UKELA
UK ENVIRONMENTAL LAW ASSOCIATION

e-law

UKELA Making the law work for a better environment

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Rydal Water, Lake District,
© Ruth Chambers

In this issue

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

On behalf of Council can I welcome you to what promises to be a very exciting 25th anniversary year for UKELA.

We need to focus on fundraising this year in order to be able to continue our great work as an organisation for the environment and our members. We have a range of events planned which we hope you will enjoy and that you will either get involved yourself or sponsor someone else. We're calling it 25 4 25 – that's £25 for each member to raise to give us our target of £25,000. And we are planning on walking round the earth – 25,000 miles – so your walks, cycle rides and kayak journeys (and any other non carbon means of transport you can think of) will contribute to that total.

I will be retiring from Council at the end of February when my second term of office as a Council member comes to an end. I shall of course continue to co-convene the Water Working Party (along with Sarah Merritt and Nina Pindham) .

I will continue to edit e-law until a successor editor is found. The handover is likely to take place at around the time of the AGM so I anticipate that the last e-law that I shall edit will be the July 2013 edition. The editor needs to be diplomatic and extremely good at encouraging members to contribute articles to e-law. If you think it sounds like your type of job then please do get in touch with me. I am happy to discuss the role in detail with interested parties!

We have some great events coming up in 2013, particularly the 25th anniversary conference at Cambridge University. We've included the programme highlights in this edition and are encouraging first time visitors to book by offering a special discount (limited numbers).

We're also delighted to be launching our student competitions – the moots, Andrew Lees prize and the Simon Ball prize for Student Achievement. We're very grateful to the competition sponsors and hope that many of our student members will enter as winning looks great on your CV. If you know someone who would benefit from entering (trainees or pupils or students at any level) please do pass on the information – you don't have to be a member to enter.

Catherine Davey

Best wishes
Catherine Davey

News

Membership Renewals

Your annual membership is now due! If you have not yet renewed your membership, please take a moment to do so. If you have mislaid your renewal information, please contact alisonboyd.ukela@ntlbusiness.com who will be able to help. Thanks to those of you who have already renewed.

25 4 25 – please help us raise £25,000

Please support your fundraising team: Ben Stansfield, Hayley Tam, Begonia Filgueira, Fiona Darroch, Stephen Sykes and James Burton and help us celebrate and raise funds to establish a firm foundation for UKELA's future.

What is 25 4 25?

It is an ambitious fundraising campaign to raise at least £25,000 in 2013 to mark and celebrate UKELA's 25th Anniversary.

What are the campaign's objectives?

- To raise awareness about UKELA
- To organise a range of fundraising events
- To inspire volunteering and active engagement from our members
- To promote UKELA beyond our current membership
- To have some fun!

What is the money for?

- Developing our work with students – the future of Environmental Law
- Supporting Young UKELA
- UKELA's increasing work in Scotland, Wales and Northern Ireland
- Laying down a solid foundation for the organisation at a difficult time financially

What can I join in with?

London Winter Warmer Pub Quiz – February 12th 2013 – raising money for UKELA's 25th anniversary
Welcome to the first event in our year-long series of fundraising activity to raise funds for our 25th anniversary.

Join us for a fun, light-hearted evening of environmental law (and other less serious subjects) in our pub quiz with celebrated quiz master Stephen Tromans QC. No expertise is necessary to join in and everyone is most welcome. Who knows, you might win something. Failing that, the beer's good and you are sure to have an enjoyable evening!

Where: downstairs at the Melton Mowbray, 14-18 Holborn, London EC1N 2LE (between Chancery Lane and Holborn Circus)

When: Tuesday February 12th starting at 7pm

Cost: £10 per person. You can enter as a team of six for £60 or we'll sort people into teams of six on the evening for those who book as individuals. Please say whether you are entering as a team (preferable) or as an individual when booking. We have space for about 14 teams of six.

Prizes: Glory, your photo on our website www.ukela.org, and something more tangible to sip at home

More information on how to join in here.

We're aiming to encourage our regional groups also to hold their own pub quizzes. Watch this space….

James Burton, of UKELA's Council and 39 Essex Street, is the event organiser.

Walk around the Earth

To mark the 25th anniversary of UKELA and to highlight environmental issues in a really bold way, we would like UKELA's members to collectively "Walk Around the Earth" in 2013.

Our journey around the Earth will equate to approximately 1,000 miles for every year of UKELA's existence as the circumference of the Earth at the Equator is 24,901 and a half miles. We hope that by having bold ambitions we will attract some outside interest in our organisation, potentially attracting more members and raising environmental awareness (as well as improving our fitness!). In addition, there will be opportunities to raise funds towards the 25 for 25 campaign by holding sponsored walks (with a small entry fee).

So, how are we going to do this? Because 25,000 miles is an awfully long way, in addition to walking, we will include distance covered by any of the following:

- cycling
- kayaking
- sailing
- jogging or running
- swimming
- any other ideas welcomed (if you want to unicycle a mile, it will count!)

Distance covered in an electric car or public transport won't count unfortunately.

We will need the support of all members in achieving our aim – if we each covered 16-17 miles in 2013, we'd make it. We need you to register your miles and the way in which covered them – to this end, we have set up a dedicated email address (ukela.earthwalk@yahoo.co.uk) and we ask that once a week or month (i.e. not every day or we'd be inundated) you send a message with the distance covered and how you did it (cycling, walking, etc). We would like the miles to have a strong element of "additionality" – i.e. miles where you are deliberately trying to increase the UKELA odometer – so taking up running towards the UKELA target counts as do situations where you decide to walk or cycle instead of travelling by car (so a stroll around the shopping centre or a walk to bus stop doesn't count) – we are relying on "self-certification" however and this is intended to be a fun activity, so don't worry too much about breaking the rules.

We will keep members updated with progress throughout the year.

Please note that as a focal point for our efforts, we will be organising a sponsored walk (ten miles) to be led by Lord Carnwath on May 12th. With luck, other walks will be organised by regional groups too. As well as counting towards our 25,000 mile target, these walks will be great social events and an opportunity to get to know other members better and see the environments which we work hard to protect but don't always have the time to enjoy.

If you have any questions, please contact us using the dedicated Earthwalk email.

Ben Stansfield is the co-ordinator of the Walk around the Earth initiative.

UKELA's One Year Only Lunch Club

UKELA will be holding four speaker lunches in 2013. The lunches are fundraising events, to celebrate our 25th anniversary and support our programme of future activities. The lunches provide a great opportunity to raise vital funds for UKELA's work. Guests will enjoy a talk by a leading speaker from the worlds of law and the environment, as well as an excellent lunch. Stephen Sykes is organising the lunches so if you wish to find out more, just drop him a line at Stephen@sykesenvironmental.com. We will circulate details of the first lunch when ready.

Thank you

Our total raised to launch the campaign is £3,500. Our thanks to Argyll Environmental for supporting Young UKELA for 2013 and to ESI for sponsoring our anniversary mugs (details of how to get one will appear here soon).

How you can help!

Please help us meet the 25 4 25 challenge by:

- Coming to the pub quiz on 12 February
- organising your own fundraising event
- participating in the core activities
- promoting UKELA and the campaign to non-members

If you would like to organise your own event please contact the relevant fundraising team member – you can view them on our new fundraising pages at www.ukela.org. If in doubt contact our member support officer, Alison Boyd alisonboyd.ukela@ntlbusiness.com

President's News

Lord Carnwath has joined the UN Environment Programme's International Advisory Council for the Advancement of Justice, Governance and Law for Environmental Sustainability. The panel says environmental law is essential for the protection of natural resources and ecosystems and reflects our best hope for the future of our planet. It has nine members from around the world.

Students

By Student Advisers Ben Du Feu and Nicola Peart

The 2013 student competitions are now officially open!

At our student summit, held last September, it was agreed that the student competitions should open later this year to allow more time for people to prepare their entries over Easter. There are three competitions: the moots; the Andrew Lees Essay Prize and the Simon Ball Prize for Student Achievement. We explain these in more detail below.

The Moots

Two mooting competitions for university students, people on vocational courses, pupil barristers and trainee solicitors are held each year: the 'Lord Slynn of Hadley Mooting Trophy Competition' and the 'UKELA Student Prize Moot'. The moot problem has been set by No5 Chambers, which is kindly sponsoring the moots in 2013 and helping organise them. The deadline for submitting skeleton arguments is 15 April and the semi-finals and finals will be at UCL's moot court on 20 June. Lord Carnwath will judge the finals.

Winning mooters will receive a cash prize and (for law students only) a mini-pupillage from No5 Chambers, a trophy, and a free subscription to Environmental Law and Management published by Lawtext Publishing.

More details here.

Andrew Lees Essay Prize

The format for the 2013 prize has changed. You can submit an essay of 1,000 – 2,500 words on either the topic of your choice, or on the set question: "Environmental regulation is most effective when relying on economic instruments and market mechanisms. Discuss." The deadline is 30 April 2013.

The prize is aimed at any student, trainee solicitor, pupil or solicitor / barrister with not more than 2 years' post qualification experience. There are great prizes:

- a **free place** at UKELA's 25th Anniversary Conference at Cambridge University on 12th-14th July 2013 (including travel expenses from within the UK);
- a one month **paid summer internship** with LexisPSL Environment.

You can view an interview about the competition and read the rules.

Simon Ball Prize for Student Achievement sponsored by OUP

The UKELA Simon Ball Prize is awarded annually to recognise and celebrate student achievement in the field of environmental law. UKELA is grateful to Oxford University Press for providing the prize of book vouchers and a subscription to the Journal of Environmental Law for the 2012 winner. The Prize is awarded at the prestigious Garner Lecture.

The 2013 prize is now open and you have up until the end of June 2013 to enter. The prize is for any outstanding contribution – not just academic – so do nominate a worthy candidate or ask someone to nominate you. More details here.

Simon Ball 2012 winner

The winner of the Simon Ball prize for Outstanding Achievement 2012 was Thomas West, who was presented with his prize at the Garner Lecture by Richard Kimblin, UKELA vice-chair. Thomas was nominated for his work at Masters level at the School of Law at the University of Nottingham, in particular for his MSc dissertation on "Environmental Justice and International Climate Change Legislation: A Cosmopolitan Perspective". The judges say this was an ambitious piece of work of outstanding quality, originality and maturity, which followed an exceptional performance on the taught part of his programme of study.

Visit to the Supreme Court

You can still book for our visit to the Supreme Court and meet Lord Carnwath, UKELA's President, on January 22nd. If you would like to attend (from 3pm) please contact alisonboyd.ukela@ntlbusiness.com

Both of us (Ben and Nicola) are attending and it would be good to meet you.

Garner Lecture 2012

We're very grateful to Karl Falkenberg, Director General of DG Environment in the EU, for giving the Garner lecture 2012. Despite being trapped on the Eurostar behind a broken down freight train Mr Falkenberg managed to give an excellent lecture, only slightly delayed. We're sorry to our remote links who were waiting for the lecture and grateful to Clifford Chance who kindly brought out some drinks to while away the time for attendees in London. If you didn't get time to ask a question we apologise – events were against us!

Dr Simon Evans, a senior writer at The ENDS Report, who attended the lecture has provided a good account of the lecture. This article is reproduced with permission from The ENDS Report www.endsreport.com.

EU losing patience over poor implementation

The head of the European Commission's environment directorate said he was frustrated by poor implementation in a frank and wide-ranging lecture on green laws

Pressing environmental issues affecting Europe must be addressed through better implementation of existing EU laws, according to Karl Falkenberg, director general of the European Commission's environment directorate.

Speaking at the UK Environmental Law Association's annual Garner lecture last night, Falkenberg expressed his frustration with the large numbers of infringement cases he is continually being forced to bring against member states for slow, incomplete or lax implementation of EU laws.

There were 1,500 outstanding infringement cases when he began working at the environment directorate three years ago, Falkenberg said. While this had now been reduced to 500, that was still "500 too many", he said.

In its annual report on the application of EU law published today, the commission said the number of open infringement cases across all EU legislation had fallen in 2011 by 15% to 1,775 but remained "high and problematic". Environment and transport were identified as particular problem areas.

The UK is joint eighth worst offender and has a long history of facing infringement action for poor, untimely or improper implementation of EU legislation including on sewage treatment, habitat protection and access to environmental justice (ENDS Reports September 1996, June 2011, August 2012 and November 2012).

The problem with directives

According to Falkenberg the wide use of directives in European environmental laws is "one of the main causes of bad implementation". He said that in his earlier career in trade law, similar problems were rare because directly applicable regulations were used rather than directives, avoiding the need for member state transposition into national law.

Falkenberg said the problem with directives was that after the commission spent several years coming up with a proposal subject to detailed impact assessment, there followed another two or three years before a final agreement was reached through co-decision with the European Parliament and member state ministers on the European Council.

Then comes member state transposition. Earlier member state positions discussed – and removed – during co-decision suddenly reappear in national implementing regulations, Falkenberg said: "We see all these old friends again… I then have no choice but to pick up the phone and ask what went wrong."

Falkenberg said after major efforts had been made to bring the European Parliament, member states and other stakeholders together towards a common position, it might be more appropriate to use regulations rather than directives.

With regulations, Falkenberg argued, "we can cut the legislative process in half if member states accept they don't have to do transposition".

As an example, he said the commission was considering proposing a regulation on invasive species, rather than a directive. This had been due by the end of 2012 but will be delayed until March 2013. Responding to an earlier consultation on these plans the UK Horticultural Trades Association called for a "light touch" approach to the problem.

But Falkenberg said that when it came to addressing environmental problems, voluntary agreements were the approaches he believed least in. He cited the failed experiments in a voluntary approach to car emissions and chemicals (ENDS Report, December 2008).

The current UK government has been a strong advocate of voluntary 'responsibility deals' with industry (ENDS Report, January 2011).

Better implementation

Falkenberg began his lecture by setting out the myriad environmental problems facing Europe – and the world – including climate change, water quality, air pollution and biodiversity loss.

"The challenges are there despite existing legislation," Falkenberg said. These challenges formed the backdrop to the commission's thinking on its seventh environmental action programme (7EAP) published on 29 November.

Falkenberg said it had to decide whether the solution to these problems was to better use existing legislation, replace it with different legislation or to introduce even more legislation, what he called "the Christmas tree approach".

In the 7EAP the commission sets out its decision to rely on improved application of existing rules which "must be implemented in full" to meet targets on biodiversity, energy and climate among others.

Earlier this year the commission said improved implementation would save €50bn per year (ENDS Report, March 2012).

Delivery in member states is to be supported by "partnership implementation agreements", the 7EAP says, along with better access to environmental justice for citizens and strengthening national regulators' inspection and surveillance duties.

Poorly performing national regulators would be assessed and assisted by a "complementary capacity" at EU level, possibly some sort of European environment inspectorate. A similar proposal in 2009 was opposed by member states.

Falkenberg said he would like to see national courts handling breaches of European legislation rather than complaints coming to Brussels. After all, he pointed out, this legislation was all national law even though it originated in Europe.

This summer the UK Court of Appeal upheld a High Court decision that it is the commission's job to take action over breaches of EU-set air quality standards (ENDS Report, June 2012).

Other priorities identified in the 7EAP include restarting the commission's long-stalled effort to introduce an EU Soils Directive (ENDS Report, October 2006). A commission spokesman said there would be no need to table a new draft as "there is already a proposal".

A top UK civil servant said earlier this year that the commission should stop producing major new environmental laws and that the UK would continue to "argue strongly" against a Soils Directive (ENDS Report, February 2012).

The 7EAP also anticipates an EU forest strategy, further efforts on green public procurement and adjustments to chemicals legislation to cope with concerns over chemical cocktail effects, nanomaterials and endocrine disruptors.

The 7EAP must be agreed by member states and the European Parliament.

A response to Garner

By Begonia Filgueira, UKELA Council member
Blog first published on www.eric-group.co.uk

It was wonderful to hear a positive, informed European who, as an economist, previously in charge of trade, exquisitely married up the environment with sustainable economic growth.

Coinciding with the day on which the 7th EU Environmental Action Programme was proposed, Karl Falkenberg said that"regulation should set the parameters for innovation, rather than innovation followed by regulation". This Action Plan known as "Living well, within the limits of our planet", will guide environment policy up to 2020. With a long term strategic vision based on outcomes it aims to link jobs and economic growth with the environment.

This Action Programme is about integration of the environment into other policies, implementation, investment and resource efficiency so we can live "within the limits of our planet". It is about stimulating growth, but a new quality of growth where resources are used efficiently and policies, such as recycling, create thousands of jobs and scrap computers provide more gold than the mining in some areas in Africa.

It seems that all studies show that EU consumers are Catholics. They promise something on a Sunday but find it hard to follow up during the week explaining why the market for environmental products is less than 1pc. A way has to be found to integrate resource efficiency into mainstream economics and trade within the EU. The emphasis on the low carbon economy and strong investment in research to secure the knowledge base are both prime contenders. Environmentally harmful subsidies are going to be phased out, taxation is to move from labour to pollution and bad health due to poor air quality is also to be tackled.

The issues with poor or inconsistent implementation were highlighted by Mr Falkenberg. He relayed that transposing environmental directives was "problematic". That the flexibility provided by Directives resulting in over 500 MS infractions, or infringement proceedings, per year is not cost efficient nor serves environmental protection. Not only is there a proposal for Regulations to substitute Directives as a tool for EU environmental regulation, but an inspection capacity will be introduced to address serious concerns. So Member States need to become much more alert to their responsibilities but may through this initiative find that duplication of work is avoided, cost saved and that we have greater integration of environmental law.

So watch this space as in the summer of 2012 we are to expect a report from the "European Resource Efficiency Platform, where more specific recommendations and the first priorities will be set out as to how to best migrate to a more resource efficient economy. There is also a Resource Efficiency Financing Roundtable in the making which will look at the barriers to environmental investments and drive action in this arena.

For me this is the first time that we are actually getting it when it comes to environmental concerns and the economy – it has to be about resource efficiency and limitation, tackling consumerism from a different angle. This is what I call real progress at a time of economic austerity.

Whilst I was hearing Mr Falkenberg speak I did think "alleluia!". Now I hope from the heart, even as an EU catholic, that we can all manage to keep the focus and the momentum to make the transition to a resource efficent economy.

60 Second interview

Featuring Hayley Tam, UKELA Council member

I'm an environmental lawyer, qualified as a solicitor in Australia, England and Wales. I live permanently in London, although my immediate family live in Brisbane and Sydney… I absolutely love animals and science, and so if I wasn't a lawyer I would be a veterinarian. I love hiking, travelling, horse-riding, photography, afternoon tea, crossing off to-do lists, and generally keeping busy!

What is your current role?

Head of Environment at LexisPSL. I manage the environment team and work closely with colleagues throughout the business to ensure a coordinated approach to environmental law at LexisNexis.

My day-to-day work includes:

- writing and reviewing practical guidance, current awareness and precedents;
- participating in webcasts, talking law, Twitter and other online media;
- publishing articles on environmental law; and
- developing marketing and business development initiatives.

I'm also an active member of LexisNexis' Green Team and worked with the CSR and Facilities teams to achieve ISO 14001 accreditation for our London office.

How did you get into environmental law?

I have been interested in environmental issues since school. I studied a combined BSc (Environmental Systems) and LLB at the University of New South Wales, followed by an LLM in Environmental Law at ANU. While studying, I worked as a paralegal at various law firms and as an environmental officer at an energy company.

When I completed my degrees I applied directly to the environment partners at a few key environmental law firms in Australia, and was lucky to be offered a graduate position at Blake Dawson (now Ashurst Australia). Times were different then!

After almost four years I moved to the UK where I worked in private practice at Stephenson Harwood and Allen & Overy, and the Environment Agency before moving to LexisNexis.

What are the main challenges in your work?

I like a challenge; so some of the most demanding aspects of my work are also the most enjoyable. Keeping up-to-date with ever increasing changes to environmental and energy law, for example, is a challenge, as is managing budgets in a difficult economic climate.

What environmental issue keeps you awake at night?

My own carbon footprint! My family still live in Australia, and so I'd hate to think how many emissions I've contributed to…

In all seriousness, I do worry about our emissions and the slow pace of international negotiations on climate change.

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

Radically reducing greenhouse gas emissions globally, particularly in China and India, by placing drastic restrictions on emissions from industry, developing more incentives like the green deal for improving the energy efficiency of older buildings, massive investment in research and development of renewable fuel and robust REDD+ projects.

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

I'm one of UKELA's Working Party Coordinators, so I attend as many of the working party meetings as possible. They are an excellent way to keep on top of legal developments, and influence changes in the law through consultation responses.

My particular personal interest areas are the Climate Change and Energy WP, the Nature Conservation WP and the Waste WP.

What's the biggest benefit to you of UKELA membership?
There are two really: 1) keeping on top of environmental law developments and getting involved in debates about the future of environmental law, and 2) meeting like-minded people.

Contributions

Climate Justice – Native Villagers' Plight is a Political Question.

Haydn Davies, Centre for American Legal Studies, Birmingham City University

Recently the U.S. Court of Appeals for the Ninth Circuit delivered its opinion in the case of *Native Village Of Kivalina v. Exxonmobil Corporation* (hereafter *Kivalina*). A group of Inupiat native Alaskan villagers had sought compensation under the federal common law of public nuisance from a number of oil and power companies ("Energy Producers") for the effects of climate change on their community[1]. The village of Kivalina is being inundated by the sea as a result of the gradual disappearance of the sea pack ice that has protected the village from the destructive effects of the ocean for hundreds of years. The US Army Corps of Engineers has concluded that the village cannot be saved and that the whole community must be relocated at a cost of up to $400m.[2] To the extent that the defendants are major emitters of the greenhouse gases (GHGs) said to be the root cause of climate change, the plaintiffs sought compensation for the costs of relocating their village. The U.S. district court for the Northern District of California dismissed the claim on the grounds that the claims were not justiciable under the political question doctrine and because the plaintiffs lacked Article III standing.[3] The plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit on both these questions. On September 21, 2012 their claim was dismissed[4], following the U.S. Supreme Court decision in *AEP v Connecticut*[5], on the basis that the Clean Air Act[6] had displaced the damages claim under the federal common law of public nuisance. Thus the possibility, left open in AEP, that claims for damages (as opposed to injunctive relief) might still be available in federal public nuisance claims despite the Clean Air Act, has been eradicated.[7]

In recent times there have been a number of attempts in the U.S. federal and state courts to use federal common law principles, and public nuisance in particular, to seek injunctive relief or damages from energy producers and oil companies for the contribution of their activities to climate change and

Photo©State of Alaska Division of Community and Regional Affairs

its associated consequences.[8] This has ignited a debate about the role of litigation in achieving what has become known as climate justice[9], an offshoot of the environmental justice movement (EJM) which originated in the U.S. in the 1980s.[10]

The EJM has long sought to use litigation in the U.S. courts as a means of achieving a more equitable distribution of environmental burdens in U.S. society; climate justice litigation is the latest manifestation of this effort. Initially the EJM concentrated on the racially disparate impact that many environmental decisions seemed to exhibit, and attempted to persuade the courts to engage the equal protection clause of the fourteenth amendment[11] in order to achieve a more equitable distribution of environmental burdens that did not disproportionately affect people of colour. However, the Supreme Court decision in *Village of Arlington Heights v. Metropolitan Development Corporation*[12] largely put paid to these efforts by requiring evidence of intentional targeting of minority communities amounting to racial animus before it would invoke the equal protection clause in the service of environmental equity. In *Bean v. Southwestern Waste Management Corporation*[13], the first major environmental justice case to follow Arlington, the U.S. District Court for the Southern District of Texas duly denied injunctive relief to a group of residents seeking to prevent the siting of a landfill near a predominantly Black school, on the basis that the level of statistical evidence supplied did not reach the level required by *Arlington* to prove intentional discrimination.[14] The Fifth Circuit affirmed the decision some seven years later.[15] Since then other constitutional challenges based on Title VI of the Civil Rights Act of 1964,[16] and the general rights protection offered by 42 U.S.C. §1983[17] have been successively closed off by the federal courts, resulting in increasing reliance on legislative and administrative challenges, and most recently, the common law. This shift away from constitutional remedies reflects the federal courts' reluctance to engage in questions of distributive justice couched in terms of race and has resulted in the EJM being forced to use alternative, race-neutral, approaches.[18] This trend has coincided with increasing awareness of the local consequences of the effects of climate change following events such as the inundation of New Orleans by hurricane Katrina in 2005 and has resulted in a broadening of the frame of the EJM's activities to encompass climate change. Such events also prompted other stakeholders such as States, local government interests and NGOs to engage in strategic litigation to force government and government agencies into action, most famously in the case of *Massachusetts v EPA*[19]. Here, the U.S. Supreme Court held that the EPA was mandated by the Clean Air Act[20] to regulate GHGs sources, including mobile sources (contrary to the EPA's assertion), and that it should regulate automobile emissions accordingly.[21] Most recently, in the AEP case referred to above, a number of states and land trusts attempted to obtain injunctive relief from power producers using the federal common law of public nuisance.[22] The attempt failed on the basis that the requirements of the Clean Air Act for the EPA to regulate GHGs displaced the federal (though not the state) common law claim. It was adherence to this decision that resulted in the dismissal of the *Kivalina* appeal in the Ninth Circuit.

This whistle-stop tour of the recent history of environmental and climate justice claims amply demonstrates the limitless imagination and creativity of the U.S. legal community in strategic environmental litigation.

However, several commentators have questioned the wisdom of using litigation to resolve disputes arising from the consequences of climate change[23] and have suggested that this is a political question best left to the executive and legislative branches in the U.S.[24] Yet others have suggested that litigation on climate change, whilst having little chance of success on the merits, is still a means of "prodding and pleading" in the face of executive or legislative inaction and that public nuisance is an appropriate instrument for this purpose.[26] The strategic use of litigation in this fashion is a prominent feature of the U.S. legal system and has been credited with a number of changes in policy in relation to campaigns against smoking, firearms, lead in paint or MTBE in gasoline.[27]

It would have to be conceded that prodding and pleading is highly unlikely to achieve much in terms of legislative action given the current Congressional position in the U.S. and the widely publicised strangulation of the political process by intransigent party interests.[28] It has been asked whether the 112th Congress is "the most anti-environment Congress ever?"[29] Certainly, there has been a concerted and orchestrated effort on the part of the Grand Old Party (the Republicans) to obstruct every environmental protection measure put before the House of Representatives (where the Republicans enjoy the majority[30]). Indeed, such is the apparent frustration of the Democratic Party that the House Energy and Commerce Committee have set up a database of environmental defeats which catalogues the 315 defeated environmental

measures to date.[31] Similarly, Democrat-dominated Senate's efforts are routinely challenged by such as the Republican Senator James M. Inofe (Okla.), ranking member on the Senate Committee on Environment and Public Works.[32]

Given this highly inauspicious Congressional atmosphere for environmental legislation, particularly in relation to climate change, it is questionable whether pleading and prodding by the courts will have any effect whatsoever. Certainly pleading with Congress and the Executive seems doomed to fall on deaf ears as things stand, and the recent re-election of Barack Obama does not appear likely to result in sufficient change in the composition or attitude of Congress to effect a shift in the appetite for any further regulation of GHGs. So far as prodding the executive and executive agencies into action is concerned, this may achieve results up to a point. Where *existing* measures and powers are capable of more enthusiastic and broader interpretation than they have been hitherto, then prodding by the courts might have some effect – as it did in *Massachusetts*, where the EPA's narrow interpretation of its powers under the Clean Air Act was 'broadened' by the Supreme Court and the EPA was, in effect, instructed to regulate. It is also the case that the EJM, and some federal agencies such as the EPA and the U.S. Army Corps of Engineers, have succeeded in controlling the expansion of the coal industry in the U.S. by means, *inter alia*, of the Clean Water Act.[33] Beyond that, however, the federal courts, including the Supreme Court, have expressed a reluctance to interfere with 'expert determinations' by executive agencies and the jurisprudence of environmental and climate change cases in particular is characterised by a high degree of judicial deference.[34] Thus in *AEP*, Justice Ginsburg reiterated the Court's reluctance to engage in scientific assessments:

> … this prescribed order of decision making—the first decider under the [Clean Air] Act is the expert administrative agency, the second, federal judges—is yet another reason to resist setting emissions standards by judicial decree under federal tort law. …It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. (Citation omitted) … The judgments the plaintiffs would commit to federal judges, in suits that could be filed in any federal district, cannot be reconciled with the decision making scheme Congress enacted.[35]

Of course, *Kivalina* was different from *AEP* in a very important aspect; the villagers were not seeking injunctive relief which would have required the court to set emissions limits as was the case in *AEP*; they were seeking damages for the inundation of their city. This, on the face of it, might seem a more 'legal' assessment than the one required in *AEP*. However, like *AEP*, the fact that the plaintiffs' standing was recognised at all is something of a surprise given the apparent difficulty of the tests for standing laid down in *Lujan v Defenders of Wildlife*.[36] The higher courts' evident generosity in this respect might indicate their willingness to engage in pleading with or prodding the other branches. Demonstrating standing to sue requires that "a litigant … demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury."[37] In *Kivalina* demonstrating injury was not an issue, but fair traceability to those particular defendants would appear to present a spectacularly difficult burden given the uncertainties of climate science and meteorology. The fact that there were multiple defendants among whom a court would have to apportion damages on the basis of an imperfect knowledge of traceability was not of itself an insuperable difficulty since there were some guiding precedents (albeit it old ones) in such cases as *People v Gold Run Ditch* and Mine.[38] However, that case involved multiple defendants emitting pollutants into the same river system; in *Kivalina* the receiving medium was the atmosphere as a whole. I would argue that recognising traceability in those circumstances stretches the principle of traceability beyond breaking point. However, in the event, like the Supreme Court in *AEP*, the Ninth Circuit did not rule on standing but followed Justice Ginsburg's lead in its assertion that compensating for the effects of climate change "must rest in the hands of the legislative and executive branches of our government, not the federal common law."[39] The Ninth Circuit judges were able to find in the "Clean Air Act and the agency action authorised thereunder"[40] sufficient grounds to displace the villagers' action. The fact that the villagers sought damages rather than injunctive relief (as in *AEP*) was not relevant since "under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies"[41]; since *AEP* had already decided that federal public nuisance actions for damage resulting from climate change were displaced by the CAA, this

extended to actions for damages also. This would appear to hand back to the EPA, (or another executive agency) responsibility for the creation of a scheme by which victims of the consequences of climate change could be compensated. Such a creation seems an unlikely prospect, even were the EPA minded to take on such a difficult task, given the number of climate change sceptics that seem to inhabit Congress at present, who would surely seek to prevent such an action on the part of the EPA.

The fact is that the displacement doctrine, like the political question doctrine[42], is a means by which the courts may formally avoid encroaching into areas where they feel unable or unwilling to carve out a judicial remedy either because to do so would be to undermine one of the other branches or, as in this case, where they wish to encourage one of the other branches to discharge its duties more effectively or with greater alacrity. Unlike the British courts, the U.S. federal courts are willing, on occasion, to create judicial remedies which require the exercise of large degrees of judicial oversight – amounting to executive oversight in some cases. The actions of a federal judge in the Boston schools desegregation litigation over many years is a fine example.[43] However, there are some issues that are simply not appropriate for judicial remedy. Determining the most appropriate social and economic response to climate change is surely the archetypical political question.

Despite Ewing and Kysar's elegant arguments for the use of public nuisance as a vehicle for climate justice[44], it is submitted that this is not a role that the courts should be asked to fulfil; first and foremost, because in adjudicating on such matters the court crosses the boundary between the political and judicial spheres, and secondly, because the defendants would be unjustly penalised for pursuing an activity that is essential to the functioning of wider society.[45]

Of course, it is recognised that the courts in the U.S. have a long and distinguished history of upholding or expanding constitutional entitlements in the face of executive or legislative failure to do so and in an era of human rights, the role of the courts as guardian becomes increasingly important. This is especially so given the individual and anti-majoritarian nature of fundamental human or constitutional rights. In order that such rights be upheld as "trumps over some background justification for political decisions that states a goal for the community as a whole"[46], there must be a mechanism, independent of majoritarian-minded government, to ensure that such "trumping" actually occurs. Where the right already exists as a legal or constitutional entitlement, the courts' role in this regard is unobjectionable. In fact, Dworkin has highlighted this as an essential foil to the "defects in the egalitarian character of democracy [which may be] in part irremedial"[47].

However, where a clear legal or constitutional entitlement does not exist, and needs must be 'carved' out of some other legal or constitutional principle, then, it is submitted, the court's role moves beyond that of guardian and becomes that of a legislature. At present in the U.S. there is certainly no general constitutional or legal right to an environment of a defined quality (not at federal level at least) as distinct from regulations that seek to achieve mandatory maximum levels of pollution in emissions, or minimum standards of air quality for example. Nor is there (yet) a consensus on the existence (still less the content) of a normative moral human right to an environment of a defined quality. Hence judicial activism that sought to carve out such a right from, for example, public nuisance or the public trust doctrine[48], would be creating the right *de novo* and to that extent would usurp the role of the legislature, not merely hold it to account. It is conceded that there are many examples of exactly this kind of judicial activism where existing legal rights have been reinterpreted to encompass environmental considerations where they have not previously been recognised. Prominent examples include the expansion of Articles 8 and 2 of the European Convention on Human Rights in cases such as *Lopez Ostra v Spain*[49], *Guerra v Italy*[50] and *Budayeva v Russia*[51] and the groundbreaking judicial activism of the Indian Supreme Court in such cases as *M.C. Mehta v Kamal Nath*[52]. I am not questioning whether this can be done by the judiciary – clearly it can – what I am questioning is whether it ought to be done in the context of global climate change where the outcome affects not only the parties to the decision, but, through its potential effects on hitherto lawful economic activity, the interests of countless other parties too.

Fundamentally, the unequal distribution of the consequences of climate change arises as a consequence of economic inequalities. In capitalist liberal economies based on enlightened self-interest, some degree of economic inequality is not only inevitable, it is essential to generate competition and prevent stagnation. Any student of natural sciences knows that most of the processes in a dynamic living system operate at non-equilibrium in order to keep the system going and I argue that economic systems are no different.

Indeed, most theories of justice which have dominated western society advocate equality of opportunity but recognise that actual equality is not possible. This includes John Rawls' highly influential theories of distributive justice or justice as fairness, which tolerates a degree of inequality in the 'difference principle.'[53] To a large extent the operation of the law and the courts' enforcement of it are designed to perpetuate this reality while defending equality of opportunity so that citizens may 'help themselves.' However, equality before the law does not equate to equality in society at large. Thus while the courts might be able to offer some redress from environmental inequality in particular cases and thereby 'prod and plea' the political branches into action, the equalizing of environmental burden is, in the final analysis, an economic and political responsibility that can only be undertaken by the legislature and the executive. This responsibility is far too important to be left to judicial creativity and the U.S. judiciary recognise their unsuitability for this task. Moreover, the solutions that could be offered through litigation are not guaranteed to achieve the desired result. The sooner these branches of U.S. government wake up to this reality, and their responsibility in respect of it, the better. There was a time, not too long in the past, when the world looked to the U.S. for leadership in matters of environmental protection and the U.S. responded by taking the lead in the creation of such measures as the Geneva Convention on Long Range Transboundary Air Pollution 1979 and the Vienna Convention for the Protection of the Ozone Layer 1985 (and the subsequent Montreal Protocol in 1987). I look forward with hope, though with little expectation in the immediate future, to a renaissance of this activism.

Footnotes

1 *Native Village of Kivalina v. Exxonmobil Corporation et al*., 663 F.Supp.2d 863 (N.D. Ca. 2009).
2 *Id*. at 869
3 *Id*. at 868, 871-877, 877-883. (N.D. Ca. 2009)
4 *Native Village Of Kivalina; City Of Kivalina v. Exxonmobil Corporation; BP P.L.C.*; --- F.3d ----, 2012 WL 4215921 (C.A.9 (Cal.)(2012)
5 *American Electric Power v Connecticut* 131 S.Ct. 2527 (2011)
6 42 U.S.C. §§ 7401 (1955)
7 Though the possibility of such action at state level remains open (see *Kivalina supra* note 4 at 14; Judge Pro's concurring opinion).
8 See e.g. *AEP v Connecticut et al*. 131 S.Ct. 2527 (2011) ; *Comer v Murphy*, 607 F.3d 1049 (5th Cir. 2010). For an indication of the wider picture in terms of U.S. climate litigation generally see the excellent web site maintained by Michael B. Gerrard and J. Cullen Howe, Arnold and Porter LLP and Columbia Law School Center for Climate Change Law. http://www.climatecasechart.com/ .
9 Maxine Burkitt, 'Climate Justice and the Elusive Climate Tort', 121 *Yale Law Journal Online* 115 (2011).
10 See David Schlosberg, *Defining Environmental Justice. Theories, Movements And Nature* (Oxford University Press: Oxford, 2007); Gordon Walker, *Environmental Justice. Concepts, Evidence And Politics* (Routledge: London, 2011). Robert D. Bullard, Dumping In Dixie, Race Class And Environmental Quality, 3rd edition (Westview Press: Boulder, CO, 2000).
11 U.S. CONST. amend. XIV §1.
12 *Village of Arlington Heights v. Metropolitan Development Corporation*, 429 U.S. 252 (1977).
13 *Bean v. Southwestern Waste Management Corporation*, 482 F.Supp. 673 (S.D. Texas 1979).
14 *Id*. at 677. A similar decision was to emanate from the fourth circuit in R.I.S.E. v. Kay, 977 F.2d 573 (4th Cir. 1992).
15 Bean v. Southwestern Waste Management Corp., 782 F.2d 1038 (Table) (5th Cir. 1986).
16 42 U.S.C. 2000a et seq.
17 See *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 145 F.Supp.2d 505 (D.N.J. 2001).
18 See Christine M. Foot, 'Scrutinizing Strict Scrutiny: Environmental Justice After Adarand Constructors, Inc. v. Pena' 11 *Berkeley Journal of African-American Law & Policy* 123
19 *Massachusetts v EPA*, 549 U.S. 497 (2007).
20 42 U.S.C. §7521
21 *Supra* note 19 at 526. The regulated industries most affected by this decision recently mounted an unsuccessful challenge in Coalition For Responsible Regulation, Inc., et al. v Environmental Protection Agency, 684 F.3d 102 (D.C. 2012)
22 *Supra* note 5

23 See e.g. Michael B. Gerrard, 'What The Law And Lawyers Can And Cannot Do About Global Warming', (2007) 16 *Southeastern Environmental Law Journal* 33 at 42-43.
24 Laurence H. Tribe, Joshua D. Branson & Tristan L. Duncan, 'Too Hot For Courts to Handle: Fuel Temperatures, Global Warming, and the Political Question Doctrine', (2010) at 15 (Washington Legal Foundation Critical Legal Issues WORKING PAPER Series Number 169) Available at http://www.wlf.org/Upload/legalstudies/workingpaper/012910Tribe_WP.pdf .(Last visited Sep. 7, 2012).
25 Benjamin Ewing and Douglas Kysar. 'Prods And Pleas: Limited Government in an Era of Unlimited Harm', (2011) 121 Yale Law Journal 350 .
26 *Id*. but cf. Thomas W. Merrill, 'Is Public Nuisance a Tort?' (2011) 4 Journal of Tort Law 1.
27 Merrill *id*. at 2-3
28 See e.g. Jonathan Zasloff, 'Courts In The Age Of Dysfunction', 121 *Yale Law Journal Online* 479 (2012)
29 Attributed to Rep. Henry Waxman, ranking member on the House Energy and Commerce Committee. See Kate Sheppard. Guardian OnLine. Guardian Environment Network. September 13, 2011. http://www.guardian.co.uk/environment/2011/sep/13/anti-environment-congress-ever (Last visited Sep. 7, 2012).
30 This situation remains unchanged despite the re-election of Barack Obama to the White House.
31 As of Sept 21, 2012, see http://democrats.energycommerce.house.gov/
32 The Committee's minority webpages are something of an *homage* to climate scepticism – see http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=d6d95751-802a-23ad-4496-7ec7e1641f2f . However, Sen. Inhofe's recent attempt to prevent the passage of a measure that would allow the EPA to control mercury pollution (among other things) from coal-fired power plants was defeated in the Senate. See http://bigstory.ap.org/article/senate-defeats-bid-block-epa-power-plant-rule
33 See Gorman Co., LLC v. U.S. E.P.A., 2011 WL 749508 (E.D.Ky.,2011). (Not reported in F.Supp.2d). Here the successful enforcement of the permitting system under the Clean Water Act is said to "have imposed insurmountable technical and economic burdens on the coal mining industry, effectively shutting down surface coal mining (and possibly significant underground coal mining) throughout much of Central Appalachia …" Id. at 1.
34 Carlton Waterhouse, 'Abandon all Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice', 20 *Fordham Environmental Law Review* 51 (2009)
35 *American Electric Power Company Inc. et al. v Connecticut et al*., 131 S.Ct. 2527,2539-2540 (2011).
36 *Lujan v Defenders of Wildlife Inc*. 504 U.S. 555 (1992).
37 *Massachusetts v EPA*, 549 U.S. 497,517 (2007).
38 *People v Gold Run Ditch and Mine* 66 Cal. 138, 4 P. 1152 (1884)
39 Though they were careful to leave open the possibility of action at state level, *supra* note 4 at 6.
40 *Id*. at 1.
41 *Id*. at 4-5
42 *Baker v Carr* 369 U.S. 186, 82 S.Ct. 691 (1962]
43 *See* Anne Richardson-Oakes, 'From Pedagogical Sociology to Constitutional Adjudication: the Meaning of Desegregation in Social Science Research and Law', 14 *Michigan Journal of Race and Law* 61 (2008).
44 Principally as a means of discouraging overpassive government. *Supra* note 25
45 Notwithstanding the fact that it is a profitable activity.
46 Ronald Dworkin, 'Is There a Right to Pornography?' 1 O.J.L.S. 177 (1981).
47 Ronald Dworkin, *A Matter of Principle*. (Boston, Mass. Harvard University Press, 1985) at 27
48 See Michael C. Blumm and Rachel D. Guthrie, 'Internationalizing the Public Trust Doctine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision.' 45 U.C. *Davis Law Review* 741 (2012).
49 20 E.H.R.R. 277(1995).
50 26 E.H.R.R. 357 (1998).
51 European Court of Human Rights (Applications nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), (2008).
52 1 S.C.C. 388 (1996).
53 John Rawls, *A Theory Of Justice* (Boston, Mass. Belknap Press of Harvard University Press,1985). Originally published 1971.

Ten things you should know about "The Practicalities of the Presumption in Favour of Sustainable Development"

William Upton & Fran Aldson – Convenors of the Planning and Sustainable Development Working Party

This joint event was organised by UKELA (through the Working Party) and the Planning and Environment Bar Association (PEBA). Led by Morag Ellis QC, the Chairman of PEBA, our speakers were Dr Hugh Ellis (Chief Planner with the TCPA), Ben Linscott (the Planning Inspectorate, Group Manager (Planning)), and John Rhodes (Quod, Planning Consultant and one of the four authors of the practitioners' draft of the NPPF). It was held on 22 November in the excellent lecture hall at Simmons & Simmons, and led to some robust discussion.

1. The National Planning Policy Framework (NPPF) has been in place for eight months now. It states that at its heart "is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking" (para 14). It is notable how much disagreement there remains about the likely impact of this even now.

2. On one view, the NPPF has created a simplified, robust planning regime designed to speed-up development through the application of a straightforward test (development should proceed unless the harm outweighs the good). It is a near perfect document. On another view, planning in England is in the worse state it has been since 1947; we have lost the evidence-base for planning policy, and the core principles and rationale that underpin it, and replaced it with legislative confusion and complexity. Consent and confidence – two pre-requisites for an effective planning system, have both been deeply eroded. There is no strategic content to the NPPF.

3. The Planning Inspectorate's approach to determining planning inquiries has not been very different under the NPPF. Inspectors are not there 'to deliver development' and they will make decisions as impartially, and in light of the statutory and policy tests, as they have always done. There are however issues regarding localism, prematurity and the out-of-date nature of much of the evidence base for local plans.

4. One of the key difficulties remains the lack of common understanding as to what is 'sustainable', e.g. wind farms can be sustainable in energy terms, but not always so in terms of their impact on the landscape etc. There is no common view or shared ambition in the community about what it "sustainable".

5. There was no agreement whether the NPPF contains a sustainability test. The Presumption in favour of sustainable development is in para 14, but in order to decide whether a particular development is 'sustainable development' is it necessary to assess it against the policies in para 18 to 219 as a whole before the Presumption can then be applied to it?

   John Rhodes took the view that the NPPF does not call for a testing of whether a development is 'sustainable'. The test is simply that development should be approved unless it can be shown that the harm outweighs the good. An alternative view is that the sustainability of a development does need to be considered under the NPPF. Indeed, this is the starting point before the presumption is applied.

   This is an important point and it has been picked up in the planning blogs. One commentator (www.andrewlainton.wordpress.com) thinks John Rhodes was right – but that it is a narrow point. There is indeed no requirement that development be sustainable, nor a presumption against unsustainable development. There is a requirement to test whether a scheme is sustainable (in the narrow terms of the NPPF) in order to test whether or not the presumption in favour of sustainable development applies. Those that do pass should be approved 'without delay'. But that does not mean that

schemes judged not to be sustainable are refused, simply that the presumption in favour (in para 14) does not apply. The normal statutory test would apply, that determinations are to be made in accordance with the development plan still applies unless material considerations indicate otherwise (such as the one that the plan is 'absent, silent or relevant policies are out of date' !).

6. The next critical date is 1st April 2013. That is the point at which the transitional period for existing local policies will end and – in the absence of an 'up-to-date' Local Plan – the NPPF becomes the local plan. We will be left with ad hoc planning decisions, as there is no evidence base for the NPPF and it is only a general, national document. Several developers are awaiting this time with active interest.

7. The speakers all had their favorite paragraph of the NPPF. Hugh Ellis's favourite footnote was Footnote 16 – that "Local planning authorities should adopt proactive strategies to mitigate and adapt to climate change,[16 … In line with the objectives and provisions of the Climate Change Act 2008]". Planning must therefore be in accordance with section 1 of the Climate Change Act. Should local plans be held to be unsound if they are not in accordance with the target that emissions are reduced by at least 80% by 2050, compared to 1990 levels?

8. The changes to the planning regime are set to continue. There is a further review going on regarding the remaining 6,000 or so pages of policy guidance (under Lord Taylor), consultations on proposed changes to permitted development rights and national infrastructure categories, and the Growth and Infrastructure Bill is currently before Parliament.

9. The Growth and Infrastructure Bill will apparently remove planning powers from local planning authorities that are deemed to be 'failing' and place them in the hands of the Planning Inspectorate instead. Hugh Ellis's major concern was that this was highly centralising, and yet planning is a political process that requires local support and trust.

10. There was an acceptance that economic growth is the priority focus in the NPPF. We would like to hear from members about any decisions that are now being made where they consider that the NPPF has made the difference between refusal and permission. The debate about the practicalities of this particular presumption in favour of sustainable development in the NPPF will continue.

Book review

Environmental Impact Assessment, 2nd edition

Stephen Tromans QC and team from 39 Essex Street Chambers
ISBN:9781847666758 – £85.00 VAT Free

Environmental Impact Assessment (EIA) is central to the planning system. This book arrived on my desk as I got stuck into a JR and a prospective planning application, in both cases where EIA is an significant factor. It provides clear and practical guidance on this complex and important area of environmental law.

The authors provide comprehensive coverage of the law in a logical progression. The book explains the legal requirements relating to EIAs including the relationship of European Union law with domestic law and detailed explanation of the resulting cases. The main part of the book concentrates on the role that EIA plays in the planning application process including knotty issues such as cumulation and the splitting of projects,alternatives and indirect effects. This alone is a reason for buying this book. It also reminds us of the application to often overlooked areas including permitted development, unauthorised development, certificates of lawfulness, ROMPS and modification orders. There is also a section on the role of EIAs in non planning development – specific contexts such as forestry, archaeology, agriculture, highways and ports. The work concludes with a section on good practice that offers guidance on scoping the statement, how to write the non-technical summary (particularly helpful) and other elements such as social impact, air quality, noise and health risk assessments.

The authors have also provided a most helpful section on challenges, covering judicial review and statutory challenge.

The book includes a detailed examination of legislative changes such as the new Strategic Assessment legislation and the Planning Act 2008; significant developments in international law such as UNECE, Espoo and Aarhus Conventions; case law such as R (Wye Valley Action Association Limited) v Herefordshire District Council [2009].

If you have not already purchased a copy and if like me you are regularly involved in planning matters this book comes highly recommended.

Review by Catherine Davey, Stevens & Bolton LLP

Working Party News

The Planning and Sustainable Development Working Party has a new co-convenor – Yohanna Weber. She will act as convenor alongside Will Upton and Fran Aldson.

Yohanna is a planning and environment lawyer at Dundas and Wilson LLP with over eight years' experience in all aspects of contentious and non-contentious planning, environment, major infrastructure and compulsory purchase matters. She has experience in both the public and private sectors in the UK, and is also qualified in Australia, where she acted for major developers, Government bodies and utilities in relation to planning and environmental consenting and compliance, compulsory purchase, and the remediation and disposal of contaminated land.

Richard Kimblin, convenor of the Environmental Litigation working party, wrote to Ministry of Justice Minister Michael Fallon in December, setting out concerns about the new policy on the use of civil sanctions powers (letter available at www.ukela.org/envlitwp). Under that policy, any future expansion of civil sanctions into areas such as environmental permitting will exempt small and medium enterprises from monetary penalties and restoration notices. The letter points out that this will significantly restrict the scope for civil sanctions to be used to deal with environmental offending and that it risks creating a complicated, two-tier system for enforcement. It also responds to points made by Cabinet Office Minister Oliver Letwin at the 8 November UKELA-UCL conference which indicated that the new policy is based on misconceptions about the way the present civil sanctions system works.

The Scottish Law working party has just commented on a SEPA-led consultation on SEPA's statutory purpose and funding. Amongst other things, the response raises serious concerns about the fact that the consultation is being led by SEPA rather than the Scottish Government, and about the replacement of 'sustainable development' as a legislative goal, with 'sustainable economic growth'.

All working party events are now appearing on the Events page of www.ukela.org. Please check here for their activities and also to avoid organising clashing meetings if you are planning something. Details of all the convenors are on the working party pages.

Regional Group News

North East regional group Drax site tour 2012

Report by Helen Peters and Emma Cottam, of Pinsent Masons

On a damp October afternoon last year, UKELA members from across the North East headed to Selby for a guided tour around the Drax Power Site, complete with a briefing session with the legal team led by Head of Corporate Affairs, Philip Hudson. First on the agenda was a stop at the Visitors' Centre to learn about the history and future development of the site, including a "virtual tour" to demonstrate how the power station – the largest, cleanest and most efficient coal fired power station in the UK – operates on a day to day basis. This session was led by the site's tour guide, Pauline, who explained the operational processes in place from the arrival of the coal at the Rail Unloading House through to the generation and supply of electricity to the National Grid. After the presentation we set off- appropriately suited and booted with ear plugs, hard hats and high-vis jackets – to see Pauline's words in action.

The tour showcased the sheer scale of the site, and was a fascinating insight in to the complexities of power station operation. Highlights included seeing (and hearing!) the turbines in operation, standing in the shadow of the main chimney (at an impressive 259m tall), and the flue-gas desulphurisation plant. Further surprises were just around the corner, as the tour took us past the Skylark Nature Reserve. Located at the heart of the ash disposal scheme, Barlow Mound, the nature reserve is a haven for over 100 species of wildlife, and provides a unique learning opportunity for children to discover more about the local area's ecological systems.

Final stop on the tour was a visit to the control room, a large open-plan hive of activity complete with sleek, large flat-screen monitors which meant you may have been forgiven for thinking you were on a trading floor and not the largest coal fired power station in the UK! As the afternoon drew to a close, Philip Hudson spoke to the group about Drax's long term plans. A key focus of this session was a discussion on plans to transform Drax into a power station predominantly fuelled on biomass, and, as seen on the tour, plans are well underway with an eco-storage dome already in place.

All in all, the tour was a great success, and was a fantastic insight in to the types of activities that are on offer to regional UKELA members.

UKELA Events

London meeting on Flood Risk Assessment and Management 5 February 2013

This is a must attend event given the focus there has been on flooding over the last few months and the implications it has for practice. Topics will include recent developments in government policy, current methods of flood risk assessment and what practical measures are available to protect properties at risk.

Speakers are Jill Boulton of flood risk specialist JBA; Matt Cullen of the Association of British Insurers (ABI; Gavin George of Aquobex; Sue Highmore of PLC

5.30 for 6pm start at Herbert Smith Freehills. Booking information here.

Wildlife, Wilderness & Wild Law weekend – Loch Lomond & Trossachs National Park: 24-27 May 2013

The weekend focuses on wildlife and nature conservation law in Scotland and the challenges of wild land management in and around Scotland's first national park. There will also be a Wild Law update. We are aiming to include talks from the National Park Authority, the John Muir Trust and a Scottish lawyer. The weekend is being organised by John Hunt who has attended the last two UKELA weekends in Scotland, and has worked professionally in nature conservation north of the border.

Booking Details here.

Annual Conference: The next 25 years: The Future for Environmental Law 12-14 July 2013

As the UK Environmental Law Association celebrates 25 years, the anniversary conference at Cambridge University looks forward to ask about the future of Environmental Law? We have an exciting programme to offer, a gala dinner in the lovely setting of King's College and some great field trips. We've added the conference highlights at the end of this e-law for ease of reference.

You can book now. First time visitors benefit from a significant discount if you book early.

If you are interested in sponsoring the conference please contact Ben Stansfield, Ben.Stansfield@CliffordChance.com. Sponsor opportunities are being taken up fast so contact Ben now and don't miss out.

Non UKELA Events

Castle Debates 2013

The Law Society, 113 Chancery Lane, London WC2A 1PL
CPD hours: 1.5
Attendance is free

The purpose of the debates is to provide objective and factual clarification of selected current environmental issues. To this end, a panel of experts will address the issues, the applicable law and current policy respectively. They will be held on an approximately monthly basis from February to June at the Law Society, Chancery Lane in association with the Law Society and Sykes Environmental and sponsored by the ENDS Report. Each speaker will have 15 minutes to present and then the floor will be opened for a question-and-answer session, chaired by Pamela Castle, OBE.

9.30 am, 12 February: Genetically Modified Crops

The first genetically modified plant was produced in 1983 and now genetically modified foods are subject to controversy over their relative advantages and disadvantages. Key areas of debate are food safety, the effects on natural eco-systems, gene flow into non-genetically engineered crops and corporate control of the food supply.

Book here

9.30 am, 20 March: Nuclear Power

In July 2011 the British Government designated 8 sites in England and Wales suitable for development for new nuclear; the Scottish Government has stated that no new nuclear power stations will be constructed in Scotland.

Attracting investment through to an active build programme remains very challenging as was seen in March 2012 when E.ON UK and RWE npower announced they would both be pulling out of developing new nuclear power plants.

Book here

Coalition for an International Court for the Environment Symposium: 7 February

Can the Law save the environment: what next after Rio and Doha?

DLA Piper, 3 Noble Street, EC2V 7EE. 5.30pm for 6pm

Speakers:
The Rt. Hon. Lord Carnwath, Justice of the Supreme Court
Jolyon Thomson, DEFRA Legal Services, International Environmental Law
Rushanara Ali, MP for Bethnal Green and Bow
James Cameron, Chairman, Climate Change Capital
Farooq Ullah, Executive Director, Stakeholder Forum
Teresa Hitchcock, Partner, DLA Piper
Chair: Stephen Hockman QC
CPD: Applied for (BSB/SRA)

Free to attend
RSVP: events@dlapiper.com

Non UKELA Events

NELA Annual Conference: 7-9 March 2013

The 2013 NELA National Conference is being held in Melbourne, 7-9 March 2013 at the Sebel Albert Park. With the conference theme "Delivering a low carbon future", the 2013 NELA National Conference will focus on legal aspects of Australia's pathway to a low carbon economy in the 21st century. The conference will examine state, national and global developments in environment and climate change litigation and review emerging regulations and programs with a focus on facilitating clean energy. The conference will attract an audience of over 350 lawyers, policy makers, academics and regulators, as well as business leaders, NGOs, environment practitioners, scientists and students.

For more information go to www.nelaconference.com.au

Public Interest Environmental Law conference on land grabbing – 15 March

Organised by a committee of students the annual PIEL conference programme is currently being finalised. Held at the Institute of Advanced Legal Studies, London. Full details will be posted on the UKELA website when available.

Waste management liabilities conference – 15-16 March

ORIEL COLLEGE, OXFORD, Organised by EELA and CHWMEG.

Key issues in waste in the EU will be analysed by experts, including lawyers from several Member States. The focus will be on recent developments and the issues that are still contentious and there will be panel discussion and audience interaction on every issue.

More details here

Special offers

Burnett-Hall on environmental law

The 3rd edition of Burnett-Hall on Environmental Law has now been published.

Your one-stop guide to analysing all the principal areas of environmental law in a single volume, Burnett-Hall ensures you'll have a clear understanding of both the EU and domestic frameworks within which parties operate. Burnett-Hall covers the latest in environmental law, from climate change, EIA and nature conservation, to water, IPPC and air; waste, contaminated land, statutory nuisance and noise, to chemicals, GMOs and nuclear.

You'll find that the new 3rd edition:

- Includes new chapters on marine protection (dealing with the newly extended legislation on marine conservation, in particular marine protection zones), and environmental marketing (covering "green" advertising, eco-labelling, eco-design and information labelling)
- Contains expanded coverage of the EU chemicals regime under REACH, the Plant Protection Products Regulation, and the proposed EU Biocidal Products Regulation
- Provides fuller treatment of the Regulatory Enforcement and Sanctions Act 2008
- Examines the issues relating to public accountability, looking at public law and access to information
- Considers the complexities of insurance for environmental liability
- Covers prosecution and sentencing for environmental damage

15% discount for all UKELA Members*

To claim your discount please quote promotion code **0912107A** when ordering. You can order your copy via our website www.sweetandmaxwell.co.uk, calling our customer services department on 0845 600 9355 or emailing TRLUKI.orders@thomsonreuters.com

*Offers ends 1st March 2013

The habitats directive – a developer's obstacle course?

Edited by Gregory Jones QC

Biodiversity within the European Union is under threat. Almost a quarter of Europe's vascular plant species and 155 species of its native mammals, birds, reptiles and amphibians are threatened with extinction. The Habitats Directive imposes a strict regime for environmental protection. But with the euro zone economy falling from 'stagnation' to 'contraction' in the second quarter of 2012and the UK entering into a 'double dip' recession in April 2012, European governments face an economic crisis. The English courts have said that the Directive should not become a property developer's obstacle course. Yet the tensions between environmental protection and economic growth are all too readily apparent with the UK government stating both that we must 'arrest the decline in habitats and species and the degradation of landscapes' and later that' gold plating of EU rules on things like habitats' was putting 'ridiculous costs' on business enterprise.

Edited by Gregory Jones QC, The Habitats Directive: A Developer's Obstacle Course? brings together a unique combination of leading academics and practitioners in the field of European environmental and planning law to address and debate controversial issues arising from the Habitats Directive in an authoritative and practical manner. A

must for anyone engaged in property development, planning and environmental law.
20% discount for all UKELA Members

Please order through the Hart Publishing Website www.hartpub.co.uk.

To receive the 20% discount please quote reference 'ENVIRO12' in the special instructions field.

The discount will not show on your order confirmation but will be applied when your order is processed. Please note that the discount is only available on orders placed directly with Hart Publishing.

UKELA Conference programme highlights – 2013 Cambridge

The next 25 years: the Future for Environmental Law

The UK Environmental Law Association is celebrating its 25th anniversary as a charity in 2013. Its conference at Cambridge University on July 12-14 aims to answer this key question: as a practitioner in the field, what do you need to know to equip yourself to meet current and future challenges? The conference, in the beautiful setting of Homerton and King's Colleges, will mark 25 years of making the law work for a better environment and asks what the future holds for environmental law? With environmental pressures increasing, both at home and internationally, and having a direct effect on quality of life on the planet, how can legislation and regulation deliver what is needed? Is the system fit for purpose or creaking at the seams? UKELA's conference team wants to make this event really useful for you and has gathered some of the top thinkers and experts to address these questions and give you the inspiration and tools you need.

Friday 12th July

Session Chair: Professor Tom Burke
Speaker: Professor Ludwig Krämer : "EU environmental law and policy over the last 25 years – good or bad for UK?"

Session focusing on:

- The main achievements
- The main failures
- UK and EU environmental law and policy
- Main challenges until 2038

Professor Dr Ludwig Krämer is widely regarded to be among the top experts on environmental law and policy in the EU. He is director of ClientEarth's European Union Aarhus Centre. A German judge from 1969 to 2004, he served on secondment as the European Commission's Chief Counsel on the environment, working with the Commission for three decades. He has written more than 200 articles on EU environmental law and authored 20 books, including a classic treatise and casebook on the subject. He has lectured on the subject of environmental rights and law in more than 50 universities in Europe and North America.

Saturday 13th July

Session Chair: Lord Carnwath
Session 1: Environmental Law: the international perspective

Session focusing on:

- The work of the Aarhus committee, access to justice, costs and provision of information

- The role of the EU in influencing UK environmental law
- Lessons to be learned from new developments in the US: Superfund Mega-Sites; Climate change regulation and litigation; "transaction trigger" law

Speakers:
Prof Jonas Ebbesson, Chair of the Aarhus Compliance Committee: "The Aarhus Convention on Access to Justice, and Compliance by the UK"

Sybille Grohs, Compliance Promotion, Governance & Legal Issues, DG Environment, European Commission: "The (past and future) role of the European Commission in influencing UK environmental law"

Jeffrey Gracer, chair of the New York Bar Environmental Law Committee, Sive Paget and Riesel

Session 2: UK Environmental Law: a view from commercial practice
Session Chair: Stephen Tromans QC, 39 Essex St

Discussion focusing on:

- Future trends in Environmental Law practice
- Will the pure environmental lawyer exist in future?
- How can environmental lawyers be relevant to their corporate and finance partners?

Discussion featuring:
Doug Bryden, Head of Environment and Safety Law at Travers Smith LLP
Matthew Townsend, Head of the London Environmental Law Practice for Allen and Overy LLP
Georgie Messent, environment partner at Bond Pearce LLP

Session 3: Working Party Sessions
Sessions potentially covering key updates on waste, water, climate change and energy, transactions, nature conservation and devolution. Speakers TBC but including Prof Colin Reid, Dundee University, on biodiversity offsetting, and Associate Prof . Zhao Yuhong, Chinese University of Hong Kong, on China's response to the challenge of Climate Change

Sunday 14th July

Session 1: Working Party Sessions
As Saturday – delegates will have a choice of up to 4 sessions

Session 2: Hot Topics (not just cases)
Session Chair: Mark Brumwell, UKELA Chair

- Sending environmental cases to Europe: Judicial Reluctance to refer
  Justine Thornton, 39 Essex Street, and Richard Drabble QC, Landmark Chambers
- Details of cases sent and not sent to Europe
- An analysis of judicial reasons for not sending cases
- Implications of the current reluctance
- The potential for reform
- Hot cases: David Hart QC, One Crown Office Row
- Your essential update on key cases in environmental law practice

CPD points 8.5 requested (for those who attend all sessions)

Advertising rates for 2013

UKELA is offering competitive advertising rates for its website (www.ukela.org) and its journal, e-law, for 2013. As a small charity, UKELA needs to make sure that it covers all its costs so that it can deliver its charitable objectives more effectively. The costs below cover staff time to gather information and disseminate it to our 1500 plus members. As the leading environmental law association in the UK we directly reach most of the environmental law professionals with regular events mailings, our bi-monthly journal e-law and a website visited by members and the public.

The UKELA website averages about 4,000 visitors a month, with over 70% being new visitors. They visit about 13,000 pages on the site with the home, environmental law, events and student pages being the most popular.

Visitors to the website – and UKELA's members – are interested in general environmental law and environmental issues, climate change and energy, water, waste, contaminated land, nature conservation, planning, sustainable development and environmental litigation. UKELA's journal, e-law, is received by over 1500 people every two months. They include solicitors and barristers, environmental consultants, regulators, government decision makers, academics and students. UKELA's student membership has doubled in the last year and they have a lively interest in new developments.

If you plan to advertise regularly in e-law or on the website please talk to us to negotiate an annual rate.

Advertising rates for commercial organisations for events and publications:

£115 to advertise in the next member mailing (which may be e-law or an events update) and the next UKELA mailing after that if your event has yet to happen. You will also need to be able to offer a discount to members (minimum 10%) as these offers are advertised as being a member benefit. The bigger the discount the higher the take up is likely to be.

£330 to advertise as above plus on our website www.ukela.org. Events will appear on our events listing page within a week of information being received with a link to your website. Publications will appear in our publications section – special offers.

We can also pass on information to our specialist working parties on request.

If you can offer us a significant reciprocal opportunity – eg for an advert in your publication or leaflets at your event – we are happy to discuss terms. But there will be no free reciprocals for offering a discount to members only.

Costs are per event and per publication. Discount for multiple entries: 20% on all entries that are agreed together.

Advertising rates for NGOs/charities:

Events advertising is free of charge to NGOs and charities provided you are able to offer us a reciprocal opportunity to advertise our event to your members.

Rates for academic institutions/other non commercial organisations:

£52 per event or publication in our next member mailing; £52 to add to www.ukela.org

Advertising rates for 2013

UKELA members (companies advertising must be UKELA corporate members): 30% off these rates

Jobs:
e-law or intermediate mailing and UKELA website: £280 per advert

Your online recruitment advertisement will appear within a week on www.ukela.org for up to 3 months (or until the closing date or when you advise us that the post has been filled), and will be included in the next issue of e-law or an intermediate mailing, subject to publishing dates.

UKELA website only: £180 per advert

Your online recruitment advertisement appears within a week on this website for up to 3 months (or until the closing date or when you advise us that the post has been filled).

e-law or intermediate newsletter mailing only: £115 per advert

Your recruitment advert will be included in the next issue of e-law, subject to publishing dates.

Costs for NGOs, academic institutions and statutory bodies including local authorities

- e-law newsletter & UKELA web site: £105 per advert
- UKELA website only: £57 per advert
- e-law newsletter only: £57 per advert

UKELA members: (companies advertising must be UKELA corporate members) 30% off these rates

Deadline for material for March edition is 7th March 2013

UK Environmental Law Association

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

For information about working parties and events, including copies of all recent submissions contact: **UKELA, PO Box 487, Dorking, Surrey RH4 9BH or visit** www.ukela.org

Vicki Elcoate
Executive Director
The Brambles
Cliftonville
Dorking RH4 2JF
vicki.elcoate@ntlworld.com
01306 501320

e-law

The editorial team wants articles, news and views from you for the next edition due to go out in March 2013. All contributions should be dispatched to Catherine Davey as soon as possible by email at: catherine.davey@stevens-bolton.com by 7th March 2013

Letters to the editor will be published, space permitting