e - law

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DESTINATION MANCHESTER

MANCHESTER 2004

Stephen Tindale, Executive Director Greenpeace UK has agreed to be Guest Speaker at the Gala Dinner.

The first session on Saturday will be environmental reporting and corporate social responsibility. Other topics include the environmental liability directive and Part IIA.

Online booking is available www.manchester2004ukela.org. All enquiries to keith.davidson@cobbetts.co.uk 0161 833 3333

UKELA NEWS

Vicki Elcoate Executive Officer

By now you will have received your annual renewal reminder and noticed that the subscription rate has gone up for some members, but that there are also new categories of membership. We received very helpful feedback on this issue when we mailed out the questionnaire earlier in 2003 and the majority of members felt an increased subscription was acceptable, as long as it supported added benefits for members. Thank you to all who have renewed already, and an even bigger thank you if you were able to sign the Gift Aid form. This enables UKELA to add 28p to each pound you donate (we asked you to support the appeal for funding for the e-library on environmental law).

E-library

Work on the scoping study has now started in partnership with BRASS, Cardiff University's Centre on Business Relationships, Accountability, Sustainability and Society. This will investigate how an e-library on environmental law would be used by the public.

"An information resource on environmental law, available electronically, would both meet an increasing public demand and help implement the thrust of European legislation on access to environmental information – the aim being to secure a better quality environment through greater public awareness and engagement", said Andrew Wiseman, chair of UKELA. "We see a big gap in providing information on everyday environmental law issues for the average person or small business".

Professor Bob Lee, co-director of BRASS said: "This project would help the implementation of the Aarhus Convention in the UK over the next two years and beyond in that it promotes an active role for citizens in designing, monitoring and enforcing environmentally sound policies and legislation at the local, national and international levels".

BRASS, the ESRC Centre for Business Relationships, Accountability, Sustainability and Society, exists to understand and promote the key issues of sustainability, accountability and social responsiveness, through research into key business relationships.

The scoping study is expected to take four months, with a working model being produced on one area of environmental law. Depending on the outcome, UKELA will then seek support and funding for the major task of establishing the e-library.

If you feel you are able to help in any way with this project please let me know (Vicki.elcoate@ntlworld .com).

Northern Ireland
Another piece of work now in preparation is a paper on the administration and enforcement of environmental law in Northern Ireland.

We are asking members in the province, and those with expertise in the subject, to contribute to the paper due to be published in the spring.

Our main concerns are failures and delays of implementation and regulation and the tangible effects of this (eg. water pollution, damage to habitats particularly those designated under the Habitats Directive, and regulation of waste). The UKELA paper is designed to inform UKELA members generally in the context of its UK remit on environmental law. It is also hoped that the report will help influence decision-makers to provide the necessary regulatory regime and resources to make environmental law work effectively in Northern Ireland.

If you would like to help develop this paper please contact me in the first instance. We're particularly interested in hearing from those have had experience of dealing with other UK regulatory agencies (SEPA, EA, and English Nature) and who have a view on whether they detect any difference in dealing with EHS and DOE in Northern Ireland.
We plan to publish the paper in e-law, and more widely, when it is ready.

Training – diary date
We are planning to hold the joint training event with the Association of Personal Injury Lawyers, previously highlighted in e-law, on April 29th. This will be a half day update on the latest in environmental law, including litigation update, case and comment with time for networking afterwards. It will be held in London but we hope that the planned afternoon timing will allow travel time for those from elsewhere. We'll contact all members directly with the programme once it's ready but please pencil in the date if you are interested.

North West Regional Group

The North West Group held a speaker meeting (at the Environment Agency's offices in Warrington) followed by a Christmas meal at a local restaurant on Wed. 10th Dec. The topic was flood defence. Two Agency flood defence officers spoke to us about river catchment flood management plans (part of long term flood defence planning) and a sustainable water environment project currently underway in the N.W (reduces flood risk and saves businesses money). Approximately 20 people attended the event.

Future speaker meetings (with provisional topics) are planned to take place next year on 2nd February - environmental risk; 29th March - environmental litigation update and 17th May - AGM and update on the implementation of end of life vehicles directive.

SUSTAINABLE DEVELOPMENT: A "MONUMENT FOR ETERNITY"?

By R G P Hawkins and H Shaw*

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Synopsis

This paper discusses and illustrates the impermanence, chimerical nature, and inherent subjectivity of the term Sustainable Development. Doubt is cast on the criteria for its present use and the future of the term Sustainable Development, together with the present public unquestioning acceptance of its continuance.

This paper examines a number of commonly held assumptions about Sustainable Development. For those who believe Sustainable Development can provide a framework for policy, a basis for international or temporal comparison, or a benchmark for industry against which environmental progress will be measured, this paper is intended as an encouragement to review and reconsider its application.

The Ephemeral Nature of Sustainable Development

The phrase Sustainable Development has a short history. It was proposed only sixteen years ago when in 1987 the World Commission on Environment and Development defined Sustainable Development as development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs.'[1]. Yet, in the 1999 UK Sustainable Development Strategy[2], Sustainable Development is defined as '*ensuring a better quality of life for now and for generations to come.'* According to Parkin *et al.*[3], there are over 200 definitions of Sustainable Development, and the natural consequential question is, how can they be consistent the one with the other?

It is commonly accepted that Sustainable Development has three dimensions: economic, social and environmental. This concept can be visualised as the triangle formed at the centre of three partially overlapping circles (economic, social and environmental) on a Venn diagram[3]. There are a number of cases today when only two dimensions are considered, with the economic dimension overshadowed by augmented environmental and social concerns.

One example of this is given later in reference to a draft review by two senior respected figures in the Environment Agency discussing the application of the Framework Directive on Water and its translation into the 2003 Water Bill.

So what does Sustainable Development actually mean? Such phrases remain meaningless and can be a deceptive substitute for a critical analysis, such as that achieved thorough environmental audit, until they mature into effective actions followed by a measured and significant outcome. The word Sustainable, for example, suggests actions such as conserving, maintaining, recycling and perhaps enhancing. But how can one measure the outcome of the actions, and what is the benchmark by which to gauge the achievement of Sustainable Development, and thus give it greater effect than would be achieved by the repetition of a meaningless mantra?

Sustainable simply means that the activity could continue indefinitely, i.e. there is a closed loop system. Even a sustainable closed loop system does not imply consistently favourable conditions for one group, species, nation or agenda. For example the cyclic function that describes the interchanging survival numbers for the snowshoe hare and lynx show a self regulating continuous 9 to 10 year cycle of

constantly changing conditions in favour of one species and its dependant predator[4]. On a short time scale, the population of the hare may appear unsustainable, but over a 50 year timescale it is sustainable.

Development for its part implies progress, the further establishment of civilisation, and the improvement of standard of living (e.g. the actual improvement of shelter, water supply, and waste management, not a metaphorical barometer). So by implication, the achievement of Development is subjective, depending on one's geographical situation, economic standing in the world arena, place and time in history, politics and religion, professional experience or necessity for short, medium or long term planning, as will be illustrated below.

Historical Ambivalences

As Richard Hawkins suggests in his recent Viewpoint article 'The Wood from the Trees'[5], was it Sustainable Development for the English to fell Hampshire's oak forests in order to build the ships needed to defend England from a Spanish invasion? Clearly the felling of ancient trees in such large quantities (approximately 60 acres of New Forest woodland was needed to build The Victory) was unsustainable, but without this action, Reformation England would not have had a future in which to develop. Post-Reformation Catholics residing in England with allegiance to Rome and Philip of Spain, would have disagreed. They might even have thought to torch the forests closest to the Portsmouth logging trail in order to prevent the fleet that defeated the Armada from being built. The Catholics would have conceived this Sustainable Development, if only because many of them went sadly to their personal London pyres.

Likewise, 250 years later, on the other side of the world the felling of Kauri timber from the native forest that once covered two thirds of New Zealand's North Island, may or may not be considered as Sustainable Development. Kauri trees are slow growing and may live for up to 2000 years. But after all, the Kauri logging and timber processing industry established by the predominantly European settlers in New Zealand funded and shaped the construction of Auckland, the development of its ports and the Island's infrastructure[6].

The New Zealand example also illustrates the sad but true saying that 'if you don't do it, then somebody else will'. Prior to the discovery of New Zealand by the Europeans, the Maori people enjoyed a life of relative harmony with nature. Meanwhile the empire building in the outside world continued to spread, spurred on by rivalry between competing predators. The eventual invasion and subjugation of undeveloped New Zealand (only possessing small arms) was inevitable. This also illustrates the subjectivity of development. In isolation from acquisitive neighbours, the level of development in New Zealand remained apparently adequate. With natural resources abundant and a relatively mild and tolerant climate in the North and the South Islands, were the imported improvements provided principally by the Europeans even needed?

In these cases the three dimensions, or triple bottom line of sustainable development[3] could not occur simultaneously, and certainly not for all parties involved. They show that there can be a political, religious and spatial element in defining Sustainable Development.

The Latest Fashion Accessory

The acknowledged greatest interpreter of Bach's piano concertos, András Schiff, recently commented "A recording is a document of one's view of a piece of music at a given time. It is not a monument for eternity"[7]. So today we accept albeit some of us most reluctantly, Brundtland, the World Commission, and Sustainable Development, in fact we are expected unanimously to embrace them. Sebastian Wood[8] hopes that by 'interrogating heads of engineering business', the 'industry leaders will realise that

sustainable development is not a fad that will disappear', and Ashley *et al.*[9] state that Sustainable Development '…serves as a comprehensive framework for the formation of policies and actions…'. But can they be mistaken? The World Commission and Brundtland appear to be powerful and self perpetuating words, but do they really deserve to be made a 'Monument for Eternity'?

In a historical context, the world has progressed without Sustainable Development. So why has the phrase been adopted now? In many respects, as we shall see, the term hasn't been adopted in its true sense. Instead it has been added to phrases, infiltrated projects, and stealthily integrated into political jargon and environmental eco-speak, to add some spurious validity, and as such life continues as usual.

In the ICE sixty page proceedings Engineering Sustainability (Volume 156 ES1), Sustainable or Sustainable Development were used in all 6 briefing notes and 6 papers, and in a random sample of 20 pages one or other expression was used on average 10 times per page. So, when should this moveable template of Sustainable or "Sustainable Development" be used and when should it not be applied?

In their recent Planning News Sheet Anthony Bowhill and Associates summarise 115 planning changes and significant cases[10], and the word sustainable is used in ten of them. For example, the 'Sustainable Communities Plan' aims to accommodate the 200,000 extra homes needed in the South of England, a proposal for a new housing development was apparently turned down because the location was found to be 'unsustainable'. Per contra, a proposal for new flats was found 'not to cause harm due to loss of employment' because it is in a 'sustainable location'. Recent cases refer to the 'sustainable use' of a brownfield site, and a 'fairly sustainable location'.

Other eminent experts in planning law[11] observe that in most planning appeals the term Sustainable Development arises in reference to the impact on transport networks or car use. They note that the concept of Sustainable Development lacks a clear definition, and apart from in transport related cases, the Sustainable Development criteria are not consistently applied. If Sustainable Development is to include all three dimensions, economic, social and environmental, then should it specifically be used as a rigorous test in all development cases?

In a lucid and reasoned draft review of the 'The Water Framework Directive and the Water Bill – a major change for environmental management' two senior Environment Agency staff noted in their introduction that 'economic considerations are an important element to the [Water Framework] Directive.'[12] However, throughout the 7 page article, economic issues in relation to the Bill are not discussed in any detail. Environmental objectives, dates for deadlines, and figures for abstraction volumes and penalties for abstraction offences are given, but no figures are given for the cost of implementation contrasted with the estimated benefits of the objectives set out in the paper.

Our examples show that it is not always apparent what meaning the authors attach to the use of either Sustainable or Sustainable Development. In many cases it is not clear whether the word sustainable has been added as an ill-defined imprimatur, or as one which has been systematically applied to satisfy the three dimensional test.

Scratches on the Escutcheon

Of all environmental decision making, the template of Sustainability should be applied to transport and highways development. This must have been what the Secretary of State for the Department of the Environment, Transport and the Regions had in mind when he said in his address at the Royal Geographical Society in 1997 that 'I will have failed in 5 years' time if there are not many more people using public transport and far fewer car journeys.' In June 2002, Whitehall officials denied that the Deputy Prime Minister had ever made a pledge to cut the number of journeys made by car[13]. In August of 2002 it was reported that car use had increased by 1% in 2001 and 2% in the first half of 2002 [14].

Alas, the ephemeral nature of Sustainable Development was quickly shown when Alistair Darling, the new Transport Secretary of State, adopting his own Sustainable Development principles stated that he is now proposing, inter alia, to widen the M25 and the M1. The Government's Transport 10 Year Plan states that in addition to 'a bigger and better railway', congestion will also be tackled by 'targeted improvements to the existing road network'[15]. According to the Plan this will involve 'widening 360 miles of trunk roads' and 'wiping out the maintenance backlog on local roads'.

Ignoring these two severe scratches on the shining escutcheon of Sustainable Development, the question must remain, how can these Sustainable Development tergiversations all be funded? Certainly the issues of funding should have been investigated at the time when these changes in policy took place. According to a Government announcement released in October 2003, 'Public money likely to be needed for roads projects is to be diverted to fill a £1.5 billion-a-year hole in the Government's rail budget.'[16].

Again we must examine the social dimension of Sustainable Development. When the Government announced recently that Network Rail maintenance work will no longer be contracted to private companies, are they really presuming that Network Rail engineers will be better that those employed by private companies? Given the skills shortage in the Civil Engineering profession, it would be interesting to see how much of the future work is actually carried out by the very same people, who have changed employer and possibly relocated. What important social issues are involved in those decisions? The resolution of industrial relation problems will certainly be more difficult in the future.

These inconsistencies and the piecemeal application of the triple bottom line do not help in maintaining the original respect for the term Sustainable Development, not only amongst the profession, but also among the public.

Does sustainable development have a future?

This paper has examined the term Sustainable Development and discussed its history and present use. Their application suggests that the terms Sustainable and Sustainable Development are being used before a common understanding and definition have been properly established. Sustainable Development should encompass at least three dimensions, social, economic and environmental, but the economic dimension is often ill considered. There is a lack of consideration of economic factors in the Environment Agency's analysis of Water Framework Directive, and blurring of the financial analysis in the change in transport policy from Prescott to Darling.

But how can the Ministers be blamed when Brian Bender of DEFRA states that 'our priorities are to get all of the headline indicators of sustainable development moving in the right direction [there are 15 of them], and industry has a valuable role in helping to achieve this'[17]. He might excuse the tergiversation from the elimination of cars on roads by another Secretary of State by saying that Sustainable Development is flexible and changeable according to a change in office or political party change in office. Political flexibility may be a part of the criteria for Sustainable Development, but this should be made clearly apparent to the public and accepted by environmental mangers. Charged with the task of playing a 'valuable role' in helping to achieve Sustainable Development, it is crucial that industry holds each Government accountable for their policies. Industry must not find itself engaged in chasing unattainable, moving targets, and unless deserved, industry will not like being the scapegoat for an incomplete achievement.

What is needed is consistency of meaning, consistency of application, consistency in examining the criteria, consistency of the results of inadequate criteria (i.e. a draft Directive or policy should not be agreed if it does not satisfy Sustainable Development criteria in all three dimensions). Any move towards these will justify the research for and writing of this paper.

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A duty to find the least worst option?

David Wolfe
Matrix

In two recent cases, the court has rejected the notion that an environmental regulator must simply approve an option which is "acceptable" in environmental terms. In Phillips (relating to mobile phone masts) the court *allowed*, and in Blewett (relating to landfills) the court *required*, the regulator to ensure that the least worst option had been chosen.

Philips – the least worst site for a mobile phone mast

In Jodie Phillips –v- Secretary of State [2003] EWHC 2415, Richards J upheld Jodie Phillips' statutory challenge to a planning inspector's decision granting approval for the "siting and appearance" of a mobile phone mast next to her home.

She was concerned, among other things, about the potential health effects of the emissions from the mast. Even though there is no positive evidence as to such health effects, it is well established in law[1],

[1] Trevett –v- Secretary of State [2002] EWHC 2696; [2003] Env. L.R. D10

and recognised in the applicable planning guidance (PPG8[2]) that fears about health effects, even if not objectively justified, are material in the planning decision.

The approval for the siting and appearance of the mast was required under the procedures built into Part 24 of the General Permitted Development Order, by which telecommunications operators have access to a fast track process for gaining planning permission for their installations.

PPG8 explains that, when considering mobile phone mast applications (for express planning permission or deemed consent under the GPDO), planning authorities must consider alternatives sites to meet the claimed need for the mast[3] including as follows:

> Local planning authorities may reasonably expect applicants for new masts to show evidence that they have explored the possibility of erecting antennas on an existing building, mast or other structure.

Richards J rejected arguments from Hutchison 3G that PPG8 did not require consideration of alternative sites, but was limited to requiring consideration of "mast sharing" and of putting masts on buildings[4]. He also rejected the contention that alternatives were only material where there was a positive finding of planning harm, where the harm might be less if another site were chosen[5], which was relevant in the case because the Inspector had found that the site in question would not cause planning harm (thus giving little, if any, weight to Ms Phillips' concerns about health impacts).

He then observed that:

> Further, although the guidance states that it should not be necessary to consider the health aspects of a development that complies with specified standards for public exposure, it recognises that public concerns about the health implications of a development can still be a material consideration (see paragraphs 97ff of the Appendix). No doubt the existence of such concerns is one of the reasons why the location of telecommunications structures is such a sensitive issue. It seems to me to follow, again as a matter of principle, that if there were two alternative sites each of which was otherwise acceptable in environmental terms, it would be open to a decision-maker to refuse approval for one of those sites if the location of a mast on that site would give rise to substantially greater public concerns than its location on the alternative site. To take an example close to the facts of the present case: if one of the sites were close to a nursery school and residential properties, whereas the other was in an industrial estate some distance away from the school and residential properties, the greater public concern about the former might tip the balance against the grant of approval for it. I am not saying that that is how a particular application would be decided or ought to be decided, but only that it would be lawful for a decision-maker to approach the matter in that way." [underlining added]

Accordingly, it should no longer be enough for the mobile phone operator simply to list out a handful of alternative options which it has considered but seek to persuade the planning authority that its chosen option is "good enough". The least worst option, including having regard to health "perceptions" should be chosen.

[2] Paragraph 29
[3] Paragraphs 19-21, Appendix paragraphs 66-88
[4] Judgment paragraph 39
[5] Judgment paras 37-38

Blewett – the Best Practicable Environmental Option for dealing with waste

Until now, the courts have held that there is no requirement for a regulator dealing with a waste management application (whether for a waste management licence, a PPC permit, or a planning permission) for a landfill or an incinerator, to consider whether the proposal is the Best Practicable Environmental Option (BPEO) for dealing with the waste stream involved[6]. BPEO was to be, at most, a material consideration (to which the decision-maker could thus lawfully give no weight provided they took it into account). And, further, that there was no obligation to give effect to the oft-repeated (but rarely acted upon) 12th report of the Royal Commission on Environmental Pollution's statement that:

> "[The BPEO is] the outcome of a systematic and consultative decision-making procedure which emphasises the protection of the environment across land, sea and water. The BPEO establishes for a given set of objectives, the option that provides the most benefits or the least damage to the environment as a whole, at acceptable cost, in the long term as well as the short term."

However, certainly in the case of planning applications for landfill, and probably in the case of planning applications for other waste disposal facilities, Sullivan J has established, in Blewett –v- Derbyshire [2003] EWHC 2775 (Admin), that the planning authority must base its decision on the outcome of a properly structured process which identifies the BPEO for the waste stream involved. Thus, it is no longer good enough (as Derbyshire had done) to grant permission for a landfill in an old open-cast quarry when there was no need for landfill capacity in the area let alone the County as a whole and which, if anything, was seen to receive waste arisings from the other end of the County.

This result came from application of the Government's Waste Strategy 2000 (WS2000) which was produced to give effect to the UK's obligation under Article 7 of the EU Waste Framework Directive to produce a plan containing measures to secure the objectives under Articles 3-5 of the Directive, which include, the proximity principle and avoidance of environmental harm and risk. WS2000 explains (so Sullivan J held) that waste management decisions (including a decision to grant planning permission) must be based on the principle of BPEO; and it explains the structured process which must be gone through as part of that process: identify the waste stream, identify objectives to be met, identify alternative ways of meeting the objective, identify assessment criteria, choose the best against the criteria.

The obligation to give effect to WS2000 arises in three overlapping ways of increasing significance. Firstly, it explains that it is a material consideration in a planning decision[7]; secondly, by Article 4 of the Waste Framework Directive[8], a decision to approve a waste disposal facility must have the objective of "implementing the material parts" of WS2000; thirdly, Article 8 the Landfill Directive[9], requires a landfill project to be "in line with" WS2000.

Plainly, the first would add little to the existing law. Because he decided that the third was in play in the decision, Sullivan J did not need to decide the second (although he recognised that it had "considerable force"). That is important because, of course, the Landfill Directive applies only in relation to a landfill, and not, therefore, for example, an incinerator. So the position for waste disposal facilities other than landfill is that decision to grant planning permission must have the objective of implementing the material

[6] See, for example, R v Bolton Metropolitan Borough Council ex parte Kirkman [1998] JPL 787 at page 799, R v Leicestershire County Council ex parte Blackfordby & Boothorpe Action Group [2001] Env LR 2, see paragraphs 46 to 49, R v Derbyshire County Council ex parte Murray [2001] Env LR 26, paragraphs 13 to 15, Levy –v- Environment Agency [2002] EWHC 1663 Admin

[7] Waste Strategy Annex A para A3

[8] given effect domestically by Regulation 19 and Schedule 4 of the Waste Management Licensing Regulations 1994

[9] 1999/31/EC

parts of WS2000. That means[10] that the planning authority must, at least, have in mind the objective of only approving the BPEO; which places a rather higher burden than simply the obligation to treat BPEO as a material consideration.

> But, in relation to landfill, Sullivan J held that, in order to give effect to the requirements of Article 8 of the Landfill Directive, the decision to approve had to be "in line" with WS2000. And that: "One of the main objectives of the Strategy is to "deliver change" by placing greater emphasis on the need to choose the BPEO when making waste management decisions."[11]

And, thus[12]:

> the policies relating to BPEO in Waste 2000 are, and are intended to be, more prescriptive than earlier policy guidance. To give but a few examples from the extracts cited above: "Decisions on waste management, including decisions on suitable sites ... for disposal should be based on a local assessment of the BPEO"; "The right way to treat particular waste streams cannot be determined simply. The objective is to choose the BPEO in each case"; "The Government ... look(s) to Waste Planning Authorities to take full account of the policies described in this Strategy, in particular ... the importance of establishing the BPEO"; "When taking waste management decisions on suitable ... sites ... local authorities must follow the framework set out below". As mentioned above, the framework describes how to determine the BPEO: "The process that should be used for considering the relative merits of the various waste management options in a particular situation is the BPEO".
>
> On a fair reading, the Strategy does not simply maintain the status quo in policy terms, leaving local planning authorities free to give such weight as they choose to BPEO. One of the main objectives of the Strategy is to "deliver change" by placing greater emphasis on the need to choose the BPEO when making waste management decisions."

Accordingly, a decision based on a proper BPEO assessment is – in effect - mandatory in considering a planning application for a landfill. And, for other types of waste disposal (such as incineration) the planning authority must have in mind the objective of deciding whether planning permission should be granted on the basis of a BPEO assessment.

The result provides strong impetus for promotion of the "waste hierarchy" (and thus a reduction in the avoidable use of landfill) as well as the "proximity principle", both of which are embraced within a BPEO assessment.

Overall

These two cases illustrate a shift in environmental regulation from an approach based on applying a threshold of what is "acceptable", to a requiring approval of only the least worst way of meeting an identified need.

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[10] following R (Thornby Farms Ltd) v Daventry District Council; R (Murray) v Derbyshire County Council [2002] QB 503 [2002] EWCA 31; Adriano –v- Surrey County Council [2002] EWHC 2471; [2003] Env. L.R. 24; [2003] J.P.L. 844; [2002] N.P.C. 150

THE PLANNING AND COMPULSORY PURCHASE BILL

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The newly merged Planning and Sustainable Development Working Party of UKELA held a seminar upon the Planning and Compulsory Purchase Bill at Bircham Dyson Bell's Westminster offices on 4 November 2003.
The debate was led by Henry Oliver, Head of Planning and Local Government for the Campaign for the Protection of Rural England (CPRE). Henry spoke with passion and authority about CPRE's opposition to much, but by no means all, of what is proposed in the Bill. In brief, CPRE strongly supports a number of the amendments to the Bill proposed by the opposition and considered (and rejected!) by the House of Commons Standing Committee in October. In particular, CPRE supports the following;

- That regional spatial strategies should set the spatial framework for all other regional strategies in the area, particularly the regional economic strategy.

- That all higher tier authorities, such as county councils, should have a statutory responsibility to actively engage in sub-regional planning, including assisting the regional planning bodies in preparing the regional spatial strategy.

- That local authorities should produce a "strategic planning statement" as a local development document, that links in with the wider strategic regional policy.

- That local transport plans should be included as a local development document.

- That Inspectors' recommendations upon local development documents should not be binding on local authorities.

- That there should not be provision for local development orders in the Bill as they will add to complexity and cause cumulative environmental damage.

- That local authorities should be able to decline to determine applications for statements of development principles where they consider they have insufficient information.

- That major infrastructure projects should be subject to an economic impact report, as recommended by the Standing Advisory Committee on Trunk Road Assessment.

- That local authorities should be subject to a statutory duty to enforce breaches of planning control.

- That permitted development rights for agriculture and forestry should be ended.

[11] Judgment para 102
[12] Judgment para 101

- That there should be provisions enabling future regulations to be made to control light pollution.

- That there should be a qualified third party right of appeal, for example, where local planning authorities grant consents against local plan policies or in circumstances where local authorities are determining their own applications.

Henry's account of CPRE's concerns upon all of these important issues contributed to a lively question and answer session, which covered, amongst other things, the lamentable failure of some local planning authorities to take enforcement action to the detriment of individuals but also of the system generally.

The Bill will shortly be referred to the House of Lords for consideration.

The Working Party is most grateful to Henry for giving up his time to attend our meeting and thanks to all of those who attended to support the event. More information about CPRE is available on their website which is www.cpre.org.uk.

CONTAMINATED LAND WORKING PARTY

COMMENTS ON THE DRAFT MODEL PROCEDURES FOR THE MANAGEMENT OF LAND CONTAMINATION (CLR 11)

Introduction

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

2. UKELA welcomes the opportunity to comment on the Model Procedures for the Management of Contaminated Land (**Procedures**) and recognises them as an important step in providing more detailed guidance on how best to assess and manage risks arising from land affected by contamination. Our comments below focus on ensuring that the Procedures provide the certainty necessary to give helpful guidance to those involved with contaminated land (together with any legal issues which the Procedures give rise to) rather than on the Government's policy on contaminated land.

Comments

3. The Procedures should make clear the extent to which they apply throughout the UK. Specific reference is made throughout the document to Part IIA which suggests that the Procedures simply apply to contaminated land in England, Scotland and Wales. Much of the Procedures is generic guidance which could also usefully be applied across the UK.

4. It would also be helpful to include a statement in Chapter 1 as to the precise legal status of the Procedures. It is understood that they are informal best practice guidance to be applied when managing contaminated land (and that those involved with contaminated land including regulators are encouraged to have regard to them).

5. As the Procedures recognise, there are a number of legal regimes under which the requirement to remediate contaminated land may arise. In England and Wales, these regimes are principally Part IIA, IPC/PPC, waste managing licensing and the planning regime. In theory, the approach taken on assessing risks and the need for any clean-up should be the same under Part IIA and the planning regime. However, the standards of clean-up and how risks are analysed may differ under IPC/PPC and the waste management licensing regime. As the Procedures note, under PPC, at the time of a permit surrender, the operator will need to restore the site to a "satisfactory state". This may be a different standard to that adopted under Part IIA (for instance).

   As such, it would be helpful to have a clear statement in Chapter 1 setting out the precise circumstances in which the Procedures should be used and to which legal regimes they apply. This should then be consistently reflected throughout the guidance. At present, the front section of the Procedures suggests that they apply to the clean-up of contamination beyond the Part IIA regime whereas the main body of the guidance is primarily focused on Part IIA.

6. It is assumed (from the wording of the Procedures) that the guidance applies to all types of contamination. This would include, for instance, radioactive contamination (which is subject to a legal regime separate to those mentioned in the Procedures). Again, it would be useful to clarify this and make reference to the full range of all applicable regimes.

7. It would also be helpful in Chapter 1 to provide a brief overview of the legal regimes under which the clean-up of contamination can be enforced. There is considerable reference in the Procedures to Part IIA and the PPC regime. It would be helpful to those less familiar with the legal framework to have a short summary of the applicable legislation and how these regimes interrelate (similar to that provided in Circular 2/2000 on contaminated land).

8. Section 1.2 of the Procedures notes that judgements will have to be made about the relative costs and benefits of a particular course of action in assessing (etc) contamination risks. Clearly, if this cost benefit analysis is fully adopted, then it has the potential to operate in a number of ways (one such way may be to *reduce* the scale and extent of any site and risk assessment carried out). This has the potential to be a contentious issue between regulators and those responsible for any clean-up. As such, the Procedures would benefit from further detail in this section particularly on the issue of how the cost benefit analysis may operate so as to reduce the scope of any investigations, risk assessment and remediation carried out. In so doing, regard should be had to the wider legal regimes under which clean-up can be enforced and the extent to which those regimes take into account a cost benefit approach.

9. The Procedures do not appear to provide any guidance on the extent to which landowners, developers (etc) should liaise with their local planning authority (**LPA**) and/or the Environment Agency (**Agency**) when working through the risk assessment process. In practice, it would be common for those proposing to carry out remediation to discuss their proposals with the Agency and, to the extent possible, obtain the Agency's approval to the works planned. The extent of any such consultation may depend upon the precise legal regime under which the assessment or clean-up is being carried out. It would be helpful to reflect this practice in the Procedures.

10. One of the difficulties experienced by those responsible for remediation is the time which can be taken by relevant authorities to provide comments on proposed investigations and/or remediation plans. There have been occasions when, due to delays in receiving comments back from authorities, developers have had little choice but to proceed with the remediation and to obtain the Agency's and LPA's subsequent approval (or risk wider penalties under the commercial contracts associated with the work). It would be useful if the Procedures could provide some clear guidance to relevant authorities as to the time and manner of any input they may be asked to provide by third parties. If no such guidance can be given, then it may be preferable for the Procedures to remain silent on the need for consultation with authorities.

11. In Chapter 4 (4.1 overview) it would be useful if further details could be provided in relation to the regulatory permits associated with remediation. Whether in this section or in Part 2 (supporting information) it would be helpful to provide the following information:

    (i) the main purpose of the permit;

    (ii) the likely timing for obtaining such a permit (and which authority issues the permit);

    (iii) the costs associated with the permit;

    (iv) details of the applicable legislation.

12. It would also be useful to advise in the Procedures that those intending to carry out remediation should consider *at an early stage* what permits may be required and the time it is likely to take to obtain them.

13. Details of appropriate financial incentives (such as landfill tax exemptions, capital grants and tax credits) which may be available to assist in reducing the costs of remediating brownfield land should be provided together with appropriate contact details for the relevant body which administers those incentives.

14. An important aspect in planning and implementing any remediation programme is for landowners (and contractors) to understand which authorities they should be liaising with and, to the extent it exists, the relationship between those authorities. This could usefully be explained in the Procedures. For instance, what is the relationship between the LPA and the Agency at the time that a remediation plan is being developed pursuant to conditions in a planning permission? To what extent will information be exchanged between these authorities?

15. Likewise, where ground investigations and remediation are a requirement of a planning consent it will often be important for the landowner, developer, funder (etc) to obtain written confirmation from the LPA that the appropriate planning conditions have been complied with. This may require the input of the Agency. The Procedures do not appear to comment on the role of authorities in this regard. Further clarity would be helpful on the appropriate time when those authorities can (and should) be expected to confirm that relevant planning conditions have been satisfied.

General

16. Given that the target audience for the Procedures is wider than technical consultants carrying out investigations and remediation, the Procedures could (in a number of places) be simplified and the text in Chapter 1 made a little clearer. In Part 2, it may be helpful, under relevant banner codes, to include the full text of the key information sources. This avoids any unnecessary cross-referencing.

17. In Part 3 of the Procedures, key information sources are helpfully listed and summarised. To what extent will these (and the Procedures themselves) be updated from time to time?

18. The Procedures provide largely technical guidance on the most appropriate ways to investigate, assess and remediate land affected by contamination. As such, it is crucial that, as part of this consultation, comments are sought from a range of environmental consultants which (we suspect) may already be carrying out much of what is described in the Procedures. The Procedures clearly need to reflect and, where necessary, improve upon existing practice in the remediation of contaminated land.
19. On a more general note, what steps will be taken to ensure that the Procedures are implemented by DEFRA, the Agency (and SEPA) and relevant local authorities? How is the Agency/DEFRA proposing to publicise this guidance within relevant authorities? It is clearly important that these authorities are fully familiar with the Procedures once issued.

Contacts

If you have any queries in relation to these comments please contact **Matt Townsend, Convenor** of UKELA's Contaminated Land Working Group (e-mail: matthew.townsend@allenovery.com).

UKELA WATER WORKING PARTY
INLAND HYDRO ELECTRIC PROJECTS MEETING

The next UKELA Water Law Working Party meeting will be held at Herbert Smith's offices on Friday 16th January 2004 when Andrew Brown from RWE Innogy will be giving a presentation on Inland Hydro Electronic Projects. All UKELA members are welcome. If you propose to attend please contact the convenor Maria Cull

Maria.cull@herbertsmith.com

UKELA - SCOTTISH REGIONAL GROUP

CONFERENCE ON ENVIRONMENTAL COURTS

UKELA Scottish Region is holding a conference on Environmental Justice in Scotland, concentrating on the case for an Environmental Court or other Environmental Tribunal.

This whole day event will be held in the George Hotel Edinburgh on Friday 30th January 2004. An outline of the main topics and speakers is attached. The cost of the event is £95 but there will be a discounted rate of £75 (plus VAT) for UKELA members.

For further details and to book a place, please contact Debbie Entwistle, Marketing Director of Morton Fraser WS, Edinburgh who are sponsoring the conference in conjunction with Talk Environment. Her telephone number is 0131 247 1084 and email de@morton-fraser.com. Alternatively, you can view details of the event and enrol on line by visiting www.morton-fraser.com/seminars.

Speakers and their topics will include :-

Richard Burnett-Hall – *The Problem – pressures for change, handling environmental disputes equitably and efficiently*

Claire Lovat – *Reflections on Present Day Enforcement Policy*

Donald Reid – *The Aarhus Convention – Access to justice and to Environmental Information*

Sir Crispin Agnew QC – *Challenging decisions – Judicial Review (Hatton and the ECJ, cost, standing, time limits) and Other Appeal Procedures*

Prof. Richard Macrory – *Proposals for an Environmental Tribunal*

Michael Woods – *Civil Penalties*

Duncan McLaren, Friends of the Earth Scotland – *The NGO perspective*

Ian Cowan (SEPA) (to be confirmed) - *Enforcement in Practice*

REGIONAL GROUPS

WEST MIDLANDS GROUP PROPOSAL RENEWABLE ENERGY SEMINAR

In March 2003, the UK government published its long-awaited Energy White Paper to a mixed reaction from the 'experts'. The Energy White Paper details the government's new energy policy to ensure that "energy, the environment and economic growth are properly and sustainable integrated". The UK is facing a decline in its indigenous energy supplies and we will soon be a net importer of energy, by 2006 for gas and 2010 for oil. By ratifying the Kyoto Protocol the UK government is legally bound to reduce its emissions of greenhouse gases from 1990 levels.

The Government has an initial 10-year strategy for renewable energy. Specifically, it is proposing that 5% of UK electricity needs should be met from renewables by the end of 2003 and 10% by 2010, as long as the cost to consumers is acceptable. These targets are intended to act as a stimulus to industry and provide milestones for progress monitoring.

Electricity from all renewable sources (including large scale hydro) currently provided 2.6% of the electricity generated in the UK in 2001.Therefore, pressure is increasing to find more sustainable alternatives to traditional fossil fuels and to meet both national and international targets.

In order for the UK to meet its international obligations and national targets, a number of difficult questions will need to be answered. These questions will have serious implications for policy makers, regulators and most importantly local communities.

Key questions may include:

1: What are the renewable options available?
2: What are the pros/cons of different options?
3: What are the environmental/planning obstacles to developing new facilities?
4: NIMBYism - where should such facilities be located?

In anticipation of this debate, UKELA West Midlands is planning to hold a renewable energy seminar in Birmingham. Our aim will be to discuss the likely environmental, planning, political and social challenges faced by all stakeholders in this area. We propose to bring together a number of key speakers from a variety of different backgrounds to put forward their views and debate this important and emotive subject.

Paul Nixon LLM MSc BSc CIWM
Head of Environmental Services

EAST ANGLIA REGIONAL GROUP

The East Anglia regional group is looking for a new convenor. The role involves organising speaker meetings and occasional site visits. Training and support is provided by UKELA's regional co-ordinator, Sarah Holmes, and UKELA staff.

If you are interested in this opportunity to raise your profile in the region and help UKELA deliver a better service to its members please contact Sarah : sholmes@bondpearce.com or phone to find out more: 01752 677703.

NORTH EAST REGION

Please would anyone who would be interested in revitalising the North east Regional Group , and who has not already been in touch with Victoria Joy get in touch with her.

Victoria Joy
Environmental Consultant
Addleshaw Goddard, Leeds
Tel. 0113 209 2334
www.addleshawgoddard.com

SOUTH EAST REGIONAL GROUP

Diary Date 5 April 2004 at Bond Pearce's Southampton Office when Marcus Trinnick will be speaking on Renewable Energy. More information to follow
catherine.davey@stevens-bolton.co.uk
01483 734234

Imperial College

Legal-Environment and Energy Centre

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Monday 1 March	***Making up or Making out? Animal Testing and the Revision of the European Union's Cosmetics Directive*** **Joanne Scott,** Reader in European Law, University of Cambridge
Thursday 18 March	***Procedure and Politics in the Regulation of Genetically Modified Crops*** **Maria Lee,** School of Law, King's College London
Tuesday 27 April	***Judicial Protection of the Environment - Here and Abroad*** **The Rt Hon Lord Justice Carnwath CVO**
Monday 10 May	***International Law, Climate Change and the United States*** **Professor Philippe Sands QC,** Professor of Law, University College London; Matrix Chambers, London
Wednesday 9 June	***The Aarhus Convention and Environmental Governance in the European Union*** **Professor Kurt Deketelaere,** Professor of Law, University of Leuven, Belgium; IALS Visiting Senior Research Fellow Chair: Professor Catherine Redgwell

To be held at BIICL/IALS, Charles Clore House, 17 Russell Square, London WC1

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☐ 10 May: Climate Change, the United States and the Function of International Law **Professor Philippe Sands**	☐ June 9:"The Aarhus Convention and Environmental Governance in the European Union" **Professor Kurt Deketelaere**

Please fax/e-mail/post back registration form to:

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STOP PRESS*

Scottish Programme for 2004

On Friday, 30 January 2004, there will be an all-day Conference on Environmental Courts. I attach a detailed Flyer with respect to this Conference. As you will see from this Flyer, for further details and to book a place, please contact Debbie Entwhistle, Marketing Director of Morton Fraser, WS, in Edinburgh.

Please also put the following dates in your diary:-

1. On 11 March, there will be an evening meeting at the offices of Brodies in Edinburgh. The topic will be Waste Strategy/Landfill Permits.

2. On 13 May, there will be an evening meeting at the offices of Anderson Strathern in Edinburgh. The topic will be the Nature Conservation Bill.

3. On 28 October, there will be an all-day Conference on General Environmental Matters.

Kenneth Ross
Chairman, UKELA Scottish Regional Group
Kenneth.Ross@bishopslaw.biz

UKELA Biotechnology Working Group
"The New Regulatory Regime for GMOs"

Seminar by Maria Lee, lecturer in environmental law, Kings' College, London
Monday 9th February 2004
TIME: 5.30 p.m. till 7 p.m.

VENUE: Freshfields Bruckhaus Deringer

65 Fleet Street
London EC4Y 1HS

Contact Martha Grekos for more information Direct tel: 0118 953 5462 Direct fax: 0118 950 9440
Email: martha.grekos@environment-agency.gov.uk

E – LAW

The editorial team want letters, news and views from you for the next edition due in March 2004 – Copy to Catherine Davey by 15th February 2004.

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

UK ENVIRONMENTAL LAW ASSOCIATION
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For information about working parties and events, including copies of all recent submissions contact.

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