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

# e - law

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**CHAIRMAN'S MESSAGE**

Our new Executive Officer has now been in place for over five months and this has enabled the Council to move forward in a number of areas. I am extremely fortunate, as the current Chairman, to be able to build on the work and ideas of my predecessor, Pamela Castle. Pamela was instrumental in the idea of the appointment of an Executive Officer and without her drive and enthusiasm, all the areas which have been discussed over the last few years by the UKELA Council would not now be put into practice.

For those of you who were unable to attend the Garner Lecture, you missed a fascinating talk given by Klaus Topfler, the Executive Director of UNEP. We were extremely fortunate to secure Dr Topfler as a speaker and his willingness to fly from Nairobi to deliver the lecture is a sign of the light in which UKELA is held. I am sure the forthcoming conference in Plymouth will strengthen UKELA's growing reputation.

I have started a programme of visiting all the regional groups. So far, I have been to the north-west and the south-west groups. I would urge all members of UKELA to get involved in their regional groups. As well as providing a useful way to obtain CPD points (!), they are also an excellent way of meeting those interested in environmental law in your region. As will always be the case with an organisation run by volunteers, some regions are more active than others. The Council is more than happy to provide assistance and encouragement to those regions who require some help in "kick-starting" their speaker programmes. As well as the regions, UKELA also has a wide range of working parties. Membership of these working parties is open to all members and if you would like to join one, please just contact the working party convener. Above all,

please remember that UKELA is your organisation and the Council run it on your behalf.

**Andrew Wiseman**
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**STRATEGIC PLAN – PROGRESS REPORT FOR E-LAW JUNE 2003**

Vicki Elcoate, Executive Officer

Thank you to all UKELA members who have responded to the questionnaire, which will help inform the future direction of the organisation. There will be a report back on your thoughts in the next edition of e-law.

UKELA's Council has agreed a strapline, which sums up what UKELA does: " The UK Environmental Law Association (UKELA) is the UK forum which aims to make the law work for a better environment and to improve understanding and awareness of environmental law." This will now be used to inform and guide all UKELA public responses and any publicity work.

There are also four aims for 2003-6. At the moment these are statements of broad intention, with the detail yet to be thrashed out, but some indications of where these might go is given below.

**1. To encourage the development of better environmental law and promote the effective implementation of it.** This includes:

- Influencing the development of legislation via the working parties
- Raising the profile of key issues
- Addressing any gaps in environmental law in northern Ireland particularly (and any other issues arising out of devolution with the aim of securing the best quality environmental legislation across the UK)
- Monitoring and responding, in line with UKELA's aims, to any proposed changes to legislation of significant importance
- Promoting effective environmental legislation wherever it originates (and give arguments against where legislation is unnecessary, confusing etc)

**2. To promote and provide access to information on environmental law to a wide audience.** This includes:

- Re-creating the website to provides access to comprehensive information on environmental law
- Establishing a training programme (if pilot work is successful)
- Producing guidelines on key issues

**3. To promote discussion and networking opportunities amongst those interested in environmental law.** This includes:

- Annual conference
- Garner lecture
- Regional groups
- Communications between members
- Social events
- Links with European organisations and institutions
- Links with other UK law/lawyer bodies

**In order to do all this there is an underpinning aim: to build and strengthen the organisation so it can deliver its other aims consistent with the overall objectives for UKELA.** This involves:

- Meeting the needs and wants of the members where possible
- Growing and broadening the membership
- Increasing income from subs
- Raising money from external sources for identified needs
- Introducing logo and consistent house style
- Attracting VIPs to help promote UKELA's work

UKELA's Council will now go on to develop a plan for providing resources to carry out this work and will need to start fundraising in earnest. Any members who have ideas about this, or thoughts about the plan, should contact me: Vicki.Elcoate@ntlworld.com.

**DEFINING 'DEVELOPMENT CONSENT' IN EIAS**

**By Martha Grekos, Pupil Barrister, Hailsham Chambers and Sarah Taylor, Solicitor, Nicholson Graham & Jones**

There is a developing body of national jurisprudence concerning the purposive approach that is taken in interpreting the Environmental Impact Assessment Directive ("EIAD")[1] and the UK implementing legislation[2]. One area where this is evident is in the area of judicial challenges concerning the meaning of "development consent"[3]. Here, we comment on the recent case of *R(on the application of Prokopp)*[4].

*R (on the application of Hammerton)*

By way of a planning permission and listed building consent granted in 1997, approval was granted to London Underground Limited ("LUL") for the construction of the East London Line, Northern Extension ("ELLX"). In the case of *R (on the application of Hammerton)*[5], Mr Hammerton sought judicial review of LUL's refusal to provide an undertaking that it would not proceed with the development of ELLX and the associated demolition of the Bishopsgate Goods Yard.

Mr Hammerton claimed that the permission had lapsed, in that no material operations had been commenced within five years of the grant of permission, or alternatively that those operations which had been commenced were in breach of conditions attached to the permission and consent. Further, Mr Hammerton argued that the listing of parts of the Goods Yard in March 2002 precluded the demolition proposed in relation to other parts of the Goods Yard.

The High Court agreed that a number of material operations had commenced within the five year period, and that one condition of the planning permission had not been complied with. On this basis the commencement of development was unlawful.

The Court referred to the judgement of Woolf LJ in *Whitley v Secretary of Wales*[6], where Woolf LJ held that:-

> "where it would be unlawful, in accordance with public law principles….. for a local planning authority to take enforcement action to prevent development proceeding, the development albeit in breach of planning control is nevertheless effective to commence development"[7].

The Court in *Hammerton* took the view that whether enforcement action was reasonable depended upon whether the Goods Yard was a single building or several structures, given that the Demolition Direction only permitted demolition of entire buildings. This was a decision for the planning authorities, the London Boroughs of Hackney and Tower Hamlets, and the Court was prepared therefore only to declare that the development had been commenced in breach of condition.

*R (on the application of Prokopp)*

Following *Hammerton*, the planning authorities indicated they would not take enforcement action, provided that LUL entered into a section 106 agreement by which they consented to be bound by conditions reflecting those in the lapsed permission.

[1] Directive 85/337/EEC of 25th June 1985 on the assessment of the effects of certain public and private projects on the environment as amended by Council Directive 97/11/EC of 3rd March 1997 on the assessment of the effects of certain public and private projects on the environment.

[2] Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 SI 1999 No. 293 ("the 1999 Regulations"). The 1999 Regulations replaced the earlier Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ("the 1988 Regulations").

[3] *Ibid*, Article 1(2).

[4] *R (on the application of Prokopp) v (1) London Underground Limited (2) London Borough of Hackney and (3) London Borough of Tower Hamlets* (2003) EWHC 960 (Admin).

[5] *R v (1) London Underground Ltd (2) English Heritage (3) Princes Foundation (4) Tower Hamlets (5) Hackney Borough Council (6) Railtrack ex parte Keith Hammerton* (2002) EWHC 2307 (Admin).

[6] *F G Whitley & Sons v Secretary of State for Wales* (1992) 3 PLR 72.

[7] *Ibid*, paragraph 127(5).

When LUL sought to start work in reliance on this agreement, a further claim was launched against LUL: *R (on the application of Prokopp*). Mr Prokopp sought and obtained an interim injunction to prevent LUL from starting to demolish the Goods Yard. In addition he sought to challenge the decision of the authorities not to take enforcement action against LUL even though the planning permission had lapsed.

In seeking judicial review, Counsel for Mr Prokopp argued that the development required a fresh permission, and this would require consideration of an environmental impact assessment ("EIA") as the development fell within the definition contained in Paragraph 10(h) of Annex II to the EIAD (which is mirrored in Paragraph 10(i) of Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999[8]):

> elevated and underground railways… used exclusively or mainly for passenger transport.

Further, he argued that the 1999 Regulations had not fully implemented the EIAD, since the EIAD permitted a failure to enforce to amount to a development consent which does not require an EIA.

Counsel also argued that within the meaning of the EIAD, a failure to enforce amounts to a negative decision. The definition of development consent is contained in Article 1(2) of the Directive as:

> "the decision of the competent authority or authorities which entitles the developer to proceed with the development".

The 1999 Regulations make no reference to the need to consider an EIA on a failure to take enforcement action, and therefore it was argued that the 1999 Regulations have not fully implemented the EIAD.

Mr Justice Collins allowed the application and agreed that a decision not to take enforcement action amounted to a development consent and it was not unlawful to allow development to proceed by way of such a decision together with a section 106 agreement containing conditions. Mr Justice Collins took the view that the planning permission for ELLX had lapsed and a new consent was necessary for the development to proceed. Consequently the requirement for an EIA could not be avoided. However:

> "even though a fresh consent is needed, when it comes to considering what information is required, the whole history must be taken into account. If as a matter of fact the relevant information was.. given at an earlier stage, then, notwithstanding the lapse of the former permission, no more will be required"[9].

Mr Justice Collins acknowledged that an EIA had been carried out in 1993 and the only change since then had been the listing of the Braithwaite Viaduct. This listing does not affect the construction of ELLX since the demolition required will not extend to the viaduct. Reference was made to the House of Lords decision in *Berkeley*[10] which stated that only where the requirements of the EIAD had been substantially complied with, would permission be granted in the absence of an EIA.

It was therefore open to the planning authorities to decide that there had been substantial compliance and no EIA was necessary. However, Mr Justice Collins did decide that the authorities had acted wrongly in deciding not to take enforcement action before all the conditions necessary to deal with the listing and protection of the viaduct were in place.

*Appeals*

The appeals from the High Court to the Court of Appeal were heard from 18 to 20 June 2003. These raised two important issues of general public importance: 1) whether, following the lapse of planning permission, a decision of the local planning authority to authorise further

[8] Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 SI 1999 No. 293 ("The 1999 Regulations").

[9] Paragraph 25.

[10] *Berkeley v Secretary of State for the Environment* (2001) 2 AC 603, at 608.

development by entering into a s.106 agreement is, in substance, a development consent for the purposes of the EIAD; and 2) whether the principle of "substantial compliance" can be extended to permit breaches of the EIAD even though its mandatory requirements have not been met.

*Comment*

Mr Justice Collins had correctly decided that the 1999 Regulations had not fully implemented the EIAD, since the EIAD permitted a failure to enforce to amount to a development consent which does not require an EIA. He went on to take the view that the planning permission had lapsed and therefore a new consent was necessary for the development to proceed. Hence, the requirement for an EIA could not be avoided.

It is possible to exempt "projects" which come under Annex II of the EIAD: Article 2(3). However, such exceptions have to be construed by reference to the purpose of the EIAD. By failing to adopt the procedure prescribed in the EIAD, specifically Article 2(3), the planning authorities, as emanations of the State, had breached the EIAD.

The EIAD provides a well-structured procedure for the assessment and evaluation of likely environmental effects. The first recital to the EIAD states this clearly. That objective is further clarified and amplified by the first and second recitals to Directive 97/11/EC (the amending Directive). Article 1 defines the EIAD's scope of application, and, in particular, Article 1(2) defines "development consent":

> (1) This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.
>
> (2) For the purposes of this Directive:
>
> 'project' means:
> -the execution of construction works or of other installations or schemes,
> -other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources,
>
> 'developer' means:
> the applicant for authorisation for a private project or the public authority which initiates a project,
>
> 'development consent' means:
> the decision of the competent authority or authorities which entitles the developer to proceed with the project

Bearing in mind that, like all EU measures, the EIAD is to be interpreted teleologically – that is, in accordance with its aims, objective and purpose[11], the authors submit that the EIAD is to be given a purposive construction. This is already evident in ECJ case law[12].

'Development consent' under Article 1(2) extends beyond merely positive decisions/acts by the competent authority. The words 'positive' and 'negative' are not expressly stated. Had the intention been to limit development consent to a positive decision/action in order for a project to proceed, then that term would have been included in the definition.

Such a meaning to development consent is appropriate in the light of the central obligation of the EIAD contained in Article 2(1):

> Member States shall adopt all measures necessary to ensure that projects likely to have a significant effect on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. The projects are defined in Article 4.

[11] See Case C-106/89 *Marleasing SA v La Commercial International de Alimentacion SA* [1990] ECR I-4135, at 4159.

[12] Case-392/96 *Commission v Ireland* [1999] ECR I-5901 at para 64 *et seq* and Case C-72/95 *Kraaijeveld* ("Dutch Dykes") [1996] ECR I-5403 at paras 31 and 39. See also Case C-435/97 *World Wildlife Fund (WWF) EA & Ors v Autonome Provinz Bozen EA & Ors* [1999] ECR I-5613.

The fifth recital to the amending Directive highlights that Article 2(1) was amended to secure two objectives:

> Whereas projects for which an assessment is required should be subject to a requirement for development consent; whereas the assessment should be carried out before such a consent is granted.

Article 4 provides:

> (1) Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.
>
> (2) Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:
>
> a. A case-by-case examination, or
>
> b. Thresholds or criteria set by the member State
>
> whether the project shall be made subject to an assessment in accordance with Articles 5 to 10…

Among the projects listed in Annex II (assessment where significant environmental effect) are:

> 10(h) Tramways, elevated and underground railways, suspended lines or similar lines of a particular type, used exclusively or mainly for passenger transport.

Article 2(3) provides that:

> Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.
>
> In this event, the Member State shall:
>
> (a) consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public;
>
> (b) make available to the public concerned the information relating to the exemption and the reasons for granting it;
>
> (c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, [where applicable], to their own nationals.
>
> The Commission shall immediately forward the documents received to the other Member States.
>
> The Commission shall report annually to the Council on the application of this paragraph.

The purpose of the EIAD was described in *Berkeley v Secretary of State for the Environment*[13]:-

> The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issue.

The *Berkeley* case found that a decision of a local planning authority (or the Secretary of State for the Environment where an application has been called in) to grant a planning permission can be overturned if the planning authority or the Secretary of State failed to consider whether the development required an EIA, whether or not it was requested to give a screening opinion or direction, except where it is clear that no

[13] [2001] 2 AC 603, at 615.

reasonable authority could require an EIA for that development.

This very much accords with *R v Durham CC and orc, ex p Huddleston*[14] where the Court of Appeal recognised the value of informed participation in decision-making. Lord Justice Brooke suggested that the citizen should be able to say this:-

> I, as an individual citizen, should have a valuable opportunity to take part in an informed consultation in relation to an extraction project which will detrimentally affect my home and environment in which I live.

Article 2(1) therefore requires that Member States adopt all measures to ensure that a development consent is in place throughout the period of the "execution of the construction works" (Article 1(2)). Thus, where, as in *Prokopp*, planning permission has lapsed, there is a requirement to obtain a development consent for the project to proceed. Therefore, a decision against taking enforcement proceedings and proceeding by way of a s106 agreement authorises the project to proceed without planning permission and confers development consent for the purposes of the EIAD.[15] The EIAD provides a comprehensive code, and hence if exceptions are to be made, they are to be made under Article 2(3). Article 2(3) was not exercised in *Prokopp*, despite the public importance of the project. The local planning authorities should not militate against the parameters of the EIAD.

In conclusion, the courts are now taking a purposive approach to the interpretation of the EIAD and the UK implementing legislation. The courts are showing a willingness to enforce the EIAD to overturn development consents. The attitude of the courts in relation to EIAD is now clearly in favour of the environment and third party rights. Any developer who relies on the laissez-faire attitude taken to an EIA by the courts in the past is in for a rude awakening.

[14] [2000] 1 WLR 1484.

[15] See the decision of the House of Lords in *R v North Yorkshire County Council, ex p Marilyn Brown & Anor* [2000] AC 397 had established that a s.22 determination was a development consent for the purposes of the EIAD.

## DRAFT NATURE CONSERVATION (SCOTLAND) BILL

**Colin T. Reid,**
**Professor of Environmental Law,**
**University of Dundee**

I am most grateful to Iain Roberts for his assistance with this article.

The Wildlife and Countryside Act 1981 was rightly hailed as a major step forward in protecting wildlife and habitats throughout Great Britain. Nevertheless, gaps and weaknesses fairly rapidly became apparent and by the 1990s the need for significant reform was obvious. For England and Wales change came with the Countryside and Rights of Way Act 2000, but Scotland continues to use the 1981 Act subject to only slight amendments. Now a draft Nature Conservation (Scotland) Bill has been published, with a promise of legislation later this year. This note outlines some key issues raised in the comments submitted on behalf of UKELA. The response was prepared by members of the Scottish Law and Nature Conservation Working Groups and is available on the UKELA web-site.

The divergence in the law between Scotland and the rest of Great Britain is not simply a result of devolution, since differences in the designation and review procedures for Sites of Special Scientific Interest (SSSIs) have existed since 1991 and notably different approaches were apparent in the separate consultation papers on reform of SSSIs issued for each jurisdiction in mid-1998, months before the Scotland Act 1998 was even passed. In Scotland, concern for the social and economic development of rural communities has always been more prominent in the discussion of conservation issues and the differences in approach were apparent in the titles of the consultation papers – *Sites of Special Scientific Interest: Better Protection and Management* (England and Wales) and *People and Nature: A New Approach to SSSI Designation in Scotland*). Wider notification and consultation procedures are features of the Scottish draft Bill.

South of the border things moved fairly rapidly and the Countryside and Rights of Way Act 2000 introduced wide changes to the system of SSSIs

and assorted other amendments to the law on habitat protection and wildlife crime. In Scotland things have moved more slowly, with a major policy paper in 2001, *The Nature of Scotland*, being the only the product until the Criminal Justice (Scotland) Act 2003 introduced some changes in relation to wildlife crime, especially the introduction of custodial sentences.

The paper produced by the Scottish Executive contains draft legislative provisions for habitat protection, but only proposals on other aspects of the law. Much of what is contained is essentially parallel to the 2000 Act, introducing a duty on public bodies to further biodiversity (a stronger phrase than the duty to "have regard" in the 2000 Act), allowing Scottish Natural Heritage (SNH) to prevent, not just delay, damaging operations on SSSIs, placing controls on statutory undertakers, introducing land management orders, extending the protection of wildlife by penalising reckless as well as intentional harm and making numerous minor amendments to definitions, powers and procedures to improve the law. Technical amendments to the Conservation (Natural Habitats etc.) Regulations 1994 have been the subject of a separate consultation.

UKELA has welcomed most of the proposals, which will make clearer provision for the protection of biodiversity whilst respecting the rights of the owners and occupiers of land. As well as detailed comments, on such matters as the form of notification to neighbours and communities when certain designations or actions are proposed and the absence of clear transitional measures to apply the new rules to existing designations, four major points have been made in our response.

The first is an overriding point about the style of the proposed legislation. With the changes proposed to the 1981 Act and the 1994 Regulations, there is a once in a generation opportunity to restate the whole of the law on nature conservation in a single, coherent set of provisions and to achieve effective and accessible legislation. If all that happens is that the 1981 Act is amended, then users of the law will be faced with the text of the 1981 Act as originally enacted, the text as amended on several occasions for the whole of Great Britain, the provisions on the Advisory Committee on SSSIs in quite separate legislation, and then the text of the 1981 Act as amended separately for England and Wales by the Countryside and Rights of Way Act 2000 and for Scotland by the new Act. The full legal picture can then be appreciated only by considering the 1994 Regulations and the various provisions on management agreements to be found in assorted legislation from 1949 onwards. This is about as far as it is possible to get from accessible and effective legislation, and is a sure way of ensuring that for the people of Scotland the law is seen as part of the problem of our relationship with nature, not as part of the solution. This rare opportunity for a comprehensive restatement of the law should be taken.

One of the claims for the proposed new rules is that they will allow for a reduction of the regulatory burden on the owners and occupiers of land designated as an SSSI. At present, the list of operations subject to control by SNH is issued when the SSSI is designated, and cannot be changed, leading to lengthy lists covering all potential threats to the site, however remote the risk at present. This means that perfectly harmless activities may be caught by the regulatory system since in different circumstances or if carried to extreme they may damage the conservation value of the site, and if not included in the list they will escape control in future. By allowing amendments to the list, the proposals are hailed as permitting a much more tightly focused list of controlled operations to be used, concentrating on real threats to the site. But this is undermined by the fact that unless all of the owners and occupiers agree, the list can be reviewed only every five years. It will still be the case, therefore, that SNH lacks the ability to respond rapidly to changing circumstances, and lengthy lists of controlled operations will remain the only guarantee of being able to intervene to provide effective protection for sites. A much more flexible system is required if the regulatory burden is to be reduced whilst maintaining adequate protection for sites

The third comment relates to the mechanism for appeals. There is clearly a need for an appeal mechanism in relation to the exercise of many powers in the Bill, and the proposal to make use of the existing structure of the Scottish Land Court is

sensible (the Advisory Committee is to remain as the body examining issues relating to the designation of SSSIs). However, use of the Scottish Land Court will only be acceptable if there are clear changes to the Court's composition to ensure that it has the expertise to deal with arguments based on ecology as well as agriculture and that it is seen as being a balanced tribunal, not one inevitably biased in favour of land managers. In this new role the Court is being asked to do something quite different from its current task, and it must change to reflect this. The legislation governing the Court does permit the use of assessors, who could provide the scientific expertise to support the Court, but the membership must also give confidence that there will be a fair assessment of conflicts between the demands of conservation and the desires of land managers. The lay members of the Court are sometimes referred to as 'the agricultural members' and a body that is seen in this way will hardly be accepted as an impartial tribunal to decide disputes between farmers and SNH. The membership of the Court must be visibly changed before it is acceptable as the appeal tribunal under this Bill, and to satisfy the requirement of being an "impartial" tribunal under article 6 of the European Convention on Human Rights.

The final comment relates to two significant issues in need of legislative attention but not covered in the proposals. The first is the position of hybrids. At present the legal rules apply only to the species listed in the various Schedules to the 1981 Act and 1994 Regulations. In practice, though, many species are subject to a degree of hybridisation in the wild, and this can raise major practical problems (e.g. the controversy over the fate of the American ruddy duck because of its inter-breeding with the European white-headed duck). Especially as genetic technology reveals the diversity within apparent species, there is a danger of the current format, based on 'pure' species being found wanting. The legislation should make express provision for hybrids. The second area in need of attention is the threat to native species caused by invasive non-native species. Especially in relation to aquatic species, the current law is proving to be ineffective, and predicted climate change will make Scotland a more suitable habitat for several of the troublesome species at present kept out only by climatic conditions. More effective controls are needed in this area.

Nature conservation law in Scotland is in need of reform, and the proposals in the draft Bill are largely to be welcomed. There are some issues that need further attention, but above all it would be a shame if too narrow an approach to amending the law means that the opportunity is lost for a new law which in content and style provides a well-balanced, effective and accessible set of rules for this important area.

## EIA: IS THERE A SOCIO-ECONOMIC DIMENSION?

**Stephen Tromans**
**Barrister, 39 Essex Street**

At a recent seminar on environmental assessment, where I was a panellist, someone raised the question of whether environmental statements should include an assessment of the social or economic effects of the proposed development. The panel (myself included) had no very clear answer to offer immediately, but the question is obviously a very important one. Many developments will have social or economic effects which may be either positive or negative: local housing may be lost, communities dislocated, jobs may be created or may be lost.

So, for example, a large urban mixed use development, including commercial, residential, leisure, hotel and retail elements, might have both positive and negative potential effects of a socio-economic nature. On the positive side might be permanent and temporary employment creation, secondary benefits for the local economy, the provision of housing and services, and the creation of leisure and amenity opportunities. On the negative side might be increased demand on limited local school and healthcare resources, the creation of retail competition and the displacement of local business, and housing provision which is inappropriate in terms of affordability. These are of course all matters of planning policy, but this in itself does not mean that they do not need to be the subject of EIA procedures. They may in some cases figure in the ES under other headings, for

example health effects may be considered in relation to air quality assessment, or the effects of community severance may feature in the transport assessment.

If EIA was being undertaken for a major infrastructure project in the developing world, funded by international financial institutions, there seems little question that such factors would have to be considered – but for an up-market housing development (say) in East London?

The point did in fact arise in a recent High Court decision, though again no conclusive answer emerged. In *The Queen (on the application of Portland Port Limited and Portland Harbour Limited) v. Weymouth and Portland Borough Council* [2001] EWHC Admin 1171, Mr Justice Harrison was faced with a challenge by Portland Port Limited (the harbour authority for Portland Harbour) to the proposed grant of planning permission by Weymouth and Portland Borough Council for the development by the South West Regional Development Agency of an area called Osprey Quay for a mixed use of residential, leisure, retail and commercial development. The area adjoined Mere Tank Farm, which is part of the operational land of the harbour and is used for storing hazardous substances, among other things.

Many points were made by the Port in the course of its unsuccessful challenge to the decision. Among them was the suggestion that the data presented in the ES was incomplete in various respects in that it did not include the detail required by Part II of Schedule 4 to the 1999 EIA Regulations. One of the alleged deficiencies related to possible socio-economic effects. It was said that whilst the ES did in fact have a section on socio-economic effects, including the number of jobs to be created by the proposed development, there was no mention of the possible adverse effect on harbour-related jobs or on the operation of the Port if the use of Mere Tank farm for storage of hazardous substances were sterilised.

Leading counsel for the Port ultimately did not press the submission that an ES was required to contain an assessment of socio-economic effects as a matter of law. Rather, his point was that the picture presented was one-sided. The Court, however, held that the Port had been allowed to address the planning subcommittee and thus had ample opportunity to rectify the balance and tell the subcommittee what they thought the adverse effects might be.

Reading Schedule 4 of the EIA Regulations, there are somewhat mixed messages as to whether socio-economic effects fall within the "Information for Inclusion in Environmental Statements" referred to in that Schedule. The "description of the development" certainly appears to refer to its physical characteristics and its physical effects (such as emissions). The statement will also refer to the likely significant effects on the environment, which by Part I, para. 4, should cover indirect as well as direct effects, secondary and cumulative effects resulting not only form the "emission of pollutants" and the "creation of nuisances", but also effects resulting from "the existence of the development".

It is of course possible to argue that the intention is to assess environmental effects in their traditional sense, on flora, fauna, soil, water, air, etc. However, by Part I, para. 3, the "aspects of the environment" to be described, if they are likely to be significantly affected, include "population", which of course can be affected in many ways going beyond simply pollution, loss of amenity, and so forth. Having said that, the thrust of the Selection Criteria laid down in Schedule 3 for screening Schedule 2 development is very much in the direction of the physical characteristics and effects of the development. Comparison of the coverage of EIA systems in other jurisdictions suggests that this is generally something of a grey area: see Christopher Wood, *Environmental Impact Assessment: A Comparative Review* (Longman, 1995, Chapter 7).

There are many grey areas in environmental law; one of the most recent being the emerging divergence on the correct pronunciation of "Aarhus" (at one end of the spectrum it can be made to sound like "Toys'r'us" and at the other end "Whore-house"). The problem in the EIA context is that, as in the Portland case, such fuzziness can leave it open to the developer to pray in aid socio-economic factors (urban regeneration or job creation) by referring to them

in the environmental statement, without necessarily having to confront by rigorous analysis the other possible side of the coin. It would be interesting to hear the views and experience of UKELA members on this issue.

** This article is extracted and adapted from EIA Law and Practice by Stephen Tromans and Karl Fuller, which will be published in July in Butterworths Environmental Law Series.*

**THE DRAFT EUROPEAN CONVENTION AND ENVIRONMENTAL PROTECTION**

**Deborah Lloyd**
**Ashursts**

UKELA submitted its concerns on the draft European Convention to Peter Hain (the Government Minister negotiating the draft of the Convention) and other members of the government team in Brussels during the plenary debates on the Convention in May. UKELA's letter to Mr Hain expressed its concerns that the first draft of the new Convention for the European Union/Community (a) detracts from the importance of environmental protection as is currently set out in the Treaty of Amsterdam and (b) marks a backwards step from the present situation where environmental protection and the management of natural resources is more fully integrated into the concept of sustainable development.

The issue is that by virtue of Article 2 of the Treaty of Amsterdam the EU determined that "The Community shall have as its task...a high level of protection and improvement of the quality of the environment". The draft Convention does not deliver this commitment and returns to a historical concept of sustainable development which fails to give due regard to environmental principles.

Further, the current draft of Article 3 of the Convention has as its guiding principle: "the Union shall work for a Europe of sustainable development based on balanced economic growth and social justice". This "new" definition of sustainable development is inconsistent with the widely understood definition of sustainable development both at the UK and International levels.

UKELA is keeping a watching brief on progress of the European Convention and will keep its members advised of developments in this regard.

**LETTER TO PETER HAIN**

This letter was was drafted with help particularly from UKELA Council Members Deborah Lloyd and Martin Diggins.

14 May 2007

Rt. Hon. Peter Hain MP
The Wales Office
Office of the Secretary of State for Wales
Gwydyr House,
Whitehall,
London SW1A 2ER

Dear Mr Hain

**Re: The Convention on the Future of Europe**

I am writing on behalf of the UK Environmental Law Association (UKELA) to support you in your endeavours to maintain environmental protection as a key principle within the draft Convention on the future of Europe. UKELA is the UK forum which aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers (and includes most of the leading environmental lawyers in the UK) and non-lawyers and has a broad membership.

UKELA is concerned that the first draft of the new Convention for the European Union/Community detracts from the importance of environmental protection as is currently set out in the Treaty of Amsterdam and marks a backwards step from the present situation where environmental protection

and the management of natural resources is more fully integrated into the concept of sustainable development. By virtue of Article 2 of the Treaty of Amsterdam the EU has decided that "The Community shall have as its task…a high level of protection and improvement of the quality of the environment". The draft Convention does not deliver this commitment and returns to a historical concept of sustainable development which does not give due regard to environmental principles.

Further, the draft Convention is inconsistent with the UK Government's commitments to the environment and to legal principles in relation to environmental protection enshrined in recent legislation. Moreover, the draft Convention does not accord with existing International principles and the general understanding of what sustainable development means: i.e. a balance between economic, social and environmental considerations. UKELA believes that the failure to make environmental protection a key objective under draft article 3 will undermine the existing importance of environmental concerns throughout the EU. UKELA would like to offer any help it can in support of the proposed amendments which address our main concerns below.

UKELA's particular concerns relate to Articles 3 and 8 and the omission of the integration principle.

**Article 3 – The Union's objectives**

The current draft of Article 3 has as its guiding principle: "the Union shall work for a Europe of sustainable development based on balanced economic growth and social justice". This definition of sustainable development is inconsistent with the widely understood definition of sustainable development both at a UK and an International perspective. At the UK level, the UK Sustainable Development Strategy aims "to bring the environment, social progress and the economy alongside each other at the heart of policy making". This overall aim is underpinned by four objectives, two of which relate to the effective protection of the environment and the prudent use of natural resources and by ten principles and approaches, some of which are established legal principles.

Removing environmental concerns from the concept of sustainable development cuts across existing principles enshrined in UK legislation (e.g. as you know the National Assembly for Wales has sustainable development built into its constitution, through section 121 of the Government of Wales Act 1998).

Similarly, the Environment Act 1995 firmly integrates the principles of protection and enhancement of the environment into its concept of sustainable development which represents an aim to be achieved by the Environment Agency in performing its functions. To remove reference to environmental concerns from the basis of sustainable development runs counter to existing UK legal principles which have been founded on the position previously stated at the EU level. Further, removal of environmental protection from the main aims and objectives of the EU departs from the concept of sustainable development at an International level which firmly integrates and fixes environment with economic and social issues.

In summary, UKELA strongly supports those pressing for the definition of sustainable development to include: "a high level of protection and improvement of the quality of the environment". The fundamental premise of sustainable development that the "needs of the present generation should respect the right of future generations to meet their own needs" should also be included.

**Article 6 of the current EC Treaty / Article 8 of the draft Treaty: Fundamental Principles of the Union**

The integration principle found in Article 6 of the Treaty of Rome as amended states: "environmental protection requirements must be integrated into the definition and implementation of Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development". The importance of this principle cannot be overstated. It recognises that the Environment is *sui generis* and, since all other political issues such as transport and agriculture necessarily impact upon it (in a manner in which they do not impact on each other), it cannot be viewed in isolation from them. The principle "calls for a permanent continuous 'greening' of all Community policies" (Kramer L. "E.C.

Environmental Law (Sweet and Maxwell 4th Edition at p15). The integration principle stands alongside other governing principles, such as subsidiarity and proportionality, and its omission from the fundamental principles of the EU in the proposed Treaty would be a major retrograde step. As stated above, UKELA considers that the draft at Article 8 should include reference to the "principles of environmental policy integration and of policy coherence" thus reinstating the principles set out in the existing Treaty.

As a general comment, UKELA is concerned with the proposed draft Treaty as it currently stands and considers that there is no merit in removing fundamental environmental principles which are clearly set out in the existing Treaty and in existing domestic laws. Further, as indicated in the Fifth Environment Action Programme, there is evidence to suggest that a number of Member States do not fully implement environmental legislation. To devalue the principle of environmental protection in the EU's main aims and objectives may serve to heighten this problem and result in further degradation of the EU's environment.

Additionally, UKELA is of the view that the well established meaning of sustainable development, which has been extant since the Brundtland Report in 1987, should be maintained given the existing legal principles which have evolved from and have been incorporated into existing domestic law.
If you would like further information or assistance from UKELA or if there is any further support or assistance we could lend to the process then we should be happy to help.

Yours sincerely

Andrew Wiseman
Chair of UKELA

cc.

Baroness Scotland; Ms Gisela Stuart MP; Lord Tomlinson; Rt. Hon. David Heathcoat-Amory MP; Lord Maclennan of Rogart

## LETTERS TO THE EDITOR

### Unending Plethora – continues

I would like to fully endorse Richard Hawkin's message in his letter " Unending Plethora" in the last issue of e-law.

As special advisor to the House of Commons EFRA Select Committee for their Inquiry into implementation of the Water Framework Directive, I can confirm that the same sentiment arose in that case also.

"17. All Member States appear to be vocal supporters of the way in which European environmental legislation is formulated and implemented, but few if any back their words with enthusiastic action. At different times every Member State has faced infraction proceedings for failing to properly implement Directives. ……

18. Past experience suggests that most if not all Member States will fail to achieve proper and full implementation of the Water Framework Directive within the timescale set out in the Directive. That is disappointing, but it is, as we have said, a common problem. Over time, Member States should address the issue, in particular by only agreeing to new Directives after the practical and economic implications of their implementation have been fully assessed and costed. Being able to do so may be particularly difficult in the case of last minute changes to Directives, including the Water Framework Directive, during the conciliation process. ……"

[The Water Framework Directive; Fourth Report of Session 2002-03; Vol.1 – HC 130-I; page 12]

It is my view that poorly implemented legislation is bad legislation. Legislation should only be brought into being if it is in support of realistically achievable policy objectives and its implementation can be properly resourced (human, financial and time). All Member States, not least the UK Government and its Agencies, are struggling to fully implement existing Environmental Directives and new ones are on their way. Little time has been available to evaluate implementation and impact. Surely with

the experience of the last 30 years there must be scope for radical reform (rationalisation and simplification) so that the often worthy aims of environmental protection and pollution control can be achieved more effectively and efficiently.

**Peter Howsam**
phowsman@howsamp.freeserve.co.uk

## VIEWS REQUESTED ON REVISION OF BS 4142

I am a practicing noise consultant, specialising in planning in environmental noise and was asked to be the UKELA representative on the EH/1/3 BSI Committee involved with, among other things, the revision of BS 4142 : Rating Industrial Noise in Mixed Residential and Industrial Areas. This is a document which is cited (rightly or wrongly) in just about every public inquiry, nuisance action case, etc. that I have ever worked on and there are many good and bad features of it.

Regardless of my personal views, I have decided to canvas UKELA members to produce a comprehensive list of issues that should be addressed by the consultants who will prepare the draft of the revision for the EH/1/3 Committee. I would be grateful if all UKELA members who wish to influence the standard's development could respond, ideally by e-mail, by the end of August to allow time for the information to be pulled together.

Please send your e-mail to : andrewraymond@pdaltd.com, or see the other contact details at the foot of this message. Please air all your pet hates and problems with BS 4142, but also the aspects which you would like to see retained or developed, as this is a major opportunity to influence the development of this standard. It would be helpful if each point you raise could be in a self-contained paragraph to ease the compilation process. I propose to circulate the compiled comments to all those who respond in time as well as submitting it to the EH/1/3 committee.

Regards

**Andrew Raymond**

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## REPORT ON WORKING PARTIES

**MARK BRUMWELL**
**SJ Berwin**
**Working Party Co-ordinator**
**17 June 2003**

MARK.BRUMWELL@SJBERWIN.COM

1 **Biotechnology Working Party – Convenor, Daniel Lawrence** daniel.lawrence@freshfields.com **Deputy Convenor, Martha Grekos** martha.grekos@hailshamchambers.com

The Working Party has organised a debate on GMO which is taking place at the conference on 27 June at 6pm. This will be chaired by Professor Malcolm Grant.

The Working Party has also organised a seminar to take place at Freshfields on 1 July 2003 at 6pm. Sue Mayer, Director of GeneWatch UK will speak on the issue of "*The GM crop commercialism decision - EU Law, co-existence and liability*".

The next meeting is fixed for after the conference, in July.

2 **Contaminated Land Working Party – Convenor, Matthew Townsend -** Matthew.Townsend@allenovery.com
No meetings of the Working Party have taken place since the last report.

3 **Climate Change (Emissions Trading & Flexible Mechanisms) Working Party – Convenor, Helen Loose –** helen.loose@ashursts.com **Secretary, Anthony Hobley -** arh@cmck.com
No meetings of the Working Party have taken place since the last report.

4 **Insurance and Liability Working Party – Convenor, Valerie Fogleman –** vfogleman@blg.co.uk
A meeting has been fixed for 25 June 2003 at which the Working Party will discuss the proposed Directive on environmental liability and the UNECE Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.

5 **IPPC Working Party – Convenor, Michael Hutchinson -** Michael.Hutchinson@mayerbrownrowe.com
No meetings of the Working Party have taken place since the last report.

6 **Nature Conservation Working Party – Convenor, Andrew Baker -** andrew_baker@dial.pipex.com
The Nature Conservation Working Party together with the Scottish Law Working Party submitted a response to the Scottish Executive on draft nature conservation legislation for Scotland.

7 **Planning Law Working Party – Convenor, Mark Challis –** challism@nortonrose.com
A meeting is fixed for the week of 9 July 2003. This will be a joint meeting of the Planning and Sustainable Development Working Parties and will be on the topic of sustainable housing in the countryside. Simon Fairlie of "Chapter 7 and PPG7 Reform Group" will be speaking.

8 **Practice and Procedure Working Party – Convenor, James Kennedy –** james.kennedy@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
No meetings of the Working Party have taken place since the last report. However individual members have participated with the Nature Conservation Working Party in the response to the Scottish Executive's draft Nature Conservation Bill.

10 **Sustainable Development Working Party – Convenor, William Upton –** wupton@compuserve.com
A meeting is fixed for the week of 9 July 2003. This will be a joint meeting of the Planning and Sustainable Development Working Parties and will be on the topic of sustainable housing in the countryside. Simon Fairlie of "Chapter 7 and PPG7 Reform Group" will be speaking.

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 4 June 2003. Jennie Price from WRAP was the speaker and gave a presentation on the role of WRAP and the impact of "Waste Not, Want Not".
The Working Party responded to the "Relevant Convictions" Consultation.
The next meeting is fixed for 11 September 2003.

12 **Water Working Party – Convenor, Maria Cull -** Maria.Cull@herbertsmith.com
No meetings of the Working Party have taken place since the last report.

## UKELA BIOTECHNOLOGY WORKING GROUP – CALL FOR MEMBERS

Biotechnology is a wide, multi-disciplinary subject and one that also relates to topics covered by other UKELA working parties. The UKELA Biotechnology Working Group focuses on key areas as they relate to biotechnology, particularly

genetically modified organisms, liability and insurance, public participation, waste, IPPC, contaminated land, health and safety, and European and International trade law issues. We are, however, open to new suggestions for topics to examine.

BWG is continuing with its educative function and it is undertaking a variety of tasks, which include inviting experts to speak at meetings, organising seminars and conferences, pro-actively reporting on topical issues and responding to key consultation papers. As a result of this activity, the BWG is keen to encourage more UKELA members to join the group. We would be extremely interested to hear from those who have experience/knowledge in this sphere and are prepared to become actively involved with the projects and initiatives the BWG are embarking upon.

Please feel free to contact the BWG convenors for further information:

Martha Grekos –
martha.grekos@hailshamchambers.com
Daniel Lawrence –
daniel.lawrence@freshfields.com

**UKELA BIOTECHNOLOGY WORKING PARTY SEMINAR**

**Tuesday 1st July 2003**

The UKELA Biotechnology Working Group is pleased to announce that Sue Mayer, Director of GeneWatch UK, will speak at its next seminar on *"The GM crop commercialisation decision – EU law, co-existence and liability".*

Attendance is free to all UKELA members. Refreshments will be provided. CPD accredited.

Date and time: Tuesday 1st July, 2003 from 6pm till 7pm
Venue: Freshfields Bruckhaus Deringer, 65 Fleet Street, London EC4Y 1HS

To reserve a place, please contact Martha Grekos:

martha.grekos@hailshamchambers.com

Hailsham Chambers
4 Paper Buildings
Temple
EC4Y 7EX

**CONFERENCE UPDATE**

Last minute queries can be sent to: ukelaconference@plymouth.ac.uk.

**E – LAW**

***The ediorial team want letters, news and views from you for the next edition due to go out in July/August 2003.***

***All e-law contributions, be they letters, articles, book reviews, case reports etc should be dispatched to Catherine Davey as soon as possible by email at:***

***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***

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See also the web site at
www.ukela.org

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

**MEMBERSHIP ENQUIRIES**
**to Richard Bines**

Email: richard@sharpsredmore.co.uk
Fax: 01473 730030