e - law

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REVIEW OF THE YEAR

Once again, it has been a busy year. 2005 has seen UKELA go from strength to strength, both in terms of what we provide for members and our external work.

We have recently taken on a part-time Member Support Officer who will (among her many tasks!) assist us in ensuring that our regional groups and working parties remain active. I would urge you to get involved in a regional group and/or working party. Not only will your involvement ensure that UKELA remains active, I am sure that you will find it a rewarding experience.

Once again, we had another fascinating and successful conference. This year we went to Edinburgh and, as well as interesting and useful sessions, we had a number of high profile speakers. I am very grateful to Jim Drysdale from Anderson Strathern for the work that he put in to ensure that the conference ran smoothly and was a financial success. Work has begun on the 2006 conference and more details of that will follow in the next edition of E Law.

UKELA has recently been carrying out some work with NGOs and the Government in Northern Ireland to work towards an independent environment agency for the province. This, coupled with the work of our various working parties, provides UKELA members with a real insight into the workings of Government and the possibility to influence legislation.

We will finish our year with the Garner lecture. This takes place after I am writing this column, although I am fairly confident that I can say that the event will be another success and a further milestone for UKELA.

I would like to take this opportunity of wishing you all seasons greetings and a happy and healthy 2006.

Andrew Wiseman
Chair, UK Environmental Law Association
Trowers & Hamlins
London EC3

WILD LAW CONFERENCE

Simon Boyle of Argyll Environmental and Begonia Filgueira of Gaia Law Ltd

Background

Cormac Cullinan's book Wild Law, A Manifesto for Earth Justice, was first published in 2002. It advocated a complete overhaul of our current legal environmental systems which, according to Cormac, merely endorse the wholesale destruction of the Earth and its life-support systems. In their place he argues for governance systems that are not wholly human centric but respect and promote the interests of all other species with whom we share the Earth.

Following the book's publication a number of UKELA members, including Donald Reid, were involved in discussing and developing the ideas of the book working in small ad hoc groups with a strong interest in this specialist area. The idea behind the conference originated in a conversation between Elisabeth Rivers (Environmental Mediator and friend of Cormac) and the author. From this a small 'Wild Law' group

was set up which began to plan for the conference and Council gave approval to run the conference as a UKELA event.

Brighton University kindly agreed to support the conference and provide their facilities free of charge.

The group selected a mix of speakers who, whilst enthusiastic about the book, would nevertheless subject it to rigorous intellectual scrutiny in accordance with UKELA's normal high academic standards. Ideally Cormac would have been present to present a paper about his book. However he lives in South Africa and so transporting him over presented both financial and environmental problems. He was however kept informed of developments and as well as providing moral support wrote two papers for the conference.

This article summarises some of the key points made by the Chairman and the speakers at the conference.

Papers

Rt. Hon Michael Meacher MP, Chairman
A Political Overview

The Chairman outlined some of the stark statistics and facts relating to the relentless destruction of the planet that he considered in their political context. He reminded us that at the start of the 19th century the population of the planet was just under 1 billion; today it is nearly 7 billion and growing at a rate of 1 billion every 12 or 13 years. This is simply not sustainable.

The overwhelming scientific consensus is that man made C02 emissions are the primary cause of to global warming. To prevent runaway overheating of the planet we need to reduce C02 emissions by 60% by 2050. However currently neither the world's largest economy (USA) nor the two fastest growing economies (China and India) will sign up to Kyoto. In the meantime the effects of global warming are already apparent and identifiable consequences such as the melting of Siberian permafrost and the consequential release of millions of tons of methane- are already occurring which will accelerate global temperature increases.

The political backdrop to this is a world where large global corporations predominate and all is subordinate to the trade imperative, indeed at the next world Trade Organisation on Hong Kong every element of the biosphere will be up for sale.

Cormac Cullinan's book offered a real alternative to the current pattern of global destruction. There were six key questions that should be tackled for the ideas to be translated into positive action:

1. Can Cormac's legal framework be made to work?
2. Will it resolve underlying problems?
3. How will it fit with free market economies and the dominance of global corporations?
4. Will there be political will to enable the ideas to take root?
5. How can you get the ideas onto the public agenda?
6. How compatible are the ideas with the maintenance of current living standards?

Professor Jacqueline McGlade, Executive Director, European Environment Agency
European Policy

Professor McGlade said that at EU policy level there were principles, such as that on marine conservation, that were visionary and matched much of the language of Wild Law. Indeed in Scandinavian countries they were already practising what could be termed Wild Law.

She did not feel that economic growth need be at the expense of the environment and for example much was being done to de-couple waste growth from economic growth. She accepted that in some areas there was much to be done. For example the Waste Packaging Directive had not achieved its objective in reducing such waste but merely in measuring it.

In other areas though there had been notable successes from which much could be learnt. She considered the implementation of the Urban Wastewater Treatment Directive. Twenty years ago Denmark and the Netherlands set about implementing this legislation by means of very different strategies. Denmark went for a technological end of pipe solution whereas the Netherlands took a holistic approach with an emphasis on conserving and reusing water. Twenty years later whilst both countries comply with the Directive the cost to the Danes is six times more than to the Dutch.

Professor McGlade concluded that we should go back to the original environmental aspirations of the European Union. There was the political will and enthusiasm to achieve these aims; although the current Commission President Jose Manuel Barrosso's policy is concentrating more on economic growth than on environmental issues. What was required was for those with the political vision to assist in providing the legislation that would deliver these aims.

Professor Lynda Warren, University of Wales Aberystwyth
The Basic Philosophy of Wild Law

Professor Warren tackled the subject both as a lawyer and biologist. She had no doubt that humans were changing the world but this was not necessarily a 'bad thing' as Cormac was saying.

The Earth had already undergone five mass extinctions, the most recent - 65 million years ago - resulted in the total extinction of all species of dinosaurs and all species of ammonites. From a human perspective this was a 'good thing' as it enabled mammals to become the dominant large animals and for our own species to evolve.

The so-called spindle model can predict the life cycle of a species by using a mathematical equation. This model states that a given species will increase in number, reach a plateau and then decline. Worryingly for us humans the number of families of mammals is already in steep decline.

Professor Warren considered homo sapiens to be just another species, albeit the Earth's dominant species at present. As with any other species our behaviour is constrained by our genetic make up, shaping not just our physical features but also our psychology.

As a species humans are very intelligent but also inherently selfish and aggressive. Whilst these traits have assisted us as a species to achieve relatively short term objectives we do not appear capable of adapting our psychology to meet the new global challenges that we have created by changing the environment. There are countless examples to illustrate this including overfishing of marine fish. Scientists and fishermen alike know that already depleted stocks will soon be gone forever but this does not stop the fishing. Fishermen know that if they were to take fewer fish to aid conservation then someone else would simply take more; everyone plays the short-term game where altruism does not pay.

Professor Warren does not agree with Cormac that as we go about destroying ecosystems and other species we are going against nature. We are in fact part of nature and everything we do is part of nature although it may well be against our long-term interests. She suggests that Cormac is in error by saying

that we need to shift away from our anthropocentric focus on the Earth. Ultimately Cormac wants our species to survive in the long term and this itself is an anthropocentric viewpoint.

If we humans continue on the path of ecological destruction and fail to make the necessary adaptations then our species is unlikely to survive. From our (and arguably Cormac's) human centred viewpoint this would indeed be 'bad' – but for the Earth itself it would simply be another 'spring cleaning' where species come and species go but life, in its widest sense, goes on.

Professor Robert G Lee, Cardiff University
Wild Law in Practice

Professor Lee began by stating his enthusiasm for the book and the many ideas in it. However there was a fundamental problem from the start. To his mind law was about regulating human conduct and so the very title 'Wild Law' created an oxymoron: 'if it's wild it isn't law and if it's law it isn't wild.'

As with Professor Warren he believed that Cormac's attempt to create a legal system that was not inherently human-centred was misplaced. In the book Cormac provides the concepts of Great Jurisprudence (essentially the characteristics that make the Universe what it is) and Earth Jurisprudence which is the governance system derived from and harmonious with the Great Jurisprudence.

Professor Lee queried how the Great Jurisprudence could be viewed other than through the human lens so that the resulting Earth Jurisprudence was anything other than a totally man made system to govern human behaviour, after all, he reminded us, we are only human.

There is then the question of why Cormac felt he had to start from scratch in developing his concept of Earth Jurisprudence. Cormac wants us to do away with the entire legal infrastructure we have in place. Further he also rejects jurisprudential philosophies which are quite close to Wild Law. Professor Lee viewed Wild Law as close to the work of Hart and others on natural law. There appear to be strong parallels between natural law as both use a value standard to judge what is right and wrong – similar to Hart's Great Law is Cormac's Great Jurisprudence, with its inherent concepts of justice and morality In Wild Law Cormac attacks the traditional notions of property ownership. It is wrong says Cormac, to pretend that we can 'own' the Earth after all humans did not create land. Our legal system though seeks to legitimise such a falsehood and encourages us to see land as a commodity, which can then be abused and exploited.

Professor Lee profoundly disagrees. He cites Hardin's 'Tragedy of the Commons' to show that the idea of a resource open to all will (as with fish stocks) inevitably result in over exploitation of the resource which becomes increasingly scarce until ultimately it is lost. Given the human predisposition for short-term gain, the only way to conserve the natural resource is through the allocation of property rights (however that might be done) which then encourage long-term husbandry.

Nor is Professor Lee convinced by Cormac's total rejection of ecological modernisation, which currently underpins modern environmental law. According to Professor Lee, this concept can be traced back at least to 1971 when the German Environmental Action Programme of that year emphasised technological innovation to drive environmental improvements. There is surely much to recommend in an outlook that aims to substantially reduce our environmental impact make good use of any technology we have to assist us in this endeavour and has clearly stated guiding principles that are not tied into morality. Professor Lee placed his hope for the future in sustainable development and not in Wild Law.

Begonia Filgueira, Overall Assessment

Begonia had perhaps the most difficult task, that of summarising the arguments that had been put forward by the speakers and assessing these against those in the book.

Humans may pretend to believe otherwise but are not the centre of the Universe. Our existence depends entirely on maintaining the delicate life support systems of our planet. If these are destroyed then no amount of money will make good that damage and our fate as a species will be sealed. Cormac was therefore right in reminding us of these inescapable facts. The big question is whether it matters whether our species survives?

If we think it does matter (which presumably most humans would think) then we somehow need to be able to act for the long term good rather than short term gain. If we look at how we have behaved in the last hundred years it is difficult to find much where we have truly acted in the interests of future generations. We have simply plundered natural resources as fast as we can (look at the rate we have used up oil and gas reserves, felled the forests and fished the seas). What will future generations make of this?

Begonia argued that Cormac was right to say that we needed to stop putting short term human needs at the centre of our decision making and start to grant rights to nature and all living beings. What was required was a Gallilean shift – to remember that we revolve upon the Earth.

Although we could not escape anthropocentrism to the extent that we are humans we can nevertheless change the basis of our laws so that they are written to deliberately protect other species from harm caused by man. The creation of wilderness corridors to allow for the migration of species is one such example.

She disagreed with Cormac that we should do away with all that has gone before us and start afresh both in terms of legal principles and actual laws. Cormac's solution was for her a moral stance not a legal mandate. But that moral stance should be taken by individuals, as then the will would exist to create balanced law where there is a balance between the rights of humans and all other living beings.

Humankind has to

- wake up to the fact that we have a problem- the greatest that we have ever faced- and that if we want to survive in anything longer than the very short term we cannot continue as we have. In order to survive change is not an option but a necessity.
- take action - if we want change we need to do something about it. First individuals need to understand their impact on the Earth and decide to reduce this impact. We all want a cure to our problems but do not recognise that actually we cause these problems.

The paradox is that our predicament has arisen because of carrying out activities that we deemed to be 'good'- raising large families, achieving economic growth, material possessions and fast travel. This is probably why, although many people now acknowledge that for example climate change is a reality, maybe none of us (because it is outside of our experience) can grasp the enormity of what needs to be done. Maybe then, as George Monbiot suggests, we are destined to remain in a dream world created by the here and now which we project into a make believe future.

As with all of human history the great changes always start with individuals taking positive action. That is why Wild Law has so much to offer as it seeks to empower individuals so they can then collectively make changes.

No one person will have all the answers. The Wild Law book is a good starting place to begin the dialogue and each of the speakers made very positive contributions in helping to explore the ways forward.

"OPEN ENVIRONMENT"

Martha Grekos[1], Barrister, No5 Chambers, reports on provisions for public access to environmental information

Background

An important way of making environmental protection laws effective is by giving the public access to environmental information held by public authorities. As Principle 10 of the Rio Declaration sets out "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided…"[2]

On 25th June 1998, the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted (Aarhus Convention). The Aarhus Convention acknowledges that we owe an obligation to future generations and that sustainable development can be achieved only through the involvement of all stakeholders. It links government accountability and environmental protection, by focusing on interactions between the public and public authorities in a democratic context. It provides for:

- the right of everyone to receive environmental information that is held by public authorities ("access to environmental information").
- the right to participate from an early stage in environmental decision-making. ("public participation in environmental decision-making");
- the right to challenge, in a court of law, public decisions that have been made without respecting the two aforementioned rights or environmental law in general ("access to justice").

The EU has taken steps to update existing legal provisions in order to meet the requirements of the Aarhus Convention. The main instrument to align Community legislation with the provisions of the Aarhus Convention on public access to environmental information is Directive 2003/4/EC on public access to environmental information (which repeals Council Directive 90/313/EEC).

The idea is that properly informed public can ask questions and demand answers. This pressure would then result in more action by public authorities (and by private companies with public responsibilities), to be more accountable for their actions and to address any environmental concerns. It is all about government accountability, transparency and responsiveness. The balance of power from the regulators is bound to shift.

Introduction

The Environmental Information Regulations 2004 ("EIRs") came into force on 1st January 2005, to coincide with the Freedom of Information Act 2000 ("FOI Act"). They clarify and extend previous rights to

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[2] Earth Summit, Rio de Janeiro, 1992.

information and the EIRs replace the Environmental Information Regulations 2002. The EIRs implements the EC Directive on Public Access to Information (2003/4/EC).

There are principally three pieces of legislation, which make up the UK's access to information regime:

1. The Data Protection Act 1998 (applying to both the private and public sectors);
2. The Freedom of Information Act 2000 or the Freedom of Information (Scotland) Act 2002; and
3. The Environmental Information Regulations 2004 or the Environmental Information (Scotland) Regulations 2004.

A useful flowchart provided by the Information Commissioner highlights how these three pieces of legislation work together. See:
http://www.informationcommissioner.gov.uk/cms/DocumentUploads/EIR%20-%20Flowchart%20to%20request%20information.pdf

Any request for environmental information held by/on behalf of a public authority, or a body carrying out a public function, must be dealt with under the Environmental Information Regulations 2004. If part/all of the information which falls within a request is personal information, where the applicant is the subject of the information, access to that information will be dealt with under the Data Protection Act 1998. A request for information (from a public authority) where that information is neither environmental nor personal will be accessed, and dealt with, under the Freedom of Information Act 2000.

As the definition of environmental information is significantly broader under the new EIRs, many more requests for information may now be subject to the regime than were previously. The introduction of a public interest test to all exceptions may result in the disclosure of information which previously may have been withheld. There is also now less time to deal with requests. The uses to which the rights of access to environmental information may be put are endless.

Who is covered?

The EIRs only apply to 'public authorities' and this is given a broad definition. There are three limbs to the definition of 'public authority'.

Under the first limb, the EIRs apply essentially to the same public authorities that are covered by the FOI Act:

1. Central government and government departments
2. Local authorities
3. Health and education establishments
4. Police forces and prison services
5. Advisory groups, commissions and agencies

The second limb also includes "Any body or person carrying out a function of public administration". Defra's Guidance states that "function is taken to include the provision of services".

The third limb of the definition of public authorities also includes:

"Any body or person under the control of a public authority who has responsibility in relation to the environment. This includes some private companies, public private partnerships, for example companies involved in energy, water, waste and transport."

The Guidance explains what "control" means. For example, it can mean a relationship created by a contract. 'Who' is covered is likely to be one of the points to be tested in court. It is useful, therefore, when interpreting any of these limbs to have regard to the overriding policy aim of the Directive in amending the definition of 'public authority' i.e. to cater for the impact of privatisation in different Member States upon the ability of members of the public to access information.

What is covered?

The EIRs only cover "environmental information". The definition is very wide and includes written, electronic, visual or audio information on:

1. the state of elements of the environment (such as air, water, soil, land, landscape and natural sites, flora and fauna, including cattle, crops, GMO's, wildlife and biological diversity) and interaction between them,
2. the state of human health and safety, conditions of human life, the food chain, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment and interaction between them,
3. substances, energy, noise, radiation or waste affecting or likely to affect the state of the elements of the environment and interaction between them,
4. measures (including administrative measures, policies, legislation, plans, programmes and environmental agreements) and activities affecting or likely to affect, or intended to protect the state of elements of the environment and the interaction between them,
5. emissions discharges and other releases into the environment,
6. cost benefit and other economic analysis used in environmental decision-making.

There is no geographical restriction or a time limit on historical data (so it includes information collected before the EIRs came into force).

A public authority is only obliged to disclose environmental information that it "holds" and it can be information held by third parties on behalf of that public authority (e.g. consultants; passed for safekeeping to the national Archives).

Environmental information does not include non-existent information that could be created by manipulating existing information nor information that does not exist until further research has been carried out or information destroyed in accordance with established records management procedures.

Public authorities must not alter records to avoid disclosure, as then they would be committing an offence.

The request and the response

An applicant must make a request in order to exercise their right of access to environmental information. This can be made in writing, by e-mail, orally over the telephone or during a meeting, or by some other means of communication. It can come from anywhere in the world. No interest or reasons need to be shown or proved.

An applicant will need to describe the information sought. If a request is unclear the applicant could be invited to clarify their request (within 20 working days after receipt of the request). The more detail an applicant provides, the more readily will a public authority be able to locate the information.

The Regulations require public authorities to provide “advice and assistance” to those who propose to make or have made a request for environmental information. The Code of Practice expands on this:

1. Publishing information about the procedures a body has adopted for handling requests for information
2. Explaining to an applicant their rights under the EIRs
3. Transferring requests to other public authorities or bodies
4. Clarification of a request
5. What constitutes appropriate assistance
6. Relevant differences between the EIRs and the FOI Act.

Once a public authority decides that it will disclose information it must do so in the form or format requested by the applicant. If the public authority does not use the applicant’s preferred format, it must explain its decision to the applicant.

The EIRs also provide for the transfer of a request from one body to another if the body receiving the request does not hold the information but believes that another public authority holds that information requested. When a request is transferred, the body transferring the request must complete the process by issuing a decision letter within 20 days of receipt of the request.

No charge may be made for advising on the availability of information or inspection of public registers. A reasonable charge may be made for the supply of environmental information, such as cost of photocopying.

REFUSALS

The EIRs contain a presumption in favour of disclosure of environmental information. Refusal is only permissible on the limited grounds set out in the EIRs.

The exceptions under which environmental information may be withheld are listed under Regulation 12 sections (4) and (5). These have been referred to as “standalone” and “adverse impact” exceptions.

However, the exceptions must be weighed against the public interest served by disclosure. The process of considering the balance between interests is referred to as ‘the Public Interest Test’.

In “the Introduction to the Freedom of Information Act 2000”, the Commissioner lists four public interest factors that would encourage the disclosure of information:

1. furthering the understanding of and participation in the public debate of issues of the day.
2. promoting accountability and transparency by public authorities for decisions taken by them.
3. allowing individuals and companies to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions.
4. bringing to light information affecting public health and public safety.

Where one of the 5 standalone exceptions applies, a public authority may choose to withhold information if it is satisfied that the public interest in maintaining the exceptions outweighs public interest in disclosing the information.

Where one of the 7 adverse effect exceptions applies, a public authority may choose to withhold information requested only where it is satisfied that disclosing information would 'adversely affect' the interest protected, and where it is also satisfied that the public interest in maintaining the exception outweighs public interest in disclosing the information.

Regulation 12(5) (d) to (g) are distinguished because public authorities are not permitted to rely on them to refuse to disclose information which relates to information on emissions.

Where the response to a request contains a refusal to make information available, and/or a refusal of a particular form or format, the refusal must:

1. Be in writing
2. Give the reasons for refusal
3. Give details of the mechanisms available for reconsideration of and appeal against the decision to refuse

When giving reasons for refusal to make information available a public authority must specify:

The particular provision of Regulation 12 or 13 relied upon
The basis on which the provision applies
In the case of specific exceptions, the reasons for claiming that, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

A refusal notice must be served within 20 working days of the receipt of the request. If neither a refusal notice nor the requested information is received within 20 working days (unless extended) then:

1. the applicant has 40 days within which to make representations to the public authority in relation to its failure to comply with its obligations; and
2. if, within 40 days of receipt of the representations, the public authority gives either no response or gives a response which the applicant is not satisfied, this will constitute non-compliance with the regulations enabling the applicant to make a complaint to the Information Commissioner.

Under Regulation 12(6), a public authority can respond to a request by "neither confirming or denying" that the information requested exists. This is intended to cover situations where a person makes a very specific request and the mere acknowledgment that the information is held may prejudice one of the matters that are supposed to be protected by the exceptions.

Complaints

Public authorities must have in place internal procedures to deal with representations to it alleging non-compliance with the EIRs. See the Code of Practice.

A further right of appeal is available to any member of the public to the Information Commissioner if they are dissatisfied with the outcome of an internal review of a case that has been carried out. The outcome of that appeal may be referred to the Information Tribunal. There is also an appeal to the High Court on a point of law.

The Regulations import the enforcement provisions of the FOI Act. The Information Commissioner may apply for a warrant to enter, search and seize material if it appears that a public authority is not complying with any of the requirements under the FOI Act. The offence is created for altering, destroying etc any information requested.

Conclusion

All public authorities should review their existing procedures for dealing with environmental information. They should consider carefully whether the new regime does actually apply and, if so, whether it is in a position to meet the significant demands, responsibilities and timeframes the EIRs entail. More guidance on such practical issues are stated in chapter 9 and 10 of the Guidance. As there are many parallels between the FOI Act and the EIRs there is a case for using a very similar procedure and developing and harnessing a combined expertise. However there are differences between the two regimes which need to be accommodated. Overall, the new EIRs are likely to lead to greater transparency in many aspects of environmental decision-making.

RIGHT TO KNOW: IS IT WORKING?

Vicki Elcoate
Executive Directive, UKELA

The challenges and benefits of enhanced access to environmental information were discussed at the recent joint conference held by UKELA and the National Society for Clean Air (NSCA) at the National Exhibition Centre in Birmingham.

The combination of the Freedom of Information Act (FOIA) and the Environmental Information Regulations (EIR) has led to more opportunities for the public to access information and a greater burden on public authorities to provide it. Over 40 delegates from NSCA and UKELA attended the conference, which was chaired by NSCA President Prof. Richard Macrory and UKELA Chair Andrew Wiseman.

Had the legislation, as promised by Ministers at the time led *"to cultural change throughout the public sector…. It will give citizens a right to know and a right to appeal to the commissioner if they do not get the information that they have sought. That is a fundamental change in the relationship between the citizens and the state*"?

Expectations from civil liberties groups had been high. As Maurice Frankel, of the Campaign for Freedom of Information, said: "*Public perception of public authorities is that they're not to be trusted, cover up their mistakes and are secretive. This perception makes it more difficult for them to do their job properly. Being open demonstrates professionalism and enhances credibility*".

Friends of the Earth had put the legislation to the test as soon as it was introduced in January 2005 and Phil Michaels, Head of Legal, had some criticisms. *"Delay is the number one problem"*, he said.

Friends of the Earth had put in twelve complaints since January, some on behalf of community groups, and received no substantive outcome for any of them. *"Public authorities are also getting the basics wrong",* he said. *"Members of the pubic don't know if they are being fobbed off with a less than adequate response".* He also questioned the legislative framework as confusing: *"Freedom of Information is used instead of the Environmental Information Regulations when the request falls under the EIR".* His advice to public bodies was: *"Members of the public need advice and assistance; get your records in order and err on the side of disclosure".*

Many speakers noted the differences between the FOIA and EIR, which was driven by European legislation. *"There are a lot of advantages for the user under EIR – it applies to a wider range of public bodies, has fewer exemptions and its access requirements trump statutory bars",* said Maurice Frankel.

Bridget Forster, of No 5 Chambers and a UKELA Council member, said: *"One of the major benefits of the EIR is that the right is not confined by subject matter (other than the need for the information to be environmental), it is not confined by the persons who may exercise it and it is not confined by motive. Another benefit of the regulations is that the regime is less limited than the FOIA".*

She listed the EIR's benefits as:

- All exemptions (with the exception of part of the personal date exemption) are subject to the public interest test
- The EIR states that a public authority must "apply the presumption in favour of disclosure" The exemptions must also be interpreted "in a restrictive way"
- Information about emissions cannot be withheld under several key exemptions, including the exemption for commercial confidentiality
- The right of access to environmental information overrides any restriction on disclosure in other legislation or under common law. This is the opposite of the position under the FOI Act where these restrictions override the rights of access
- Where the information that has been requested has been produced by the authority or on its behalf, the authority is required to ensure that it is up to date, accurate and comparable.
- In addition the Regulations are retrospective in that they apply to "environmental information" irrespective of whether it was created or received before the Regulations came into effect in contrast to the FOIA s1(4).

The main problem of EIR, which several speakers highlighted, was the cost of accessing the information. There were no standard charges and the notion of what constitutes a reasonable cost, which is what EIR requires, is highly variable. Bridget Forster said: "the regulations state that the public authority may not charge more than what it is satisfied is a reasonable amount. This is a subjective test that does not transpose the objective test in the Directive. It can be seen that the issue of "reasonable cost" is one that the Information Commissioner has had to deal with".

Phil Michaels of Friends of the Earth claimed that the Information Commissioner's decisions on this issue "show a serious misunderstanding of the EIR, FOIA and the Aarhus Convention. The Information Commissioner should put in place an objective test on reasonable cost".

Gerrard Tracey, the Assistant Information Commissioner, said that over 2,000 complaints had been received since last March, over 700 had been closed and 69 decisions had been issued. It was clearly early days and the Commissioner was developing advice and guidance on various issues that had arisen. For instance, in the next couple of weeks guidance will be published on the Commission's website about what refusal notices should include (www.ico.gov.uk).

"We've found that a lot of refusal notices are of poor quality with not enough explanation about reasons for non-disclosure", Gerrard Tracey said. "The legislation does make for better decision-making and government. Our main aim is to resolve complaints informally. If that's not possible a decision notice is served and published on the website".

Two speakers from public authorities set out their experience of implementing the new right to know.

Surrey County Council – in common with other local authorities - had no extra resources for access to information but was providing additional staff time and training volunteers. Considerable work was generated by monitoring how the legislation was being applied and to introducing new policies and guidelines.

Speaker Thomas Deards said the County Council had received a plethora of different requests for information ranging from incineration proposals, highways surface water quality, air quality and emissions and even a request for an aerial photo from 1913. The challenges in dealing with them included deciding what constituted "environmental information", what could be excluded because it was deemed to be "manifestly unreasonable" and how to interpret the use of the "internal communications" exemption.

Chris Jarvis of the Environment Agency said they'd received over 7,000 requests for information, only a few hundred less than the whole of central government. However he was confident that the Agency was on top of the job: "we have a stated policy of being an open and transparent organisation – I think we are about 95% of the way there on providing access to information. We want people to be asking us for information".

The Vice-President of NSCA, Derek Osborn, who's a non-executive director of Severn Trent, said that business had for a long time recognised that "cover up is much worse than a culture of openness. Providing access to information is a consolidation, not revolution".

Stephen Shergold, of Denton Wilde Sapte, advised local authorities on the right to know regime. He reminded the audience of Lord Hoffman's principle from 2001: "the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues". He urged public authorities to be proactive on disclosure.

The NSCA and UKELA plan to hold another event in 2006, bringing together local authorities, lawyers, consultants and others. Watch this space for details.

More about the National Society for Clean Air

NSCA is a registered Charity with regional divisions throughout the UK. NSCA brings together organisations across the public, private and voluntary sectors to promote a balanced and innovative approach to understanding and solving environmental problems.

NSCA is both active and influential in the fields of air quality, noise, land quality, local environment management, and industrial regulation. It has over 100 years experience of environmental campaigning, public information provision, producing educational resources and policy formulation.

It offers members -

A chance to influence policy: NSCA is recognised nationally and internationally for its balanced arguments, response to issues, integrity and promotion of pubic education. Policy formulation is developed as issues arise through the NSCA Committee structure, specialist working groups and training events.

Events: NSCA organises conferences, workshops and training seminars and publishes a wide range of information and educational material and regular briefings on current issues.

Information and Publications**: NSCA publishes information material on a wide range of environmental issues for the public and professionals, including the annual Pollution Handbook which provides a comprehensive overview of pollution control legislation and the monthly NSCA Briefing provides regular updates.**

Associated Organisations: NSCA's broad federal structure allows it to develop collaborative partnerships with other like-minded bodies.

NSCA members benefit from joining a national network of environmental professionals, with the opportunity to:

- exchange views and experience on policy and practice
- influence development the development of sound policy and effective practice
- promote wider education on environmental protection issues.

To find out more about membership contact NSCA on 01273 878770 or admin@nsca.org.uk.

UPDATES

The future of CAP

On 2 December 2005, DEFRA published a paper commenting on the sustainable evolution of the European Union's Common Agricultural Policy (CAP). It acknowledges that CAP is "increasingly out of step with the need for Europe to respond to the challenges of globalisation", and proposes radical change to its long-term development. It recommends the sustainable implementation of CAP that reduces the costs of protectionism on developing countries, promotes the expansion of world trade, and more effectively protects the environment. The paper focuses on operation of CAP along a timescale of 10 to 15 years, and aims primarily to stimulate and inform debate.
See 'A Vision for the Common Agricultural Policy', DEFRA, December 2005.

The international launch of Partners for Environmental Co-operation in Europe (PECE)

The launch of PECE in November marked a commitment to a sustainable future in Eastern Europe, Caucasus and Central Asia (EECCA). It brings together UK-based organisations from civil society, and public and private sectors to promote environmental protection and sustainable development in the EECCA region. This multi-stakeholder partnership identifies priority areas to which PECE expertise will contribute, including: biodiversity, water, education for sustainable development, energy, public participation, municipal and community capacity building. For more information, see www.pece.co.uk.

Court of First Instance rules in favour of UK emissions trading (Case T-178/05)

The European Court of First Instance has annulled the Commission Decision declaring that the UK's proposed amendment of its plan for the allocation of greenhouse gas emission allowances was inadmissible.

Directive 2003/87/EC establishes a Community scheme for greenhouse gas emission allowance trading aiming to reduce such emissions. Member States are required to develop a national plan for the allocation of greenhouse gas emission allowances, stating the total quantity of allowances that Member States intend to allocate and how it proposes to allocate them.

In April 1004, the UK notified the Commission of its national plan, indicating that it was provisional. It stated that the total quantity of allowanced between 2005 and 2007 would be 736 million tonnes of carbon dioxide, but that this figure was subject to further revision in the light of ongoing work.

In June 2004, the Commission informed the UK that its national plan was incomplete and that the missing information had to be supplied. In July, the Commission adopted a decision specifying that (i) aspects of the UK national plan were incompatible with the Directive and had to be amended by September 2004;

(ii) the total quantity of allowances specified could not be exceeded; and (iii) any amendments to the national plan had to be notified to the Commission.

In November 2004, the UK, having informed the Commission that it was unable to provide the additional information required until a public consultation had been completed, proposed to increase the quantity of allowances of carbon dioxide. The Commission adopted a decision stating that the proposed amendments were inadmissible. The UK asked the Court of First Instance to annul this Decision.

The Court held that the Commission could not restrict a Member State's right to propose amendments to its national plan. Accordingly, such a restriction would "deprive the public consultation prescribed by the Directive of its effectiveness". The Court also noted that, given that the Directive aims to reduce greenhouse gas emissions in the context of the needs of the European economy, Member States must be allowed to propose amendments if its national plan is based on incorrect information. On this basis, the UK was entitled to propose amendments until it had adopted its final plan.

New Animal Welfare Bill

The Animal Welfare Bill, described as "the most significant animal welfare legislation for nearly a century", has been introduced to the House of Commons and was published in October. It replaces the Protection of Animals Act, which was first passed in 1911, and also consolidates more than 20 other pieces of legislation. The Bill is aimed primarily at the keeping of non-farmed animals, and applies only to vertebrates. In essence, it:-

aims to reduce animal suffering by enabling preventive action to be taken before suffering occurs;
introduces a duty on those responsible for animals to do all that is reasonable to ensure the welfare of their animals;
deters persistent offenders by strengthening penalties and eliminating loopholes, e.g. those causing unnecessary suffering to an animal will face up to 51 weeks in prison, a fine of up to £20,000, or both;
extends the power to make secondary legislation and bring current licensing powers into one place; and
extends to companion animals the use of welfare codes agreed by Parliament, a mechanism currently used to ensure the welfare of farmed animals.

CONFERENCE PAPERS

The website now has on it the papers for the 2005 conference.

BRISTOL EVENT

WEEE – AN OVERVIEW OF THE DIRECTIVE AND ITS IMPLICATIONS
Adrian Harding of the Environment Agency
&
WEEE – HOW?

Julie-Ann Adams of M Baker Recycling Limited

Venue- Osborne Clarke Building, Temple Quay, Bristol

13 DECEMBER 2005
12.30pm Arrival & Sandwich Lunch
12.45pm Presentations and Questions
2.00pm Finish

RSVP by mid-day 8 December 2005 to: Ms Venetia Lockyer

Osborne Clarke
2 Temple Back East
Temple Quay, Bristol BS1 6EG
direct dial: 0117 917 3664
direct fax: 0117 917 3665

e-mail: venetia.lockyer@osborneclarke.com

UKELA LONDON MEETINGS PROGRAMME 2005/2006

Date:	Thursday 20 October 2005
Topic:	**EIA/SEA**
Speakers:	Paul Winter, Ian Gilder
Venue:	Eversheds

Date:	Wednesday 16 November 2005
Topic:	**US Environmental Law**
Speakers:	Cliff Petriella, Greg Battista
Venue:	Herbert Smith LLP

Date:	Wednesday 18 January 2006
Topic:	**Penalties for Environmental Offences**
Speakers:	Richard Kimblin, tbc
Venue:	Herbert Smith LLP

Date:	Wednesday 8 February 2006
Topic:	**Environmental Insurance**
Speakers:	Stephen Sykes, Valerie Fogleman
Venue:	Herbert Smith LLP

Date:	Wednesday 12 April 2006
Topic:	**Ecological assessments**
Speakers:	Simon Colenutt, Jason Weeks
Venue:	Herbert Smith LLP

Date:	Thursday 25 May 2006
Topic:	**Waste and Van de Walle case**
Speakers:	Stephen Shergold, Stephen Tromans
Venue:	Herbert Smith LLP

Date: Wednesday 19 July 2006

Topic: **WEEE/RoHS**
Speakers: Paul Rice, Jeff Cooper
Venue: Herbert Smith LLP

ANNUAL INVITATION TO RENEW YOUR UKELA MEMBERSHIP

The annual invitation to renew your UKELA membership is about to be mailed out and it would be very welcome if you could renew promptly. Events for 2006 are in the process of being planned – the annual conference will be held in the West Midlands (details will be posted on the website as soon as they are finalised); a training event with the Association of Personal Injury Lawyers will be held in October; there is a lively programme of London meetings and more special events are on the cards. UKELA members will receive excellent rates at all these events. UKELA will also continue to work to influence environmental law and how it is delivered – particularly DEFRA's review of enforcement and the governance review in Northern Ireland.

You will also find with your mailing a questionnaire on what you think of what UKELA does and what you would like UKELA to do be doing over the next three years. UKELA's current strategic plan runs out next July and UKELA's governing body, the Council, would like to consult widely on the new plan. We want to know what you think of the events' programme, publications, regional groups and working parties and how you can help UKELA, which is largely dependent on volunteers?

Please take the time to fill out the questionnaire and return it to the new Member Support Officer, Alison Boyd.

Alison comes to UKELA from a background as a civil servant, and recently worked for Surrey County Council. Her role is to help provide a better service to members, particularly by supporting the organisation of meetings and events. She can be contacted on 01306 500090 or aliboyd@fsmail.net. Alison will be looking after the questionnaire and analysing its findings so please get them to her by the end of January.

THE WELSH DEVELOPMENT AGENCY ENVIRONMENTAL GOODS AND SERVICES INNOVATION (EGSI) PROGRAMME

"The Assembly and its agencies support the development of an active cluster of companies and organisations engaged in water, wastewater and environmental related activities in Wales, with a particular focus on opportunities for Small and Medium Enterprises…"

The Welsh Development Agency Environmental Goods and Services Innovation (EGSi) programme has announced its intention to offer support specifically designed for businesses involved, or seeking to become involved, in the water and wastewater sectors.

Phase 1 of the EGSi Water project aims to build a comprehensive picture of the water and wastewater sector in Wales. This will enable the Agency to identify gaps and opportunities for businesses and to help promote and develop existing companies.

As part of phase 1 the Agency are also gathering data on key market drivers, such as legislation, national policy, market demands and technological advances. F indings will be published in a newsletter and posted it on the Agency website (www.wda.co.uk/egsi).

Phase 2 of the project anticipates the establishment of a Water Sector 'Industrial Development Group'. This will keep members up to date with the latest business opportunities in the water and wastewater sectors, including forthcoming industry events and new legislation. It will also provide opportunities to network with other businesses, and offer grant support, and access to specialist expertise to eligible members. If phase 2 proceeds the Agency will invite businesses to join the Water Sector IDG.

Small and medium sized enterprises within Objective One areas may also be eligible for specialist advice and implementation grants for innovative projects (up to £15,000 at 50%).

To help the Agency support businesses they have issued a questionaire for completion by 7th December 2005. This information will be used to analyse the needs of the water sector and help the Agency provide appropriate support.

For information visit http://www.wda.co.uk/innovationworks

JOB OPPORTUNITIES

BARR ELLISON

Environmental law is an important and rapidly emerging field and Barr Ellison has every intention of being at the forefront of it.

We've started to build an excellent Environmental Department and we need another member of the team.

First and foremost you'll need to have a passion for the subject, and a proven track record, earned over two or three years.

Academically we'd like you to either have a first in a natural science subject or geography. Or at least a 2:1.

It will be challenging work but you'll be paid well, will be able to work flexible hours and will automatically benefit from private health cover, a pension scheme and life assurance.

In short, we'll provide you with the best environment to practice environmental law.

Send your CV and a covering letter to Lynn Roberson, who's our Office Manager at 39 Parkside, Cambridge, CB1 1PN or feel free to email it to her as a Word document at l.roberson@barrellison.co.uk
www.barrellison.co.uk

ANGLERS' CONSERVATION ASSOCIATION
ASSISTANT SOLICITOR

Because we are a small organisation, you will gain much broader experience than in a large company. The work we do is unique and challenging and the team is very motivated to build on the organisation's many successes over the past 57 years. The Association is based in Leominster in Herefordshire.

Post holder will assist the Solicitor in providing advice to ACA members on all aspect of angling and environmental law and representing ACA angling club and riparian members in legal proceedings to protect their interests and fight pollution and provide such other support to the ACA as required to promote the work of the organisation.

We are looking for someone

With 0 – 2 years PQE
Knowledge and experience of environmental law and civil litigation.
Excellent verbal and communication skills.
Excellent IT skills (Microsoft Office software, e-mail and internet use).
Experience of aquatic science and/or media relations would be an advantage.
Team player prepared to take the initiative when required.

Applications:
Please send a covering letter and a CV, with the names and addresses of two referees to: mark@a-c-a.org

or by post to:
Mark Lloyd, Director,
ACA,
Eastwood House,
6 Rainbow St.,
Leominster,
Herefordshire, HR6 8DQ.

We will not take up your references without first asking your permission.

The closing date for applications is 5pm on Friday 9 December.

Interviews will be held at our offices in Herefordshire.

Start date as soon as possible in 2006.

UK ENVIRONMENTAL LAW ASSOCIATION
Registered Charity number: 299498, Company limited by guarantee: 2133283

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

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RG8 8LP

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Fax: 01473 730030

E - LAW

The editorial team want articles, news and views from you for the next edition due to go out at end January 2006. All contributions should be dispatched to Catherine Davey as soon as possible by email at: Catherine.Davey@stevens- bolton.co.uk by 21 January 2006 .
Please use Arial font 11pt. Single space.

Letters to the editor will be published, space permitting