e-law

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EDITORIAL

Welcome to the September edition of e-law and a look forward to UKELA's packed programme of autumn events. I'm delighted that we are offering members events around the UK and that we will be able to videolink the Garner lecture live to some of our regional groups (thanks to Clifford Chance's sponsorship). This will be an exciting first for UKELA, as we all join together for this important occasion (the lecture is by David Kennedy, the CEO of the Committee on Climate Change, and is on December 1st).

We're also pleased that you will by now have received our interim report on reviewing Environmental Law. Please can I encourage you to take a little time to send us your views via our online survey. We know there are a huge number of expert members who can provide useful contributions so we'd love to hear from you. It's really important that we gather a critical mass of replies in order to finalise the report. We're grateful for all the help we've had from King's College London, and Matrix Chambers which has provided financial support.

In this edition you can read the latest on civil sanctions, the new EIA regulations, wind developments in the context of the Localism Bill and planning reforms, nuclear expansion plans and the latest environmental information case.

I hope to see you at one of our autumn events – I'll be in Scotland for the full day conference on Waste on 6th October. And with other events including Contaminated Land in Northern Ireland, Wild Law, Young UKELA, the Vermont Environment Court, events around the regions and the student careers' evening, I'm sure you'll find something of interest.

With best wishes

Mark Brumwell
Chair, UK Environmental Law Association

In this issue

Garner lecture

You are warmly invited to join us for the 2011 Garner Lecture which is being given by David Kennedy, Chief Executive of the Committee on Climate Change. David Kennedy will be speaking on: "Meeting the UK's carbon budgets – progress and challenges".

Thursday December 1st 2011

Registration from 5.30; speaker at 6pm.

Drinks and canapés to follow.

Venue: Clifford Chance, Canary Wharf, London

Our thanks to Clifford Chance for sponsoring this event.

Bookings will open shortly.

Subscriptions news

SUBSCRIPTIONS FOR 2012

We have some great news on subscriptions for 2012!

- UKELA's Board of Trustees is pleased to announce that annual subscription rates for 2012 have been frozen at 2011 prices. We hope you agree that this means that we continue to offer a great product at a great, value for money price. Look out for information regarding renewing your membership at the beginning of December.

- And even better news for our graduate/trainee/pupil members or student members who have recently graduated and need to update their membership. The Board has decided to reduce the subscription rate for all graduate members to just £15, matching the rate paid by our student members. This is a saving of £18 on the current rate, making this membership tier fantastic value for our graduate members. If you are currently a graduate, pupil or trainee solicitor member and expect to still be so in 2012, then your membership renewal will be at the new rate. If you are currently a student member, but your status has changed (ie you've graduated), then you will need to let us know when renewing in December. Don't forget to let your friends and colleagues know about this change and encourage them to join.

- Do you know anyone thinking about joining UKELA? Now is a great time to join as, from 1 October, we offer 15 months membership for the price of 12 to new members. This coupled with the price freeze makes UKELA membership fantastic value and with our extensive Autumn events programme which offers special rates for members, no-one should miss out.

Direct Debit

Have you considered paying your subscription by Direct Debit? It's a great way to ensure you don't miss out on any of the benefits of membership by forgetting to renew. It's easy to sign up and helps to save you time and us money, which in turn helps us to keep subscription rates low. Look out for the Direct Debit form sent with your membership renewal package in December and do please consider signing up.

News

UKELA REPORT ON UK ENVIRONMENTAL LEGISLATION OPEN FOR CONSULTATION

Many of you will be aware of UKELA's 'Aim 5' project investigating whether there are problems with the quality of environmental legislation throughout the UK. This project is being undertaken jointly by the UK Environmental Law Association (UKELA) and King's College London. After much hard work, an interim report for this project has recently been published - *The State of UK Environmental Legislation In 2011: Is There a Case for Reform?* (see http://www.ukela.org/rte.asp?id=43). The publication of this report has launched a period of consultation amongst all UKELA members, and you are encouraged to get involved (if you are not already), ideally by the end of September. If we are to make useful headway in getting to grips with the problems that make UK environmental legislation difficult to use and access, then we need to hear from as many

of you as possible about your experiences.

To inspire you to contribute, here is a brief reminder of what the report is about and what we have concluded to date. In broad terms, the project asks whether there are *identifiable problems* with the quality of UK environmental legislation, focusing on issues of legislative coherence, integration and transparency. Considering the breadth of environmental law, the project to date has focused only on legislation relating to waste, environmental permitting, environmental and habitats assessment (and their interaction with planning law), and the regulation of water quality and resources. It analyses issues of legislative quality in relation to these areas of environmental law across *all* UK administrations (England, Wales, Scotland and Northern Ireland). The project also considers the systems and procedures for scrutinising environmental legislation within government, and legislative drafting practices.

Other aspects of the project have explored avenues for *potential reform* of any problems of legislative quality, focusing in particular on the potential role of environmental principles in UK environmental legislation, and on reforming existing drafting practices and models of legislative scrutiny within UK governments and parliaments.

Initial findings in the interim report indicate a range of areas where UK environmental legislation is so complex that it is difficult to access, understand and apply. The report also highlights examples – such as the *Environmental Permitting Regulations* in England and Wales – where attempts to make legislative schemes simpler have been generally welcomed.

The report also asks if more radical suggestions – such as setting up an Environmental Law Commission to oversee the quality of new environmental legislation – are good ideas and worthy of further research.

The current consultation aims to collect the views of UK environmental lawyers and users from a range of backgrounds and perspectives – from industry, practice, and private individuals, to government, NGOs and academics. You can give your individual views on the interim report, and your experiences in using environment legislation in any UK administration, via the online survey at http://obsurvey.com/S2.aspx?id=9d737dac-ec16-48c9-82be-3afc1dd80d7b (password 'Aim 5') **by September 16th or as soon as possible**.

Alternatively, you can give views to your relevant Working Party (http://www.ukela.org/rte.asp?id=17), who will be compiling more comprehensive responses to the report. Please also do this as soon as possible, and you may have already heard from your Working Party about this. All consultation replies will be considered by the Aim 5 team and edited into the final report, to be published early in 2012.

The Aim 5 team are enormously appreciative of any time you can give to help us develop this project further. If you have any questions about the consultation process, please contact Jemma Braid, our Aim 5 intern: jemma_braid@hotmail.com.

UPDATE ON CIVIL SANCTIONS

By Rosie Oliver, UKELA's working party support officer

2011 has been something of an emotional rollercoaster for civil sanctions geeks. It began with eager excitement in January. That was when the Environment Agency officially started 'using them' – or at least, considering using them, applying their new enforcement guidance. Would this be the dawn of a brave new world where offending is dealt with by notices, monetary penalties and undertakings, with the occasional prosecution a quaint reminder of how much things have changed?

Events in Spring cast this in doubt. The new Coalition Government announced a review of the regime; shortly after, Oliver Letwin spoke out against the 'intolerable' way it allowed regulators to impose sanctions directly without going to court. The anticipated Natural England consultation about how it would go about using civil sanctions did not materialise; nor did plans to introduce them for environmental permitting offences. For a while we wondered whether the Government might call the whole thing off.

But developments over the summer suggest that civil sanctions are back on, at least for environmental offences. The Environment Agency reported in July on its use of the new powers since January. So far, this has been confined to enforcement undertakings. It has received thirty offers and accepted eight: all of the eight for packaging offences, and each involving donations to environmental projects or charities. It is too early to gauge their willingness to use notices and monetary penalties. For the time

being, though, civil sanctions are providing a small but significant funding lifeline for community projects at a time of painful cuts.

Then, in August Natural England launched its consultation on new compliance and enforcement documents. These set out how it will decide between issuing a warning, caution, prosecution, or one of the range of civil sanctions available to deal with breaches. They follow the same general approach that the Environment Agency is taking. UKELA's nature conservation working party is currently preparing a response.

Also in August, Defra announced decisions about introducing civil sanctions for environmental permitting offences, which make up the bulk of the Agency's enforcement work. Variable monetary penalties will be made available for all offences; enforcement undertakings and fixed monetary penalties for those not involving fraud or deception. The new compliance, restoration and stop notices will not be introduced because the Environmental Permitting Regulations already include equivalent powers. The Defra document does not say when the changes will come in, but 6 April 2012 seems likely.

We are still a long way off the enforcement culture shift hoped for by proponents of civil sanctions. If all goes smoothly the Agency and Natural England could start using them to deal with more common offences next Spring. Judging from the Agency's experience so far, it will take some time before regulators issue notices and penalties, longer for appeals to come through. Defra will in 2013 be reviewing how the Agency is operating the regime, and this could lead to changes. Meanwhile, we can expect the likes of Oliver Letwin to take a close interest. A BIS consultation on enforcement strategy over the summer indicated a continued distrust of regulators, majoring on proposals to make them more accountable. The Government could still get cold feet.

Links
Environment Agency article on its use of civil sanctions:
http://www.environment-agency.gov.uk/news/131671.aspx

Natural England consultation: http://www.naturalengland.org.uk/ourwork/consultations/enforcement.aspx

Defra announcements about civil sanctions for environmental permitting offences contained in its Summary of Responses to Consultations on amending the Environmental Permitting Regulations: paragraphs 2.93 – 2.109, and Table 1 in Annex A
http://archive.defra.gov.uk/corporate/consult/env-permitting-regs/100730-env-permitting-regs-condoc-summary.pdf

BIS consultation on Enforcement Strategy: http://www.bis.gov.uk/policies/better-regulation/improving-regulatory-delivery/consultation-enforcement-strategy

Contributions - James Burton

THE TOWN AND COUNTRY PLANNING (ENVIRONMENTAL IMPACT ASSESSMENT) REGULATIONS 2011

James Burton- james.burton@39essex.com

The new EIA Regulations, which came into force on 24th August 2011, replace the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, as amended, in England.[1] They are a further attempt to fully implement the EIA Directive (85/337/EEC as amended). They introduce the following significant new features:

(1) a duty to give reasons for negative screening decisions;
(2) clarification regarding the handling of subsequent applications in relation to EIA development;
(3) changes to the screening of modifications or extensions to projects;
(4) confirmation that screening directions for Sch.2 development may be requested from the Secretary of State by any person, and that such direction may include development below the Sch.2 thresholds.

They also now include sites for the geological storage of CO^2 and installations for the capture of CO^2 for the purposes of geological storage.

1 The 1999 Regulations remain in force in Wales. The new regulations allow the Secretary of State to disapply the devolved administrations' EIA regimes in respect of particular projects for national defence purposes.

Duty to give reasons for negative screening decisions

The new duty upon local planning authorities and the Secretary of State to give reasons for negative, as well as positive, screening decisions follows from the decision of the Court of Justice of the European Union in *R (Mellor) v Secretary of State for Communities and Local Government* (Case C-75/08), [2010] Env LR 2, that reasons for negative screening decisions should be given on request. Pragmatically, the new Regulations require all negative screening decisions to be accompanied by reasons to avoid a belated attempt to put together reasons when a request is subsequently made. This reflects Mr Mellor's primary case in the European Court.

The duty is found in Reg. 4(7), and also Reg. 4(5)(a) (the latter in relation to a direction that the EIA Regulations shall not apply in relation to a particular proposed development pursuant to Reg.4(4)(a)(i)).

Decision makers must, of course, take care when preparing their reasons for a negative screening decision as they may be subject to administrative law challenge in the normal way.

Subsequent applications in relation to EIA development

A series of European Court decisions established that EIA had to be possible for multi-stage development consents. The 1999 Regulations were amended in 2008 to require screening of 'subsequent applications' which had not been subject to EIA. A "subsequent application" is an application for approval of a matter (in a project falling within Sch. 1 or 2 of the Regulations) where the approval is required by or under a condition to which a planning permission is subject *and* must be obtained before all or part of the development permitted by the planning permission may be begun (ie a *Grampian* style condition).

Those amendments still caused problems. The requirement to screen later applications was often overlooked (in an ongoing case, *R(Wrenn) v Wiltshire Council*, permission to apply for judicial review has been granted because the Council failed to screen a reserved matters application for 285 homes). Perhaps more seriously the 1999 Regulations' approach to subsequent applications where EIA had been carried out at the planning permission stage was hard to discern. The proposals in the 2010 consultation were even more Delphic.

The new Regulations are much clearer.

Regulation 7 requires screening of planning applications for development which has not been subject to a screening opinion or direction and which is not accompanied by an Environmental Statement under the EIA Regulations.

Where the original planning application was subject to EIA, then Reg. 8 requires the original Environmental Statement to be considered when determining subsequent applications unless a new Environmental Statement is submitted. The regulation provides that where it appears to an LPA that an application before them for determination is a subsequent application in relation to Sch.1 or Sch.2 development, has not itself been the subject of a screening opinion or screening direction, is not accompanied by an Environmental Statement *and* the original application was accompanied by an Environmental Statement (or approval is required pursuant to a deemed planning permission under s.10(1) of the Crossrail Act 2008), then:

(1) if the environmental information already before the LPA is adequate for them to assess the environmental effects of the development, they shall take that information into consideration in their decision-making;

(2) if the LPA consider the environmental information already before them inadequate to assess the environmental effects of the development, they shall serve a notice seeking further information in accordance with Reg.22(1).

There is no requirement to reconsult on the original Environmental Statement, but any representations made could refer to that document. There may be an issue as to whether the other environmental information submitted during the course of the original planning application, including consultation responses, has to be considered again.

Regulation 9 requires the screening of subsequent applications where the original application was not subject to EIA, even where the original application was subject to a negative screening decision. If a subsequent application is submitted then the LPA is required to screen it provided the subsequent application has not itself been subject to a screening opinion or screening direction and is not accompanied by an Environmental Statement.

Changes to the screening of modifications or extensions to projects

Readers will recall *R(Baker) v Bath and North East Somerset Council* [2010] 1 P&CR 43, concerning extensions and alterations to an existing composting facility. The old EIA Regulations required only that the extensions and alterations be considered, rather than the cumulative whole that would be created. Collins J held that this amounted to a failure to implement the EIA Directive. Schedule 2(13) "changes and extensions" aims to plug this gap. The paragraph requires painful cross-reference to Sch.1. For Sch. 2 development screening is required if the 'development as changed or extended may have significant adverse effects on the environment' or the change or extension exceed the thresholds in Schedule 2 or the site is in a sensitive area.

Confirmation that screening directions for Sch.2 development may be requested from the Secretary of State by any person, and that such direction may include development below the Sch.2 thresholds

This was a further issue considered by Collins J in *R (Baker) v Bath and North East Somerset*. By Reg. 4(8)(b) any person may request the Secretary of State to make a screening direction, and by Reg.4(9) the Secretary of State may direct that particular development of a description mentioned in column 1 of Sch.2 is EIA development albeit the development is neither within a

sensitive area nor meets or exceeds a relevant threshold.
However, readers will recall that in *Baker* (paras.37-38) Collins J explained that he considered Art.10a of the Directive had not been implemented because:

"the absence of any system to draw attention to the possibility of reference to the Secretary of State is a flaw in the whole"

It must be wondered whether the new EIA Regulations themselves amount to sufficient publicity to meet Collins J's criticism. Finally, as noted, the new regulations transpose the amendments made by Directive 2009/31/EC by including Carbon Capture and Storage facilities in Schedules 1 and 2.

ECOLOGICAL IMPACT ASSESSMENTS; SKIRTING THE BOUNDARY OF THE LAW?

Katherine Drayson - 09047584@brookes.ac.uk

CONTEXT

Ecology is "the scientific study of the interrelations between living organisms and their environment, including both the physical and biotic factors". Over the past few decades, ecology has gained in stature, to the extent of being recognised and protected under EU law and policy. Indeed, the EU, and by extension the UK, has committed to halting biodiversity loss by 2020.

In this article, I consider ecology in the context of Environmental Impact Assessments (EIA). In particular, I focus on whether the information requirements laid out in the EU's EIA Directive (and by extension the UK's transposition of this Directive into national law, known as the EIA Regulations, which have recently been consolidated and modified), are being satisfied in English Ecological Impact Assessments (EcIAs).

The EIA Directive is intended to ensure that projects "*likely to have significant effects on the environment*" are subject to an assessment of those environmental impacts prior to development consent being granted. This assessment is submitted as an Environmental Statement (ES). Article 3 of the EIA Directive includes a requirement to consider, "*the direct and indirect effects of a project on…fauna and flora,*" (i.e. living organisms, or biodiversity). In addition, there is a requirement to consider the interrelations between these and, "*soil, water, air, climate and the landscape,*" (i.e. their environment). This clearly specifies ecology, according to the definition above, as a necessary component of the majority of EIAs.

Article 5 states that, with some exceptions, the developer must provide the information specified in Annex IV, all of which may have a bearing on the ecology of the proposed development site. This is further qualified by a statement of the minimum information that must be included in an ES, namely;

"*— a description of the project comprising information on the site, design and size of the project,*
— a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,
— the data required to identify and assess the main effects which the project is likely to have on the environment,
— an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects,
— a non-technical summary of the information mentioned in the previous indents."

Credit: Sir Crispin Agnew

There are two potential exclusions to the information requirements of the EIA Directive. The first is that the information may not be considered, "*relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected*". In this study, it is assumed that inclusion of an EcIA as part of the EIA, either as a result of advice received from an environmental consultant or as a result of a request from the Local Planning Authority (LPA), indicates that the ecological information required under the EIA Directive is relevant and therefore should be included.

The second potential exclusion is that "*a developer may [not be] reasonably… required to compile this information having regard* inter alia *to current knowledge and methods of assessment.*" With respect to the information requirements of

the EIA Directive, there are two that are likely to be particularly challenging. These are the,*"description of the aspects of the environment likely to be significantly affected by the proposed project,"* and the,"*description of the likely significant effects of the proposed project onthe environment"*. The first requires adequate baseline ecological surveys, which may not be carried out due to developer budget and time constraints. However, they are possible with regard to current knowledge and methods of assessment, and so should be conducted appropriately. The second relies on the professional judgement of ecological consultants, as some impacts can be extremely complex to predict and characterise. However, the remainder of the requirements are relatively straightforward and certainly within the capacity of developers and environmental consultants to provide, with current knowledge and methods of assessment.

Study

An analysis of 42 EcIAs was conducted to determine just how comprehensively EcIAs include the information required under the EIA Directive.The EcIAs were submitted to English LPAs from 2000 onwards for built developmentsfrom a variety of sectors, such as energy, transport, housing, etc.All of the EcIAs were for developments that had been granted planning permission, and therefore could be expected to have been thoroughly reviewed and corrected, where necessary.

From the information requirements outlined in the EIA Directive, a series of 14 questions was developed and asked of each EcIA. For example the question, 'Is the development size indicated' would be answered 'Yes', 'No', or 'Partially'. A crude index was then used to facilitate comparison between EcIAs. It takes into account incomplete answers to questions and gives scores ranging from 0 (no questions answered) to 1 (all questions fully answered).

Results

Figure 1 illustrates the frequency distribution of index scores across the EcIAs analysed. Of the 42 EcIAs analysed, the average index score was 0.55, with scores ranging from 0.32 to 0.73. More than half (54.76%) of the EcIAs scored 0.5 or less, with none scoring greater than 0.75. These results indicate that there is a widespread information gap in English EcIAs, calling into question their efficacy as a tool for the protection of ecology.

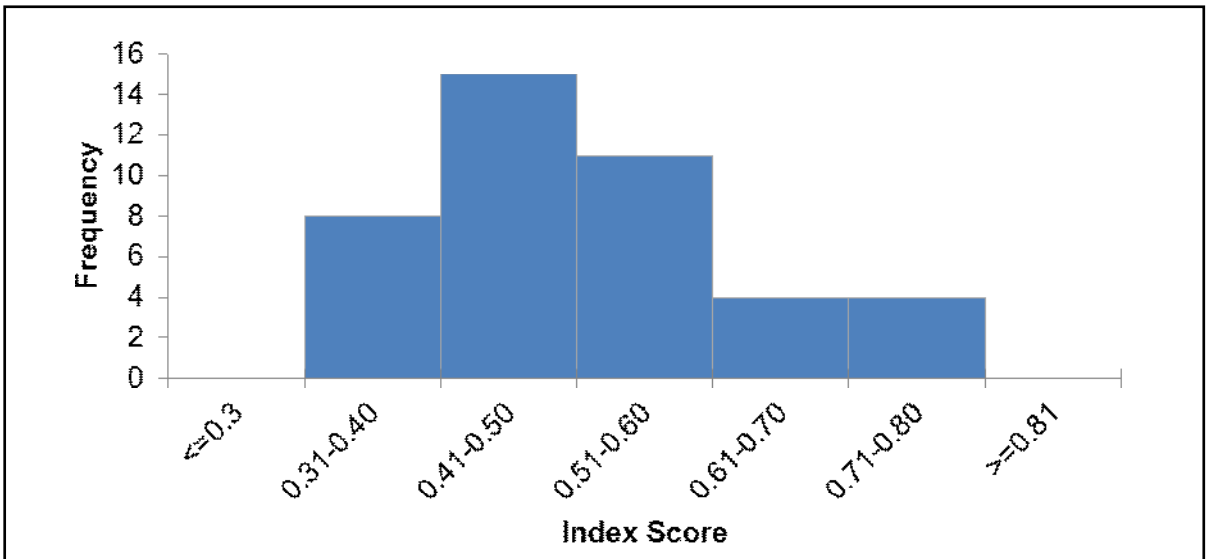

Figure 1: The distribution of index scores for the 42 EcIAs analysed

CASE LAW

All of the EcIAs examined in this study were for developments that had already gained planning permission, either directly from the LPA, or from the Secretary of State after public inquiry. As a result, they should have been reviewed at several levels by, for example, the LPA, the statutory consultees and the non-statutory consultees (including the public).

Given the extensive review process, it is remarkable how many EcIAs that fail to fully meet the information requirements of the EIA Directive slip through the net. The full implications of the information gaps identified in this study are wide-reaching in scope. These range from, for example, issues of public participation to the protection of ecology, and from law to policy. This article will, however, only examine the legal implications, beginning with a discussion of case law with regard to information gaps in EIAs.

i) **Information Gap**

In favour of not including all the information requirements of the EIA Directive, it could perhaps be argued that, "*it is the identification of key issues that is most important, rather than the provision of information for its own sake.*"[1]Indeed, Harrison J[2] remarks that whilst full knowledge of the likely significant environmental effects of a project is required prior to consent being granted, "*thatis not to suggest that full knowledge requires an environmental statement to contain every conceivable scrap of environmental information about a particular project.*" This is particularly apposite for large projects, where a myriad of effects might be expected, not all of which are likely to be significant. In such instances, it is only the "*main effects*"[3] that should be included. And indeed, this principle is incorporated into the professional guidance available to ecological consultants[4].

ii) Determination of Significance

But who determines whether an effect will be significant? The EIA Directive makes it clear that this information should be included in the ES; consequently environmental consultants currently conduct the assessment. Sullivan J[5]and Harrison J[6], however, state that, "*it will be for the local planning authority to decide whether a particular effect is significant.*"Lloyd Harris J[7] confirmed this by stating that, "*the test of 'significant effects on the environment' is intended to confer discretion on expert decision-makers to take decisions on a case-by-case basis. There is no single, hard-edged test appropriate for application in all cases*."

This places a heavy burden on LPAs, the majority of whomdo not employ ecologists[8]. It is therefore to be hoped that they consult particularly carefully with Natural England and the Environment Agency during both the scoping and decision making processes. Given the recent budget cuts introduced by the Coalition Government[9], however, the resources of these statutory bodies and the LPAs will be stretched. In the absence of

iii) Determination of Sufficiency

Sullivan J[10] also makes it clear that, "*a local planning authority is not deprived of jurisdiction to grant planning permission merely because it concludes that an environmental statement is deficient in a number of respects*", and Harrison J[11] concurs, stating that, "*it is for the decision maker to decide whether the information contained in the document is sufficient to meet the definition of an environmental statement in Regulation 2 of the EIA Regulations*."

This places another heavy burden on LPAs; at what point does an ES "*deficient in a number of respects*" become "*so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations*"? The only guidance given to LPAs as to what a sufficient ES should contain is the information requirements outlined in the EIA Directive and EIA Regulations (these have not changed in Schedule 4 of the new, consolidated EIA Regulations, as they have been directly transposed from the EIA Directive[12]). Leaving the decision as to where this line should be drawn to LPAs, even with the help of the statutory consultees, is potentially problematic, particularly given the technical staffing issues mentioned earlier.

Ideally, therefore, developers and their environmental consultants should supply all of the information required by the EIA Directive within the ES. It is, however, true that a certain level of pragmatism is required when compiling an ES in order to avoid the danger of "*losing the wood for the trees*[13]" and to prevent ESs from being overly long.

Currently, most ESs include a summary table of the identified significant impacts and their proposed mitigation measures. My recommendation would be for an additional table of the EIA Directive's information requirements to be included at the end of each ES chapter. This would include a brief description of, or even simply a paragraph reference to, the findings of that chapter with regard to those requirements. This would take no more than a few pages and would relieve LPAs of much of the burden of

1 See p57 of: ODPM. 2004. Planning for Renewable Energy: A Companion Guide to PPS22. London: HMSO
2 R v Cornwall County Council, ex parte Hardy [2001] Env LR 473.
3 Humber Sea Terminal Limited v Secretary of State for Transport [2005] EWHC 1289 (Admin).roll-off berths at Immingham and its impact on the Humber Estuary special protection area (SPA)
4 Paragraph 2.34 of: IEEM. 2006. *Guidelines for Ecological Impact Assessment in the United Kingdom* [Online]. Winchester, UK: Institute of Ecology and Environmental Management. Available: http://www.ieem.org.uk/ecia/index.html [Accessed January 2011].
5 R v Rochdale Metropolitan Borough Council ex parte Tew and others [1999] PLR 74.
6 R v Cornwall County Council, ex parte Hardy [2001] Env LR 473.
7 R (Loader) v Secretary of State for Communities & Local Government [2011] EWHC 2010.
8 SELECT COMMITTEE IN ENVIRONMENTAL AUDIT. 2004. Minutes of Evidence: Examination of Witnesses (Questions 201-219). HOUSE OF COMMONS. London, UK: The Stationery Office Ltd
9 For example, NATURAL ENGLAND. 2010. *Natural England Grant-In-Aid Settlement - Update* [Online]. Available: http://www.naturalengland.org.uk/about_us/finance/grant-in-aidsettlement.aspx [Accessed 29/07/2011].
10 R (on the application of Blewett) v Derbyshire County Council [2003] EWHC 2775 (Admin).
11 R (on the application of Kent) v First Secretary of State [2004] EWHC 2953 (Admin).
12 DCLG. 2011. Explanatory Memorandum to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT. London, UK:
13 R v Rochdale Metropolitan Borough Council, ex parte Milne [2000] CO 292/00.

determining whether the ES provides sufficient information on which to base their decision (for example, in terms of time). In addition, the table could form the basis for the NTS, which currently tends to gloss over many of the points made in the technical chapters[14]. That is not to say that further information cannot be submitted later by the developer, the consultants, consultees and/or the public[15]. But the table would provide a useful basis from which to begin.

Drivers for Change

Theoretically, each of the individual information requirements of the EIA Directive, where not met, has the potential to open the developer to an information request[16], or even a rejection, from the LPA. As I have demonstrated, however, this is far from inevitable. Given the age of the EIA Directive and the hundreds of ESs submitted since its transposition into the EIA Regulations, why should there be any impetus now towards the inclusion of all the information requirements of the EIA Directive in EcIAs? There are two main drivers for change; refusal of planning permission and legal challenges.

i) **Refusal of Planning Permission**

Despite budget cuts and lack of in-house expertise, there does seem to be a growing awareness of ecological issues amongst LPAs. This may be due to the combination of including ecology in legislation and planning policy[17],and increased media attention. As a result, there appears to be a general increase in planning permission refusals that cite ecology as one of the grounds for refusal, two which are outlined below. Over time, this could lead to increased LPA pressure on developers to ensure that all the relevant information requirements of the EIA Directive are included in the EcIA.

A landmark case was the refusal of the planning application for the proposed Dibden Bay deep water terminal[18] at public inquiry on the grounds that: "*the most significant harm arising from the proposed Dibden terminal would be to nature conservation interests*" and that "*no reliance could be placed on the Appropriate Assessment undertaken by the Applicant under the Conservation (Natural Habitats, &c.) Regulations 1994*". Whilst the information gap was in the Appropriate Assessment rather than the EcIA, there is potential for a similar situation to apply to EcIAs.

In the energy sector, an appeal against non-determination of a controversial proposed wind farm in the Peak District[19] was rejected at public inquiry, partly because, "*the shortcomings of the appellant's [bird] surveys make it difficult to quantify the risks with any confidence.*" This would come under a failure to meet the requirement to describe "*the aspects of the environment likely to be significantly affected by the proposed project*".

ii) **Legal Challenge**

Under the current planning system, there are only two means by which third parties can appeal against a grant of planning permission. The firstis by Judicial Review (JR) and the second is under Section 288 of the Town and Country Planning Act[20]. In both cases, the appeal is heard by the High Court with its attendant costs. However, the courts have purposely avoided debating the merits of proposed developments, relying purely on legality (for example, whether procedure has been correctly followed) to determine appeals.

As described earlier, there have been a number of cases in the past decade relating to inadequate information of ESs. More than ever before, the public are increasingly aware of the potential ecological impacts of development, partly as a result of media attention[21]. In the absence of third party rights to appeal, the introduction of lower thresholds for obtaining Protective Costs Orders (PCOs) has the potential to make access to environmental justice possible for a greater proportion of the public. It is possible, therefore that the number of legal challenges to planning permissions could increase.

Sullivan J[22] condemns the, "*tendency on the part of claimants opposed to the grant of planning permission to focus upon deficiencies in environmental statements, as revealed by the consultation process prescribed by the Regulations, and to contend that because the document did not contain all the information required by Sch.4 it was therefore not an environmental statement*

14 Drayson, K. unpublished research

15 Paragraph 39 of: R (on the application of Blewett) v Derbyshire County Council [2003] EWHC 2775 (Admin).

16 Under Regulation 19 of: HMSO 1999. Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations. Her Majesty's Stationery Office.

17 ODPM. 2005. Planning Policy Statement 9: Biodiversity and Geological Conservation. Office of the Deputy Prime Minister, Her Majesty's Stationery Office

18 SECRETARY OF STATE FOR TRANSPORT. 2004. Dibden Bay Container Terminal: Decision Letter. London: Department for Transport

19 THE PLANNING INSPECTORATE. 2010. Land Belonging to Rushley Lodge Farm: Decision Notice. Bristol: The Planning Inspectorate

20 HMSO 1990. Town and Country Planning Act. Her Majesty's Stationery Office.S288: Proceedings for questioning the validity of other orders, decisions and directions

(1

21 See, for example, BBC NEWS COVENTRY & WARWICKSHIRE. 2011. *Warwickshire Wind Farm Test Mast Approved on Appeal* [Online]. BBC News. Available: http://www.bbc.co.uk/news/uk-england-coventry-warwickshire-12806784 [Accessed 26/07/2011].

22 R (on the application of Blewett) v Derbyshire County Council [2003] EWHC 2775 (Admin).

and the local planning authority had no power to grant planning permission." Assuming that third party rights to appeal are unlikely to be introduced in the near future, completion of the table as described above at the end of each chapter could help to reduce the risk of challenges to planning permissions on these grounds, to the benefit of all.

Other than information gaps, another cause of legal challenge was the intentional provision of misleading information. However, the 2011 EIA Regulations have removed this as a criminal offence. Whilst this offence had never been used[1]and there are other mechanisms for ensuring prosecution, such as the fraud offence, its loss does appear to weaken the incentive for providing accurate information in EcIAs.

Conclusions

The EIA Directive sets out a series of information requirements that have direct and/or indirect relevance to EcIAs and therefore should be included. However, this study has revealed a widespread failure of EcIAs to include all, or even the majority, of this information, calling into doubt the effectiveness of EcIAs for the protection of ecology.

This has not appeared to have had major implications for the success of planning applications, as all of the EcIAs studied had been granted planning permission. It has been stated that it is unnecessary to include every last scrap of environmental information; indeed, this has been incorporated into the professional guidance available to ecologists. However, it is necessary to ensure that the information requirements of the EIA Directive are met. To this end, I recommend that a table briefly summarising the main findings of each chapter with regard to the EIA Directive information requirements be included at the end of each technical chapter of the ES. This will aid both consultants (in refining the EcIA and writing the NTS) and LPAs (in determining whether the EcIA is sufficient).

With improved public and LPA awareness of ecological issues, the availability of PCOs potentially allowing greater numbers of legal challenges in the future, and the gradual increase in planning permission refusals citing ecology as one of the reasons for refusal, it is likely that such a table would reduce the risk of legal challenge of planning permissions.

There is an urgent need for developers, environmental and ecological consultants, and environmental and planning lawyers tocooperate to address the information gaps identified in EcIAs, in order to help meet the UKs obligation to the EUs commitment to halt biodiversity loss by 2020.

WINDFARM WARS

Alec Samuels

Some environmental lawyers may have watched the television series Windfarm Wars, from Den Brook in Devon. This dealt mostly with the lifestyle and anxieties and actions of the promoters and developers and of local objecting residents, with little about the law. The s 288 appeal is reported R (Hulme) v Secretary of State for Communities and Local Government [2010] EWHC 2386 (Admin), Frances Patterson QC sitting as a Deputy High Court Judge. See also Lee v Secretary of State for Communities and Local Government [2011] EWHC 807 (Admin), [2011] JPL 814, same judge.

Applications for windfarms will increase in number in the next decade. See DECC white paper "Planning our Electric Future", 12 July 2011 - legislation expected 2012.

Hulme and Lee indicate the legal issues likely to arise and the likely relevant evidence and arguments and judicial approach if the matter gets to the Judge.

Advantages and disadvantages

The principal advantages of windfarms are the need for economic growth, manufacture, employment, energy, including diverse and renewable energy. Turbines are improving in efficiency and costing less. There are no polluting carbon emissions. The business rates will be retained by the local authority and developer. In 2011 Renewable UK (formerly the British Wind Energy Association) and Renewable Energy Foundation REF and Yes2wind are supporters.

1 Page 6 of: DCLG. 2011. Explanatory Memorandum to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. DEPARTMENT FOR COMMUNITIES AND LOCAL GOVERNMENT. London, UK:

The principal disadvantages, depending upon the individual circumstances, may include:

- Variable and unpredictable wind
- Peak wind not conforming to peak demand
- The need for a back up source of energy
- Limited efficiency in turbines, between 20 per cent and 30 per cent
- High cost of construction, especially off-shore
- Carbon emissions in construction work
- Subsidies for wind energy
- Compensation for switching off the turbines and the power stations when not needed
- Visual impact, especially in the countryside
- Damage to the tourist industry
- Noise pollution
- Reduction in the value of houses
- Bird strike

Many bodies and individuals offer expert advice: The Campaign to Limit Onshore Wind Development CLOWD; the National Association of Wind Action Groups NAWAG; Professor Michael Jefferson, London Metropolitan Business School; Meterological Department, University of Reading; the Cambridge University Energy Policy Research Group, the RSPB. The professional, trade and lobby organisations provide a wealth of information. The web displays many pages on windfarms, particularly useful for pursuing particular or unusual points.

Government policy

Government policy was recently expounded by the Minister (House of Commons, Westminster Hall, 10 May 2011, column 346 WH, 365-370), and is set out in detail in the white paper. Government supports windfarms in principle, believing them to be increasingly efficient and reliable. Subsidy will be directed to the suitable as opposed to the unsuitable sites, and to projects exhibiting costs efficiencies and reductions. Projects supported by appropriate infrastructure, such as grid connections, and especially underground connections, will be favoured. A report has been made on shadow flicker, and another report has been commissioned on noise. There will be further investigation into assessment of visual impact. Government is anxious to encourage community support, and is investigating proposals for financial compensation or benefits for local communities arising out of planning gain; see also Minister (House of Commons 12 January 2011). Section 106, the Community Infrastructure Levy CIL, and the Tesco case [1995] 1 WLR 759, HL, are for the moment still very much with us.

Local planning authority policies

Naturally the decision-maker is expected to adhere to published policies, and to provide compelling reasoning for any departure. Both parties will pay particular attention to all relevant policies.

Safety

Safety must always be paramount. If the proposed windfarm site were close to an airport, or perhaps a balloon training and recreation site, then any possible interference with operational safety would be a cogent factor Enertrag v Secretary of State for Communities and Local Government [2009] EWHC 679 (Admin), Frances Patterson QC. Vestas is developing radar friendly stealth blades which do not interfere with military aviation.

Alternative sites

If there are overwhelming or very strong planning objections to the proposed site, then consideration of possible alternative sites may be appropriate. There may be competing sites involved. But if there are advantages and disadvantages to the proposed site,

the decision-maker is having "to weigh the pros and cons", to reach a balanced decision, in a proportionate manner, then it is not necessary to investigate alternative sites, it is a matter of planning judgment for the decision-maker Derbyshire Dales DC v Secretary of State for Communities and Local Government [2009] EWHC 1729 (Admin), paras 11-35, Carnwath LJ.

Alternative sources of energy

"Everyone knows" that there is a growing shortage of energy ("The lights will go out in 2017 unless we do something"), so arguing that there is no need for this proposed windfarm and that there are suitable alternative sources of energy available is unlikely to be very persuasive PPS22 Climate change Act 2008. The Government renewable energy target is 15 per cent for 2020. Even where there are other actual and potential sources of energy in the area, e.g. hydro-electric power in the Scottish highlands or Welsh hills, additional wind power electricity can still usefully be fed into the national grid. There may be a case for arguing that these turbines are inefficient and poor value for money, but the risk is a matter for the promoters, and Government providing the subsidy. Derbyshire Dales DC v Secretary of State for Communities and Local Government [2009] EWHC (Admin), paras 38-42, Carnwath LJ. Opponents frequently point to the alleged unreliability of wind turbines. They only operate intermittently, between 20 and 30 per cent of the time. They may not operate in very hot or very cold weather. They may not operate at time of peak demand. They may need to be switched off at times of excess production. They need back-up or standby gas-fired stations. Conventional stations may need to be switched off at times of excess production. Compensation is payable for switch off. All the indications are that the planning application decision-maker is unlikely to want or to need to be concerned about need, capacity and output Capacity versus output (and other energy policy issues) in UK windfarm planning, William Norris QC and Simon Bucknall [2009] JPL 831-841, a most expert exposition of the issues. For an overall appraisal of energy planning in general see Energy Planning in 2009, all systems go?, Patrick Robinson, JPL Occasional Papers no 37 (2009), pp 53-77.

If deadlines have to be met for some reason then the likelihood of facility to meet those deadlines could become a relevant matter Enertrag v Secretary of State for Communities and Local Government [2009] EWHC 679 (Admin).

Visual impact

The turbines are getting taller and taller, and inevitably are very likely to be visible from afar. In the nature of things proposed sites tend to be on high ground, in the countryside, often rather special countryside, such as windy Devon and Cornwall, and in the west generally; see the National Parks Environment Act 1995 ss 61-62. Clearly the decision-maker must consider the character of the area and the degree of harm involved and deal clearly with these issues in the decision. The issue will very probably be controversial, and subjective, and there are many legitimate opinions. Some put economic growth and the production of energy very high; some point to an absence of a legal right to a view in a crowded island; some like the simple elegant design of the turbines; some have become accustomed to the turbines, and are content that more will not make any significant impact; some value our countryside as a priceless asset, not to be damaged.

Amenity

Amenity and heritage features may be alleged to be at risk, and this becomes a balancing and reasoning factor for the decision-maker. Genuine minimisation factors such as appropriate and considerate location and design are likely to be very relevant. Where the setting of listed buildings or similar amenities would be or might be already affected then English Heritage should be consulted R (Friends of Hethel) v South Norfolk DC [2010] EWCA Civ 894, [2011] JPL 192, paras 21-41. Enertrag v Secretary of State for Communities and Local Government [2009] EWHC 679 (Admin).

Wildlife

There will be wildlife, which would be put at risk by the turbines. The Conservation (Natural Habitats) Regulations 1994 must be observed, or the derogation provisions applied. Provided that the promoters propose reasonable mitigation and protection of the habitats and conditions generally, so that the continuance of the species would not be endangered, the possible loss of a few individual flying creatures by collision would not be lethal for the application. Birds are fairly shrewd creatures. R (Morge) v Hampshire County Council [2011] UKSC 2. Turbines 80 metres high with blade tips 125 metres high were allowed to Cornwall Light and Power 5 km offshore which allegedly represented a threat to pink-footed geese and whooper swans at Morecambe Bay in Lancashire, Judge Pelling QC sitting as High Court Judge 2 August 2011 Manchester. The developments made a contribution to the feeding grounds. Tagging birds yields information regarding their movements.

Noise

The turbines make a noise. Naturally the levels and the quality and indeed the perceptions depend upon location, contours, climate, wind, design, height, proximity, spacing of turbines, number of blades, angle of blades and more. Noise may be regular and insistent or irregular and intermittent. Promoters and objectors need to instruct a competent expert. Noise science is a complicated, diffuse and developing science, research and technology and experience are developing fast, and methodologies exist, acceptable if shown to be professionally sound. See DEFRA Contract No NANR 277, windfarm noise and statutory nuisance. In

view of apparent climate changes, especially in wind patterns, a meteorological expert is also likely to prove useful.

A particular potential and actual problem for residents is sleep disturbance. There is a phenomenon known as blade swish, wind sheer, depending on the height and shape of the blade, known as amplitude modulation AM. In Julian and Jane Davis v Tinsley, July 2011, the claimants are seeking injunction and substantial damages in the High Court for statutory noise nuisance, on the basis of alleged unbearable amplitude modulation. The decision-maker often seeks to meet this problem with suitable planning conditions. The problem with conditions relating to noise in these circumstances is that it is difficult to make the conditions ascertainable, clear, sensible, reasonable, workable. Merely setting maximum decibel levels will not suffice. A common practice is to make a condition that if requested a scheme must be submitted to the local planning authority for approval. This approach confers considerable discretionary power upon the local planning authority, which may not be over-endowed with expertise to appraise a noise control scheme very effectively. In 2011 the Scottish Highlands Authority for Achany, Lairg, issued a stop notice against Scottish and Southern Electricity, based on alleged absence of a scheme, excessive noise and a failure to respond to claimants; the notice was withdrawn after four days.

The decision-maker is entitled to pay less attention to the effect of noise upon workers in nearby fields than residents in nearby houses; to pay little attention to non-expert noise evidence; and to impose noise conditions on the basis of reasonable parameters Barnes v Secretary of State for Communities and Local Government [2010] EWHC 1742 (Admin).

Incidentally, failure or refusal by a party to disclose or make available on request the expert report and relevant data will be most unwise and very probably incur the displeasure of the decision-maker, and worse Finn-Kelsey v Milton Keynes Council and MK Windfarms [2008] EWCA Civ 1067, paras 37-43. In the Den Brook case the developer submitted to judgment on this issue.

Mitigation

The promoters will do well to exhibit a responsible attitude, and to show constructive mitigation features, such as careful consideration for location, scale, height, noise attenuation, design, construction and servicing methods, compensation and similar matters. Off-shore windfarms must ensure the fullest possible safety for navigation.

Reasons

As always, the decision-maker must give adequate reasons, whether the windfarm proposals did or did not conform to local plans, whether or not there would be an adverse effect upon visual or amenity aspect, whether or not the noise levels would be acceptable, or whatever were the substantive issues raised in the case Tegni Cymru Cyf v Welsh Ministers [2010] EWHC 1106 (Admin). South Buckinghamshire DC v Porter (no 2) [2004] UKHL 33.

Conclusion

The Localism Bill 2011 and the National Planning Policy Framework NPPF may well change the planning climate, substance and procedure. But the windfarm issue will most certainly remain. All the indications are that the pressure for new windfarms will increase. The industry is powerful. The need for energy will increase. The Japanese nuclear incident has weakened public support for nuclear energy. However, local objectors are much better informed and better organised and supported. The biggest issues will continue to be amenity and visual impact and noise. In Wales the Welsh Assembly may impose a cap on the number of turbines to be permitted in the Principality. The judge will continue his traditional role. Was the procedure properly followed? Was there adherence to policies? Was there satisfactory evidence? Was the decision balanced and proportionate and reasoned and rational?

THE FUTURE IS NUCLEAR

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1. Now that the dust has settled on the change of administration, the IPC has survived that change and has a recognised role to perform, and the Coalition Government has published in final form the NPS series it seemed a good time to review the consenting process for new nuclear facilities both as to Law and policy.
2. This paper is restricted to dealing with the regulatory and policy framework for consenting new nuclear facilities. There is not space to cover the vital and related areas of licensing their operation, questions surrounding radiological protection, temporary and long term

waste disposal and decommissioning.

3. A further limitation on the scope of this paper is that it is not proposing to engage in a polemical discussion of civil nuclear power – however obvious its merits may be. This is because the ideological argument about whether we need a new generation of nuclear facilities is both finished and irrelevant.

4. It is finished in the sense that the argument has been conclusively resolved in favour of nuclear and the question is no longer up for debate. To some ears this may sound surprising especially following the accident at Fukishima and pronouncements by the German Government shortly thereafter. Despite this, over the last decade the debate has moved decisively in favour of nuclear. The Labour Government elected in 1997 was politically and ideologically opposed to the building of any new nuclear power stations but eleven years later, John Hutton, the Labour Business Secretary announced the Governments ambition to make the UK "*the world's number one location for new nuclear investment"*.

5. The Coalition Government has absorbed that ambition into the Coalition Agreement and supports it albeit with the caveat of no public subsidy.

6. The ideological question is also irrelevant to the determination of individual applications. It has long been held that national policy is the business of national government to settle in Parliament:

> *"...not of separate investigations in each of scores of local inquiries before individual inspectors up and down the country upon whatever material happens to be presented to them at the particular inquiry over which they preside"* [2] The common law position has now been placed on a statutory footing in which an IPC panel deciding an individual application for a new nuclear facility may disregard representations if they relate to the merits of policy set out in an NPS[3] and they have a similar power to exclude such arguments at a hearing[4].

THE PLANNING ACT 2008

7. There has been a long established view within Industry and Government that the lengthy procedures involved in planning inquiries cause unnecessary expense and delay and deter investment. The length of the Heathrow Terminal 5 Inquiry is routinely cited as proof of this concern and, in the context of new nuclear installations, Sir Frank Layfield's Inquiry into Sizewell B[5]. The Planning Act 2008 is the legislative response to these concerns. It sets up new procedures for submitting and determining applications for "*Development Consent"*[6] for nationally significant infrastructure projects – such as a new nuclear facility.

8. The Act provides a structure for decision making which is as stream lined, speedy and efficient as it can be without compromising the rights of those who wish to object. Thus, an application for a Development Consent Order (DCO) must be made to the IPC[7] and the function of the panel is to both examine and decide the application. This is an important change to major infrastructure applications made either under S36 Electricity Act 1989 or S77 TCPA 1990 because it cuts out the delay and uncertainty in having an inquiry in which the Inspector reports to a higher decision maker.

9. The panel have wide powers to govern their own proceedings both as to procedure and content. An example of the former is that the panel can decide how it receives evidence; in writing or with oral evidence which may be with or without cross examination. An example of the latter is the discretion to exclude evidence which is thought to be frivolous or vexatious. These powers, combined with the elimination of any *"ideological"* discussion of the need or desirability of nuclear power provide a framework for a crisp and robust Inquiry process. This is underlined by the fact that the Panel is under a duty to complete the examination by the end of six months from the start date of the initial procedural meeting[8].

10. One potentially fertile area of complaint is the degree to which these procedures are compatible with a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[9]

11. The Planning Act 2008 makes a radical departure from the traditional structure of the Town & Country Planning Act 1990 in another important way. The Act sets out to influence the substantive decision as well as providing a procedural framework within which the decision is taken. S104(2) provides that in making its decision the panel must have regard to any NPS which has effect in relation to that description of development. This reflects the classic planning formulation that the

2 See Lord Diplock in Bushell v. Secretary of State for Transport [1981] AC 75.
3 See Planning Act 2008 S87(3)
4 See Planning Act 2008 S94(8)
5 January 1983-March 1985
6 Which have, to all intents and purposes, the same effects as a grant of planning permission under TCPA 1990
7 See S37(1)
8 See S98
9 See Article 6 European Convention on Human Rights

decision maker must have regard to the development plan and any other material considerations. S104(7) goes further; this provides that the panel must decide the application in accordance with the NPS unless one of five situations applies:

> "*1 The Panel is satisfied that deciding the application in accordance with the NPS would lead to the UK being in breach of its international obligations (Section 104(4)).*
>
> *2 The Panel is satisfied that deciding the application in accordance with the NPS would lead to the Panel being in breach of any duty imposed on it by any enactment (Section 104(5)).*
>
> 3 *The Panel is satisfied that deciding the application in accordance with the NPS would be unlawful by virtue of any enactment (Section 104(6)).*
>
> 4 *The Panel is satisfied that the adverse impact of the proposed development would outweigh its benefits (Section 104(7)).*
>
> 5 *The Panel is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a NPS is met (Section 104(8))*."

12. The Act therefore adopts a highly prescriptive approach in which, even if an oral hearing is permitted, a party attending is not permitted to question the merits of any relevant NPS and, except for very limited exceptions, the panel must determine the application in accordance with the NPS. In creating this structure the Government is clearly sending a message to Industry; namely the planning system will not operate so as to inhibit, frustrate or delay investment in new nuclear infrastructure. It is equally clear from this review of the Act that a great deal turns on the content of any relevant NPS. In the case of nuclear there are two; Overarching National Policy Statement for Energy (EN-1), and National Policy Statement for Nuclear Power Generation (EN-6 Vol I and II).

EN-1

13. In 2006 the Government had an unhappy experience in purporting to consult the public on a new nuclear policy. Following the Greenpeace judgement lessons were learnt and this publication has gone through two full draft stages, a final "version for approval" followed by the finally published document. At the time of writing the six week challenge period is almost up and the NPS appears to have emerged unscathed.

14. (EN-1) makes it clear that it has effect with regard to new nuclear power stations "*Only in relation to applications for the development of new nuclear power stations on the sites listed in (EN-6)"*[10] As to those sites the NPS could hardly be more positive and accommodating;

15. The NPS acknowledges "*...an urgent need for new electricity generation plant including new nuclear...*"[11] that nuclear is a key part of "*...a diverse and secure energy mix"*[12] that nuclear is a "*stable and mature industry"*[13] with adequate uranium resources, independent supply chains, low generating costs and an ability to operate for long periods without refuelling.

16. In a world which is increasingly unstable and insecure, in which additional sources of demand for fossil fuels are continually arising against a finite and diminishing supply, it is easy to see why the NPS includes a heading:

> "*The Urgency of the Need for New Nuclear Power"*

followed by the clearest green light to the industry:

> "*...it is important that new nuclear power stations are constructed and start generating as soon as possible and significantly earlier than 2025"*.[14]

17. When this type of statement is set against the statutory requirement to determine any application on any identified site in accordance with the NPS it is easy to see how investor confidence might be generated.

(EN-6)

18. This is the most important policy document for substantive decision making with regard to any application for new

10 See Paragraph 1.4.5
11 See 3.5.1
12 See 3.5.3
13 See 3.5.4
14 See 3.5.9

nuclear facilities. This is because it has a special status under the Planning Act 2008 in which, as discussed above, the ultimate decision must be made in accordance with it except in some limited circumstances. It is not the sort of policy document which makes abstract statements about desirable outcomes. Rather, it is a specific statement of what, how and when certain events should be achieved.

19. The NPS identified a list of eight "*Potentially suitable sites*"[15]. These have been through a process of Strategic Site Assessment (SSA) the details of which are described in full in Annex C. These sites – but only these sites – have the full support in principle of (EN-6) as suitable locations for a new nuclear facility.

20. Having identified the preferred locations the NPS then goes on to express the Government's unequivocal support for the urgent construction of a new generation of nuclear installations which it sees as an essential aspect of a secure, affordable and low-carbon energy policy.[16]

21. Overall, the combined effect of the legal framework introduced by the Planning Act 2008 together with the policy framework now in its final published form in terms of (EN-1) and (EN-6) is to create the most benign regulatory environment for the private sector to invest in a new generation of nuclear facilities in the post-war period.

PITFALLS

22. Not everything in the garden is rosy. The strong promotion of a new generation of nuclear facilities is an interest of national importance to the UK. However, the legal mechanisms for bringing forward such a significant form of development are greatly influenced by European legislation and jurisprudence. Various European Directives place legal constraints on the autonomy and power of the Executive branch of the UK Government and the Courts have long made it clear that they will not uphold any planning permission (which must include any DCO) granted contrary to the provisions of a Directive since to do so would be inconsistent with the Court's obligations under European Law to enforce Community rights.[17]

23. The power of independent decision making on the part of the UK Executive may be constrained but it is not curtailed or eliminated. In other words, it still has power to grant consent but in doing so it must be extremely careful to respect procedures laid down by Directives and Treaty obligations.

24. The Aarhus Convention on Access to Environmental Justice requires that procedures are put in place which allow the public full and effective access to policies and plans and programmes which have environmental implications.[18] Although the principles and procedures underlying the Convention are important they are unlikely to present a serious obstacle to development in practice. Firstly, because the rights of the public to participate are embedded in every aspect of the promulgation of policy and IPC decision making and secondly, even if a breach of the Treaty is established its legal effect is limited. In Morgan v. Hinton Organics Ltd [2009] EWCA Civ 107 the Court of Appeal held there was no principle which would enable the Court to treat a pure treaty obligation, even one adopted by the European Community, as converted into a rule of law directly binding on the English Court.

25. A material breach of a European Directive, as indicated above, has a different effect. In this case the Court will quash the relevant administrative action and has no discretion to exercise in the matter. There is one principal Directive which will come into play in the consideration of any nuclear new build proposal; 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. This introduces a high degree of procedural and substantive complexity and a breach of any part may be fatal to the overall outcome. The Habitats Directive and Wild Birds Directive are also likely to come into play together with, in certain circumstances, the Marine Directive. These introduce the concepts of Imperative Reasons of Overriding Public Important (IROPI) and Alternatives – both sites and solutions.

26. This all leads to a requirement that the development proposals should be carried forward with the highest degree of legal rigor and – provided that occurs – the decision making climate is likely to be very favourable.

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15 These are Bradwell, Hartlepool, Heysham, Hinkley Point, Oldbury, Sizewell, Sellafield and Wylfa – See (EN-6) paragraph 4.1.1. page 33

16 See in particular Section 2.2 page 7

17 See Berkeley v. SOSE [2001] 2AC 603

18 See in particular Article 6 and 7

Contributions - Anthony Crean QC

END NOTE

27. It is the solemn duty of all law and policy makers to do everything possible to prevent that situation from becoming a reality. The weak and vulnerable members of society must have access to heat which is secure, inexpensive and perpetually available. It is also essential to switch from carbon generating sources of supply.

28. Nuclear is the only form of energy which can meet these requirements and Government Policy is absolutely right to encourage an urgent and timely construction of a new generation of nuclear power stations.

Contributions - David Hart QC

ENVIRONMENTAL INFORMATION

Case EA/2010/0204 Robinson v. Information Commissioner & Department for Communities & Local Government, First-Tier Tribunal, 19 July 2011

David Hart QC

This interesting decision of the First-Tier Tribunal (not linked to this post, for reasons I shall explain below) goes to the circumstances in which a public authority can refuse under environmental information rules to disclose legal advice received by it. All lawyers will know that such advice is covered by legal professional privilege. But such privilege does not necessarily prevent it from being disclosed by a public authority. Under the Freedom of Information Act (FOIA) regime, it is a ground for refusing to produce documents, but only when that is in the public interest. Under the exemptions in the Environmental Information Regulations privilege is not even a ground of exemption; the public authority must show a rather different thing, namely that disclosure of the legal advice would adversely affect the course of justice, and in all the circumstances of the case, the public interest in maintaining that exemption outweighs the public interest in disclosure. In addition, there is a presumption in favour of disclosure.

The appeal arose out of a planning application by a windfarm operator to install an 80m tall anemometer (and associated guy wires radiating over about 0.5ha) near Fring in North Norfolk. Its purpose was to assess the viability of a wind farm at or near the site. It became a matter of local controversy. The local planning authority refused permission, and the operator appealed. The issue then arose: how should the appeal be decided? There are three ways of doing this - a full public inquiry with oral evidence and submissions, an informal hearing or written representations. Local people (of whom the appellant is one) wanted a public inquiry. They were supported in that by the council, and the local MP thought that the council was the best body to judge that. The Planning Inspectorate (PINS, an Executive Agency of DCLG, the relevant government department) disagreed with the calls for a public inquiry. Its initial letter from an administrator in August 2009 said that the issues being raised by the objectors were "the same as in the reason for refusal i.e. the impact of the development on visual amenity....In this case the [local] controversy would appear to more specifically directed at the possibility that the anemometer will lead to subsequent applications for wind turbines.... The fact that there may be a subsequent application for wind application for wind turbines is not something the Inspector will be able to attach any weight to in reaching his conclusions on the current application." In short, PINS said, no complex issues arose for which a public inquiry was necessary.

The appellant was in fact putting a rather more complex case than PINS's reasons suggest. He and his team were saying that an anemometer would itself have an impact on local populations of pinkfooted geese, a protected species in nearby coastal areas; hence, any development would need an Environmental Impact Assessment before it could be approved by the planning authority, whether or not the wind turbines proceeded. This, with all due respect to PINS, is by no means a straightforward argument; the threshold of when an EIA is or not needed is far from straightforward, and in any event there are a number of European cases designed to stop developers "salami-slicing" applications into bits which do not require an EIA, whereas the proposal taken as a whole would require an EIA. The issue was not simply about visual amenity, as PINS thought it was; the mast would pose a potential hazard to the geese, and the question before the Inspector was whether this was significant and/or could be mitigated against.

PINS were however unmoved. They confirmed their views in a later letter of December 2009 - in which they said they had

“taken legal advice which has confirmed that our approach on this point is correct.”

Unsurprisingly, the appellant asked to see this legal advice. And it was PINS’s refusal to provide it, coupled with the Information Commissioner’s confirmation of that refusal (see ICO site), which led to this appeal.

Before explaining why the Tribunal allowed the appeal, I should complete the rest of the story. The planning appeal proceeded by way of written representations. The operator’s appeal was allowed on the basis that, yes, the mast did present a potential hazard to pink-footed geese, but that there was no evidence that the proposal would result in significant losses of geese, and that in any event this could be mitigated by attaching deflectors apparent to flying birds - even though these would also make the structure equally apparent to local people. (One wonders whether determination of this issue might have been assisted further by the carrying out of the EIA for which the appellant was calling).The Inspector was not persuaded that the anemometer proposal was an integral part of an inevitably more substantial proposal. Hence, on 15 February 2010, the planning appeal was allowed.

There were two other potential routes for the appellant to take in respect of PINS. He could have sought judicial review of PINS’s original decision or he could have appealed or sought judicial review of the Inspector’s decision. However, as he explained in his submissions to the IC and the Tribunal, either route would have cost substantial sums and may have given rise to significant costs liabilities if unsuccessful - precisely the point which has put the UK in trouble with the Aarhus Compliance Committee enforcing that Convention about access to justice, and on which the UK faces infraction proceedings before the European Court of Justice.

Returning now to the Tribunal’s decision, it ordered disclosure of the advice. It concluded that the EIR regime, based upon Directive 2003/4/EC on public access to environmental information, is a more permissive regime that the domestic freedom of information regime. The Tribunal held that it was not consistent with either that Directive or FOIA

to carve out what amounts to a de facto absolute exemption for legal advice. Nor is it consistent with the presumption in favour of disclosure expressly articulated in Regulation 12(2) EIR.

The information being requested was used by PINS as the basis for depriving the Appellant and members of the public of their ability to participate effectively in environmental decision-making. Considering the information itself, even if this exception was fully engaged (and the Tribunal, in the circumstances of this case, concludes on the balance of probabilities that it is not,) then the public interest balancing test could not produce a result which would prevent disclosure.

Hence, even if the exemption relied upon was engaged by the advice in question,

the public interest elements in this case were sufficiently compelling to override the considerations which usually favour withholding legal advice.

This conclusion is both interesting and significant. It may be the first time in which legal professional privilege has been considered in the context of the EIRs, though it has been litigated on various occasions under the freedom of information regime. Whilst of course the principle of legal professional privilege (a right to consult your lawyer and receive his advice freely) is itself an important value to be upheld, it equally must be right that the balancing of public interests must be carried out in the circumstances of each case before disclosure is ordered or refused, as the case may be.

I understand that PINS have sought to appeal this decision to the Upper Tribunal, and have been granted permission to do so. I also understand that the Tribunal refused an application to recall its decision, and remove certain parts of it to a confidential annex before re-issuing it, and that permission has also been granted to appeal that refusal. I have not therefore linked the decision to this post - for a similar reason, the decision is not to be found on the Tribunal website.

Finally, a declaration of interests, of sorts. I live not far from the appeals site, beneath the daily flight path of the many thousands of pink-footed geese which over-winter in North Norfolk. I am also grateful for the appellant drawing my attention to this decision.

UKELA events

Nearly all UKELA events offer a limited number of free places to students.

LONDON MEETING ON CLIMATE CHANGE 14 SEPTEMBER
The next London meeting will be on Tackling Climate Change and will be held at Herbert Smith in London starting at 6pm, with registration from 5.30pm.
Chaired by Tim Clare of WSP Environment & Energy, speakers are:
Dan Dowling – PriceWaterhouseCoopers LLP, Climate Change & International Development Team
Ben Stansfield - Clifford Chance LLP
Giles Bristow – Carbon Leapfrog
To book, please contact angela.pallett@herbertsmith.com
Cost: £20 members, £30 non-members, students/unwaged members free. All places must be booked.

NORTH WEST REGIONAL GROUP MEETING ON WATER REGULATION IN THE UK 22 SEPTEMBER
The North West regional group is hosting a session to look at water regulation in the UK. It is on Thursday 22 September with registration from 4.30pm at the offices of Freeth Cartwright in Manchester. Further details, including how to book here: http://www.ukela.org/rte.asp?id=56

WILD LAW IN THE SOUTH DOWNS WORKSHOP HAMPSHIRE 23-25 SEPTEMBER
There is still a chance to book for this year's Wild Law workshop which takes place at the Sustainability Centre at East Meon in Hampshire. There are some great speakers – inspirational woodman Ben Law, Prof Jane Holder of UCL and Prof Ted Benton of the University of Essex - an opportunity to develop your thoughts on Environmental Law and to enjoy the new South Downs National Park. You can book here (but please be quick if you want to attend).

YOUNG UKELA: BEYOND THE UK, INTERNATIONAL ENVIRONMENTAL LAW AND COMPARISONS WITH OVERSEAS JURISDICTIONS – 26 September

5.30 for 6pm

Young UKELA is delighted to invite you to attend a seminar on International Environmental Law and Environmental Law in Overseas Jurisdictions. The event is being hosted by the Honourable Society of the Inner Temple, and will conclude with a drinks reception. Speakers include Jonathan Robinson, Director of Legal Services, Environment Agency; Gita Parihar, Head of Legal, Friends of the Earth; Carla Pike, International and EU Environmental Lawyer, Defra. There will be a short presentation on the work of the Pegasus Trust, and an opportunity to meet with former Pegasus scholars to discuss their experiences of working overseas.

To book visit our online booking portal.

ANNUAL SCOTTISH CONFERENCE 6 OCTOBER: Waste Recycling and Other Issues
9.30 am registration, speakers from 10am – George Hotel, Edinburgh
Finish 4.45. Organised by Origin Events.
Topics at the conference include the Zero Waste Policy, SEPA & Regulation, Recycling, water pollution, contaminated land and a case law update.
Click here to register.

EAST REGION MEETING AND AGM 12 OCTOBER
The East region is holding its AGM on 12 October at the offices of the Environment Agency in Peterborough. There will also be speaker presentations from Anne Brosnan, the Agency's Chief Prosecutor, who will give a briefing on Civil Sanctions and Sarah Ward, a Principal Solicitor, who will give a briefing on the Floods and Water Management Act. Further details will be posted on the website when available.

IS NORTHERN IRELAND A SPECIAL CASE IN THE MANAGEMENT OF CONTAMINATED LAND? - half day seminar **13 October**
Registration from 1.30, speakers from 2pm.
Chaired by Dr Trevor Elliot, Reader in Environmental Engineering, Queens University Belfast
UKELA is partnering with EPLANI for its third half day seminar on a key topic for Northern Ireland. This afternoon seminar will be held at the Law Society in Belfast. Speakers include Andrew Wiseman, head of Environmental Law at Stephenson Harwood and convenor of UKELA's Land Contamination and Insurance Working Party, and members of Landmark Chambers and the Northern Ireland Environment Agency.
Thanks to Tughans and Landmark Chambers for sponsoring.
Click here to register.

UKELA events

THE VERMONT ENVIRONMENTAL COURT IN THE US - LESSONS FOR THE UK? - 1 NOVEMBER
In association with University College London's Centre for Law and the Environment
Registrations from 5.30; speakers from 6pm. Finish by 7.30 pm followed by drinks and nibbles.
Venue: Gustav Tuck Lecture Theatre, University College London
Chaired by Lord Justice Carnwath. Panel speakers include Mr Justice Lindblom QC; Nick Warren, President General Regulatory Chamber, Prof Richard Macrory QC of UCL.
To register click here.

JOINT GLS ENVIRONMENT GROUP/UKELA SEMINAR – ENVIRONMENTAL ENFORCEMENT AND CORPORATE GOVERNANCE - Thursday November 3rd
Registrations at 5.30, speakers from 6pm
At Linklaters LLP, One Silk Street, London, EC2Y 8HQ
Speakers include: Anne Brosnan and Peter Kellett (Environment Agency).
Drinks and nibbles to follow.
Free to attend but all places must be booked. To reserve a place please email climatechange@linklaters.com.

WILDLIFE LAW Course - 15 – 17 November 2011

This course organised by the Nature Conservation working Party is designed for those whose jobs require them to understand the practical impact of the legislation surrounding wildlife (e.g. conservation officers, conservation advisors, county and national park ecologists, site managers, planning officers, stewardship officers, water company conservation staff etc). It will concentrate on enabling participants to make the best use of the law on the ground and to avoid the pitfalls that accompany such a technical subject as the law.
The 3 day course will take place at Browne Jacobson solicitors Nottingham office in November at a cost of £120.
Accommodation is not included but there are plenty of hotels nearby. Bookings will be on a first come first served basis. To book contact Lisa Mcgill at Browne Jacobson lmcgill@brownejacobson.com.
You can view the programme at http://www.ukela.org/rte.asp?id=63.

Particular emphasis will be placed on the practical rather than the academic impact of the law. The experienced team of course tutors will seek to make the issue come alive by reference to real casework situations and thus to take away some of the mystique attached to law and to de-mystify some of the jargon. We hope that the course will help participants regard Wildlife Law as a tool which they can use to safeguard sites and species, rather than as the sole preserve of solicitors, lawyers and other legal specialists.

STUDENTS CAREERS AND NETWORKING EVENING – 16 NOVEMBER 2011
The annual careers evening for students takes place at Landmark Chambers in London on 16 November from 6pm. Advisers include: the Environment Agency, DEFRA, private practice solicitors, NGOs, barristers from Landmark and No 5 Chambers. The evening is for students at any stage who want to meet professionals, inform their career choices and get an inside look at jobs in Environmental Law. Thanks to Landmark Chambers for hosting.
To reserve your free place, email alisonboyd.ukela@ntlbusiness.com

External events and courses

Master of Laws (LLM) in: Environmental Law & Practice – by Distance Learning
From Leicester De Montfort University

Further your knowledge, skills and career without interrupting your employment by enrolling on the Environmental Law distance learning course. Tailor the programme to suit your job role and industry by selecting your own personal combination of modules.

You can select modules from these Environmental Law modules: Environment, Legal Control and EU Regulations; Atmospheric Pollution; Health and Safety Law; Waste Management and Contaminated Land; Planning Law; Biodiversity and Nature Conservation Law; Water Pollution Law; Environmental Assessments; International Environmental Law; Noise Pollution Law; Light Pollution; Environmental Crime; Nuclear Energy and Environmental Challenges; Negotiated Study Module (explore an area of law that you select).

External events and courses

Plus you can mix and match these with modules from within De Montfort's other LLM courses!
For a full list of available modules, tutor information and admission requirements please see the Environmental Law and Practice brochure - available on the event website.

AARHUS AND ACCESS RIGHTS: COALITION FOR ACCESS TO JUSTICE FOR THE ENVIRONMENT: 10 October

Aarhus and Access Rights: the New Landscape

A day of inspirational presentations and workshops on environmental access rights into Rio + 20 and beyond

With perspectives from:

Jeremy Wates - Secretary General, EEB & former Chair of the Aarhus Secretariat

Veit Koester - Former Chair, Aarhus Convention Compliance Committee

Prof Richard Macrory - University College, London

Carol Day - WWF-UK on behalf of CAJE

Date: Monday 10th October 2011 9.45am – 4pm

Venue: The Great Hall King's College Strand London WC2R 2LS

Price: £45 practitioners and public bodies

£5 community groups, NGOs, students and academics

CPD: 5.5 points (SRA confirmed BSB tbc)

To book visit http://www.elflaw.org/events/caje-aarhus-and-access-rights-event/

THE CARBON SHOW – 20 and 21 OCTOBER
10% off seminar programme for UKELA members

Capitalise on clean, green growth at The Carbon Show 2011, Business Design Centre, London.

The **FREE** to attend exhibition will feature organisations from all across the carbon and renewable energy industries as well as informative plenary sessions and a green technology demonstration stage.

UKELA members receive a 10% discount for the top level seminar programme, which includes sessions dedicated to Energy Efficiency, Green Technology & Renewables, CRC and Climate Finance, by quoting the discount code **UKELA10** when registering.

Register for the free exhibition at www.thecarbonshow.com.

WILL NATIONAL CLIMATE CHANGE LEGISLATION COOL DOWN GLOBAL WARMING? 27 October 2011
Conference in Brussels supported by UKELA's Climate Change and Energy Working Party and organised by the Flemish Environmental Law Association. The conference should be of interest to those with pan-European practices and those who may struggle to keep up-to-date with the legislation and policy in this fast moving area.
http://www.omgevingsrecht.be/english.html

THE *JOURNAL OF ENVIRONMENTAL LAW* 2011 ANNUAL LECTURE
15 December
6pm at the School of Law, SOAS, London in the Brunei Gallery lecture theatre (http://www.soas.ac.uk/gallery/).

The event is being chaired by Philippe Cullet of SOAS and delivered by Professor Thomas J Schoenbaum, George Washington University, on the topic **'Liability for Damages in Oil Spill Accidents: Evaluating the United States and International Law Regimes'**

The lecture is free to attend but requires registration. Please contact jel-lecture@reading.ac.uk for enquiries and registration.

For more information about the event, view the flyer here: http://www.oxfordjournals.org/page/3817/10
Also, visit the *Journal of Environmental Law* online: http://www.oxfordjournals.org/page/3817/12

UK ENVIRONMENTAL LAW ASSOCIATION

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For information about working parties and events, including copies of all recent submissions contact:
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E - LAW
The editorial team wants articles, news and views from you for the next edition due to go out in November 2011. All contributions should be dispatched to Catherine Davey as soon as possible by email at:
catherine.davey@stevens-bolton.com by **8 November 2011**
Please use Arial font 11pt. Single space. Ensure headings are in bold capitals.
Letters to the editor will be published, space permitting