e - law

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UKELA
UK ENVIRONMENTAL LAW ASSOCIATION

RESULTS OF UKELA COUNCIL ELECTION

(a)	Total number of votes cast:	106
(b)	Total number of spoilt ballot papers:	0
(c)	Total number of invalid/unsigned ballot papers:	4
(d)	Total number of valid votes counted:	102

(e) Results (there were 6 places to fill):-

(i)	Elizabeth Hattan	- 84 votes
(ii)	Neil Humphrey	- 69 votes
(iii)	Colleen Nelson	- 66 votes
(iv)	Steve McNab	- 65 votes
(v)	Richard Kimblin	- 63 votes
(vi)	Bridget Forster	- 61 votes

The ballot was conducted in accordance with the rules of Electoral Reform Services, who acted as scrutineers of the Election

Dr Christina Hill
Company and General Secretary
May 2005

FIRST HIGH COURT DECISION IN UK CONTAMINATED LAND REGIME ILLUSTRATES DIFFICULTY IN ITS ENFORCEMENT

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On 10 May, Newman J ordered a retrial by the Sevenoaks Magistrates' Court of *Circular Facilities (London) Ltd v. Sevenoaks District Council*. The decision is the first appeal against a remediation notice under Part IIA of the Environmental Protection Act 1990 to be heard by the High Court. The judgment highlights certain evidential complexities of the regime whilst also clarifying one important legal point in relation to knowledge of harm.

The central issue in this case was whether the developer, who had built houses on land that contained organic matter approximately three metres below ground level, had "knowingly permitted" the continued presence of polluting matter by failing to deal with it between 1978 and 1985. The organic matter subsequently caused a significant risk of significant harm to residents of the houses due to methane and carbon dioxide generated by its decay. As a result of the significant risk, Sevenoaks District Council had a duty to serve a notice to remediate the contamination on any person who "caused or knowingly permitted" the presence of the organic matter.

Newman J ordered the retrial because he concluded that the District Judge had not made clear in his judgement the basis on which he had concluded that the developer and/or its managing director had knowledge of the contents of a soil investigation report, dated 1978, that indicated the presence of the organic matter and gasses generated by it. Sevenoaks received the report in March 1980. Despite the fact that the developer purchased the site in 1978, its managing director denied personal knowledge of the report until 2002.

In his judgement, Newman J noted the difficulties that arise in establishing facts that are capable of giving rise to a conclusion that a developer knew about the presence of substances over 20 years before the land was determined to be "contaminated land" and, thus, to require remediation. Newman J nonetheless stated that, "[i]n my judgement, the underlying ambit of the evidence and applicable legal principle, when fully explored and considered, could give rise to a legitimate conclusion that [the developer] was an appropriate person to be served with a remediation notice".

The consequences of the decision

The High Court's decision illustrates the complexity of Part IIA and the difficulties faced by local authorities (and the Environment Agency) in enforcing it. The decision does not mean that companies that caused or knowingly permitted contamination due to past pollution incidents, or that own or occupy contaminated land, will not be required to remediate it. Rather, the decision shows the detailed investigations that may have to take place to establish the requisite knowledge linking companies and other persons to the contaminating substances. What has also been made clear is that a person need only have knowledge of a substance, he does not have to know that it could cause harm. In this context the evidential burden is significantly less than would have been the case had the judgement gone the other way on this point.

ANDREW LEES PRIZE ESSAY COMPETITION 2005

WINNING ESSAY

IF JUSTICE IS EQUALITY, WHAT DOES THIS MEAN IN RELATION TO ENVIRONMENTAL LAW, AND HOW MIGHT EQUALITY BE ACHIEVED IN PRACTICE?

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Winning author of this years Andrew Lees Prize, Cheryl Parkhouse, attended the University of Wales, Aberystwyth where she completed an LLB in Law and French; LLM in Environmental Law and Land Management; and a PhD in Law focussing on water pollution issues and the Common Agricultural Policy. She has also completed a stage in DG Environment, Agriculture Integration Unit, European Commission Brussels and is currently a first year trainee solicitor at Burges Salmon, Bristol, presently sitting in the Environmental Law Department.

Introduction:

Following the definition in the Oxford English dictionary, 'equality' means 'equal' which in turn denotes that something is the same in level, rank, character and importance as something else.

This essay will argue that if justice *is* equality, then environmental law and policy must achieve equality amongst other European laws and policies, especially those that have a significant and direct environmental impact, in order to achieve justice for the environment. This is required to such an extent that they form the basis of or provide equilibrium within other policy areas and remove those instruments that are currently creating a barrier for the achievement of justice and equality for the environment. Equality means that environmental law and policy must be treated as equal to and awarded equal significance to other legislation and policies on a practical level. Justice for the environment means protection through positive and preventive as well as reactive measures to halt the extensive environmental degradation that has occurred throughout Europe in the race to achieve economic stability and growth.

If environmental law and policy is to achieve this, then it cannot exist in isolation and be executed alone. Most damage does not occur within the framework of environmental policy, but within the growth of the economy and

industry, transport and through agricultural policies.[1] Article 6 of the European Treaty[2] states that 'Environmental protection requirements must be integrated into the definition and implementation of Community policies and activities…in particular with a view to promoting sustainable development'. This calls for a permanent, continuous 'greening' of all Community policies. However, it must be noted that equality and justice in relation to the environmental law and policy does not mean superiority for the environment above all other policies, including economic development. Rather, the different objectives of the EC Treaty rank at the same level and the policy must endeavour to achieve all of them.[3]

In order to explore the meaning of "justice is equality" within the meaning of environmental law and policy, this essay will focus on the extent to which it has achieved equality amongst other policy areas, through using agricultural policy as a case study. Governed by the Common Agricultural Policy ("CAP"), one of the principal and most powerful policies of the Community, agriculture provides an interesting focus from which the meaning of justice and equality in relation to environmental law and policy can be analysed. The agricultural industry is dependent upon a productive and stable environment for food production and subsequently for agricultural economy. Conversely, as much of the environment is semi-natural, it is reliant on farmers as 'countryside stewards' to protect and maintain our surroundings, suggesting that both agriculture and the environment are interdependent which, in turn, should be reflected at policy level.

Due to this especially close connection with rural resources, agriculture may seem an ideal candidate for supporting environmental law and policy in ensuring justice for the environment. However, agricultural policy has been identified as the main driving force behind the intensification of agricultural practices and subsequent damage to Europe's environment.[4] This questions the extent to which environmental law and policy has achieved, or can ever achieve, justice and equality on a European level. However, justice and equality for environmental law and policy does not simply relate to its standing in the Community, but how each of these laws and policies are implemented and observed on a national level.

At the base of this achievement of equality stand the Member States. If the Member States themselves do not promote understanding and protection of the environment and ensure that these measures are correctly implemented, equality will never be achieved in practice, even if it exists fully at policy level and the instruments firmly established. It is the Member States who hold the responsibility to realise these measures and to achieve equality in practice. Therefore, equality in relation to environmental law and policy also means recognition on the

[1] The Common Agricultural Policy contained in Treaty Articles 32 (ex 38), 33 (ex 39) and 34 (ex 40). Kramer, L., (2000) EC Environmental Law: 4th Edition, Sweet and Maxwell, London at 15, para. 1-25

[2] ex Article 130R following the numerical amendments of the Amsterdam Treaty

[3] Ibid 1.
In Case 164/97 (joined cases C-164/97 and C-165/97 EP v Council [1999] ECR I-1139 the Court held that 'With more particular reference to the common agricultural policy and the Community environmental policy, there is nothing in case-law to indicate that, in principle, one should take precedence over the other.'

[4] Commission of the European Communities, Agenda 2000: For a Stronger and Wider Union', COM(97) 2001

part of the Member States of the necessity to ensure full implementation of and compliance with environmental protection measures.

The obstacles faced by environmental law and policy in achieving equality

Environmental law and policy was far from the European agenda when the Treaty of Rome, founding the European Economic Community (EEC) and creating the CAP, focussed on rebuilding a stable and self-sufficient Europe following World War II.[5] Priorities lay with the need to increase food production,[6] achieved through protected market mechanisms and the provision of guaranteed price support to farmers for production. Due to the high support prices offered and relatively non-existent production control, the CAP stimulated the level as well as the intensity of agricultural production, and each farmer was caught up in a 'production frenzy' in order to receive maximum profit.

This narrow focus on economic gain, at the expense of all other concerns, represented injustice and inequality for the environment. For example, in the arable sector,[7] high crop prices 'coupled' or attached to production encouraged farmers to pursue financial profitability at the expense of sustainable farming.[8] Full advantage was taken of increased farming technology comprising of larger, heavier machinery, requiring the removal of hedgerows for easier access and an increased production surface area. Field margins were also farmed for this reason, and as well as destroying many wildlife habitats,[9] fertilisers were applied in vast amounts to maintain the fertility of overworked soil and to bring poorer soils into production. In addition, the development of winter wheat allowed a further harvest and increased income, with soil resources being placed under increasing pressure. In France alone, an estimated 790,000 hectares of non-agricultural land were converted into agricultural use between 1969 and 1984.[10]

Member States that benefited economically and politically from the CAP have defended it,[11] which may help to explain why the expansionary or 'productivist' ethos has endured despite the growth of surpluses and mounting budgetary costs. Furthermore, 'Agriculture has a strong political influence and weighs heavily in national politics'.[12]

[5] 1939-1945
[6] The objectives of the CAP are contained in Article 33 of the Treaty, ex Articles 38-43 preceding the numerical changes by the Treaty of Amsterdam
[7] Even in 1997, 43% of the budget alone was earmarked for the arable sector, with assistance more than doubling since 1990. Eurostat, (1999) Agriculture in the European Union, GraphAgri Europe 1999 at 20
[8] European Commission, (1999) Agriculture, environment, rural development – facts and figures (A challenge for agriculture), Office of Official Publications of the European Communities, Luxembourg at 10
[9] Nesting opportunities, food resources and overall habitat diversity have greatly affected the numbers of birds in Europe. Birdlife International, (1997) 'A Future for Europe's Rural Environment: Reforming the Common Agricultural Policy', Birdlife International. Brussels at 1
Also generally see Pain, D.J., Pienkowski, M.W. (eds), (1997) 'Farming and Birds in Europe: The CAP and its Implications for Bird Conservation', London Academic Press, London
[10] Kromarek, P., (1984) European Aspects of Ground Protection Policy, IEEP, Bonn quoted in Baldock, D., (1984) The CAP Price Policy and the Environment – an Exploratory Essay, IEEP, London at 32
[11] Grant, W., (1997) The Common Agricultural Policy, The European Union Series, MacMillan Press, Basingstoke at 7
[12] Communication of the Commission to the Council and to the European Parliament – The development and future of the common agricultural policy – follow up to the Reflections Paper (COM(91) 100 of 1 February 1991) – Proposals of the Commission, COM(91) 258 final of 11.07.91

'Agricultural lobbies and interest groups are well-organised and influential, and the 'farm-vote' is an important factor in electoral politics,[13] such as in France. Moreover, environmental problems are often deep-seated and many environmental policies only promise benefits in the long term which mean they are often ignored or sacrificed in political systems geared up for short term electoral or economic cycles.'[14]

It is due to factors such as these that the introduction of environmental law and policy on the European stage and the attainment of justice for the environment have proved difficult. Even though it has been awarded a significant legal position in the Treaty, environmental policy has faced an uphill struggle to even begin to create equality and justice for environmental protection amongst the other policy areas, already consuming the bulk of European priorities and budget.

Therefore, at this stage in environmental law and policy's development, the question of whether equality was being achieved could not even be considered. The price policy, dictating agricultural policy, represented a complete contradiction to the principles upon which environmental law and policy are based, such as the polluter pays principle, becoming instead, "pay the polluter". In turn, it has created an obstacle to environmental law and policy's achievement of equality in European policy, further destroying and providing injustice to environmental protection in the Community.

An attempt to impact upon agricultural policy

Therefore, in order to begin its role of providing justice for the environment, environmental law and policy has to confront these policies and instruments lying behind European agriculture. Without this, it has struggled to make a substantial impact upon agricultural practices, making equality and justice far from possible.

This concept is illustrated by the Nitrates Directive,[15] focused on the polluter pays principle, and one of the first real attempts of environmental law and policy to achieve recognition in agricultural policy through regulating the polluting practices themselves. Even though intensive farming practices were correctly identified as the source of aquatic pollution, the Directive attempted to tackle the practices from outside of the agricultural framework, failing to penetrate to the core of the problem - the price policy instrument - and the real force behind intensification.

[13] Junius, L., Common Agricultural Policy, Chapter 7 in Glöcker, G., Junius, L., Scappucci, G., Usherwood, S., and Vassallo, J., (1998), 'Guide to EU Policies', College of Europe, Blackstone Press Ltd, London at 108
[14] Lowe, P., Baldock, D., Integration of Environmental Objectives into Agricultural Policy Making, Chapter 3 in Brouwer, F., Lowe, P., (2000) CAP Regimes and the European Countryside, CABI Publishing, Oxon at 31
[15] Council Directive 91/676/EEC of 12 December 1991concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ L375, 31.12.1991 ("the Directive")

In brief, the Directive aims to deal with the problem of diffuse water pollution caused by nitrates originating from agricultural sources.[16] The Directive is centred on the requirement for Member States to designate nitrate vulnerable zones (NVZs), defined as areas of land draining into waters that contain, or are likely to contain, more than 50mg/N/l, or that suffer, or are likely to suffer, from eutrophication.[17] Within these areas, action programmes regulating agricultural activities were to be established and implemented,[18] in addition to codes of good agricultural practice mandatory within the vulnerable zones, but voluntary elsewhere. [19]

Even though the Directive represents a highly innovative instrument, its impact on agricultural practices has been severely hampered due to grave problems of enforcement and implementation. The vast scale of non-compliance by the Member States raises questions as to the effectiveness of environmental law and policy to tackle the economic policies of the Community on an equal playing field.

Designation of the NVZs was required by December 1993, whilst the first action programmes were set for the period from 20 December 1995 to 20 December 1999. However, the first action programme was far from complete even by 30 July 1997.[20] Even as late as 2000, infringement proceedings existed against 12 of the 15 Member States.[21] In 2001, the European Parliament adopted a resolution[22] requesting the Commission to explain why the Directive was not being effectively implemented and in its 2002 report, the Commission noted that all Member States, except for Denmark, were still involved in at least one infringement.[23] Ireland originally deciding not to designate any areas at all,[24] even though agriculture contributes to 70-80% of the country's nitrogen content in water, further aggravated this.[25] However, its position has now changed with the country being placed under a strict obligation to correctly comply with the Directive.

'Enforcement is a critical problem in the search for an effective EC environmental policy. Differing legal regimes, economic concerns, degrees of public concern, and levels of political interest among Member States have contributed to uneven implementation of environmental directives throughout the Community.'[26] The effectiveness of environmental law and policy is also dependent on the agricultural unions' attitudes towards such regulation with

[16] Agriculture was listed as one of the five target sectors in the Fifth Environmental Action Programme.
[17] Article 3 with reference to Annex 1of the Directive
Eutrophication occurs when nitrate present in the watercourse causes accelerated growth of plants and algae that exhaust the oxygen supply in the watercourse through the prevention of sunlight into the water. Eventually the water body is left stagnant and dead.
[18] Article 5 of the Directive
[19] Article 4 with reference to the criteria laid down in Annex IIA of the Directive
[20] Commission of the European Communities, Report from the Commission to the Council and European Parliament: 'The Implementation of Council Directive 91/676/EEC concerning the Protection of Waters against Pollution caused by Nitrates from Agricultural Sources', Report COM(97) 473 at 15
[21] Commission Européene, DG Environnement, 'Pollution de l'eau par les nitrates: La Commission engage de nouvelles poursuites judiciaires contre le Grèce, l'Autriche et le Luxembourg, 13 janvier 2000
[22] European Parliament, (2002/2110/INI) OJ C262, 18.9.2001 at 128
[23] Commission of the European Communities, Report from the Commission: Implementation of Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources: Synthesis from year 2000 Member States reports, COM(2002) 407 final, Brussels, 17.07.2002 at 30
[24] Ibid. 20 at 13. This was due to the belief that its inland eutrophication problems can be attributed to phosphorous and its tidal waters to sources not coming under the remit of the Nitrates Directive.
[25] European Parliamentary Questions: Wallstrom, M., European Commissioner for the Environment, response to written question E-0190/02, 'Implementation of Directive 91/676/EEC (the Nitrates Directive), European Parliament, 26.03.2002
[26] Dinan, D.,(1994) 'Ever Closer Union? An Introduction to the European Community', MacMillan, London at 393

governments accused of 'bowing too much from the pressure of the farmer's lobby'.[27] This lack of implementation greatly questions the importance awarded to environmental legislation by the Member States, which in turn has led to inequality for environmental law and policy, greatly undermining its ability to provide justice for the environment.

The Commission also acknowledged that the problem faced by environmental law and policy, in regulating agricultural practices, is that farmers are particularly sensitive to land-use changes with inevitable repercussions on their farm's economic viability.[28] The most prominent environmental principle on which the Nitrates Directive is based is the polluter pays, focussed upon the principle that the polluter is held entirely responsible for his acts and therefore must pay for the clean-up of any resultant damage of his activities. Following this principle, the Directive has imposed a high implementation cost on farmers with no funding or compensatory structure established to assist farmers in making necessary structural and other changes. For example, the implementation cost of the Directive in France was approximately ECU 618 million. Due to its direct economic impact upon the farming industry, it has faced considerable criticism and opposition from the agricultural sector of the Member States. The Polluter Pays Principle is completely contradictory to the ethos that farmers have become well accustomed to under the generous support structure of the Common Agricultural Policy.

This is turn led to those farming within the NVZs feeling that they were being unfairly held responsible for past practices for which European agricultural policy was entirely responsible and for pollution by other sources. This latter point was raised in *ex parte Standley & Others and Metson & Others*.[29] Two groups of British farmers, supported by the National Farmers' Union, challenged the way in which the UK government had designated NVZs under the Directive, seeking an annulment of several designated NVZs in East Anglia.[30] Supported by the National Farmers' Union, they argued that the Government's approach was heavily flawed, as designation was not limited to those areas where the limit of 50mg/N/l was exceeded solely by virtue of agricultural inputs. The restriction of agricultural use 'would cause them immediate and long-term economic harm in terms of land values and of income from their farming businesses'.[31] It was felt that farmers had to unfairly bear the cost of nitrate pollution caused by others rather than solely for the pollution identified as originating from their own practices.

In response, the European Court of Justice stated that the Directive did not require the Member States, in designating the NVZs, to determine whether the source of the pollution was exclusively agricultural. 'No provision of the Directive or its annexes contains even an implied obligation on the Member States to assess the

[27] Committee on Environment, Public Health and Consumer Protection, Rapporteur: Patricia McKenna in European Parliament, Resolution on the Commission Reports on the Implementation of Council Directive 91/676/EEC concerning the Protection of Waters Against Pollution caused by Nitrates from Agricultural Sources and on Measures Taken Pursuant to the Council Directive 91/676/EEC concerning the Protection of Waters Against Pollution caused by Nitrates from Agricultural Sources, COM(97) 473 – COM(98) 016 – C4-0040/98, Part B: Explanatory Statement, 24.06.1998

[28] Report of the Commission to Council and European Parliament: The Implementation of Council Directive 91/676/EEC concerning the Protection of Waters against Pollution caused by Nitrates from Agricultural Sources, Report COM(97) 473 at 5

[29] R v Secretary of State for the Environment and the Ministry of Agriculture, Fisheries and Food, ex parte Standley & Others and Metson & Others, Queen's Bench Division (Crown Office List), May 7 1997, [1997] Env LR 589

[30] The Directive was implemented in England and Wales by the Protection of Water against Agricultural Pollution (England and Wales) Regulations of 21 March 1996: SI 1996 No.888

[31] Case C-293/97, Judgement of the Court (Fifth Chamber) of 29 April 1999. The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte HA Standley and Others and DGD Metson and Others, para.15

concentration of nitrate attributable solely to agricultural sources of pollution when establishing whether the threshold of 50mg/l is exceeded.'[32] This was further illustrated by Article 5, concerning the establishment of Action Programmes and requiring Member States to take into account 'nitrogen contributions originating from agricultural *and* other sources.'[33] The Court agreed therefore, that the 'sufficient contribution' applied by the UK government was correct under the Directive, whilst also acknowledging the certain degree of discretion awarded to Member States in designation. 'Community law cannot provide precise criteria for establishing in each case whether the discharge of nitrogen compounds of agricultural origin makes a significant contribution to the pollution.'[34]

Even though further issues were raised in this case relating to the validity of the Directive, in relation to this discussion, if these farmers' opinions represented those within NVZs throughout the EU, then a major obstacle to the achievement of equality is immediately created on a practical level. This has proved an extremely difficult balance for environmental law and policy, in attempting to regulate damaging agricultural practices, to strike. Many would agree that farmers should not be compensated for cleaning up their own mess or avoiding further pollution incidents. This is an extremely strict, but correct, interpretation of the polluter pays principle, on which European environmental policy, and the Nitrates Directive, is strongly based.

Farmers finding themselves within a NVZ are bound by the Directive's mandatory requirements, obliged to pay for costs arising from compliance themselves and faced with fines if they do not comply. On the one hand, in individually specified areas, some farmers feel unfairly, and even randomly, targeted, especially if one producer is bound under compulsory adaptations and codes of good farming practice, whilst his neighbour outside of the vulnerable zone is permitted to continue his practices, whether polluting or not. The first conclusion is that designation of specific areas may result in farmers outside the areas feeling they need not farm to protect the environment or the NVZ next to them[35] and to continue profiting to the maximum from the payments made under the CAP for intensification. This has raised questions regarding the equality of treatment between those farmers within the zones and those outside, and is, of course, worsened by the presence of production-related incentives, aggravating the feelings of unfair targeting.

On the other hand, designating the whole territory of a Member State[36] indicates on the surface that all farmers are being treated equally and may avoid animosity existing between those that farm in restricted areas and those situated the other side of the NVZ boundary. However, such equal treatment is not justified when those who are not polluting are placed under great restrictions. Those executing good farming practice receive no recognition for their environmentally friendly agriculture, whilst the polluted areas where full attention should be concentrated are controlled in exactly same way, perhaps even avoiding major structural changes. This in turn results in environmental protection receiving 'bad press' in the agricultural communities, and creates a 'no win' situation.

[32] Ibid, para.18
[33] Article 3(5) of the Nitrates Directive – emphasis added
[34] Ibid. 32 at para.1.1
[35] Elworthy, S., (1994) Farming for Drinking Water: Nitrate Pollution of Water: An assessment of a regulatory regime, Athenaeum Press Ltd, Newcastle upon Tyne at viii

Some are of the opinion that all effort should be concentrated on the areas where the problem exists, even if this means that severe restrictions are imposed to ensure that the situation is ameliorated.[37]

Therefore, the polluter pays principle working in this way may be perceived as actually having an artificial application in agriculture. It does not work in the simple way as in industry where the polluter pays for cleaning up and fines. It is felt that in agriculture, there is a need to distinguish between the definition of an agricultural polluter and a non-agricultural polluter meaning that some kind of baseline at Community level is required.

This leads to the question of whether environmental policy, through legal, regulatory instruments such as the Nitrates Directive, is capable of achieving equality in isolation, situated outside of the agricultural policy framework, or whether it should actually be far more integrated into the sector it seeks to regulate. The Nitrates Directive represented a significant instrument, but has always stood alone in its attempt to regulate and improve agricultural practices, whilst the price policy continued to provide conflicting incentives.

The 1992 CAP reforms and equality for environmental law and policy

In the 1980s, there was growing awareness that modern farming was devastating rather than preserving the landscape. In addition, the CAP was experiencing grave economic and political problems including surpluses in most major commodities, a worsening of structural problems and budgetary costs.[38] In response, the 1992 CAP reform introduced several supply control measures in the various market organisations. For example, a progressive reduction of prices in arable and beef sectors was introduced over a period of 3 years. It was felt that price cuts, feeding through falls in land prices, would encourage less-intensive exploitation of the land,[39] consistent with the law of diminishing returns. This implies that a reduction of output prices (price support) may in turn induce a reduction of production and therefore input use. As farmers generally aim to achieve the maximum profit possible for their particular holding, a decrease in guaranteed prices should encourage a far more detailed cost-benefit analysis of all input costs in relation to outputs, theoretically reducing any inputs to the minimum to lessen costs.

In the cereal sector, the reduction in intervention payments was compensated in the form of direct payments, the Arable Area Payment Scheme, based on historical base areas[40] and regional yields subject to compulsory set-aside

[36] Article 3(5) of the Directive. Five Member States – Denmark, Germany, Luxembourg, the Netherlands and Austria - have all chosen this option.

[37] Goodchild, Robert, DG ENV, Personal Communication at the European Commission, Brussels, 26/02/02

[38] Smith, J., Club de Bruxelles, (1995) 'Agriculture in Europe', Club de Bruxelles, Brussels at 3
By February 1991, the Commission was forecasting a CAP overspend in 1991 of about 6.5% or nearly 2 billion ECU: Ackrill, R., (2000) The Common Agricultural Policy, Sheffield Academic Press at 65

[39] Noted in Bowers, J., 'Set-Aside and Other Stories', Chapter 1 in Baldock, D., Conder, D. (eds), (1987) 'Removing Land from Agriculture: The Implications for Farming and the Environment', CPRE, IEEP, WWF, London at 16, para.1.45

[40] Only land that was in arable use on the 31 December 1991 was eligible for area payments, including new set-aside payments. This includes temporary grassland as part of an arable rotation, as long as the grass was newly planted on or after the 1 January 1987

for such crops grown by all farmers exceeding 92 tonnes of cereals equivalent.[41] The aim of this was to offset the reductions in income, whilst reducing over-production by extending set-aside and making it a pre-condition of the receipt of subsidy.[42] This constituted a move towards decoupling or separating support from production.

However, payments were still firmly attached to production levels encouraging continued fertiliser consumption levels. The environmental effectiveness of the reduced payments and compulsory set-aside was also severely limited by solely making set-aside land subject to the environmental requirements, rather than all land under arable production. On one hand, the compulsory set-aside, both rotational and non-rotational, represented a major development through taking a major step away from the production and agricultural intensification. Rotational set-aside allows alternate parcels of land to be placed under set-aside within a certain period, whilst non-rotational stipulates the fixing of the set-aside obligation on one area of land which cannot be transferred to during the specified period. 'The monitoring of the ecological effects of set-aside in Germany revealed that such schemes can have positive effects on soil quality both in the improvement of nutrient balance and on the recovery of soil structure because there is no soil compression through land cultivation.'[43]

Within the areas set-aside, Member States were required to 'apply appropriate measures which correspond to the specific situation of the land set-aside so as to ensure the protection of the environment'.[44] However, doubt has been raised as to the real environmental benefits as the Regulations lacked detailed standards of how to maintain and manage the land to achieve the maximum environmental benefits. Other than these clauses, there was no attempt to tailor the EC regulations to meet environmental concerns or objectives with the effectiveness of the provisions heavily dependent on the rules already adopted at Member State level.

In addition, the environmental conditions were limited solely to land set-aside, and not applicable to all land under production. The temptation therefore still remained to fulfil the set-aside requirement to participate in the compensatory payments scheme setting-aside the least productive land.[45] There was little guard against 'slippage'- farming the remaining farmland more intensively to make up for the area lost - defeating both environmental and production objectives. This was found to be especially common amongst farmers using the rotational option.[46] Potential benefits were further reduced by the lowering of the set-aside obligation from 15% in 1993/4 to 5% in 1998/9.[47]

[41] Commission Regulation (EEC) 2293/92 of 31 July 1992 laying down detailed rules for the application of Council Regulation (EEC) No 1765/92 with regard to the set-aside scheme referred to in Article 7, OJ L221/19, 06.08.1992
[42] For example, the proportion was 12% if the land was put into rotational set-aside (1995-1996 marketing year). A non-rotational option was added in 1993 with the proportion of land set at 18%
See Hawke, N., 'Set-aside and Environmental Protection', (1997) 45 Drake Law Review 222, footnote 14
[43] Hawke, N., Kovaleva, N., (1998) Agri-environmental law and policy, Cavendish Publishing Ltd, London at 73
[44] Article 3, Commission Regulation (EEC) 2293/92 of 31 July 1992 laying down detailed rules for the application of Council Regulation (EEC) No 1765/92 with regard to the set-aside scheme referred to in Article 7, OJ L221/19, 06.08.1992
[45] Kay, A., (1998) The Reform of the Agricultural Policy, CABI Publishing: Oxon at 135
[46] Robinson, G.M., Lind, M., 'Set-Aside and the Environment: A Case Study in Southern England', (1999) 90(3) Tijdschrift voor Economische en Sociale Geografie 296 at 304
[47] Lowe, P., Baldock, D., Integration of Environmental Objectives into Agricultural Policy Making, Chapter 3 in Brouwer, F., Lowe, P., (2000) CAP Regimes and the European Countryside, CABI Publishing, Oxon at 43

Furthermore, a number of payments contradictory to environmental protection and reduced production were still apparent, such as the availability of arable payments on cereal grown for fodder, increasing the production yields of maize silage. Maize is an extremely input-intensive crop, requiring large amounts of nitrogen inputs and pesticides. In addition, as maize also produces higher yields, by weight per hectare, than other cereals, it became an attractive alternative to grass silage, and to other cereals, increasing the risk of excessive fertiliser use and loss through leaching[48] by encouraging production of the crop even on poor land. The reforms also led to changes in farming practices from cereals to vegetables, which also require high levels of inputs.

The inclusion of temporary grass within the eligible crop area, but not eligible for payment also caused problems. This encouraged the ploughing of grass leys, as no economic benefit was gained from retaining them, especially when the land could be used both to claim arable payments and to give greater flexibility in arable rotations. The system encouraged permanent cropping and fewer grass leys within rotations, thereby increasing dependency on chemical inputs and the destruction of wildlife. Moreover, 15% of farmers in England were growing crops on non-eligible land[49] illustrating that the rules of eligibility did not prevent a continuing expansion of the arable area as predicted. In addition, non-eligible land was ploughed to take advantage of the high subsidies offered for potatoes and flax.

The Accompanying Measures adopted alongside the reforms were also a significant development, concerning early retirement, forestry and agri-environment. The Agri-Environment Regulation 2078/92[50] was an important step forward for the achievement of equality for the environment, by providing a framework within which Member States could establish voluntary schemes for 'promoting ways of using agricultural land which are compatible with the protection and improvement of the environment'.[51] It recognised that 'farmers can fulfil an important function as stewards of the environment and the countryside'.[52] For the purposes of this discussion, whilst some of these programmes developed at Member State level contain innovative instruments, they were unable to achieve their full potential again due to existing conflicting signals at agricultural policy level. In comparison to the market organisations, the funding available for agri-environment was fractional, co-financed between the Member State and the Community. Many Member States were either unwilling or unable to provide large budgets for this and take up the co-financing available. Furthermore, as illustrated above, many payments were still in place for production, meaning that the take-up of the programmes were found to be amongst smaller producers, with less environmental impact, as the larger producers could gain more financially through continuing production. Furthermore, the environmental conditions imposed under the agri-environment regulation solely affected the areas that had been placed under agreement. The payments made under the market organisations were never affected, meaning that intensive production could continue unlimited elsewhere on the farm holding.

[48] Baldock, D., Beaufoy, G., (1992) 'Plough On! An Environmental Appraisal of the Reformed CAP', IEEP, London at 25
[49] Winter, M., 'The Arable Crops Regime and the Countryside Implications, Chapter 8 in Brouwer, F., Lowe, P., (2000) 'CAP Regimes and the European Countryside, CAB International Publishing, Oxon at 130
[50] Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside, OJ L215, 30.07.1992 ("Regulation 2078/92")
[51] Article 1(c) of Regulation 2078/92
[52] Scheele, M., 'The agri-environmental measures in the context of the CAP reform' in Whitby, M. (ed.), (1996) 'The European Environment and CAP reform – policies and prospects for conservation', CAB International, Oxon at 4

Therefore, whilst environmental law and policy cannot exist in isolation, dependent to a certain extent upon reform in the agricultural sector, simply recognising the need for environmental protection in agriculture is inadequate to achieve equality. As illustrated above, whilst the insertion of environmental measures into the sectors themselves represented a major step forward, justice for the environment and environmental protection cannot be achieved if full consideration is not given to the destructive incentives still in place. Full and effective environmental justice can only be ensured if it is economically viable for the farmer to comply, as farmers, as part of an industry, will realistically be pushed towards the economic benefits, rather than ethics. The reforms represent a failure to achieve equality for environmental law and policy due to the continued existence of conflicting market signals and the vague inclusion of environmental conditions.

Agenda 2000 and equality for environmental law and policy

It can be argued that the new "European Model of Agriculture" created under the Agenda 2000 reforms, and built upon by the Mid-Term Review, has finally achieved equality and justice for environmental law and policy. The model is 'based on competitive, multifunctional and sustainable agriculture' throughout the EU.[53] This consists of the creation of two equal pillars: the market organisations as before and the Rural Development Pillar 'to counterbalance the traditional dominance of the market sectors'[54] and placing emphasis upon rural development and protection.

One of the most significant developments in the new CAP is the attachment of compulsory cross-compliance to the receipt of the single income payment based on historical entitlements and the number of acres farmed.[55] This replaces the majority of the direct payments currently granted to farmers. In order to access the new income support premium, the farmer is placed under an obligation to respect certain statutory requirements, concerning public health, animal health and welfare, plant health issues and the environment, such as the Nitrates Directive,[56] and ensure the land is kept in good agricultural condition.[57]

The primary significant aspect of this is that cross-compliance under the CAP is now compulsory in all Member States, immediately removing some of the obstacles previously experienced in the achievement of equality. For

[53] Fischler, F (1999) The European Model of Agriculture-facing the WTO acid test. CEA Congress Verona, 24 September; and Fischler, F., (1999) WTO negotiations – agricultural aspects. Speech to informal hearing with the non-governmental organisations, Brussels 22/10/99 cited in Bryden, J., (2000) The Implementation of Agenda 2000 in Rural Areas: A Preliminary Assessment, Finland, Vora and Ekenas European Information Conferences, March 20-21 at 2
See also Mannion, J., Gorman, M., Kinsella, J., 'Connecting Farming, the Environment and Society: a living countryside perspective',(2001) 1(1) Tearmann: Irish Journal of Agri-Environmental Research at 16
McMahon, J.A. (2000) The Common Agricultural Policy: from Quantity to Quality?, [2002] Northern Ireland Legal Quarterly 9-27
[54] Statement by Dr. Franz Fischler, Commissioner of Agriculture and Rural Development quoted in House of Commons, Agriculture Committee, Second Report, CAP Reform: Rural Development, Volume I, Report and Proceedings of the Committee, Session 1998-99, London: The Stationery Office at viii, para.18
[54] European Commission, Directorate General of Agriculture, (2000) 'The CAP – 1999 Review', OOPEC, Luxembourg at 4
[55] Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the Common Agricultural Policy and establishing certain support schemes for farmers, OJ L270 21.10.2003
[56] Ibid., at Article 4 and Annex III

example, the obligation to execute a certain standard of farming, excluding limited measures such as set-aside, was kept completely separate from the market organisations. This therefore meant that environmentally destructive behaviour, even though it may reduce or remove any payments made under the Agri-Environment Regulation to participating farmers, would not have any effect on the support payments for production made under the individual sectors. In addition, penalties are now awarded for non-compliance with the statutory requirements and good agricultural conditions, divided into non-compliance due to negligence and intentional non-compliance.[58] In permitting the environment to be finally integrated into the production-orientated mechanisms themselves, cross-compliance responds to the obligation laid down in Article 6 of the Treaty requiring that environmental protection requirements must be integrated into all Community policies and approaching justice for the environment.

Further development made is that cross-compliance now applies as a whole-farm approach.[59] This means that environmental consideration in one part of the farm will not lead to intensification elsewhere as the requirements are applicable to the whole farm unit. 'By bringing together a range of schemes within a whole farm plan, backed up by a basic code of management practice, farmers cannot pick and choose the more lucrative schemes and ignore the other more environmentally worthy ones.'[60] The whole farm approach also overcomes problems associated with previous agri-environment commitments, or to any specific designated area, concerning the displacement of pollution or environmentally harmful practices, with intensification occurring outside of the controlled areas to maintain output. In addition, this is further strengthened by the need to take 'all' polluting factors and all livestock on the holding into account in calculations, not simply those on the pasture under agreement.

However, in practice, the extent to which cross-compliance is effective in controlling nitrate pollution will depend upon a number of factors. For example, cross-compliance can only affect those in receipt of payments, excluding a number of polluting agricultural activities, such as pig-rearing. This is a significant issue and an important limitation of the instrument's potential to secure equality for environmental considerations into the CAP, as the intensive pig-rearing farms, such as in The Netherlands and Belgium, greatly contribute to environmental pollution and degradation in these areas. Equity issues again become apparent as this places some farming sectors at a competitive advantage in avoiding such intensive regulation and it is felt that "properly established good farming practice would apply to all farming, whether in receipt of specific subsidy or not".[61] Therefore, cross-compliance is limited in its capacity to currently treat all farmers equally, and therefore the environment, to create an even playing field.

[57] Established under Article 5 'taking into account the framework set up in Annex IV'

[58] In the case of non-compliance due to negligence, the percentage of reduction is not to exceed 5%, or 15% if repeated non-compliance occurs. However, intentional non-compliance imposes a 20% reduction, with the possibility of exclusion from one or several aid schemes.

Article 7(2) Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the Common Agricultural Policy and establishing certain support schemes for farmers, OJ L270, 21.10.2003

[59] Commission of the European Communities, (2003) A Long-Term Policy Perspective for Sustainable Agriculture, COM(2003)23 at 4

[60] Webster, S., Felton, M., (1993) Targeting for nature conservation in agricultural policy', Land Use Policy (January) p.67-82 cited in Banks, J., Marsden, T., 'Integrating Agri-environmental Policy, Farming Systems and Rural Development: Tir Cymen in Wales, Sociologia Ruralis, Vol.40:4, October 2000, 466-480 at 473

[61] Council for British Archaeology, 'Consultation on CAP Reform: Mid-Term Review of Agenda 2000', comments to DEFRA September 2002

Doubt also remains as to how the attachment of environmental conditions to payments based upon past production levels will provide any substantial benefit, and how this will in fact function in practice. There is also concern that the whole farm approach abrogated by this payment does not provide the best approach to environmental issues. Even though there are definite advantages to such an approach in avoiding the protection of some farm areas leading to a displacement and even increase of polluting, intensive practices elsewhere to compensate for the loss of productive land, environmental protection can only be applied in a broad-brush manner. Due to the diverse environmental conditions existing within a single farm area, the attempt to encompass all possibilities may result in a general or even minimum application of conditions throughout the farm, rendering it unable to target issues, such as nitrate pollution, adequately throughout the farm. Furthermore, no consideration is paid to the natural delimitation of the environment, with focus purely on pre-established administrative boundaries. Returning to the focus of the Nitrates Directive, nitrate leaching or surface run-off will always occur regardless of these boundaries, crossing from one farm to the next within the river basin to reach the watercourse. Therefore, rather than, or in addition to, the whole farm, application of cross-compliance, there is some need to enforce some degree of control based on the natural delimitation of the river basin itself, as favoured for the protection of the aquatic environment within the Water Framework Directive.[62]

With regard to this and consideration of environmental law and policy, the inclusion of the action programmes and codes of good practice of the Nitrates Directive as a condition of receipt of payments is a major step forward in achieving equality for environmental law and policy. However, the failure of a proper application of the Nitrate Directive in some Member States cannot solely be rectified through the CAP. Controlling nitrate emissions is still primarily the task of transposition and implementation of the Directive itself. This may also have resulted in a dilution of the Directive's effective targeting and burying it amongst the requirements of agri-environmental measures under the second pillar. This concern is accentuated by the fact that experience from the action programmes under the Directive has shown that the Member States only put the minimum basic requirements into the programmes meaning that only the minimum improvements are achieved. Therefore, as 'good farming practice' is developed by the Member States themselves, the extent of equality accrued from the inclusion of environmental law and policy into the CAP's mechanisms will greatly depend upon the conditions imposed under cross-compliance by each Member State within both pillars.

The role of the Member States in ensuring justice for the environment

'Good Farming Practice' (GFP) under the Rural Development pillar has been developed from previous agri-environment measures that farmers should observe a minimum level of environmental practice as part and parcel of the support regimes, but that any additional environmental service should be paid for by society through agri-environmental programmes.[63] However, the latest reforms take one step further, as rather than paying farmers

[62] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L327, 22.12.2000

[63] Barnes, P.M., Barnes, I.G., 'Understanding the costs of an environmentally 'friendly' CAP for the EU', (2001) 11(1) European Environment 27 at 30

simply to reach the norm, payment that will not be made unless the farmer goes beyond this baseline of GFP. Furthermore, a farmer making an agri-environment commitment to one part of the farm is obliged to respect good farming practice throughout the whole of his farm and not simply to one part of it.[64] This reflects the polluter pays principle and the view that farmers should not be remunerated for doing nothing. However, '[a] key problem concerns the elasticity of the concept of 'good practice'.[65]

The legal basis for GFP is defined as '*the standard of farming which a reasonable farmer would follow in the region concerned*'.[66] Therefore, each Member State is to establish verifiable standards in their rural development plans, in compliance with general mandatory environmental requirements, and in order to provide a framework from which 'good farming practice' can be assessed. However, the above definition is extremely broad and directly leads to the complicated question of how to define a 'reasonable farmer'. From one perspective, this could be perceived as strengthening and further building on the concept of 'stewardship', emphasising a 'duty of care' for all farmers and providing a legal basis for enforcement. The interpretation of the word 'reasonable' is a huge subject alone, even when simply considering the implications in the UK Courts of Law, without including the perceptions and different languages present in the remaining Member States, now greatly increased through accession. In addition, the definition and interpretation of the term 'reasonable' revolves around the question "Reasonable for whom?" and by reference to criteria or the ends to be achieved.

The plans will have been developed from a range of disciplines, by those directly involved in agriculture – government agricultural departments, farmers' unions - and environmental agencies working with agriculture. Therefore, these parties will have subsequently been responsible for creating their own definition of good agricultural practice. In response, Winter points out that 'policy is a process…something that is dynamic and changing rather than a single action, decision or piece of legislation',[67] and policy makers may be seen to react to various pressures and political demands of society.[68] This may be found to apply to the definition of GFP dependent on existing practices, past experience, and the influence from varying powerful pressure groups.

The definition awarded to GFP in each Member State, or in each region will also be dependent on the political structures present, the role of the various pressure groups in policy-making and this political structure and the importance awarded to the pressure groups by the political authorities.

Therefore, the achievement of equality for environmental law and policy is not simply dependent upon the integration at European level, but also consistency at Member State, or ground level.

[64] Article 23 of Council Regulation (EC) 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain regulations, OJ L160, 26.06.1999
[65] Rodgers, C.P., 'Agenda 2000, Land Use and the Environment: Towards a Theory of "Environmental" Property Rights?' in Holder, J., Harrison, C. Law and Geography, (2002) 5 Current Legal Issues at 251
[66] Article 29 of Commission Regulation (EC) No 445/2002 of 26 February 2002 laying down detailed rules for the application of Council Regulation No 1257/1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF), OJ L74 15.03.2002
[67] Winter, M., (1996) Rural Politics: politics for agriculture, forestry and the environment, Routledge, London at 8
[68] ibid at 11

This need for consistency has been recognised by the development of a common framework at Community level to assist Member States in defining 'good agricultural condition', which farmers must fulfil in order to receive the single income payment, and to 'maintain an even playing field'.[69] This provides a basic outline of the requirements of such 'good conditions' based upon soil protection and management issues.

In support of the subsidiarity principle and the continuing recognition that the European regions are extremely diverse, this common baseline is fairly short and 'broad'. The baseline is divided into principal issues, mainly focused upon soil impacts, including erosion, organic matter and structure. These are then further subdivided in requirements and standards to be achieved. Even though remaining rather broad and vague, the provision of the common framework constitutes a much needed baseline for Member States in implementing the instrument of cross-compliance. This may also assist in reducing the great discrepancies experienced in the drawing up of Rural Development Plans and result in some convergence towards more common environmental standards for a particular sector[70] or for agricultural practices generally.

However, it must also be noted that Member States only have to take account of this, meaning that interpretations and application will still greatly differ. It is also expected that in drawing up the environmental conditions of cross-compliance, Member States will be greatly influenced by their existing definitions of good farming practice in their Rural Development Plans. However, these contain a large historical bias including environmental structures already relied upon and implemented in each Member State which may undermine the full application and reference to the common framework provided.

In addition, even though this framework is very appropriate for the management of soil that forms the basis of all agricultural practices, it is limited and lacking in reference to other environmental aspects, such as biodiversity. This indicates that the conditions imposed upon farmers for receipt of their direct payments are indeed extremely basic and general, raising the question as to whether these will be substantial enough to achieve environmental benefit in any sector or environmental concern. Therefore, the achievement of equality, even within this framework, will be largely dependent upon the existing environmental mechanisms in each Member State, the economic and agronomic factors at play at national or regional level, alongside the significance awarded to further environmental considerations.

How can equality in relation to environmental law and policy be achieved in practice or is this impossible?

Conclusion: The achievement of equality for environmental law and policy

It has become apparent that the inclusion of cross-compliance into the CAP has changed the regulatory form of environmental protection measures in agricultural policy. Rather than running counter to the CAP, environmental law and policy may be perceived to have become part of it, its financial structure and Rural Development pillar. It

[69] Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, Mid-Term Review of the Common Agricultural Policy, COM(2002) 394, Brussels, 10.07.02 at 21

can therefore be argued that all the instruments are now in place to achieve equality for environmental law and policy.

For example, the polluter pays principle, upon which environmental law and policy is based, has been fully integrated into the CAP, stating that no payments will be made for those who do not achieve a certain level. Anyone who falls below that level is viewed as a polluter and must pay for their actions meaning that polluters are identified whilst environmental stewards are remunerated. This addresses to a certain extent the issue of fairness and equilibrium raised in relation to the Nitrates Directive. As the action programmes and codes of good practice now form the statutory basis of compliance, any practices going beyond these requirements will be rewarded whether within a designated area or not. However, it must also be ensured that by integrating environmental policies into the CAP, they are not lost or diluted. For example, the fact that the action programmes and codes of good agricultural practice, originating from the Nitrates Directive, have now become a condition of payment, should not remove the fact that the Directive still has its own identity and must be implemented as required in the Directive itself. Therefore, the significance of each environmental law and policy instrument, whether integrated into the CAP or not, must be maintained in addition to receiving the support now offered by the CAP.

In addition, the use of cross-compliance in the CAP has removed, to a great extent, production-related subsidies, placing environmental concerns at the heart of the payments. This in turn means that, unless farmers opt out of the direct payments entirely, they can no longer choose to ignore environmental considerations and obligations and are actively encouraged to care for the land as there is little financial gain remaining in intensification. Furthermore, the common framework has also been created in response to concerns that the extensive diversity between the Member States would hinder the achievement of equality for environmental law and policy within the CAP. However, inequality for environmental law and policy has *still* not been achieved, meaning that justice for the environment *still* does not exist.

In attempting to solve this question of equality, it would be possible to further analyse all the above criticisms of the CAP, such as the restricted application of the cross-compliance instrument solely to those in receipt of direct payments. There are also doubts as to whether decoupling of direct payments has truly been achieved or even whether the use of environmental taxes should be increased in place of cross-compliance. It is even possible to expand upon the interesting theory briefly referred to above regarding the need to focus all legislation and the CAP, rather than on the whole farm approach, but on the principle that the 'natural river basin should be the basic unit for administration and development.'[71] However, whilst these are significant considerations in relation to the enhancement of environmental protection, they will not provide the basic answer to the achievement of equality of environmental law and policy, and deserve analysis elsewhere. On a practical level, these are simply minor points in the far wider picture of achieving equality for environmental law and policy.

[70] Baldock, D., Mitchell., K., (1995) Cross-compliance within the Common Agricultural Policy: a review of options for landscape and nature conservation, IEEP, London at 20

[71] UN revised guidelines, (UN 1970) cited in Jones, J.A.A., (1997), Global Hydrology: Processes, resources and environmental management, Longman, Harlow at 3

Whilst it is true that 'The instruments of the CAP form only a part of Community policy towards the protection of the farmed environment,'[72] there also exists a holistic collection of environmental instruments to complement the developments in the CAP and outside. Equality of environmental law and policy is longer hindered by the lack of policy instruments and frameworks, but by the implementation and realisation of these aids in practice. Therefore, the achievement of equality and justice for the environment lies with the Member States. This has been illustrated by the lack of implementation of the Nitrates Directive and other environmental legislation and with the increased significance awarded to the principle of subsidiarity at Community level. This states that powers are only to be exercised at Community level if they cannot be better attained at Member State level.[73] The use of this principle is illustrated by the definition and application of 'good agricultural practice', laid out in the common framework, but intentionally broad in order to take into account the diversity of Europe's environment. However, unfortunately, this principle also allows for the diversity of significance awarded to the environment and the political strength of those opposed to environmental considerations at the expense of other objectives.

Therefore, 'If the carrot does not work, then the stick has to do the job.[74] The Commission has been heavily criticised for its reluctance and delay in commencing enforcement procedures, even though this has begun to increase with great use of the penalty provisions of Article 171(2). Furthermore, another complaint concerning breach of environmental requirements draws a comparison between the fines awarded in competition, or other areas, and in environmental infringement cases. However, Greece was ordered to pay the daily penalty of EUR 20 000 in a second action under Article 228 of the Treaty for not eliminating toxic or dangerous waste.[75] On 22 December 2000, Greece paid EUR1 760 000, representing the full amounts due at the daily rate of EUR20 000 for the period from 5 July to 30 September 2000.'[76]

Whilst such a 'stick' approach may be necessary as a deterrent, increasing fines for those in non-compliance will not achieve justice for the environment. Whilst the enforcement procedure is continuing, the environment is still being destroyed, resulting in reactive or clean-up measures that are largely unable to return the environment to its former glory. A proactive and motivated approach is required from the Member States themselves in response to this comprehensive framework.

Even though this in itself may appear a theoretical solution to a practical problem, the following shows an illustration of the extent of the need to have Member State support and action and what the Member States are capable of achieving. In the past, Denmark had the worst nitrate pollution in Europe, recording more than 100mg/N/l in almost all the country's waterbodies with the Majara Fjord in NE Jutland declared biologically dead in 1997. However, the

[72] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Directions Towards Sustainable Agriculture, [1999] C173/02 at 11
[73] Article 130r(4) SEA, new Article 174
[74] Ibid.
[75] As required under Directives 75/442/EEC of 15 July 1975 on waste and 78/319/EEC of 20 March 1987 on toxic and dangerous waste: Case C-387/97 of 5 July 2000 due to its delay in implementing measures to comply with judgement of 7 April 1992 (Commission v Greece, C-45/91)

country has taken serious measures to deal with this problem, severely halving all fertiliser application rates. The reduction reached in 1997 was still only 14%, clearly illustrating how extensive the measures in other countries, such as the Netherlands need to be in order to comply. Even after having enforced serious reductions in fertiliser application, 'it is estimated by the Danish government that the limit on cattle farms will be 230kg, 10% above the limit of 210 for the first Action Programme.'[77] Even though it will not be able to achieve the limits set by the Directive in the immediate future, it illustrates the way in which a country is able to adapt in order to tackle the environmental problem.

The instruments to achieve equality for environmental law and policy within agriculture are now largely in place. However, the extent to which equality can be realised in practice, offering justice to the environment through protection and enhancement, depends solely upon the willingness of the Member States to use these instruments to their fullest potential. It must be realised that even though it is far more difficult to encourage change to established policies and practices, economic expansion and environmental quality and equality are 'complementary goals of advanced industrial society'[78] and must both be met without one sacrificing the other.

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[76] Commission of the European Communities, Eighteenth Annual Report on Monitoring the application of Community law (2000), Volume I, COM(2001) 309 final, Brussels, 16.7.2001 at 16-17

[77] Committee on Environment, Public Health and Consumer Protection, Rapporteur: Patricia McKenna in European Parliament, Resolution on the Commission Reports on the Implementation of Council Directive 91/676/EEC concerning the Protection of Waters Against Pollution caused by Nitrates from Agricultural Sources and on Measures Taken Pursuant to the Council Directive 91/676/EEC concerning the Protection of Waters Against Pollution caused by Nitrates from Agricultural Sources, COM(97) 473 – COM(98) 016 – C4-0040/98, European Parliament Resolution, B-Explanatory Statement

[78] OECD, Water Pollution by Fertilisers and Pesticides, Paris 1986 at 77

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THE CLEAN NEIGHBOURHOODS AND ENVIRONMENT ACT 2005

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On 7 April 2005, the Clean Neighbourhoods and Environment Bill received Royal Assent, and became the Clean Neighbourhoods and Environment Act 2005 ("the Act").

Some of the powers will be enacted in June of this year and others will be subject to new regulations that will be enacted in April 2006. Consultation on the regulations and guidance by Defra will follow shortly. More information on commencement of the Act is available at:
http://www.defra.gov.uk/environment/localenv/legbill/commencement-qa.pdf

The Act contains a package of measures the Government hopes will create safer, cleaner and greener communities. The Rt. Hon Margaret Beckett, Secretary of State, Defra, said in February 2005 that "[o]ver the next five years we want to make a real difference to quality of life at all levels from local to global. We want to improve everyday life by a new focus on cleaning up local neighbourhoods, with the Clean Neighbourhoods and Environment Bill giving a new legislative Impetus. Cleaner, safer, greener neighbourhoods will be healthier as well as more pleasant places to live and will reduce poverty and health inequalities."

A summary of the new Act is as follows:

Part 1 – Crime and Disorder

The Act requires local Crime and Disorder Reduction Partnerships to take anti-social behaviour affecting the local environment into account in developing crime and disorder reduction strategies. It gives local authorities new powers to deal with alleyways affected by anti-social behaviour. Thus, local authorities will have the power to make "gating orders". A gating order will enable a local authority to restrict the public right of way over minor highways which attract anti-social behaviour.

The Act also makes greater use of fixed penalties as an alternative to prosecution, in most cases giving local authorities the flexibility to set their own rates.
It also gives parish councils the power to issue fixed penalties for litter, graffiti, fly posting and dog offences.

Part 2 – Vehicles

The Act gives local authorities the power to remove abandoned cars from the streets immediately. It also creates two new offences to help local authorities deal with nuisance parking. The Act makes it an offence if at any time a person:

1. Leaves two or more motor vehicles parked within 500 metres of each other on a road or roads where they are exposed or advertised for sale; or

2. Carries out works for the repair, maintenance, servicing, improvement or dismantling of a motor vehicle or any part of or accessory to a motor vehicle and/or works for the installation, replacement or renewal of such part or accessory on a road.

Part 3 – Litter and Refuse

The Act makes it an offence to drop litter anywhere, including private land and rivers, ponds and lakes. Local authorities are given new powers (litter clearing notices) to require businesses and individuals to clear litter from their land.
The Act strengthens existing powers for local authorities to require local businesses to help clear up litter they generate (street litter control notices);
It enables local authorities to restrict the distribution of flyers, hand-outs and pamphlets that can end up as litter and it confirms that cigarette butts and discarded chewing gum are litter.

Some of the provisions relating to this part come into effect on 7 June 2005 and other commencement dates are yet to be published.

Part 4 – Graffiti and Other Defacement

This part extends the provisions which were introduced by the Anti-Social Behaviour Act 2003 so that local authorities can now give penalty notices for both graffiti and fly-posting.

The Act also improves local authorities' powers to tackle the sale of spray paints to children. The Act strengthens the legislation to make it harder for beneficiaries of fly-posting to evade prosecution and enables local authorities to recover the cost of removing illegal posters.

Part 5 – Waste

The Act amends provisions for dealing with fly-tipping by:

1. removing the defence of acting under employer's instructions

2. increasing the penalties

3. enabling local authorities and the Environment Agency to recover their investigation and clear-up costs

4. extending provisions on clear up to the landowner in the absence of the occupier.

The Act gives local authorities and the Environment Agency the power to issue fixed penalty notices (and, in the case of local authorities, to keep the receipts from such penalties):

1. to businesses that fail to produce waste transfer notes
2. to waste carriers that fail to produce their registration details or evidence they do not need to be registered
3. for waste left out on the streets (local authority only)

The Act introduces a more effective system for stop, search and seizure of vehicles used in illegal waste disposal and also enables the courts to require forfeiture of such vehicles The Act introduces a new provision covering the waste duty of care and the registration of waste carriers The Act introduces a new requirement for site waste management plans for construction and demolition projects and repeals the divestment provisions for waste disposal functions to provide greater flexibility for local authorities to deliver waste management services in the most sustainable way The Act also reforms the recycling credits scheme to provide increased local flexibility to provide incentives for more sustainable waste management.

Part 6 – Dogs

The Act replaces dog byelaws with a new simplified system. Part 6 enables local authorities and parish and community councils to create offences relating to the control of dogs known as a “dog control order”.

A dog control order must relate to one of the following matters:

1. fouling of land by dogs and removal of dog faeces;
2. the keeping of dogs on leads;
3. the exclusion of dogs from land;
4. the number of dogs which a person may take onto any land.

The Act gives local authorities the sole responsibility for stray dogs. Previously this responsibility had been shared between local authorities and the police (the change will come into force only when the transfer of resource has been agreed).

Part 7 – Noise

The Act gives local authorities new powers to deal with noise from intruder alarms.

The powers for dealing with night time noise nuisance are extended from domestic premises to also cover licensed premises.

This part also gives local authorities greater flexibility in dealing with noise nuisance by enabling the local authority to use alternative means to resolve complaints about noise, which qualifies as statutory nuisance, prior to the issuing of an abatement notice.

Part 8 – Architecture and the Built Environment

The Act puts the Commission for Architecture and the Built Environment (CABE) on a statutory basis.

Miscellaneous Provisions

The Act enables local authorities to recover the costs of dealing with abandoned shopping trolleys from their owners and also extends the list of statutory nuisances to include light pollution and nuisance from insects The Act also amends the contaminated land appeals process. It also increases the penalty for various offences relating to pollution.

A NEW SOLUTION TO AN OLD PROBLEM: FIXED PRICE CLEAN UP AND INDEMNIFICATION FOR CONTAMINATED SITES

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This article was first published in May 2005 in issue 151 of the Property Law Journal, published by Legalease Ltd.

Contaminated sites that require remediation present two principal risks to owners and stakeholders: first, the risk of clean-up costs running out of control; and, secondly, the risk of incurring onerous liability to third parties and regulators.

Contamination liability is a classic example of a low probability / high magnitude risk - if problems materialise, they may be very difficult and costly to manage.

Traditional solutions are available to address these risks, but they are less than perfect.

Cost control solutions can be achieved by either of the following traditional mechanisms:

Guaranteed fixed-price remediation

Clients can select an experienced remediation contractor of sufficient financial strength to offer guaranteed fixed-priced remediation (GFPR).

GFPR fixes the cost of remediation by transferring the risk of overrun to the remediation contractor. Additionally, it can guarantee the time-scale for completing remediation.

Remediation cost cap

However, if GFPR is not on offer, then remediation cost cap insurance may be available to remove some of the cost overrun exposure.

However, few insurers underwrite this risk (in the UK at any rate).

Premiums are perceived to be high. Clients may have to retain a fair amount of risk themselves (deductible and a co-insured layer (e.g. 75% of the first £1m of overrun may be insured; 85% of the next £1m, etc)).

As far as the third party and regulatory liability risks are concerned, until relatively recently, clients have only had the choice of retaining risk themselves or transferring it to a third party - e.g. to the other party to the deal (using indemnities and warranties) or perhaps to an environmental insurer.

The value of indemnities is dependent on their enforceability (governed by their scope, triggers and definitions) and the creditworthiness of the party giving them. Indemnity triggers have been and continue to be a source of litigation (e.g. the Cambridge Water Company case - *Eastern Counties Leather Plc v Eastern Counties Leather Group Limited* [2002]).

Insurance is generally available for periods of up to ten years and can address unknown contamination.

Policy wording can be inflexible. Clients sometimes harbour concerns about the general payment record of particular insurers.

A NEW APPROACH

A new solution to the risks of contaminated land liability and remediation cost overrun has been developed. It combines risk funding for remediation and known contamination liability and indemnification, backed by insurance, for unknown contamination liability.

US Origins

TRC INC developed the new solution in the US in 1998. It is known as "environmental liability assumption" or "environmental liability buy-out".

More than a dozen other environmental engineering companies have followed TRC's lead and developed similar solutions, all underpinned by long-term insurance.

In addition, an insurance company with an in-house environmental engineering capability is also offering environmental liability buy out solutions (long-term indemnification with insurance backing).

Over the past seven years, the US environmental indemnification market has expanded considerably. Approximately 25% of the premium income received by US environmental insurance companies in 2003/4 ($600m) was generated from environmental liability buy-outs.

Approximately 100 insurance-backed environmental indemnification deals have been concluded during this period, generating over $2 billion of premium for insurers. Three deals have involved premiums in excess of $100m.

UK Contamination Liability Deals

The first UK contamination liability deal was completed by WSP Environmental in February 2005 for a blue-chip property asset management company (see Case Study 1).
The environmental indemnity was negotiated with the client's solicitors.

Environmental Indemnification

The environmental indemnity will be subject to negotiation, but typically addresses on- and off-site contamination and liabilities arising under current and future environmental liability statutes (e.g. Environmental Protection Act 1990, Water Resources Act 1991), tort and contract (e.g. breach of leasehold covenants).

The indemnity will typically protect specified parties against loss and expense, defined as:

> *"…claims, costs, damages, expenses, judgments, liabilities and losses (including, without limitation, legal costs and expenses and the costs of investigation, removal, disposal, treatment or remediation) which the [indemnified party] is legally liable to pay caused by or arising out of Pollution Conditions [as defined] or relating to any enforcement notice from a regulatory authority* ***in respect of any such Pollution Conditions received by the [indemnified parties] after the [commencement of the indemnity]."***

There may be some limitations attaching to the indemnity - risk scenarios, which will be excluded from the ambit of the indemnity (e.g. bodily injury from high level radioactive materials). However, most restrictions will be subject to negotiation.

Although the environmental indemnification component of the liability solution can be distinguished from a contract of insurance under English law, consultants whose activities include, for example, helping to arrange insurance, will still require Financial Services' Authority authorisation or exemption.

CASE STUDY 1 - SHORT-TERM "BRIDGING SOLUTION"

1. Client and site

A blue-chip asset management company wanted to acquire a large investment site in the United Kingdom. The Site contains a gasometer. The client wished to continue with the present use (B1, B8).

2. Risk

The client wanted to remediate the site after acquisition, but was concerned about cost overrun and the risk of liability during the relatively short period of remediation (less than six months).

The client was comfortable with the long-term, post-remediation risk presented by the site and hence did not seek a long-term contamination liability solution.

The consultant, having undertaken investigations at the site, proposed guaranteed fixed priced remediation, comprising the removal of infill and immediately surrounding materials.

To address the short-term risk, and in light of the Financial Services and Markets Act 2000, the client used an insurance broker.

The Environmental Insurance Market was approached to see whether the site was insurable during the period of remediation. The client was told that environmental liability insurance would only be available after remediation.

The client decided not to pursue insurance because of the coverage gap and because it was not seeking long-term risk transfer.

3. Solution

The consultant designed and implemented a bridging solution to address the short-term exposure period during clean-up. GFPR was provided with an environmental liability assumption by the consultant.

The consultant cleaned up the site under a usual construction contract (ICE Design and Construct 2002).

The consultant warranted that remediation would be carried out to requisite remediation standards. The consultant then indemnified the client for specified environmental liabilities, losses and expenses.

In this case the indemnity was for the lesser of six months or the period of the remediation. The indemnity was capped for a six-figure sum. The indemnity provided protection against specified environmental liabilities during the course of the remediation.

4. Outcome

Having transferred its potential land contamination exposures, the client proceeded with the acquisition of the site.

Remediation has been completed within budget. The indemnity served its purpose. There was no need to claim against the indemnity.

COMMERCIAL APPLICATIONS

The possibilities for liability assumption through indemnities in remediation contracts are manifold.

A fixed price can also be agreed to cover clients beyond the period of remediation (for example, if environmental laws should change and require further clean up of the site) or to protect against the possibility that contamination has migrated off-site.

Sometimes the unknown factors of costs or scale involved in a particular site may be such that the environmental consultant cannot absorb the costs of a potential overrun. This would not affect the service provided to the client; wherever possible, the fixed price remediation principle will still apply.

The indemnity may in such cases be backed up by an insurance policy, either arranged by the environmental consultant to cover its own risks and with which the client does not have to trouble itself, or alternatively, a broader policy, covering the client's risks as well as the consultant's. Arranging a policy in the name of the client ensures that the client will also be protected in the unlikely event that the remediating consultant should go out of business.

At its broadest, the new approach could offer an unlimited environmental indemnity (i.e. with no time or quantum caps), backed up by an insurance policy.

The new liability solutions will appeal particularly to the commercial property markets. A solution which allows vendors to transfer their contingent liabilities and walk away from a contaminated site carries obvious attractions, whilst purchasers will clearly be encouraged by the opportunity to buy properties which they can be sure are 'clean' and will not entail any expensive environmental liabilities.

Finally, the new approach is expected to have an impact on the market for straightforward remediation, where no land transfer is taking place.

CASE STUDY NO.2 - LONG TERM EXIT STRATEGY

1. Client and site

A manufacturing company wanted to sell a site in the south of England. The company had operated the site for more than 40 years. Soil and groundwater was contaminated with solvents and other chemicals used in the manufacturing process. The purchaser's plan was to clean up the site and redevelop it for non-residential use.

The consultant, having undertaken investigations at the site, proposed GFPR for the manufacturing company, comprising the removal of contaminated soils and the treatment of groundwater for up to two years.

2. Risk

The manufacturer was uncomfortable with the risk that environmental liabilities might be incurred prior to, during or following remediation of the site. In particular, it was concerned that solvent-contaminated groundwater might have migrated from

the site, impacting neighbours' property and other interests.

An insurance broker was used to approach the Environmental Insurance Market to ascertain whether the site was insurable for on-site and off-site liabilities.

The client was informed that adequate insurance would only be available after site remediation. The client decided not to pursue insurance further.

3. Solution

The consultant proposed a solution to the client's risk exposure: to address the gap with the consultant's environmental liability transfer solution as part of the consultant's remediation services.

The consultant would clean-up the site (including decommissioning of plant, asbestos removal and demolition) under a standard ICE design and construct contract. The consultant warranted that remediation would be carried out to requisite standards. The consultant then provided a ten year indemnity to the client (and its assignees as applicable) for specified environmental liabilities, losses and expenses.

A leading environmental insurance provider then insured the consultant in the event of a claim being made against the consultant's indemnity by the client. This insurance was for a period of ten years and a seven figure sum.

The risk of contaminants having migrated off site was addressed. Furthermore, the client was insured in the case of an insolvency event affecting recoverability under the consultant's indemnity.

4. Outcome

The client's business objectives were satisfied. Having transferred its potential land contamination exposures, it could proceed with the disposal of the site having finalised an effective exit strategy.

These solutions are particularly attractive because of their bespoke nature; the varying periods of protection offered and the opportunity to structure a package to meet the requirements of a particular client.

IMPLICATIONS FOR LAWYERS

While the new approach cannot protect companies against criminal liability for environmental damage (at any rate in respect of crimes requiring *mens rea* on the part of the offender, on grounds of public policy), it allows parties to pass on their remediation liability, third party liability and legal and technical defence costs to an environmental consultant.

At a time when such liabilities could have an unknown impact on a company's balance sheet, the ability to predict costs in advance and budget for them accordingly will be attractive.

This new approach to contaminated land liability management will enable companies to transfer their contractual liabilities to an environmental consultant, thereby providing a way of 'un-blocking' a deal which might otherwise be lost because of too much business uncertainty.

NEWS ROUNDUP

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Natural Environment and Rural Communities Bill

On 19 May, the Natural Environment and Rural Communities (NERC) Bill was introduced to the House of Commons for first reading. The House of Commons Environment, Food and Rural Affairs Select Committee published the Bill in draft for pre-legislative scrutiny on 10 February 2005.

The Bill implements key elements of the Rural Strategy (published July 2004) and merges English Nature, the Countryside Agency, and certain functions undertaken by the Rural Development Service (a DEFRA Directorate) to create a new independent umbrella agency which will be called called 'Natural England' – which will be responsible for conserving, enhancing, and managing the natural environment.

Local Air Quality Management

DEFRA has issued an addendum to its guidance on local air quality management to update its policy guidance published in 2003 in relation to Part IV of the Environment Act 1995. It aims to assist local authorities with the integration of air quality action plans into local transport plans.

See:-
http://www.defra.gov.uk/environment/airquality/laqm/guidance/pdf/laqm-pga05-addend.pdf

Power Stations and IPPC guidance

The Environment Agency has issued a draft guidance note setting out how it will apply integrated pollution prevention and control (IPPC) to power stations and other combustion plants. Power stations are due to come under the IPPC regime in late 2006 or early 2007. The EA's guidance develops the European BAT Reference (BREF) notes for combustion plants.

For Draft IPPC Section Guidance Note see:-
http://www.environment-agency.gov.uk/yourenv/consultations/1019672/?version=1&lang=_e

Hazardous Waste Regime

Two sets of regulations, due to come into force on 16 July 2005, were issued by DEFRA in early April (SI 2005/895 'The List of Wastes (England) Regulations 2005'). Applying in England only, the first regulation sets out the regime for the control and tracking of the movement of hazardous waste; and the second implements the classification of hazardous waste set out in the European Waste Catalogue. The new provisions replace the system for the

consignment of 'special waste' and extend new classification system to waste management licensing. DEFRA is expected to issue interpretative guidance before the provision comes into force.

See:-
http://www.opsi.gov.uk/si/si2005/20050895.htm

Technical amendments to landfill tax rules

The Landfill Tax (Amendment) Regulations 2005 (SI 2005/759) came into force in April 2005, amending the Landfill Tax Regulations 1996 (SI 1996/1527). Pursuant to regulation 21 of the 1996 Regulations, a registered person is entitled to a credit where he has accounted for and paid landfill tax. This provision was designed to encourage waste producers to produce less waste, to recover more value from waste, and to use more environmentally friendly methods of waste disposal.

Regulation 21 did not apply to sites with permits under the new pollution prevention and control regime. This failure to recognise PPC permits was criticised for giving rise to an adverse situation in which a landfill operator which received waste at a site outside its licence terms was ordered by regulators to move it to another site, meaning that credit could be claimed by the landfill operator of the first site for material removed to the second. Customs & Excise claimed that the old rules encouraged "unscrupulous site operators, who have accepted such waste [outside the terms of their licence], to say nothing about it to their environmental regulator and for the material to be landfilled."

New regulations introduced by the Landfill Tax (Amendment) Regulations 2005 insert 'permits' to the list of regulatory instruments establishing a site as 'landfill' for purpose of claiming tax credit.

See:-
http://www.opsi.gov.uk/si/si2005/20050759.htm

Shifting focus of the Lisbon Strategy

The Lisbon Strategy was launched in 2000, and aimed to make the EU the "most dynamic and competitive knowledge-based economy in the world". Its initial drafting, however, has been widely criticised for failing to give consideration to environmental and sustainable development concerns

In March 2005, at an EU summit in Brussels, it was recommended that the Strategy consider the ideals of economic growth in the context of sustainable development, and that environmental policies support, rather than conflict with, the its fiscal objectives.

Three broadly defined key goals were established – jobs, growth, and process towards EU environmental objectives. Furthermore, a number of other environmental issues were brought to the forum, including greenhouse gas targets after Kyoto Protocol expires in 2012; an eco-innovation environmental technology action plan to boost Europe's share of the world market in environmental good and services; the European commitment to protection of bio-diversity; and, a consideration by the Registration, Evaluation, and Authorisation of Chemicals regime (REACH) of environmental goals.

BAA SHEDS LIGHT ON SUSTAINABLE BUSINESS STRATEGY

On 19 May 2005, BAA hosted a Beacon Network site visit at Heathrow Terminal 5 to demonstrate the work the company has undertaken to integrate environmental strategy into the biggest construction site in Europe. Along with the Environment Agency, BAA demonstrated how the company is managing sustainable building design and construction, as well as relationships with suppliers, to maximise environmental performance while minimising environmental impact.

In addition to touring the half-completed Terminal 5 and learning how BAA was managing environmental impacts onsite, participants on the day had an opportunity to learn about the Environment Agency's modern regulatory partnership approach. In addition, companies and organisations in attendance were able to share experience and debate the most current environmental issues with a large network of peers and subject experts.

This event was part of the Beacon Network, an initiative launched by Business in the Environment (the environmental campaign of Business in the Community) to bring companies the best information on innovative approaches to environmental risks and opportunities, as well as help them develop effective solutions of their own. The Beacon Network seminars provide an opportunity to learn from leading companies' successes (and challenges). In addition, participants can share experiences to improve company environmental performance and advance the corporate environmental agenda.

A report detailing the outputs of this Beacon Network seminar is currently in production. To order a copy of this report or any other Beacon Network working papers, please contact Daianna Rincones at Business in the Community on 0870 600 2482.

BOOK REVIEWS

"NUCLEAR WASTE; LAW, POLICY AND PRAGMATISM" BY PETER RILEY

REVIEW BY IAN SALTER, JOINT HEAD OF ENVIRONMENTAL LAW UNIT, BURGES SALMON LLP

I have the pleasure of knowing Peter Riley from the conference circuit in the nuclear sector, and most recently met him at a conference in South Africa at a meeting of the International Nuclear Lawyers Association. Having heard Peter speak there on the subject of nuclear waste I was not expecting his book to be boring – and it does not disappoint!

This is an area where there is a great deal of law, both international and domestic, but very few texts have dealt with the subject recently and none to my knowledge have just focused on the issue of nuclear waste. I, for one, very much welcome such a careful and detailed study of the law surrounding this area. Where Peter Riley particularly succeeds however is in placing the wide ranging sources of law into a readable and well structured book, and then most importantly he is able to set it against the present context of international and government policy.

This is most illustrated by simply looking at the chapter headings where rather than setting out chapters on the Radioactive Substances Act 1993, the Nuclear Installations Act 1965 etc the chapter headings are as diverse as 'international and government policy'; 'attitudes and influences of stakeholders'; and 'practice, pragmatism and the way ahead'. That is not to say that the detailed evaluation of the law is not there – it is and it is easily findable if one needs to – but this is not an encyclopaedia or reference book but a carefully thought through analysis of the law relating to nuclear waste; and how their application might assist or detract from resolving one of the most pressing and controversial issues facing our generation.

At the moment most of the UK's waste is stored in above service long term storage at various nuclear licensed sites around the country. Efforts by United Kingdom Nirex Limited to develop and build a long term deep geological disposal facility was refused planning permission in 1997. Since then the debate has moved on. Nuclear power is seen by some as the emissions free answer to our energy needs, given that on most people's projections renewables will not fill the gap. Existing nuclear generation plants are coming to the end of their useful life. One of the key objections to "new" nuclear power remains how to deal with the waste.

But that is to ignore the conundrum facing the present generation – the existing waste exists whether new build occurs or not and needs to be dealt with. Against that backdrop the author explains that the government has launched a consultation called "Managing Radioactive Waste Safely" and set up a committee to investigate options for disposal of the waste (CORWM). The government has also announced that Nirex is to become independent of the nuclear industry. The book comments upon the huge emphasis on stakeholder involvement openness and transparency which now pervades those trying to resolve these issues.

Similarly at a European level the Euratom Treaty is showing signs of its age but a new nuclear package has been proposed including a Directive on Radioactive Waste.

Against that lively backdrop Peter Riley's book outlines the factors that determine policy – technological, social, economic and legal and sets in context some of the well established and some of the emerging legal principles. The author also helpfully draws on experience from other countries such as the United States, France, Finland and Korea where those countries have embarked on programs of long term waste disposal. The advances also made in Sweden could helpfully have also been covered in that part of the text.

The chapter on international and government policy is particularly important and welcome and provides an invaluable guide to the international laws and organisations which are involved. With so much environmental law

being issued under the Treaty of Rome there is increasing scope for conflict with measures made under the Euratom treaty and how those conflicts are resolved will be one of the key developments in the next few years.

Peter devotes an entire chapter rightly to the important subject of attitudes and influences of stakeholders addressing such matters as engaging the public, and international and national influences. For those lawyers looking for the black letter law, the sections on sources of law relating to nuclear waste and on national nuclear laws do not disappoint with thorough examinations of the ALARP principle, the justification test in the Basic Safety Standards Directive, optimisation and the ALARA requirement, and UK and EU environmental law. A confusing array of international conventions and provisions exist regarding nuclear matters and the book sets out in clear fashion the network of obligations which exist including reviewing the Paris convention and the Vienna convention as well as more recently the joint convention on the safety of spent fuel management and on the safety of radioactive waste management and some of the important international maritime conventions such as OSPAR and the London sea dumping convention.

In a similar fashion the chapter on national nuclear laws will be invaluable to those practising in this area covering as it does the law surrounding licensing and regulation of radioactive waste as well as its transportation. Again the book looks to the international position to identify what could usefully be imported in to domestic legislation, in attempting to draw together the technical, environmental and social perspectives identified by the INLA Nuclear Waste Working Group report as critical factors in relation to the siting of an installation for the storage or disposal of radioactive waste.

The final chapter of the work entitled "practice, pragmatism and the way ahead" enables the writer to put forward some more personal views and warns that the absence of a sensible strategy for the management of radioactive waste is being hindered by not technical but political obstacles, and that the consequent effect on energy policy and climate change could be very serious indeed. The writer concludes "to ensure that no nuclear plant can be installed without valid opposition and to meet justification requirements two problems remain to be resolved; the first is the question of economics and the second is the management of radioactive waste." The writer can see a clear way ahead in relation to both issues and concludes that the management of radioactive waste should be on the way to being resolved by 2007 after the current consultative process if over. There have been false downs in the past but if the writer is correct then I suspect many members of UKELA will be as grateful as I am that such a clear and helpful text has been written on this important subject.

THE PRACTICAL GUIDE TO WASTE MANAGEMENT LAW
By RGP Hawkins and HS Shaw

Published by Thomas Telford (275 pages)

Review by Andrew Wiseman, Trowers & Hamlins, London EC3. Chair UKELA

Heidi Shaw and Richard Hawkins have attempted the impossible. Anyone that knows Richard well will be aware that the impossible is something that Richard often strives towards! They have attempted to write a practical guide to waste management law while making the book both informative and an easy read. Anyone with even a basic knowledge of waste management law will understand that this is no easy task. The authors claim the book is for those who feel inundated by this rapidly moving area of law. Although not directly aimed at lawyers, it will still be of interest and use to many of us. The authors claim the book is intended primarily for engineers, surveyors, building contractors, accountants, geologists, environmental scientists, insurers and controllers of financial liability, transportation managers, local and central government regulators and enforcers and all those who produce, manage, transport, reuse, reclaim and recycle waste.

It is always debatable whether you can have a book on waste management law that is practical, accurate and is of actual use to such a wide audience. It will always be easy to find flaws but basically this book does "exactly what it says on the cover"!

The book runs through the historical background of waste management legislation starting with the Royal Proclamation Against Using Coal in London in 1306 and ending up (in the space of 18 pages) with the principle of subsiduarity. It then goes on to look at the definition of waste, waste classification and the administration and management of waste. In looking at the waste hierarchy the authors explore minimisation, recycling, bio-processing, energy recovery, incineration and landfill. All of these issues are always looked at against the increasing volume of regulation.

The authors then go on to explore the planning system and other permitting including Integrated Pollution Prevention and Control. Criminal and civil liability are also explored as is health and safety, the Duty of Care Regulations, consignment and the movement of waste and waste management and water quality.

The book is written with the aim of making it readable and is certainly not any form of a boring legal textbook. It walks an interesting tightrope balanced between legal information and political commentary. At no stage could it be described as dry!

The authors are often outspoken and willing to criticise. One example is the 2002 European Court of Justice case *Palin Granit* being described as "a confused decision following inconsistent logic and legal precedent". Throughout the book readers are left with no doubt of the author's views on various issues.

The book contains seven pages of abbreviations and acronyms that clearly indicate the degree to which this area has become full of jargon. The authors do their best to make it an area that non-lawyers can get to grips with. Interestingly, some 50 groups affected by waste management law, ranging from academics to waste producers and civil servants to town planners are listed in the book. Somewhat surprisingly, lawyers do not get a mention, although it is clear from the book that the involvement of lawyers in waste management issues is something that cannot be avoided.

When compiling such a concise book, the authors will always have to be selective in what is included and what is omitted. Their legal and engineering backgrounds have enabled them to do this with good effect and they have used a combination of tables, text and commentary boxes from media reports to make the book more readable and interesting. Wherever possible, website references have been provided.

There is no doubt that this book is well researched, well written and will provide a useful addition to those who require some practical guidance. At no stage could it be described as an authoritative legal textbook nor a formal political commentary on the area. It is something in between providing an interesting and useful introduction to this complex area.

CALLING ALL SCOTTISH LAWYERS

Gordon McCreath of Dundas & Wilson (gordon.mccreath@dundas-wilson.com) is currently looking for enthusiastic new members for the Scots Law Working Group
If interested in getting involved contact Gordon at

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ENVIRONMENTAL LAW MASTERCLASS

You should find information about an environmental law masterclass to be held in September attached to this edition of e-law.
The organisers have offered UKELA members an opportunity to attend at the CLT subscription price mentioned in the flyer (£695 plus VAT, a saving of more than £300). If you would like to attend please print off and return the booking form to the conference organisers (not UKELA). Please write on the booking form that you are a UKELA member to claim your discount.

LETTERS TO THE EDITOR

Dear Editor,
UKELA must take its share of the blame for the resounding "NO" that the French and Dutch have delivered in the E U Constitutional Referenda.
For many years in the UKELA Council and then in its sub-committees I have urged the Association to take a constructively critical approach to the concept of each new piece of E U environmental legislation before seeking to improve its detail. The suggestion always fell on stony ground often accompanied by a susurration of "Eurosceptic". In fact then untrue.

Much of this legislation has arisen from the democratic deficit that gives virtually all the power in the E U to un-elected bureaucrats. Over certainly the last decade too many voters have viewed the E U as a bureaucracy too far - in which they have little or no say.

I hope UKELA now will review its procedures for assessing new EU legislation immediately it appears on the horizon. For example few doubt now that the landfill directive was clearly legislation to which the principle of subsiduarity should have applied

Yours truly
Richard Hawkins
Founder Member UKELA

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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 July 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 12 July 2005.
Please use Arial font 11pt. Single space.

Letters to the editor will be published, space permitting