e-law

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EDITORIAL

You will shortly be receiving your subscription renewal reminder. I do hope you sign up again promptly so that you can continue to enjoy the benefits of UKELA membership.

We are also shortly opening bookings for the 2009 conference in Durham. You will receive more information about this with your mailing. I do encourage you to book early as we had to turn away people last year who left it until the last minute.

It was good to see so many of you at the Garner lecture, given this year by Richard Hawkins. It was a fantastic turnout and again we were oversubscribed. You can read more about the Garner in this edition.

I'm also pleased to be able to include news of the launch of Young UKELA. This exciting new initiative also attracted a good crowd.

I am most grateful to all who have contributed articles this year and would encourage you all to keep up the good work. Thanks this month to Richard Turney, Simon Pickles and Richard Kimblin who have all contributed articles. A second article on the Regulatory Enforcement and Sanctions Act 2008 follows next month from James Maurici. If you have not yet considered writing for e-law I would encourage you to do so but do get in touch with me to discuss any proposed article before putting pen to paper - or do I mean finger to keyboard?

Can I also encourage you all to consider contributing shorter pieces on cases you have been involved in and letters commenting on articles or current topics. I want to hear more from our grass roots membership next year.

My contact details are Catherine.Davey@stevens-bolton.co.uk and my telephone number is 01483 734234.

Finally – this editorial was due to have been written by the chair of UKELA, Peter Kellett. I'm delighted to announce that he wasn't able to do that because he was called away to the birth of his second son. Toby arrived three weeks early on the day of the Garner lecture!

Catherine Davey – editor of e-law

In this issue

HELPFUL TIP FOR READING E-LAW

Did you know that to save yourself scrolling through e-law to find later items, you can use the bookmark system? E-law arrives with you in pdf format. When you open a pdf document at the side you get a list (this appears vertically) – one of the options is bookmarks. Click on that and a clickable index of e-law will appear on the left hand side of the screen. Click on the article you require and you can go straight to it. No need to scroll.

Hope this helps – apologies to the more computer literate amongst the membership who knew this already.

2008 Conference Papers

With your membership renewal mailing you will receive a complimentary special copy of Environmental Law & Management published by Lawtext Publishing Ltd (www.lawtext.com) which features the 2008 UKELA conference papers. We're very grateful to Lawtext for helping produce these papers at minimal cost to UKELA and hope you enjoy reading them. If you are a corporate member but not the main contact you will receive your personal copy directly.

Strategic Planning Process 2009

UKELA's 3 year strategic plan comes to end in 2009, so work is already in hand to put in place the next 3 year plan which will take the organisation through to 2012. UKELA's Council of Management would like your views on the direction UKELA should be taking over the next 3 years and to this end we have put together a questionnaire. Some of you may recall completing a similar questionnaire 3 years ago – your answers were helpful in deciding the way forward for UKELA at that time. The questionnaire is attached. Please take some time to complete and return to Alison Boyd at alisonboyd.ukela@ntlbusiness.com by 31 January 2009 at the latest. Thank you for your views.

UKELA's new Online Booking System

You will all have received an invitation via email for this year's Garner Lecture and those of you in the Scottish, North England and West Midlands regions will also have received invitations to events happening locally.

These invitations form part of UKELA's new online booking system, where you can register for events by following a simple online link. It is designed to help you sign up for events quickly and easily either via a personal email invitation or via a link on our website, which has the positive effect of increasing the number of people registering. In addition, the system helps to reduce administration time and, therefore, costs for UKELA, enabling us to divert our attention to a wider range of our charitable objects.

So, how does the system work? As a first step, it issues an invitation to an event to which the recipient can either accept or decline. On acceptance, the registrant is then led through a short series of simple steps to register. Guests can be registered too or the invitation can be sent on to anyone you think would like to come along too. Acknowledgement emails are automatically generated as are reminders of the event nearer the time, with venue directions and reminders on timings, locations etc. If you don't accept or decline the first time, then a reminder to you will also be generated to prompt you to register. Once the event has taken place, we will ask you for your feedback via this system – this will be a short series of tick-box style questions which will help us to evaluate our events.

And if you subsequently decide you can't make the event or you need to amend your booking in any way, you can do this easily by logging in to the system with your booking reference and making the changes.

At present, payment for events is only available via an "offline" option, but we will shortly be offering the option to pay online thus streamlining the booking process even further.

UKELA hopes you like this new system. It is still early days, of course, so, inevitably, there are one or two issues to iron out, but we are confident that as we become more proficient in setting events up on the system, so your experience will be smoother, more efficient and straightforward. We welcome your comments – please direct them to alisonboyd.ukela@ntlbusiness.com

HIGH COURT PLANNING CHALLENGES
ENVIRONMENTAL IMPACT ASSESSMENT AND PROTECTED HABITATS

RICHARD TURNEY - Landmark Chambers

1. Failures to comply with the legal requirements of the assessment of the environmental impacts of developments continue to generate significant volumes of litigation. Both the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 ("the EIA Regulations") and the Conservation (Natural Habitats, &c.) Regulations 1994 ("the Habitats Regulations") with their origins in EC law, produce a double hurdle for developers and local authorities, who have found on several occasions that complying with the terms of the national law in force at the relevant time may not be enough. This paper does not attempt a complete appraisal of the law, but attempts to identify certain areas of recent, and perhaps future, litigation.

The scope of EIA

(i) Amendments to the EIA Regulations

2. In the past few weeks, the scope of the EIA Regulations has been expanded to include decisions to approve reserved matters and other approvals under conditions. I do not propose to examine in any detail the changes, engendered in part by the *Barker* litigation,[1] which have recently been made by way of the Town and Country Planning (Environmental Impact Assessment) (Amendment) (England) Regulations 2008/2093. The key change is that an "EIA application" is now defined to include "a *subsequent application* in respect of EIA development".[2] Subsequent applications are:[3]

a. Applications for an approval of a matter where the approval is required by or under a condition to which planning permission is subject;

b. Applications for an approval of a matter where the approval must be obtained before all or part of the development permitted by the planning permission may be begun. In other words, the approval of reserved matters in the context of an outline planning permission.

3. A request for a screening opinion must now identify any planning permission which has been granted for the development in respect of which the subsequent application is made. Perhaps the most alarming element of the amendments is that "Schedule 1 applications" are now defined to include "subsequent applications in respect of Schedule 1 development". That means that any development following an approval in respect of an outline planning permission for Schedule 1 development is now itself EIA development, requiring in all cases the provision of environmental information. This will impose a considerable burden on developers of large schemes which fall within Schedule 1, and may encourage them to apply for full planning permission rather than an outline where any subsequent approvals will require an ES. It also raises the thorny question of what information will be required to be provided say, for example, where there is an approval required under condition for a matter of detail such as a junction scheme or planting.

4. The implementation of these amendments was always likely to raise difficulties – which might explain the considerable delay since the final judgment in *Barker* – and doubtless they will engender a new generation of EIA disputes. The 2008 amendments also make new provision in respect of the determination of conditions in minerals permissions, to ensure that that system of approvals is caught where appropriate by the duty to undertake an EIA.

(ii) Edwards

1 Case C-290/03 *Barker* [2006] QB 764 and *R v Bromley LBC ex p Barker* [2006] 3 WLR 1209 and [2007] 1 AC 470. See also Case C-201/02 *Wells* [2004] 1 CMLR 31, and Case C-508/03 *Commission v UK* [2007] Env LR 1. I also note *Cooper v Attorney General* [2008] EWHC 2178 (QB), an action for damages under the *Francovich* principle of Community law, which arose as a result of the Court of Appeal wrongly deciding in 1999 and 2000 that EIA was not required for reserved matters approval. The ECJ corrected the error in *Barker* and *Commission v UK* and Mr Cooper, a disappointed litigant before the English courts, sought the recovery of his legal expenses from the Attorney General (who would foot the bill for the Court of Appeal). The claim failed at first instance.

2 Reg 2(1) EIA Regulations, as amended

3 Reg 2(1) EIA Regulations, as amended

5. Putting those amendments to one side, in the past two years a broader issue as to the scope of EIA has arisen. It is inherent in the scheme of the EIA Regulations that, as a matter of domestic law, an EIA can only be required in the context of an application for planning permission (or, following the recent amendments, applications for the approval of reserved matters or under conditions). It follows that an EIA will, as a matter of domestic law, only ever be required in the case of "development" as defined in the Town and Country Planning Act 1990. It is not clear whether that satisfies the requirements of the EIA Directive.[4]

6. In *R (Edwards) v Environment Agency* [2008] UKHL 22; [2008] Env LR, a PPC permit had been granted by the Environment Agency to the interested party, a multinational cement manufacturer, to allow them to burn tyres as a partial replacement for coke in their cement kiln. The regulations under which the permit application is considered (the Pollution Prevention and Control (England and Wales) Regulations 2000/1973) allow the EA to regulate harmful effects to the atmosphere by limiting the quantity of polluting matter that a given activity may emit and by imposing quantitative limits by reference to the surrounding air quality on how much the environment may be polluted. In other words, there is consideration of the pollution caused by the particular process which is the subject of application, and then consideration of the effect of that pollution in the context of the existing air quality.

7. The EA's role in emissions control deserves a lecture, if not a whole seminar, in its own right. For present purposes, the important thing about *Edwards* was what was said about EIA. Part of the challenge in *Edwards* was founded on the contention that the approval for the change of fuel in the kiln was an approval for EIA development, and therefore that EIA was required. The argument was that, in terms of the EIA Directive, the use of old tyres as a fuel was a project for the disposal of waste, falling within Annex I of the Directive and therefore demanding EIA, or at least within Annex II requiring an EIA if there were likely to be significant environmental effects. On this particular point, the House of Lords were split.

8. Lord Hoffmann, with whom Lord Hope and Lord Walker agreed, concluded that a change of the fuel used in a kiln could not be a "project" for the purposes of Article 1 of the EIA Directive because the definition of project "appears to contemplate the creation of something new and not merely a change in the way existing works are operated".[5] Lord Hoffmann found support for that proposition in the Annexes themselves, which suggest in

their descriptions of development the creation of something new. It followed that, if the change of the fuel was to fall within the EIA Directive at all it must fall within the category in Annex II of a "change" in a project.[6] Given that there were no significant environmental effects arising from the change of fuel, no EIA would be required. However, his lordship found that, whilst the point seemed clear to him, it could not be considered *acte claire* and therefore a reference to the ECJ would have been required if the point was necessary for the determination of the appeal.

9. Lord Mance disagreed, and Lord Brown agreed with him:

> *[83] ... I would have regarded it as probable that the change to tyre burning would have brought the project within Annex I para.10 (rather than Annex II para.13) of Directive 85/337/EEC . I say this for a combination of reasons. First, the language versions of Art.1 of the Directive that I have inspected appear to vary quite considerably. The German is the most sparse. But others with their various final references to "the execution of ... schemes" (English) or "the realisation of ... works" (French, Spanish, Dutch and Danish) are on their face more expansive. Further, both Annexes I and II list "projects" within Art.1 , and it seems clear from the nature of some of these projects that activities not involving construction works may be "projects": for example, in Annex II , intensive fish farming (para.1(f)), treatment of intermediate products and production of chemicals (para.6(a)), manufacture or packing and canning of various products (para.7) or storage of various items (paras 3(c) and (e) and 11(e)).*
> *[84] Second, the plan to change to tyre burning did in any event involve not inconsiderable physical adaptation of the company's site and plant. This is described in part 4.1 of its detailed application to allow burning of tyres. They were to be discharged into a covered reception area, from which they were to be transferred by crane or mechanical conveyors into a storage area (holding up to 300 tons) fitted with smoke detectors linked with an alarm and with a water spray system. From there they were to be extracted mechanically and conveyed to a metering system inside the pre-heater tower and then fed to the combustion chamber via an airlock system. All this, including the vital combustion chamber was new.*
>
> *[85] Third, the European Court has said repeatedly that "the scope of Directive 85/337 is very wide and its purpose very broad"...*

4 Directive 85/337 EEC
5 [51]
6 See Article 13 of Annex II

10. On the facts, the disagreement between their lordships was not material because the information provided by the applicant for the permit would have been adequate to satisfy the requirements of EIA, if EIA were required. If the change in the process to the burning of waste tyres fell within Art 13 of Annex II, the conclusion that there were no significant environmental effects meant that there would be no duty to carry out an EIA in any case. It followed that there was no need for a reference to the ECJ on this point.

11. In my view there are several important points arising from *Edwards*:

a. Each member of the committee agreed that the process change approved by the grant of the PPC permit would be caught by the EIA Directive, whether as a project for the disposal of waste under Annex I (Lords Brown and Mance) or as a change to an Annex I project under Art 13 of Annex II (Lords Hoffmann, Hope and Walker). In other words, the EIA Directive can, *prima facie*, apply outside the context of "development" as defined in the 1990 Act;[7]

b. The House of Lords disagreed as to whether a process change (without significant physical development) can amount to a "project" within the meaning of the EIA Directive, and would have referred the matter to the ECJ if the matter was determinative to the outcome of the appeal;

c. The EIA Directive was complied with either because there were no significant environmental effects, or because the requisite environmental information was in fact taken into account.

12. The prospect of the EIA Directive applying outside the scope of development control suggests that there is at least a partial failure on the part of the UK to transpose the requirements of the Directive. The EIA Regulations only apply in the context of the planning process. The point has been canvassed before in both the English courts and at the ECJ.

13. The first relevant case is *R (Lowther) v Durham CC* [2002] Env LR 13, where it was argued that a similar process change to that in *Edwards* amounted to a material change of use requiring planning permission. That of course is the way in which changes to processes can be caught by the planning regime, and therefore by the EIA Regulations. The Court of Appeal held that an alteration in the source of power or fuel used for a process is capable of constituting a material change of use, but it would always be a question of fact and degree.[8] On the facts of that case, there was no material change of use.

14. In *R (Horner) v Lancashire CC* [2008] Env LR 10, the Court of Appeal considered whether the erection of machinery at a cement works to handle animal waste derived fuel required an EIA. The Court dismissed a challenge to the "floorspace" thresholds set out in the EIA Regulations, holding that the measure was not confined to conventional floorspace and could be given a broad interpretation. However, Sedley LJ gave this short but ominous judgment in agreement:[9]

> *[102] It is difficult not to have misgivings about a planning mechanism which, by being based on simple floorspace, allows single storey structures of unlimited height to escape environmental control so long as their "footprint" is less than 1000m². But it is not open to the court to scrap a criterion laid down by domestic law in presumptive conformity with the EIA Directive, and to adopt instead a default rule of its own making, even if such a rule better reflected—as it might well do—the intentions of the Directive. Where no floorspace is involved at all, for example where there is a change of system only, resort to the Directive may be legitimate. For the rest, the default process, if there is one, has to lie in the Secretary of State's power to give a direction that a particular development is an EIA development.*

15. The underlined passage demonstrates that there are doubts about the adequacy of transposition of the EIA Directive in the context of process changes.

16. One way through the difficult issue raised by *Edwards* is to revert to the domestic law relating to changes of use. A change of use which has significant environmental effects would be likely to be considered a material change of use requiring planning permission. So long as

> *the change of use did not constitute a new "project" falling within Annex I of the Directive (i.e., so long as the majority view of the House of Lords in Edwards wins the day, if and when there is a reference to the ECJ), that threshold would neatly dovetail with the requirements of the EIA Directive. Changes of use with no significant environmental effect would not, in any case, require EIA.[10] The extent to which this reasoning shuts the gap between authorisations which may*

7 There was no planning application for the change of fuel.

8 Per Lord Phillips MR, [79] – [88].

9 Emphasis added

10 Although the screening process would of course be lost, and one would have to revert to the doctrine of "substantial compliance".

require EIA as a matter of Community law but which are not caught by the EIA Regulations remains to be seen.

17. I also note this year's ECJ judgment in Case C-2/07 *Abraham v Wallonia* [2008] Env LR 32, which concerned an extension to Liege-Berset Airport in Belgium. The defendant regional authority had entered into agreements with freight carriers for the adaptation of the runway, the provision of a new control tower and various other works to allow the airport to operate 24 hours a day, 365 days a year for freight flights. One question referred from the national court was whether an agreement between a public authority and a freight undertaking could in itself amount to a "project" for the purposes of the EIA Directive. It was held that it could not. The ECJ stated that projects must be "works or physical interventions", a definition which does not particularly assist in the context of the debate in *Edwards*. However, the ECJ also pointed out that such an agreement may amount to development consent, entitling the undertaking to proceed with the works, depending on the provisions of national law. Such an agreement may be an "in principle" decision, requiring EIA.[11] Furthermore, the provisions of the EIA Directive could not be circumvented by splitting the project up into several stages, and seemingly not by splitting the decision-making into a number of stages. The Advocate General's view was that such a commercial agreement between a public authority and an undertaking should be regarded as the first stage of a consent procedure "if and in so far as it limits the discretion of the competent national authorities in subsequent consent procedures".[12]

18. It is also worth mentioning *R (England) v London Borough of Tower Hamlets* [2006] EWCA Civ 1742, where the Court of Appeal held that it was potentially arguable that domestic law

> *failed to properly transpose the EIAD in respect of demolitions. Again, because the whole EIA process is premised on the need for planning permission, where demolition is exempted from the definition of "development" in the 1990 Act, there is no question of an EIA being required as a matter of domestic law. In England leave to appeal was refused on other grounds, but the Court expressly authorised reference to their judgment in other proceedings, as an exception to the normal rule for judgments on permission application.*

19. The question of when an EIA is required cannot, because of the Community law backdrop, be answered once and for all by reference to whether planning permission is required for what is proposed. That presents a significant challenge for those bodies (such as the EA) which have to grapple with applications that are not necessarily made in parallel to a planning application. It also raises a question as to whether more should be done by local planning authorities in assessing process changes such as those in *Edwards* against the "material change of use" yardstick.

Cumulative effects

20. Schedule 3 to the EIA Regulations requires the decision-maker to have regard to the "cumulation with other development". That raises the question of what "cumulation" is in this context. That issue is also of significance in the context of the Strategic Environmental Assessments of planning policy under the Environmental Assessment of Plans and Programmes Regulations 2004 (SI 2004/1633), which I do not consider here.

21. The question of what amounts to cumulation was addressed in *R(Tree and Wildlife Action Committee Ltd) v Forestry Commissioners* [2008] Env LR 5. That case concerned the Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (SI 1999/2218) which implement Council Directive 85/337/EEC in respect of forests and which mirror the EIA Regulations on this point. The development proposed was deforestation and development of around 5ha of a 19ha area of woodland for football pitches and car-parking. Collins J held that the deforestation must be analysed in cumulation with the future use of the football pitches:[13]

> *it will be a question of fact in an individual case whether it can properly be said that there is a cumulation, whatever that means in the context. Clearly it would not be possible to say*
>
> *merely because there were developments proposed which were nothing to do directly with the one in question but happened to be nearby, that that would bring this into play. It is a question of fact: proximity, combined effect and so on, are all factors which would have to be taken into account. However this is an exercise which any planning authority has to carry out, because there are similar provisions under the [EIA Regulations].*

22. Cumulation is not, of course, simply adding together the effects of the separate proposals. In *R (Mortell) v Olham MBC* [2007] EWHC 1526 (Admin), Sir Michael Harrison quashed three outline planning permissions where a negative screening

11 On the basis of *Wells*, cited above.

12 Opinion of AG Kokott, [77]. It can be anticipated that such a situation would not arise in the UK, where a contractual agreement could not be entered into which would fetter the discretion of a public authority when it came to dealing with a subsequent planning application.

13 [36], emphasis added

opinions had been produced. The Council had granted three separate planning permissions for urban redevelopments at sites all governed by the same Masterplan. Each screening opinion simply referred (in identical terms in each case) to the fact that the proposal formed part of a wider redevelopment. It then concluded that, in comparison to the existing use of the sites, the proposal would have no greater impacts on the environment. The judge accepted the claimant's argument that the point about cumulative effects is that they may have a magnitude and significance which the individual components do not have. Merely simultaneously assessing the effects of three developments is simply not grappling with accumulation.

23. However, as *R (Littlewood) v Bassetlaw District Council* [2008] EWHC 1812 (Admin) demonstrates, cumulation is not a question to be answered in the abstract. In that case planning permission had been granted for part of a site which was likely to be subject to extensive redevelopment. No Masterplan had been brought forward to lay out what was to follow. It was argued that the application should be considered in light of the further development proposed. Sir Michael Harrison held:[14]

> *... at that time no proposals had yet been formulated by Laing for the rest of the site for the reasons that I have mentioned. I simply do not see how there could be a cumulative assessment of the proposed development and the development of the rest of the site pursuant to the EIA Regulations when there was no way of knowing what development was proposed or was reasonably foreseeable on the rest of the site. The site was not allocated for development in the local plan. No planning application had been made and no planning permission given in respect of the rest of the site, and no proposals had yet been formulated for that part of the site. There was not any, or any adequate, information upon which a cumulative assessment could be based. In my judgment, there was not a legal requirement*
>
> *for a cumulative assessment under the EIA Regulations involving the rest of the Steetley site in those circumstances.*

Taking into account the mitigation of adverse effects

24. To what extent should provisions to mitigate the adverse effects of a development proposal be taken into account in assessing the environmental effects of the proposal in the context of EIA or "appropriate assessment" under the Habitats Regulations?

25. In *Gillespie v First Secretary of State* [2003] Env LR 30, the Court of Appeal quashed a grant of planning permission which had assumed that a planning condition requiring a comprehensive investigation of contaminated land provided a "complete answer" to the question of whether there were likely to be significant effects on the environment. In so doing, Pill LJ said:

> *[40]... In the circumstances, it was necessary to consider the stage which the site investigation had reached (condition VI requires a future site investigation in detail to be undertaken), the nature and extent of the scheme for remediation, including its uncertainties, the effects on the environment during the remediation and the likely final result. The condition is properly drafted but itself demonstrates the contingencies and uncertainties involved in the development proposal, as does the evidence of Mr Simmons already quoted.*
>
> *[41] When making the screening decision, these contingencies must be considered and it cannot be assumed that at each stage a favourable and satisfactory result will be achieved. There will be cases in which the uncertainties are such that, on the material available, a decision that a project is unlikely to have significant effects on the environment could not properly be reached. I am not concluding that the present case is necessarily one of these but only that the test applied was not the correct one. The error was in the assumption that the investigations and works contemplated in condition VI could be treated, at the time of the screening decision, as having had a successful outcome.*

26. *Gillespie* was taken, for a short while, to mean that conditions which effected mitigation of environmental effects should be disregarded in the screening process. In *R (Catt) v Brighton and Hove CC* [2007] Env LR 32 Pill LJ revisited the point in respect of a decision to grant planning permission for a new football stadium:

> *[31]... In the present case, it would be ludicrous to ignore conditions imposed as to the frequency of football matches, the days on which they may be played and the music which may accompany them. An activity involving thousands of people which occurs daily has more effect on the environment than one which occurs on a limited number of occasions a year and for no more than a few hours on each occasion.*
>
> *...*
>
> *[33]... There will be cases, such as Gillespie , where the uncertainties present, whether inherent or sought to be resolved by conditions, are such that their favourable implementation cannot be assumed when the screening opinion is formed.*
>
> *[34] On the other hand, there will be cases where the likely effectiveness of conditions or proposed remedial or ameliorative measures can be predicted with confidence. There may also be cases where the nature, size and location*

14 At [32]. Permission to appeal was refused after an oral hearing before Richards LJ last week.

of the development are such that the likely effectiveness of such measures is not crucial to forming the opinion. It is not sufficient for a party to point to an uncertainty arising from the implementation of the development, or the need for a planning condition, and conclude that an EIA is necessarily required. An assessment, which almost inevitably involves a degree of prediction, is required as to the effect of the particular proposal on the environment, and a planning judgment made.

27. The Court of Appeal visited the point again in *R (Dicken) v Aylesbury Vale DC* [2008] Env LR 20, where planning permission had been granted for buildings to house a chicken farm which incorporated an "oli-free roosting system", designed to keep the environment free from odour, vermin and flies. It was argued that, in screening the development, the roosting system should have been disregarded. Laws LJ rejected this argument, holding that the roosting system was "part and parcel" of the development, which the decision-maker was entitled to bear in mind whilst screening the application.

28. The point about mitigation measures arose again in the context of appropriate assessment under the Habitats Regulations in *R (Hart DC) v SSCLG* [2008] 2 P&CR 16. That case concerned housing development close to part of the Thames Basin Heaths SPA. One potential adverse effect on the SPA of new housing was that the new residents would be inclined to walk their dogs on the SPA, running the risk of disturbing protected bird species which nest on the ground. Part of the proposal was therefore for the provision of a "Suitable Alternative Natural Greenspace" or SANG which would draw people away from the SPA. It was argued by the local authority that the SANG should be disregarded in assessing the effects on the SPA. Sullivan J rejected that contention:

[55] The first question to be answered under Art.6(3) or reg.48(1) is: what is the plan or project which is proposed to be undertaken or for which consent, permission or other authorisation is sought? The competent authority is not considering the likely effect of some hypothetical project in the abstract. The exercise is a practical one which requires the competent authority to consider the likely effect of the particular project for which permission is being sought. If certain features (to use a neutral term) have been incorporated into that project, there is no sensible reason why those features should be ignored at the initial, screening, stage merely because they have been incorporated into the project in order to avoid, or mitigate, any likely effect on the SPA.

...

[72] The underlying principle to be derived from both the Waddenzee[15] judgment and the domestic authorities referred to above is that, as with the EIA Directive, the provisions in the Habitats Directive are intended to be an aid to effective environmental decision making, not a legal obstacle course. If, having considered the "objective information" contained in the EPR Report, and agreed by NE in the Statement of Common Ground, the first defendant, as the competent authority, was satisfied that the package put forward by the second and third defendants, including the SANGS, would avoid any net increase in recreational visits to the SPA (thereby avoiding any increased disturbance to the Annex 1 bird species), it would have been "ludicrous" for her to disaggregate the different elements of the package and require an appropriate assessment on the basis that the residential component of the package, considered without the SANGS, would be likely, in combination with other residential proposals, to have a significant effect on the SPA, only for her to have to reassemble the package when carrying out the appropriate assessment.

29. Sullivan J revisited the point in *Millgate Developments Ltd v SSCLG*[2008] EWHC 1906 (Admin) where it was contended that a planning inspector had erred in requiring SANGs to be secured by s 106 agreement to be taken into account. Sullivan J held that that was not what the inspector was doing, but rather he was applying Natural England's guidance that "if sufficient avoidance mechanisms were incorporated into the proposal itself so that it could be concluded on the basis of an objective assessment that there was no risk of significant harm to the SPA, an appropriate assessment would not be necessary before the proposal could proceed".[16] On the facts, the inspector had simply rejected the contention of the applicants that other SANGs, some distance from the appeal site, could mitigate the effects of the development on the SPA. That conclusion was "pre-eminently a matter of planning judgment for the inspector".[17]

30. Both *Hart* and *Millgate* raise a further issue, which was also dealt with the by the Court of Appeal in *R (Lewis) v Redcar and Cleveland BC* [2008] 2 P&CR 21. The question essentially is, how should a planning decision-maker approach the advice received from Natural England as the statutory conservation body? In *Hart*, the Secretary of State had departed from the inspector's conclusions on adverse effects on the SPA in favour of the analysis of Natural England. In *Lewis*, it was alleged that the local planning authority had failed to come to the conclusion for themselves that there were no adverse effects on an adjoining SPA. The argument was effectively that the discretion had been unlawfully delegated to Natural England and the RSPB, whose views were accepted without more. Pill LJ held:

15 Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw , Natuurbeheer en Visserij* [2004] ECR I-7405

16 [14]

1. 17 [19]

[85] NE and RSPB are, of course, organisations of high repute. I have no doubt that in approving the scheme, subject to the conditions they required, they were well aware of the nature and extent of the reg.48 duty. A summary of their findings was included in the report to Committee and Committee members were entitled to rely on their recommendations. Mrs Mealing, who was aware of the test to be applied, expressed her opinion. The recommended conditions were included in the report submitted to the Committee. It is not suggested that members of the Committee failed to consider the report. One of the stated reasons for granting permission was that "subject to suitable safeguarding conditions, the integrity of the nearby protected sites will not be compromised".

[86] In these circumstances, neither the failure to set out the reg.48 test, nor the failure to set out Mrs Mealing's opinion, in the report to Committee, in my view, require the planning decision to be quashed. The issue had received expert consideration. The Committee had expert advice and could assume from the source of that advice that the appropriate test had been applied.

31. It is clear from these cases that Natural England's analysis will often be decisive, but that the planning authority must still make its own judgment on adverse effects.

Environmental information

32. The final topic which I wish to cover concerns the nature of the environmental information provided to the local planning authority or inspector, and how that information should be dealt with by the authority which receives it. In *R (Finn-Kelcey) v Milton Keynes Council* [2008] EWCA Civ 1067, information had been provided by the applicant to the local authority in the context of an application for a wind farm in Bedfordshire. The information provided included a reference to raw wind speed data, which had been used to assess the noise which the wind far would cause and the power which it would generate. Third party objectors had not been provided with the raw wind speed data, although they had been provided with the environmental statement and a further statement submitted by the applicant.

33. In the Court of Appeal, it was held that the EIA Regulations as in force at the time imposed no obligation on the Council or the developer to send the raw wind speed data to the objector. The duty, which arose from the direct effect of Directive 2003/35/EC amending the EIA Directive as the relevant provisions had not been transposed into UK law at that time, was merely to make the data available. A reference in the written document, which had been sent to the applicant and placed on the planning file, to CDs containing the data was sufficient for these purposes. Keene LJ held:

[41] It seems to me that the way in which technical information is "made available" is bound to vary and these days will often consist of the use of some electronic format, whether on CD, memory stick or some other method. There can be no objection to that, but it means that the traditional planning file, well-suited to hard copy paper documents, will not always be easy to use for such electronic material. No doubt the CDs sent by the IP could have been put into some plastic sleeves in the file, but there can in principle be no objection to such items of information being kept separately by a planning authority, so long as the file itself indicates their existence and availability. It is little different from the way in which physical models of a proposed development, more common in the past than today, have generally been dealt with. The important thing in such cases is that those interested should be informed that the material is available.

34. The Court of Appeal's judgment is premised on the amendments to the EIA Regulations which gave effect to Directive 2003/35/EC not being in force. Those amendments extend the requirement to distribute information which is received after the submission of the environmental statement to "any other information", rather than just information received by the decision-maker pursuant to a request under reg 19(1) of the EIA Regulations. The new reg 19(7) provides:

(7) Where information is requested under paragraph (1) or any other information is provided, the relevant planning authority, the Secretary of State or the inspector, as the case may be, shall suspend determination of the application or appeal, and shall not determine it before the expiry of 14 days after the date on which the further information or any other information was sent to all persons to whom the statement to which it relates was sent or the expiry of 21 days after the date that notice of it was published in a local newspaper, whichever is the later.

35. This is a potentially difficult provision for developers and local authorities. Often, the submission of the ES will not be the end of the story even where there is no request made for further information under reg 19(1). Eager developers may submit further evidence in respect of environmental matters through an abundance of caution or because it assists their case. Reg 19(7) seems to require that information to be sent to those to whom the ES was sent, although in my view that should only apply to the statutory consultees who are required to be sent the ES. The Court of Appeal did not have to grapple with this issue in *Finn-Kelcey*.

ADDENDUM: Reasons for negative screening opinions

EXTRACT FROM PAPER GIVEN BY JAMES MAURICI, LANDMARK CHAMBERS

Reasons for negative screening decisions?

1. Are local planning authorities or the Secretary of State required to give reasons for a negative screening opinion or direction (i.e. that development is not EIA development) pursuant to the Town & Country Planning (Environmental Impact etc.) Regulations 1999 ("the 1999 Regulations")?

2. An examination of the 1999 Regulations themselves would suggest not. The 1999 Regulations do not state that reasons need to be given for a negative screening decision. In direct contrast under reg. 4(6) of the 1999 Regulations where a positive screening decision is given i.e. that development is EIA development there is an express duty to give "a written statement giving precisely and clearly the full reasons for that conclusion". This would suggest that the drafter of the 1999 Regulations made a deliberate choice not to require the giving of reasons for negative, as opposed to positive, screening decisions under reg. 4.

3. However, the matter does not end there. The issue was considered by the Court of Appeal (Nourse, Pill, Mummery LJJ) in the context of a renewed application for permission for judicial review in ***R v Secretary of State for the Environment, Transport and Regions, ex parte Marson*** [1998] Env LR 761. In that case, Parcelforce proposed to develop a 17 hectare site near Coventry Airport for the construction of sorting and handling depots. The Secretary of State determined that EIA was not required. This decision was challenged by way of judicial review. It was contended that he had unlawfully failed to give reasons, or to give sufficient reasons for the decision.

4. ***Marson*** in fact concerned the predecessor to the 1999 Regulations (the Town & Country Planning (Assessment of Environmental Effects) Regulations 1988) and the pre-1997 version of the EIA Directive. However, the reasoning of the Court of Appeal is equally applicable in the context of negative screening decisions under the 1999 Regulations. Indeed Pill LJ at p. 679 expressly said so in rejecting a submission that Directive 97/11/EC was material to the decision reached by the Court of Appeal[1].

5. The Court of Appeal refused permission and held that it was not arguable that reasons were required where the competent authority of a member state decides not to require an EIA in relation to a particular project:

> *"1) No general duty has been established under Community law or national law to give reasons for all decisions by competent authorities of Member States.*
> *2) Neither the Directive nor the 1988 Regulations expressly require reasons to be given for a decision not to direct an environmental impact assessment.*
> *3) The applicant's right is not a right to an environmental impact assessment but to a decision from the Secretary of State as to whether such an assessment is required.*
> *4) The decision requires an exercise of judgment by the Secretary of State and he is left with a discretion in its exercise. The requirement for a decision is only one part of the procedures provided for planning control and the protection of the environment.*
> *5) Whether or not there is an environmental impact assessment, the local planning authority, in determining applications for planning permission, must have regard to "material considerations" (sections 54A and 70 of the 1990 Act) which will include environmental considerations. The applicant had the opportunity to make representations to the local planning authority and the authority were supplied with information upon environmental considerations, albeit not in the form of an assessment in the form specified in the Directive and Regulations.*
> *6) The right concerned in the circumstances is removed from the relevant substantive decision, that is the decision whether or not to grant planning permission.*

1 See para. 5 of the judgment of Burton J. refusing permission in the case of ***Probyn*** (see below) where in relation to ***Marson*** he said: "That decision did not relate to the identical Regulation, but it is seemingly common ground, certainly it was before me, that that does not make any difference and that the decision of the Court of Appeal has the same effect on these Regulations as in relation to the specific Regulation it was considering, and that the fundamental principle was very fully set out by the Court of Appeal in that case, namely that there was no obligation on the Secretary of State to give reasons when giving a decision as to whether or not an environmental assessment is necessary."

7) The right conferred is very far removed from the fundamental right considered by the ECJ in ***Heylens****…"*[2]

6. In ***Marson*** (see p. 766) the decision letter said that no EIA was required because the Secretary of State was of the opinion that the proposed development "would not be likely to have significant effect on the environment by virtue of factors such as its nature, size and location". Pill LJ said at 766 that even if there was an obligation to give reasons " … that the statement gives a reason or reasons for the decision because the words of the Regulation, which are recited, set out the basic criteria for the decision". At 770 he said that "reasons for the decision were given, albeit in summary form".

7. ***Marson*** has been cited and relied upon in the following cases: ***R. v St Edmundsbury BC Ex p. Walton*** [1999] Env. L.R. 879 per Hooper J.; ***BAA Plc v Secretary of State for Transport, Local Government and the*** [2002] EWHC 1920; [2003] J.P.L. 610; ***Gillespie v First Secretary of State*** [2003] EWHC 8; [2003] 1 P. & C.R. 30[3].

8. ***Marson*** was recently reconsidered by Burton J in an application for permission to apply for judicial review in ***R (on the application of Probyn) v First Secretary of State*** [2005] EWHC 398 (Admin). A 25m high fume extraction stack had been built pursuant to planning permission at a combined slaughter house and cutting facility for chickens. The permission was subsequently quashed and an application was made for permission for retention of the stack. The claimants requested a screening direction under Regulation 4(8) of the EIA Regulations[4],

but the Secretary of State declined. It was contended that he had unlawfully failed to give reasons, or to give sufficient reasons.

9. The claimants in ***Probyn*** relied upon two ECJ decisions post-***Marson*** namely, ***Commission v Italy*** C-87/02 and ***Commission v Italy*** C-83/03, to suggest that ***Marson*** was wrongly decided. In C-87/02, Advocate General Ruiz-Jarabo Colomer stated (at [36]) that:

> *"36. An administrative decision which concludes that the particular features of a project are not such that it is damaging to the environment must be explained by reasons. (35) According to the general rule, which I have already set out, all projects must be made subject to an assessment of their effects prior to authorisation; therefore, if a particular project is excluded from that requirement because it is not harmful, the reasons on which that finding was based must still be disclosed. Environmental protection currently occupies a prominent position among Community policies. (36) Furthermore, the Member States also have a crucial responsibility in that area. (37) Community citizens are entitled to demand fulfilment of that responsibility (38) under Article 37 of the Charter of Fundamental Rights of the European Union, (39) which guarantees a high level of environmental protection and the improvement of the quality of the environment. Accordingly, the main elements of any measure which strays from the general criteria aimed at protecting the environment must be duly specified, since that is an embodiment of the rational exercise of power, as well as being a tool which, if necessary, enables the measure to be reviewed subsequently*[5]*."*

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2 Following what Richards J. said in ***Gillespie*** (see below) para. 5) of the reasoning has been undermined by the House of Lords decision in ***Berkeley v. Secretary of State for the Environment*** [2001] 2 AC 603 but "that does not affect the balance of the reasoning, the broad thrust of which … hold[s] good."

3 In that case, Richards J. said:

"Although the judgment of the Court of Appeal in ***Marson*** was on a permission application, it was a detailed judgment and is of strong persuasive authority. I accept that the decision of the House of Lords in ***Berkeley*** has undermined part of the reasoning, namely reliance on the fact that the applicant had the opportunity to make representations on the environmental considerations and the authority was supplied with information on those considerations. But that does not affect the balance of the reasoning, the broad thrust of which seems to me still to hold good."

The Court of Appeal ([2003] EWCA Civ 400; [2003] Env. L.R. 30) upheld Richards J's decision but did not consider ***Marson*** and reasons aspect.

4 Reg. 4(8) provides "The Secretary of State may direct that particular development of a description mentioned in Column 1 of the table in Schedule 2 is EIA development in spite of the fact that none of the conditions contained in sub-paragraphs (a) and (b) of the definition of "Schedule 2 development" is satisfied in relation to that development." See further: ***Berkeley v Secretary of State for the Environment Transport & Regions & London Borough of Richmond upon Thames*** [2002] Env. L.R. 14.

5 Note also paras. 20 – 22 of the Advocate-General's opinion:

"20. The Commission maintains that, pursuant to Article 4(2) of the Directive and Article 1(6) of the Presidential Decree of 12 April 1996, the Italian authorities are obliged to check the impact of the Lotto Zero route on the environment. The Commission goes on to state that the decision not to submit the project to an environmental impact assessment, adopted in Regional Decree 25/99, is not explained by reasons.
21. The Italian Government responds that the project was checked and that it was possible to adopt the decision by administrative silence, without providing reasons, but that, in any event, the decision contained in the Presidential Decree of 12 April 1996 is explained by reasons because it refers to the report from the Regional Committee for the Assessment of Effects on the Environment.
22. The Commission contends that its complaint essentially relates to the fact that the Italian authorities failed to check whether the characteristics of the project required it to be assessed for its impact, a failure which is evidenced by the absence of reasons in Decree 25/99"

10. The ECJ's conclusion was more ambiguous ([46]-[49]):

"46. Examination of the documents produced shows that Decree No 25/99, by which the Abruzzo Region gives a favourable opinion as regards the outcome of the screening procedure and decides to exempt the project from the assessment procedure, is based on a cursory statement of reasons and merely refers to the favourable opinion by the Coordinating Committee. The latter opinion, which appears in the handwritten minutes of the Committee's meeting of 22 October 1999, contains a sentence which conveys the favourable opinion and states that in adopting that opinion, the Committee had available to it the civil engineer's opinion No 8634 of 6 July 1999.

47. As the Advocate General rightly observes in point 33 of his Opinion, that opinion by Teramo's civil engineering department, produced at the Court's request, is not an opinion on the environmental effects of the project, but merely an authorisation 'solely for hydraulic purposes' to cross the Tordino river and carry out certain works. The document attached by the Italian Republic to its defence, the cover page of which gives the necessary details as to the nature of the document and which was produced at the Court's request, does not appear to be required under the Law as part of the screening procedure. Moreover, the Court does not have information which would allow it to conclude that it was used by the competent authority as a basis for its decision.

48. That information indicates that no screening was carried out to determine whether to subject the project 'Lotto zero' to an impact study and that the failure to fulfil obligations as set out by the Commission in its claims is established.

49. It should be pointed out, however, that if the civil engineer's opinion had not been produced at the request of the Court, it would have been impossible to determine whether the screening had been carried out or not. It must be observed that a decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an assessment of its effects on the environment must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337."

11. In ***Probyn***, Burton J accepted that all that the ECJ decided was that it could not be satisfied that screening had actually occurred[6] – the best evidence of the absence of screening being that no reasons had been given. However, he did acknowledge (at [12]) that "it is plain that the drift of the European Courts –or, at any rate, that of those arguing before the European

Court –is flowing in the other direction from ***Marson***". Nevertheless, Burton J. refused permission because ([20]):

" ... it would ... be quite inappropriate, and in the interests of neither of the parties in this case for me to grant permission to send this through to a full hearing by the Administrative Court, where the overwhelmingly likely result would be that the Administrative Court would consider itself either bound or extremely persuaded by Marson, and would leave the matter to the Court of Appeal to decide whether it was or was not bound by its own previous decision, and whether it should or should not reconsider it in the light of the apparent dicta of the European Court in the Italy cases, or refer the matter to the European Court. Consequently, it is only a mercy, and a saving time and costs, if I prevent that unnecessary course now, but enable the parties to take the matter straight to the Court of Appeal by way of a renewal of this application; or, if that is the way it must be, by way of an application for permission to appeal against my refusal."

(emphases added).

And paras. 31 to 35:

"31. As the Commission rightly points out in the reply, the dispute therefore centres on the issue of whether the Italian competent authorities examined the characteristics of the Lotto Zero project in order to establish whether there would be any damage to the environment and, if so, whether they made their consent conditional on a prior assessment of the impact of the project on the environment.

32. That supervision was carried out, in the formal sense, inasmuch as Regional Decree 25/99 of 15 November 1999 states that it is not necessary to assess the effects of the project on the natural surroundings on the grounds that it does not affect a protected zone and the Regional Committee for the Assessment of Effects on the Environment came to a favourable conclusion in the meeting held on 22 October 1999. However, the committee's report is as lacking in detail as the Decree, (32) in that it merely contains a reference to the positive opinion which was issued by the civil engineer on 6 July 1999, under number 8634, and which, like the administrative decision and the conclusion of the committee, is not explained by reasons. (33)

33. That document, which the defendant Member State submitted with its reply to the questions formulated by the Court, is not a report on the environmental impact of the public works under discussion. It is clear from simply reading the document that it is an authorisation, 'solely for hydraulic purposes', (34) to cross the Tordino river and to carry out work on the riverbed relating to the construction of a number of viaducts.

34. The report attached to the defence is not the opinion of the civil engineer referred to in the decision of the regional committee; instead it is an environmental compatibility study conducted in December 1997 at the request of a company called ERM Italia Srl.

35. It is clear from the foregoing considerations that, by failing to check whether the construction of the road in Teramo required an environmental impact assessment, the Italian Republic has committed the breach complained of by the Commission."

6 "[a]t least in fuller form, a case was put forward by the Commission that there had not been a screening at all, and that the best evidence of the absence of screening was that there had not been any reasons given."

12. Laws LJ subsequently granted permission to appeal in ***Probyn*** saying " … I have an uneasy sense that judicial insistence on full or fuller reasons in these cases will be an instance (in the tired phrase) of the best being the enemy of the good …". The appeal was, however, withdrawn shortly before it was heard by the Court of Appeal.

13. However, the Court of Appeal is due to consider the issue in ***Mellor (R on the application of) v Secretary of State For Communities & Local Government*** [2007] EWHC 1339 (Admin). The case is listed in the new year. The appellant is seeking a reference to the ECJ

14. Furthermore, the Commission has recently announced that it will be taking infraction proceedings against the UK in relation to the failure to give reasons for negative screening decisions. The complaint that has led to these proceedings arises from the ***Marson*** case!

15. Given all this what in EIA Directive supports an obligation to give reasons for negative screening decisions? Not a lot. Article 4 makes no reference to a need to provide reasons in determining whether EIA is required. This is in marked contrast with the wording at Article 9 of the EIA Directive relating to decisions to grant or refuse development consent. The wording here expressly requires the competent authority to make reasons for their decision available to the public. Had it been the purpose and intention of the EIA Directive that competent authorities were required to make available to the public reasons why, in a specific case, EIA was not required, is it not reasonable to assume the wording would have been more explicit, and in line with that used in Article 9? Furthermore, Article 3(7) of the more recent Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive") expressly requires that reasons be given "for not requiring an environmental assessment". The contrast with Article 4 of the EIA Directive could not be clearer.

BACKGROUND AND INTRODUCTION TO THE REGULATORY ENFORCEMENT AND SANCTIONS ACT 2008

Simon Pickles - Landmark Chambers

This is the first of two articles on the Act contributed by members of Landmark Chambers – the second article will follow in the December Edition.

Background

1. The background to RESA essentially comprises:

- The Government's Better Regulation Agenda;
- The Hampton Review (Reducing Administrative Burdens: Effective Inspection & Enforcement) (March 2005); &
- The Macrory Review (Regulatory Justice: Making Sanctions Effective) (Nov. 2006).

2. It is important to emphasise that the Better Regulation Agenda is driven by BERR, whose RESA 2008: Guidance to the Act (July 2008)[1] explains that businesses and frontline public and third sector workers regularly complain about the time spent on regulation and the many ways in which they find rules frustrating. The Better Regulation Agenda (to which RESA gives effect) is part of a programme of reform, to address those concerns. Key to BERR's Agenda are:

- Regulating only when necessary and doing so in a light-touch way that is proportionate to the risk;
- Setting exacting targets for reducing the cost of administering regulation;
- Rationalising inspection and enforcement arrangements; &

1 Referred to simply as 'Guidance'

- Supporting compliance and tackling businesses that deliberately or consistently flout their regulatory responsibilities.

BERR reason that better regulation promotes efficiency, productivity, and value for money; and that proportionate regulation and inspection arrangements can help to drive up standards and deliver outcomes on the ground (whether in the form of improving public services, a better environment for business, or advancing economic reform).

3. Sir Philip Hampton's Review[2] set out a vision of a regulatory system based around risk and proportionality. It concluded that - while there were many positive aspects to the work of trading standards and environmental health services - there remained wide variations and inconsistencies in the application of national standards set in legislation; and that these inconsistencies resulted in uncertainty and unnecessary administrative burdens for business. A lack of coordination often led to unnecessary inspection resulting in conflicting advice and the duplication of effort at a local level. Finally, regulators' penalty regimes were cumbersome and ineffective; and he recommended a comprehensive review of them. He envisioned a regulatory regime which is – at national and local level - risk-based, consistent, proportionate and effective.

4. Enter Professor Richard Macrory, whose Review[3] established a blueprint for transforming the regulatory sanctioning regime. The Macrory Review found that many regulatory sanctioning regimes were over-reliant on criminal prosecution and lacked flexibility; and it diagnosed a 'compliance deficit', where non-compliance occurs but no enforcement action is taken because the appropriate tool is not available. The Review recommended that regulators have access to a flexible set of sanctioning tools consistent with Hampton's risk-based approach to enforcement.

5. RESA came into force on 1st October 2008 (Royal Assent 21st July 2008), excepting those elements of Part 2 dealing with the Primary Authority Scheme; and it applies across England & Wales (subject to adaptation).

Part 1: The Local Better Regulation Office (LBRO)

6. Part 1 dissolves the Government-owned company known as LBRO and established in May 2007 and replaces it with a statutory corporation also known as LBRO[4]. LBRO in this form is expected to be longer-living than its predecessor, but not long-term; and provision is made for its dissolution by order (Sections 1, 2 & 10).

7. LBRO's operations are directed at the behaviour of local authorities (as defined by Section 3) insofar as they are exercising a 'relevant function' (Section 4). The definition of local authorities is unexceptionable; but that of 'relevant function' is noteworthy and covers a truly vast swathe of activities subject to local authority regulation (subject, naturally enough, to addition or removal by order)[5].

8. In exercising its functions, LBRO's objective is to secure that local authorities exercise their relevant functions:

- effectively;
- without giving rise to unnecessary burdens;
- in a way which is transparent, accountable, proportionate and consistent; &
- on the basis that they are targeted only at cases in which action is needed (Section 5).

These objectives and principles – aka 'The Principles of Good Regulation' permeate RESA (see eg Section 66); and they are transposed elsewhere into duties so far as LBRO itself is concerned (Section 13).

9. LBRO's functions (Sections 6-11) are to:

- give local authorities guidance, to which they must have regard, as to how to exercise their relevant

2 Reducing Administrative Burdens: Effective Inspection and Enforcement, Hampton P, HM Treasury, March 2005.www.berr.gov.uk/files/file22988.pdf

3 Regulatory Justice: Making Sanctions Effective. Final Report. Better Regulation Executive, Cabinet Office, November 2006. www.berr.gov.uk/files/file44593.pdf

4 http://www.lbro.org.uk/

5 Those of note include: Caravan Sites & Control of Development Act 1960, Clean Air Act 1993, Control of Pollution Act 1974, Countryside Act 1968, Environment Act 1995, Environmental Protection Act 1990, Noise Act 1996, Noise & Statutory Nuisance Act 1993, Pollution Prevention & Control Act 1999 and Public Health Acts 1936 & 1961.

functions (this may be to one or more selected authorities);

- when the chips are down, direct authorities to comply with its or another body's statutory guidance in relation to a relevant function;

- provide financial assistance to a local authority or any other person in relation to the exercise of a relevant function or assistance in doing so;

- advise ministers on how local authorities are exercising their relevant functions, the effectiveness of existing and proposed legislation regarding those functions, whether other regulatory functions might appropriately be exercised by local authorities, and generally; &

- prepare and publish lists, to which local authorities must have regard, specifying those matters to which they should give priority when allocating resources to their relevant functions[6].

10. LBRO's online Mission Statement follows closely 'The Principles of Good Regulation' (above), and indicates that it will week to be: outcome-focused, evidence-based, creative, challenging & supportive.

11. LBRO has recently assumed responsibility for a retail enforcement pilot involving some 30 local authorities and involving officers dealing with trading standards, environmental health, licensing and fire safety, which it hopes will provide the basis for practical guidance for local authority regulators. Some 30 local authorities have been involved in the pilot, which sees local inspectors from different disciplines working more closely together.

12. LBRO is to enter into a memorandum of understanding with, inter alia, the Environment Agency about how they will work together.

Part 2: Co-ordination of Regulatory Enforcement

13. Part 2 of RESA is more narrowly focussed and establishes the Primary Authority Scheme ('PAS'), whose management is one of LBRO's most important functions. Upon application by a business operating in more than one local authority area and with the written agreement of the local authority concerned, LBRO may nominate that authority as the 'primary authority' so far as that business is concerned in relation to the statutory function concerned. The intention behind the scheme is that a business choosing to have a Primary Authority Partnership should benefit from improved consistency of advice and enforcement action, with improved compliance flowing from this.

14. Once nominated, the primary authority has the function of advising both the regulated person in relation to the relevant statutory function and other local authorities with that function as to how they should exercise it in relation to that person (Section 27).

15. Where the function concerned consist of or includes a function of inspection, the primary authority may make an inspection plan and, subject to LBRO consent to it, they may bring it to the attention of other authorities, who must have regard to it when undertaking their own inspections. Where a PAS is in operation, a local authority must notify the primary authority before taking enforcement action in respect of the relevant function and that authority may direct that that action should not take place, subject to referral to LBRO. LBRO may approve the proposed enforcement action, direct that it not be taken or direct an alternative course of enforcement action.

16. Further provision is to be made for the procedures involved in and exemptions from the PAS; and it is intended that the Scheme will come into operation on 6th April 2009.

17. LBRO is out to consultation on the PAS[7]; and it is clear from the consultation paper that the Scheme will operate (at least initially) in relation to trading standards, environmental health and fire safety functions[8]; and LBRO has recently announced that B&Q, Boots, John Lewis, Tesco, Sainsbury's and Waitrose are gearing up to test the new Primary Authority partnerships with local authority regulators in respect of what it refers to as 'key trading laws'.

Part 3: Civil Sanctions

6 Air Quality tops the current non-statutory national priorities for local authority enforcement.
7 http://www.berr.gov.uk/files/file47801.pdf
8 Any overlap with main-stream environmental law is marginal

Introduction

18. Part 3 is aimed at promoting greater adherence to the law by business; and it provides the tools thought necessary for the job. It establishes a range of four 'off the peg' civil sanctions ('an extended sanctioning toolkit'), and it is important to secure a grasp of the widespread availability of these sanctions. They are available to:

- The 27 designated regulators listed in Schedule 5
- The additional authorities with an enforcement function in respect of specified offences in the (approaching 150) Acts listed in Schedule 6; and
- Authorities who enforce offences in secondary legislation made under the 45 Acts listed in Schedule 7.

With an eye to the environment:

- The designated regulators include:
- English Heritage;
- Environment Agency; &
- Natural England.

- The Acts specifying offences listed in Schedule 6 include:
  - Ancient Monuments & Archaeological Areas Act 1979;
  - Clean Air Act 1993 [black smoke etc];
  - Control of Pollution Act 1974 (Part 3) [noise];
  - Environment Act 1995 (Section 110) [powers of entry];
  - Environmental Protection Act 1990 (Parts 2, 2A & 3, Sections 118 & 150(5)) [waste, contaminated land, statutory nuisances, clean air & genetically modified organisms];
  - Highways Act 1980 (Part 9) [lawful & unlawful interference with highways & streets];
  - Noise Act 1996 [noise at night];
  - Planning (Listed Buildings & Conservation Areas) Act 1990;
  - Public Health Act 1936 (Part 2 & Sections 269,288 & 290) [sanitation & buildings, moveable dwellings, entry, obstruction & notices].

- The Acts authorising secondary legislation include:
  - Control of Pollution Act 1974 (Section 17) [dangerous & intractable waste];
  - Environment Act 1995 (Sections 87, 95 & 97) [air quality, waste & hedgerows];
  - Environmental Protection Act 1990 (Sections 140 & 156) [injurious substances/articles, Community & other international obligations];
  - Pollution Prevention & Control Act 1999 (Section 2 & 3) [polluting activities & offshore installations].

19. These powers are not, however, conferred directly upon any regulators by RESA itself, but are made available by order[9]; and a great deal of concern was expressed as the Bill progressed through Committee about the '*unprecedented use of statutory*

9 For procedure involved in awarding new powers see Guidance p. 29 Fig. 2.

instruments ... a mountain of statutory instruments'[10] The Guidance explains that the minister must, before making an order, be satisfied that a regulator will use the new powers in a way that is compliant with the principles of good regulation (transparent, accountable, proportionate, consistent and targeted only at cases where action is needed), with much of the evidence for this being forthcoming through Hampton Implementation Review (HIR)[11] – which focus on the extent to which regulators are performing in line with 'the Hampton principles and the Macrory characteristics'.

20. The Guidance introduces the availability of these sanctions in these terms:

> *The Government believes that regulators should have access to effective sanctions that are flexible and proportionate and that ensure the protection of workers, consumers and the environment when tackling non-compliance by businesses. These sanctions should be flexible enough to reflect the regulatory needs of legitimate businesses, as well as being able to ensure that where businesses have saved costs through non-compliance, they do not gain an unfair advantage over those that have complied with their regulatory obligations. (emphasis added)*

21. DEFRA is currently undertaking its Fairer & Better Environmental Enforcement Project[12], in the course of which it is to consult the EA and NE on the potential use of civil sanctions[13].

Sanctions & Appeals

Fixed monetary penalties (FMP) notices (Sections 39-41)

22. FMPs are intended to provide an alternative to prosecution in respect of low level, minor non-compliance; and since the alternative is prosecution, the regulator must be satisfied beyond reasonable doubt that the recipient has committed the offence referred to and may not prosecute once notice of intent (see below) has been served (to avoid double jeapordy). The level of prescribed or fixed monetary penalty is to be fixed in the minister's order, which may provide for different amounts based on certain factors (eg size of business) (though the amount may not exceed the maximum fine on conviction); and it is very clear that FMPs raise legitimate concerns about the imposition of what may be substantial financial penalties without the safeguards of a court process at the outset.[14]

23. RESA provides that the regime imposed by order must provide for the following elements[15]: (1) a 'notice of intent' (with prescribed content); (2) an opportunity to make a discharge payment at what may be a discount rate; (3) an opportunity to make written representations; (4) final notice, which may be modified (or no notice); (5) an appeal (grounds must include that the decision was based on an error of fact, was wrong in law or was unreasonable) Appeal is to the first-tier Tribunal; and penalties are to be recoverable via the civil courts.

Discretionary requirements (Sections 42-45)

24. Discretionary requirements are a step up, intended for mid to high level examples of non-compliance. Flexibility of response is a keynote here and the minister is able to give a regulator the power to impose one or more (ie a combination) of the following:

- A variable monetary penalty (VMP) determined by the regulator (this may remove any financial gain and take the history of compliance and gravity into account);
- A 'compliance requirement' to take specified steps within a stated period, designed to secure that the offence does not continue or recur (the business is required to bring itself back into compliance); &
- A 'restoration requirement', designed to secure that the position is restored, so far as possible, to what it would have been if no offence had been committed (this may involve cleaning up the contaminated area or reimbursing customers).

10 Lord Lyell 30th January 2008: Column GC328.
11 For HIR guidance see http://www.nao.org.uk/publications/workinprogress/HIR_Guidance_31May07.pdf
12 http://www.defra.gov.uk/ENVIRONMENT/enforcement/FairerBetterProject/index.html
13 But note that NE's Hampton Review is not due until March 2009.
14 It was noted in Committee that whereas some regulators' conviction rates are very high indeed, others are not (Hansard 30 January 2008 Column GC332); but the proposals enjoyed the general support of the Council of HM's Circuit Judges and the Justices' Clerks' Society (ibid GC339).
15 For procedure see Guidance p. 32 Figure 3.

25. The regime for these reflects that for FMPs[16], with adaptations – of which two are significant. First, the necessary order must provide for a business to offer to the regulator an undertaking to take action to benefit a third party affected by the offence (including the payment of compensation); and the regulator may decide whether to accept that undertaking and how to take it into account in its sanctioning decision. Secondly, failure to comply with a 'compliance requirement' or 'restoration requirement' results in the possibility of prosecution for the original offence (double jeopardy notwithstanding) (RESA enables the minister to extend the time limits for prosecution to facilitate this – though not retrospectively).

26. The Guidance advises that internal arrangements may provide for a senior and independent officer (ie one not previously involved) to decide or review the decision whether to progress to a final notice having regard to written representations or objections received.

27. The minister's order may include provision for the recovery of the regulatory authority's costs in relation to the imposition of a discretionary requirement or Stop Notice; and those costs include investigation costs, administration costs and those of obtaining expert - including legal - advice.

Stop notices (Sections 46-49)

28. Serious situations call for serious remedies, and a Stop Notice may only be served if a business is carrying on or is likely to carry on an activity and the regulator has the reasonable belief:

- that in carrying it on the business presents, or would be likely to present, a significant risk of serious harm to: human health, the environment (including the health of animals and plants) or the financial interests of consumers; &
- that in doing so the business is, or is likely to be, committing an offence.

These are, therefore potentially reactive and/or preventative; and breach of a Stop Notice will be a criminal offence. They are also the potentially most far-reaching of the civil sanctions; and the Government established a deliberately high threshold for their use with that in mind (though uniquely amongst the sanctions provided for, it does not appear that a decision to issue a Stop Notice requires satisfaction beyond reasonable doubt that an offence has been – or is likely to be – committed).

29. The regulator must issue a 'compliance certificate' if satisfied that the business has complied with the notice[17]; and a business may appeal against either the decision to impose a Stop Notice or refusal to issue a completion certificate. Interestingly, the minister's order will deal with whether notices are automatically suspended on appeal.

30. There is a distinct sting in the tail:

> *The serious nature of stop notices means that compensation should, in certain circumstances, be available where a notice is wrongly imposed. Accordingly, orders giving regulators the power to serve stop notices will have to provide for regulators, on application, to compensate businesses where they have suffered loss because of the service of a stop notice. The Minister will determine the specific grounds for compensation in the order. Compensation might be appropriate where a business wins an appeal against imposition of a stop notice and where the regulator is considered to have acted unreasonably or in serious default. Compensation will not be appropriate in all cases, for example, it may not be appropriate if an appeal was upheld on a technicality (Guidance paragraph 56) And there is to be a right of appeal against decisions not to award compensation and against the amount of a compensation award. Appeals*

31. Appeals will lie be to a 'general regulatory chamber'[18] of the First-tier Tribunal established pursuant to the Tribunals Courts & Enforcement Act 2007 or to another statutory tribunal specified by the minister (eg employment tribunals). They will be heard by a tribunal judge sitting alone or with one or two members expert in the regulatory field concerned. RESA sets out minimum grounds of appeal, which will differ between sanctions. A person will in general be able to seek to overturn a sanctioning decision on the basis of an error of fact or law or unreasonableness. The Tribunal will be able to substitute its own decision or remit; and issues of suspension will be addressed in the minister's order or the rules of the tribunal.

Other

Enforcement undertakings (Section 50)

16 For procedure see Guidance p. 36 Figure 4.
17 For procedure see Guidance p. 41 Figure 5.
18 The First-tier Tribunal and Upper Tribunal (Chambers) Order 2008 (2008/2684) established three other chambers with effect 3rd November 2008.

32. Enforcement undertakings are a legal novelty, as the Guidance explains:

> *The Macrory report noted that current sanctioning regimes do not allow for creative ways of addressing regulatory non-compliance. There have been cases where businesses have recognised that they have fallen into non-compliance and proposed innovative and restorative ways of returning to compliance. Until now, there has been no legislative basis to facilitate or encourage this kind of creative measure.*

33. RESA provides, in effect for voluntary or reverse compliance or restoration requirements[19], with prosecution or other administrative sanction being no longer available once an authority has accepted an undertaking. If a business fails to comply with its undertaking action may be taken in respect of the original offence; and it is expected that provision will be made for a right of appeal against refusal of a completion certificate.

Guidance (Sections 63-65)

34. Regulators will be required to provide both penalty guidance and an enforcement policy (though these may be combined).

Publicity (Section 65)

35. Regulators must publish reports specifying their use of civil sanctions.

Part 4: Regulatory Burdens

36. This creates a duty that requires regulators to review their functions, not impose unnecessary burdens and remove unnecessary burdens (unless disproportionate or impracticable to do so) and to report on progress annually; but RESA does not impose this on any regulator within the scope of this papers[20] (though ministers may by order do so).These regulators stated that they did not want to be included in the Bill because they already have sufficient powers[21].

Conclusion

37. The emphasis of this seminar is, of course, on the implications of RESA for Environmental Law; and I hope, that it will be clear from this introductory paper:

- that RESA lays the groundwork for a wide range of regulators to have at hand an entirely new set of enforcement options;
- the likelihood is that those options will become available in core areas of environmental (including planning) law;
- that they raise the prospect of appeals to the newly-constituted First-tier Tribunal; & that
- those options and appeals will raise new opportunities and issues for regulators and regulated alike.

38. Introducing the Bill on its second reading, the Minister of State (Lord Jones) expressed the view that:

> *Less time preparing for court might be bad news for lawyers – I used to be one – but is very good news for everyone else.*

May be; but not if they are simply preparing for the Tribunal instead.

19 For procedure see Guidance p. 44 Figure 6.

20 The Gas and Electricity Markets Authority (OFGEM), the Office of Fair Trading (OFT), the Office of Rail Regulation (ORR), the Postal Services Commission (Postcomm), & the Water Services Regulation Authority (OFWAT).

21 Hansard 30th January 2008 GC350.

ENVIRONMENTAL LITIGATION WORKING PARTY

PROTECTIVE COSTS ORDERS UPDATE

Richard Kimblin - Convenor

On 4 November, judgment was given by the Court of Appeal in a case concerned with an "environmental" PCO[1] . The judgement very much reflects the approach in another of this year's PCO cases[2]. Both modify the quite rigorous and careful approach set out by the court of appeal in *Corner House*[3].

The substantive issues in *Buglife* are concerned with invertebrate habitats on a substantial development site in the Thames Gateway. It is a claim by way of judicial review which failed before Mitting J and for which permission to appeal was granted in rather unenthusiastic terms by Laws LJ. The PCO issues which were determined by the Court of Appeal (Sir Anthony Clarke MR giving the only judgment) were (1) whether the cap on the costs to be recovered by Buglife, if it succeeded in its appeal/claim, should be increased to £70,000, and (2) whether Buglife's costs protection should be extended to the proceedings before the Court of Appeal . It illustrates the way in which court applies the Corner House criteria for a PCO.

The Court of Appeal took some considerable care to set out the background to the approach to PCO issues with a view to modifying the effect of Corner House, while still recognising that its effect was binding on the court [para 25]:

...in Corner House this court laid down guidance which, subject to the facts of a particular case and unless and until there is a rule which has statutory force to the contrary, we must follow, albeit in a flexible way.

The relevant principles in *Corner House (para 74)*are:

i. The issues raised are of general public importance
ii. The public interest requires that those issues should be resolved
iii. The applicant has no private interest in the outcome of the case
iv. Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order
v. If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in doing so
vi. If a PCO is made, as a balancing factor, the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant is, therefore, to provide a schedule of the claimants future costs [*Corner House p 2626, para 76 at D and para 78 at H*].

The "flexible" application of the Corner House principles has its origins in *Compton* in which a majority of the Court of Appeal held that the principles were not to be read as statutory provisions or in an over-restricted way and approved the flexible approach in *Bullmore*[4].

Buglife affirms the majority view in *Compton* which dismissed the concept of a exceptionality test which raises additional criteria to those in *Corner House.*

The effect of the judgment is this:

i. A broad-brush approach is taken to deciding whether to grant a PCO, rather than applying a stricter series of tests or thresholds to be passed;
ii. The *Corner House* principles are to be read in a way does not lead to too few PCOs, which would therefore make access to justice too difficult and expensive;
iii. The use of caps on claimant's costs, or not, is a matter very much in the judge's discretion.

The net result is that a fairly wide variation in outcomes is likely on applications for PCOs.

This case appears to show the limit of the Court of Appeal's interest in the topic for the near future. On 5 November, the day after giving judgment in Buglife, Sir Antony Clarke MR and Waller LJ (who gave the leading judgment in Compton) refused permission to appeal a PCO which was made in terms which took no express account of the merits, did not identify why there

1 R (oao) Buglife (The Invertebrate Conservation Trust) v Thurock Thames Gateway Development Corporation and Rosemound Developments Ltd [2008] EWCA Civ 1209

2 *R (oao) Compton v Wiltshire Primary Care Trust [2008] EWCA Civ 749*

3 *R (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600.*

4 R (Bullmore) v West Hertfordshire Hospitals NHS Trust [2007] EWHC 1350

was a public interest in the resolution of a particular issue and did not deal with the question of a claimant's cap[5].

Having set out the principles in *Corner House*, the Court of Appeal expressed the *hope that the Civil Procedure Rules Committee and the senior costs judge may formalise these principles in an appropriate form....*[6]

Isn't it in everybody's interest for that to be done sooner rather than later?

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5 R (oao) Eley v SoS Communities and Local Government & Anr Case C1/08/1849

6 Para 81

THE GARNER LECTURE 2008

A packed audience at Freshfields NC Auditorium heard Richard G P Hawkins speak on the topic *"What do you tell your Client about Global Warming?"* Richard questioned whether there can ever be common ground between the views of the climate contrarians, deniers and sceptics, warmists, alarmists and catastrophists?

In a controversial and wide ranging lecture Richard Hawkins acknowledged that whilst the 1972 Conference on Environment and Development in Rio undoubtedly succeeded in its consciousness raising goal in putting pressure on governments to act on climate change, it also created an unwelcome politicisation of the environmental debate. It also marked a departure from the step by step pragmatism of the 1987 Montreal Protocol on the ozone layer.

Richard described Rio's Agenda 21 as "stratospherically ambitious and unrealistic", oversight of which fell to the UN General Assembly with the "predictable consequence of a depressingly familiar and unproductive rhetorical battle between north and south". The Kyoto Protocol with its blanket exemption for developing countries and its reliance on emission ceilings and targets rather than a more flexible multi-dimensional approach to climate change was the result. Richard criticised the progressive politicisation of the work of the Intergovernmental Panel on Climate Change (IPCC) and called for a greater independence of the IPCC.

In his review of the scientific view of climate change and the existence of global warming he appeared to accept that global warming exists whilst wearily suggesting that much climate change policy is designed to enable politicians to bathe in the warm glow of good intentions with little or no regard to the mounting costs or infinitesimal benefits. He suggests that the solutions will be incredibly costly and will achieve very little even in a century's time.

Richard expressed concern about the manner in which scientists and economists (who question the IPCC's scientific assumptions or the soundness of its economic projections) are being frozen out of the mainstream debate on climate change. University

departments, business interests, government laboratories and pressure groups all wish to promote findings that attract research grants and support their work. Few are independent enough to voice opinions that do not support the majority view and they are condemned if they do not do so.

Richard accused governments across the world and in particular governments of the OECD member countries of mishandling client change issues and that a new approach is needed, less presumptive and more inclusive with common ground between the two poles identified and encouraged. He welcomed *Dimmock v Secretary of State for Education and Skills (2007) EWHC 288* as an encouraging if not tardy start.[1]

UKELA is grateful to Freshfields for kindly hosting the lecture and to Clifford Chance for supporting the speaker's dinner afterwards.

1 In that case the plaintiff sought to prevent the educational use of *An Inconvenient Truth* on the grounds that schools are legally required to provide a balanced presentation of political issues. The court ruled that the film was substantially founded upon scientific research and fact and could continue to be shown, but it had a degree of political bias such that teachers would be required to explain the context via guidance notes issued to schools along with the film. The court also identified nine 'errors' in the film, and ruled that the guidance notes must address these errors specifically

Young UKELA

The Young UKELA Group, a new group for junior environmental lawyers, was launched on Monday 10th November to discuss the challenges and opportunities in this rapidly evolving area of law.

Around 40 people attended the launch event on 10th November 2008, hosted by DLA Piper. The audience was treated to a seminar with three high profile speakers:

- Andy Fisher, Head of the Metropolitan Police's Wildlife Crime Unit, who gave a lively and engaging introduction to wildlife crime in London and beyond;
- Steven Gray, of Climate Change Capital, who spoke on the evolution of the climate change regime and the international processes shaping it; and
- Stephen Hockman QC, Head of Chambers at 6 Pump Court, who talked about the opportunities open to young lawyers in environmental law, and the challenges faced, from law-making and the need to adapt more quickly, to the issues over the funding of environmental litigation and the need for institutional change and an international judicial institute or court for the environment.

Lord Tim Clement-Jones of DLA Piper gave the inaugural address. The presentations were followed by a champagne reception with an opportunity for networking.

Ruth Coffey, a barrister, and Gabrielle Tipple, a solicitor with DLA Piper's London Regulatory Group, launched Young UKELA to provide a network for junior practitioners with an interest in environmental law. In the words of Stephen Hockman QC, 'it only takes one ingenious lawyer to make a breakthrough and open up a whole new field. So go for it!' Peter Kellett, UKELA's

chair welcomed the new group: "I'm delighted that the UK Environmental Law Association has supported the formation of this lively group and at the range of events, competitions and grants that we can now offer to help younger lawyers develop their practices and careers in environmental law."

On behalf of Young UKELA, Ruth and Gabrielle would like to extend their thanks to those who made the inaugural event possible; to the speakers, Stephen Hockman QC, Andy Fisher and Steven Gray; to Vicki Elcoate and Alison Boyd of UKELA for their invaluable assistance and guidance in making the preparations; and to our hosts, DLA Piper, for their generous hospitality.

The aim of the group is to provide training and education, a space for debate, and opportunities for professional development and networking among junior practitioners with an interest in environmental law. It is intended to complement the range of seminars and groups active within UKELA. If you are interested in becoming involved in the organisation of Young UKELA, or would like to be kept informed about future events, please contact us on the e-mail addresses given below. We would also be delighted to hear from anyone with ideas for speakers, topics or future events.

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Member offers

PLC ENVIRONMENT

PLC Environment is an online environmental law knowhow service for lawyers in the public and private sectors as well as other commercial practitioners such as environmental consultants and EHS directors.

The service includes:

- clear and concise summaries of the law on a wide range of environmental topics (see www.practicallaw.com/environment for a full list of topics)

- standard documents and drafting notes, such as environmental warranties and indemnities

- e-mail alerts on key UK and EU environmental developments

- a guide to environmental law in other jurisdictions, including details of leading environmental lawyers and law firms in those jurisdictions

PLC Environment is run by a team of specialist environmental lawyers with a wide range of experience in both the private and public sectors - including Herbert Smith LLP, Freshfields Bruckhaus Deringer LLP, Norton Rose LLP, Veale Wasbrough and Defra.

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- To view an example of an e-mail alert, see 'Government publishes new guidance on the legal definition of contaminated land' www.practicallaw.com/7-382-8720.

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ENVIRONMENTAL LITIGATION WORKING PARTY – UPDATE

The working party is active in three areas at present:

Regulatory reform – particularly the implementation of RESA 2008. A workshop on civil penalties is in the offing and there will be further details available November.

Access to Justice – the UKELA Moots are on the topic of Protective Costs Orders. The law in this area continues to develop quite quickly and an update will be provided (seminar style) prior to the Moots in early 2009.

Improving the machinery of environmental litigation. The Group keeps a wish list of changes which it would like to see made, when legislative opportunities arise. One example is the ability for specialist judges to sit in the Magistrates Court in cases which would benefit from environmental expertise, such as complex statutory nuisance or waste cases.

Richard Kimblin
rk@no5.com

Competitions

UKELA VOCATIONAL BURSARY FUND

UKELA is launching a pilot Vocational Bursary Fund in 2009 which is intended to enable students to undertake a period of vocational placement (such as an internship or externship) in the field of environmental law. Placements may be with a public body (e.g. a government department, local authority, regulatory agency), with a non-for-profit organisation such as a non-governmental organisation, with a university department, in private practice (legal or otherwise), or any other vocational placement which would further the charitable objects of UKELA.

Full information was circulated in the last edition of e-law or visit the website, www.ukela.org.

The maximum available for 2009 is £5,000.

CLIMATE CHANGE COMPETITION FOR LAWYERS

Advocates for International Development (A4ID) are promoting an international competition along with the Climate Justice Programme and Oxfam for lawyers, academics and law students to come up with the most innovative legal case for a developing country to take legal action on injuries suffered from climate change. The competition supports Oxfam's new report 'Climate Wrongs and Human Rights'.

The 3500-word complaints will be judged by a panel of eminent lawyers, including A4ID Advisory Council Member Stephen Hockman QC, and the winners will be announced in March 2009 to coincide with the release of the report from the UN OHCHR. The winning submissions will be published on Oxfam's website and the winners will receive a £100 voucher for books or eco-goods from the Centre for Alternative Technology.

Further information on this competition can be found at http://www.oxfam.org/files/make-the-case-climate-law-competition-9Sept08.pdf. Entries should be sent by email to climatechangecompetition@a4id.org by 31st December 2008.

Nick Flynn
Weil, Gotshal & Manges
nick.flynn@weil.com

Annual Competitions

Richard Kimblin of UKELA's Council and No 5 Chambers

THE ANDREW LEES PRIZE

UKELA is pleased to announce its annual article competition - "the Andrew Lees Prize". This competition is open to any student (of any discipline – not only law students), trainee solicitor, pupil or solicitor / barrister with not more than 2 years' post qualification experience.

Andrew Lees was the Campaigns Director for Friends of the Earth and a leading environmental campaigner on a range of issues from water pollution to illegal waste dumping. He died suddenly in 1994 while on a working holiday in Madagascar campaigning against a large opencast mine.

There will be two prizes – a winner and a runner up. Each will receive a free place (including travel expenses) to the 2009 UKELA conference. The winner of the first prize will have their article published in UKELA's journal e-law.

The title of the article is:

"The law is useless as a tool to deal with climate change."

Discuss

The judges have been appointed by UKELA Council and their decision on all matters relating to the competition is final.

All articles should be typed in 12pt script and 1.5 line spacing. Your name should appear on the top right hand corner of each page and the number of words should appear at the end of the article along with your contact details. The word count should relate only to the text of the article and does not include your name, the title, nor your contact details. However, if the article text exceeds 1000 words your entry will be disqualified.

Your article should be sent by email to Richard Kimblin at No5 Chambers (rk@no5.com) by 4pm on 25th January 2009.

UKELA's MOOTS

UKELA is pleased to announce the opening of entries for the 2009 Mooting Competitions. This year's moot problem can be found at www.ukela.org, under the pages for students.

There are two mooting competitions:

a. The Lord Slynn of Hadley Mooting Trophy Competition (the senior competition) is open to all those who as of 31st October 2008 are in pupillage, a trainee solicitor, on the bar vocational course or legal practice course, or who are on taking the CPE. In essence this competition is for those on vocational courses

b. The UKELA Student Prize Moot (the junior competition) is open to those who as of 31st October 2008 do not qualify for the Lord Slynn Trophy Competition but who are studying for a degree (including graduate degrees, e.g. LLM's or non law degrees). In essence this competition is for those who are students not yet on vocational courses.

Teams consist of two members. An institution may enter more than one team. Teams may comprise of competitors from different institutions.

Each team should submit two skeleton arguments, one on behalf of the Appellant and one on behalf of the Respondent. No more than two authorities may be cited in each skeleton in addition to those referred to in the Moot problem. Each skeleton argument should be no more than six pages of A4 paper. The font should be Times New Roman, size 12, with 1.5 line spacing. Paragraphs and pages should be numbered. The skeleton arguments should include a contact name, address and day and evening telephone number. A copy of the skeleton argument should be forwarded electronically, by email to rk@no5.com **no later than 4pm on Monday 26th January 2009.**

The finalists will be selected on the basis of the skeleton arguments. All competitors will be notified of the outcome. The finals will be held at a venue and at a date to be announced during March 2009.

The Master of the Moot (Richard Kimblin) reserves the right to change the rules of the competition without notice as he thinks fit and his decision is final.

The winners of both competitions will receive a cash prize from No5 Chambers. The winners of the Senior competition will receive the Lord Slynn of Hadley Mooting Trophy and the Junior competition winners will receive the Junior Trophy.

UKELA is grateful to the sponsors of the moot, No 5 chambers.

Please could all UKELA members circulate this to anybody who might be interested and not on the UKELA mailing list themselves.

UKELA events

We have a number of events coming up. We do hope you are able to come along to some or all of them.

Further details including how to book for all these events can be found on the UKELA website – look on the events page or the relevant regional group's page.

THE WAY WE LIVE NOW – AN ENERGY, WASTE AND PLANNING CONFERENCE FOR THE 21ST CENTURY ON TUESDAY 20 JANUARY 2009 AT THE NATIONAL SCIENCE & LEARNING CENTRE, YORK UNIVERSITY, YORK

This is a collaborative event organised by UKELA, IEMA and Denison Till and further details including how to book can be found at www.ukela.org. York is only 2 hours by train from London and 2 1/5 hours from Edinburgh so don't miss this opportunity to hear the experts speak on a range of key issues.

There are 15 free student places offered on a first-come, first-served basis. To claim your free student place, please contact events@iema.net

SCOTTISH REGIONAL GROUP

To book either event go to www.ukela.org and click on the link on either the Scottish regional page or the events page.

SEMINAR ON CLIMATE CHANGE on Tuesday 2 December 2008 at Brodies in Edinburgh

Climate Change Legislation: the UK Climate Bill introduces carbon targets and carbon budgeting as well as providing for additional emissions trading schemes. The Scottish Bill will also introduce more stringent carbon targets and carbon budgeting. The seminar will examine the legal implications of key provisions in the legislation including the extensive use of duties within the legislation.

SEMINAR ON DEVELOPMENTS IN ENFORCEMENT on Thursday 22 January 2009 at Turcan Connell in Edinburgh

Developments in enforcement: The Regulatory Enforcement and Sanctions Act 2008 makes provision for a range of civil penalties and other new enforcement tools which can be extended to apply in Scotland. What potential do they offer for environmental law? These and other developments are the latest stages in a broader move away from the criminal law as the means of enforcing regulatory provisions, the implications of which are to rarely considered in terms of procedural justice and human rights.

STUDENTS CAREERS ADVICE AND SOCIAL EVENING – Tuesday 9 December

Students interested in pursuing a career in environmental law are invited to an evening session on 9 December in London. Come and chat with professionals from a range of backgrounds and learn more about UKELA. To book your place go to www.ukela.org.

WEST MIDLANDS REGIONAL GROUP on Thursday 15 January 2009 at Pinsent Masons in Birmingham.

UKELA's West Midlands Regional Group is holding an early evening seminar in Birmingham on 15 January 2009 to discuss implementation of the ELD. To book your place, go to www.ukela.org and click on the link on either the West Midlands regional group page or the events page.

Diary Date

A joint symposium organised by UKELA and the Society for Legal Scholars is scheduled for Friday April 24th. More details will be posted on the website www.ukela.org as soon as they are ready.

Environmental Industries Commission conference: Latest Developments in UK and EU Environmental Policy - Business Risks and Opportunities

2 December 2008 Central London

Special offer for UKELA members: 10% discount if you quote UKELA10
To book your place visit http://www.eic-uk.co.uk/national2008.cfm

Rt Hon Lord Peter Mandelson, Secretary of State for Business, will provide the keynote speech at EIC's National Conference - Latest Developments in UK & EU Environmental Policy - Business Risks and Opportunities. The essential event for understanding the implications of EU and UK environmental policy on your business.

Other Speakers include:

- Chris Smith, Chair of the Environment Agency
- Timo Makela, Director of Sustainable Development, European Commission

EIC has brought together a unique line up of the top policy makers, regulators and business leaders to analyse the environmental policy framework and its implications for business.

This is an essential event for those who need to understand how businesses can gain competitive advantage in a slowing economy from the shift to a low carbon and resource efficient future.

The event is kindly sponsored by Enviros and Faber Maunsell

THE 2nd ANNUAL EUROPEAN CARBON CAPTURE & STORAGE SUMMIT
2 – 3 December 2008, Thistle Marble Arch Hotel, London

10% DISCOUNT FOR ALL UKELA MEMBERS

This timely summit, which builds on the success of last year's inaugural event, brings together a speaker panel of exceptional quality to examine, in the round, the prospects for the development of CCS on a commercial scale. It includes sessions on the policy context, the economics of commercial scale CCS, the maturity of CCS technologies, developments in Europe, CCS throughout the world and establishing a regulatory framework for CCS.

Attendance at this conference will be invaluable for all those involved in the development of CCS in Europe, including generating and utility companies, technology suppliers, oil and gas companies, energy ministries, energy regulators, project financiers, lawyers, technical consultants and academics.

Among the specific topics that will be covered are the following:

- The next steps for UK's carbon capture and storage
- Proposed EU regulation on CCS
- Opportunities and challenges in CCS
- EU CCS directive - hurdles for implementation for EU countries
- Practical capacity for offshore CO2 storage - UK
- Legislation/Regulation - delivering the objectives for CCS
- Regulatory aspects of CO2 storage
- Latest developments in capture, transport and storage technologies
- Commercialisation of projects
- Economic modelling of capture process
- Progress of CCS in the Kyoto CDM
- Analysing the risk involved in CCS projects
- Managing the cost of projects
- Victoria's CCS agenda
- Developments in North America
- CCS best practice

External Events

Case studies:

- Looking at the Netherlands
- Latest developments in transport technologies - linking the hubs
- Near-Zero emissions from Coal project (UK-China)
- In Salah Gas

For the full programme visit www.cityandfinancial.com/ccs2.

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2) fill in the Registration Form on the last page of the summit brochure (this form includes the UKELA members 10% discount) and fax it to City & Financial at +44 (0)1483 757824 or e-mail it to mhayter@cityandfinancial.com.

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For information about working parties and events, including copies of all recent submissions contact:

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E - LAW

The editorial team wants articles, news and views from you for the next edition due to go out in December 2008.
All contributions should be dispatched to Catherine Davey as soon as possible by email at:
Catherine.Davey@stevens-bolton.co.uk by 12 December 2008
Please use Arial font 11pt. Single space. Ensure headings are in bold capitals.

Letters to the editor will be published, space permitting