

Index

Renewal reminder from the Membership Secretary	2
Consultation on Landfill Regulations 2005	2
Derbyshire Waste Ltd v John Blewett (and the Secretary of State for the Environment, Food and Rural Affairs – Intervener)	3
Second Reading Debate on Clean Neighbourhoods and Environment Bill	4
Appointment of Planning and Environmental Law Committee Members	4
Training for UKELA members	5
Asbestos: the risks and good practice	5
UKELA Conference 2005	6
E-library on environmental law: progress report	6
UKELA Moot 2004 finals	7
UKELA Water Working Group Seminar	8
Environmental Audit Committee	9
South East Regional Group	10
East Midlands Regional Group	10



RENEWAL REMINDER FROM THE MEMBERSHIP SECRETARY

Richard Bines

Many thanks to all of you who have renewed your UKELA membership so promptly. Please could all of you who have not got round to it yet please let me have forms and payment as soon as possible. Also extra thanks to those who have been able to renew using our new Direct Debit system. This will be more efficient for UKELA in the future and ultimately will reduce our costs.

If you work for a private company which has more than four members with an interest in UKELA's work, it would be more cost effective to use our corporate membership rate (£200). If you work for an NGO please consider corporate membership which at £50 is no more than individual membership. Public/statutory bodies receive a very favourable rate too at £120. If you sign up for corporate membership and provide me with up to 10 email addresses I will make sure that those individuals in your organisation receive UKELA mailings directly.

If you have lost your renewal form (although please have a good look first) let me know by emailing join@ukela.org.

CONSULTATION ON LANDFILL REGULATIONS 2005

On 15 December 2004, DEFRA launched a consultation on the proposed Landfill (England and Wales) Regulations 2005, which are designed to implement further provisions of the EU Landfill Directive. These Regulations (available on the DEFRA website www.defra.gov.uk/corporate/consult/landfillregs-rev/index.htm) introduce new provisions dealing with waste at landfills, as well as amend the Landfill (England and Wales) Regulations 2002, and the Landfill (England and Wales)(Amendment) Regulations 2004.

The draft 2005 Regulations establish Waste Acceptance Criteria (WAC), deriving from Council Decision 2003/33/EC, which set out standards and procedures for the acceptance of waste at landfill sites. These Criteria include:-

- the limiting of values for monolithic wastes, and for polycyclic aromatic hydrocarbon in inert landfills;
- the specification of the role of the producer in waste characterisation;
- the application of Landfill Directive Article 3(2) exclusions to non-hazardous wet dredgings; and,
- the extension of the risk assessment option to cover individual waste streams feeding mono-fill separate cells in hazardous waste landfill sites.

The consultation is looking for views on the proposed WAC scheme. For more information see DEFRA website: <http://www.defra.gov.uk/corporate/consult/landfillregs-rev/index.htm>

DERBYSHIRE WASTE LTD V JOHN BLEWETT (AND THE SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS – INTERVENER)

[2004] EWCA Civ 1508, 11 November 2004

An appeal by Derbyshire Waste Ltd ('Derbyshire Waste' hereafter), against the decision of Sullivan J on 7 November 2003 quashing one of the three grounds of planning permission given by Derbyshire County Council to Derbyshire Waste to use the land at the former Glapwell Colliery, near Bolsover.

The main issue of the appeal was whether a waste planning authority, in determining a planning application for waste disposal by landfill, was obliged by Council Directive 75/442/EC on waste (in its amended form, known as the 'Waste Framework Directive') and Article 8(b) of the Landfill Directive 1991/31/EC concerning the treatment of waste, to ensure that the proposal fulfilled Waste Strategy 2000 requirements of the principal of Best Practicable Environmental Option (BPEO) before granting permission.

On 8 February 2001, Derbyshire Waste submitted a planning application for part of the Glapwell Colliery site, accompanied by an environmental statement pursuant to Schedule 2 of the Town and Country Planning (Environmental Impact Assessment)(England and Wales) Regulations 1999, proposing to reclaim a despoiled and to facilitate the disposal of waste arising in the area. Before the Council's Regulatory Planning and Control Committee has decided whether or not to grant planning permission, the Secretary of State issued a direction under Article 14 of the General Development Order, preventing the Council from determining the application. The Council resolved that it would have granted permission, subject only to a minor amendment.

Mr Blewett, a resident in the Glapwell area, was registered as a disabled person and suffered from chronic bronchitis, asthma and angina. Concerned that the dust and odour generated by the landfill site would exacerbate his conditions, he applied for permission to claim judicial review in order to challenge the Council's resolution. Mr Blewett's principal claim was that the Council should not have resolved to grant permission without first making certain that, pursuant to Article 8(b) of the Landfill Directive, the proposed development was 'in line with' the national waste management plan for England and Wales, namely Waste Strategy 2000, and in particular, the requirements under BPEO.

Finding in favour of Mr Blewett, Sullivan J held that in making its planning decision, the Derbyshire County Council was obliged to comply with the BPEO methodology. The Judge noted that, even if the Council was not so obliged, its consideration of BPEO in this case was so fundamentally flawed that its planning permission would have been rendered unlawful.

In granting permission to appeal, Sullivan J noted that it was important to determine the weight to be assigned to the BPEO conditions in the light of the Landfill Directive. In the Court of Appeal, Lord Justice Auld asked first, whether Article 8(b) of the Landfill Directive had become part of domestic law; and second, if it had, whether Article 8(b) imposed a more rigorous obligation with reference to BPEO in relation to landfill decisions on waste planning than the provisions contained in the Waste Framework Directive.

Reflecting the judgment of Sullivan J, the Court concluded that Article 8(b) was part of domestic law, although the provision did *not* require that a landfill proposal satisfied the policies of BPEO before planning permission could be granted. It also noted that, regardless of the legal status of Article 8(b) in the domestic framework, the Council's unsound reasoning on the application of BPEO rendered its resolution unlawful. Furthermore, even if the Council Committee had complied with the BPEO

stipulations, it was held that it would be inappropriate for the Court to exercise its discretion not to quash a decision that has been found to be *ultra vires*.

SECOND READING DEBATE ON CLEAN NEIGHBOURHOODS AND ENVIRONMENT BILL

On Monday 10 January, during the Second Reading of its Clean Neighbourhoods and Environment Bill, the Government set out a raft of measures designed to clean up local communities and tackle anti-social behaviour.

The bill includes measures to tackle crime and disorder affecting the local environment; makes greater use of fixed penalty notices as an alternative to prosecution; creates powers enabling local authorities to deal more effectively with nuisance and abandoned vehicles; and contains detailed provisions relating to litter, graffiti, fly-posting, and waste.

For more information, see DEFRA website: <http://www.defra.gov.uk/news/latest/2005/localenv-0107.htm>

The Law Society

APPOINTMENT OF PLANNING AND ENVIRONMENTAL LAW COMMITTEE MEMBERS

The Law Society is seeking to appoint new members to its Planning & Environmental Law Committee.

Members will help to formulate responses to consultations on proposals for new and amendments to existing town and country planning law and environmental law and will promote improvements to law and procedure in these areas of practice. The Committee meets six times a year and members are also expected to contribute to occasional working parties dealing with a particular consultation or issue.

Applications are invited from solicitors with practice experience in planning and environmental law who are able to contribute positive ideas and to commit time to the Committee. The Committee would particularly welcome applications from solicitors employed in industry or specialising in environmental law.

We are striving to deal with all people fairly and to ensure that our Committee membership comprises a balance of society. Applications are welcome from all, irrespective of sex, race, colour, age, sexuality or disability and appointments will be based on merit, following an open and clear selection process.

For an application pack please contact Simone Tomlinson at the Law Society on 020 7320 5817; fax 020 7320 5673; e-mail simone.tomlinson@lawsociety.org.uk or write to the Law Society at 113 Chancery Lane, London WC2A 1PL; DX 56 London/Chancery Lane.

The closing date for applications is 28th February 2005.

TRAINING FOR UKELA MEMBERS

There are still places available for the essential environmental law training being run by UKELA and the Association of Personal Injury Lawyers on April 13th.

The focus is on Hot Topics and the speakers are: Owen Lomas, Allen and Overy (chair and hot topics update);

Angus Innes, Head of Thames Region Prosecution Team, Environment Agency (regulatory issues); David Travers, Barrister, 6 Pump Court Chambers (health and safety – dealing with the Health and Safety Executive);

Robert McCracken QC, Barrister, 2 Harcourt Buildings (nuisance – statutory and common law).

The event starts at 2pm and ends with early evening drinks.

To book please see the booking form at www.ukela.org or email Vicki.elcoate@ntlworld.com

The Practice and Procedure training event due to be held in February has been postponed until June (date TBC). If anyone, who hasn't already done so, would like to register an interest in that please email Vicki.elcoate@ntlworld.com

ASBESTOS: THE RISKS AND GOOD PRACTICE

**Stephen Sykes,
UKELA vice-chair**

Asbestos kills 3,500 people a year. Numbers are expected to keep rising until 2011. In spite of this, very little is heard about it, compared with, for example, road deaths.

UKELA's recent London meeting, kindly hosted by Norton Rose and attended by about 50 members, explored issues related to the dangers presented by asbestos and the mitigating measures introduced by the Control of Asbestos at Work Regulations 2002. This regulation introduced the new duty to manage asbestos risk in non-domestic premises and is at the core of the Government's continuing strategy to eradicate asbestos-related diseases.

Mike Williams of the Health and Safety Executive is in charge of asbestos licensing in London. He took an overview of the nature of the risk and discussed practical steps to mitigate it. The HSE's website www.hse.gov.uk/campaigns/asbestos promotes good practice and is well worth a look.

Bill Sanderson of Casella talked about the impact of new training requirements for analysts, operatives, supervisors and consultants. His consultancy provides training and education.

Finally, Angus Evers, Associate in the Environment and Planning Group of Norton Rose, discussed current legal issues relating asbestos, including the impact of the new regulations on corporate and property transactions. He also examined recent case law on the liability of employers and the new focus on pleural plaques which is currently the subject of a High Court case involving ten insurance companies.

A significant issue is the multi billion pound global exposure for insurance companies arising from asbestos, some of which are no longer writing business. Asbestos-related personal injury claims are still flooding in from employees, contractors and others, leading to claims by defendants against liability insurance policies, often underwritten decades ago. Insurers then mitigate their losses by bringing claims

against reinsurers. This important area of practice looks set to keep insurance, reinsurance and maybe environmental lawyers fully occupied for many years to come and could usefully be the focus of another UKELA meeting.

The next UKELA London meeting is on Thursday March 3rd, at Herbert Smith's offices on Land Remediation in Practice. Speakers are: Mark Southwood, of Temple Environmental; Stephen Tromans, of 39 Essex Street and Rob Williams and Darren Henaghan of LB Barking and Dagenham. Booking details will be circulated nearer the time.

UKELA CONFERENCE 2005

Friday 17th to Sunday 19th June - Edinburgh, Scotland

This year's annual conference will be set against the stunning backdrop of the Scottish capital of Edinburgh. Full agenda and booking information will be released via the UKELA website soon and further notification will follow.

Accommodation will be at Edinburgh First, the historic campus of the University of Edinburgh with superb views of Arthur's Seat in the heart of the city. There will also be a gala dinner at Dynamic Earth on the Saturday evening, a stone's throw from the new Scottish Parliament building.

Speakers confirmed so far include Professor Bill McGuire, Christopher Bond (Legal and Environmental Director Argent By-Products Group) and Sir Kenneth Collins (Chairman of SEPA) who will be the guest speaker at the gala dinner.

E-LIBRARY ON ENVIRONMENTAL LAW: PROGRESS REPORT

The Department for Environment, Food and Rural Affairs, is planning a "coherent package of measures" to the recommendations for reform to access to environmental justice. UKELA's proposal for an e-library on environmental law "may form one part of this", says the Environment Minister Elliot Morley MP.

UKELA's chairman, Andrew Wiseman, wrote to Elliot Morley after last November's Defra conference on access to justice, seeking support for the e-library. Many of the delegates there had supported the e-library idea and UKELA and Cardiff University have developed a fully costed project, on which work could start immediately, should funding be forthcoming.

UKELA is seeking contributions to the project from Defra and the Legal Services Commission, and has applied to a major charitable trust. Whilst the full project cost is £164,000 (this would cover the year's costs to get the e-library on-line), work could start if the project is only part-funded. UKELA is keen to find a partner who will provide kick start funding for the e-library.

Elliot Morley wrote: "As you will know, the Government endorses and considers itself to be compliant with the Aarhus principles: access to environmental information, public participation in decision-making and access to justice in environmental matters. Nevertheless, my Department is continuing to work hard to improve the provision of information on environmental matters available to the general public".

UKELA MOOT 2004 FINALS

Vicki Elcoate

The somewhat delayed 2004 finals of the UKELA mooting competition involved lively argument over what constitutes waste and the role of the Environment Agency in advising businesses. Thanks to the generous sponsorship of the chambers of Robin Purchas QC, 2 Harcourt Buildings, two teams in each of the senior and junior competitions tussled with the issue of subterranean tomatoes.

The problem (crafted by moot master Gregory Jones of 2 Harcourt Buildings) centred on the white tomatoes that inhabit sewers thanks to the resilience of the tomato seed in sewage processing. EWC, a sewage treatment company, had come to realise that it could transform its unwanted and inedible tomatoes into marketable products: compost; building blocks and biodegradable flower pots.

The Environment Agency (EA) had issued a guidance note and a press statement was made in order to encourage recycling and conserving natural raw materials, with no requirement for waste management licences.

The EA reviewed and scrutinised its decision after a couple of years and now required waste management licences. The market for the tomato products collapsed and EWC, having made significant investment in their development, suffered heavy losses as it had not calculated this into its profit calculations.

EWC sought judicial review of the EA's announcement on the grounds that the products ceased to be waste once processed and the EA was in breach of a legitimate expectation on which the EWC had relied to its detriment. The subject of the moot was EWC's appeal to the House of Lords as part of its quest for damages.

The judge, Robert McCracken QC, of 2 Harcourt Buildings, referred the question of whether the products were waste to the European Court of Justice. He was not persuaded that the expectation of EWC – that it could establish a business on the basis of EA guidance - was reasonable as guidance can be changed.

The winners of the Lord Slynn Trophy (the senior competition) were Tom Ball and Kathryn Griffiths. Edward O'Bree and Judy O'Loan, a newcomer to mooting, were the runners up.

The junior competition winners were Tanja Suessenbach and Stephanie Motz, who is from Switzerland and studying for a Masters in Law at Oxford University. The runners up were Ann Portman and Sam Keeling-Roberts.

Afterwards Robert McCracken said: "Mooting provides a great opportunity for law students who are thinking about their future careers to find out if they enjoy advocacy. Does the thrill of the adrenaline rush outweigh the stress? For new entrants to the profession it provides an opportunity to develop the skills of appellate advocacy in the demanding circumstances of a time limit even stricter than that of the European Court of Justice and the US Supreme Court. The UKELA Moot encourages able, ambitious advocates to think about environmental law. Not only the winners of the prestigious Lord Slynn of Hadley cup, but other participants too, have found that involvement has given them an edge in gaining that vital first foothold on the professional ladder. The quality of finalists in both events this year was so high that sponsors 2, Harcourt Buildings decided to give a monetary prize to the runners up as well as the winners".

The finalists also received books and afterwards everyone enjoyed dinner at the Old Hall, Lincoln's Inn.

One of the junior competition winners, Tanja Suessenbach, who decided to study law in London after completing her “Abitur” in Germany, said: “Mooting is a great experience since it provides an opportunity to research further areas of the law as well as being part and parcel of the legal profession. I have twice mooted and twice won the first prize (International Intellectual Property Moot 2003 at Oxford University and UKELA Moot 2004) and it certainly helped me realise what I truly enjoy. I am grateful to have had the opportunity and support from my teachers at King’s College London”.

Tanja is currently studying International Business Law at postgraduate level and researching on behalf of the Intellectual Property Institute London copyright in the digital age.

Edward O’Bree, who was a senior finalist, said: “It fell to me to argue the legitimate expectation ground. As such I sought to rely on *Coughlan*¹ as authority for the proposition that acts done, or assurances given, by public authorities can give rise to legitimate expectations of substantive benefits which, if frustrated, may be so unfair as to amount to an abuse of power. The test, I submitted, was one of fairness involving a balancing act by the court between the expectation and any point of public interest that the public authority would, almost inevitably, invoke.

I would encourage all emerging lawyers with an interest in environmental law to take part in the UKELA moot. As well as being a useful exercise for the aspiring advocate, the moot affords opportunities both to explore a contentious current issue in environmental law and, of course, to meet some of the most respected practitioners in the field. Two further benefits warrant a mention: first, taking part in the moot was good fun, and secondly the prizes for all finalists were generous, for which my thanks to UKELA and 2 Harcourt Buildings”.

The finals of the 2005 moot, which are being organised by Martha Grekos of UKELA’s Council and No 5 Chambers, are due to be held in the next few weeks and you will be able to read a full report in e-law. The aim is to establish a timetable of promoting the moot to students, pupils and trainees in the autumn with the finals being held in the spring. The moot is an excellent way of promoting environmental law and UKELA to young people.

UKELA WATER WORKING GROUP SEMINAR

ENVIRONMENTAL MANAGEMENT IN THE UK AND JERSEY – A COMPARISON

Speaker

Chris Newton, Director of Environment for the States of Jersey.

Seminar

You are invited to attend this UKELA Water Working Group Seminar to be held at the offices of Allen & Overy, One New Change, London EC4M 9QQ on Friday 15th April, 2005 at 12.45 pm for a 1.00 pm prompt start.

This seminar will provide an update on water pollution, air quality, water resources and waste management; with particular emphasis on Jersey’s inter-relationship with the UK, France and the EU in relation to such matters.

¹ *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213

For information please contact Louise Elliott on tel: 020 7330 3046 or email: louise.elliott@allenoverly.com

- a) CPD points and Bar Practice points are available
- b) The seating capacity is 40 and places will be issued on a "first come, first served" basis.

ENVIRONMENTAL AUDIT COMMITTEE - HOUSE OF Corporate Environmental Crime

The Environmental Audit Committee established a sub-Committee on environmental crime on 12 November 2003 in order to conduct a number of short inquiries. It published its first Report in this series, *Environmental Crime and the Courts*, in May 2004. *Fly Tipping, Fly Posting, Litter, Graffiti and Noise*, the second in the series, was published in July 2004. The sub-Committee's third report, *Wildlife Crime*, was published in October 2004. Copies of the sub-Committee's Reports, oral evidence and other publications, are available on the Committee's Internet home page, which can be found at: www.parliament.uk/parliamentary_committees/environmental_audit_committee.cfm

The Environmental Audit Committee has just published its Second Report of Session 2004-05 on Corporate Environmental Crime. The Report brings to a close a series of inquiries into environmental crime and looks at who is committing corporate environmental crime and why.

Announcing the Report, the Chairman of the EAC, Peter Ainsworth MP, said "During the course of this inquiry we have heard examples of just about every possible corporate environmental crime and heard almost every explanations and excuses as to why the crime was committed. The truth is that crimes against the environment are perceived - wrongly - as victim-less and therefore a low priority. Environmental compliance barely registers with far too many businesses and why should it when they know their illegal actions are likely to remain undetected and largely unpunished? Unless and until the Government sends out a clear signal to business that failure to act on statutory environmental obligations will result in detection and punishment, then there is little hope of any progress. Fundamental to this is the commitment of sufficient resources to the Environment Agency, in particular, to enable them adequately to police all businesses with environmental obligations. "

The MPs say that without realistic, long-term funding the Environment Agency has little hope of tackling corporate environmental crime. Whilst the Agency is making headway with those business sectors it regulates, it is clear that the vast majority of those businesses committing environmental crimes fly under the Agency's radar. Small and Medium-sized Enterprises (SMEs) are responsible for up to 80% of all pollution incidents and more than 60% of the commercial and industrial waste produced in England and Wales; yet research has shown that between 70%-75% of SMEs are unaware of their environmental obligations.

The Committee is supportive of further exploration of alternative methods to ensure compliance, whether through the greater use of the lifestyle provisions of the Proceeds of Crime Act 2002 or the creation of a civil penalty. The Committee also believes that the survival of a business that repeatedly commits environmental crimes and is unable or unwilling to learn from its mistakes, cannot be more important than protection of the environment it pollutes.

¹ Under the terms of the Standing Order No. 152A the Environmental Audit Committee is to "consider to what extent the policies and programmes of government departments and non-departmental public bodies contribute to environmental protection and sustainable development: to audit their performance against such targets as may be set for them by her Majesty's Ministers; and to report thereon to the House." The Committee was set up on 16 July 2001.

MPs found that communication of policy, new legislation and regulation was patchy. Of particular concern was the quality and timeliness of guidance being produced by the Government, most notably with regard to the adoption and implementation of EU Directives. Despite what many would see as ample time to prepare such guidance, in the case of the implementation of the EU Landfill Directive a staggering five years, businesses were still waiting for guidance a scant three months before the deadline for implementation. This is wholly unacceptable and the Government needs to act quickly to address this problem if it is to avoid exacerbating the damage caused to the environment by businesses acting in ignorance.

The Committee also looked at companies who commit environmental crimes, not through ignorance but because the nature of their business, they argue, compels them to. It concluded, however, that the idea that the Ministry of Sound, and companies like it, are somehow compelled to fly-post in order to reach its customer base is nonsense. (Paragraph 28)

The state of the River Thames also concerned the MPs who heard from Thames Water that the system, built in the Victorian era, is not able to cope with the demands made upon it in the 21st Century. This problem will only be exacerbated by increasingly wet weather and the development of land which has not been properly supported by improvements in infrastructure. The MPs call for urgent action to be taken by Defra to remedy this legitimised pollution and for a speedy decision to be taken on the question of a new sewage tunnel under London.

SOUTH EAST REGIONAL GROUP

The EU Directives 'Restriction of Certain Hazardous Substances' (RoHS), and 'Waste from Electrical & Electronic Equipment' (WEEE) was supposed to have been transposed in national law in August of last year. Some national governments have already transposed the Directives whilst others, including the UK have not done so yet. In addition definitions and exemptions at European level are still being finalised. Producers will find themselves in the position of having to meet the registration requirements in some countries by the 13th August this year in order to sell into those countries that have transposed, but later in other countries. Furthermore there are considerable differences between countries on how the WEEE directive is being implemented, which will add even more confusion for producers.

SE Regional Group is planning a workshop in Brighton at the offices of DMH on Saturday 2nd April 9.30 am –13.00. The workshop will look at the progress of implementation within the UK and the rest of Europe, and what that means for Producers. It will also consider the different organisations being put in place to deal with WEEE and RoHS, progress on agreeing an extended list of RoHS exemptions, and the differences between EU member states.

For further information contact Catherine.Davey@stevens-bolton.co.uk

EAST MIDLANDS REGIONAL GROUP- PROGRAMME 2005

1 March 2005

Richard Barlow, partner, Browne
Jacobson
“Human Rights and Nature
Conservation – Recent Court of
Appeal Battles”

6 April 2005	Jonathan Mitchell and Andrew Hogan, barristers, Ropewalk Chambers "Planning and Compensation Act 2004"
May/June 2005 (date to be confirmed)	Trip to new visitor facility, Attenborough Nature Reserve
17-19 June 2005	Annual Conference, Edinburgh
27 September 2005	Annual General Meeting followed by Kevin Pickup, Director of Development, the Coal Authority "The Legacy of Coal"
15 November 2005	Matt Farnsworth, environmental consultant with Scott Wilson (with input from Richard Barlow) "Environmental Issues in Corporate Transactions"

*All meetings to be held at 6pm at the offices of Browne Jacobson
44 Castle Gate, Nottingham NG1 7BJ unless otherwise stated
For details contact the Secretary Sue Clarson on 0115 976 6000
sueclarson@hotmail.com*

UK ENVIRONMENTAL LAW ASSOCIATION

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For information about working parties and events, including copies of all recent submissions contact.
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E - LAW

The editorial team want articles, news and views from you for the next edition due to go out in March/April 2005.

All contributions should be dispatched to Catherine Davey as soon as possible by email at: Catherine.Davey@stevens-bolton.co.uk no later than 25 March 2005.

Letters to the editor will be published, space permitting

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