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UKELA Making the law work for a better environment

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EDITORIAL

Celebrations this month as we reach our sixtieth issue in this format!

With less than a week to go to our annual Garner lecture we are hoping to see as many of you there as possible. Sir Konrad Schiemann is talking on access to justice. This remains one of the big issues for Environmental Law. The Garner lecture is always an opportunity to catch up with old and new friends. If you haven't booked yet, there's still time, but be quick as bookings close this evening (Monday November 15th).

UKELA has run many events around the country over the past two months. The post election seminar focused minds on where the Coalition government might draw its priorities for the environment. We have invited the Minister to speak to us about the Government's plans. We have held very popular seminars in Scotland, on waste in Northern Ireland and on energy in Wales. Young UKELA discussed the Marine Management Organisation and the latest London meeting was on the environment and economics. Our student careers evening is coming up shortly and the student competitions are being launched with this edition of e-law. We aim to provide something for everyone in our events programme. If there's an event you'd like to see UKELA organise please let us know.

Wild Law received fresh impetus from the annual workshop which was held at the end of September. A new Wild Law group is holding its first meeting shortly and there is already a lively training programme plus Wild Law walks.

Membership renewals will be coming to you in the next couple of weeks. We look forward to being able to offer you another year of events and activities - and of course e-law - that will continue to make your subscription excellent value.

Best wishes to you all for a peaceful and happy Christmas and new year.

Catherine Davey
Editor

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In this issue

CALLING ALL BARRISTERS - CONFERENCE 2011 NEEDS YOU

Volunteers are sought to provide the end of year review of the hottest environmental cases in 2010/11 at next year's UKELA Conference (the theme is "Sustainable Development in an Age of Austerity"). The conference will be held in Norwich between 24th and 26th June 2011. Three papers of approximately 25 minutes duration will be required on Sunday 26th June(between 11.30 and 13.00).

Contact catherine.davey@stevens-bolton.com or on 01483 734234 if you are interested in participating next year. She is waiting for your emails and calls!!

ANNUAL CONFERENCE QUESTIONNAIRE

Thank you to everyone who took the time to complete our questionnaire on the format of our Annual Conference. The results show that there was not a consensus on what the format of future Conferences might be – you were fairly evenly split on leaving things the way they are now, against making some changes which might include starting earlier on the Friday or shortening the overall length of the Conference to allow more time at home on the Sunday. More clearly, many of you felt that the prestigious location of the Gala Dinner was not of paramount importance and would rather save money on the delegate fee. However, as we know from feedback taken at the Conferences themselves, the networking opportunities at Conference remain for the majority a key aspect of the weekend. Your views are valuable and will be taken into account by the Conference planning team in their deliberations for 2011 and beyond.

SOCIAL MEDIA

UKELA is now on Twitter – please follow us and keep up to date with UKELA activity; events, press releases and so on. You can find us at www.twitter.com @ukela_law.

We need more followers so please join and tell your colleagues!

UKELA is also part of the LinkedIn network – you can find us here:

http://www.linkedin.com/groups?mostPopular=&gid=3521071

We have nearly 250 members and the network grows daily. Thanks to Paul Collins for looking after Linked In for UKELA.

And don't forget we have our own Facebook page which you can find at:

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

The page has nearly 100 friends so please encourage others to join and join yourself.

AIM 5 – REVIEW OF ENVIRONMENTAL LAW FUNDING SUCCESS

We're delighted that UKELA's Aim 5 project – to review Environmental Law – has attracted funding from two sources. The Matrix Causes Fund (Matrix Chambers) has donated funds to support the design and publication of the final report which will be late 2011 or early 2012. The King's College Futures Fund has offered nearly £6,000 which will support the next phase of the project – interviewing key Environmental Law figures, working up the priority problem areas that the report will cover and holding a workshop to discuss the preliminary findings. UKELA is pleased to be working in association with King's College on this phase of the project and is grateful to Eloise Scotford, who has recently joined the Law School there, for her help in securing funding.

The project's three interns – James Corbet-Burcher, Srijanee Bhattacharyya and Vikki Leith – will organise and carry out initial interviews before Christmas. There will then be a more comprehensive programme of discussions and questionnaires involving some UKELA members. They have already made good progress on researching "the problem", principles for Environmental Law and models of scrutiny from the UK and other jurisdictions.

CHANGE OF REGISTERED OFFICE

Members are advised that UKELA has a new registered office, with immediate effect. It is: City Point, One Ropemaker Street, London, EC2Y 9SS. There is no change to our postal address.

MEMBERSHIP RENEWALS

Members are reminded that subscriptions are due for renewal at the end of the year so do look out for your renewal information coming to you via email at the beginning of December.

UPDATE ON THE UKELA BURSARY SCHEME PROJECT

Earlier this year, the UKELA Bursary Fund supported Kirsty Schneeberger's proposal for a project with the Department of Energy and Climate Change (DECC) that involved establishing a 'Youth Advisory Panel.' Kirsty undertook this work first in a voluntary capacity and is currently acting as the coordinator of the programme as a consultant to DECC.

The Youth Advisory Panel programme this year has focussed on Energy issues, and how young people are affected by decisions made relating to energy in this country. As part of the programme, Kirsty has organised for the group to spend the last five months visiting different power stations and renewable energy developments across the country to learn more about the energy mix and the supply of energy in the UK. The Panel has also visited organisations that focus on reducing the demand for energy, through retrofitting housing stock, training workers in the skill of installing micro-generation technologies as well as companies that are working towards electrifying transport.

The Panel has been meeting in DECC on a monthly basis, reporting back on visits and discussing the relative merits, benefits and burdens of the various methods of energy production and lifestyle changes. The Panel has also had the opportunity to meet with the Minister for Energy, Charles Hendry and the Chief Scientific Adviser, David MacKay, as well as other DECC policy officers, to discuss how decision-making around Energy affects young people.

At the end of this year the Panel is publishing a Report that will offer details of these visits, as well as the subsequent discussions that have taken place amongst the members of the youth organisations involved in the Panel's activities. The Report will be distributed to Youth networks across the country in order to encourage a much wider public debate on the issues surrounding energy and how it affects young people.

Kirsty has offered a few words to UKELA to say thank you:

"I would like to thank UKELA very much for offering the initial support for the project. Without that I would not have had the opportunity to develop the project further and continue with the Youth Panel as I am now. I am tremendously grateful that the Bursary Scheme committee decided to support this work and I hope they will enjoy the final report at the end of this year!

"Finding ways practically to apply the Principle of Intergenerational Equity is a driver for my work and I am delighted that the Government has been open to new ways of integrating the opinions of the youth constituency into DECC's decision-making processes. Long may such collaboration and cooperation continue!"

In recognition for her work with involving young people in the political process, particularly relating to the environment, Kirsty has been Honoured as a Member of the British Empire for Services to Environmental Conservation. Kirsty received the Honour at Windsor Castle in October this year and was delighted to be able to take her Mother, Grandmother and Great-Grandmother to the investiture.

"It was truly wonderful to have the four generations together for the day. It was also a beautiful way to recognise how hard these women worked towards ensuring their families had the best opportunities open to them and I am immensely grateful for all they have done to support me in my efforts. I am constantly inspired by the proverb: 'We do not inherit the world from our ancestors, we borrow it from our children' and I really do believe that our families play an important role in integrating this philosophy in our lives."

UNMASKING THE SIGNIFICANCE OF WASTE LAW AND REGULATION IN NORTHERN IRELAND

Left to right: James Orr, David McMillen, John Quinn, Prof Sharon Turner, Andrew Ryan, David Elvin QC.

UKELA held a half day seminar in Belfast on waste management issues in association with Tughans Solicitors, Landmark Chambers and the Environmental and Planning Law Association for Northern Ireland. Held in early October 2010, the theme of the seminar was developments in waste regulation in Northern Ireland. The event was chaired by Professor Sharon Turner of Queen's University and presentations were made by a number of high profile figures from the waste management and legal sectors.

John McMillen, Chief Executive of the Northern Ireland Environment Agency gave his perspective on the Agency's role in waste regulation. He set out how the Agency was actively enforcing environmental crime, with some 40 convictions secured in court in 2009. Greater emphasis was also being placed on the seizure of assets alongside imposing fines for criminal penalties. Other measures such as the repatriation to Ireland of illegal waste deposits were also being used to counteract serious criminal activities. John also recognised the need for the Agency to work with business in Northern Ireland. He outlined continuing steps that were being taken under the "Better Regulation" programme to improve how the Agency interacts with businesses, along with targets to reduce consultation times on planning applications.

Partner and Head of the Environment and Planning Team at Tughans, Andrew Ryan reviewed proposed changes to waste regulation set out in the Waste and Contaminated Land Order (Amendment) Bill plus other future developments in waste law. Changes proposed by the Bill include increased powers of investigation and prosecution for local councils and the ability to serve fixed penalty notices for relatively minor waste offences. Andrew noted that with the new powers came a need for detailed guidance that would allow both the Environment Agency and the local councils to understand their roles and responsibilities within this new regulatory framework. He also commented on proposed changes to the Northern Ireland Landfill Regulations that would further restrict the types of waste that could be landfilled. This will lead to significant challenges for the local waste industry to provide the new facilities required for increased recycling and recovery. Andrew also highlighted the continuing delays that are seen in the planning system, which must be addressed to enable the timely development of new waste management facilities.

Chief Executive of waste management group Arc 21, John Quinn, set out his views on the challenges facing the development for major waste management infrastructure. In particular, John noted the need to both expedite planning applications but also ensure public "buy in" for major projects such as energy from waste facilities. John highlighted Belfast City Council's recent consultation or the development of an energy from waste facility in Belfast. Whilst the proposal was ultimately rejected by Belfast Council, the consultation itself was an excellent example of broad public engagement that – perhaps surprisingly – indicated substantial public acceptance of the proposal.

David Elvin QC of Landmark Chambers provided a detailed paper on Waste Regulation from a European perspective. David highlighted the changes that will be brought about by the new 2008 Waste Framework Directive. David noted how the issue central to waste regulation - the definition of waste, remains a complex issue that defies an all-encompassing definition. The recent case law of the European Court of Justice that David reviewed showed, if nothing else, that whether a material is waste or not still must be judged on a case-by-case basis. Helpfully, general principles for end of waste criteria have now been incorporated into the new Waste Framework Directive. However, detailed end of waste guidance must still be developed for specific waste streams to provide the certainty that manufacturers of recycled or recovered produces require.

Finally, a contrasting view on waste regulation and resource efficiency was provided by James Orr, Director of Friends of the Earth Northern Ireland. James put forward the view that much more needed to be done to minimise waste production and increase the recycling and recovery of viable materials. In particular, James considered that a focus on large scale energy from waste facilities was directing resources away from much more efficient reuse of waste materials.

So did the conference unmask the significance of waste law and regulation Northern Ireland? The answer to that could well be yes. Nobody would question the need to put into place further regulatory measures and improved infrastructure to deal with waste in Northern Ireland. However, significant problems and barriers still remain, for example the timely delivery of waste infrastructure; the need for clarity on end of waste criteria; and, a regulatory framework that balances environmental protection and crime prevention against encouraging legitimate business operations.

YOUNG UKELA EXPLORES TIDE OF CHANGE IN MARINE LAW

Margaret Walker, Chair, on behalf of the Young UKELA Group

On Monday 1st November 2010, Landmark Chambers hosted the Young UKELA Autumn Seminar, which was well attended by over 45 lawyers, academics and students.

The evening explored the topic of 'Managing the Marine Environment', with 5 experienced practitioners speaking about the new Marine Management Organisation (MMO), the Marine and Coastal Access Act and recent developments in the marine planning regime.

Denis Rice, Head of Legal at the newly created MMO, presented an overview of his organisation's background, mission and varied responsibilities which range from marine planning and fisheries management to licensing and emergencies. The audience gained insight into the role of MMO lawyers, with the MMO Enforcement Lawyer, Amy Clements, shedding light upon how such an organisation ensures that the legal rules and regulations are enforced. From civil penalties to deal with illegal catches of fish and the (often controversial) powers to detain vessels, it was fascinating to learn about the life of an MMO lawyer with their dual-roles in advisory work and enforcement.

Richard Moules of Landmark Chambers presented his paper on 'the English Coastal Route' which dealt with the Marine and Coastal Access Act 2009, including how duties to create a long-distance coastal walking route are likely to be put into place. With this legislation affecting a large number of property owners and the provisions for restrictions of the right of access, Richard's talk encouraged attendees to consider how such a system will work in practice, and how it contrasts with the access provisions under the Countryside and Rights of Way Act 2000.

Scott Lyness, also of Landmark Chambers, spoke on the topic of Marine Planning. With increasing pressures on the marine environment for space and usage, Scott explored the operations of the 2009 Act including the Marine Policy Statement, Marine Plans, the government commitment to establish Marine Protection Zones, and how marine planning might interact with on-shore planning.

The talks concluded with James Maurici's excellent introduction to Judicial Review and the MMO. The likelihood of interesting litigation arising in response to the new marine regime was thought-provoking for all those in attendance.

The event concluded with questions and a lively discussion, which continued over refreshments which were kindly provided by Landmark Chambers.

CR: Professor Paul Leonard ©

Amy Clements addressing questions about MMO enforcement. From Left to Right: Denis Rice, Amy Clements, Margaret Walker (chairing), Scott Lyness, James Maurici.

Contributions - Scott Lyness

MARINE AND COASTAL ACCESS ACT 2009: MARINE PLANNING

Scott Lyness, Landmark Chambers

Marine planning: purpose and structure

1. The marine environment is already subject to significant pressure and competition for space and usage. The 2009 Act is central to the government's vision for "clean, healthy, safe, productive and biologically diverse oceans and seas"[1] and a regime which can balance these contending aspirations for our waters.

2. The 2009 Act is designed to:

    a. create a more integrated approach to effective marine management;

    b. enable the sustainable use and protection of marine resources;

    c. provide a clearer framework for consistent decision-making which affects the use of the marine environment.

3. At the heart of the new system is the Marine Management Organisation ("MMO"), a centre of marine expertise designed to deliver many of the objectives and functions set out in the legislation. Other papers deal with the wider functions of the MMO. This one focuses on marine planning, in particular its two central features:

    a. Marine Policy Statement ("MPS"): a document prepared by the UK government which sets out overarching

1 See UK Marine Policy Statement: a draft for consultation, para. 2.1.

policy objectives for use of the marine environment;

b. Marine plans: plans which will be prepared by the MMO to implement the MPS in specific areas, using information about uses and needs in those areas.

Marine Policy Statement

4. The MPS will be a document in which the "policy authorities that prepare and adopt it state general policies of theirs (however expressed) for contributing to the achievement of sustainable development in the UK marine area".[2]

5. The "policy authorities" are the Secretary of State, the Scottish Ministers, the Welsh Ministers and the Department of the Environment in Northern Ireland and the MPS can be prepared by them acting jointly, or by the Secretary of State and any one or more of the authorities acting jointly, or by the Secretary of State alone (if he has first invited the other authorities to participate in the preparation of the statement).[3] At the moment the UK authorities are working towards joint adoption of the MPS.[4]

6. The "UK marine area" to be covered by the MPS consists of:

   a. the area of sea within the seaward limits of the territorial sea adjacent to the UK (12 nautical miles);

   b. any area within the limits of the exclusive economic zone (a seazone pursuant to the UN Convention on the Law of the Sea in respect of which the UK has special rights over the exploration and use of marine resources, to be designated by Order in Council – up to 200 nautical miles);[5]

   c. the area of sea within the limits of the UK sector of the continental shelf (in so far as it is not covered by the exclusive economic zone;[6]

7. It includes the bed and subsoil of the sea within those areas. "Sea" includes any area submerged at mean high water spring tide and the waters of every estuary, river or channel, so far as the tide flows at mean high water spring tide.[7]

8. Schedule 5 to the Act sets out the procedure for the preparation and publication of an MPS. In summary this involves:

   a. preparation and publication of a consultation draft MPS;[8]

   b. preparation and publication of a statement of public participation ("SPP"), ie a statement of policies for the involvement of interested persons in the preparation of the MPS; and a timetable for its production, including the making of representations and adoption and publication;[9]

   c. a sustainability appraisal of the draft MPS;[10]

2 S. 44(1) of the 2009 Act. References hereafter to legislative provisions are to the 2009 Act unless otherwise stated.

3 S. 45.

4 See too ss. 46-8 for provisions relating to review, amendment and withdrawal of or from an MPS.

5 Until designation any reference to the exclusive economic zone is to be read as a reference to a renewable energy zone as defined under the Energy Act 2004 – an area over which the UK claims exclusive rights with respect to production of energy from water or winds: see s. 42(5).

6 S. 42(1).

7 S. 42(3).

8 Para. 8.

9 Para. 4.

10 Para. 7. This is done, in part, to meet the Strategic Environmental Assessment requirements of Directive 2001/42/EC.

d. the making of representations by any person on the draft;[11]

e. laying copies of the consultation draft before the UK Parliaments and Assemblies[12] (and provision for a response by the appropriate authority to any resolution made by its Parliament or Assembly or a recommendation by a legislative committee);

f. adoption of the final text with notice being given by each policy authorities to the others;[13]

g. publication of final MPS, with a summary of any differences to the draft and reasons for them.[14]

9. The "UK Marine Policy Statement: A draft for consultation" has been published[15] and the consultation period ended on 13th October. The final version is expected in Spring 2011. It describes itself as providing the "high-level policy context" within which marine plans will be developed and "setting the direction for marine licensing and other relevant authorisation systems".[16]

10. The draft MPS does not set out detailed criteria against which marine planning decisions are to be taken. Its format is to identify main policy priorities and issues that will need to be taken into account. The main theme is the need to maximise sustainable economic activity and prosperity whilst respecting environmental limits.[17] It seeks to draw on the regime for National Policy Statements introduced by the previous government, where relevant.[18]

11. Economic and social factors including employment are to be taken into account,[19] alongside the need to ensure a halting and, if possible, a reversal of biodiversity loss with species and habitats operating as part of a healthy, functioning ecosystems.

12. The system should ensure healthy marine and coastal habitats across their natural range and resilient and adaptable marine ecosystems, along with the long-term abundance and retention of full reproductive capacity in the marine food web.[20] The MMO should identify areas and features of importance for nature conservation[21] and state policies for in connection with the sustainable development of the area. These should inform identification of policies and locations for marine activities or developments that may result in unacceptable adverse impacts on biodiversity should be designed or located to avoid such impacts. Development should aim to avoid harm to marine ecology, biodiversity and geological conservation interests, including through location, mitigation and consideration of reasonable alternatives. Where significant harm cannot be avoided, then appropriate compensatory measures should be sought. If appropriate compensation and mitigation of the impacts cannot be achieved then the development should be refused.[22]

13. The guidance refers to more specific issues raised by marine development, including the need to take mitigate and mini-

11 Para. 9.

12 Para. 10.

13 Para. 12.

14 Para.s 11 and 12. If a policy authority participates in the preparation of an MPS but does not adopt it, this does not affect the validity of the document: paragraph 13.

15 With a Draft Appraisal of Sustainability including a Strategic Environmental Assessment, a Draft Habitats Regulation Assessment and a Draft Equalities Impact Assessment screening.

16 P. 17.

17 "Charting Progress 2", published by the UK Marine Monitoring and Assessment Strategy (UKMMAS) community (which the MPS acknowledges as a major source of the evidence base for the UK marine planning system), estimates that marine-based industry contributed £47billion to the UK economy in 2008.

18 See Consultation on a marine planning system for England, Defra, July 2010, para. 6.15.

19 Para. 2.5 pp. 30-1.

20 Para. 2.7 pp. 32-3.

21 See too the treatment of Marine Protection Zones, below.

22 See para.s 2.7 and 2.14 pp. 33 and 41-3.

mise effects of noise and vibration on wildlife[23] the requirement to consider air quality impacts (eg oil and gas platforms at sea and vehicle emissions as a result of increased coastal activity);[24] effects on seascape[25] and heritage assets[26] and on water quality.[27]

14. A further objective of the guidance is that "the precautionary principle is applied consistently in accordance with the UK government and devolved administrations' sustainable development policy."[28]

15. The importance of the marine environment in mitigating and adapting to climate change is recognised, including the objectives of: building in sufficient flexibility to take account of climate change impacts, for example by introducing appropriate criteria for selection or de-selection of protected marine areas, changing or moving current uses/spatial allocations, or safeguarding areas for future uses; and promoting development/projects that take account of the impacts of climate change over their estimated lifetime.[29]

16. Coastal erosion and flood risk is addressed, including the need for equitable access for those who use the coast and the contribution to communities that can adapt to coastal erosion and flood risk. Development is to be safe over its planned lifetime and not cause or exacerbate flood and coastal erosion risk elsewhere.[30]

17. Specific forms of development and activity are considered, illustrating the very broad range of activity that the marine planning system will cover. A great deal of latitude is left to the next tier of the system, the marine plans (see below), to develop policy. The MPS often does not much more than identify fairly obvious issues without being prescriptive as to what is likely to be acceptable or not. Sector-specific considerations include the following:

    a. energy production and infrastructure development:[31] the guidance advises that account should be taken of matters including:

        i. the national level of need for energy infrastructure, as set out in the Overarching National Policy Statement for Energy (EN-1);

        ii. the UK's policy objective to maximise economic development of the UK's oil and gas resources (the economic recovery of UK oil and gas resource sustainably is a stated priority in the UK's energy supply and energy security strategies)[32];

        iii. the positive wider environmental, societal and economic benefits of low carbon electricity generation and carbon capture and storage as key technologies for reducing carbon dioxide emissions (offshore wind[33] is regarded as having the potential to have the biggest impact in the medium-term security of energy supply and carbon emission reductions through its commercial scale output; the potentially significant socio-economic benefits from the renewables sector including employment opportunities, export business and energy security are recognised);[34]

23 P. 34.

24 Para. 2.12 pp. 38-9.

25 Para. 2.13 p. 39. There is no legal definition for seascape in the UK but the European Landscape Convention (ELC) defines landscape as "an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors". Seascapes should be taken as meaning landscapes with views of the coast or seas, and coasts and the adjacent marine environment with cultural, historical and archaeological links with each other.

26 Eg protected wrecks: see para. 2.13 p. 39 and para. 2.9 pp. 34-5.

27 Para. 2.14 pp. 40-1.

28 Box 1, p. 24.

29 Para. 2.10 pp. 36-7.

30 Para. 2.11 pp. 37-8.

31 Para. 3.3 pp. 44-52.

32 Offshore oil and gas is at present the largest source of UK energy supplies and satisfied about two thirds of primary energy demand in 2008 (91% of oil demand and 73% of gas demand): see pp. 46-8.

33 Pp. 48-9.

34 P. 49.

iv. the reality that the physical resources and features that produce wave and tidal energy and form oil and gas fields or suitable sites for gas or carbon dioxide storage occur in relatively few locations and can only be utilised where they are found;

v. the potential impact of inward investment in offshore wind, wave, tidal stream and tidal range energy related manufacturing and deployment activity (it is anticipated that the amount of wave and tidal energy being generated will increase markedly up to and beyond 2020);[35]

vi. potential adverse effects on marine life from construction noise; and the displacement of marine life as a result of infrastructure development (eg offshore wind turbines)

vii. potential socio economic impacts through displacement of fishing activity,

b. offshore electricity networks: reference is made to the socio-economic benefits from such an increase in network capacity, along with the risks associated with such an increase in underwater cabling;[36]

c. carbon capture and storage: the expectation is that storage will take place almost exclusively offshore and the impacts are not envisaged as significant;[37]

d. ports and shipping:[38] account should be taken of the contribution that the development would make to the national, regional or more local need for the infrastructure, against anticipated adverse effects including cumulative impacts;[39]

e. marine aggregates:[40] marine aggregates should contribute to the overarching government objective of securing an adequate and continuing supply to the UK. Permissions to dredge should only be issued if the marine plan authority is content that the proposed dredging is environmentally acceptable.[41]

f. telecommunication cabling: all effort should be taken to protect and include them in considerations regarding activities in the marine area;[42] they are anticipated as having a low and spatially minor impact;[43]

g. fisheries:[44] decision makers must have regard to the provisions of the Common Fisheries Policy ("CFP") in developing any plans or proposals affecting fisheries.[45] Marine plan authorities should consider the potential socio-economic impacts of other developments on fishing activity, as well as potential environmental impacts (eg impacts of displacement and the viability of fish stocks in the alternative fishing grounds) and impacts on fishing communities;

h. waste water treatment and disposal: it is stated that this activity will be subject to the environmental permitting regime,[46] but it is acknowledged that the location of waste water infrastructure will impact on future marine planning decisions. The physical act of discharging to sea in the form of design and construction of outfalls should be considered by the MMO, and inappropriate development in vulnerable areas should be avoided.[47]

Marine plans

Marine planning regions

35 P.49.

36 Pp. 50-1.

37 Pp. 51-2.

38 Para. 3.4 p. 54.

39 Ibid.

40 See para. 3.5 p. 55: The UK has some of the best marine aggregate resources in the world. Marine sand and gravel are particularly important in England, accounting for 38% of the total regional demand for sand and gravel in the South East (80% in London).

41 Para. 3.5 p. 56.

42 Para. 3.7 p. 58.

43 Para. 3.7 p. 57.

44 Para 3.8 p. 58.

45 The CFP is being reviewed with the aim of introducing reform by 1 January 2013.

46 Para. 3.10 p. 63.

47 P. 62

18. The second tier of policy-making involves a series of "marine planning regions" which together comprise the UK marine area. These regions are divided into the English, Scottish, Welsh and Northern Irish inshore and offshore regions.[48] Inshore regions are the areas of sea within the seaward limits of the territorial sea adjacent to each country; and the offshore regions are the remaining areas within the UK marine area which are defined by reference to Scottish, Welsh and Northern Irish "zones".[49]

Marine planning authorities

19. The legislation provides for a series of marine planning authorities for each marine planning region.[50]

20. In England, the SS is defined as the marine planning authority for both the English inshore and off-shore regions.[51] However the MMO has been delegated most of the SS's functions as marine planning authority for these regions.[52]

Marine plans for marine plan areas

21. Marine plans are intended to approximate to the development plan that has been an important part of the land use planning system for many years.[53] They will set out policies which refine the broad objectives of the MPS.

22. Although the Act provides that a marine planning authority "may" prepare a marine plan for a "marine plan area" consisting of all or part of its marine planning region,[54] where an MPS governs marine planning in the region[55] a marine planning authority "must seek to ensure" that all of the region is covered by a marine plan.[56]

23. The marine plan area boundaries have been the subject of a number of public consultations, the most recent of which ran from November 2009 to February 2010. This sought views on the scope of marine plan areas within the English marine planning regions and the order in which plans should be brought forward.[57] Defra has also issued a consultation document on the marine planning system[58] (consultation closed on 13th October) which refers to the recommendation of 11 marine plan areas to the MMO[59] and explains that the overall order for work on the plans is the MMO's decision.[60] It estimated that it would take 2 ½ years to complete each plan and that the MMO would work on 2 plans at a time.[61]

24. The process has been continued by MMO, resulting in the selection of the East Inshore and East Offshore sea areas (Flamborough Head in East Riding of Yorkshire to Felixstowe in Suffolk) as the first two English marine plan areas that will be developed from April 2011.[62] Plans will be progressed following the publication of the MPS.

25. A marine plan must:

    a. "state the authority's policies…for and in connection with sustainable development of the area";[63]

    b. "be in conformity with any MPS which governs marine planning for the marine plan area unless relevant

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48 S. 49.

49 See s. 322.

50 Other than the Scotland and Northern Ireland inshore regions.

51 See s. 50. In Scotland, Wales and Northern Ireland, the devolved administrations will be the plan authority.

52 See "Consultation on a Marine Planning System for England (Defra July 2010), p. v; although the source of the legislative act delegating these functions to the MMO is unclear.

53 The government has also stated that the plans will help the UK its obligations agreed under the Marine Strategy Framework Directive (which requires each member state to put in place measures to achieve good environmental status in its marine waters by 2020) and the Water Framework Directive which requires the UK to achieve good chemical and ecological status in inland and coastal waters by 2015: see "Consultation on a marine planning system for England", Defra, July 2010.

54 S. 51(1).

55 S. 51(7).

56 S. 51(2).

57 "Consultation on marine plan areas within the English Inshore and English Offshore Marine Regions"; see too summary of responses and recommended area boundaries at http://www.defra.gov.uk/corporate/consult/marine-plan/index.htm

58 "Consultation on a marine planning system for England" (July 2010, updated 1st September), with draft impact assessment: http://www.defra.gov.uk/corporate/consult/marine-planning/100721-marine-planning-condoc.pdf

59 See http://www.defra.gov.uk/corporate/consult/marine-plan/index.htm

60 See para. 2.44.

61 Para. 2.49.

62 See MMO Press Release 28.10.2010.

63 S. 51(3)(b).

considerations indicate otherwise".[64]

26. The inclusion of the words "unless relevant considerations indicate otherwise" contrasts with the requirement on the marine planning authority to take "all reasonable steps to secure that the plan is compatible with" the marine plan for any related marine plan area, and with the development plan for any related area.[65] It also diverges with the approach historically taken in the land use planning regime where lower-tier plans are to be "in general conformity" with higher-tier plans.[66] This could be an area which generates case law, as it has under the terrestrial planning system.[67]

27. During the progression of the Bill, an amendment was proposed which deleted this phrase, on the grounds that decisions whether considerations were relevant or of sufficient weight to justify allowing the plan not to be 'in conformity' with the MPS would be liable to challenge. The threat of legal proceedings was however regarded as an adequate deterrent to the marine planning authority relying inappropriately on this part of the subsection.[68]

28. A plan must be prepared in accordance with Schedule 6 to the Act. This essentially involves:

    a. giving notice to related planning authorities, including the SS and neighbouring marine or local planning authorities;[69]

    b. preparing and publishing a SPP in a similar way to the preparation of the MPS;[70]

    c. having regard to matters including:

        i. the requirements for conformity/compatibility set out above;

        ii. the effect which any proposal for inclusion in the plan is likely to have on any related area;[71]

        iii. any representations made pursuant to the SPP about what should be in the plan;[72]

        iv. any advice received from an expertised person or body in response to a request from the MMO;[73]

        v. any plan prepared by a public authority in connection with the management or use of the sea or the coast, or of marine or coastal resources;[74] and

        vi. such other matters as the MMO considers relevant[75] (eg the draft MPS advises that marine plans should identify how they will contribute to delivery of national targets and priorities, including legally binding commitments entered into under the Renewable Energy Directive and our domestic binding target to reduce greenhouse gas emissions by 80% by 2050.[76] It also advises that in developing marine plans the MMO will identify areas and features of importance for nature conservation and state policies in connection with those areas for marine activities.[77]

    d. carrying out a sustainability appraisal of its proposals for inclusion in a draft plan and publish it and only proceeding "if the results of the appraisal indicate that it is appropriate to do so";[78]

64 S. 51(6).

65 Schedule 6, paragraph 3. "Related" means adjoining, adjacent to, wholly or partly within or affects or is affected by: see Schedule 6 paragraph 3(3). Government has advised that although nota requirement of the 2009 Act, the MMO should during plan preparation acknowledge the weight carried by other statutory plans in the terrestrial system, including River Basin Management Plans (RBMPs), Air Quality Action Plans under the Environment Act 1995 and Local Transport Plans under the Transport Act 2000: see Consultation on a marine planning system for England, Defra, July 2010, para. 6.23.

66 See eg s. 15(2A) of the TCPA 1990 and s. 24(1)(b) of the PCPA 2004 which requires UDPs and LDDs respectfully to be in general conformity with the London Plan; and ss. 36(4) and 43(3) of the TCPA which prohibits the adoption of a local plan which do not conform generally to the structure plan.

67 See eg Persimmon Homes (Thames Valley) Ltd v. Stevenage BC [2005] EWHC 957 (Admin).

68 Hansard HL Vol. 707 cols 1102-1103, February 10, 2009.

69 Para.s 1-2.

70 Para.s 5-6.

71 Para 9(2)(c).

72 Para. 9(2)(f).

73 Para. 9(2)(g).

74 Para. 9(2)(h); eg Shoreline Management Plans, AONB management arrangements and biodiversity action plans: see Consultation on a marine planning system for England, Defra, July 2010, para. 6.32.

75 Para. 9(2).

76 Para. 3.3 p. 46.

77 Para. 3.1 pp. 41-3: see below in relation to Marine Protection Zones.

78 Para. 10. This is intended to meet the requirements of the SEA Directive along with other social and economic issues and it is envisaged that it can incorporate or

e. preparing and publishing a consultation draft to be consulted upon in a similar manner to the MPS;[79]

f. taking into account any representations on the draft plan;[80]

g. "consider[ing] appointing an independent person[81] to investigate the proposals contained in the draft and to report on them", having regard to representations received about the inclusion of matters within the plan, any representations on the draft and the extent to which those have not been resolved;[82]

h. when settling the text of a marine plan, "having regard to" any recommendations made by a person appointed to examine the draft;[83]

i. adopting the plan, if the SS agrees;[84]

j. publishing the plan, with statements of any modifications that have been made to the draft and reasons for them.[85]

29. The Defra consultation document on the marine planning system advises that a wide participatory approach should be employed by the MMO and that it is vital for organisations that hold regulatory roles in or adjacent to the marine area to be involved at the earliest stages, including Defra, local authorities and National Park authorities, the Environment Agency[86] and Natural England,[87] all of whom will be able to assist in gathering a shared evidence base that will enable preparation of the plans.[88]

30. It also suggests the structure and content for marine plans, acknowledging that they are likely to comprise more than one document:

    a. a Strategy Document[89] including policies and objectives for marine uses, activities, assets and designations in the plan area; and an explanation of the relationship between the plan and other related plans. Area-specific policy could relate for example to busy estuaries, ports and harbours or designations;
    b. a policy map;[90]
    c. a delivery framework, comprising an Implementation and Monitoring Plans.[91]

31. As with terrestrial development plans, the process of plan preparation will involve collecting and mapping information about ecological, environmental and oceanographic conditions and human activities, identifying conflicts and complementarities and defining a vision for the plan area by projecting trends in human activities and estimating requirements for new demands on marine space and identifying possible alternative futures for the area, before selecting the preferred scenario.[92]
32. There is no statutory period for the duration of a marine plan, but the government has indicated that they should cover a 20-year period from their adoption date.[93]

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complement other assessments including a Habitats Regulations Assessment under the Habitats Directive. It is envisaged that sustainability appraisals for marine plans will be informed by the appraisal prepared for the draft MPS: see "Consultation on a marine planning system for England", Defra July 2010, paragraphs 4.17-20.

79 Para. 11.

80 Para. 12.

81 It is anticipated that this will be an Inspector from the Planning Inspectorate and that independent investigations would take the form of examinations in public as provided for under current terrestrial planning legislation.

82 Para. 13. The independent person would also consider the sustainability appraisal: see "Consultation on a marine planning system for England", Defra July 2010, paragraph 4.23.

83 Para. 14.

84 Para. 15(2).

85 Para. 15(7)). See too ss. 52-4 of the Act regarding the amendment, withdrawal (subject to agreement by the SS) and review of marine plans. A table setting out the different stages appears at p. 39 of the see "Consultation on a marine planning system for England", Defra July 2010.

86 Key issues will include the relationships between marine plans and River Basin Management Plans prepared pursuant to the Water Framework Directive and Shoreline Management Plans prepared to manage the risks of flooding and coastal erosion.

87 See too CEFAS (Centre for Environment, Fisheries and Aquaculture Science); and Inshore Fisheries and Conservation Authorities (IFCAs) which are intended to ensure democratic input (each IFCA will include local authorities representatives from the districts covered by the authorities) in the management of inshore fisheries. It is envisaged that IFCAs will be able to undertake functions in the marine environment on behalf of the MMO: see para. 5.46.

88 See para. 2.28-35 and 5.1-51.

89 See para.s 3.16-27.

90 See Para.s 3.27-3. See too s. 51(5) of the 2009 Act which requires the plan to identify the plan area.

91 See para.s 3.34-3.61. These are intended to assist with the requirement to monitor and periodically report on the implementation of policies under s. 61 of the 2009 Act.

92 Para.s 4.25-39.

93 Para. 3.62.

33. Any challenge to a marine plan (or any MPS) must be made pursuant to s. 62 of the 2009 Act, not later than 6 weeks after publication, by way of application to the High Court.

Marine Protection Zones

34. The Government has committed to establishing a well-managed ecologically coherent network of Marine Protected Areas ("MPAs") in our seas by 2012, to help meet the Marine Strategy Framework Directive requirement for measures contributing to a coherent network of marine protected areas. Part 5 of the 2009 Act contains provisions for the creation of a new type MPA, called a Marine Conservation Zone ("MCZ").

35. MCZs will conserve nationally important marine wildlife, habitats, geology and geomorphology[94] and can be designated essentially anywhere in English inshore and UK offshore waters.[95] They will include existing SSSIs designated under the Wildlife and Countryside Act 1981 (although most are on land and intertidal area there are some which extend into the marine environment below low water mark). MPAs will also include European sites subject to European designations (Special Areas of Conservation and Special Protection Areas) under the Habitats and Birds Directives,[96] along with sites designated under the Ramsar Convention.[97]

36. Any public authority with a function capable of affecting the protected features of an MCZ (or any ecological or geomorphical process on which the conservation of a protected feature of an MCZ is dependent) must exercise it so as to best further the MCZ's conservation objectives or, if it is not possible to further those objectives, so as to least hinder them. If the authority believes that there is a significant risk of a function or act hindering those objectives, it must inform the relevant statutory conservation body and wait 28 days before acting unless the body says the authority need not wait or in cases of an urgent need to act.

37. Similarly, any application for any authorisation which is capable of having such an effect must not be determined until the body has been informed and the same period has elapsed subject to the same provisos. Authorisation may not be granted unless: there is no significant risk of the act hindering the conservation objectives for the MCZ or there are no other means of proceeding which would create a substantially lower risk; the benefit to the public of proceeding outweighs the damage to the environment; and the person seeking the authorisation will make arrangements for the undertaking of measures of equivalent environmental benefit to the damage which the act will or will be likely to have in or on the MCZ.[98]

Interaction between terrestrial and marine planning

38. There are number of complex relationships between terrestrial and marine activity: activities on land can have an effect on activities at sea and vice versa; and the activities may overlap. Marine plans will generally extend up to level of mean high water spring tides while terrestrial boundaries generally extend to low water spring tides – a marine plan area will physically overlap with terrestrial plans.

39. As described above, the process of marine plan preparation requires liaison with relevant terrestrial planning authorities. Terrestrial planning guidance and development plan documents already include policy addressing coastal and estuarine planning. The view of government is that marine policy guidance should try and complement it rather than replace or complicate it and that any conflicts can be resolved through the plan preparation process.[99] Overarching national policy suggests the theoretical scope for this to be achieved, however it remains to be seen how effectively this process will be carried out. It is important to note that there is no reciprocal obligation on terrestrial plans requiring compatibility with any marine plan.

40. As we shall see below however, marine policy will in some cases be applicable to decision-makers in the terrestrial planning system.

94 See ss. 117 and 123.

95 See s. 116(2).

96 See too the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007/1842, as amended, and the Conservation of Habitats and Species Regulations 2010 2010/490.

97 See s. 123.

98 See ss. 125-6 generally.

99 Para.s 6.4, 6.8, p. 59.

41. Areas where care will be required when addressing the aspirations of terrestrial and marine policy include: the safe-guarding of marine characteristics from inappropriate terrestrial interventions (eg loss of deep-water access as a result of new development on land); integrating nature conservation interests across the land-sea boundary (eg relationships between ecosystems potentially some distance apart); coastal erosion and flooding (currently considered mainly through the terrestrial planning system,[100] but many interventions will be located below mean high water and will require MMO involvement); the physical impact of development on water, (such as development plans giving support for a new port development);[101] and considering the effect of marine development on landscape designations (eg effect of marine development on views from a National Park). Further, there would appear to be scope for debate about the proper relationship in decision-making between different regimes, as has occurred in the terrestrial planning system.[102]

Implementation and decision-making

Introduction

42. The importance of the MPS and marine plans is underscored by s. 58(1) of the 2009 Act, which requires all public authorities to take "any authorisation or enforcement decision in accordance with the appropriate marine policy documents, unless relevant considerations indicate otherwise". If an authority takes such a decision otherwise than in accordance with those documents, it must state its reasons.[103]

43. An "authorisation or enforcement decision" is any of the following:

    a. the determination of any application for the authorisation[104] of the doing of any act which affects or might affect the whole or any part of the UK marine area; and any decision relating to any conditions of such an authorisation; and

    b. any decision about extension, replacement, variation, revocation, withdrawal or enforcement of any such authorisation or conditions.[105]

44. It does not however include any decision on an application for an order granting development consent for nationally significant infrastructure projects ("NSIP") under the Planning Act 2008.[106] Where any decision by a public authority is not an "authorisation or enforcement decision" under the 2009 Act (including an NSIP decision), the authority must still have regard to the appropriate marine policy documents in taking any decision which relates to the exerise of any function capable of affecting the whole or any part of the UK marine area.[107] NSIPs are dealt with further below.

45. An "appropriate marine policy document" is defined to mean:

    a. to the extent that the decision relates to a marine plan area, any marine plan which is in effect for that area;

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100 And Coastal Change Management Areas identified by local planning authorities drawing on advice from Shoreline Management Plans.

101 The draft advice is that when the MMO comes to prepare a marine plan these policies should be supported through the marine plan "unless the MPS or other relevant considerations indicate otherwise" Consultation on marine planning system, para. 6.46 – this does not appear to be the correct approach on the legislation, although cf para. 6.48 which acknowledges the MMO's duty to seek compatibility with terrestrial plans.

102 See eg Gateshead MBC v. SSE [1995] Env LR 37; R v. Bolton MBC ex p Kirkman [1998] Env LR 560; Hopkins Developments Ltd v. FSS [2006] EWHC 2823.

103 S. 58(2).

104 This means "any approval, confirmation, consent, licence, permission or other authorization": s. 58(6).

105 S. 58(4).

106 The coalition Government has stated its intention to abolish the IPC and to return decision-making power on NSIPs to Ministers. The Government must legislate to abolish the IPC, which it is expected to do in the Decentralisation and Localism Bill due to receive its first reading in Parliament in November 2010. The Government intends to replace the IPC with a Major Infrastructure Planning Unit that would be part of the Planning Inspectorate. This Unit would carry out broadly the same functions as the IPC, but final decisions would be made by Ministers based on the recommendations of the Unit.

107 S. 58(3).

b. any MPS for any minister or government department, or other public authority so far as it is carrying out functions in relation to the English inshore or offshore regions.[108]

46. The language of s. 58 is similar to s. 38(6) of the Planning and Compulsory Purchase Act 2004, which itself adopted the form of s. 54A of the Town and Country Planning Act 1990, a provision which generated a great deal of caselaw relating to when a decision was "in accordance" with the development plan.[109] This will undoubtedly be relevant to any decisions taken pursuant to s. 58.

47. It will be some time before the first Plans are adopted, or until there are Plans covering the entire English inshore and offshore regions (2011 on current MMO estimates). Once planning is in progress, decisions will need to be undertaken in the context of the MPS, newly adopted and emerging Marine Plans and other relevant and emerging documents. The Consultation on a marine system for England advises that authorisation or enforcement decisions should:
    a. be in accordance with the policies set out in the MPS, unless relevant considerations indicate otherwise;
    b. take into account the relevant policy objectives of any draft MPS or marine plans;
    c. take into account the any clear policies for the marine area that the government has established but which do not for some reason appear in the MPS;
    d. contribute to the achievement of sustainable development and be conducted in a manner that meets statutory requirements under UK and EU legislation and is consistent with our obligations under international law;
    e. take account of other relevant projects, programmes, plans and national policies and guidance; and take account of and be in accordance with existing consents, authorisation and/or licenses;
    f. be taken using a risk-based approach that allows for uncertainty, recognising the need to use sound science responsibly as set out in the high level objectives for the marine area (including the precautionary principle).[110]

NSIPs

48. The decision-making regime for NSIPs is due to change under the coalition government's Localism Bill, however the distinction between this regime and marine planning legislation appears likely to remain.

49. The Planning Act 2008 procedures, currently involving the examination of applications for NSIPs by the Infrastructure Planning Commission, require the MMO to be consulted on proposed applications for development consent where the proposed development would affect of be likely to affect specified areas falling under its responsibility (see below).[111]

50. Relevant projects are most likely to include offshore wind farms generating more than 100 megawatts[112] and large harbours.[113] An order granting development consent may include provision deeming a marine licence to have been issued under Part 4 of the 2009 Act.[114]

51. The MMO must also be notified of an accepted application where it seeks development consent in one or more of those specified areas[115] and is an "interested party" for the purposes of the examination in public process relating to such applications under the Act.[116]

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108 Ss. 59(3) and (5); see too s. 322 which defines the English inshore region to mean the area of sea within the seaward limits of the territorial sea adjacent to England, and the offshore region as so much of the UK marine area beyond those seaward limits but not in the Scottish, Welsh or Northern Irish offshore regions. See also s. 42 for the definition of the UK marine area and sea.

109 See eg City of Edinburgh v. SS for Scotland [1997] 1 WLR 1447; R (Cummins) v. Camden LBC [2001] EWHC Admin 1116.

110 Para.s 7.30-3.

111 S. 23(2), amending s. 42 of the 2008 Act.

112 S. 15 of the 2008 Act.

113 S. 24 of the 2008 Act.

114 See s. 149A of the 2008 Act.

115 See s. 23(5), amending s. 56 of the 2008 Act.

116 See s. 23(6) amending s. 102 of the 2008 Act. The MMO will enforce the parts of a DCO that relate to a deemed CPA consent or FEPA/marine licence and will be responsible for dealing with any breaches of any conditions of those approvals. Defra has issued Government guidance to the Marine Management Organisation (MMO) on its role in relation to applications, and proposed applications, to the Infrastructure Planning Commission (IPC) for development consent under the Planning Act 2008: http://www.defra.gov.uk/environment/marine/documents/legislation/mmo-ipc.pdf

Marine licensing

52. The 2008 Act regime can be distinguished from the new marine licensing regime provided for by the 2009 Act.[117] The purpose of the new system is to remove complexity and overlap between the legislative schemes under primarily the Food and Environment Protection Act 1985 ("FEPA") and the Coast Protection Act 1949 ("CPA"). The new licensing system to be governed by the MMO[118] is planned for spring 2011.

53. Thus the 2009 Act includes within its list of licensable marine activities beyond the scope of this paper, but they include the construction of works in or over the sea, or on or under the sea bed, which will include other offshore energy generating installations[119] between 1-100 megawatts (the MMO has taken over the electricity consent functions of the SS under section 36 of the Electricity Act 1989),[120] harbours,[121] pontoons and jetties, marinas, some flood defences, marine mineral extraction[122] and land reclamation.

EIA

54. Just as the requirements of Strategic Environmental Assessment apply to the making of policy under the new regime, EIA applies to decision-making under the licensing regime. The EIA regime that is well-known to those operating within the terrestrial planning system will therefore continue apply in a modified form to works covered by the MMO within the marine environment. The MMO must therefore apply the Electricity Works (EIA) (England and Wales) Regulations 2000 (in relation to the applications for consent under the Electricity Act) and the Marine Works (Environmental Impact Assessment) Regulations 2007 [123] (in relation to regulated activities under FEPA, the CPA and the Harbours Act 1964).[124]

Conclusion

55. The new regime is a legislative milestone for the marine environment. The MMO will be first in the world to develop an integrated planning system for the marine area. The scale of the task is daunting; and the task of resolving conflicting pressures for use of the sea will be just as difficult as that faced by the terrestrial planning system.

117 See Part 4 generally.

118 See s. 98 of the 2009 Act which enables delegation of licensing functions to the MMO.

119 Currently around the English and Welsh coasts there are approximately 274 wind turbines installed producing around 851.2 megawatts of electricity.

120 See ss. 12 and 79 of the 2009 Act. Any applications under section 36 of the Electricity Act 1989 made before 1 April 2010 will continue to be dealt with by the Department of Environment and Climate Change (DECC). Licences and consents required also include the Food and Environment Protection Act 1985 and Coast Protection Act 1949.

121 The MMO website explains that from 1 April 2010, the MMO took over new applications for harbour revision and empowerment orders from the Department for Transport. The MMO also took over the Department for Transport's existing cases, except for those specified in The Harbours Act 1964 (Delegation of Functions) Order 2010. See s. 78 of the 2009 Act.

122 The MMO website explains that from 1st April 2010, the MMO took over from the Marine and Fisheries Agency (MFA) on 1 April 2010 as the consenting authority for marine mineral extraction.

123 For a list of recent decisions by the MMO under the 2007 Regulations see http://www.marinemanagement.org.uk/works/environmental_decisions.htm

124 Dredging for marine minerals is regulated under the Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) (England and Northern Ireland) Regulations 2007. Similarly, where the project is within or adjacent to a designated conservation site, an appropriate assessment may be required under the Conservation of Habitats and Species Regulations 2010.

Judicial Review and the MMO[1]

James Maurici, Landmark Chambers

Introduction

1. The purpose of this talk is to look at those areas of the MMO's work where it is likely to be most susceptible to judicial review proceedings being brought against it.

2. The functions of the MMO under the Marine and Coastal Access Act 2009 ("the 2009 Act") so far as relevant to this talk broadly fall into four areas:
   (1) Licensing and Marine Works;
   (2) Marine Planning;
   (3) Enforcement; and
   (4) Conservation.

3. I shall start by looking at the MMO's role in each of these areas and where it is susceptible to challenge by way of judicial review and then go on to address other key issues such as Environmental Impact Assessment ("EIA"), Protective Cost Orders ("PCOs") and disclosure.

Licensing and Marine Works

4. Part 1, Chapter of the 2009 Act transfers a number of the licensing functions previously carried out by the Secretary of State for the Environment, Food and Rural Affairs to the MMO. For example,
   a. licensing of fishing boats under s.4 of the Sea Fish (Conservation) Act 1967. S. 4 has given rise to judicial review in the past: see ***R (Pamona Limited) v Truro Magistrates Court*** [2001] EWHC Admin 269; most famously ***R v Ministry of Agriculture, Fisheries and Food ex p. Hamble (Offshore) Fisheries Ltd*** [1995] 1 C.M.L.R. 533 and ***Watt and Others v Secretary of State for Scotland*** [1991] 3 C.M.L.R. 429;
   b. Various nature conservation licences e.g. licences to take and kill seals, licenses under s. 16 of the Wildlife & Countryside Act 1981 in relation to activities undertaken seaward of the mean low water mark (this section generated a judicial review in Scotland: ***Royal Society for the Protection of Birds v Secretary of State for Scotland*** [2000] S.L.T. 1272) and under the Sea Fisheries (Wildlife Conservation Act) 1992 (see ***R v Ministry of Agriculture Fisheries & Food ex p Bray*** (unrep. 23 March 1999));
   c. Consents under the Electricity Act 1989 for offshore energy generating installations including wind farms, wave and tidal devices between 1 and 100 megawatts[2]. This is an area which is very susceptible to judicial review proceedings especially in relation to windfarm developments. Recent examples of challenges to s.36 consents include: ***R. (North Devon DC) v Secretary of State for Business, Enterprise and Regulatory Reform*** [2008] EWHC 1700 (Admin) (in relation to an inshore windfarm) and ***R. (Redcar and Cleveland BC) v Secretary of State for Business Enterprise and Regulatory Reform*** [2008] EWHC 1847 (Admin) (in relation to an off-shore windfarm).

5. Part 4 of the Act relates to "Marine Licensing" and combines existing regulatory regimes contained within the Food and Environment Protection Act 1985 ("FEPA"), the Coast Protection Act 1949 ("the CPA") and the Telecommunications Act 1984. Part 4 is not yet in force.

6. Pursuant to s.66 of the 2009 Act, marine activities licensable by the MMO include: depositing any substance or object in the sea; scuttling; construction, alteration or improvement of works; removing any substance or object from the sea bed and dredging.

7. The power to issue licences is one area which you would expect to be vulnerable to judicial review. However, in relation to the marine works licenses which can be granted under FEPA, to date there appears to be only one reference to judicial review proceedings being brought. The case of ***R (Deepdock Ltd) v Welsh Ministers*** [2007] EWHC 3347 (Admin) concerned the location in which a challenge to a decision which had been devolved to the Welsh Assembly should be brought. However the background to the case was a challenge by way of judicial review to the validity of the decision by the Welsh Minister for Environment, Planning and Countryside to grant a licence under s. 5 of FEPA to permit the deposit of materials in the sea at the site of a marina development. It was alleged on behalf of local mussel farmers that the deposits would considerably interfere with or destroy the marine environment on which they depended for their business and they therefore sought to judicially review the grant of the licence on a number of bases including: offences under the Sea Fisheries (Shellfish) Act

1 James appeared in the following cases mentioned below: ***R (Anti-Waste Ltd) v Environment Agency; R (Shoesmith) v. OFSTED*** and ***Coedbach Action Team v. Secretary of State for Energy and Climate Change***. He has also acted for the MMO defending the first judicial review brought against them.

2 If the capacity is in excess of 100 mw it is a nationally significant infrastructure project under ss.14 and 15 of the Planning Act 2008 in which case the consents fall within the purview of the Infrastructure Planning Committee (s.12(4) of the 2009 Act).

1967, infringement with Article 1 Protocol 1 of the European Convention on Human Rights and irrationality in light of the EIA Directive[3].

8. The paucity of challenges to the grant of licences under FEPA is more striking when one considers that, unlike under the 2009 Act, FEPA does not provide an independent mechanism to appeal licensing decisions. Does this mean that we can expect very few challenges to MMO licensing decisions under the 2009 Act?

9. One factor that would suggest a greater potential for judicial review under the 2009 Act than was seen under both FEPA and the CPA, is that the 2009 Act expands upon the powers contained in both of those Acts. For example, just like under FEPA and the CPA, s. 71(2) of the 2009 Act provides that conditions may be attached to the grant of a licence. The examples of such conditions which are provided in s.71(3) are similar to those which could previously be imposed under FEPA, but are more expansive in scope as FEPA conditions could only govern the original carrying out of an activity, whilst s.71(2)(b) of the 2009 Act allows the MMO to attach conditions that will govern the behaviour of the licensee after the authorised activities have been carried out. Another example of the 2009 Act expanding upon FEPA is s.66(1)9 which provides that any form of dredging within the UK marine licensing area (whether or not involving the removal of any material from the sea or sea bed) is a licensable marine activity. Consequently, under the 2009 Act, all forms of dredging are licensable, where as under FEPA only those forms of dredging which involved the removal and dumping of sediment elsewhere at sea were licensable.

10. On the other hand, unlike under FEPA and the CPA, the 2009 Act provides that the MMO must by regulations make provisions for any person who applies for a marine licence to appeal against a decision under s. 71 to refuse a licence or grant it subject to conditions (s. 73(1)). S. 73 was added as a result of the recommendation of the Joint Committee Report on the Bill dated 30 July 2008 which stated:

> "We heard some criticism of the lack of provision for an appeals mechanism against MMO licensing decisions. The policy paper indicates that an appeals mechanism to an independent tribunal is expected, but this is not provided for in the Bill; if this situation were to continue, judicial review would be the only option. Several factors make the lack of appeal mechanism particularly significant: there are currently no statutory time limits proposed in the draft Bill on the MMO's licensing decisions, as for example are provided in the Planning Bill, and the 'catch-all' nature of clause 66(3)(d) [now s. 72(3)(d)], which allows a licensing authority to revoke a licence for 'any other reason that appears relevant' which will have a detrimental effect on the confidence of investors in the marine renewable energy sector."

11. It is not entirely clear why the Joint Committee was concerned at the power to revoke a licence 'for any reason that appears relevant' where there was no appeal mechanism as this power existed in that form in s.8(11)(c) of FEPA without such a mechanism. Concern over statutory time limits and the possibility of non-determination was also raised in the House of Lord Committee debates, but the Under Secretary of State at the Department for Environment, Food and Rural Affairs, Huw Irranca-Davies explained that, as the licensing function was to be delegated to the MMO by the Secretary of State pursuant to s.98 of the Act, the Secretary of State had the power under s.100 to direct the MMO to determine an application. The Minister then went on to note that there was also scope for judicial review (*Hansard,* PBC col.34 (June 30, 2009)).

12. The existence of an independent appeal mechanism will reduce the likelihood of judicial review proceedings being brought of the MMO's licensing decisions as it will constitute an 'alternative remedy'. However, just because the 2009 Act provides for a statutory appeal mechanism does not necessarily foreclose the possibility of judicial review.

13. First, it is arguable that where a statutory appeal contains a substantial issue of law, it is appropriate to apply to the High Court, by way of judicial review, for a declaration in advance of the statutory appeal. This was the approach taken by the applicants, and not resisted by the Environment Agency, in ***R (Anti-Waste Ltd) v Environment Agency*** [2008] 1 WLR 923 in relation to an appeal to the Secretary of State under the Pollution Prevention and Control (England and Wales) Regulations 2000. Anti-Waste brought a judicial review of the Environment Agency's decision to refuse to issue it a landfill permit under the old PPC regime. The applicants sought to separate the factual issues (to be determined in the statutory appeal to the Secretary of State) from the underlying legal issues (for which they sought a declaration from the Administrative Court). While Collins J. was content to issue such a declaration on the law, the Court of Appeal disapproved of the approach. Sedley LJ noted, at para 45:

> "In my view neither the declarations which were made nor any of the expanded versions put, at our invitation, before this court is a proper use of the court's declaratory function. The pursuit of them in advance of the statutory appeal to the Secretary of State is an inappropriate endeavour to anticipate part of that appeal. To do so without addressing the technical facts is to seek declarations of Delphic generality; to tie a declaration to ascertained facts is an impossibility if the court is not to take on the role of the Secretary of State; and to tie it to assumed or hypothetical facts is a waste of time."

3 ***Isle of Anglesey CC v Welsh Ministers*** [2008] EWHC 921 (QB) which related to the same marina development, explains that the ***Deepdock*** proceedings were eventually withdrawn as the matter became academic as the licence was due to expire.

14. Second, the appeals mechanism under s.73 is only open to the applicant and not third parties. The reasoning behind barring third parties from the statutory appeals procedure under the Act was explained by the Minister during the Committee debates as being: (i) there is sufficient opportunity during the application process for third parties to get their views factored into any decision (s. 68 requires publication of notice of the application in such a manner as is best calculated to bring it to the attention of any persons likely to be interested in it and s.70 allows the MMO to cause an inquiry to be held); and (ii) because "it is important that marine developments are not held up unnecessarily by a large number of appeals lodged by third parties who simply disagree with the licensing authority's decision." (*Hansard* PBC col.34 (June 30, 2009)). It is therefore possible that challenges by way of judicial review to the grant of licenses will be brought by third parties with an interest in the decision and who are unable to use the s.73 mechanism.

15. Despite the existence of an independent appeal mechanism for applicants to challenge licensing decisions and the scarcity of previous examples of judicial review challenges to licensing decisions, the breadth of the MMO's powers and the sort of cases which will require licensing suggest that it is in this area of its operation that the MMO will be most vulnerable to judicial review. This is even more so when the Environmental Impact Assessment implications of licensing decisions are factored into the equation – to which I shall return below.

16. The MMO has taken over responsibility from 1 April 2010 for harbour revision and empowerment orders from the Department for Transport under the Harbours Act 1964. Such orders have in the past attracted judicial review claims: see e.g. ***R (Richards) v Pembrokeshire CC*** [2005] B.L.G.R. 105.

Marine Planning

17. The 2009 Act introduces a two-tier approach to marine planning – an overarching UK Marine Policy Statement ("MPS") and a series of marine plans which will apply the MPS to particular geographical areas. Pursuant to s. 55 of the 2009 Act, responsibility for the preparation of marine plans has been delegated by DEFRA to the MMO[4]. There are two areas in relation to marine planning where the MMO could be vulnerable to judicial review: (1) the preparation and content of the marine plan and (2) decisions which are affected by marine policy documents.

(1) the preparation and content of the marine plan

18. S. 51(6) of the 2009 Act provides that "a marine plan must be in conformity with any MPS which governs marine planning for the marine plan area unless relevant considerations indicate otherwise". During a sitting of the Lords Committee on the Bill, an amendment was proposed to this section suggesting that the phrase 'unless other considerations indicate otherwise' should be deleted. Baroness Hamwee was concerned that "third parties might challenge whether considerations were truly relevant or of sufficient weight that they should have allowed the plan not to be 'in conformity' with the marine policy statement, and could use (s. 62(4)(a)), arguing that the document was not within the appropriate powers."

19. However, Lord Hunt of Kings Heath noted that the appropriate plan authority would be very aware of the potential for judicial review and that "the possibility of judicial review proceedings imposes a very powerful discipline on the way in which they behave, and I would have thought that it would be very much one of the safeguards against the ill-judged use of the relevant consideration clause." (*Hansard* HL Vol 707 cols 1102-1103 (February 10, 2009). The preparation of the marine plan is therefore an area where it was anticipated the MMO could be vulnerable to judicial review proceedings.

20. Despite the comments in the Lords Committee debates, it seems that a challenge to a marine plan by way of judicial review is, in fact, prevented by s. 62 of the 2009 Act. S. 62(4) provides that "a person aggrieved by a relevant document (which includes a marine plan or any amendment thereto (s.62(1))) may make an application to the appropriate court (the High Court (s.62(6))) on any of the following grounds – (a) that the document is not within the appropriate powers; (b) that a procedural requirement has not been complied with." Any such application must be made not later than 6 weeks after the publication of the relevant document (s.62(5)). Pursuant to s. 63, on an application under s.62, the High Court has the power to quash the marine plan or remit it to the MMO with certain directions examples of which are listed in s.63(6). This procedure was introduced into the 2009 Act to mirror the approach in s. 113 of the Planning and Compulsory Purchase Act 2004[5] (*Hansard* HL Vol 708 col 69 (February 23, 2009)).

21. Quite apart from the fact that the s. 62 procedure would amount to an alternative remedy were judicial review proceedings brought, s. 62(3) provides that "a relevant document must not be questioned in any legal proceedings except in so far as is provided by the following provisions of this section." This therefore prevents normal judicial review proceedings being

4 The MMO on 28 October 2010 announced that it has selected the sea areas off the coast between Flamborough Head in East Riding of Yorkshire to Felixstowe in Suffolk (known formally as East Inshore and East Offshore) as the first two English marine plan areas that will be developed from April 2011.

5 Reference was also made in the debates to approach of the Planning Act 2008 to challenges to national policy statements in s.13. However, interestingly, s. 13 of the 2008 Act requires that challenge to be brought by way of judicial review albeit time limited to 6 weeks: see *Judicial Review under the Planning Act 2008* [2009] JPL 446 – 452 James Maurici.

brought and requires any challenge to use the mechanism in s. 62 with the shorter 6 week time limit.

(2) decisions which are affected by marine policy documents

22. The other area where the MMO may be vulnerable to judicial review proceedings is in relation decisions taken by it which are affected by marine policy documents. The MMO is required by s. 58 of the 2009 Act to take any authorisation or enforcement decisions in accordance with the appropriate marine policy documents unless relevant considerations indicate otherwise. If the wealth of planning cases on the similarly worded s. 38(6) of the Planning and Compulsory Purchase Act 2004 (previously s. 54A of the Town and Country Planning Act 1990) tells us anything it is that such decisions are incredibly susceptible to being challenged in the courts: see e.g. ***City of Edinburgh Council v Secretary of State for Scotland*** [1997] 1 W.L.R. 1447 dealing with s. 18A of the Town and Country Planning (Scotland) Act 1972 (c. 52) – the Scottish equivalent to s. 54A.

Enforcement

23. Enforcement is one of the MMO's key functions and as such it is granted extensive powers under the 2009 Act. Those powers are split into two parts: (i) those under Part 4 which relate to enforcement of licences and (ii) the common and fisheries enforcement powers under Part 8 of the 2009 Act. Given the broad powers which are bestowed on the MMO under the Act it could be expected that this is an area which could provide plentiful scope for judicial review challenges. However, the provisions of the 2009 Act make that more unlikely by providing for a number of statutory appeal mechanisms and other alternative remedies in relation to the MMO's enforcement powers.

(i) ***Licensing***

24. Under Part 4, Chapter 3 of the 2009 Act the MMO may issue various forms of enforcement notices to persons carrying out licensable marine activity: e.g. compliance notices (s. 90) and remediation notices (s. 91). It is a criminal offence to fail to comply with such notices.

25. In addition under Part 4, Chapter 3 of the 2009 Act there is the prospect of fixed and variable monetary penalties where satisfied beyond reasonable doubt that an offence has been committed. This mirrors the scheme in the Regulatory Enforcement and Sanctions Act 2008 ("RESA 2008").

26. A statutory appeals mechanism is provided in ss. 94(2)(e) and 96(2)(e) which provide for an appeal against the imposition of a fixed monetary penalty and the imposition and amount of a variable monetary penalty. An appeal must be to the First Tier Tribunal (Sch. 7 para. 7) and can be brought on the grounds that - (a) that the decision was based on an error of fact, (b) that the decision was wrong in law; (c) that the decision was unreasonable and (in relation to a variable monetary penalty only) (d) that the amount of the penalty is unreasonable (s.94(6) and s.96(7)).

27. On the use of civil penalties in the environmental context under RESA 2008 see: "Rethinking regulatory sanctions: Regulatory Enforcement and Sanctions Act 2008 - an exchange of letters" Macrory and Maurici E.L.M. 2009, 21(4), 183-188 and "Possible legal issues arising under the Regulatory Enforcement and Sanctions Act 2008: lessons to be learnt from the Alphasteel greenhouse gas emissions trading penalty appeal" Maurici and Turney Env. Law 2008, 48, 2-10.

28. S. 108 requires the MMO to make regulations for the provision for any person who has been issued with a notice under s. 72 (variation/suspension/revocation and transfer of licence), s.90 (compliance notice), s. 91 (remediation notice), s. 102 (stop notice) and s.104 (emergency safety notice) to appeal against that notice. However, as noted above, the existence of a statutory appeal mechanism does not, necessarily, foreclose the possibility for judicial review.

(ii) ***common and fisheries enforcement***

29. As already noted, Part 8 of the 2009 Act contains broad common enforcement powers such as the power to board and inspect vessels and marine installations (s.246), the power to seize and detain items (s.253) and the power to direct a vessel to port and detain it there (s.259). The fisheries enforcement powers include the seizure and detention of fish and gear for the purposes of forfeiture (ss. 268 and 269), the power to detain vessels in connection with court proceedings (s.279) and the power to enter into bonds for the release of seized fish or gear (s.272) and detained vessels (s.282).

30. The ability to appeal these powers by way of a statutory procedure is more limited under Part 8. The value of the bond required for the release of any fish, gear and vessel detained by the MMO can be determined by a magistrates court if the parties cannot agree the amount (s.272(4)(b) and s.282(2)(b)). Pursuant to s.283 the person who gave a bond for the release of a detained vessel can apply to the magistrates court for the return of the bond on the basis that (a) the continued detention of the bond is not necessary to secure that the relevant parties will attend court or (b) there are no grounds for believing that the court would, in the absence of the bond, have ordered the vessel to be detained.

31. Further, where a vessel has been detained under s. 279 in connection with court proceedings, the magistrates court has the power, pursuant to s.281, to order the release of the vessel if it is satisfied that (a) the continued detention is not necessary to secure the parties attendance at court; or (b) there are no grounds for believing that the court will order the vessel to be detained.

32. The seizure of a vessel and the ability to require a bond to be paid for the return of fish, gear or vessels which have been detained are the most draconian of the MMO's enforcement powers under the 2009 Act given the financial consequences resulting and it is no doubt for this reason that the Act provides a statutory mechanism for the exercise of those powers to be reviewed by the Magistrates Court from which there can be an appeal on a case stated to the Higher Courts. The existence of those statutory procedures provides a measure of protection for fishermen against the MMO but also stands in the way (although not acting as a complete bar) of the possibility of bringing judicial review proceedings as they amount to an alternative remedy.

33. Indeed it was against the use of these powers that the first judicial review against the MMO was brought and the existence of the statutory appeal mechanism was the reason that ultimately those proceedings were withdrawn. In July this year the MMO detained a Spanish fishing vessel under s.279 of the 2009 Act on suspicion of fisheries offences and set a £500,000 bond for its release. The owners applied to the Truro Magistrates Court for the release of the vessel under s.281 and for a reduction in the bond to £40,000. Both applications were refused and the owners then issued an application notice under s.108 of the Magistrates Court Act 1980 to appeal to the Crown Court. At the same time the owners launched judicial review proceedings against both the MMO and the Truro Magistrates Court challenging the MMO's decision to detain the vessel and the level of the bond required.

34. The MMO's summary grounds of defence challenged the bringing of proceedings by the owners on the basis that there were a number of alternative remedies open to them. First, reference was made to the ability to apply under s.282 of the 2009 Act to the magistrates court for the release of the detained vessel. Second, it was noted that, pursuant to s.280(5) a notice of detention must be withdrawn by the MMO as soon as possible if any of the grounds in s.280(6) apply. It was therefore open to the Claimant to advance further grounds to the MMO for the withdrawal of the notice. Third, it was open to the Claimants to appeal the decision of the Magistrates Court by way of case stated to the Crown Court. Finally, despite the MMO disagreeing with the use of an appeal to the Crown Court instead of by way of case stated, the Claimant had a current appeal pending and therefore judicial review was inappropriate.

35. Having received the MMO's summary grounds the Claimant made a further application to the Magistrates Court for release of the vessel and a reduction in the bond. The Court declined to hear the Claimant's case whilst they had a judicial review pending which prompted the Claimant to withdraw their claim for judicial review. The Magistrates then heard the case and reduced the bond to £150,000 which was eventually paid.

36. This case serves to illustrate that, given the potential sums involved and the financial implications of having a vessel detained, it is in relation to the MMO's fisheries enforcement powers that judicial review proceedings are likely to brought. However, the case also demonstrates that the mechanisms for review of the decision by the MMO and the prospect of an appeal to the Magistrates Court mean that any judicial reviews proceedings which are brought are capable of being robustly defended on the basis of the existence of an alternative remedy.

Conservation

37. This is really an area which goes to all aspects of the MMO's functions, particularly in relation to licensing. However, Part 5 of the 2009 Act specifically relates to Marine Conservation and in particular provides for the designation of Marine Conservation Zones ("MCZs"). Although the designation of MCZs is a matter for the Secretary of State, the MMO does have the power, pursuant to s.129 of the 2009 Act to make byelaws for the purpose of furthering the conservation objectives stated for an MCZ in England with such byelaws requiring the confirmation of the Secretary of State (s.130(8)). Further, pursuant to s.131, where the MMO thinks that there is an urgent need to protect an MCZ, it can make an emergency byelaw which has effect without being confirmed by the Secretary of State.

38. A further key function of the MMO in relation to marine conservation is the power pursuant to s.132 to make an interim byelaw for the purpose of protecting any feature in an area in England if the MMO thinks (a) that there are or may be reasons for the Secretary of State to consider whether to designate the area as an MCZ and (b) that there is an urgent need to protect the feature. These interim byelaws remain in force for a specified period not exceeding 12 months (s.132(5)). Although any interim byelaw made by the MMO can be revoked by the Secretary of State (s.132(8)), concern was expressed by bodies such as the British Ports Association and the Renewable Energy Association at the wide discretion given to the MMO in making these orders. Further, the Joint Committee's report notes that apart from the fact that the Secretary of State can

revoke an interim-byelaw and the requirement that the MMO keep the need for the interim-byelaw to remain in force under review (s.132(9)) there was no mechanism for appealing the decision aside from judicial review (Joint Committee Report, 30 July 2008, para. 178). Given the interests, in particular the commercial interests, which could be affected by such an interim byelaw and the absence of any statutory mechanism to appeal the making of the byelaw, this seems to be one area where the MMO could be vulnerable to judicial review proceedings.

39. The MMO is also a relevant authority for marine areas and European marine sites under the Conservation of Habitats and Species Regulations 2010 (see reg. 6). It has other functions under those Regulations including as the licensing authority in so far as the licence relates to the restricted English inshore region, see regs. 53 and 56.

40. An example of a recent judicial review of a kind we can expect the MMO to become involved in is ***R(Akester) v. Department for Environment, Food and Rural Affairs*** [2010] EWHC 232 (Admin). The case concerned the legality of a decision made by the second defendant, Wightlink Ltd, the owner and statutory harbour authority for the ferry terminal at Lymington Pier, to introduce a new class of ferry on a route between Lymington and Yarmouth. The area of the route included salt marshes and mud flats which were designated as part of a Special Area of Conservation under the Habitats Directive (1992/43). The decision was challenged, *inter alia,* on the basis that it breached the Conservation (Natural Habitats &c) Regulations 1994 (now the Conservation of Habitats and Species Regulations 2010).

41. Having concluded that the introduction of new ferries was a 'plan or project' for the purposes of the 1994 Regulations and that Wightlink was the competent authority, Owen J went on to consider whether there had been an appropriate assessment of the effect of the introduction of the new ferries on the protected sites. Owen J concluded that Wightlink's assessment was flawed because (1) he could not be satisfied that Wightlink gave the advice received from Natural England the weight it deserved and that consequently it could not have concluded that no doubt remained as to whether or not there would be significant adverse effects on the integrity of the site by the introduction of the new ferries; (2) the decision making process of the Wightlink board by which is arrived at, what it claimed, was an appropriate assessment, was not made clear in the record of its decisions; (3) the board misled itself as to the test that it was obliged to apply as a competent authority;(4) the decision was influenced by commercial considerations. Consequently, Wightlink's decision to introduce the new ferries was found to be unlawful. A second judicial review has recently been threatened in this matter.

EIA

42. Recent years have seen a large amount of litigation in relation to Environmental Impact Assessments ("EIA") under the various Regulations implementing the EIA Directive (85/337/EEC). Westlaw returns 396 cases when one searches for "EIA" and "judicial review". Given the broad functions exercised by the MMO, particularly in relation to the granting of consents and licences this is an area where the MMO may be very vulnerable to judicial review.

43. The areas of the MMO's functions where this is most likely to be in issue will be in relation to (1) the granting of electricity consents for off-shore windfarms as the MMO has taken over the functions of the Secretary of State in relation to the Electricity Works (EIA) (England and Wales) Regulations 2000 (SI 2000/1927); and (2) the granting of certain consents under FEPA, the CPA and the Harbours Act 1964 which are 'regulated activities' for the purposes of the Marine Works (Environmental Impact Assessment) Regulations 2007 (SI 2007/1518)[6]. For some recent MMO decisions under these latter Regulations: see http://www.marinemanagement.org.uk/works/environmental_decisions.htm.

Protective Cost Orders

44. Given the environmental nature of much of the MMO's work and the likelihood of EIAs being an issue, one factor which has the potential to impact substantially on the MMO in relation to any judicial review proceedings which are brought against it is the prospect of a Protective Cost Order ("PCO") being made.

45. The recent decision of the Court of Appeal in ***R. (Garner) v. Elmbridge Borough Council*** [2010] EWCA Civ 1006 has potentially paved the way for more PCOs to be granted in environmental cases. By widening the category of people who will count as a 'member of the public concerned' and accepting that in cases concerning Article 10a of the EIA Directive 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, Sullivan LJ liberalised the requirements for the granting of a PCO.

46. Significantly, Sullivan LJ's judgment recognised that a purely subjective approach to whether a review procedure was 'not prohibitively expensive' under Article 10a was not consistent with the objectives underling the Directive and that the courts should consider "whether the potential costs would be prohibitively expensive for an ordinary member of the public concerned" (para. 46).

6 Some consent decisions issued by the MMO in relation to these regulations can be found at: http://www.marinemanagement.org.uk/works/environmental_decisions.htm

47. There is, however, some comfort for organisations such as the MMO as Sullivan LJ accepted the Borough Council's submission that the imposition of some form of reciprocal limit upon a respondent's liability for costs is not necessarily inconsistent with Article 10a of the EIA Directive. He therefore set a PCO of £5000 with a reciprocal cap on the Borough Council's liability of £35,000.

48. Despite the general view that judgment the in ***Garner*** is likely to result in more PCOs being granted in environmental cases, the position has been somewhat blurred by the recent decision of Wyn Williams J in ***Coedbach Action Team v. Secretary of State for Energy and Climate Change*** [2010] EWHC 2312 to reject the Claimant's application for a PCO. Although acknowledging that, on the basis of ***Garner***, he was required to consider whether the potential costs of the litigation would be prohibitively expensive for an ordinary member of the public concerned, Wyn Williams J went on to look at the number of members of the limited company which had been formed by local residents and stated that "I would not anticipate that each of those individuals would regard a potential outlay of about £3,000 each as prohibitively expensive in relation to litigation which was of importance to them….There is nothing in the evidence in this case which persuades me that these proceedings are prohibitively expensive for the Claimant or, in context perhaps more importantly, the individuals who have an interest in the activities of the Claimant" (paras. 36-37).

49. In rejecting the application for the PCO, Wyn Williams J also took into account the conclusions of the Sullivan Report on Access to Environmental Justice published in May 2008. Referring to paras 56-58 of that report he stated, "in my judgment, the paragraphs do not support the general proposition that a protective costs order in favour of a limited company is usually unnecessary since by its very nature the company can limit or virtually extinguish its potential liability for the costs of an opposing successful party" (para. 40).

50. It remains to be seen how the decision in ***Coedbach*** will affect the granting of PCOs post-***Garner***, but it is clear that, even with the security of a reciprocal cap, the granting of a PCO will significantly increase the cost of judicial review proceedings for bodies such as the MMO.

51. There have been other developments recently including the publication of an update to the Sullivan Report in August 2010 and also decisions from the Aarhus Compliance Committee in the Port of Tyne and other cases finding the UK costs regime to be in breach of the Aarhus Convention.

52. The effect of Article 10a of the EIA Directive derived from the Aarhus Convention is soon to be considered by the Supreme Court in ***R (on the application of Pallikaropoulos) v Environment Agency*** to be heard in November 2010.

Disclosure

53. An issue which the MMO will need to have in mind in relation to any judicial review proceedings which are brought against it is its duty of candour and full and frank disclosure. The case of ***R (Shoesmith) v. OFSTED*** [2010] EWHC 852 (Admin) is a good example of the costs consequences that can flow from a public body's failure to fulfil their duty. In an appendix to his main judgement Mr Justice Foskett was damning of "the wholly inadequate way in which Ofsted's duty of candour was addressed" and went on to award indemnity costs against them. A similar adverse cost award (which counsel for the Secretary of State had accepted was 'inevitable') was made in the case of ***R. (Al-Sweady) v Secretary of State for Defence*** [2010] HRLR 2 as a result of the 'persistent and repeated failure by the Secretary of State to comply with his duties of disclosure'.

54. The duty of candour applies to interested parties to a judicial review: see ***Belize Alliance v Department of the Environment*** [2004] UKPC 6.

55. To address the concerns about the disclosure of documents that arose in ***Al-Sweady*** the Treasury Solicitor issued 'Guidance on Discharging the duty of candour and disclosure in judicial review proceedings' in January of this year which specifically refers to the adverse cost consequences that can result from a failure to fulfil the duty (see para. 1.6).

56. The MMO is a body listed in Schedule 1 to the Freedom of Information Act 2000 (Sch 2, para. 6 of the 2009 Act). Much of the information it holds though will instead be covered by the Environmental Information Regulations 2004 (SI 2004/3391, "the EIR"). The EIR 2004 give the public access rights to environmental information held by a public authority in response to requests. The definition of 'environmental information' is very wide and covers information about air, water, soil, land, flora and fauna, energy, noise, waste and emissions as well as any decisions, measures and activities affecting or likely to affect them. Pursuant to Regulation 5 the MMO are under a duty to make environmental information available on request as soon as possible and no later than 20 working days after the date of receipt of the request.

57. The MMO can only refuse to disclose the information if for example the request is manifestly unreasonable or involves

the disclosure of internal communications (see Reg 12(4)) or in order to protect *inter alia* international relations, defence, national security or public safety and intellectual property rights (see Reg 12(5)) and if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information (Reg 12(1)). Failure to comply with the duty under Regulation 5 would render the MMO liable to the enforcement and appeal provisions contained in the Freedom of Information Act 2000.

UPDATES ON COSTS IN ENVIRONMENTAL JUDICIAL REVIEW[1]

Thea Osmund - Smith[2]

1. The rapid development of commentary on the UK's approach to costs in environmental judicial review continues. Since the review in last month's "e-law"[3] the UK government has responded to the adverse findings of the Aarhus Compliance Committee. This note looks at the UK response.

2. The domestic costs laws in the UK will have to change. That is the clear conclusion of the Aarhus Compliance Committee published in the draft findings on 25th August;

> "despite the 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;"

As such,

> "the Committee considers that the considerable discretion of the courts of E&W in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest."[4]

3. Despite this finding and the general conclusion that the UK has not adequately implemented its obligation under Article 9(4)[5] the UK's response begins by stating its position that;

> "the law relating to the award of costs in England and Wales is compliant with Article 9 (4) and (5) of the Convention."

4. The UK confidently contends that compliance is achieved through a variety of measures, the most important of which are:

(a) Legal Aid – i.e. public funding by the Legal Services Commission

(b) Conditional Fee Agreements (CFAs)

(c) Protective Costs Orders (PCOs)

(d) Judicial Discretion

It is noted by the Committee that "it is not contended that each measure, individually, would necessarily be adequate to achieve compliance with article 9, paragraph 4, but rather that together they prevent costs from being prohibitively expensive."[6]

4. Given the unequivocal conclusion of the committee, the UK's confidence in the compatibility of the current costs regime operating in this important area is misplaced. The UK's stated position is symptomatic of widespread reluctance to apply different cost rules and considerations in environmental and non environmental cases - The draft findings report that the UK is concerned ;

1 UK Response to Aarhus Compliance Committee's Draft Findings in cases 2008/27 and 2008/33
2 Pupil Barrister No 5 Chambers
3 Richard Kimblin 'Costs in Environmental Judicial Review - Significant Recent Developments on Aarhus.'
4 ACCC/C/2008/33 at paragraph 135
5 paragraph 134
6 paragraph 37

> "that it is important to recognise that the provision of a fair and just system of law involves treating all parties to litigation fairly. The resources applied by public authorities in defending judicial review proceedings stem ultimately from the taxpayer, and it is therefore proper that the cost implications for both parties in an individual case should be taken into account."[7]

5. This highlights a fundamental difference of view - the UK government is occupied with achieving fairness between parties, the Convention is concerned with achieving access to justice. This may require that the defendant continues to bear a costs risk. The Compliance Committee make it clear that

> " 'fairness' in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant, a public body. The Committee moreover finds that fairness in cases of judicial review where a member of the public is pursuing environmental concerns that involve the public interest and loses the case, the fact that the public interest is at stake should be accounted for in allocating costs. "[8]

6. Wholesale compliance with Aarhus undoubtedly challenges traditional notions of fairness adopted by the domestic costs regime. A shift in attitude as well as costs rules will be needed to achieve compliance.

7. There are cracks however in the UK's apparent resolve on the issue of compliance. The stated position is tempered by details in the response of proposals

> "to consolidate the case law on Protective Costs Orders into rules of court once the practice had sufficiently developed;" Accordingly draft rules are being prepared for consideration by the Civil Procedure Rule Committee (CPRC) and it is anticipated that these rules will be implemented by April 2011 at the latest. This codification will give added clarity and transparency to the law and the procedure for making an application for a PCO, thereby providing certainty for applicants at the outset of the proceedings that the costs they will face if their claim fails will not be prohibitively expensive and certainty as to the modest costs of applying for a PCO."

8. Further, regarding injunctive relief and cross-undertakings in damages, the UK apparently is

> 'mindful of the concerns in this area and intend to consult shortly on whether the factors that the court should consider in deciding whether to dispense with a cross undertaking in damages should be set out in the court rules or in guidance and the detail of those factors."

9. These proposals are a step in the right direction but addressing transparency won't tackle prohibitive expense. It remains to be seen whether the outcome of the proposal will be sufficient to meet with the Committees recommendation that the UK

> "undertake practical and legislative measures to overcome the problems identified in [the draft findings] to ensure that such procedures:
>
> (i) are fair and equitable and not prohibitively expensive; and
>
> (ii) provide a clear and transparent framework."[9]

7 paragraph 40
8 ACCC/C/2008/27 at paragraph 45
9 ACCC/C/2008/33 at paragraph 145

DEVELOPMENTS IN INTERNATIONAL ENVIRONMENTAL LAW

Update by Carla Pike, Defra lawyer and member of the GLS Environment Group.

Welcome to the fifth update on developments in international environmental law. You may recall from previous editions of E-law that we aim to publish regular updates on recent developments in international environmental law and to highlight future meetings and expected outcomes.

Any comments, please contact Elizabeth Hattan, Defra who is a UKELA Council Member http://www.ukela.org/rte.asp?id=6.

A look back over recent developments…

Marine Environment

The 32nd Consultative Meeting and the 5th Meeting of the Contracting Parties to the London Convention and Protocol on dumping at sea respectively (COP LC 32 / LP 5) took place from 11th – 15th October at the IMO Headquarters in London.

The main issue discussed at the meeting was the further development of the regulation of ocean fertilisation activities. Building on intersessional work which took place following COP LC31 / LP4 (see the 4th update on developments in international environmental law), the meeting adopted a further resolution on ocean fertilisation which confirmed the approach taken in LC-LP1(2008) on the regulation of ocean fertilization adopted at COP LC30 / LP 3 and endorsed an Ocean Fertilisation Assessment Framework to evaluate proposed ocean fertilisation research activities. The Framework provides a basis for assessing proposed activities to determine if they constitute legitimate scientific research that is not contrary to the aims of the London Convention or Protocol and contains environmental safeguards and consultation requirements.

In addition, a further intersessional working group was established to continue to work towards providing a global, transparent and effective control and regulatory mechanism for ocean fertilization activities and other activities that fall within the scope of the London Convention and Protocol and have potential to cause harm to the marine environment.

The **OSPAR Convention 2010 Meeting** took place from 20-24 September in Bergen, Norway with a Ministerial segment from 23-24 September. The most notable achievement of the meeting was the adoption of six marine protected areas covering a total area of 285 000 km^2 protecting a series of seamounts and sections of the Mid-Atlantic Ridge and hosting a range of vulnerable deep-sea habitats and species, which resulted in OSPAR receiving WWF's "Gift To the Earth" award in recognition of its leading work on protection and conservation of marine biodiversity in the high seas.

The meeting also adopted its North-East Atlantic Environment Strategy for the period 2010-2020, which provides OSPAR with new and ambitious goals to deliver the Ecosystem Approach and achieve good environmental status in the North-East Atlantic by 2020. Further achievements include the launch of the Quality Status Report 2010 and the adoption of a variety of measures to manage human activities in the North East Altantic.

Mercury

The first session of the **Intergovernmental Negotiating Committee to prepare a global legally binding instrument on mercury** took place in Stockholm on 7 – 11 June 2010. The rules of procedure for the Committee were adopted swiftly and the INC moved quickly on to a first round of discussions and constructive exchange of views on all aspects of the future LBI. These include: objectives, structure, financial and technical assistance, compliance and the technical issues such as supply, demand in products and processes, trade, approach to wastes, contaminated sites and emissions. The session was one of general orientation, which has enabled the Secretariat (in accordance with a request from the INC) to produce a paper setting out possible draft elements for the future treaty which is intended to be used as a basis for negotiations on text, beginning at the next INC taking place in January.

Biodiversity

In March 2010, **COP15 of the Convention in the International Trade in Endangered Species (CITES)** took place in Doha, Qatar.

The two week meeting covered a veritable mountain of issues, and although decisions were adopted to strengthen wildlife management for several reptiles, combat illegal trafficking in tigers and rhinos and update the trade rules for a wide range of

plant and animal species, the Governments present were unable to agree on new trade measures to protect marine species.

Four proposals to include sharks (scalloped hammerhead, Oceanic whitetip, porbeagle and spiny dogfish) in CITES Appendix II were rejected, meaning that they can continue to be traded without CITES permits. A proposal to include blue-fin tuna in Appendix I was also rejected, following a short debate and amid much confusion about voting procedures.

Other high profile debates included that on the polar bear, with the proposal to list the species on Appendix I being rejected by a majority of Governments on the basis of insufficient scientific evidence and the cultural and economic role of polar bears in the Arctic. The African elephant was also subject the of extensive debate, however with the rejection of the downlisting requests of Tanzania and Zambia and the withdrawal of the Kenyan proposal for a 20-year moratorium, the status quo was retained.

In June 2010, a third meeting on the **Intergovernmental Science Policy Platform on Biodiversity and Ecosystem Services (IPBES)** was held in Busan, South Korea, under the auspices of the United Nations Environment Programme to decide in principle whether an IPBES should be established. Such a Platform would operate in a similar way to the Intergovernmental Panel on Climate Change (IPCC) in the fields of biodiversity and ecosystem services, allowing for the undertaking of global and thematic scientific assessments that would provide a valuable tool for policymaking in those areas. The Platform would serve both Governments and multilateral environmental agreement Conferences of Parties alike, and would effectively cover the science-policy interface through the provision of policy relevant information. More than eighty States, through the so-called Busan Outcome, did consider that such a Platform should be established, covering both scientific assessments and a capacity building element, but that finding still requires the endorsement of all UN Member States through the UN General Assembly, possibly during its current 65th session. If so endorsed, and an IPBES is established, many of the operational details, including the scope of working groups and the provision of secretariat and administrative services, will need to be determined at an initial meeting of the Platform's plenary body that could be held during the course of 2011.

In October 2010, the **10th Conference of the Parties to the Convention on Biological Diversity** and the **5th Meeting of the Parties to the Biosafety Protocol** took place in Nagoya, Japan. At MOP5, agreement was reached on a Supplementary Protocol to the Biosafety Protocol on Liability and Redress for damage caused by transboundary movements of GMOs, in addition to decisions on *inter alia* risk assessment and risk management and the adoption of the first strategic plan for the Protocol. COP10, meanwhile, adopted a Protocol on Access and Benefit Sharing and took decisions on a new Strategic Plan for the Convention, including targets for the period 2011-2020; a resource mobilisation strategy for the Convention; and approximately 40 other decisions, including on marine and coastal biodiversity, invasive alien species, protected areas and climate change – which decision included extension of the moratorium on geo-engineering activities that are damaging to the environment.

Looking Forward…

INC2 LBA, January 2011 – second meeting of the Intergovernmental Negotiating Committee on a globally legally binding instrument on mercury. The meeting will commence negotiations on draft text, based on preparatory work by the INC Secretariat.

26th UNEP Governing Council 21 – 25 February 2011 (Nairobi) – full and varied agenda, including the green economy, international environmental governance, chemicals (including synergies and financing for the chemicals and waste cluster), IPBES and oceans.

4th Governing Body to the International Treaty on Plant Genetic Resources for Food and Agriculture 14-18 March 2011 – full and varied agenda, including expected adoption of rules and procedures on compliance.

COP 5 Stockholm Convention on Persistent Organic Pollutants, April 2011 - whilst the agenda is yet to be finalised, the meeting is likely to cover
synergies, compliance, nomination of new substances, financing and implementation, effectiveness evaluation and regional centres.

Intergovernmental Negotiating Committee on Access and Benefit Sharing – 06-10 June 2011 – modalities of the ABS clearing house mechanism; capacity building measures; awareness raising measures; compliance.

WILD LAW WEEKEND WORKSHOP

Margaret Walker, Lawyer (Department for Environment, Food and Rural Affairs) reporting on behalf of attendees at this year's Wild Law Workshop.

The sixth annual Wild Law workshop took place at the Lee Valley YHA over the weekend of 24th - 26th September 2010 on the theme of "Wild Law and Our Habitat: from Resource to Relationship".

The 40 participants (who comprised lawyers, scientists, academics, environmentalists and students) shared their diverse expertise and explored the big, and very real, problems facing our environment. The debates were underpinned by the fundamental question of how our legal framework should operate to ensure effective protection of the natural environment.

The Lee Valley Regional Park, which falls within Hertfordshire, the north-east of London and Essex, provided an appropriate setting for the weekend's explorations and a poignant reminder that 'wilderness' is not only something in remote regions or television documentaries but can be found even in urban areas and should be accessible to all.

Time for a fundamental shift in both thinking and law?

Colin Tudge, biologist and author of titles including *The Secret Life of Trees*[1] , *So Shall We Reap: the Concept of Enlightened Agriculture*[2] and *Feeding People is Easy*[3] gave a fascinating explanation of the history of scientific interpretation of the natural world, and made the case for how science should be used to help better appreciate nature rather than to recklessly exploit it.

Colin spoke about the contribution of biological sciences to the historical development of a mechanistic view of the natural world, and why such an approach is not always conducive to gaining a proper understanding of the interconnectivity of living organisms. Colin quoted the example of traditional measurements of animal behaviour, in particular where this had been done purely in terms of mechanism; if animals are nothing more than reactive machines, then there is no need to address the complexities of sentience or ecological interdependencies? After all, if something doesn't have words, how can it be capable of thought? Darwinism and modern genetic theory have, in Colin's view, given credence to mechanistic thinking about humans too.

Colin also raised the issue of where religion and spirituality might fit into environmental solutions; he considered that religion has a role to play in helping us find our equilibrium with nature.
"Renaissance" was an interesting word that came through Colin's presentation. Although used in the context of Colin's *Campaign for Real Farming*[4], this word also captures people's more general thinking about what needs to be done to return human society to some rational manner of working with nature, rather than against it. Colin's work recognises the significance of agriculture as a point of interaction between humans and the natural world, and so getting that interaction right must be key to avoiding ecological disaster whilst ensuring there is enough food to go around.

Wild law does not shy away from the complex interdependencies that Colin talked about, and not unlike his campaign, it pushes the boundaries of people's thinking with a focus on what really needs to be done to protect the environment and ensure our survival. Wild laws, based on 'Earth Jurisprudence', are those consistent with all components of the natural environment. They recognise the value of all subjects of the 'Earth Community', providing an ecocentric approach to analysing our legal framework. Interesting examples of wild laws have been identified in the March 2009 UKELA and Gaia Foundation international research

1 Allen Lane, London, 2005. Penguin Books, London, 2006. Published as *The Tree* by Crown, New York, 2006. ISBN 0-713-99698-6

2 Allen Lane, London 2003; Penguin Books, London, 2004. An alternative title is *So Shall We Reap: how everyone who is liable to be born in the next ten thousand years could eat very well indeed; and why, in practice, our immediate descendants are likely to be in serious trouble*, on the future of agriculture, in which he challenges the current science and technology paradigm and outlines a sustainable way of feeding the population of the world, expected to stabilise at ten billion people by the middle of the 21st Century.

3 Pari Publishing, Italy. 2007. When agriculture is expressly designed to feed people, all the associated problems seem to solve themselves.

4 See http://www.campaignforrealfarming.org. Incorporating the College for Enlightened Agriculture, this campaign calls for "Real Farming", agriculture guided by principles of sound biology, which can tell us "what is necessary" and "what is possible"; and by basic morality – "what is it good to do".

report entitled "*Wild law: Is there any evidence of Earth Jurisprudence in existing law and practice?*"[5]. At the workshop, Begonia Filgueira provided an interesting update on what had come out of this research and the Report (p50-1) provides a useful summary of where this movement is heading:

> "this suggests that Wild Law principles are not as alien, or as far-fetched, as some of us may originally have thought. Certainly, there is enough in what we have reviewed to suggest that a more deeply Wild Law jurisprudence is not a complete impossibility. The Ecuadorian constitution, and the decisions by the Indian Supreme Court, are good examples of what can be achieved....Wild Law offers a potential solution, although it requires a huge shift in thinking. That shift is already beginning to be seen, as this report shows."

Putting Wild Law into practice

The 'Open Space' format of the workshop allowed participants to set their own agenda for discussions, with one group opting to discuss environmental activism and the input of lawyers in particular campaigns, whilst others took the opportunity to explore the Lee Valley by foot and share ideas on the best ways to communicate wild law ideas. Another group explored the practical difficulties encountered when trying to be a 'wild lawyer' in practice, for example, knowing how to hold up wild law concepts with validity in the courts.

So are wild law concepts useful in practice? David Hart QC, of One Crown Office Row, in his presentation on 'floods, habitats and wild law in action', helped to stimulate ideas by providing an insight into how 'compensatory measures' provisions in the Habitats Directive have, in his view, the potential to provide an insurmountable obstacle to big developments.

Whilst acknowledging that most of our current laws are based on 18th century anthropocentric language, David identified legislative provisions in Article 6 of the 1992 Habitats Directive which he suggested might serve to uphold the interests of the environment to the detriment of proposed developments in areas inhabited by protected species. Article 6 of the Directive imposes an obligation not to do anything that leads to deterioration of protected habitats, to assess plans and projects, and agree to them only if they will not affect the integrity of those sites. David stated that if a proposed plan or project does affect the integrity of a protected site, and if there are no alternative solutions, it can only go ahead where there are reasons of overriding public interest and all necessary 'compensatory measures' are taken to ensure that the overall coherence of the Natura 2000 network is protected. David presented this as a good example of where the law sets fairly high thresholds which must be met in the interests of protecting nature, and in doing so, goes some way to acknowledging its intrinsic value.

An uncomfortable truth

Dr Mayer Hillman presented an urgent call to action on climate change, prompting participants to think about the daily excuses given for not reducing carbon footprints. Mayer is a qualified architect and town planner and Senior Fellow Emeritus since 1992 at the Policy Studies Institute, University of Westminster. His publications include titles such as *How We Can Save the Planet: Preventing Global Climate Catastrophe* [6] and *Climate change and a Sustainable Transport Policy*[7].

Mayer, one of the first proponents of carbon rationing, asked how society is realistically going to achieve the necessary reductions in greenhouse gas emissions. How are we going to move to zero-carbon, by when, and who's going to do it? In Mayer's view, one of the fundamental challenges is energy-intensive travel and, in particular, the growth of air travel. The question was posed, should we individually have the right to continue to travel by whatever means we choose, regardless of the environmental consequences? This of course raises all sorts of questions relating to individual freedoms versus the right of society to continue to exist in the face of a changing climate. Participants considered what, as individuals with energy-intensive lifestyles, they were prepared to sacrifice and if they don't, who will make them? Mayer put forward the argument that individual rights do need to be curtailed if we are to avert ecological disaster, with use of laws being a necessary part of this.

A musical interlude of "Flying" by the band 'Seize the Day' was appropriately played by the workshop's organizers at the end of Mayer's presentation, with the poignant lyrics: *'I will recycle, I'll ride my bicycle...., but don't take my freedom away…don't take my wings away'* serving as a poignant reminder of the difficult challenges that lie at the heart of any plan to move towards a zero-carbon society. Mayer's talk prompted participants to set up breakout discussions on radical environmentalism and 'ecofascism'.

Any discussion of individual rights should, in the view of many of the participants, also have regard to 'intergenerational equity'. Another breakout session explored what might be done through the political and legal process to shift towards intergenerational equity, drawing upon existing ideas for an Ombudsman for Future Generations[8], radical thinking on impact assessment and trusteeship for future generations, and how such considerations could become guiding principles of society.

5 Download at: http://www.ukela.org/rte.asp?id=5 or see UKELA website for details on ordering a paper copy.
6 (with Tina Fawcett and Sudhir Chella Rajan), New York: Thomas Dunne Books/St Martin's Press, March 2008.
7 Turning the Corner? A Reader in Contemporary Transport Policy (ed. Francis Terry), Blackwell Publishing, 2004.
8 See A. Antypas 'Hungary's Ombudsman for future generations' [2009] 4 Env. Liability CS72-4, and note the UKELA event which took place on 25 February 2010 at the Ministry of Justice with speaker Dr Sándor Fülöp Hungary's first elected Parliamentary Commissioner for Future Generations.

Wild Law

Wild Law going forward

Wild law initiatives have been springing up world-wide, with a notable example being the second Australian Wild Law Conference which was held at the University of Wollongong in July[9]. Also, here in the UK, the 'Wild Law in Education' subgroup continues to encourage awareness and discussion of wild law ideas and has generated interest in teaching the topic.

At the workshop, Simon Boyle, convenor of the UKELA Wild Law Special Interest Group, and Louise Waddell from Aberdeen University presented the thinking and research that flowed from a wild law event that took place earlier in the year at Loch Ossian, Scotland. This was about 'wilderness' and their views on whether there is a need for new EU legislation specifically designed to protect wilderness areas. A wilderness working group plans to explore these issues in more detail with their particular interest in a European Parliament resolution (3 Feb 2009) on 'Wilderness in Europe'.

Wild Law diary dates

Several wild law events are planned for the coming year

- At the workshop it was agreed in principle that a campaigning Wild Law Group, independent from UKELA, should be set up. The inaugural meeting will to take place on 16th November 2010 in north London. Anyone who plans to attend should notify alisonboyd.ukela@ntlbusiness.com
- The second 'Wild Law in the wilds of Scotland' weekend will take place at Broadmeadows Youth Hostel from 29th April–2nd May 2011. Book via our online system (very limited places).
- The next Wild Law workshop will be held on the weekend of September 23rd-25th 2011. A volunteer team has been set up to organise the workshop and the venue is just being finalised. Bookings will open early in 2011.

9 Papers and speaker information from this conference available at http://www.ukela.org/rte.asp?id=122.

Students

STUDENT UPDATE AND APPEAL FOR HELP

Co-Student adviser needed

UKELA is still 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-adviser deals with discrete tasks. It is anticipated that the co-advisers 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. We look forward to hearing from you.

STUDENT COMPETITIONS 2010/2011 LAUNCHED

THE MOOTS - RULES
Deadline January 31st 2011

1. The United Kingdom Environmental Law Association is pleased to announce the opening of entries for the 2011 Mooting Competitions.

2. Further information about UKELA may be found at www.ukela.org.uk.

3. There are two mooting competitions:

   a. The Lord Slynn of Hadley Mooting Trophy Competition (the senior competition) is open to all those who as of 31st October 2010 are in pupillage, a trainee solicitor, on the bar vocational course or legal practice course, or who are on taking the CPE. In essence this competition is for those on vocational courses

   b. The UKELA Student Prize Moot (the junior competition) is open to those who as of 31st October 2010 do not qualify for the Lord Slynn Trophy Competition but who are studying for a degree (including graduate degrees, e.g. LLM's or non law degrees). In essence this competition is for those who are students not yet on vocational courses.

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

5. Each team should submit two skeleton arguments, one on behalf of Nimby Ltd (the Appellant) and one on behalf of the Secretary of State (Respondent). No more than four authorities may be cited in each skeleton in addition to those referred to in the Moot problem. Each skeleton argument should be no more than six pages of A4 paper. The font should be Times New Roman, size 12, with 1.5 line spacing. Paragraphs and pages should be numbered. The skeleton arguments should not include any contact name or name of an institute to which you belong. The purpose of this rule is to ensure that judges can assess the skeletons without associating the skeleton with a particular person or institution.

6. A copy of the skeleton argument and the student competitons entry form sheet (available on ww.ukela.org) should be forwarded by email to Alison Boyd <alisonboyd.ukela@ntlbusiness.com> no later than 4pm on Monday 31st January 2011.

7. The semi-finalists will be selected on the basis of the skeleton arguments. All competitors will be notified of the outcome. The semi-finals and finals will be held in London on a single date in March 2011.

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

9. The winners of both competitions will receive a cash prize from No5 Chambers, memberships of UKELA and an annual subscription to Environmental Law and Management. The winners of the Senior competition will receive the Lord Slynn of Hadley Mooting Trophy and the Junior competition winners will receive the Junior Trophy.

UKELA is grateful to the sponsors of the moot.

Richard Kimblin
Master of the Moots
No5 Chambers
76 Shoe Lane
London
EC4A 3JB
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rk@no5.com

Moot Problem

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

NIMBY	Appellant
-and-	
THE COUNCIL	Respondent

APPROVED JUDGMENT

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1. The facts of this case are simple, but, like snails in bottles of ginger beer, its resolution raises important issues of law.

2. Nimby lives in Small Town. Some 30 m from Nimby's house on Quiet Street, there is a factory. It manufactured furniture. There was no history of complaint in respect of that industrial use. In the autumn of 2009 an application was made to the Council to change the use of the factory to a composting site for the treatment of organic wastes.

3. The Council decided that the proposal was not one which required an environmental impact assessment. It is common ground that this was an error on the Council's part. The Council did advertise the planning application, but did not notify Nimby as they ought to have done in accordance with the relevant Order under the planning Acts. In any event, the Council received no objections to the proposal and granted permission on 24 December 2009.

4. Nothing happened until 1 May 2010 when the use of the site for composting commenced. Nimby noticed this immediately because of the traffic, the noise, the smell and the flies from the composting activity. Nimby raised the matter with the operator and the Council and was shocked to learn that planning permission had been granted. She knew nothing about the application, nor the grant of permission until the site commenced operations.

5. After consulting a very helpful web-site about 'law and your environment', she very quickly realised that her only option was to apply for judicial review of the grant of planning permission. This she did on 29 July 2010, almost three months after she knew that planning permission had been granted without an EIA.

6. It is apparent from the evidence filed in this case that the operator of the composting plant has invested some £6M in the site and that the site is crucial to the Council's obligations in meeting targets for the recycling of wastes.

7. The Council raised the issue of delay in opposing the grant of any relief in this case.

8. The judge granted permission to apply for judicial review but refused any relief on the basis that the claim had not been made promptly. She now appeals to this court.

9. The reference to 'promptly' is to CPR r.54.5(1) , which governs claims for judicial review. It provides:

> "The claim form must be filed –
>
> (a) promptly; and
>
> (b) in any event, not later than 3 months after the grounds to make the claim first arose."

10. As the wording indicates and as has been emphasised repeatedly in the authorities, the two requirements set out in para.(a) and (b) of that rule are separate and independent of each other, and it is not to be assumed that filing within three months necessarily amounts to filing promptly: see R. v Independent Television Commission Ex p. TV Northern Ireland Ltd [1996] J.R. 60, [1991] T.L.R. 606 and R. v Cotswold DC Ex p. Barrington Parish Council [1998] 75 P. & C.R. 515 . The need for a claimant seeking judicial review to act promptly arises in part from the fact that a public law decision by a public body normally affects the rights of parties other than just the claimant and the decision-maker. For example in Hardy v Pembrokeshire CC (Permission to appeal) [2006] EWCA Civ 240 at [10] it was held:

> "It is important that those parties, and indeed the public generally, should be able to proceed on the basis that the decision is valid and can be relied on, and that they can plan their lives and make personal and business decisions accordingly."

11. In that same case this court rejected a submission that the requirement in CPR r.54.5(1) for an application for judicial review to be made "promptly" offended against the principle of "legal certainty" in European law.

12. The importance of acting promptly applies with particular force in cases where it is sought to challenge the grant of planning permission. In R. v Exeter City Council Ex p. JL Thomas & Co Ltd [1991] 1 Q.B. 471 at 484G, Simon Brown J. (as he then was) emphasised the need to proceed "with greatest possible celerity", as he did also in R. v Swale BC Ex p. Royal Society for the Protection of Birds [1991] 1 P.L.R. 6 . Once a planning permission has been granted, a developer is entitled to proceed to carry out the development and since there are time limits on the validity of a permission they will normally wish to proceed to implement it without delay. In the Exeter case, Simon Brown J. referred to the fact that a statutory challenge under what is now s.288 of the Town and Country Planning Act 1990 to a ministerial decision must be brought within six weeks of the decision. Thus if a planning permission is granted by the Secretary of State on an appeal or a called-in application, the objector seeking to question the validity of that decision must act within six weeks, without there being any power in the court to extend that period of time.

13. That factor led Laws J. (as he then was) to conclude in R. v Ceredigion CC Ex p. McKeown [1997] C.O.D. 463, [1998] 2 P.L.R. 1 that it was nearly impossible to conceive of a case in which leave to move for judicial review would be granted to attack a planning permission when the application was lodged more than six weeks after the planning permission had been granted. That was perhaps a somewhat extreme statement of the position, and certainly it was rejected by the House of Lords in R. (on the application of Burkett) v Hammersmith and Fulham LBC (No.1) [2002] UKHL 23, [2002] 1 W.L.R. 1593 , where Lord Steyn (with whom the rest of the Appellate Committee generally agreed) said at [53] that from the McKeown case

> "the inference has sometimes been drawn that the three months limit has by judicial decision been replaced by a 'six weeks rule'. This is a misconception. The legislative three months limit cannot be contracted by a judicial policy decision."

14. I would respectfully agree that, where the CPR has expressly provided for a three-month time limit, the courts cannot adopt a policy that in judicial review challenges to the grant of a planning permission a time limit of six weeks will in practice apply. However, that does not seem to me to rob the point made by Simon Brown J. and others of all of its force. It may often be of some relevance, when a court is applying the separate test of promptness, that Parliament has prescribed a six-weeks time limit in cases where the permission is granted by the Secretary of State rather than by a local planning authority, if only because it indicates a recognition by Parliament of the necessity of bringing challenges to planning permissions quickly. There are differences between the two situations: for example, where the Secretary of State grants a permission, an objector is entitled to be notified of the decision, which is not the case where a local planning authority grants the permission. Thus where in the latter case an objector is for some time unaware of the local authority decision, the analogy is less applicable.

15. Against these considerations, we have had our attention drawn to recent authority of the ECJ. In summary where breach of European law is in issue, time runs from the date on which the Claimant knew or ought to have known of the breach (Uniplex (UK) Ltd v NHS Business Services Authority (C-406/08)). In Sita UK Ltd v Greater Manchester Waste Disposal Authority [2010] EWHC 680 Ch, the court held that the appropriate course was to extend time to three months from the date of knowledge of the breach.

16. I am grateful for the careful researches of Counsel amongst the Scottish cases. In succinct and tempting arguments it was suggested that the more flexible approach which is found the plea in bar, Mora, is to be preferred: Inner House in Somerville v Scottish Minister [2007] SC 140; United Coop Ltd v National Appeal Panel for Entry to the Pharmaceutical Lists [2007] SLT 831.

17. For my part I would hold that the Claimant (now Appellant)has applied within three months of her knowledge of the breach, but has not acted promptly. No good reason has been advanced to explain what is almost three months of delay. I appreciate that there is a need for some certainty in these matters, but I do not think that there is a need to make a fetish of it. I consider that the court retains a discretion even where issues of European law are in play. Tempting though the Scottish approach is, such a change is for others to consider.

18. I dismiss the appeal but certify two questions of public importance upon which I would encourage Nimby to pursue in the Supreme Court:

(i) Is it lawful to refuse relief on the basis that the Claimant has not acted promptly in respect of a breach of European law, albeit that the claim was brought within 3 months?;

(ii) Is it lawful to refuse relief on the basis that the Claimant has not acted promptly in respect of a breach of domestic law, albeit that the claim was brought within 3 months?

ANDREW LEES PRIZE
Deadline January 31st 2011

The United Kingdom Environmental Law Association is pleased to announce its annual article competition - "the Andrew Lees Prize". This competition is open to any student, trainee solicitor, pupil or solicitor / barrister with not more than 2 years' post qualification experience.

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

A shortlist of no more than four entries will be invited to present their paper to a panel of judges in London in March. The presentation may be accompanied by AV or other material and will take no more than 15 minutes. It will subject to Q&A from the audience invited from UKELA's membership and entrants' supporters.

- The winner will receive a free place (including travel expenses from within the UK) to the 2010 UKELA conference which is being held at Norwich University on June 24th - 26th.

The winner will also have their article published in UKELA's journal e-law.

The title of the article is:

Is access to justice under Art 9 Aarhus Convention a necessity or a luxury the UK cannot afford?

All articles should be typed in 12pt script and 1.5 line spacing. The number of words should appear at the end of the article. The word count should relate only to the text of the article and does not include the title. However, if the article text exceeds 1000 words your entry will be disqualified. The judges have been appointed by UKELA Council and their decision on all matters relating to the competition is final.

Please do not put your name or institution on your essay - your contact details should go on the sheet which is provided for that purpose. **Your essay and the entry form** should be forwarded by email to Alison Boyd <alisonboyd.ukela@ntlbusiness.com> no later than 4pm on Monday 31st January 2011.

THE UKELA SIMON BALL ACADEMIC PRIZE FOR OUTSTANDING STUDENT ACHIEVEMENT SPONSORED BY OUP

Deadline: April 29th 2011

Simon Ball
Simon Ball taught law at Sheffield University from 1979 until his death, aged 39, in 1996. He was a founder member of UKELA and actively involved in the Association. Simon was one of the first to teach environmental law as a subject and in 1991, with Stuart Bell, authored one of the first texts on Environmental Law. He was very highly regarded as a teacher, and his textbook writing set the standard for work that was both academically rigorous and considered but also accessible to students.

The UKELA Simon Ball Prize was first awarded in 2010 and will be awarded annually to recognise and celebrate student achievement in the field of environmental law.

The award is open to undergraduate and postgraduate students at a UK higher education institution from any academic discipline so long as the basis of the contribution has relevance to the advancement of environmental law or otherwise to the charitable objects of UKELA. The basis of the award is not limited to academic achievement and may extend to any achievement attained by, or contribution made by, the student.

Criteria and Rules

1. The UKELA Simon Ball Prize for Student Achievement (the Prize) is awarded annually to recognise and celebrate student achievement in the field of environmental law. The winning entry will receive £250 of books from OUP and a subscription to the Journal of Environmental Law. The winner (if a group entry a maximum of four memberships will be available) will also be offered free UKELA student membership for one year (current members qualify for the following

year free provided they are still students).

2. The Prize is open to undergraduate and postgraduate students (the student) at a UK higher education institution from any academic discipline so long as the basis of the achievement or contribution has relevance to the advancement of environmental law or otherwise to the charitable objects of UKELA (see below).

3. Joint nominations may be made (in which case, student includes the plural).

4. Academic achievement may be demonstrated on the basis of work submitted as part of a degree programme or to any other demonstrable achievement.

5. The basis of the Prize is not limited to academic achievement and may extend to any achievement attained by, or contribution made by, the student. This may include, but is not limited to, charitable work, university or community involvement, clinical legal education or support or the like where the contribution has relevance to the advancement of environmental law or otherwise to the charitable objects of UKELA (see below).

6. Achievement in any other UKELA competition may not form the basis of any nomination.

7. Up to four nominees will be chosen on the basis of submissions made on their behalf by a teacher at their institution. Students may be nominated in more than one year.

8. Submissions should not exceed 500 words and should identify clearly the achievement or contribution made by the student. A form will be available at www.ukela.org to accompany submissions.

9. Submissions should be sent to Alison Boyd (alisonboyd.ukela@ntlbusiness.com) and received no later than **April 29th 2011**.

10. Where appropriate, submissions should be accompanied by any relevant supporting material (e.g. a copy of an essay or dissertation which should be made available electronically).

11. The winner will be chosen by the judges, whose decision is final and will be announced by May 31st 2011.

12. The competition will be reported in UKELA's journal, e-law, and on the UKELA website, and the winner will be asked to provide a photo for this purpose.

Entry Forms
You will need an entry form for all the competitions this year – please visit http://www.ukela.org/rte.asp?id=20 for further information

UKELA events

UKELA ANNUAL GARNER LECTURE
Thursday 18 November

Sir Konrad Schiemann gives this year's annual lecture on the subject of "The influence of European Union Law on Access to Justice in Environmental Cases"
Clifford Chance, London
Our keynote lecture on a highly topical issue. You should not miss the opportunity to attend.

Information about all events at:
http://www.ukela.org/rte.asp?id=12

Please look out for our newsletter before Christmas with details of events early in 2011. Details are currently being finalised.

UKELA events

YOUNG UKELA

Christmas Drinks Social December 16th 6pm.
Full details will be circulated shortly.

Sustainability v Localism - a friendly match?
Seminar in association with the Planning and Environment Bar Association, organised by UKELA's Planning and Sustainable Development Working Party. Open to all.
20 January, 5pm, Beachcroft's Fetter Lane office in London

This seminar will consider the implications for the environment of the planning reforms in the forthcoming Localism Bill. We will hear from Steven Quartermain (DCLG's Chief Planner), Simon Marsh (RSPB's Head of Planning and Regional Policy), and speakers from local government and the renewable energy sector. The event will be chaired by Morag Ellis QC, PEBA's Vice Chairman.

Bookings will open this week - visit www.ukela.org.

External events

Butterworths Environmental law: compliance, best practice and litigation
30 November 2010 | Central London | 6 CPD Hours

This conference brings together a speaker panel including Adrian Roberts of Department of Energy & Climate Change, Owen Lomas of Allen & Overy and Richard Wald of 39 Essex Street. Our experts will guide you through the latest developments in legislation and case law enabling you to be fully compliant and mitigate the risk of litigation.
Attending this conference will enable you to:

- Gain insights from DECC on climate change legislation including EU and international developments
- Explore the latest developments in CRC and REACH
- Examine recent developments in environmental liability and litigation
- Analyse the impact of the new biodiversity agenda

View the speakers >>> View the agenda >>>

Also available to purchase with the conference: Waste and Contaminated Land Workshop Wednesday 1st December 2010, 9.00-12.30, 3 CPD hours

Exclusive UKELA offer - 20% discount off of the full conference rate!
To Book:
Call: +44(0)20 7347 3573
Email: ebookings@lexisnexis.co.uk
Simply quote 'UKELA' to receive your 20% discount.

Private sector delegates:

Conference and workshop:
£639.20 + VAT =£751.06 – a saving of 20% for UKELA members!

Conference:
£479.20 + VAT = £563.06 – a saving of 20% for UKELA members!

Public sector delegates:

Conference and workshop:
£559.20 + VAT = £657.06 – a saving of 20% for UKELA members!

External events

Conference:
£399.20 + VAT = £469.06 – a saving of 20% for UKELA members!

Tuesday 7 December
Journal of Environmental Law Annual Lecture
The Challenge of Climate Change Adaptation by Professor Daniel A Farber, University of California, Berkeley
Institute of Advanced Legal Studies, Russell Square, London
For further details click here.

REACH: Legal Implications & Supply Chain Strategies 2011
Understand the post-deadline legal implications, resolve disputes, defend challenges and take steps to protect your organisation

19th & 20th January 2011 - Crowne Plaza St James, London, UK
http://www.informaglobalevents.com/KW8103UKEE1

Meet your organisation's legal obligations with confidence by attending this one-day *IBC Legal* conference:

- Benefit from a superb review of enforcement and what to expect after the deadline
- Learn protective and proactive steps to deal with the suppliers who fail to provide REACH compliant chemicals
- Discover what you need to know about litigating before the BoA and the EU Courts
- Hear about the legalities and strategies for challenging the competition
- Learn strategies for dealing with disappointment in, and frustration of, contracts
- Analyse the key legal risks and main deadlines
- Equip yourself with tools and tips to implement measures in your organisation for the commercial management of REACH

Benefit from the expertise of these corporate, regulatory and institutional speakers:

- Andreas Herdina, Director of Co-operation, *European Chemicals Agency* (subject to final confirmation)
- Richard Bishop, HM Inspector of Health & Safety, *HSE*
- Dr Joanne Lloyd, Director of *REACHReady*
- Dr Hanns-Peter Nehl, Legal Secretary in the Chambers of Judge Azizi, *General Court*
- Mike Ellwood, Senior Regulatory Manager, *Arch Biocides*
- Dr Keith Huckle, Corporate Director, Environment, *Lhoist*
- Dr Cándido García Molyneux, Of Counsel and Head of the REACH Practice, *Covington & Burling LLP*
- Genevieve Hilgers, Regulatory Affairs & REACH Team Leader, *Procter & Gamble*
- Dr Roger Van der Linden, Group Manager Product Stewardship and REACH, *Borealis Kallo NV*

The detailed programme and full list of speakers is available on the event website.

Book now for the best prices and don't forget to quote VIP Code: KW8103UKEE1 for your extra 10% discount*:
Visit the website Email IBC Legal Conferences Call +44 (0) 20 7017 5503

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

Intern opportunities

VIDEO MEDIA INTERN WANTED

Are you a media student with an interest in the environment or do you know someone who is? UKELA has been made a YouTube charity partner and we need someone with the right technical expertise to help us make videos for our YouTube channel.
We are looking for someone who can help us produce two minute snapshots on key environmental law issues with

some of our expert members.

What we need:

- Someone with their own equipment to work with a UKELA staff member to produce up to 10 two minute videos
- Time to film the interviews (mostly in London) and carry out any post production needed using your own equipment
- Work to be completed by the end of July 2011
- A good quality technical standard in the final production

What UKELA will provide:

- The scripts
- ITN trained former TV producer to work with
- Arrangements and logistics for the interviews to suit you
- A credit for any material that appears on our YouTube site (which will be streamed also via our www.ukela.org and Law and Your Environment www.environmentlaw.org.uk sites with a total visit number currently of over 20,000 a month)
- Travel and any other relevant expenses (although we cannot unfortunately fund any hire of technical equipment)
- References as requested
- An opportunity to meet environmental experts

What UKELA cannot provide:

- A fee – this is a voluntary intern role equipping you with the skills to work with clients and produce YouTube style output

To apply for this role:

Please send your CV and a covering letter stating why you would like to become UKELA's video media intern to alisonboyd.ukela@ntlbusiness.com. If you can provide an example of your current work either via online access or on disc that would help your application.
Any queries please call Alison Boyd at 01306 500090.
UKELA's equal opportunities policy applies to this role.

Deadline for applications: December 31st 2010. The role will start early in 2011.

Book review

EU policy for agriculture, food and rural areas
edited by: Arie Oskam, Gerrit Meester and Huib Silvis, 443 pp including Index; published by Wageningen Academic Publishers, ISBN-13: 978-9086861187, price £40.00

Sixty-one authors contributed; including authors from the Organisation for Economic Co-operation and Development , French National Institute for Agricultural Research (INRA), World Trade Organisation – Sanitary Phytosanitary, European Commission, and the World Bank. Although a plea is made for fair international rules and institutions to oversee the increasing liberalisation and globalisation of markets, the proposal is that success is based on the continuation of trade liberalisation and market integration, which is reflective of the authors' backgrounds.

EU policies are categorised as based on the package of EU legislation called acquis communautaire with the objective of achieving certain targets. Some may claim that policies come before legislation. But either way, the authors clearly

show that scientific approaches to analysing political policies have overtaken traditional methods.

The Common Agricultural Policy (CAP) is described as having developed with the economic need to compete with the United States and Japan in mind, but has now become less important in relative financial terms to other common policies in the quest for the EU "to be the most competitive and dynamic knowledge-based economy in the world." However, the book also, perhaps worryingly for some, predicts a focus in Europe on the continued development of knowledge-intensive and capital-intensive agriculture as part of the quest for higher value-added innovative food products.

The authors discuss the globalisation of the agricultural product market, forward contracts, options and futures markets, debt financing, natural hedging, the multi-product hedging approach, short and long hedging, and bonds. The reader soon understands the financial complexities facing farmers today. In addition, the authors show that larger enterprises are favoured by the direct income support system and that cross-compliance measures provide very little actual environmental benefits.

The book is based on anthropocentric reasoning even when the topic is biodiversity, plant and animal welfare, or the environment (i.e., countryside benefits). One comment that stuck in my mind was that rural areas will more and more be used as resorts and playgrounds for busy city dwellers; providing opportunities for entrepreneurs which should be supported with EU co-financing schemes. But whether or not this will be any better for biodiversity and the environment than agricultural activities is not touched upon.

UK ENVIRONMENTAL LAW ASSOCIATION

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For information about working parties and events, including copies of all recent submissions contact:
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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 January 2011
All contributions should be dispatched to Catherine Davey as soon as possible by email at:
catherine.davey@stevens-bolton.co.uk by **10 January 2011**
Please use Arial font 11pt. Single space. Ensure headings are in bold capitals.
Letters to the editor will be published, space permitting