| Journalist | 10 |
| Trainee Solicitor | 9 |
| Civil Servant | 7 |
| Insurance | 7 |
| Geologist | 5 |
| Pupil Barrister | 5 |
| Business Development | 4 |
| Librarian | 4 |
| Environmental Health Officer | 3 |
| Chemist | 3 |
| Accountant | 1 |
| Vet | 1 |
| Total | 686 |

Richard Bines – Membership Secretary

## REPORT ON WORKING PARTIES

1 **Biotechnology Working Party – Joint Convenors, Daniel Lawrence** daniel.lawrence@freshfields.com **and Martha Grekos** (martha.grekos@4paperbuildings.com).

Group members have produced a draft response to the Agriculture and Environment Biotechnology Commission's (AEBC) Consultation Paper on future scenarious for the uptake of GM in agriculture. This is currently being finalised and is soon to be sent to Professor Malcolm Grant, chair of AEBC.

The group is also liaising with the 2003 UKELA Conference organisers in order to organise a panel for the planned GMO discussion session.

2 **Contaminated Land Working Party – Convenor, Matthew Townsend -** Matthew.Townsend@allenovery.com
A meeting was held on 25 April 2002. At the meeting a draft response to the proposed Planning Technical Advice re: Development of Contaminated Land consultation was discussed The Convenor requested comments by 13 May 2002 in order to send off the response by 15 May 2002.

The Working Party also agreed to provide Catherine Davey with articles for the November edition of E-Law.

3 **Climate Change (Emissions Trading & Flexible Mechanisms) Working Party – Convenor, Helen Loose –** helen.loose@ashursts.com **Secretary, Anthony Hobley -** arh@cmck.com

A meeting was held on 10 June 2002. There were talks by:

(a) Chris Dodwell on legal dimensions of recent developments : UK ETS and proposed EU ETS;
(b) Neil Davies and Duncan Mitchell from the Environment Agency on SO2/NOx ETS proposals; and
(c) A member of the Government Climate Change Projects Office.

As well as the talks, the Working Party also discussed the ratification process of the Kyoto Protocol.

4 **Insurance and Liability Working Party – Convenor, Valerie Fogleman –** vfogleman@blg.co.uk

The Working Party met on 15 May 2002 and discussed a response to DEFRA's consultation on the EU proposal for Directive on Environmental Liability.
On 20 May 2002 there was a seminar with representatives from AIG (Europe) Limited, Bridge Insurance Brokers (Manchester) Limited, Certa (UK) Limited, Chubb Environmental Services, Marsh, Tysers, Wilks Limited, XL Environmental Limited and Zurich Specialities London. Over 100 people attended.

5 **IPPC Working Party – Convenor, Michael Hutchinson -** Michael.Hutchinson@mayerbrownrowe.com

No meetings of the Working Party have taken place since the last report.
The Group are considering a consultation on site reports for IPPC, along with the contaminated land working party.

6 **Nature Conservation Working Party – Convenor, Andrew Baker -** mdxe56@dial.pipex.com

Andrew Baker of Baker Shepherd Gillespie has taken over as convenor of the Nature Conservation Working Party in place of Robert Simpson.
A meeting of the Working Party took place at the UKELA Conference.

7 **Planning Law Working Party – Convenor, Mark Challis –** challism@nortonrose.com

No meetings of the Working Party have taken place since the last report. However a response was prepared on the Planning Green Paper and also on the associated consultations on planning obligations and major infrastructure projects.

8 **Practice and Procedure Working Party – Convenor, Daniel Lawrence –** daniel.lawrence@freshfields.com

No meetings of the Working Party have taken place since the last report.

9 **Scottish Law Working Party – Convenor, Ian McPake –** ianmcpake@todsmurray.co.uk

The Working Party met on 7 May and then on 20 May 2002 to discuss its response to the Scottish Executive consultation on the EC Proposal for Directive on Environmental Liability. This response was considered alongside the response from the Insurance and Liability Working Party.

The Working Party briefly considered responding to the Public Access to Environmental Information consultation, but there was a lack of interest to pursue this.

10 **Sustainable Development Working Party – Convenor, William Upton –** wupton@compuserve.com

A response was prepared to DEFRA's consultation on the Environment Agency's Objects and Contribution to Sustainable Development.
No meetings of the Working Party have taken place since the last report.

11 **Waste Working Party – Convenor, Andrew Bryce –** bryce@ehslaw.co.uk **Secretary, Anju Sanehi -** anju.sanehi@dla-law.co.uk

The Working Party met on 29 May 2002 to discuss the Landfill Regulations - Progress and Issues; the HC Committee Hazardous Waste Inquiry; the EU Liability Directive Proposals and the Finnish EU Decision on the Palin Granite case.
The next meeting is fixed for 10 September 2002.

12 **Water Working Party – Convenor, Elizabeth Hattan -** elizabeth.hattan@freshfields.com

The Working Party met on 19 April 2002 and Gordon Nardell held a seminar on Human Rights and the Environment. The Working Party considered a submission on the Nitrates Directive and also the DEFRA Groundwater consultation.
Nottingham Trent University asked for some feedback regarding the Groundwater Directive and this was prepared.
The Working Party also considered the effects of the decision on Commission v. Belgium.
The next meeting is fixed for 19 July 2002. This will include a talk by Sir Ian Byatt.

MARK BRUMWELL
**SJ Berwin**
**Working Party Co-ordinator**
**17 July 2002**
mark.brumwell@sjberwin.com

## UKELA LONDON MEETINGS - AUTUMN PROGRAMME

I would like to invite members to email me with suggestions for the Spring 2003 programme. I am planning a meeting on asbestos litigation but topics of interest and suggestions for speakers would be most welcome.

All meetings 5pm for 5.30pm until c. 7pm and held at Allen &Overy, One New Change, London EC4M 9QQ Invitations and full programme details will be sent to UKELA members in due course.

Monday 16th September, 2002
The EU chemicals strategy and the toxic debate
Speakers: Judith Hackitt, Chemical Industries Association and a speaker from DEFRA (to confirm)

Wednesday 23rd October, 2002
What is waste? A review of the latest ECJ and domestic case law
Speaker: Maurice Sheridan, Matrix Chambers

Wednesday 20th November, 2002
Developments in conservation law impacting developers and major projects
Speakers:

* on the CROW Act - Craig Bennett, Friends of the Earth - covering the increased regulations relevant to protected areas and what developers need to be aware of. Craig lobbied for and assisted in drafting this legislation.

* on the impact of the Habitats Directive on offshore projects – Brian Cleater, ERM Edinburgh

Clare.Coleman@AllenOvery.com

---

## Forthcoming Conferences

The Chartered Institution of Water and Environmental Management are running a conference on Brown Field Development – clearing the hurdles, reaping the rewards at Kensington Town Hall, London on 9th October 2002. There will be a keynote address from Baroness Barbara Young, Chief Executive of the Environment Agency and papers from (amongst others) Andrew Waite and Andrew Bryce. For further information contact Clarence Dawton Limited, 47 Water Street, Lavenham, Suffolk CO10 9RN, tel 01787 249290, fax 01787 248267 e-mail lis@lavenhamgroup.co.uk. The registration fee for UKELA members will be the same as for CIWEM members, ie £250 plus VAT (a saving of £30).

## Forthcoming UKELA Meetings

Seminar on the proposed EU Directive on Environmental Liability - the date of 15 October 2002 has been settled for this Seminar. The speakers are: Lord Justice Carnwath; Professor Malcolm Grant; Professor Stephen Tromans; Mr Chris Clarke; and Dr Marcel Steward.

Daniel Lawrence –
e-mail daniel.lawrence@freshfields.com

UKELA Water Working Group Seminar by Glen Plant the Offshore Wind Industry's Legislative Deficit Challenge – Friday 18 October 2002 at 1pm – 2.15pm at the offices of Freshfields, Brook House, Derringer.
Contact Elizabeth.Hattan@freshfields.com for further information

---

## BOOK REVIEW

### FLOOD DEFENCE LAW

### AUTHOR – WILLIAM HOWARTH

**Publisher Shaw & Sons**
**Paperback 552PP**

The combination of unprecedented rainfall and environmental fears about long term climactic change have placed legal provisions and administrative responsibilities concerning floods and land drainage under new scrutiny.

As somebody who lives in close proximity to a lake with a garden half of which spent the six months between December 2000 and May 2001 under two feet of water, I was an eager reader of this book.

In Flood Defence Law William Howarth, Professor of Environmental Law at the University of Kent at Canterbury has undertaken the mammoth task of examining and explaining the legal aspects of flooding and land drainage.

This work will be invaluable as a reference source for all involved with the subject be they policy makers at national or local level; lawyers both in private practice and within environmental agencies or water utility companies. It will also be invaluable to engineers and other environmental professionals working in the field.

The author deals with land drainage, the defence of water courses and the sea from flooding, the provision of flood warning systems and coast protection activities undertaken to protect loss of coastal land.

The book is wide ranging and covers private rights and duties including an explanation of riparian rights, distinguishing between water courses and other waters. The book considers the extent to which riparian owners are permitted to discharge flood or drainage water to a water course can prevent flood water from a water course from passing on to adjoining riparian land are bound to maintain the channel of the water course in a state which avoids the flooding of other land.

There is a useful discussion of rights as between land owners in nuisance and extensive consideration of the Culverting Cases, nuisance, negligence and the civil liability of public bodies.

Another chapter provides a succinct introduction to institutional responsibilities as split between DEFRA, The Environment Agency, internal drainage boards and local authorities.

The book explains the powers of flood and coastal defence operating authorities to undertake works and supervise or regulate works carried out by third parties.

There is a useful discussion of the legislation on coast protection and a detailed consideration of the funding of flood and coastal defence works.

The author does not confine himself to flooding from water courses and the sea but also considers the flooding caused by the overloading of sewerage systems, particularly where they receive surface water run off. The chapter includes a discussion of the recent case of Peter Marcic –v- Thames Water Utilities Limited.

Chapter 8 focuses on local authority responsibilities for public health legislation in so far as it addresses water quantity concerns; drainage of highways and statutory regime for reservoir safety;

Local responsibilities in relation to the operation of the town and country planning system and the role of land use planning in relation to the avoidance of flooding is dealt with in some detail in a separate chapter.

What intrigued me most was the general reluctance of the law to impose criminal culpability or civil liability in relation to flood damage. There is no criminal offence of causing flooding and ones ability to enforce private duties to prevent flooding are limited. Conversely, those public bodies with responsibility for flood

defence have extensive powers but comparatively few duties.
All in all you will find this book extremely topical, very readable and a useful addition to the research resources available to you.

Catherine Davey - Stevens & Bolton

## LETTERS

Dear Friends,
**India – Contacts in Environmental Law**
It was a pleasure meeting with you in the UKELA Annul Conference 2002, Sheffield 28-30 June. it provided me an opportunity to meet some great personalities in the field of Environmental Law. I was particularly impressed by a Barrister from London. Unfortunately, I have lost the contact details of the gentleman who got me introduced with many others participants of the conference.

However, I am taking this opportunity to cordially invite you for developing sustained contact on the issues of mutual interest in the field of Environmental Law in India and the UK.

Thanking you and looking forward to hearing from you.

Warm regards,

Tariq Rehman
National Alliance of People's Movements
14, Supreme Enclave
Mayur Vihar, Phase I
Delhi - 100 091
INDIA
e-mail: tariq_rehman2001@yahoo.com

**Apology from the Editor**

My apologies - I had hoped to get this edition out to members before the summer break but sadly this was not possible.

The next major edition will be the November issue with articles contributed by the Contaminated Land Working Group.

Catherine Davey
Stevens & Bolton

**MEMBERSHIP ENQUIRIES to Richard Bines**

Email: richard@sharpsredmore.co.uk

Fax: 01473 730030

**UK ENVIRONMENTAL LAW ASSOCIATION**

Registered Charity number: 299498,
Company limited by guarantee: 2133283

General Secretary: Dr Christina BT Hill, MA
Registered Office: Honeycroft House, Pangbourne Road, Upper Basildon, Berkshire RG8 8LP

**Tel /Fax: (01491) 671184**
**NB. New number**
Email: cbth_ukela@yahoo.com

See also the web site at www.ukela.org

for more information about working parties and events, including copies of all recent submissions.



**WEBSITE**

Peter Kellett
Editor

Peter.kellett@environment-agency.gov.uk
Tel: 0845 9333111

## E – LAW

The editorial team want letters, news and views from you for the next edition. If we have the material, there will be a slim edition edition at the end of October 2002. The November Edition will be devoted to Contaminated Land with Articles from members of the Contaminated Land Working Group.If anyone else wishes to contribute an article please contact me to check that no one else is already dealing with the same topic.

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 20 September) 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