e-law

UKELA Making the law work for a better environment

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EDITORIAL

As the Coalition Government settles into its stride our working parties are getting to grips with a growing stream of new consultations and initiatives. Our post election seminar this week will discuss some of the challenges that face the Coalition. We hope to persuade a Minister to come along and talk to us early next year.

We have a packed autumn events programme – from Belfast to Edinburgh, Cardiff to London with events on a wide range of topics, which we hope will be of interest to you. I do hope to see you at the Garner Lecture on November 18th, when Sir Konrad Schiemann will talk about the topical issue many will grapple with in the months ahead - the influence of EU law on access to justice in environmental cases.

We're also delighted that we have three interns helping us out with our review of Environmental Law. Thanks to James Corbet Burcher, Srijanee Bhattacharyya and Vikki Leitch for helping with the research for this major project. You can read more about the project in this edition.

We are very proud of how our Law and Your Environment website has taken off since we won our free advertising campaign with Google. In the last month alone we've helped over 5,000 people get the information they need about their environmental problems. Noisy neighbours, flooding and planning remain the hot topics. You can read in this e-law about how you can help.

Finally we are planning the programme for the 2011 Annual Conference in Norwich so please do give us feedback on the 2010 Exeter Conference, using the email link we have sent you, or let Vicki Elcoate vicki.elcoate@ntlworld.com have your suggestions. I hope to see you at a UKELA event before too long.

Peter Kellett, UKELA Chair

In this issue

Membership Subscriptions Increase

For the first time in four years membership subscriptions are set to increase. For all membership tiers with the exception of the students and unwaged tiers, an increase will be implemented in time for 2011.

The new rates will be as follows (with current rates for 2010 in brackets for comparison):

Individuals	£60 (£55)
Public Sector Individuals	£45 (£40)
Retired	£45 (£45)
Trainee Solicitors/Pupil Barristers/Graduate Consultants	£35 (£30)
Students	£15 (£15)
Unwaged	£15 (£15)

Corporate Members

Private Businesses	£370 (£350)
National Statutory Bodies	£140 (£130)
Local Authorities	£80 (£75)
NGOs	£60 (£55)

The Trustees took the difficult decision to increase subscriptions following consultation with members, which showed that a clear majority agreed that UKELA continued to offer good value for money. With costs continuing to increase, it was felt that a further price freeze was unsustainable and so it was agreed that the modest increases set out above should be implemented.

We hope you agree that the new rates continue to offer great value for money. The Trustees are proud of the achievements that have been made in the last 4 years since the last price increase, which include the following:

- New membership tiers introduced for pupils, trainees and graduates, as well as local authority employees, in recognition of the widening range of professionals wishing to join us.
- Review and expansion of the Working Parties and specialist groups helping to cover the spectrum of interests represented within the organisation from Wild Law to sustainable development.
- Greater involvement of the academic community including specialist sessions at our Annual Conference.
- Appointment of a contractor to work with our Working Parties helping to make our submissions to Government stronger and more relevant.
- More seminars and meetings across the country offering CPD accredited training to all our members across a wide range of subjects.
- Greater involvement in the use of up-to-date technology to make your membership experience smoother and more accessible such as online booking for events, use of podcasts on the website, Facebook and You Tube.
- Modern, relevant and clear website re-launched.
- More and better student services, including a wider range of competitions and opportunities to improve career prospects through internships, careers advice evenings and mooting competitions.

Your renewal information will be sent out to you at the beginning of December via email, so do look out for it and renew promptly to ensure you don’t miss out on any of our great offers and events.

Is Environmental Law working effectively?

UKELA's research project to find out whether Environmental Law is working as effectively as it might and, if not, to suggest some ways it might be improved, has been given a boost by three interns joining the team.

There was a high level of interest in the unpaid roles with three being chosen from the final shortlist. They will work for about the next six months on three different strands of research alongside their supervisors. The project is being jointly co-ordinated by the UKELA Chair, Peter Kellett, and Council member, Begonia Filgueira. UKELA is enormously grateful to the volunteer supervisors: Colleen Theron; Bridget Marshall; Angus Evers; Richard Kimblin; Eloise Scotford and Jamie Whittle.

Peter says: "the project seeks to provide concrete support to UKELA's working parties as they seek to "make the law work for a better environment". It aims to test the idea that Environmental Law is less effective than it could be because it is insufficiently transparent, coherent, principled and accessible. We need a body of environmental law that accessible to business and the person in the street and our contention is that it merits a careful look.

"Our interns will be investigating three different but related areas – whether there is a problem with Environmental Law (after all there are some great successes), principles for Environmental Law and what models of scrutiny might deliver improved Environmental Laws."

The interns are James Corbet Burcher, Srijanee Bhattacharyya and Vikki Leitch. They've provided some information about themselves and their research below.

James Corbet Burcher is researching the problem

"As the intern for Strand 1, my task is to diagnose challenges in environmental law, particularly those relating to coherence, integration and transparency.

I've long been interested in UKELA's work and I'm very glad to be able to contribute to this. The project should be a good opportunity to learn about practitioners' views on environmental law and to explore how it can be improved. I recently completed an LLM specialising in Environmental Law at UCL. I am currently studying the BPTC at BPP (London) and will start pupillage at Landmark Chambers in October 2011".

Srijanee Bhattacharyya is researching principles for Environmental Law

"I have just completed my law degree and during my last year took environmental law as an optional subject. I thoroughly enjoyed the experience so when the opportunity came to intern for UKELA I jumped at the chance to deepen my interest in the subject and research the area of environmental principles further. So far, I have focused on the vast expanse of academic literature defining principles and the limited role of principles in the UK, guided by my supervisors. In the future, I am hoping to consult with UKELA members to gain their perspectives on how such principles have been and may be used to improve environmental protection".

Vikki Leitch is researching models of scrutiny

"I studied at the University of Warwick and graduated with a First Class degree in Law. I then took a gap year and travelled extensively in North and South America. Upon returning I completed a Masters degree in Environmental Law and Policy at Newcastle University and graduated last year with Distinction. While writing my dissertation last summer I also interned at the Environment Agency in Newcastle in their Environmental Crime Department. After finishing my Masters I carried out three months of conservation work in the National Parks of South Western USA. This year I have completed an internship at the Environmental Law Institute in Washington DC where I was a Visiting Scholar and focused primarily on the role of natural resource management in post-conflict countries.

I applied for the internship due to these experiences sparking a real interest in environmental law and therefore relished the opportunity to contribute to such an exciting project. I also see the project as a good bridge between my academic background and a more practical application of law given the focus of the research on environmental law in practice. My research in particular will focus primarily on the
scrutiny mechanisms both pre- and post- enactment and implementation of environmental legislation".

Can you contribute?

The views of UKELA members are a valuable part of the research. If you are able to offer help – e.g. particular experiences you have to offer – pleas contact Vicki Elcoate in the first instance: Vicki.elcoate@ntlworld.com.

"Eternal Torment of Scunthorpe" – how you can help

http://www.environmentlaw.org.uk/

Warm summer days seemed to cause particular anguish for some of the visitors to our "Law and Your Environment" website. Imagine not being able to open your windows because of noisy neighbours. And then the local council doesn't help and you don't know where to turn. The anguished email we received in August from "eternal torment" who lives in Scunthorpe really brought home how difficult it is to live with a persistent environmental problem on your doorstep.

Since our website won a Google Adwords campaign, searches on Google for "noisy neighbours" direct people with one click to the page on Law and Your Environment which lets them know what to do about the problem. We know it works because visits to the website have increased 177% comparing August with the month before the Adwords campaign was set up. It's worth at present about $800 a week in free advertising and we can increase that further. Over the last year we've helped 26,000 people and we're on the way to doubling that over the next year.

The most frequently visited pages are noise and nuisance FAQs, public rights of way, noisy neighbours, causes of flooding, waste and sources of water pollution.

The website is kept up to date with the help of UKELA members. Some have volunteered to provide updates or add new information (eg about Scotland). Others donate regular sums or one off payments into the Lord Nathan Memorial Fund for the Environment. The interest raised from their donations this year paid for our Working Party Support Officer, Rosie Oliver, to add essential updates on climate change, planning, flooding and marine issues. Where there's a change in the law we need to get it onto the website.

We'll soon be writing to everyone who's donated to say thank you and ask for further support. If you haven't donated yet please consider doing so. It's UKELA's chance to help people with real environmental problems.

If you are able to make a donation you can pay it direct to the UK Environmental Law Association, account number 22573376, sort code 15-10-00 (please mark it for the Lord Nathan Fund). We will apply Gift Aid to any eligible donations provided you've already agreed to Gift Aid. Alternatively email Alison Boyd alisonboyd.ukela@ntlbusiness.com and she will let you have details of how to set up a regular payment or how to sign up for Gift Aid.

New, expanded Climate Change and Energy Working Party: a call for volunteers

With so much going on around green energy at the moment, UKELA wants to boost its activity in this area. The Climate Change Working Party is already responsible for looking at energy efficiency, renewable energy, carbon capture and storage, new low carbon technologies and emissions trading. We want to extend the working party's scope so it can lead on a wider range of environment-related energy issues.

Working Party News

The new, expanded Climate Change and Energy Working Party will provide an opportunity to meet and discuss energy and climate change related issues, hold events on hot topics, and contribute to development of new policies and legislation by participating in consultations. As climate change and energy issues cross over into other areas, the group would have to collaborate with other working parties – for example around planning legislation, water pollution and waste.

Would you be interested in joining the expanded Climate Change and Energy Working Party? Are you already a member of the Climate Change working party, and interested in getting more involved in energy issues? If so, let Tom Bainbridge (t.bainbridge@nabarro.com) know. The more active members that join the new Working Party, the more it will be able to achieve. The working party also now has a new co-convenor, Becky Clissmann, to help with the extended remit.

The working party meeting due to be held on 7 September on 'International policy development in the run up to COP16 in Mexico' will now be held on 14 October at 5.30pm at 6 Pump Court. The speakers are the same and anyone previously booked needs to rebook by emailing e.ferguson@nabarro.com.

The next meeting planned for 16 November, will discuss policy announcements following the spending review, on:

- a floor price for carbon
- a Green Investment Bank
- Climate Change levy reform

The working party is also planning a meeting for Tuesday 11 January 2011 to consider litigation issues relating to climate change, in particular the duty of care.

Environmental Litigation

The next meeting is due in mid-autumn. The plan is to discuss costs and RESA update. The working party is contributing to Professor Richard Macrory's work on expanding the work of the First Tier Tribunal (Environment). It is also reviewing the Law Commission consultation document on regulatory offences.

Nature Conservation

The next meeting is on 23 September at Browne Jacobson's office in London. The group will be discussing the Wildlife and Natural Environment Bills for Scotland and Northern Ireland and the Defra consultation on Shaping the Nature of England.

Planning and Sustainable Development

The working party is planning an open meeting early in 2011 on the Decentralisation and Localism Bill which is being published in November. Watch out for dates on the UKELA website or by direct mail.

Waste

The next meeting is on 20 October in London. The group is working on various consultations including the transposition of the revised Waste Framework Directive and the Animal By-Products (Enforcement) (England) Regulations.

Water

The working party held a successful meeting, jointly with PIANC, on 7 September, on the Marine and Coastal Access Act implementation proposals. Despite the tube strike about 30 people attended to hear the three speakers. The working party is now considering consultation responses for Defra on the UK Marine Policy Statement, Marine Planning System for England and the Marine Licensing System.

If you want to get involved with any of the working parties please contact the relevant convenor. You can see all the details on http://www.ukela.org/rte.asp?id=17

Regional Groups

East Anglia – Convenor needed

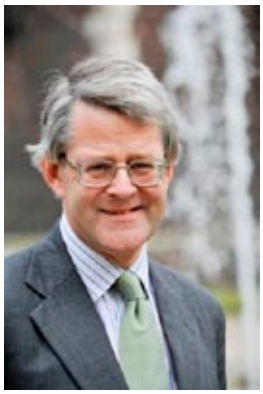
The current convenor of the East Anglian region, Helen Korfanty, is standing down due to other commitments. UKELA would like to take this opportunity to thank her for hard work organising activity in the region over the past few years.

This means we need someone new to step forward – could it be you? The role of convenor, supported by a committee if possible, is to arrange events in the region for UKELA members. This usually means at least 2 speaker meetings per year and an AGM but we welcome other initiatives and ideas.

If you would are interested in this role and would like to chat to someone about what it might entail, please do contact the Regional Group Co-Ordinator on Council, Kenneth Ross at kenneth.ross@brodies.com or Alison Boyd, Member Support Officer at alisonboyd.ukela@ntlbusiness.com who will be pleased to help.

Contributions - Stephen Tromans QC

Legal Issues in Assessing Wind Turbine Impacts



Environmental Protection UK - Wind Turbine Impact Assessment Workshop

Stephen Tromans QC 39 Essex Street London stephen.tromans@39essex.com

1. The UK's first commercial wind farm was built in Delabole in North Cornwall. Its ten 400kw turbines became operational in 1991. Planning permission was granted without appeal. A great deal has changed since 1991.

2. The first change is the scale of the industry. Wind overtook hydropower in 2007 as the UK's largest renewable energy source. It now constitutes 2.5% of UK electricity production.[1] 2,400 turbines are in use, planning consent has been given for a further 2,100, and planning applications are being processed for more than 3,000.[2] Current proposals for changes to the rules on sales of electricity to the Grid, allowing local authorities to obtain commercial benefits from feed in tariff payments from renewable energy schemes, may lead to a further dramatic increase in such projects.[3] What this means in practice is that schemes are no longer mainly located in relatively remote mountains and moors, but often exist in close proximity to housing.

3. The second change is the scale of the technology.[4] Early wind farms used turbines with an installed capacity of 250-400kW, and an overall height of around 55m. Today, applications commonly specify 3MW machines and the typical turbine has grown to more than 150m. Although the size and capacity have increased, the rotational speed of the turbine blades has declined. The blades of a 250kW machine may rotate at up to 30rpm; those of a 3MW turbine do not rotate at more than 18-20rpm. The proposed re-powering of the first Delabole site would involve only four turbines with a generating capacity of 2.3 MW each, increasing the site's capacity from 4 MW to 9.2 MW. The combination of greater turbine height and flatter topography as locations have moved from the hillier areas of Wales and the South West into the flatter terrain of Eastern England has implications for the type of noise which may be generated, in

***I am extremely grateful to Zack Simons, pupil barrister at 39 Essex Street, for his invaluable assistance in researching and producing this paper, which is acknowledged.**

1 http://www.bwea.com/media/news/articles/pr20100729.html

2 'Wind farm planning applications dealt with speedily in Britain', *The Times,* 23/4/10. http://www.timesonline.co.uk/tol/news/environment/article7105710.ece

3 *Planning*, August 13, 2010 "Council Grid Sales Cleared".

4 Cf. Marcus Trinnick, "Green on Green: Planning for Wind Energy" [2006] JPL Supp (Planning: The Changing Climate?) p.89.

particular aeodynamic modulation.

4. The third change is the scale of the opposition. There are more than 200 anti-wind farm groups in the UK[5]; opposition is dedicated, organised, and has been shown to inhibit the likelihood and speed with which planning permission is obtained.[6] The list of objections can be long. It will depend, of course, on the circumstances of each site. I outline some common topics below. The visual impact of the turbines on the surrounding landscape is a perennial ground of challenge. As commonplace, and more controversial, are objections on the basis of noise. There are several reasons for this.

5. The first set of difficulties is empirical. Noise is not straightforward to measure or to predict. Developers are tasked with (i) selecting sites on which to conduct background noise monitoring, (ii) conducting the monitoring in representative conditions, and (iii) collating, interpreting and presenting the data in an Environmental Statement. These steps require subjective assessment. For all the technology it involves, noise measurement is not an exact science.

6. The second set of difficulties relates to planning policy. The relevant guidance endorses ETSU-R-97 "*The Assessment & Rating of Noise from Wind Farms*",[7] a 1996 paper of the Noise Working Group of the Energy Technology Support Unit for the DTI. ETSU has a variety of critics. It has been said that the guidance has not kept pace with the technology, and that ETSU should be reformed or replaced to take account of modern machines and different kinds of noise. At the very least, ETSU is not always an easy document to understand and to implement. As evidenced by the cases below, this difficulty often forms the basis of challenges in planning appeals, and in the High Court.

7. In this paper:

   i) I outline the planning policy framework pertaining to onshore wind farms;

   ii) I summarise the common issues of dispute on appeal; and

   iii) Finally, I turn to noise and to the interpretation and application of the ETSU-R-97 guidance in planning appeals and in the courts.

I. Policy Framework

(i) PPS 22[8]

8. PPS22 has been the operative national planning policy on renewable energy since it replaced PPG22 in 2004. Its "Key Principles" are at section 1. Four of its relevant guidelines are:

> "(i) Renewable energy developments should be capable of being accommodated throughout England in locations where the technology is viable and environmental, economic, and social impacts can be addressed satisfactorily.
>
> (ii) Regional spatial strategies and local development documents should contain policies designed to promote and encourage, rather than restrict, the development of renewable energy resources. Regional planning bodies and local planning authorities should recognise the full range of renewable energy sources, their differing characteristics, locational requirements and the potential for exploiting them subject to appropriate environmental safeguards. […]

5 Listed at http://www.countryguardian.net/Campaign%20Windfarm%20Action%20Groups.htm
6 McLaren Loring, J., 2007. "Wind Energy Planning in England, Wales and Denmark: factors influencing project success", *Energy Policy* 35, 2648–2660.
7 http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/energy/sources/renewables/explained/wind/onshore-offshore/page21743.html
8 http://www.communities.gov.uk/documents/planningandbuilding/pdf/147444.pdf

(iv) The wider environmental and economic benefits of all proposals for renewable energy projects, whatever their scale, are material considerations that should be given significant weight in determining whether proposals should be granted planning permission.

(v) Regional planning bodies and local planning authorities should not make assumptions about the technical and commercial feasibility of renewable energy projects (e.g. identifying generalised locations for development based on mean wind speeds). Technological change can mean that sites currently excluded as locations for particular types of renewable energy development may in future be suitable. […]"

9. Paragraphs 20 and 21 relate to the landscape and visual effects of wind turbines:

"20. Of all renewable technologies, wind turbines are likely to have the greatest visual and landscape effects. However, in assessing planning applications, local authorities should recognise that the impact of turbines on the landscape will vary according to the size and number of turbines and the type of landscape involved, and that these impacts may be temporary if conditions are attached to planning permissions which require the future decommissioning of turbines.

21. Planning authorities should also take into account the cumulative impact of wind generation projects in particular areas. Such impacts should be assessed at the planning application stage and authorities should not set arbitrary limits in local development documents on the numbers of turbines that will be acceptable in particular locations."

10. Noise is addressed at paragraph 22:

"Local planning authorities should ensure that renewable energy developments have been located and designed in such a way to minimise increases in ambient noise levels ... The 1997 report by ETSU for the Department of Trade and Industry should be used to assess and rate noise from wind energy development."

11. Paragraph 25 concerns issues to be addressed pre-application. It advises that any potential impacts of wind turbines "taking account of Civil Aviation Authority, Ministry of Defence and Department for Transport guidance in relation to radar and aviation, and the legislative requirements on separation distances" should dealt with by developers before the application is submitted. In addition, "Local Planning Authorities should satisfy themselves that such issues have been addressed before considering planning applications".

(ii) PPS22 Companion Guide[9]

12. PPS22 is accompanied by a lengthy Companion Guide. Onshore wind is covered at section 8 of the Technical annex from page 155. Planning issues are addressed from page 166:

"35. A wind turbine development of 50MW or less installed capacity will need planning permission granted by the local planning authority under the Town and Country Planning act 1990.

36. A wind turbine development of over 50 MW capacity will be considered by the Secretary or State for Energy, under Section 36 of the Electricity Act 1989, and the local planning authority will be a statutory consultee.

37. The successful development of wind energy always entails detailed consideration of a number of factors, and in first appraising a prospective site a developer will take the following into account:

• Access – Can large delivery vehicles gain access to the site without major modifications To the public road network?

• Extent of site – Is the site large enough to accommodate sufficient turbines? (as a rule of thumb, 1 km2 of unconstrained land can accommodate six 1.3MW turbines).

9 http://www.communities.gov.uk/documents/planningandbuilding/pdf/147447.pdf

• Wind speed – Is there sufficient resource for a viable project?
• Planning permission – Is there a reasonable prospect of obtaining planning permission?
• Grid Connection – Is the grid infrastructure within a reasonable distance?
• Proximity to dwellings – Is the site constrained by a population centre, or scattered dwellings?
• Air safeguarding and Electromagnetic Interference (EMI).
• Landscape and ecological designations."

13. Guidance on noise is at paragraphs 41-46, and I address that below in relation to particular appeals.

14. The recommended approach for developers is at paragraphs 84-99. Communication with the planning authority should be early and often. Further consents may be required in relation to radar, low-flying zones and grid connection.

(iii) Other relevant policies

15. The following policies are regularly addressed in wind farm decisions:

i) The "Planning Policy Statement; Planning and Climate Change"[10] (PPSPPC) was published in December 2007 as a Supplement to PPS1. It advises local planning authorities on the delivery of special strategies with regard to tackling climate change (cf. paragraphs 9-11).

ii) "PPS5: Planning for the Historic Environment"[11], published on 23 March 2010, enjoins authorities to balance the mitigation of climate change against the conservation of heritage assets (cf. page 3).

iii) "PPS7: Sustainable Development in Rural Areas"[12] promotes sustainable socio-economic and environmental development in the countryside, and in rural towns and villages.

iv) "PPG15: Planning and the Historic Environment"[13] gives guidance on identifying and protecting historic buildings and conservation areas.

v) "PPG24: Planning and Noise"[14] accepts that much of the development required to create jobs and to improve infrastructure will generate noise. It cautions that the planning system should not place unjustifiable obstacles in the way of such development but advises that Local Planning Authorities should ensure that development does not cause an unacceptable degree of disturbance. It gives guidance on controlling noise with conditions.

16. In November 2009, the Government published draft National Policy Statements for energy (EN-1)[15] and renewable energy infrastructure (EN-3)[16]. The latter addresses wind farm noise from paragraph 2.7.60. The ETSU guidance is retained; paragraph 2.7.66 states that:

> "Where the correct methodology has been followed and a wind farm is shown to comply with ETSU-R-97 it should be reasonable for the IPC to conclude that it may give little or no weight to adverse noise impacts from the operation of the wind turbines."

17. Turning to energy policy, section 1(1) of the Climate Change Act 2008 puts the Secretary of State under a duty to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline. There is a body

10 http://www.communities.gov.uk/documents/planningandbuilding/pdf/ppsclimatechange.pdf
11 http://www.communities.gov.uk/documents/planningandbuilding/pdf/1514132.pdf
12 http://www.communities.gov.uk/documents/planningandbuilding/pdf/147402.pdf
13 http://www.communities.gov.uk/documents/planningandbuilding/pdf/142838.pdf
14 http://www.communities.gov.uk/documents/planningandbuilding/pdf/156558.pdf
15 http://data.energynpsconsultation.decc.gov.uk/documents/npss/EN-1.pdf
16 http://data.energynpsconsultation.decc.gov.uk/documents/npss/EN-3.pdf

of national energy policy, set out in the 2009 Renewable Energy Strategy ("RES"),[17] the 2009 Low Carbon Transition Plan,[18] the 2003 Energy White Paper,[19] its 2006 review "The Energy Challenge",[20] and the 2007 Energy White Paper "Meeting the Energy Challenge".[21] Among other things, these policies attach significant importance to wind energy. In the lead scenario of the 2009 RES, the 2020 carbon reduction targets rely on 30% gross electricity generation from renewable sources (up from 5.5% in 2008), with more than two thirds of that total deriving from on- and off-shore wind farms.

II. Environmental issues

18. I deal with noise separately below. This section outlines other environmental criteria pertaining to wind farms. Each application turns on its facts. What follows is no more than a summary of common issues: alternative sites, visual impact, shadow flicker, aviation, heritage assets, ecology and wind speed data.

(i) Alternative sites

19. There is no statutory or regulatory requirement for a developer to study alternative sites. Paragraph 2 of schedule 4 to the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293) states that an Environmental Statement should include:

> "An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects."

20. Paragraph 83 of Circular 02/99[22] states that:

> "Although the Directive and the Regulations do not expressly require the developer to study alternatives, the nature of certain developments and their location may make the consideration of alternative sites a material consideration (see, for example, paragraph 3.15 of PPG 23). In such cases, the ES must record this consideration of alternative sites. More generally, consideration of alternatives (including alternative sites, choice of process, and the phasing of construction) is widely regarded as good practice, and resulting in a more robust application for planning permission. Ideally, EIA should start at the stage of site and process selection, so that the environmental merits of practicable alternatives can be properly considered. Where this is undertaken, the main alternatives considered must be outlined in the ES."

21. The correct approach to alternative sites was considered in the 2009 North Dover wind farm appeal.[23] The appeal was brought by Ecotricity against the Dover District Council's refusal of planning permission for a five turbine development. The inspector accepted at paragraph 20 of the decision that Ecotricity's Environmental Statement had addressed site selection, and had indicated the range of site-selection criteria. This complied with Circular 02/99. The inspector found at paragraph 21 that:

> "[A]s PPS22 advises, renewable energy developments should be capable of being accommodated throughout England in locations where the technology is viable and environmental, economic and social impacts can be addressed satisfactorily. There is thus no need to rank sites in any particular order of preference or to fear

17 http://www.decc.gov.uk/en/content/cms/what_we_do/uk_supply/energy_mix/renewable/res/res.aspx
18 http://centralcontent.fco.gov.uk/central-content/campaigns/act-on-copenhagen/resources/en/pdf/DECC-Low-Carbon-Transition-Plan
19 http://www.berr.gov.uk/files/file10719.pdf
20 http://www.berr.gov.uk/files/file31890.pdf
21 http://www.berr.gov.uk/files/file39387.pdf
22 http://www.communities.gov.uk/documents/planningandbuilding/pdf/155958.pdf
23 28 April 2009, APP/X2220/A/08/2071880

> that the "best" site might be sacrificed to development of a lesser site or sites. Rather, it is the nature of wind energy development that, subject to there being no harmful cumulative impact (which is not the case here) an assemblage of suitable sites (whether "best" or "satisfactory") should be utilised."

22. Objectors have argued – both at planning appeals, and in the High Court – that a failure to consider alternatives may invalidate a planning application at common law. The key case is Carsington Wind Energy's appeal against the Derbyshire Dales District Council's refusal of permission for a four turbine wind farm:

i) At the planning appeal,[24] the inspector examined the cases, particularly *R (Scott and another) v North Warwickshire BC* [2001] 2 PLR 59 and *SoS v Edwards* [1994] 60 P&CR. Both parties agreed that it is only a "narrow range of cases" where alternative should be considered as a matter of law (paragraph 84). The inspector was "not convinced that … the appeal proposal would cause such harm that it would be inherently unreasonably to consider alternative sites" (paragraph 82).

ii) The inspector's approach to alternative sites was challenged in judicial review proceedings before Carnwath LJ.[25] After a review of the authorities, he concluded at paragraph 28 that:

> "[I]t is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because "obviously material") requires to be taken into account "as a matter of legal obligation".

iii) Absent a policy requirement to consider alternatives, according to Carnwath LJ at paragraph 37, the approach to alternative sites is "... left as a matter of planning judgment on the facts of the case". In particular, PPS 22 did not create any such requirement:

> "I accept that, if there had been specific national or local policy guidance requiring consideration of alternatives, failure to have regard to it might provide grounds for intervention by the court. However, Mr Crean was unable to point to any such requirement. For example, Planning Policy Statement 22 on "Renewable Energy", which sets out "key principles" for planning authorities (para 1) makes no such reference. Mr Crean pointed to principle (viii), which requires proposals to demonstrate how environmental and social impacts "have been minimised through careful consideration of location, scale, design and other measures". I accept that the reference to "careful consideration of location" may be said to imply a need for the developer to be able to demonstrate the particular merits of the selected site. But it is far from requiring the decision-maker in every case to review potential alternatives as a matter of obligation. It is left as matter of planning judgment on the facts of the case. That is how the Inspector approached it, and he was entitled in law to do so."

(ii) Visual Impact

23. A perennial ground of challenge is that the proposed wind farm would have an adverse visual impact on the surrounding landscape. To generalise is unhelpful – the matter will turn on the size of the turbines, the design of the site, the topography of the landscape and (perhaps most of all) the subjective assessment of the planning inspector. The inspector will examine the site from different distances and directions, looking for "shielding" (i.e. from trees or foliage), for the prior presence of development, pre-existing breaks in the skyline and, more generally, how the turbines are likely to affect the atmosphere of the landscape.

24. These will be matters of planning judgment (not fact) on which there will usually be scope for a fairly broad range of views, none of which can be categorised as unreasonable.[26] Inspector RPE Mellor gave the latest appeal decision in the long-running wind farm application at Hockley Farm in Essex.[27] In allowing the appeal, and granting permission for

24 APP/P1045/A/07/2054080
25 *Derbyshire Dales District Council v. SSCLG and Carsington Wind Energy* [2009] EWHC 1729 (Admin)
26 See *West Midlands International Airport Limited v. Secretary of State for Communities and Local Government* [2008] EWHC 2309 (Admin), per Forbes J at para. 7. Applied in *Tegni Cymru Cyf v. Welsh Ministers* [2010] EWHC 1106 (Admin).
27 25 January 2010, APP/X1545/A/06/2023805

development, he said in relation to visual impact:

> "22. The wind turbines would be large structures visible over a wide area extending several kilometres across land and sea. They would result in a significant change in landscape character. Whilst modest nature conservation enhancements can be incorporated in the development, their positive landscape impact would be at ground level and they would be dwarfed by the scale of the turbines. However the large skies would provide a neutral background for the tall but slender structures. The degree of change would also diminish with distance. The turbines would dominate their immediate surroundings where they would create a 'wind farm landscape character'. However in more distant views the turbines would become but one element in a wider landscape and skyscape that might be termed a 'drained estuarine marsh with wind farm'. […]
>
> 26. For those who perceive the turbines negatively, there would be a marked and major adverse visual impact in the immediate environs of the turbines, but this would lessen with distance. In particular I do not consider that there would be a significantly adverse impact on views from the sea or across the Blackwater from where the present landscape appears as little more than a thin line on the horizon, punctuated by a few trees, pylons and the looming presence of the nuclear power station. However even within the Dengie Peninsula, many of the key landscape characteristics would survive including the windswept and desolate feel, the huge skies, the panoramic views and much of the present tranquillity. It is entirely to be expected that wind farms will be located in windswept locations to capture the wind resource. The turbines will introduce additional movement beyond that associated with the action of wind on trees and the sea. However, as the CPRE mapping indicates the usual absence of a human presence and the daily traffic movements associated with most other forms of built development would help to retain the feel of tranquillity."

25. Inspector Elizabeth Ord's recent appeal decision on the wind farm application at Weaverthorpe Road in Bradford dismissed the developer's appeal,[28] partly because:

> "12. The proposed turbine would be in very close proximity to a number of dwellings, some of which are within an unrestricted direct line of sight, and others of which have partial short distance views. The outlook from these dwellings would be significantly harmed by the scale, movement, height and close proximity of the turbine, resulting in an unreasonable visual impact."

26. The more remote the site and the more obstructed the prospective sight lines, the more likely the application is to succeed. However, the visual impact question is, in part, a question of taste. Inspector Ruth Mackenzie's decision on the wind farm application near Wood Farm in Norfolk[29] dismissed Ecotricity's appeal overall, but found for the developer on the question of visual impact. The inspector said at paragraph 62 of her decision that:

> "To my mind, the turbines have an elegant design which would not be unsightly. I accept that this is a matter of subjective opinion and there are others who take the opposite view."

(iii) Shadow Flicker

27. Shadow flicker was described by Inspector David Lavender in the North Dover appeal decision[30] in the following terms:

> "60. […] I regard it as the rhythmic pulsing of contrasting light and relative darkness that occurs when the size of a room window (domestic or otherwise) excludes a significant proportion of sunlight other than that which is filtered through the orbit of the moving turbine blades. This contrast is greatest when the sun is brightest, so it is more apparent during some seasons of the year than others. It will also occur only when the sun is sufficiently low in the sky – normally at or about sunrise or sunset – to be seen through (rather than above or to either side of) the turbine blades so that the passage of sunlight is effectively blocked completely or substantially by each blade in turn. It does not occur when direct sunlight is not visible (such as when it is cloudy) or when the turbines are aligned away from the window (because of wind direction). Also, the flicker does not alternate at speeds likely to give rise to health effects – it is most likely to be experienced as a brief and relatively infrequent annoyance, for example by those waking up in a first floor bedroom without curtains or taking enjoyment in the last of the day's sunshine in an otherwise unlit downstairs living room or

28 11 February 2010, APP/W4705/A/09/2114165
29 9 March 2009, APP/F2605/A/08/2089810 (ex 1174295)
30 28 April 2009, APP/X2220/A/08/2071880

> workplace. As with noise, its impact diminishes greatly with distance, the PPS22 Companion Guide advising that flicker effects have been proven to occur only within ten rotor diameters of a turbine […]"

28. Although Ecotricity's appeal was dismissed, and the application refused, at paragraph 64 the inspector was "for the most part content that shadow flicker effects would be avoided by a combination of distance, contours and building orientation" and by planning conditions. Shadow flicker was discounted by Inspector Ruth Mackenzie in the Wood Farm appeal[31] at paragraph 56 as not "an overriding problem" which can be easily dealt with by condition.

29. However, in Weaverthorpe Road appeal,[32] the inspector found that there were many dwellings, offices and two schools within the area of potential shadow flicker. In addition, there were pupils at one of the schools with epilepsy, and photosensitive epilepsy can result in seizures triggered by flickering light. The inspector said at paragraph 68 that:

> "Whilst mitigation measures could be taken, such as fitting blinds to affected windows, it would be unreasonable to expect residents, office staff, teachers and pupils to block out natural light. I note that a photocell could be installed on the turbine to programme it to shut down during potential flicker periods and, in these circumstances, an appropriate condition might suffice. However, I do not have all the details before me on how this would work, and I remain concerned that there could be times when shadow flicker was not adequately controlled, resulting in it exacerbating what would already be an adverse effect on outlook."

(iii) Aviation[33]

30. Turbines built within the line of sight of airport radars can, when turning, paint on the radar screens. Those images can resemble moving aircraft and may not be filtered out of the radar display. In the Hockley Farm appeal,[34] the inspector found that Air Traffic Control Operators would become accustomed to, and be able to detect, the turbine images, and to divert aircraft accordingly (cf. paragraphs 84-86).

31. However, the inspector in the Dover wind farm appeal[35] took a different view. Two problematic sites arose on that appeal – the Kent International Airport, and a nearby airstrip at Inglenook. On the Airport, the inspector found that Ecotricity's Environmental Statement had not meaningfully engaged with the safety fears, and that "avoidance" was not a practical mitigation option because of the significance of a nearby navigation beacon and the aviation activity attracted around it. On Inglenook, the inspector again found that the developer had failed to engage in dialogue with the airfield operator and that safety concerns relating in particular to turbulence remained unresolved. The appeal was dismissed and planning permission refused.

(iv) Heritage Assets

32. The relevant guidance is PPG15.[36] It creates various planning presumptions. For example, there are presumptions:

i) In favour of the preservation of listed buildings (paragraph 3.3);

ii) Against the grant of planning permission for development that conflicts with the objective of preserving or enhancing the character or appearance of Conservation Areas (paragraph 4.19);

iii) In favour of retaining buildings which make a positive contribution to the character or appearance of a Conservation Area (paragraph 4.27);

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31 9 March 2009, APP/F2605/A/08/2089810 (ex 1174295)
32 11 February 2010, APP/W4705/A/09/2114165
33 Cf. Civil Aviation Authority "CAP 764 Policy and Guidance on Wind Turbines" http://www.caa.co.uk/docs/33/Cap764.pdf
34 25 January 2010, APP/X1545/A/06/2023805
35 28 April 2009, APP/X2220/A/08/2071880. Cf. paragraphs 27-41.
36 http://www.communities.gov.uk/documents/planningandbuilding/pdf/142838.pdf

iv) In favour of the physical preservation in situ of ancient monuments and their settings (paragraph 27).

33. That guidance should be read in conjunction with the Planning (Listed Buildings and Conservation Areas) Act 1990 which places general duties on the Secretary of State to have special regard to the desirability of preserving listed buildings (section 66(1)), and to pay special attention to preserving or enhancing the character of conservation areas (section 72(1)).

34. In the Thackson's Well Farm appeal,[37] a representative of English Heritage appeared as a witness for the South Kesteven District Council to criticise the developer's consideration of impact on heritage in the Environmental Statement. The argument turned on the effect of the proposal on the settings of a group of country houses in Lincolnshire. The inspector found that Infinenergy's Environmental Statement had understated the turbines' impact. For example, in relation to Belton House, he said:

> "39. […] Where the environmental statement records the magnitude of impact as "negligible" and its significance as "no change", I strongly disagree. In my judgment the carefully and historically planned view of the house and the gardens (as they were originally intended to be and still remain) would be spoilt, the enjoyment of the many people who visit Belton principally to appreciate its historic ambience would be impaired, and the setting of the Listed Buildings and registered grounds would thereby be seriously harmed."

35. The developer's appeal was dismissed and permission refused.

36. The question will often turn on the topography of the relevant sites. The appeal decision for the turbines at the Willow Bank Farm appeal in Bicester[38] considered impact on conservation areas and listed buildings. The inspector assessed the impacts as between negligible and moderate (paragraph 45) and the developer's appeal was allowed.

37. In *R (Friends of Hethel Ltd) -v- South Norfolk DC*,[39] it was held that the council's failure to consult English Heritage had breached paragraph 8(3) of Circular 01/01 and Regulation 5A of the Planning (Listed Buildings are Conservation Areas) Regulations 1990. In that case, both the Conservation and Design Officer and the Head of Planning had concluded that the proposed development would affect the setting of a Grade I or a Grade II* listed building. Sullivan LJ held that "the extent of the effect, and its significance in terms of the setting of the particular listed building, are precisely the matter on which English Heritage's expert views should be sought" (paragraph 36). The failure to notify vitiated the council's decision, and the permission was quashed.

(v) Ecology

38. An area of particular concern has been the risk of collision between birds and bats and the moving turbine. That was the objection of BATTLE at the Hockley Farm appeal. In that case, the inspector found that there was "no substantive evidence that this would occur here to an extent that would justify resisting the development" (paragraph 91).

39. Again, each case turns on its facts. At the Rushley Lodge Farm appeal in Derbyshire,[40] Inspector Ruth MacKenzie said the following:

> "75. NEDLP policies NE3 and NE5, and DDLP policies NBE3 and NBE4, seek to prevent adverse impacts on flora and fauna, including those on the Derbyshire Local Wildlife Sites Register. For all flora and fauna, apart from birds, I have concluded that the proposed wind farm would cause only negligible harm, and there would therefore be a significant degree of compliance with these LP policies.
>
> 76. However, in respect of birds, my conclusion is not the same. Three risks have to be considered: habitat loss, displacement and collision risk. In order to quantify the risks, a clear understanding of bird distribution and

37 17 November 2008, APP/E2530/A/08/2073384
38 6 July 2010, APP/C3105/A/09/2116152
39 [2010] EWCA Civ 894 (Sedley, Lloyd and Sullivan LJJ).
40 22 April 2010, APP/R1038/A/09/2107667

activity is necessary. The shortcomings of the appellant's surveys make it difficult to quantify the risks with any confidence. In view of the rarity of some species, and the fragility of their populations, I consider that a precautionary approach is necessary. I have therefore concluded that, so far as merlin, peregrine falcon, nightjar, goshawk and lapwing are concerned, the likelihood of the proposed wind farm having a significant adverse effect cannot be ruled out."

(vi) Wind Speed data

40. This is often a focus of dispute by objectors. *R (Finn-Kelcey) v. Milton Keynes BC*[41] was a rolled-up challenge to the adequacy of the developer's Environmental Impact Assessment on the basis that its raw wind speed data was not disclosed. The council had received a CD-rom containing the data, but this was not passed on to local objectors. The claimant's case was this non-disclosure breached Regulation 19(4) of the 1999 EIA Regulations as amended. The judge accepted that submission, but found that it did not lead to any unfairness. This was because (i) the CD-rom was available (although not provided) to the objector group as part of the Supplementary Environmental Information, and (ii) notwithstanding the breach of the Regulations, because of the flaws in the claimant's wind expert report, the council could not have come to any other decision. Permission was refused.

41. Collins J's judgment was successfully appealed[42] in part on the basis that the judge had considered the 1999 EIA Regulations as amended by the Town and Country Planning (Environmental Impact Assessment) (Amendment) Regulations 2006. This was with the agreement of both parties. However, the 2006 regulations were not in force at the time of the planning application. The application was governed by the unamended 1999 Regulations. On that analysis, the CD-rom was *not* "further information" under regulation 19(1) to be sent to the local objectors under regulation 19(4). In consequence, there was no regulatory breach. Keene LJ accepted that the CD-rom was available to the objectors, although not supplied. In consequence, there was no breach of the Environmental Information Regulations 2004.

III. Noise

(i) ETSU-R-97

42. The inspector in the North Dover appeal[43] gave a helpful summary of the four stage process required by ETSU-R-97:

> "45. The first stage is to measure prevailing background noise levels during day and night time periods. ETSU-R-97 recognises that, in many cases, it would be impracticable to undertake background noise levels at every property that might be exposed to turbine noise and recommends that measurements are therefore taken at a sample of representative properties. These are not always the closest properties to the turbines but are expected to be the ones where the noise environment, once the turbines are operational, is likely to be most affected.
>
> 46. The second stage is to use those measurements to generate maximum permissible day-and night-time noise levels. These are set at a prescribed margin above background level – normally 5 dB(A) (or, in low noise environments, at recommended fixed levels). This margin recognises that a balance needs to be struck between the impact of turbine noise and the need to ensure satisfactory living conditions for those who might be exposed to it. Since the margin is prescribed in ETSU-R-97, the required levels that emerge from this stage of the process are thus entirely dependent upon the results of the background noise measurements.

41 [2008] EWHC 1650 (Admin); [2009] Env. LR 4 (Collins J)
42 [2008] EWCA Civ 1067; [2009] Env LR 17 (Keene, Thomas & Hughes LJJ).
43 28 April 2009, APP/X2220/A/08/2071880

> 47. The third stage is to predict the likely noise emissions from the turbines at each of the representative properties. This is normally achieved by validating turbine manufacturers' warranted outputs against local anemometric data (such as wind speed) and other site specific environmental conditions (such as topography). The purpose of this stage is to provide the turbine operators and local people with assurance, before the turbines are purchased or installed, that they will actually be capable of operating within the pre-established noise limits. They do not affect the noise limits themselves, or limit turbine noise in operation, but are produced solely for comparison with the background noise measurements. The outcome of that comparison does, however, influence turbine choice and contribute to ensuring, at site planning stage, that there will be adequate separation distances from places of habitation.
>
> 48. The fourth and final stage is to draft planning conditions requiring that the pre-established noise levels are not breached. Provided the third stage noise predictions prove robust (and that turbine choice and separation distances have been suitably fixed), there is no reason to believe that these noise levels would be breached. Indeed, experience throughout England is that they very rarely are."

Stage 1 – measuring background noise[44]

43. The ETSU-R-97 process is cumulative. Each step relies on the previous step, and everything relies on the first – the measurement of background noise at representative sites. The measuring is complicated and inexact: as Inspector Elizabeth Ord emphasised in the Weaverthorpe Road, Bradford Appeal,[45] it is sensitive to small physical variations in location of the microphone, and to ambient conditions such as temperature, humidity and rain so that the results of any two sets of background measurements, taken on the same place on different days, are likely to vary (para. 25). Such measurement forms the basis for the noise projections and conditions, so is often the target of challenges. It is in all parties' interests that the measurements are robust, and that the site selection is realistic and, ideally, by consent. For developers, consent increases the possibility that the measurements will stand up on appeal. For councils and objectors, failing to consent to background measurements, or to conduct alternative measurements, makes it more difficult challenge the developer's figures.

44. In the North Dover inquiry, the sites for measurement were selected unilaterally by the developer's noise expert. Noise experts for the council, and for a local opposition group, criticised the raw data. The inspector noted at paragraph 53 that:

> "The Council's noise expert also wryly observed at the Inquiry that the results of any two sets of background measurements taken, for example, by the same person using the same equipment at the same location and over the same time span, but on different dates, would in all likelihood vary from each other. It is clear that this is not a precise science."

However, the developer was criticised at paragraph 54 for conducting the measurements unilaterally, and the measurements were found to be insufficiently robust. That finding undermined the entirety of the developer's noise evidence. The inspector emphasised the importance of phase 1 of the process being undertaken "fastidiously" (para. 50). The concern is that otherwise there would always be lingering doubt that the outcomes had been manipulated in the developer's favour, whether unfounded or not.

45. In the Wood Farm, Shipdham appeal,[46] measurements were taken by the developer, the council and by a local opposition group in 3 different places and at 3 different times. Faced with these alternatives, the inspector found that the developer's site selection was unrepresentative (measurement was taken just outside a farm near a running tap, high trees and a hedge). The inspector went further, finding that the developer's readings were inaccurate. The readings had shown that background noise was greater when periods of rainfall were discounted. This anomaly was not explained by the developer's witness. Paragraph 26 of the appeal decision states:

> "The unrepresentative location of Ecotricity's measuring site and the anomalies in the results have led me to conclude that the appellant's background noise measurements should be treated with caution. The indications are that they are overstated. This is an important matter, because it is on these measurements that Ecotricity has based its noise predictions."

44 ETSU-R-97 chapter 7, and pages 99-101.
45 11 February 2010, APP/W4705/A/09/2114165.
46 9 March 2009, APP/F2605/A/08/2089810 (ex 1174295)

46. In the Weverthorpe Road appeal,[47] the council had agreed that the sites selected by the developer were representative of noise sensitive properties in the vicinity. Nonetheless, the results were found to give rise to unacceptable noise impact and the appeal was dismissed. However, the raw measurements themselves were unchallenged.

47. In the Hockley Farm inquiry,[48] the Maldon District Council was given the opportunity to agree the method and locations for the background noise survey in advance but declined to take up the offer. On appeal, the council did not challenge the developer's results. A local opposition group criticised the measurements, but the inspector discounted the opposition on the basis that there was no alternative survey in support.

48. In the not unlikely event of a flawed background survey, inspectors are likely to be cautious. In the Willow Bank Farm appeal,[49] the inspector said the following:

> "81. In view of this lack of absolute reliance on the noise survey findings, it therefore seems appropriate to me that the daytime noise limits in the proposed planning conditions should be based on the lowest noise level at each site irrespective of wind speed (rather than the less demanding common practice of relating the noise limit to wind speed, thus allowing noise levels to rise in windy conditions). This precautionary approach adds robustness to the proposal that, for the reasons I have given, is to a degree lacking from the survey work."

49. These decisions evidence the benefits – to the council, the developer and to opposition groups – of seeking consent to the background measurements. In the Rushley Lodge appeal,[50] the developer's original figures were disputed, so further measurements were taken. These new results and the methodology adopted were agreed by the council, and by local objectors. They were accepted by the inspector.

50. In addition, the background noise measurement process has given rise to several challenges in the High Court. *R (Friends of Hethel Ltd) -v- South Norfolk DC*[51] was a judicial review challenge to the grant of permission for 3 turbines in Norfolk. The judgment of Cranston J has recently been subject to a successful appeal on limited grounds,[52] but his findings on noise were not addressed on appeal. The issues before Cranston J included whether the council had adequately considered Ecotricity's noise measurements, whether the council had adequate regard to safety, and whether particular planning conditions were unenforceable or irrational. Cranston J found for the council on each point, save the procedural point that it had failed to inform the public of the ultimate planning decision. On background noise measurements issue, the judge held that the objectors' challenge was prejudiced by their failure to comment on the developer's methods at the time, and that there was insufficient evidence before him to reach a view on ETSU compliance. He said at paragraph 70 that:

> "[I]n my view, the challenge in this case on noise gets nowhere. The choice of locations for measuring noise was agreed between the council's environmental services department and Ecotricity's noise consultants. Officers from that department considered Chapter 11 of the Environmental Statement and concluded that the noise measurements were in compliance with ETSU-R-97. (The environmental expert, Dr Towner, employed by Mr and Mrs Watson, of East Carleton, reached a similar conclusion). The committee report provided sufficient information and guidance to enable the committee's members to reach decision on noise impact, applying the relevant considerations."

51. *R (Hulme) -v- Secretary of State for Communities and Local Government*[53] was a section 288 challenge brought against Inspector David Lavender's 22 March 2007 grant of permission to a nine turbine wind farm in Devon. The applicant was a local resident. The challenge concerned the developer's refusal to disclose raw background noise data

47 11 February 2010, APP/W4705/A/09/2114165
48 25 January 2010, APP/X1545/A/06/2023805
49 6 July 2010, APP/C3105/A/09/2116152
50 22 April 2010, APP/R1038/A/09/2107667
51 [2009] EWHC 2856 (Admin) (Cranston J).
52 [2010] EWCA Civ 894 (Sedley, Lloyd and Sullivan LJJ) on the basis that the council's constitution contravened the majority voting provisions in paragraph 39(1) of Schedule 12 to the Local Government Act 1972, and that the failure to notify English Heritage had contravened Regulation 5A of the Planning (Listed Buildings and Conservation Areas) Regulations 1990.
53 [2008] EWHC 637 (Admin) (Mitting J)

(to the applicant and to the inspector). The inspector had relied on (i) the Environmental Statement assertion that the ETSU measuring guidance had been complied with, and (ii) the evidence of Dr Bullimore, an independent expert instructed on behalf of the developer. The appeal decision gave no reasoning for the conclusion that the measuring was ETSU-compliant. Nonetheless, because the inspector had drafted an adequately stringent condition to control noise and to allow for subsequent monitoring by the local planning authority, Mitting J found that Mr Hulme had not been substantially prejudiced by the failure to provide raw data, and there was no breach of natural justice.

52. Often the problem will be that the developer has very good quality expert evidence, opposed by limited and non-expert evidence, to which the inspector may attach less weight, as in the Crosslands Farm, Kent appeal[54] which led to the challenge in *Barnes v. Secretary of State for Communities and Local Government*, where the inspector (who had only the Executive Summary of ETSU-R-97) was held to have followed "a manifestly proper approach".[55] In that case the objectors were denied some wind-shear data on commercial confidentiality grounds by the developer, but there was held to be no procedural unfairness as they had made no application to the inspector to direct its disclosure.

Stage 2 – setting maximum noise levels[56]

53. On the basis of the background measurements, maximum noise levels are set at a prescribed margin above background level – normally 5 dB(A) (or, in low noise environments, at levels fixed in ETSU).

54. This is a mechanistic process which does not itself normally give rise to challenge. The key to the maximum levels is that they are credible; to be credible they must, at the risk of repetition, be based on robust background noise measurements. This is because the margins between the maximum levels and the predicted levels are often tight (see paragraph 55 et seq. below). If it is suspected that the developer has used unrepresentative background measurements to set maximum noise levels too high, the inspector is less likely to allow tight margins between predicted and maximum noise output.

Stage 3 – predicting noise emissions

55. This stage compares likely noise output (based on turbine specifications, and environmental factors such as wind speed) against the prescribed maximum noise levels. The aim is to ensure that the former is lower than the latter. That is not always the case, and predicting output exceeding maximum levels is not always fatal to wind farm applications. However, the tighter the margin, the more scrutiny will be applied to the developer's figures.

56. The 2009 North Dover wind farm appeal[57] is a useful example. The inspector said the following:

> "55. My second (and related) concern is that, given the imprecision inherent in the process of background noise limits in general, some of the third stage noise predictions fail to demonstrate sufficient cushion to fill me with confidence that the margin above background noise determined during the first two stages would not, in practice (or if re-worked on a consensual basis), be exceeded. [...] The predictions also show that the noise environment would variously be either at or only just below the required levels at all three properties during other times, or even with one or more turbines temporarily shut down or operating at reduced power ("mitigation") [...]
>
> 56. This amply demonstrates the veracity of PPG24 "Noise" advice that the best form of noise mitigation is separation between noise generating and noise sensitive development. "Mitigation" (other than by separation distance) should not, in my judgement, be deployed in this case as a device to provide scope for the Appellant to site turbines closer to places of habitation than would otherwise be acceptable, because the safety margins at the three "representative" properties concerned are of such small order, even after allowing

54 22 July 2009, APP/M0933/A/08/2090274
55 [2010] EWHC 1742 (Admin), para. 29.
56 ETSU-R-97 chapter 6, and pages 101-102.
57 28 April 2009, APP/X2220/A/08/2071880

> for the manufacturer's recommended "safety factors" for various uncertainties. Those "safety factors" cannot be relied on with confidence when the predictions are based on a "candidate turbine", which may not be the model employed in practice. Moreover, although commenting in the context of day-time limits within the range of 35-40dB(A), ETSU-R-97 says that "the more dwellings there are in the vicinity of a wind farm, the tighter the limits should be as the total environmental impact will be greater". Clearly in this case, if the present noise predictions proved to be inaccurate by only a relatively tiny amount, a greater number of properties within, say, the 500 m – 1 km range could also be at risk of exposure to excess noise with fewer, if any, further post-installation remedial mitigation options remaining available."

57. A similar analysis appears in the 2009 Wood Farm, Shipdham appeal decision.[58] The inspector said the following:

> "33. Ecotricity's noise predictions are based on two E70 turbines working at their warranted noise output level under downwind propagation conditions over hard ground. However, there would be nothing to prevent the installation of any other turbine model, provided that it complied with the height parameters specified in the description of development. According to RoDG, 3 alternative models have higher noise outputs than the E70, but fit within the height parameters. There is no evidence to dispute this. […]
>
> 37. In addition to the 7% of the time when the daytime noise limit would be exceeded at Wyrley Farm, I am also concerned about the tightness of the margins for the times and places when Ecotricity predicts that the ETSU-R-97 daytime and night time limits would be met. These margins are either nonexistent during the daytime at Brick Kiln Farm and Stable Cottage; or as little as 3dB during the night at all three NSPs. In my view the margins are uncomfortably tight, not least because they are based on background noise measurements which I have already decided should be treated with caution because the indications are that they are overstated."

58. This led to the inspector reaching the conclusion (paras. 42-44) that there was no certainty as to the turbine models which would be erected, that the margins for meeting the ETSU noise limits were tight, that background noise measurements were to be treated with caution and could well be overstated, and that for these reasons there was a strong likelihood that noise from the two turbines would materially worsen living conditions at relevant locations unless the operations could be effectively restrained by planning conditions. The issue was then whether conditions could impose such effective control, and that is discussed below.

59. Another example of a precautionary approach in the case of tight margins was the appeal decision in the Rushley Lodge Farm wind farm application.[59] In that case, as is common, there was uncertainty at the time of the appeal as to which particular turbine model would be adopted. The inspector said:

> "81. The appellant's noise predictions take wind shear into account, and they show that the ETSU-R-97 daytime and night-time limits would be met. But at Grouse Cottage Farm (about 650m to the north east of the nearest turbine), when the wind is blowing at 5 or 6 metres per second (m/s), the predicted daytime noise would be equal to the ETSU-R-97 limit, with no safety margin. Indeed, the appellant accepts that there is a theoretical possibility that the noise limit could be breached. At Cuckoostone House Farm (about 750m to the south of the nearest turbine), when the wind is blowing at 5m/s, the predicted daytime noise would be within 2dB of the ETSU-R-97 limit and, when the wind is blowing at 6m/s, it would be within only 1dB of the limit.
>
> 82. To my mind, these situations are uncomfortably tight. A slightly noisier model of turbine, or a minor difference between a turbine's warranted sound power level and its actual sound power level, or unexpected atmospheric or ground conditions, could make all the difference between the noise limits being met or not met at Grouse Cottage Farm and Cuckoostone House Farm."

60. An issue which sometimes arises is that the environmental statement may make assumptions as to turbine size, height, capacity and so on. In *Barnes v. Secretary of State for Communities and Local Government and South Lakeland District Council*,[60] the argument was that the inspector had acted unlawfully in not imposing a condition limiting the development in the same way. It was held that in deciding what was granted on appeal, regard must be had to the

58 9 March 2009, APP/F2605/A/08/2089810 (ex 1174295)
59 22 April 2010, APP/R1038/A/09/2107667
60 [2010] EWHC 1742 (Admin).

whole of the decision letter,[61] and that even without a condition it was clear what permission was being granted for, which was based on the environmental statement.

61. Lack of clarity over the type of turbine and its mode of operation can however be a matter of concern, in that these may affect the noise profile. In the Thackson's Well Appeal[62] Inspector David Lavender was disturbed by the lack of clarity as to these matters, and regarded it as necessary in the interests of public confidence in the decision-making and enforcement process, that noise limits and choice of turbine be founded upon data "which has, and can be seen to have been, carefully and accurately compiled before full permission has been granted, rather than afterwards" (para. 16). This did not however prevent the inspector from allowing the appeal. The decision also contains a thorough discussion at paras. 17-23 of health concerns raised in respect of "Vibro-Acoustic Disease", on which the inspector found nothing in the evidence or circumstances on which to base a rational health fear sufficient to justify either refusal of permission or to seek any greater separation distances between houses and turbines than would be required to secure compliance with ETSU-R-1997.

Stage 4 – planning conditions

62. The relevant guidance is in Circular 11/95: The Use of Conditions in Planning Permissions.[63] It states that conditions should only be imposed where they are necessary, reasonable, enforceable, precise and relevant both to planning and to the development to be permitted. Paragraph 78 states:

> **"**Noise can have a significant effect on the environment and on the quality of life enjoyed by individuals and communities. The planning system should ensure that, wherever practicable, noise-sensitive developments are separated from major sources of noise, and that new development involving noisy activities should, if possible, be sited away from noise-sensitive land uses. Where it is not possible to achieve such a separation of land uses, local planning authorities should consider whether it is practicable to control or reduce noise levels, or to mitigate the impact of noise, through the use of conditions or planning obligations."

63. It is however important to bear in mind that the Circular's advice is just that. It provided guidance on good practice, but failure to follow it does not necessarily mean that a condition is unlawful. As Sullivan LJ emphasised in *R (Enstone Uplands and District Conservation Trust) v. West Oxfordshire District Council*:[64]

> "When considering this ground of challenge it is important to bear in mind that circular 11/95 is not an enactment; it contains advice as to good practice. Whether the advice in the circular has or has not been followed may very well be a good indicator as to whether a condition is or is not lawful; but failure to follow the advice does not necessarily result in unlawfulness. Specifically, the fact that circular 11/95 advises that a personal condition is inappropriate if the person is a company does not mean a) that the imposition of such a condition is necessarily unlawful (rather than unwise or undesirable because it may be ineffective as a means of controlling the impact of a permitted use; or b) that, if such a condition is unlawfully imposed, the permission as a whole is unlawful since the condition may not go to the root of the permission."

64. In the Hockley Farm, Bradwell-on-Sea Appeal,[65] the council submitted that a condition to control operational noise would be so complex and difficult to enforce that it would fail to comply with Circular 11/95. The developer's response was to propose that noise be controlled via a section 106 undertaking. The inspector said:

> "70. Whilst ETSU refers to the possibility of using S106 obligations to control noise, ETSU-style planning conditions are in widespread use and have been endorsed by the Secretary of State in many previous decisions. There is a lack of evidence that they are in practice ineffective. Paragraph B51 of Circular 05/05 'Planning Obligations' also advises that, where possible, planning conditions are preferable to obligations for reasons which include their more ready enforceability.

61 See *Smith v. SSETR* [2003] EWCA Civ 262; [2003] Env LR 32.
62 Appeal Ref: APP/E2530/A/08/2073384, November 17, 2008.
63 http://www.communities.gov.uk/documents/planningandbuilding/doc/324926.doc
64 [2009] EWCA Civ 1555.
65 25 January 2010, APP/X1545/A/06/2023805

> 71. I acknowledge that the Inspector for the Shipdham Appeal concluded that the planning conditions before her failed the test of enforceability and were too complex and unwieldy for frequent use. However, those conditions were worded differently and were considered to lack precision. Moreover it was anticipated there that the set noise levels would be frequently exceeded, which I do not consider to be likely here."

65. However, if the preceding steps in the ETSU process are flawed – as the inspector held to be the case in the North Dover appeal[66] – and the consequent margins are tight, conditions are unlikely to be sufficient to make good the application:

> "57. Nor is it, in my estimation, sufficient in this particular case (where the margins are as tight as currently predicted) to rely solely upon planning conditions to deal with excess noise exposure should it occur. Such conditions have become increasingly refined with the passage of time since ETSU-R-97 guidance (which promoted their expression in planning Obligations) was published. However, if breaches are alleged, investigation and remediation can still be a lengthy and complex process, not least because of the need to wait for climatic conditions (notably wind speed and direction) at the time of complaint to be replicated and with sufficient forewarning to ensure that the requisite measurement equipment is at hand. The time taken to then investigate and agree potential causes and to assess the effectiveness of practicable solutions must also be added. Clearly, the greater the number of properties close by, the greater will be the potential number both of complaints fed through the Council and needing to be investigated, and of occupiers exposed to excess noise while those investigations are in train. All this in the face of a natural reluctance by the Appellant to forego electricity generation or incur the cost of turbine modification or replacement without clearly demonstrable reason."

66. Similarly in the Wood Farm, Shipdham Appeal,[67] the inspector considered the efficacy of the complex conditions proposed in the real world and specifically, whether they could do the job they were intended to do, without undue difficulty and delay (see paras. 48-55). On the evidence, it was likely they would be invoked with some frequency, and would involve time-consuming measurement, during which time the complainants would have to live with the noise. They would not control noise effectively and would be too cumbersome for frequent use. This was, it should be said, in the context of a case where the proposed turbines were very close (within 500 metres in some cases) of dwellings – a situation which the inspector regarded as unprecedented in flat and quiet rural locations. The inspector found it surprising that the sites had been chosen in preference to more distant ones, that they were chosen without a prior noise study, and that the same sites had been "doggedly pursued" for 8 years (para. 67).

67. A similar analysis appears in the Rushley Lodge Farm appeal.[68] In that case, although the background measurements were accepted, the inspector found the margins uncomfortably narrow. In consequence, conditions were likely to be frequently in contention. That likelihood made them inappropriate:

> "86. Whilst there is nothing intrinsically wrong with long and complex planning conditions, such as those discussed at the Inquiry, it is essential that they do the job that they are intended to do without undue difficulty or delay. The low background noise levels, together with the lack of a "safety cushion" between the predicted noise and the noise limits at certain locations, have led me to the view that, if planning permission was granted, the suggested noise conditions might be brought into play with some frequency. At the Inquiry, the Councils were confident that they have the resources to deal effectively with any breaches of condition. However, the necessary investigations would take many weeks to resolve and, during that time, complainants might have to live with a noise problem. If this situation were to arise, it could have a serious impact on their living conditions."

68. The approach of the courts to planning conditions will be to interpret them benevolently so as to give effect to them if possible.[69] Thus in *Barnes*[70] there was a series of complex conditions imposed by the inspector, dealing with maximum noise levels, tonal correction, measurement in event of complaints, and so on. It was argued that these were not

66 28 April 2009, APP/X2220/A/08/2071880
67 9 March 2009, APP/F2605/A/08/2089810 (ex 1174295)
68 22 April 2010, APP/R1038/A/09/2107667
69 See *Carter Commercial Developments Limited v. Secretary of State for Environment, Transport and the Regions* [2002] EWHC 1200 (Admin).
70 *Barnes v. Secretary of State for Communities and Local Government and South Lakeland District Council* [2010] EWHC 1742 (Admin) (George Bartlett QC).

sufficiently certain in various respects, such as how measurements were to be taken. It was held that the conditions were adequate, in that it would be for the council, or an inspector on appeal, to take a reasonable approach – quite possibly based on ETSU – as to how to apply the conditions.

69. In some cases an appropriately worded condition may suffice to prevent an otherwise defective permission being quashed. In *R (Hulme) -v- Secretary of State for Communities and Local Government*[71] the judge found that the relevant noise condition prevented any breach of natural justice in the inspector's approach to ETSU. The reasoning on ETSU in the decision letter was deficient, but since there was an adequate condition there was no substantial prejudice or breach of natural justice.

70. In essence however, it has to be recognised that securing compliance with noise limits at wind farms will not be as straightforward as with most forms of noise generating development. This was discussed by Inspector David Lavender at some length in the Thackston's Well Appeal (2008) at paras. 11-12. Noise from turbines is affected primarily by external factors such as topography and wind strength, which cannot be so easily controlled as, say, noise from machinery. The standard condition may be helpful to the developer in filtering out unjustified complaints, where specified limits are not being exceeded at the relevant properties. But where further investigation is necessary, and there is no obvious immediate problem such as breakage or wear of moving parts, it may take a considerable time to investigate, identify the cause and agree and initiate any necessary mitigation.

71. Nor will the standard type of condition deal with the possibility of noise from amplitude modification. In the Hockley Farm, Bradwell-on-Sea Appeal,[72] Inspector RPE Mellor noted that the lack of an agreed definition of what constituted excess AM or an agreed basis for its measurement, made it particularly difficult to construct a planning condition or other objective means of control (paras 64-67). The inspector concluded that statutory nuisance procedures were the best means currently available of addressing the issue, should it arise.

(iv) Noise nuisance

72. ETSU has also been relevant to the few cases brought against wind farm developers in nuisance.

73. Statutory nuisance is of course a possibility. However, local residents will face the task of persuading the environmental health officers that there is a nuisance, and that the developer is not already applying best practicable means. This may be difficult where the wind farm is complying with existing planning conditions. The first (and only recorded) statutory nuisance wind farm case was *Nichols, Albion and Lainson -v- Powergen Renewables Limited and Wind Prospect Limited* (South Lakeland Magistrates' Court, 20 January 2004).[73] This was a case where the local authority had declined to take action on the basis that in its view there was no nuisance. Local residents therefore brought summary proceedings themselves under section 82 of the Environmental protection Act 1990.

i) The complaint related to a "whooshing" and "thudding" noise deriving from a seven turbine development near Barrow-in-Furness. The consequences for the companies were potentially serious, as a finding that a nuisance existed, or was likely to recur, would have required an order to be made under s.82(2) for the abatement of the nuisance or for preventing its recurrence.

ii) Proceedings were brought not only against the two companies concerned, but also against the council, on the basis that they were, together with the companies, "the persons responsible for continuance and recurrence of the said statutory nuisance, in that they have repeatedly failed and delayed to take any action against the first and second defendants in respect of the occurrence of the said statutory nuisance, and have thereby caused or materially contributed to its continuance". However, at a pre-trial hearing DJ Peter Wallis ruled that the Council

71 [2008] EWHC 637 (Admin) (Mitting J).
72 25 January 2010, APP/X1545/A/06/2023805.
73 See Stephen Tromans, "*Case Comment: Statutory nuisance, noise and wind farms*" [2004] JPL 1023-1027.

was not competent as a defendant and that they should be struck out of proceedings. In so doing, the judge noted that under s.82(11) the court was empowered to direct the local authority to enforce any nuisance order made and that were the council to be a defendant, it would be placed in an impossible situation.

iii) At the substantive hearing, it was agreed that the standard of proof under section 82 was criminal. The judge commented however that he would have come to the same conclusion by applying the civil standard of proof. The judge accepted that common sense argued against ETSU-compliant levels (enforced by ETSU conditions and a section 106 agreement) being set so as to constitute a nuisance. It was clear that the judge placed great reliance on expert evidence for the developers from a consultant with great experience of wind farm noise (Malcolm Hayes), who had carried out measurements and attended listening, and had concluded that the noise complied with the conditions, and was otherwise at an acceptable level.

74. What appears to be the first civil noise nuisance claim against a wind farm developer is currently awaiting a trial date in the High Court. The case is *Davis v. Tinsley, Watts, Fenland Windfarms Ltd, EDF & Fenland Green Power Co-op Ltd*.[74] Jane Davis – a veteran wind-farm objector – lives 930 metres from an 8 turbine wind farm in Deeping St. Nicholas, Lincolnshire. The Particulars of Claim describes "swishing, ripping/flashing, low frequency humming, mechanical turning, background roar, 'helicopter noise' (aerodynamic modulation) and enhanced 'helicopter noise' (amplitude modulation of aerodynamic modulation)". However, it is agreed that the turbines are ETSU-compliant. Nonetheless, their operation is said in the Particulars of Claim to give rise to an inconvenience materially interfering with the ordinary comfort and enjoyment by the claimants of their home and garden. The claimants had complained that there was a statutory nuisance, but in the opinion of the local environmental health officers this was not the case. Part of the defendants' case is that the wind farm's compliance with PPS22, PPG24 and ETSU-R-97 is evidence that it does not constitute a nuisance, and further that the support for wind farms in UK energy policy is relevant in determining "reasonableness" for the purposes of a nuisance action. The claimant is reported to have said that "190 campaigners around the country have complained of noise and are expected to consider legal proceedings if the test case is successful."[75]

75. In *Fägerskiöld -v- Sweden*,[76] the European Court of Human Rights considered a claim brought by two Swedish nationals under Article 8 of the European Convention on Human Rights. The claim related to three wind turbines (of 225kW, 150kW and 600kW capacity) erected on a property adjacent to that of the applicants. According to applicants, the largest turbine emitted a constant pulsating noise. The court reiterated that where an individual is directly and seriously affected by noise pollution, an issue may arise under Article 8. However, to engage the Article, the adverse effects of the noise pollution must attain a certain minimum level of severity. The assessment of that minimum is relative and depends on the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. As the applicant's figures had the noise level at 42-45db (within WHO standards, and only marginally exceeding Swedish recommended maximums), the court found that the minimum level of severity was not reached and the claim was dismissed.

Conclusions

76. As described above, wind turbines have changed dramatically since ETSU-R-97 was drafted. Its critics assert that the guidance has fallen behind the technology. For example, ETSU does not address all the implications of amplitude modulation and low frequency noise (the subject of the *Davis -v- Tinsley* case referred to above). At the time it was drafted, research on low frequency noise was only just beginning. Its references to margins and separation distances dealt with machines of an entirely different scale. Opponents warn that ETSU no longer affords adequate protection to the public. Jane Davis, the claimant in the pending High Court nuisance action, claims that ETSU has left her "with no

74 Claim no. HQ10X00900.
75 http://www.telegraph.co.uk/earth/earthnews/7085086/Wind-farms-can-cause-noise-problems-finds-study.html
76 [2008] ECtHR 37664/04.

recourse to justice under existing British law."[77] It has to be recalled that ETSU was not a government report: it was the consensus view of a limited group of experts, produced in the context that existing guidance on noise in BS 4142 was not appropriate or adequate for wind farms, and produced a compromise which ETSU itself acknowledges was intended in the public interest to offer a reasonable degree of protection to neighbours without imposing unreasonable restrictions on wind farm development or adding unduly to the costs and administrative burdens on developers and local authorities.

77. However, planning inspectors are generally and unsurprisingly unwilling to depart from ETSU (see Rushley Lodge decision at paragraph 79, Hockley Farm decision at paragraph 52, North Dover decision at 59). With one exception,[78] permission for wind farms is hardly ever refused on the basis of noise impact when the inspector has accepted that the development will be ETSU-compliant.

78. Indeed, a decision which refused permission on the basis of ETSU-compliant noise was recently quashed in the High Court. In *Tegni Cymru Cyf -v- The Welsh Ministers, Denbighshire County Council*,[79] the inspector had found that the 13 turbine development complied with ETSU, but nonetheless breached Policy MEW 10(iv) of the Denbighshire Unitary Development Plan. The inspector reported that with certain wind directions there would be a cumulative effect with other existing turbines which, while within ETSU guidance, would give rise to a level of harm conflicting with the development plan policy against unacceptable noise levels to residential amenity. Wyn Williams J found it "difficult to reconcile" the inspector's conclusions in the absence of clear explanation, and was tentatively inclined to find that the decision was *Wednesbury* unreasonable. However, the judge declined to quash the decision on that basis because it could possibly have been justified by the evidence of residents or by the inspector's own observations on site visits. The flaw lay really in failing to explain what such evidence there was, if any, leaving substantial doubt as to whether there had been a rational decision. On that basis, the judge quashed the decision for insufficient reasons.[80]. Permission to appeal has been granted by Mummery LJ on the papers. If the appeal proceeds, it may be an important test for ETSU.

79. One point which emerges from the case is the somewhat different policy position regarding ETSU in England and Wales. In Wales the relevant guidance is not PPS22, but TAN 8.[81] Whereas PPS22 states that ETSU "**should be used** to assess and rate noise from wind energy development" (para 22, emphasis added), TAN8 merely states that ETSU "can be regarded as relevant guidance on good practice" (para 2.16). This distinction enabled Wynn Williams J to say the following at paragraph 68 of *Tegni*:[82]

> "In my judgment the Inspector is clearly correct when he says (as he does in paragraph 21 of the decision letter) that the indicative noise levels set out in ETSU-R-97 are guidance not absolute values. That is the clear effect of paragraph 2.16 of TAN 8. It follows that there may be circumstances in which it is open to a local planning authority or an Inspector to conclude that noise levels associated with a wind farm are unacceptable notwithstanding compliance with ETSU-R-97."

80. ETSU was previously the subject of attention in 2007, when work was undertaken by Salford University into the issue of aerodynamic modulation. Work done for the DTI by Hayes Mackenzie had suggested that aerodynamic modulation could be occurring in ways not anticipated by ETSU-R-97, leading to Salford being commissioned to carry out a further study to look at levels of noise complaints and review the level of understanding of aerodynamic modulation effects. The study concluded that although AM could not be predicted, its incidence was low, with only four cases of complaint out of the 133 wind farms them operating. The Government did not consider this to merit further work or

77 http://www.wind-watch.org/documents/statement-from-jane-davis-of-deeping-st-nicholas/
78 19 February 2008 decision of David Gordon re 5 turbine wind farm in Fife, P/PPA/250/675, http://www.cadeap.org/Rossie_Appeal_Decision.pdf
79 [2010] EWHC 1106 (Admin) (Wyn Williams J).
80 See paras. 68-74.
81 (http://wales.gov.uk/topics/planning/policy/tans/tan8/?lang=en).
82 Wyn Williams J also emphasised (at paras. 25-26) that there was no basis for saying that policy documents in England apply in Wales, or vice versa.

research into AM, and continued to endorse ETSU as the basis for rating and assessing noise.[83]

81. In *R (North Devon District Council) v. Secretary of State for Business, Enterprise and Regulatory Reform*,[84] one ground of argument was that the Secretary of State should have re-opened the inquiry to address the Salford report's findings. Sullivan J held that on the basis of the content of the Salford report, there was no change in policy or in the relevant position generally that made the Department's decision not to re-open the inquiry, or to invite further representations unreasonable.[85] In that case, the local authority case was that the PPS was not prescriptive in requiring ETSU-R-97 as the only assessment document to be used, nor could it properly do so in view of the fact that policy is not to be applied as if it were a statute, but rather having regard to its underlying purpose. Therefore, the authority contended, there could be no proper objection to applying other standards, such as BS 4142 or WHO, as a check on ETSU, to ensure the relevant policy test is fulfilled. The inspector rejected that argument, on the basis that policy did not allow for a choice of method. The local authority argued that the inspector had unlawfully fettered his discretion in so doing. Sullivan J regarded it as very unlikely that an experienced inspector would forget or overlook the fundamental distinction between law and policy, indeed it was clear from his decision that he recognised there could be a departure from the guidance in PPS 22 if there was sufficient justification. As the judge put it at paras. 47-48:

> "The Inspector went straight to the heart of the matter. He considered the underlying reason why the claimant was arguing that it was appropriate to use other standards such as BS 4142 or the WHO sleep disturbance criteria as a check on ETSU: because one had to have regard to the purpose underlying the policy advice in the PPS and that purpose was to avoid harm to amenity. However, the Inspector concluded that the test of avoiding harm to amenity "was inherent in the ETSU guidance". He also concluded that there was nothing in PPS22 to indicate that other mechanisms should be used. Both of those conclusions were clearly correct (see the passage from paragraph 44 of the Companion Guide to PPS22 and paragraph 22 of PPS22 above). The relevant extract from the Companion Guide was cited by the Inspector in paragraph 8.159 of the report. That provides an intelligent and adequate reason for following, rather than departing from, recent national policy advice.
>
> "On a fair reading of the Inspector's report the Inspector followed the advice in PPS22 as to the use of ETSU because, in his planning judgment, it was the appropriate course bearing in mind the underlying policy test -- that of avoiding harm to amenity -- not because he mistakenly believed he was legally obliged to do so."

82. Further, it was not necessary, in Sullivan J's view, for the inspector to address and resolve the disputes which arose at the inquiry as to the seven ways in which the council criticised the approach of ETSU:[86]

> "He did not need to do so, having been satisfied that the justification advanced for not applying ETSU, the policy objective of avoiding harm to amenity was, contrary to the claimant's submissions, inherent in the ETSU methodology. A decision to depart from recent national policy advice might well have required more detailed justification, but since the Inspector was following national policy advice, his reasoning was perfectly adequate."

83. Given the apparently low incidence and low risk of nuisance from amplitude modification, and the government's decision in 2007 not to change ETSU to reflect it, inspectors may well give little weight to the risk of AM occurring. For example in the Carsington Pastures appeal (2008), Inspector Robin Brooks at para. 111 noted the "possibility" of wind shear noise occurring because of local topography or atmospheric conditions, but considered this risk to be "low and acceptable". He noted (para. 113) that noise can be perceived in different ways by different individuals, and that compliance with ETSU guidelines cannot in itself guarantee that no-one will ever be disturbed by new sources of noise. Nevertheless he found no compelling evidence to depart from the ETSU approach, as advised by PPS 22.

84. It should be emphasised that this does not mean that an inspector will never have regard to any standards other than ETSU. Whilst ETSU will be the starting point, it should not be used inflexibly, and regard may be had to the fact that the WHO guidance on which it was originally based has itself moved on. In the Weaverthorpe Road, Bradford Appeal[87]

83 Statement of DBERR, August 1, 2007.
84 [2008] EWHC 1700 (Admin).
85 Paras. 54-55.
86 See para. 49.
87 11 February 2010, APP/W4705/A/09/2114165.

the margins by which some properties would meet ETSU standards was described by the inspector as "negligible", even on the appellant's results. There were numerous sensitive receptors in close proximity to the industrial estate where the proposed turbine would be located. A cautious approach was merited, and the inspector placed substantial weight on WHO sleep disturbance criteria, which demonstrated that noise could result in sleep disturbance (paras 50-59).

85. ETSU has now also received the backing of the coalition Government. On July 27, 2010, the Secretary of State for Energy and Climate Change was asked in Parliament whether ETSU would be reviewed. The answer was:

> "Noise is a key issue to be taken into account in considering proposals for wind farm development. There is no reason to believe that the protection from noise provided for by the ETSU-R-97 guidance does not remain acceptable, and we have no plans to change this.
>
> However, I have commissioned an analysis of how noise impacts are considered in the determination of wind farm planning applications in England. The project will seek to establish best practice in assessing and rating wind turbine noise by investigating previous decisions. Our aim is to ensure that ETSU-R-97 is applied in a consistent and effective manner and that it is implemented in a way that provides the intended level of protection.
>
> Following a competitive tender process, we have awarded the work to Hayes McKenzie, who will begin in September and expect to complete the project around the end of the year."[88]

86. The project will review ETSU, but is not intended to lead to its replacement. This may be unsurprising; Malcolm Hayes of Hayes McKenzie was one of ETSU's original authors. The document is endorsed by current and future planning policy – PPS22 and the draft EN-3 NPS. It has been approved by subsequent governments. It is followed by planning inspectors, and by the courts. Problematic though it has been, unwieldy and controversial as it remains, ETSU-R-97 has survived. Whether the scope of review is adequate is a matter of controversy, or whether a more thorough overhaul is needed.[89]

87. Noise will undoubtedly continue to be a concern for proposals of this sort, in rural communities which may have benefited traditionally from low levels of background noise. As Sedley LJ put it in his judgment in the decision in *R (Enstone) Uplands and District Conservation Trust*:[90]

> "Noise is a plague which can wreck communities and ruin lives, and planning authorities are not only entitled but bound to take very seriously any land use or proposed land use which is going to add to the burden of noise to which communities, and none more than rural communities, are subjected."

88. With that in mind, it is unfortunate that there is so much in the relevant law and practice which remains unclear. As Deputy High Court Judge George Bartlett QC put it in the recent case of *Barnes v. Secretary of State for Communities and Local Government and South Lakeland District Council*:[91]

> "I would only add that it seems to me most unfortunate that after many years of wind farm developments there are no generic noise conditions, contained in national planning guidance, for local planning authorities and inspectors to impose. The result is that resources have to be spent by developers, local planning authorities and objectors in agreeing, or disputing, what the noise conditions should contain; and, on appeal, inspectors have to devote time at the inquiry and afterwards in resolving the matter. And then there can be challenges to the conditions that are imposed, as has happened here. Unsurprisingly appeal decisions come up with different answers, as I was shown, and the scope that there is for inconsistency in this respect is obviously undesirable."

88 *Hansard*, 27 July 2010, Column 889W.
89 See *Planning*, August 6, 2010, p. 2 "Turbine Noise Study Seeks Assessment Unity".
90 [2009] EWCA Civ 1555, para. 44.
91 [2010] EWHC 1742 (Admin), para. 27.

Costs in Environmental Judicial Review - Significant Recent Developments on Aarhus[1]

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1. The summer has seen two important developments in respect of costs in environmental judicial review cases: the Court of Appeal applied Aarhus principles in an EIA case (Garner[2]) and the Aarhus Compliance Committee issued its draft finding on the complaint by a number of NGOs as to the UK compliance with the convention.

2. The Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the Aarhus Convention, 20th June 1998) is concerned with a number of aspects of access to justice in environmental cases including that the costs of challenging decisions in the environmental context should not be prohibitively expensive. The principles of the Aarhus Convention have been incorporated, by amendment, into the EIA Directive (Council Directive 85/337/EEC - see Article 10a).

3. This issue is not new and not without significant airing in the domestic context. An important and authoritative work in this regard is the report of the Working Group on Access to Environmental Justice (May 2008), chaired by Sullivan J, as he then was. As Mr Justice Sullivan records in the Foreword to the report:

"When it signed up to the Aarhus Convention, nearly a decade ago, the United Kingdom undertook to ensure that ordinary members of the public who wish to pursue environmental law challenges should have access to procedures that were "fair, equitable, timely and not prohibitively expensive"".

4. He went on to observe:

"Our current cost rules may well strike a fair balance in private law cases, where individuals are pursuing their own private interests in litigation, but they take no account of the recognition in Aarhus that there is a public interest in ensuring that environmental laws are not contravened."

5. In respect of claimants without legal aid, the report concluded that:

"Our view concurs with a recent comparative study on access to environmental justice commissioned by the European Commission which concluded that the UK was one of only five member states whose provisions on access to environmental justice under Aarhus were unsatisfactory."[3]

6. In respect of protective costs orders, the report finds:

"The availability of a protective costs order (PCO) at an early stage in the proceedings can provide an important

mechanism in meeting the requirements on access to justice in that a PCO provides a cap and advanced certainty on potential exposure to costs should an application fail. But the current judicial principles on PCOs were not developed with Aarhus in mind, and contain constraints that are not consistent with Aarhus."[4]

"If the individual Aarhus claimant, acting reasonably in the circumstances, would be prohibited by the level of costs or

1 Richard Kimblin, Barrister, No 5 Chambers (rk@no5.com)
2 R (oao) Garner v Elmbridge Borough Council [2010] EWCA Civ 1006
3 See paragraphs 5 – 7 of the Executive Summary at page 3.
4 See para 9, page 4.

costs risks from bringing the case, then the Court must make some form of PCO to ensure compliance."[5]

"It also needs to be recognised that compliance with Aarhus – and the re-evaluation of conventional costs principles that it implies – will inevitably impose some extra costs on individual public authorities and third parties who are involved in environmental judicial review. These costs, though, have to be set against the goal of improving the protection of the environment that underlies the Aarhus requirements on access to justice."[6]

7. However, it is not until the decision in Garner that the principles which are set out in both the Aarhus Convention and the Directive, and endorsed in the Sullivan report, have found their expression in the Court of Appeal.

8. At para 39, Sullivan LJ held:

"Turning then to the two grounds on which Nicol J refused a PCO, I accept the Appellant's submission that in an Article 10(a) case there is no justification for the application of the issues of "general public importance"/ "public interest requiring resolution of those issues" in the Corner House conditions.

9. Hence, in an EIA case, the general public importance/public interest issue does not arise.

10. Turning then to the next important issue of principle which arose in Garner, Sullivan LJ held[7]:

"This raises an important issue of principle. Should the question whether the procedure is or is not prohibitively expensive be decided on an "objective" basis by reference to the ability of an "ordinary" member of the public to meet the potential liability for costs, or should it be decided on a "subjective" basis by reference to the means of the particular claimant, or upon some combination of the two bases?

In an ideal world, I would have preferred to defer taking a decision on such an important issue of principle until after the findings of the Aarhus Convention Compliance Committee as to whether our domestic costs rules are Aarhus compliant are published (it is anticipated that the committee's draft findings will be published within the next two months or so) and until after we know whether the European Commission will accept or reject the United Kingdom's response to the Commission's reasoned opinion, announced in a press release dated 18 March 2010, in which the Commission is contending that the United Kingdom is failing to comply with the directive because challenges to the legality of environmental decisions are prohibitively expensive.

I am also mindful of the fact that we were told that an appeal to the Supreme Court is pending against the decision of Mrs Registrar di Mambro and Master O'Hare on preliminary issues which arose in the detailed assessment of the bills of costs lodged by the respondents in the case of Edwards v The Environment Agency and Others [2006] EWCA Civ 877. They decided to disallow any costs that would be prohibitively expensive and, in deciding whether the costs were prohibitively expensive, they adopted an objective test, but said that they should also have regard to other matters including the parties' financial resources (see paragraphs 18 to 19 of the decision on the preliminary issues). Thus it seems likely that before too long this issue of principle will have been considered at the highest level by the Aarhus Compliance Committee, the European Commission and the Supreme Court.

Sadly, it is not an ideal world; it is now over a year since the planning permission was granted, and we are still no nearer to deciding whether it was lawfully granted. The parties anticipate that the rolled up hearing will be listed in October. This term ends tomorrow, so we must reach a decision today as to whether or not the judge was wrong to refuse to grant a PCO.

Whether or not the proper approach to the "not prohibitively expensive requirement under Article 10a" should

5 See para 10, page 4.
6 See para 21, page 5.
7 Starting at para 42 of the judgment

be a wholly objective one, I am satisfied that a purely subjective approach, as was applied by Nicol J, is not consistent with the objectives underlying the directive. Even if it is either permissible or necessary to have some regard to the financial circumstances of the individual claimant, the underlying purpose of the directive to ensure that members of the public concerned having a sufficient interest should have access to a review procedure which is not prohibitively expensive would be frustrated if the court was entitled to consider the matter solely by reference to the means of the claimant who happened to come forward, without having to consider whether the potential costs would be prohibitively expensive for an ordinary member of "the public concerned".

11. The Court of Appeal had to decide Garner in the absence of certain information which it would have preferred to have, including the findings of the Aarhus Compliance Committee, which are now in fact available, having been published in draft on 25th August 2010. In particular, it is noted that the Compliance Committee's draft findings include:

(i) The limiting effect of reciprocal costs and in particular the need for there to be equality of arms between the parties such that claimants should not have to rely on pro bono or junior legal counsel (see para 130).

(ii) The Committee concludes that despite various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements under the Convention and in particular, that there is considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest. In particular, the Committee in this respect notes that fairness in Article 9, paragraph 4, refers to what is fair for the claimant, not the defendant (para 133).

(iii) A general conclusion that the UK has not adequately implemented its obligation under Article 9(4) (para 134).

12. The draft findings deal with a range of other issues including the rules in England and Wales as to the time limit for judicial review and applications for interim relief.

13. The direction of travel disclosed in the Draft Findings is also to be found in the European Commission's letter to the UK Government (18 March 2010) stating:

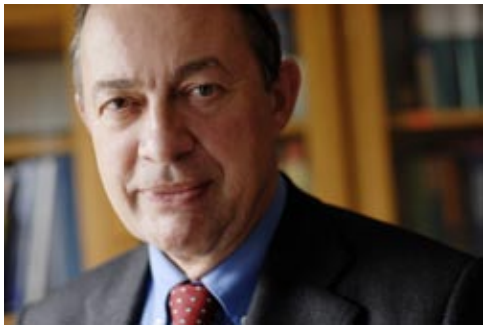
"When important decisions affecting the environment are taken, the public must be allowed to challenge them. This important principle is established in European law. But the law also requires that these challenges must be affordable. I urge the UK to address this problem quickly as ultimately the health and wellbeing of the public as a whole depends on these rights."[8]

14. The response to the letter is awaited.

15. Given the dynamic nature of this area of law at present, the Environmental Litigation Working Party will be holding a meeting on the topic during the course of the autumn. The Working Party always welcomes new members or the return of old members. If you are interested, please contact Richard Kimblin at No 5 Chambers (rk@no5.com)

8 From the Press Release from the Commission.

The New Environmental Tribunal



Richard Macrory Professor of Environmental Law, University College, London

As many will be aware, a new First-tier Tribunal (Environment) has been created within the new General Regulatory Chamber. Initially, its jurisdiction is limited to hearing appeals against civil sanctions imposed for a limited number of environmental offences in England and Wales by the Environment Agency and Natural England. The first appeals are likely to be heard some time next year,

Sir Robert Carnwath, as Senior President of Tribunals, has now asked me to prepare a report for him looking at the possibility of extending its jurisdiction to determining other forms of statutory appeals under various environmental laws.

In 2003 and with the assistance of Michael Woods I prepared a report for DEFRA on the possibility of an environmental tribunal as a statutory appeals body. The appendix to Modernizing Environmental Justice identified over 37 different statutory environmental appeals, with a scattered range of appeals bodies, including the Secretary of State, the Planning Inspectorate, Magistrates Courts, and the High Court. Part of the purpose of the new review is to update this table. If anything, the picture appears to have got more complex in the past few years as there are now a greater range of government departments such as DECC and BIS involved in new statutory appeals regimes concerning issues such as emissions trading and packaging regulations.

I would be interested in hearing from any UKELA member who has recently been involved in statutory environmental appeals. Who heard the appeal? How satisfactory was the procedure? Were difficult legal issues involved and were they handled well? How long did it take before the decision was made, and was the decision letter satisfactory? Do you feel that a first level environmental tribunal might provide a preferable appeals body and why? (In more complex cases, the tribunal is likely to have a legally qualified chair plus two non-legal specialists; for simpler cases, a single member. The Tribunal can sit anywhere in the country).

Deciding what does or does not constitute an ‘environmental appeal’ is never clear-cut. For the 2003 report I excluded town and country planning appeals (including environmental assessment), compulsory purchase, listed buildings, building regulations, hedgerows and tree preservation orders. Included were contaminated land, habitat protection, waste, environmental permitting, air and water pollution, water abstraction, GMOs, contaminated land. I would now add emissions trading, environmental liability regs., packaging, WEE, etc.

Please send any comments by e-mail r.macrory@ucl.ac.uk by October 7th.

Insights on how the system actually operates on the ground will be invaluable to me in writing the report. I am not sure yet whether I will include directly in the report any comments sent to me – if I do I will seek permission.

A (Lawyer’s) Life Less Ordinary

Paul Collins Government Legal Service (GLS) for the Department for Environment, Food and Rural Affairs (Defra).

I am a lawyer within the Government Legal Service (GLS) for the Department for Environment, Food and Rural Affairs (Defra). As a chemistry graduate, my career started with working for the Environment Agency and then qualifying as a lawyer into private practice, in which I worked for six years. In December 2008, I left private practice to start a new phase of my career, with the GLS.

The GLS consists of all those lawyers in around thirty Government Departments, Agencies and other public bodies. As a department, Defra has one of the largest legal teams in Government. Defra

is responsible for environmental protection, food production and standards, agriculture, fisheries and rural communities in the United Kingdom.

So why did I want to join the GLS and, in particular, Defra? Well, the GLS recruitment literature offered great things – the opportunity to be involved in a variety of high quality work of a political nature and input into making the law!

My interest in the dynamic of environmental issues between politics, people and the business community is the driving force behind my wanting to be an environmental lawyer. Since joining the GLS, my portfolio of work has always been varied, ranging from drafting legislation on dog walking controls to advising on proposals for restructuring the water industry in England and Wales. In the summer of 2009, I was responsible for drafting legislation to improve the energy efficiency of white goods and introducing a ban on certain types of light bulbs, which attracted a lot of media attention at the time.

As a lawyer within the GLS, I work closely with Ministers and policy colleagues within the Department and across Whitehall to help deliver Government policy. This involves working with colleagues and stakeholders (e.g. the environmental regulators, local authorities and businesses) to work through how policy can be delivered on the ground and critically, if legislation is required, ensure it is effective and fit for purpose. Drafting submissions to Ministers for their decision and briefing them in person is another important element of my work.

Many of the skills I developed and demonstrated as a lawyer in private practice apply equally to my work within Defra – assessing and advising on legal risks, managing client expectations and delivering a legal service that clients can trust to deliver Government policy. However, the range of legal issues I now advise on in depth is far greater than the relatively narrow scope of environmental law I previously advised on in private practice. Such issues include European legislation, administrative law, human rights, devolution and freedom of information. All this calls for a much deeper understanding of the law than would typically be required as a lawyer in a commercial practice.

As a lawyer, I personally find the legal challenges and experiences of collaborating with colleagues to deliver Government policy much more rewarding than the achievement of a billable hours target. It's true that my role carries with it a lot of responsibility and its own demands and pressures. However, Defra and the GLS are well structured to support its lawyers.

The training provided by the GLS is excellent. All lawyers new to the GLS attend a mandatory five day introductory course for lawyers. Attending this course at the start of my GLS career immediately settled my nerves and calmed my apprehension of having taken the step from private practice lawyer to the public sector. I have since attended courses on devolution, drafting statutory instruments and dealing with Parliamentary Bills. There are regular training sessions that are run by Defra and other Government departments on a vast array of relevant subjects.

There is a considerable breadth of invaluable experience and expertise among my colleagues who I can readily consult. A knowledge-sharing culture clearly exists throughout Whitehall and it is encouraging that this is seen by all as a good thing and not something that could potentially jeopardise an individual's own career ambitions. The emphasis that is placed on professional development and the encouragement to initiate and lead on new ideas for sharing knowledge and working by all levels of the GLS is far greater than I have encountered before.

My experience of working for Defra has been rewarding and far exceeded my expectations. I invested a lot of time and money in training to be a lawyer and I am pleased that it is in an exciting, challenging and fast moving area of law that I work, at the heart of Government. Can things be better? Well, there's always room for improvements. The level of bureaucracy I encounter at times can be frustrating but usually there's a good reason for it. However, I would highly recommend a career within the GLS for anyone who wants to be exposed to new challenges, feel satisfaction with their job and make a real difference.

This article first appeared in the August/September 2010 edition of Government Gazette.

UKELA Member Profile - Ben Stansfield

What is your current role?

I am a solicitor at Clifford Chance.

How did you get into environmental law?

Before I started at Clifford Chance, I worked at Slaughter and May for a year as a paralegal and worked a lot with their environmental team: Ed Keeble, Paul Davies (now at Macfarlanes) and Nigel Price (now at Ashurst). They had an infectious enthusiasm for what they did and I made sure that when I joined CC as a trainee solicitor, I did an environmental law seat, which I thoroughly enjoyed.

UKELA Member Profile

What are the main challenges in your work?

Other than timesheets? Distilling the vast amount of environmental law into concise and commercial advice for a diverse client base interested in differing industries. Staying on top of the latest developments (both legal and policy) is also a massive challenge and I'm grateful to be in a reasonably large team of environmental lawyers so that they can share the burden of reading all the consultation papers!

What environmental issue keeps you awake at night?

The side-effects of climate change – mass migration, famine and war. I worry what the world will be like in 50 years for my children and grandchildren. On a lighter note, I have a small garden which I tend organically and I've yet to find an effective way of dealing with the slugs.

What's the biggest single thing that would make a difference to environmental protection and well-being?

A period of regulatory stability – there seems to be endless tinkering with legislation and policy. Whilst this creates welcome (and interesting) work for lawyers, it creates uncertainty which could easily be avoided. We work on a lot of energy projects at CC and regulatory instability seems to be the number one cause of delay for many projects which would contribute to a low-carbon economy and a healthier planet.

What's your UKELA working party of choice and why?

Due diligence - not the most glamorous of working parties, but probably one of the most active in terms of meetings and social events, and we never have any consultations to respond to! The DD working party brings together a wide spectrum of UKELA members and for that reason, it's been a great way to meet other professionals and to forge new connections.

What's the biggest benefit to you of UKELA membership?

Like many others who have answered these questions, it has to be the opportunity to meet other people interested in environmental affairs.

Students

Co-Student advisor needed

UKELA is looking for a student to help Claire Collis, who is the student advisor to UKELA's Council. Claire is working hard to manage all her commitments – work and study – whilst the student adviser role has grown. The aim is to share out the elements of the role set out below so that each co-advisor deals with discrete tasks. It is anticipated that the co-advisors would alternate in attending Council meetings (rather than both attend all of them) – this means attending two a year in London.

The role of student advisor involves:

- Advising UKELA's Council on how to retain the current student members
- Advising Council on how to attract new student members
- Ensuring UKELA's student contacts at universities are sound
- Helping keep the student section on the website (www.ukela.org) up to date
- Helping with the UKELA Facebook site and attracting more sign ups
- Helping co-ordinate the mentoring scheme
- Contributing articles for students to e-law
- Initiating student mailings as and when needed
- Helping design the annual student competitions programme and competitions day
- Liaising with relevant partner organisations

Any travel or other expenses relating to the role are covered. There is a panel which supports the student advisor comprising UKELA trustees and competition organisers and they occasionally hold phone conferences to discuss important issues.

If you would like to be considered for the role, with a commitment to the end of 2011, please send a covering letter explaining

what you would be able to offer to the role and a CV to Vicki.elcoate@ntlworld.com. The deadline is 5pm on September 30th 2010. The decision will be made by the student panel.

Students Careers and Networking Evening

November 23rd 2010

UKELA student members are invited to the annual UKELA student careers and networking evening. This year it's being hosted by Landmark Chambers (thank you), 180 Fleet Street, London EC4A 2HG. It starts at 6pm and finishes around 9pm with talks at 7pm. The format is quite informal with representatives of various careers in Environmental Law available to meet students. So far we have barristers, solicitors, environmental consultants, government and regulatory lawyers and NGOs attending. Drinks and nibbles are provided.

If you would like to attend please email Alison Boyd to register: alisonboyd.ukela@ntlbusiness.com.

Facebook

UKELA's Facebook page isn't just for students. You can use it to network and share information.

http://www.facebook.com/home.php?#!/group.php?gid=480436435214

Last chance to book our September events

What Environmental Challenges face the Coalition Government?

A UKELA early evening seminar at Freshfields Bruckhaus Deringer in London.

Thursday September 16th 2010

What does the Coalition Government have planned for the environment? What are the challenges ahead? What will the impact of budget cuts and the emphasis upon localism be on environmental policy? For environmental practitioners and those interested in what the government is planning on key issues like the low carbon economy, planning and energy, our post election seminar on September 16th 2010 is not to be missed.

Chaired by Nicholas Schoon, editor of the leading environmental journal, ENDS, speakers who will address the key questions for the new government are:

- Tom Burke, environmental adviser to Rio Tinto plc and visiting professor at Imperial and University Colleges, London. With experience as special adviser to three secretaries of state Tom has a unique insight to the workings of Parliament and business. Tom is also a patron of UKELA.
- Caroline Lucas MP, the first Green Party MP and leader of the Green Party in England and Wales. After three terms of office as a MEP Caroline can help unravel the relationship between what might be happening in Europe for the environment, and the new government's plans.
- Lord Colin Boyd QC. Lord Boyd is a former Lord Advocate of Scotland and a Labour member of the House of Lords. He is head of the UK Consenting Group in Dundas & Wilson which handles the consenting process for major infrastructure projects. He has taken a keen interest in planning and environmental issues in the Lords and is an honorary professor of law at Glasgow University.

Nicholas Schoon was environment correspondent of the Independent newspaper from before joining the Secretariat of the Royal Commission on Environmental Pollution, where he worked as a policy analyst. His most recent post before joining ENDS was as communications director for the Campaign to Protect Rural England, a long-established green NGO. He has had two books published, one on biodiversity (Going, Going, Gone: the Story of Britain's Vanishing Natural History, Bookman, 1998) and one on UK Cities and urban regeneration (The Chosen City, Spon Press, 2001).

Registration from 1730. Speakers from 1800. Finish by 1945 with drinks and nibbles.

CPD: 1.5

£25 for UKELA members, £35 non members, students free (limited places)

To book please visit http://guest.cvent.com/d/8dqz94

London meeting on Economics and the Environment

Thursday September 23rd at Herbert Smith in London

CPD TBC 1.5

UKELA members are cordially invited to this early evening session where the subject will be the environment and economics. Speakers will discuss the current major international study on valuing nature and the use of economic instruments to improve environmental performance.

Speakers:

Dr John Snape , Associate Professor of Law, University of Warwick

This talk will be about the prospects for green taxes, in changed economic circumstances, and with a new government in office. It will focus, not only on how green taxation policy is explained, but on why we think those explanations are important within the system in which they operate. The provisional title of the talk is: 'Green taxes in winter: parsing the policy explanations'.

William Evison, Environmental Economist at PricewaterhouseCoopers and chapter editor of The Economics of Ecosystems and Biodiversity (TEEB) report for business

The Economics of Ecosystems and Biodiversity (TEEB) is a major international study with over 500 contributing authors - commonly dubbed the 'Stern Report' for biodiversity. The study was instigated by the G8+5 environment ministers in 2007 and is now hosted by the United Nations Environment Programme. TEEB will publish its final set of papers later this year. This talk will summarise key themes from the TEEB reports for policy makers and for business, exploring how a better appreciation of the value of nature can influence decision making at all levels.

The Meeting will be chaired by Simon Boyle of Argyll Environmental.

The Meeting will last for approximately 90 minutes after which refreshments will be provided to enable those attending to discuss the issues informally.

Registration is 5.30 pm with the seminar due to start at 6 pm.

1.5 CPD points will be available for all attending.

There will be a small contribution to cover costs at £20 for Members and £30 for Non-members. Students and Unwaged members are free. Your booking is not confirmed until payment has been received. If you book but don't let us know you can't attend before the event we will chase you for payment as every booking incurs costs.

If you wish to accept please contact by e-mail Angela Pallett at Herbert Smith: angela.pallett@herbertsmith.com

All cheques should be made payable to UKELA and sent to:

UKELA, c/o Angela Pallett, Exchange House, Primrose Street, London EC2A 2HS, (DX 28 London)

With many thanks to Herbert Smith for hosting and to Angela Pallett for organising.

Annual Wild Law Workshop: 5pm Fri 24 Sept – 2pm Sun 26 Sept 2010

Lee Valley Youth Hostel Association, Cheshunt, Herts.

2.5 CPD points

This year's wild law workshop will take place at the comfortable and conveniently located Lee Valley YHA, just outside of London. The theme of the workshop is our habitat and how we relate to the land. We will explore, in the beautiful and uniquely 'wild' setting of the Lee Valley Country Park, how we can move from 'exploitation' to 'relationship' with the land.

Our speakers, David Hart QC, Colin Tudge and Dr. Mayer Hillman, will provide expert insights from a legal, philosophical/ scientific and public policy perspective. Participants will have the opportunity to learn outdoors and experience one of the few remaining semi natural habitats in greater London.

As with previous wild law workshops, the event will be multidisciplinary, highly experiential and participatory. Above all, it will be fun! All new participants are very welcome – you'll meet other 'thinkers' and make new friends. For further information and to book: http://guest.cvent.com/d/vdqsbv

UKELA Scottish Conference 2010: Climate Change and Other Issues

The UKELA Scotland Conference 2010 takes place this year at The George Hotel, Edinburgh on Thursday 7th October 2010.

The all day Conference will gather leading speakers from the public and private sectors. Registration is from 9.30am.

Please note sponsorship opportunties are still available for this conference, contact events@originevents.co.uk for further details. To book please visit http://guest.cvent.com/d/mdq8fh

Half day seminar: Unmasking the significance of waste law and regulation in Northern Ireland

Tuesday October 12th 2010

Venue: Wellington Park Hotel (near QUB) 21 Malone Road, Belfast, BT9 6RU, Belfast.

Second in the annual series of half day seminars run by the UK Environmental Law Association in Northern Ireland. This special event, in partnership with the Environmental and Planning Law Association of Northern Ireland, focusing on Waste is for environmental lawyers, government advisers, NGOs, academics, local authorities, business and students.

Registration from 1.30; speakers from 2pm.
Chair: Professor Sharon Turner, Queen's University Belfast

Speakers:
Waste law and regulation– the regulators' perspective – John McMillen, Chief Executive NI Environment Agency
Proposals for a Waste Bill and other developments in Northern Ireland waste law – Andrew Ryan, Tughans
Waste law and regulation – the Waste Management Group's perspective – John Quinn, Chief Executive of ARC21
Recent developments in EU waste law – David Elvin QC, Landmark Chambers
Waste law and regulation – the NGO perspective – James Orr, Director, Friends of the Earth Northern Ireland

Finish with drinks and nibbles at 5.15pm.

Fees: UKELA and EPLANI members £30; non-members £40; NGOs and low waged £15; students – 1st 10 free, then £5

Bookings: to book please visit http://guest.cvent.com/d/9dq9wc

Refreshments kindly provided by Tughans and Landmark Chambers. With thanks also for sponsorship by EPLANI.

Early evening seminar on Energy in Wales

November 10th 2010

Venue: Hugh James solicitors, Hodge House, 114 - 116 St. Mary Street, Cardiff, CF10 1DY

Registrations from 4.30; speakers from 5pm, followed by drinks and nibbles

Chair: Prof. Mark Stallworthy, Co-Director of the Centre for Environmental and Energy Law and Policy at Swansea University

1. Energy from Waste - a talk on the planning issues to be considered and overcome - Rhodri Price Lewis QC
2. Nuclear power and Wales – Prof. Lynda Warren
3. Llywelyn Rhys (Head of Renewables UK) - Wind Energy, A Welsh Perspective.
4. Speaker from the Co-operative Bank - Financing Renewable Energy Projects.

Speakers from Hugh James may also contribute.

Cost £20 for UKELA members, £30 non members, free to students (limited availability, places must be booked).

Videolinking is also available. Please contact Alison Boyd if you are interested in this. There will be a small admin charge of people attending by videolink. alisonboyd.ukela@ntlbusiness.com

To book please visit http://guest.cvent.com/d/tdqvtv

Refreshments kindly provided by Hugh James solicitors and Landmark Chambers.

Garner Lecture 2010

November 18th 2010

You are warmly invited to join us for the 2010 Garner Lecture which is being given by Sir Konrad Schiemann. Sir Konrad will be speaking on "The influence of European Union Law on Access to Justice in Environmental Cases".

Registration from 5.30; speaker at 6pm. Drinks and canapés to follow.

Sir Konrad Schiemann is the UK judge on the European Court of Justice, Europe's highest court, which is responsible for ensuring European Union law is applied consistently across all member states. The ECJ's rulings affect the daily lives of millions of people across the Continent. Sir Konrad was appointed in 2004 after a long career in the English High Court and Court of Appeal.

The Garner Lecture is being chaired by Lord Justice Carnwath CVO, senior President of tribunals, and UKELA President.

The Simon Ball Prize for Outstanding Academic Achievement will be awarded after the Lecture.

Attendance fees: £30 for members; £45 non members. Limited number of student places are free, and full price after that.

All places must be booked http://guest.cvent.com/d/vdqfqb

This event is kindly being hosted at Clifford Chance LLP, 10 Upper Bank Street, London, E14 5JJ. The nearest tube station is Canary Wharf on the Jubilee Line, only 15 minutes from Waterloo station.

Student Careers and Networking evening

November 23rd, Landmark Chambers, 180 Fleet Street, London, EC4A 2HG (on the corner of Fleet Street and New Fetter

Lane)

Bookings have just opened for the annual student careers and networking evening. There is a cap on numbers and it's usually very busy so please do book as early as possible.

Our advisers are from: commercial law practices; public interest solicitors; Landmark Chambers; Environment Agency, Defra, NGOs, environmental consultancies.

To book please send your name, academic institution, and contact details (not postal address) to Alison Boyd: alisonboyd.ukela@ntlbusiness.com. There are talks from 7-7.30 which everyone will have the opportunity to attend.

Wild Law in the Wilds 2011

We are planning to hold another Wild Law in the wilds of Scotland weekend workshop in 2011. This year's was a great success and we want to know if you might be interested in attending on the 1st May Bank Holiday weekend (April 29th – May 2nd). The planned venue is Broadmeadows Youth Hostel in the Scottish Borders:

http://www.syha.org.uk/hostels/borders/broadmeadows.aspx

The likely cost would be £100 to include accommodation and transport from the nearest train station (Berwick upon Tweed).

To express an interest without commitment please email Vicki.elcoate@ntlworld.com and we'll keep you informed about the event.

You can view this year's event here:

http://www.ukela.org/rte.asp?id=99

Diary Date: UKELA annual conference 2011

The 2011 conference will be held at the University of East Anglia, Norwich, on June 24th-26th.

The programme is currently being planned and bookings will open before Christmas.

If you have any ideas, suggestions or thoughts on how to make the conference better for you please contact the conference team by emailing Vicki.elcoate@ntlworld.com.

Environmental Law Conference 2010

Organised by IBC Legal Conferences

5th November 2010 - Le Méridien Piccadilly, London

Book by the 8th October to save up to £300

Plus, UKELA members get an extra 10% discount! Quote VIP Code: KW8097UKELE1*

This one-day conference is your opportunity for a practical update on the key environmental law developments including climate change, carbon reduction, the environmental sanctions regime and Cleantech.

Keynote:

Jasper Teulings, General Counsel & Advocaat, *Greenpeace International*

Chair:

David Hart QC, Barrister, *One Crown Office Row*

And eleven specialised speakers... Download the full list of speakers here

Prepare and meet your organisation's legal obligations with confidence, topics include:

- Benefit from a superb review of essential case law and regulations
- Understand the EU Emissions Trading Scheme and the CRC Energy Efficiency Scheme
- Equip yourself with tools and tips to implement climate change measures in your organisation
- Analyse practical examples of what could happen if you don't meet your obligations

- Obtain insights into current hot topics in Cleantech developments and M&A considerations
- Discover the future legal developments to watch out for in the wake of Copenhagen
- Hear from the leading experts in the field about how to plan for the financial implications of environmental legislation

For further information and the course brochure:

- Visit: http://www.informaglobalevents.com/KW8097UKELE1
- Email: professionalcustserv@informa.com
- Call: +44 (0) 20 7017 5503

Quote VIP Code: KW8097UKELE1 in all correspondence

**10% discount is void if person is already registered*

Jobs

EHS Regulatory Consultant for sub-Saharan Africa and the UK

Enhesa is the market leader in global EHS compliance assurance. As a dynamic and rapidly growing environmental, health and safety consultancy serving corporate clients worldwide, we are constantly seeking to recruit talented and dedicated EHS professionals.

Our mission is to assist our clients in identifying the regulatory requirements they have to comply with, to assist them with ensuring ongoing compliance in practice and to advise them on how to develop their corporate environmental, health and safety strategies. Core clients are Fortune 500 multinational companies.

Enhesa is looking to strengthen its team of consultants and is currently seeking to hire one or more environmental, health and safety professionals to work with sub-Saharan African countries and the UK.

Typical activities will involve research of EHS laws and regulations, contact and liaison with regulatory officials, preparation of reports to industrial companies on regulatory compliance, and EHS audits.

This job is located in: Brussels, Belgium.

Full-time position

Requirements:

- Academic qualification: Law Degree or degree in Environmental and/or Health and Safety Management
- EHS knowledge/experience in sub-Saharan African (such as South Africa or other countries) and the UK.
- Fluency in written and spoken English (other languages would be a bonus)
- Good analytical and writing skills
- Candidates who have any of the following skills will be preferred: Environmental experience or training; Professional experience in EHS issues; Project management capabilities; Auditing experience; Extended computer literacy.

Please submit applications (motivation letter and CV) by email, with the reference: 2010-08-Africa-UK to recruitment@enhesa.com

Book Reviews

Book Review By Jennie Wilson

Corporate Power in Global Agrifood Governance
Edited by Jennifer Clapp and Doris Fuchs
Published by the MIT Press, London 2009
ISBN 978-0-262-51237-4

The agrifood business is important in the discussion of environmental law because, as the editors assert, farmers are the stewards (or trustees) of almost one-third of the Earth's land. Use of an industrial agricultural model which relies heavily on chemical use and plant genetic engineering is described as antithetical to sustainability. Inequality, erosion of democracy, lack of transparency, reliance on international trade for food security and heightened vulnerability are other negative aspects of corporate dominance

in food production and distribution discussed in this book.

In the introductory chapter, the editors set out the framework for the book which was written together with nine other academic authors: from Europe,North America and one from Australia. Corporate power is discussed and analysed by using three categories: discursive power (e.g., media, public relations and lobbying), structural power (e.g., private standards, organic certification, and private ownership of seeds) and instrumental power (e.g., membership of key policymaking committees, ability to withhold intellectual property information, and even law making positions). They outline the global scale of modern production, trade, and marketing of food and agricultural products, describing developments over the past 50 years. They highlight the involvement of trans-national corporations (TNCs) at all stages of the food production chain. The book is divided into two parts: Part I, Chapters 2-5, is devoted to the nature of corporate power in the global agrifood governance; and Part II, Chapters 6-9, deals with the use and regulation genetically modified organisms (GMOs).

In the concluding chapter the editors describe how the well-being of local, regional, and global ecosystems is determined by TNCs in the global agrifood business. They reiterate the often heard assertion that the public interests of social and environmental concerns are continually trumped by the private economic objectives.

Despite a few reservations, I found this book to be very informative and interesting, and would recommend it.

UK ENVIRONMENTAL LAW ASSOCIATION

Registered Charity number: 299498 (Registered in England and Wales), Company limited by guarantee: 2133283 (Registered in England and Wales)

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

UKELA, PO Box 487, Dorking, Surrey RH4 9BH

Vicki Elcoate

Executive Director

The Brambles

Cliftonville

Dorking RH4 2JF

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01306 501320

MEMBERSHIP QUERIES

Contact alisonboyd.ukela@ntlbusiness.com if you need further assistance.

E - LAW

The editorial team wants articles, news and views from you for the next edition due to go out in November 2010

All contributions should be dispatched to **Catherine Davey** as soon as possible by email at:

catherine.davey@stevens-bolton.co.uk by **10 November 2010**

Please use Arial font 11pt. Single space. Ensure headings are in bold capitals.

Letters to the editor will be published, space permitting