

**Public involvement in environmental
matters and the funding constraints in
securing access to justice**

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Research Degree PhD

A thesis submitted in fulfilment of the requirements of the University of
Hertfordshire for the award of the degree of
Doctor of Philosophy based upon published works

April 2008

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ABSTRACT AND METHODOLOGY

This thesis brings together six works published between 2003 and 2007 which consider public involvement in environmental matters. The later works focus on access to justice, one of three elements of public involvement. The works support the thesis that aspects of public involvement and, in particular access to justice in environmental matters, remain elusive for many individuals and groups in society; something that is inconsistent with both domestic and international law. They include analysis of why the need for participation arises and how it should be secured. By publishing primary research and new commentary the publications identify the gaps in the provision of public involvement in environmental matters and offer options for change. They have also informed further research and debate. The publications are brought together in this submission in chronological order, which illustrates how the hypothesis develops. The works are critically appraised in an introductory chapter.

Public involvement is first discussed in *The Prestige oil disaster, another example of the West living beyond its means* (Environmental Law & Management 15[2003]1 16 (Jan 2003). LawText Publishing, Banbury, UK) and sets the backdrop for the later works. It highlights some of the key environmental problems of our time including, for instance, that environmental protection remains subservient to the pursuit economic development. *Getting to the real EIA* (Journal of Environmental Law, (2003) Vol 15, No. 2, p. 141 Oxford University Press, Oxford, UK) considers the role of public involvement in major land use development

decision making by analysing one of the key participatory areas of public involvement; environmental impact assessment (EIA). EIA places emphasis on access to information and public participation in helping to prevent rather than alleviate adverse socio-environmental impacts. It is argued in *Getting to the real EIA* that for the major development projects requiring EIA, public participation is nominal in nature and that, often, is entirely absent.

While *Getting to the real EIA* considers information and participation, access to justice is the focus of the third work; *Civil law aspects of environmental justice* ((2003) Environmental Law Foundation, London, UK). The work is based upon primary research which was necessary once it became evident that there was little, if any, data on how effective the judicial system is in securing access to environmental justice. The research conclusions were critical of the present judicial system highlighting that, in practice, a legal remedy was often unavailable individuals and communities in challenging environmental decisions and resolving environmental problems; the most significant barrier being prohibitive expense. This was to such an extent that the UK Government was not meeting its international obligations.

The failure to provide effective access to the courts as highlighted in *Civil law aspects* prompted the publication of the later work; *The cost of doing the rights thing* (Environmental Law & Management 16[2004]2 p. 59 (Mar 2004). LawText Publishing, Banbury, UK) which reviews the problems of access to environmental justice and then proposes innovative ways of starting to resolve those inherent in the legal justice system, including liability for an opponent's costs if any legal challenge is ultimately unsuccessful.

As the arguments surrounding funding constraints on access to justice were crystallising, the need to produce a substantive text clarifying the environmental rights and responsibilities of all interested parties became clear. This prompted the publication of *A Practical Approach to*

Environmental Law ((2005). OUP, Oxford, UK) which is, in the main, a practitioner's text. However, the text also seeks to explain and raise awareness of the environmental rights that are available in the UK and the notion that public involvement in environmental decision-making has a central role. For instance, Chapter 2 *Environmental rights and principles* which is incorporated into this submission, outlines the main aspects of information, participation and access to justice and explains their relevant judicial and governmental application. While *A Practical Approach to Environmental Law* is novel in its comprehensive approach, its primary purpose is to inform readers, in an objective way, of the present legal position. Its inclusion in this submission is to illustrate how the arguments raised in the earlier publications have been presented to a wide audience.

The final published work, *Current concerns in environmental decision making* (Journal of Environment and Planning Law [2007] p. 536 Sweet & Maxwell, London, UK), places the argument of limitations of access to justice alongside the parallel and associated problems of an unwilling public protector and a conservative judiciary. It revisits the need for public participation in environmental matters by highlighting the reluctance of public bodies and the courts to take the issue of environmental justice seriously. It also argues that recent efforts in access to justice are largely superficial and that fundamental change remains necessary. The final paper was presented at the University of Kent, Critical Lawyer's Conference on 24 February 2007.

The submitted works follow a distinct theme by exploring the application of public involvement in environmental matters highlighting what is the main criticism of the public participatory provision in the UK the provision of access to the courts without prohibitive expense. The works have also been directly related to practical experience and work in seeking to improve the position.

In drawing the published works together in one volume it has been helpful to outline some of the underlying issues relating to public involvement

including what is meant by public participation, any levels and limitations to the rights now said to be conferred. This analysis has been provided in an expanded introduction which also includes a critical appraisal of the main published works.

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22nd April 2008

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1 INTRODUCTION AND CRITICAL APPRAISAL

This submission brings together a range of works published between 2003 and 2007 which considers public involvement and access to justice in environmental matters in England and Wales. The collected works support the thesis that aspects of public involvement and, in particular access to justice in environmental matters, remain elusive for many individuals and groups in society; something that is inconsistent with both domestic and international law.

An objective of the research project has been to highlight the problems of public involvement in environmental matters through the publication of primary research and new commentary. Another has been to find a clear path through the complexity of environmental democracy in an attempt to resolve the problems raised in the published works. It has sought to highlight the pitfalls in the implementation of environmental regulatory control and public participation rights. This has involved identifying the gaps in the provision of environmental public participation and offer options for change. This introductory analysis reviews the published works and considers the underlying issues relating to public involvement including what is meant by public participation, any levels and limitations to the rights now said to be conferred on members of the public.

The emergence of public involvement in environmental matters

Public involvement in environmental matters is not new. For as long as people have been involved in local decision making some members of the public have been involved in matters that affect the environment, for instance in the development and application of early public health legislation. Further, environmental litigation has been pursued in the UK since at least the 19th century. *St Helen's Smelting Co. v Tipping* [1865] XI HLC 644 is a paradigm case of nuisance in which the claimant was awarded compensation for damage to his property including trees, crops

and cattle caused by 'noxious gases, vapours and other noxious matter'.¹ There has also been legislation providing, at least in principle, access to the courts. For example, the Noise Report 1963 found that there were concerns with the application of the Noise Abatement Act 1960 including the need for at least three occupiers of premises to make a complaint about noise to the court under the provisions of what is now s 82 of the Environmental Protection Act 1990 (EPA 1990). The Report concluded that there was, 'as yet, insufficient experience of the working of the present provisions of the Act to justify disturbing them.'²³ Notwithstanding the opportunity of access to the courts; the related rights of proprietary interest, sufficient interest and cost have all had limited its scope.

Further evidence of early public participation is found in the Report of the Committee on Administrative Tribunals and Enquiries of 1957 (the Franks Report) which considered the role of public involvement in land use planning. This report was published less than a decade after the Town and Country Planning Act 1947 had entered into force and provided, for the first time, a comprehensive system of land use control in the UK. In 1969, the Committee on Public Participation in Planning: *People and Planning*⁴ again reviewed the role of participation in the land use planning system and then made recommendations for change to address the shortcomings inherent in the system, something outlined below.

What, however, is a relatively recent development is that three inter-related procedural environmental rights have been formalised under European Union and domestic legislation by the ratification of the UNECE⁵ Convention on Access to Environmental Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention 1998). As its name implies, the Convention

¹ cf. Cocks R. *Victorian Foundations in Environmental Protection and the Common Law* ed by Lowry J & Edmunds R (2000). Hart Publishing, Oxford, UK, for a detailed analysis of the case.

² page 18, Cmnd. 2056. HMSO, London, UK

³ The opportunity of an individual to make a complaint for certain limited statutory nuisances had been previously available under s. 105 of the Public Health Act 1875.

⁴ The Skeffington Report HMSO, 1969, discussed further below.

⁵ United Nations Economic Commission for Europe

requires signatory states to ensure certain standards of public involvement in environmental matters in three areas; access to information, public participation and access to the courts. The UK Government and the European Union (EU) ratified the Convention in 2005. It has been transposed through domestic and EU statutory revisions and the reliance upon existing legal provisions such as Part 54 of the Civil Procedure Rules 1998 in providing for judicial review. Although inter-related, the three 'pillars of Aarhus' are often regarded as distinct concepts. Since ratification of the Convention by member states the provision of the three primary environmental rights is no longer discretionary; a point recently affirmed by the courts. In *R (oao of Greenpeace Ltd) v SSTI* [2007] EWHC 311 Mr Justice Sullivan noted at paragraph 49 that in terms of the consultation requirements under Article 9(2) of the Convention:

'... Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will be the executive. The United Kingdom Government is a signatory to ... ("the Aarhus Convention") ...'

Benefits and drawbacks of participation

The inter-related Convention rights are generally regarded as being procedural in nature (as distinct from conferring any substantive environmental rights), providing mechanisms for involvement in environmental matters. Although, it could be argued that the development of these procedural rights may now question the need for a substantive right at all; that is - do the Aarhus rights provide sufficient protection to enable the public to protect their environment sufficiently and to the extent that the public now have, by default and implication, a right to a healthy environment? This could be so, providing the procedural rights are effective and are duly respected by decision makers, regulators and polluters. To properly answer this question and to consider the potential drawbacks and complexities of public involvement and the Convention rights in the UK, it is important to understand where the Convention rights

fit into environmental law and regulation in the UK and also to explore whether there is a need for public involvement at all.

Environmental decision-making and protection in England and Wales is carried out mainly by local and central government bodies and agencies such as local councils, the Environment Agency and the Department for Environment, Food and Rural Affairs. There is a complex and varied system of regulatory environmental protection in the UK, whether home grown or transposed from EU and international law, with a raft of command and control systems in place from land use planning under the Town and Country Planning Acts through to the pollution prevention and control regime recently overhauled under the new environmental permitting scheme. There is also specific legislation such as the Water Resources Act 1991 and the statutory nuisance provisions under Part 3 of the EPA 1990. Finally, there is the continuing development of EU environmental law. The extent of the regulatory control is recognised by many commentators including, for instance, Parpworth *et al* note that an examination of the UK statute book reveals that there is a wide array of environmental offences. ... from breaches of IPPC permits for industrial processes, through health and safety offences, to wildlife crimes ...⁶ In one sense, access to justice within these regulatory regimes may be regarded as adequate. For instance, *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal* identified over 50 different appeal routes under specialised environmental legislation.⁷ However, it has been noted that of those 50 appeal routes the operator, applicant, or developer being regulated has the right of appeal with little or no cost but there is no comparable right available to any other third party, such as a potential statutory consultee or affected party. This limitation is affirmed in a recent report commissioned by the European Commission *Measures on access to justice in environmental matters (Article 9(3)) Country report for United Kingdom*, which commented that:

⁶ Parpworth, J, Thompson, K and Jones, B (2005). *Environmental Offences: Utilising Civil Penalties in Journal of Environmental & Planning Law* p 560. Sweet & Maxwell, London. UK

⁷ Macrory, R & Woods, M (2003). University College London, London, UK

'... for the regulatory appeals discussed above the right of appeal lies with the person or business affected by that decision; i.e. the licence applicant or the person served with a notice. The members of the general public do not have a general right of appeal other than by way of judicial review.'

The reliance upon judicial review has significant limitations. First, it is a remedy of last resort, see e.g. the case of *R v Sandwell Metropolitan Borough Council, ex p Wilkinson* (1998) 31 HLR 22 in which Laws J, as he then was, held that: 'Principle and pragmatism combine to emphasize the legal fact that judicial review is a remedy of last resort' and then refused relief as a matter of discretion on the ground that the applicant has failed to exhaust her remedies). Second, judicial review is not concerned with the merits of a decision or whether any particular decision was right or wrong. The only challenge can be of unlawful process by public decision makers.⁸ Finally, it has been widely documented that judicial review is expensive. The concern of cost and prohibitive expense is where the ratification of the Convention has come under much criticism in the UK, and is discussed in varying degrees in three of the published works.⁹ The latest concern has been raised in the report: *Ensuring access to environmental justice in England and Wales* in which Mr Justice Sullivan notes in his foreword that unless the costs regime in judicial review is changed it will:

'... perpetuate the inevitable inequality of arms between the publicly funded bodies that take decisions in the environmental field and the individuals and environmental groups who have to rely on their own resources if they wish to challenge those decisions.'¹⁰

With such a highly regulated and often sophisticated means of environmental regulation it is reasonable to ask why there is a need for

⁸ see e.g. House of Commons Library (2006). Research Paper 06/44, Judicial Review: A short guide to claims in the Administrative Court. HMSO, London, UK. See also: *Adan v Newham London Borough Council* [2001] EWCA Civ 1916)

⁹ *Civil law aspects of environmental justice, The cost of doing the rights thing, and Current concerns in environmental decision making.*

¹⁰ *Ensuring access to environmental justice in England and Wales*, Report of the Working Group on Access to Environmental Justice.

public participation at all. It could be argued that the public control of pollution and development provides effective and adequate environmental protection. There are a number of good reasons why public participation in environmental matters is necessary. First, the regulatory systems currently in place are not perfect. By way of example, the inadequacies of the statutory nuisance regime are highlighted in *Current Concerns* which argues that the concept of 'best practicable means' (which is central to the legislation's application) has little to do with 'best' at all, and is instead merely a 'reasonably practicable' standard that is applied inconsistently and often incorrectly by public bodies. The conclusion reached is that 'with public bodies often unwilling, impotent or incompetent it remains necessary for the public to look elsewhere for a remedy, including the courts.'¹¹

There is also a question of personal or self-interest in the outcome of decision-making. This was posed recently by Ken Livingstone when discussing why the government was so resistant to local energy production in favour of nuclear energy. Mr Livingstone explained that:

'[all] these civil servants know that when they retire there'll be a job for them on the board of British Nuclear Fuels. They know Greenpeace isn't going to give them £40,000 a year for doing two days a week ...'¹²

Further, public involvement can actually assist the decision making process. This point is made well by Jenny Steele in *Participation and Deliberation in Environmental Law*:

'There are a number of things which citizens might offer to the decision-making process. One of these can be summarised as 'situated knowledge'. Those who are closest to a problem and its effects may in certain respects have derived a greater understanding of that problem than those ordinarily required to resolve it. This might be expected to be the case with citizens

¹¹ cf. p. 152, Stookes, P. *Current concerns in environmental decision making* in *Journal of Planning and Environmental Law* 542 April (2007, Sweet & Maxwell, London).

¹² Ken Livingstone. *When Thom met Ken* in the *Observer Magazine* p 24 (23.3.08, The Observer, London).

who can be referred to as 'affected parties' - the people who will feel the effects of the environmental problems most closely. However other groups may provide the opposite and complementary virtue, of breadth of reflection. These could be referred to as 'interested' parties. 'Interested' parties are often those who have reflected broadly about a particular set of problems, such as conventions or bio-diversity, including non-governmental action groups such as environmental groups. ...

Furthermore, it is argued that dissenting views should be carefully considered where any claim to 'knowledge' is asserted, particularly in an area where there are many uncertainties. Scientific claims are increasingly debated in the public realm, and citizens are supposedly more able to gain access to information on the basis of which knowledge-claims can be asserted and questioned. ... One suggestion here is that the public through its very scepticism and willingness to question scientific claims, may provide important decision-making resources in respect of information, where those with responsibility for decisions choose to recognise this.¹³

The benefits of public involvement provide the backdrop for *Getting to the Real EIA* and both the consideration of participation in the EIA process and the argument forwarded to significantly increase the level of EIAs carried out in the UK. In particular, the work notes:

'Glasson et al¹⁴ suggest that key benefits of public participation in EIA include the chance to convey information, clear up misunderstandings, allow a better understanding of relevant issues and to identify areas of controversy ... Early public participation can minimise public frustration and anger and so help to avoid the possibility of more forceful 'participation'. Tabb believes that including a vehicle for public participation potentially enhances public trust of government decision-making, reduces litigation and serves to coordinate and reconcile various strategies of achieving public interest objectives.¹⁵ In practice, individuals and communities often simply want to take part in decision-making and contribute meaningfully to the debate about a particular development. And when this properly occurs, they feel more satisfied than if attempts have been made to restrict their involvement. A project

¹³ Steele J, *Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach* in Oxford Journal of Legal Studies 415 (2001, OUP, Oxford).

¹⁴ Glasson et al in *Introduction to Environmental Impact Assessment* (1999 Spon Press, London).

¹⁵ Tabb, (1999) W *Environmental Impact Assessment in the European Community: Shaping International Norms* Tulane Law Review 953.

generally proceeds more smoothly if local people support, or at least do not obstruct, the proposal.¹⁶

A critical but often overlooked point in support of public involvement in decision making is that those people that have to live with a particular development or operation long after the decision has been taken should have an effective and influential input into the decision as to whether or not it should proceed at all. It provides 'a chance for communities and individuals that have to live with the long-term effects of development to inform and be part of the decision-making process.'¹⁷ This interest in the outcome or effect of decision making, however, assumes some legitimate basis. The interest is not, for instance, formally recognised in the regulatory systems. If it were, there would be a third party right of appeal of third party's in most if not all of the 50 appeal processes referred to by Macrory and Woods.¹⁸ Such a right has been expressly denied in land use planning despite a cogent argument in support.¹⁹ This then raises the question of why a developer or operator should have certain rights or interests that appear to be greater than others, even though those other persons may be directly affected by the decision. It also raises the question of what rights are available to the public in decision making, something that is considered further below.

It may be that public participation is necessary, but it is not unanimously regarded as a benefit for all. If, for example, the public interest is best served by public bodies and they are, in turn, governed by elected members voted into power by the public, then public participation may only be an inconvenience to effective decision-making; the argument being that public involvement is best carried on at the ballot box. Thereafter, the public should simply let those democratically elected persons and bodies take decisions on behalf of the electorate. This was the position of the

¹⁶ p 56, Stookes, P. (2003) *Getting to the Real EIA*, p 142-3 OUP, Oxford.

¹⁷ op cit. p 56.

¹⁸ Macrory, R & Woods, M (2003), UCL, London, UK

¹⁹ See e.g. Stookes, P & Razzaque, J. (2002) *Community Participation. The UK planning reforms and international obligations*. Environmental Law Foundation, London, UK and Green Balance & others (2002) *Third Party Rights of Appeal in Planning* CPRE & others, London, UK.

House of Lords in *R (on Application of the Campaign for Nuclear Disarmament and others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 when considering a breach of Article 6(1) of the European Convention of Human Rights and the procedural right to an independent and impartial tribunal. Lord Hoffman at paragraph 69 noted that:

'69. In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them. ...

70. There is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. ... But outside these basic rights, there are many decisions which have to be made every day (for example, about the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate.'

This argument has some force. However, there are reasons why post-election democracy requires public involvement. First, poor electoral turnouts and voter apathy suggests that society has lost confidence in the political system.²⁰ Also, leaving matters to the elected representatives assumes that they are competent and capable of taking the best decisions for the local community without bias or unfairness. This is not always the case. For the democratic process and governance to work effectively and fairly it requires public involvement in ensuring that the checks and balances on state power operate effectively. It will most often be the public that bring claims to court to ensure the judiciary can exercise its constitutional role in upholding the rule of law. This is recognised by Lord Hoffman in *Holdings & Barnes* at paragraph 72, when he notes that when ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. Without the participatory right of access to justice, the rule of law may break down.

²⁰ See p 62 e.g. *Getting to the real EIA* and the election of a full size cartoon monkey as Mayor.

There are further concerns raised about potential disadvantages of public participation. In *Environmental Protection, Law and Policy*²¹ Jane Holder and Maria Lee suggest that while participation in environmental decision making is welcome, genuine dilemmas remain and in particular that participation might in fact enhance exclusion. They explain that:

'Creating institutions and situations in which meaningful public participation or deliberation can take place is the greatest challenge for those who advocate enhanced public participation in environmental decision making. We should be aware of who is allowed or willing to participate, and how the grounds of the debate might work to exclude some ideas and some people. Exclusion can be direct, be explicitly restricting access to the forum, for example by inviting on certain 'sensible' environmental groups, or only those physically affected by a particular development, to provide information or take part in debate. There are less obvious forms of exclusion. The institutions in which debate takes place may be physically remote or otherwise poorly accessible by those who lack insider knowledge - think, for example, of the obscurity of much EU decision making. The nature of the debate may also serve to marginalise certain positions: debates framed in overwhelmingly technical or scientific terms could limit the discussion of competing experts. It is not unusual to see limitations placed on what counts as 'legitimate' reasoning in environmental debate: most obviously, a narrow approach to 'sound science' or economic efficiency can mean that other concerns are dismissed as 'irrational' or 'NIMBYism' (not in my back yard) ...'

This concern is very real, tokenism in participation may often place a gloss on or legitimise decision making when, in fact, there is little genuine participation taking place. One such example is where major developments or activities are required to establish liaison committees between developers and local residents. However, often these are controlled by the developers to such an extent that participation or involvement into improved operations is meaningless. Usually, the operator prepares the agenda, the minutes and also decides who may or may not be on the liaison committee.²² However, what then is the

²¹ p. 129. 2007, Cambridge University Press, Cambridge.

²² Such is the case for the opencast coal mining liaison committee in Merthyr Tydfil, South Wales, which was set up as a requirement of the planning permission. The conditions provided for the operator to set up and run the committee but they then denied those residents living close to the

alternative? Does weak or illusory participation provide the justification for excluding participation altogether?

Another legitimate question is whether public involvement can impede efficient and proper decision making. Take, for instance, the development of a wind farm. During participation in the policy debate about renewable energy local residents may well support the use of wind farms as a means of cutting reliance on fossil fuels and reducing pollution. However, when participating in the siting of a wind farm locally residents may object to the proposal and such opposition may result in the rejection of what appears to be an environmentally sound development. In effect, participation may have encouraged what may be regarded as the wrong environmental decision. This argument has some weight, however what participation should elicit is that if such a proposal is unacceptable, what is the alternative? If it were the case that local residents were to be the sole beneficiaries of the energy produced by the wind farm would this influence the local community view? Possibly. In the circumstances, the opportunity for public involvement in decision making should not be restricted on the basis that such involvement may result in a decision that is not preferable to the majority or to others who do not otherwise experience the adverse consequences of that decision. Put another way, why should a local community have to pay the price for excess energy consumption of others which necessitates the need for a wind farm in the first place?

One final argument against participation is simple, why should certain people participate in what may be regarded as private matters and when allowing participation results only in cost and delay? This argument is particularly prevalent in land use planning matters where developers may often fail to see why their rights as landowners should be fettered or

site from being members of that committee. It was also the case with the Grampian Foods Liaison Committee in Attleborough, Norfolk whereby local residents were invited to attend liaison meetings which were often cancelled, unreported or if any concerns were raised simply not acted upon. As a result local residents suffered odours, noise, smuts and other pollutants arising from food processing plant operating opposite residents' homes.

regulated by the land use planning system and the public involvement in that system.

Patrick McAuslan in *The Ideologies of Planning Law*²³ explored the competing interests in public decision making when assessing aspects of the land use planning system. He suggested that there were three main competing interests which were; those seeking to protect private property and rights including typically developers, landowners and operators; the interests promoted by public bodies and agencies; and the interests of others, i.e. third parties, that could be involved through public participation. McAuslan considers these interests as three competing ideologies of law explaining:

'... firstly, that the law exists and should be used to protect private property and its institutions; this may be called the traditional common law approach to the law. Secondly the law exists and should be used to advance the public interest, if necessary against the interest of private property; this may be called the orthodox public administration and plan approach to the role of law. Thirdly, the law exists and should be used to advance the cause of public participation against both the orthodox public administration approach to the public interest and the common law approach of the overriding importance of private property; this may be called the radical or populist approach to the role of law.²⁴

He explains briefly how each ideology evolved:

"Planning's historical origins lay in the need to do something about the horrendous living conditions of the new urban working classes in the mid nineteenth century. This involved taking powers to control and regulate the use of property - land and houses. To property-owners in urban areas, this was a new and unwelcome use of governmental power sanctioned by law, and their reaction was to seek the aid of courts and lawyers to protect them against these intrusions, as they saw them, of governmental power. ... The principles development by the courts in the late nineteenth and early twentieth centuries to provide some protection for the urban land-owner against

²³ 1980, Pergamon Press, Oxford.

²⁴ p. 2 *op cit*

government action form the basis of the common law strand, the private property ideology. ...

The second competing ideology is what I have called the ideology of public interest. ... [It] is translated into laws which confer wide powers on administrators to do as they see fit and which either provide no redress or appeal. Special provisions may be made for the land-owner within this system but this is as much because experience has shown that to do so will lessen the chances of judicial interference or make more plausible provisions purporting to deny access to the courts, ...

The third competing ideology (that law is a vehicle for the advancement of public participation) can claim as equally respectable a philosophical ancestry as the other two ideologies; that of J S Mill. It is, however, the most recent and least developed of the ideologies in practice, ... It is none the less an ideology of equal importance to the other two. It sees the law as the provider of rights of participation in the land use planning process not by virtue of the ownership of property but by virtue of the more abstract principles of democracy and justice. These in turn come down to the argument that all who are likely to be affected by or who have, for whatever reasons, an interest or concern in a proposed development of land or change in the environment should have the right of participation in the decision on that proposal just because they might be affected or are interested. This ideology, like the public interest ideology, denies the property-owner any special place in participation; such an interest is merely one of a great number to be considered in the democratic process of decision-making and by no means the most important, particularly when it is in conflict with the majority view; e.g. the tenants of a building have an equal if not greater moral claim to participation than the landlord, public or private, present or absentee. This ideology differs, however, from that of public interest by denying that the public interest can be identified and acted upon by public servants on the basis of their own views and assumptions as to what is right and wrong.

For McAuslan, the rights of those affected can be as important, if not more so, than those with a private interest in the development or the general public interest.

Levels of participation

McAuslan's assertion suggests that the rights of those affected would or should be equal to those pursuing private and often economic rights. However, this is not the case in the UK. To understand this it is helpful to consider the various levels of participation, something explained in what are apparently derogatory terms by Sherry Arnstein in her article *A Ladder of Citizen Participation*.²⁵

'The bottom rungs of the ladder are (1) *Manipulation* and (2) *Therapy*. These two rungs describe levels of 'non-participation' that have been contrived by some to substitute for genuine participation. Their real objective is not to enable people to participate in planning or conducting programs, but to enable powerholders to 'educate' or 'cure' the participants.'

This is consistent with the concerns raised by Holder and Lee as to whether participation is actually a good thing. At this level it may even be causing more harm than good. Arnstein continues:

'Rungs 3 and 4 progress to levels of 'tokenism' that allow the have-nots to hear and to have a voice: (3) *Informing* and (4) *Consultation*. When they are proffered by powerholders as the total extent of participation, citizens may indeed hear and be heard. But under these conditions they lack the power to insure that their view will be heeded by the powerful. When participation is restricted to these levels, there is no follow through, no 'muscle', hence no assurance of changing the status quo, Rung (5) *Placation* is simply a higher level tokenism because the ground rules allow have-nots to advise, but retain for the powerholders the continued right to decide.

Further up the ladder are the levels of citizen power with increasing degrees of decision making clout. Citizens can enter into a (6) *Partnership* that enables them to negotiate and engage in trade-offs with traditional powerholders. At the topmost rungs, (7) *Delegated Power* and (8) *Citizen Control*, have-not citizens obtain the majority of decision-making seats or full managerial power.

²⁵ Sherry R. Arnstein. *A Ladder of Citizen Participation* (1969) 36 *Journal of American Planning Association* 216 p. 217.

Implicit in Arnstein's analysis is that it is only really consultation at the partnership, delegated Power and citizen control levels that has any real worth, below that public participation is either tokenism and effect. That is not necessarily so. Levels of participation may be nominal but nevertheless influential and effective. The relevant factors will not necessarily be what form of involvement the participation takes but the sincerity and commitment to the process allowed by the decision-maker. However, it is conceded that it is all too easy for decision-makers to hear representations and then give them little or no weight under the wide discretionary powers conferred upon the decision-maker.

Problems of securing public participation

In the light of academic debate and the government commitment to the Aarhus Convention 1998 (manifest by ratification) it is reasonable to conclude that public involvement in environmental matters is broadly if not universally welcome. It is then reasonable to test the thesis that aspects of public involvement remain elusive for many individuals and groups in society. The thesis focuses in particular on access to justice and the funding constraints of pursuing legal proceedings. In this case, it is important to assess the limitations on access to information and public participation with reference to the published works.

Since the introduction of the Environmental Information Regulations 2004 (EIR 2004) the UK may broadly be regarded as complying with its Convention obligations in terms of access to information. The Regulations help ensure that there is a presumption in favour of disclosure, while the Freedom of Information Act 2000 (FoIA 2000) has set up a review process for challenging an adverse disclosure decision by reference to the Information Commissioner and then a further appeal to the Information Tribunal, without prohibitive expense. That is to say, there is no appeal fee and the usual litigation costs rules of 'loser pays the winner's costs' does not apply.

Further, the decisions of the Information Tribunal have not been overly conservative. Recent decisions have included clarification on the cost of information provision and disclosure of what had previously been regarded as legally privileged material. In *Markinson v Information Commissioner* (2006) EA/2005/0014 the Tribunal concluded that the Commissioner had not applied the correct test to determine a Council's charges and directed the Council to reassess. It referred to recent government guidance and suggested that copying charges of 10p per page were reasonable adding that the Council 'should be free to exceed that guide price figure only if it can demonstrate that there is a good reason for it to do so.' In *Mersey Tunnel Users Assoc. v Information Commissioner* (2008) EA/2007/0052 the Tribunal ordered disclosure of legal advice given to Merseytravel acting as the public authority. The disclosure being on public interest grounds including that the advice being relied upon was by the time of the disclosure request, several years old.

The only practical factor limiting effective disclosure of environmental information and an equally effective remedy is that, at present, the Information Commissioner's Office (ICO) is unable to cope with the volume of review requests being made and the system may be criticised as not providing a timely review process.²⁶ Nevertheless, and assuming that the ICO can remedy the backlog, the access to information provision as an element of public participation may reasonably be regarded as in place. The UK government through the enactment of the EIR 2004 and the FoIA 2000 can be regarded as Aarhus compliant and as reasonably conferring the environmental right of access to information.

In terms of public participation the question of compliance is not so clear. As Arnstein explained, participation can range from consultation at a notional level to direct decision making. The Aarhus Convention 1998 requires only basic or nominal levels of participation and only in certain circumstances. This is because Article 6 of the Convention only applies to

²⁶ It is the author's experience that the ICO is taking around three months even to allocate application for review to a caseworker. The review conclusion is taking a number of months afterwards.

those activities that are either set out in Annex I or those which are considered to have significant effects on the environment. The Convention then further limits the level of participation of those applicable activities to either the right to be informed about any applicable proposal, the right to make representations to the decision-making body (and for due account to be taken of those representations) and the right to be informed of the decision taken.²⁷ Any additional forms of participation such as the right to make oral representations to a decision maker, the right to vote on any decision, or the right to be a member of the decision making body are at the discretion of the decision maker.

Most regulatory control mechanisms confer the right of the public to be informed and to be make representations.²⁸ Thus, while on the one hand the UK may be regarded as Aarhus compliant through specific information and consultation provision that does not, by itself, mean that public participation in any meaningful sense is available. There are instances of public participation higher up the ladder than consultation. Manns and Wood in their report *Public Representations at Committee Meetings* found that 62.5% of respondent planning authorities allowed public representations at planning meetings.²⁹ The Aarhus Convention 1998 allows member states to provide broader access to information, more extensive public participation and wider access to justice than required by its terms. The Convention is often described as providing 'a floor not a ceiling' of rights.³⁰ And, while oral representations may be offered by many local planning authorities participation rights in the UK tend to dominate the lower end of the participatory scale. This concern was raised in *Getting to the real EIA* and then recognised in *Environmental Impact Assessment - Law and Practice* (2003, LexisNexisButterworths: London) by Stephen Tromans and Karl Fuller who note with reference to *Getting to the real EIA* that:

²⁷ Art 6(6), (7), (8) and (9) of the Aarhus Convention 1998

²⁸ See e.g. the rights under Article of the Town & Country Planning (General Development Procedures) Order 1995.

²⁹ Referred to and cited at page 144 in *Getting to the Real EIA in Journal of Environmental Law* (2003, OUP: Oxford).

³⁰ See, for instance, the Aarhus Implementation Guide (2000, United Nations, New York)

'... it has been pointed out that in England and Wales the EIA 'regime' is at the information and nominal consultation end of the public participation spectrum, and is not securing the active public participation needed.'

In 1969, the Skeffington Report³¹ reviewed the role of participation in the land use planning system and then made recommendations for change. The committee focussed on public involvement in the strategic or development plan process and noting:

"10. The advantages that flow from involvement of the public have been recognised by several local planning authorities whose work has, to some extent, anticipated the requirements of the Town and County Planning Act 1968. That being so, it may be asked why there has been so little to show from past efforts and why, generally, the public has made so little impact on the context of plans. The reasons vary from place to place, but two general points emerge. They are:

(i) First, most authorities have been far more successful in informing the public than involving them. Publicity - the first step - is comparatively easy. To secure effective participation is more difficult.

(ii) Secondly, some of the authorities who have made intensive efforts to publicise their proposals have done so when those proposals were almost cut and dried. At that stage, those who have prepared the plan are deeply committed to it. There is a strong disinclination to alter proposals which have been taken so far; but from the public's point of view, the opportunity to comment has come so later that it can only be an opportunity to object. The authority are then regarded more as an antagonist than as the representative of the community and what was started in good will has ended in acrimony.

11. Where information comes too late and without preliminary public discussion there is the likelihood of frustration and hostility. It may be that the plan produced is one of the best suited to the needs of the community but the reasons for decisions do not emerge, nor are people told why superficially attractive alternatives have been put aside. The failure to communicate has meant that the preparation of a plan, instead

³¹ The Committee on Public Participation in Planning (the 'Skeffington Committee'), *People and Planning* (HMSO, 1969).

of being a bridge between the authority and the public, has become a barrier, reinforcing the separation that springs up so easily between the 'them; of the authority and the 'us' of the public."

Despite being published nearly 40 years ago the concerns raised in the Skeffington Report are relevant today. In *Land and Limits* Susan Owens and Richard Cowell note that attempts to engage the public in plan making enjoyed limited success with a persistent failure to meet certain groups with many models of participation offering 'shadow rather than substance'.³² Further, while the UK Government's now regular series of planning reforms profess to provide a more dynamic and effective land use planning system, its efforts to engage the public are often wanting. For instance, the reforms to 2005 found the maintenance of local development frameworks and the removal of open public inquiries in certain strategic planning fora a mechanism of limiting rather than increasing public participation.³³

The court has recently been critical of the government in breaking its promise to provide the fullest public consultation on the review of energy policy. In *R (oao Greenpeace Ltd) v SSTI* (referred to above) that a Government promise to the 'fullest public consultation' was not met. In *Greenpeace*, the Court made a declaration that there was a breach of the claimant's legitimate expectation to fullest public consultation; that the consultation process was procedurally unfair; and that therefore the decision in the Energy Review that nuclear new build "has a role to play ..." was unlawful. In his judgment Mr Justice Sullivan noted at paragraph 48 that:

Given the importance of the decision under challenge — whether new nuclear build should now be supported — it is difficult to see how a promise of anything less than "the fullest public consultation" would have been consistent with the Government's obligations under the Aarhus Convention.

³² Owens, S & Cowell, R *Land and Limits: Interpreting sustainability in the planning process* (2002, Routledge, London).

³³ See e.g. Stookes, P & Razzaque, J. *Community Participation. The UK planning reforms and international obligations* (2002, Environmental Law Foundation, London).

Getting to the real EIA concludes that environmental impact assessment provides a genuine opportunity to secure effective and meaningful public involvement in major environmental decision making. However, the hypothesis is that, after two decades of policy, legislation and guidance on the benefits of public involvement in EIA is far from clear. Following initial analysis and discussion the hypothesis appeared inaccurate. However, the paper concludes that such an antithesis can only be sustained if it is accepted that effective public participation is satisfied by notional levels of information provision and consultation. If it is accepted that effective participation requires greater involvement than information provision and consultation, and that some form of active participation is necessary, such as the right to directly communicate with decision makers or the right to properly test any opposing view, then effective participation remains rare and the hypothesis is correct.

Often the environmental statement produced is inadequate (see, for example, the environmental statement for a waste slurry system in Cornwall that failed to highlight certain significant environmental effects and failed to submit a non-technical summary.³⁴) But of equal concern is that development projects that should be subject to EIA are avoiding the process altogether through failure of planning authorities to properly screen the project. Either, the planning department fails to recognise the adverse impacts, for instance by accepting the developer's statement that there are no adverse effects, or it concludes that there will be no significant environmental effects because of the mitigation measures proposed. Each of the conclusions is unlawful. The last conclusion in taking into account mitigation measures has been subject to recent judicial consideration. In *R (oao Catt) v Brighton & Hove City Council* [2007]

³⁴ www.ncdc.gov.uk: Planning applic. no. 2007/02120: retention of the enlargement of dirty water separation unit at Pawton Dairy, St Breock.

EWCA Civ 298, the Court concluded that it was entirely appropriate to mitigation measures into account.³⁵

Reference to *Getting to the real EIA* is made by S Hockman QC (Leader of the South Eastern Circuit) who, in his paper *Environmental Considerations in Planning 2003* presented to the Oxford Planning Conference took issue with the role of EIA and environmental concerns in land use planning. Hockman notes that:

‘Some, such as Paul Stookes in his paper ‘Getting to the Real EIA’ present the historical purpose of the planning system as giving *priority for the development of land over other uses, such as habitats and benign agricultural uses*. A purpose which he argues persists to the present day. I suggest a slightly different view. I suggest that the planning system was and is designed to mediate between competing interests including the environment. Whilst I understand the position taken by Stookes and other that the environment has for too long been under-represented within the planning system, I shall consider whether the various methods of asserting the significance, some would say pre-eminence, of the environment through the planning system have been successful.’

This approach to EIA and the environment in the context of planning is not uncommon. It sees environmental matters including the associated environmental rights informing land use planning when, strictly, land use planning is simply one of the mechanisms of regulating the environment and protecting it. To place distance between the environment and land use planning means that the environmental rights conferred by the Convention may not necessarily apply to all land use planning matters, which, it is submitted, is incorrect.

Getting to the real EIA is important in highlighting the nominal nature of public participation in environmental matters even in the largest development projects. The UK Government could confer elevated rights of participation in EIA matters. It could be achieved by issuing statutory

³⁵ The European Commission has concluded otherwise and is to take formal complaint steps against the UK. The Claimant in *Catt* is seeking leave to petition the House of Lords against the decision of the Court of Appeal.

guidance to that effect and it would be entirely consistent with the Convention's principle of member state's conferring elevated rights beyond the minimum standards conveyed by the Convention. However, until greater participation is conveyed to the public, then genuine and meaningful public involvement in EIA matters is likely to remain illusory.

In contrast to nominal levels of public participation, rights of access to environmental justice contained in the Convention appear quite robust. And it is perhaps the high level of this right that helps emphasise why the UK Government failing to meet its access to justice obligations. Article 9 of the Aarhus Convention 1998 confers a right to participate in the review procedures and access to the courts. The rights are explicit in Article 9(4) which provides that review procedures shall:

'... provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. ...'

If the Convention's access to justice provision imports the qualities of public participation advocated by McAuslan above, that is to say, that the public should have equal status to public bodies and private interest rights, then it is reasonable to conclude that the legal justice system or review procedures in environmental matters are neither fair, nor equitable. To be so would require, for example, third parties to enjoy a right of appeal in land use planning matters that reviewed the merits of any planning decision; something expressly denied by the Government.

Aside of the elevated McAuslan-style rights, there can be less criticism of the legal justice system *per se* that it breaches the Aarhus obligations and it may reasonably be said that the rights conferred are consistent with the overriding objective contained in Part 1 of the Civil Procedure Rules 1998 (CPR 1998) which helps ensure that legal proceedings are dealt with justly, expeditiously, and fairly. There is, however, one major exception which has been the subject of much debate and judicial comment all of which, to date, been *obiter*. It is the requirement that review procedures

are not prohibitively expensive. The fundamental problem is that the Government is relying primarily upon judicial review to provide its review procedures (outside the access to information provisions) and this imports the general costs rule contained in Part 44.3(2) of the CPR 1998 that the loser pays the winners costs in legal proceedings. When private interests alone are at stake, then the Part 44 rule is, perhaps, less contentious; but when environmental matters are being litigated then the Article 9(4) obligation of non-prohibitive expense should prevail.

The concerns about costs raised were tested in the research report, *Civil law aspects of environmental justice*. The primary purpose of the *Civil law aspects* study was to evaluate the effectiveness of environmental justice for communities and individuals experiencing environmental problems and how they are assisted by the present judicial system. The conclusion found that the risk of losing legal proceedings and being liable for the other side's costs was a significant bar to potential claimants pursuing legal proceedings.

Publication of the study was reported in the leading environmental monthly magazine ENDS³⁶ which recognised that "the study has provided valuable new data on the realities of access to environmental justice." The New Law Journal³⁷ commented that:

'A "radical" scheme is required to protect the public from the consequences of environmental harm because traditional legal remedies don't work, according to the author of a groundbreaking six-month study on the delivery of environmental justice.'

The quarterly environmental journal Sustain³⁸ noted that the report emphasised the unique nature of environmental law with, on average, 869 people being affect by each environmental problem. It also found that, in terms of annual income, the largest groups of people contacting ELF

³⁶ p 345, October 2003, ENDS, London, UK

³⁷ p 3, October 2003, LexisNexisButterworth, London, UK

³⁸ Volume 4(6), 2003, Sustain, Manchester, UK

about environmental problems came from the lowest income groups of under £10,000.

The report was also discussed in the *Journal of Planning and Environmental Law*³⁹ which highlighted the reports concerns that the majority of cases under analysis were ultimately unsuccessful and that there was an inherent difficulty for those with scarce resources to go to law. As well as contemporary critical review, the findings were also highlighted in the *Guardian* newspaper article of 23.6.04 which quoted from the report that “too often, legal action that had reasonable prospects of success has not been pursued because it has been prohibitively expensive to do so.”

More recently, the study has informed eminent judicial commentators. In the paper: *Environmental Justice: The Cost Barrier*⁴⁰ presented to the Law Society by Lord Justice Brooke stated that:

‘In 2003, the Foundation published its report on Civil Law Aspects of Environmental Justice. The author analysed hundreds of potential claims that did not make it to court. He concluded that in 31% of these cases it was the cost of pursuing a legal action which was the main reason why the challenge was not advanced. The clients had been advised that they had a reasonable case, but they abandoned it when told about the likely costs. The study also revealed that only 30 solicitors’ firms in England and Wales had a full LSC franchise for public law. And because of the perceived lack of profit in environmental law, UK lawyers in general had little interest in it.’

Lord Justice Brooke gave the leading judgment in the case *R (Burkett) v Hammersmith & Fulham LBC and others* [2004] EWCA 1342, noting at paragraph 80 that:

‘If the figures revealed by this case were in any sense typical of the costs reasonably incurred in litigating such cases up to the highest level, very serious questions would be raised as to the

³⁹ pp 4-5 of Jan 2004, Sweet & Maxwell, London, UK

⁴⁰ The Professor David Hall Lecture 2006 *Journal of Environmental Law*, No. 3 2006, OUP, Oxford, UK.

possibility of ever living up to the Aarhus ideals within our present system. And if these costs were upheld on detailed assessment, the outcome would cast serious doubts on the cost-effectiveness of the courts as a means of resolving environmental disputes. ... An unprotected claimant in such a case, if unsuccessful in a public interest challenge, may have to pay very heavy legal costs to the successful defendant, and this may be a potent factor in deterring litigation directed towards protecting the environment from harm.'

The publication is also referred to extensively in the sister report and publication *Environmental Justice*⁴¹ Most recently, *Civil law aspects* informed the report *Ensuring access to environmental justice in England and Wales* which made a number of recommendations relating to access to justice in environmental matters including, among others, that a bespoke approach to Protective Costs Orders (PCO) be adopted in environmental cases to which the Aarhus Convention 1998 applies and that where a PCO is made that it secures compliance with the Convention's obligation to ensure proceedings are not prohibitively expensive.⁴²

The cost of doing the rights thing: overcoming the problem that environmental justice remains prohibitively expensive for the majority of the 'public concerned'.⁴³ It proposes that the government and the legal justice system are sending out contradictory messages about what they want from society in terms of protecting the environment noting that:

'First, we want you to taken an active role in protecting your environment. We want you to pay for it by way of taxes to cover the cost of public bodies carrying out that protection. We also want you to pay for any review of a public body when they fail to look after the environment on your behalf. Finally, we will ensure that the potential cost of reviewing that public body will be so high that you will not risk legal action for fear of personal financial ruin.'

⁴¹ Castle, P, Day, M, Hatton, C & Stookes, P (2004) WWF & others, Godalming, Surrey.

⁴² Report of the Working Group on Access to Environmental Justice (April 2008) WWF-UK. Godalming, Surrey, UK

⁴³ co-authored with Phil Michaels, head of legal at Friends of the Earth [90:10 Stookes/Michael contribution]

The work seeks to clarify and to begin to resolve the single biggest obstacle in securing access to environmental justice for concerned members of the public, namely the justifiable fear and unquantifiable risk of facing high financial costs in taking legal action. It is an innovative article proposing a new kind of approach to costs in public law matters with the award of a Public Interest Certificate in certain cases that involve environmental matters. The article and a subsequent briefing paper published by the Coalition for Access to Justice for the Environment (CAJE)⁴⁴ was followed by a briefing session in the House of Commons in July 2004 in which members of the legal profession together with Members of Parliament discussed and debated the problems of inequity in environmental matters. The CAJE briefing paper again informed *Ensuring Access*. In essence, the concerns set out in *Civil law aspects* and the proposals contained in *The cost of doing the rights thing* have informed this critical area of public involvement in environmental decision making. However, until such proposals are adopted and implemented the problems remain.

There is further recognition of the persistent problems of public involvement in environmental matters in *Current concerns in environmental decision-making*. The work explains and examines two key problems; that at both local and national level there is continuing government inertia in genuinely responding to and resolving environmental harm, and that when faced with a lack of state intervention, individuals and local communities continue to face an uphill struggle to effectively resolve the problems themselves.

The second problem identified in *Current concerns* includes an analysis and argument of recent developments taking into account the approach of the judiciary to limitations in access to justice as a result of prohibitive expense. The work concludes that an effective environmental justice system cannot properly be based upon a discretionary public funding

⁴⁴ CAJE is a coalition of environmental NGOs including the Environmental Law Foundation, Friends of the Earth, Greenpeace, RSPB and WWF.

system and a patchwork of inconsistent cost protection measures. It adds that:

'The Government is placing great emphasis on the importance of environmental protection and preservation yet its environmental access to justice provisions are, quite frankly, a mess. There may be adequate review procedures for developers and polluters as part of the regulatory control provisions, but for those seeking to assert their environmental rights, the outlook is unclear. Perhaps most disturbing of all is that, on occasions, not only is the legal justice system weighted against communities seeking to protect their environment, but the very public bodies that should be protecting their interests appear to be more willing to assist the polluter. The inequality of arms among litigants is widespread and is often worsened in the courts with the polluted frequently coming off second-best.'

The question of inequality of arms was the discussed in the article 'How Green was your Valley': Independent Lawyer, February 2007, which highlighted the problems facing local communities in South Wales resisting proposals to develop the largest opencast coal mining site in the UK. The inertia or ambivalence in public bodies is illustrated starkly by the following case study which in concluding this section draws together a number of the themes and illustrates the main thesis of the research.

Case study

Local residents in Publow, a rural hamlet south-east of Bristol in the UK, have been suffering odour, noise and other pollution problems from the operations at a nearby waste composting site for over five years. The waste site was granted temporary planning permission in 2000 and a waste management licence in 2001. The locality is green belt land.

The waste company has breached its waste management licence on numerous occasions since 2003. It has been served with at least 10 formal notices by the Environment Agency, including suspension notices. It has been served with at least three abatement notices by Bath & North East Somerset Council. It has been cautioned twice and prosecuted at

least once. Despite this, the waste company continues to operate in a manner that causes odour and other pollution in the locality. Without any effective control for four years by either the Environment Agency or the Council two residents, Mr Morgan and Mrs Baker, issued nuisance proceedings against the company as a last resort, claiming an injunction to stop the pollution problems.⁴⁵

In January 2007, Mrs Baker also issued judicial review proceedings against the Council on the ground that the Council failed to comply with the EIA Regulations 1999 when considering three retrospective planning applications which would help the waste company increase its operating activities and result in increased pollution. Permission to proceed with the judicial review was granted on the 20th June 2007. The matter has entered the warned list.⁴⁶

There is also concern that the Agency has failed to properly assess the waste site for bio-aerosol emissions. It has had the opportunity to request a site-specific bio-aerosol assessment on a number of occasions but has failed to do so. The Agency understands the concerns expressed by local residents that the site is operating contrary to its own guidance on bio-aerosols emissions (i.e. that compost waste sites should not operate within 250 metres of properties without providing an independent site specific bio-aerosol assessment) but has failed, to date, to take any action to resolve those concerns.

In June 2007, odour problems became serious. The Council recognised this and purported to take steps to enforce a breach of an abatement notice issued on the 1st July 2005. The Agency took steps to enforce breach of the waste management licence and issued a breach of condition notice on the 24th July 2007.

⁴⁵ *Morgan & Baker v Hinton Organics (Wessex) Ltd* HQ06X02114, 7BS90899

⁴⁶ *R (oao Baker) v Bath & North East Somerset Council* CO/397/2007

Serious odour problems continued during September and into October 2007, by which time conditions had deteriorated to the worst ever experienced. The Council explained that it was unable to take prosecution proceedings against the Defendant due to defects in more than one abatement notice. The Agency did not confirm one way or another whether it was going to take any action. Both the Council and the Agency agreed that there were odour problems emanating from the Defendant's site. The Claimants considered that they had no other option than seek to interim relief from Court and an application for an injunction was issued on the 25th October 2007.

Various steps were taken to avoid an injunction hearing, including seeking an undertaking from the Defendant on more than one occasion. The Claimants made it clear to the Defendant that it was not in a position to providing a undertaking in damages in the event that an interim injunction was granted.

An interim injunction was granted on 9th November 2007 by the High Court to prohibit the Defendant from causing odours at or in the immediate vicinity of the Claimants' respective properties situated at the Claimants' homes at levels that are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of those properties as perceived by either (a) an authorised officer of the Environment Agency; or (b) an authorised officer of Bath and North East Somerset County Council.

The Agency and the Council were advised of the order of the 9th November 2007 and both objected to the terms of the order in that they may become a party to civil proceedings. There was correspondence between all the parties including clarification from the Court as to the judge's understanding of the position and that neither the Council nor the Agency would be asked to do anything outside of their normal functions.. The Agency and the Council nevertheless pursued the application to remove reference to them. This application was supported by the

Defendant. As a result, the Court concluded that the injunction should be discharged. There was a costs order against the Claimants that they should pay the costs of the Agency, the Council and the Defendant in circumstances where the High Court had ruled that there was a serious issue to be tried and that the Claimants deserved some form of interim protection. The costs award amount to some £25,000.

The Claimants appealed the costs order of 21st December 2007 on the ground that is contrary to Article 9(4) of the Aarhus Convention 1998 in that such an order is prohibitively expensive. Permission to appeal is now being by the Court of Appeal, the costs order has now been stayed.

On 7th April 2008 the trial began in Bristol District Registry. However, during cross examination of Mr Morgan by the Defendant, the Claimants made an application that the Defendant's expert evidence be ruled inadmissible on the ground that the Defendant's consultant was also employed by the Council. The Council determined the planning applications for the site and determined whether to take any enforcement proceedings on this. It also determined whether to take any action for statutory nuisance. The Court granted the application and ruled that the Defendant's expert evidence was inadmissible. The Defendant then asked for an adjournment, which was granted by the court.

The courts have recognised the Convention on a number of occasions and expressed concern about costs. See, for example, *R v LB Hammersmith & Fulham ex p Burkett* [2004] EWCA (Civ) 1342 at para 74, *R (oao England) v LB Tower Hamlets & others* [2006] EWCA Civ 1742 and *Davey v Aylesbury Vale DC* [2007] EWCA Civ 1166. However, they have not directly considered whether or not a particular costs order is prohibitively expensive. The Claimants contend that the judgment of the 21st December 2007 does not satisfy the criteria set out in the Convention of ensuring adequate and effective remedies that are fair, equitable, timely and not prohibitively expensive.

The practical effect of the order of 21st December 2007 left the Claimants without any form of redress or effective remedy against the Defendant if there were recurring nuisances before trial. Odours problems occurred on the 3rd January 2008, the Council recognised these. No regulatory action was taken to resolve these. In February 2008, the Agency wrote to the Defendant advising that it had committed numerous offences in recent months including dates that the Claimants had complained about in its application for an injunction but that it was not going to prosecute the Defendant.

On 9th November 2007 the Judge held that there was a serious issue to be tried and that the Claimants should be afforded some form of interim relief. The terms of the injunction of 9th November 2007 were limited but were framed in such a way as to afford some meaningful protection. There was some discussion during the proceedings of the practicality of reliance on Agency or the Council's officers. However, the Claimants considered that any officers would not be asked to perform any function over and above the existing roles. Their contention of being drawn into civil proceedings existed in any event. Obtaining injunctive relief in such terms provided some form of interim protection against further odours. The Court order also provided support for any regulatory controls.

The objections of reference to the Agency and the Council in the order were all the more surprising given their own reluctance to control the Defendant's operations. By the time of the hearing of the 21st December 2007, the Council had issued a third abatement notice. However, this notice was again defective in that it failed to provide a clause that the abatement notice would not be suspended on appeal. The Defendant appealed the notice and at the first directions hearing of the appeal on 11th December 2007, the Council and the Defendant agreed to stay the appeal proceedings pending the outcome of the final hearing of these civil proceedings, the abatement notice has since been withdrawn.

In recent correspondence, the Agency and the Council have stated that it is incorrect to suggest that the Appellants have no interim remedy but that there is a civil remedy, judicial review and proceedings under s 82 of the Environmental Protection Act 1990. However, and most importantly, none of these has any realistic chance of being heard before trial, which is what the application for interim relief sought. Moreover, judicial review proceedings can only seek to challenge the failure of the Agency and the Council to act properly and could not directly resolve the odour problems in the short term. Any action under s 82 of the EPA 1990 would involve initiating an entirely fresh set of proceedings whereby any complainant would be acting as a prosecutor and for matters to be pursued in the magistrates' court. The Claimants simply do not have the resources to pursue this.

In theory, the Claimants could have issued a further application for interim relief, but this would almost certainly be contested and with no prospect of support from the Agency or the Council. The only other form of injunction would be an absolute prohibition in any operations at the Defendant's waste site that would be likely to cause odour emissions. However, this would require the Claimants providing an undertaking in damages to the Defendant, which they were simply unable to do because of the prohibitive cost. In effect, the Claimants would be underwriting the costs of the Defendant's business in circumstances where it is uncertain whether or not the Defendant is financially stable in any event. That the Claimants were not in a position to provide an undertaking in damages to the Defendant was made clear in correspondence leading up to the 9th November 2007 injunction hearing.

On the 10th January 2008, the Council wrote to the 1st Claimant recognising that the abatement notice of the 2nd October 2007 was suspended but stating that this does not prevent the Council from issuing further abatement notices. In the circumstances, involvement in any potential breach of the injunction order of 9th November 2007 appeared modest, uncontroversial and by far the most cost effective means of

seeking to resolve further odour problems. It would simply have been referring a breach back to the court in proceedings that had already been initiated. Were either the Council or the Agency to institute their legal proceedings they would have to obtain their own officers to attend to give evidence, they would also have their own legal costs. By contrast, reference in an interim injunction appeared to be a very efficient use of public resources, where little or no legal costs of the public bodies would be incurred. The only situation where such costs would be more than the public bodies own legal proceedings was if they had pre-determined that they simply were not going to take any legal action to prohibit the odours themselves.

Article 9(3) of the Aarhus Convention 1998 affords the right to members of the public to have access to judicial procedures to challenge acts and omissions by private persons which contravene provisions of its national law relating to the environment. There has been some implicit suggestion that the Aarhus Convention 1998 only applies to public law decision making and review procedures see e.g. Ebbeson, J in *Access to Justice in Environmental Matters in the EU*.⁴⁷ There is no substantive foundation for this. Indeed, without express exclusion of private right legal mechanisms in the Convention it would appear to be contrary to the spirit of the Convention to exclude such rights. This matter has yet to be determined.

The points at issue now before the Court of Appeal are whether or not the costs award may be regarded as prohibitively expensive and how the requirement to prohibit prohibitive expense should be determined; whether the cross-undertaking requirement for an interim injunction as often required by either the Court is, in environmental cases, a breach of the Convention; and whether or not private nuisance matters do fall within the Convention.

⁴⁷ pp. 1-8, *Comparative introduction*, Ebbeson, J (2002). Kluwer Law International, The Hague, The Netherlands.

The Claimants made a formal complaint to the UNECE Aarhus Convention Compliance Committee which has made a preliminary determination that the complaint is admissible and have asked a series of questions of the UK Government, including quite pertinently, why have the Environment Agency and the Council failed to act in this matter? But for the continuing and chronic failure by these regulatory bodies to act and control the Defendant in causing serious and continuing pollution, local residents would not have had to take private legal proceedings, judicial review proceedings and a complaint to the Convention Compliance Committee.

The eventual outcome of these proceedings is uncertain. In the meantime, the waste company is continuing to cause odour, bio-aerosols and other pollution problems in the locality while the Environment Agency and the Council watch on. The situation experienced by the residents of Public is by no means unique.⁴⁸ There are similar circumstances throughout the country where pollution and development problems are not being adequately controlled by regulators failing to act. The only option left for members of the local community is reference to the court. The novel aspect of the above case study is that it is an occasion where prohibitive expense has found to arise in a case *after* either judgment has been given or proceedings issued. Most frequently, it never gets to that stage, because the prohibitive expense of proceedings prevents this as found by the *Civil law aspects* report.

Conclusion

The basic need for public involvement in environmental decision making comes from the now recognised importance of environmental matters in society. This status derives from the fact that an environmental concern will not simply relate to private rights but will influence and affect rights of others either in the locality or the wider world. It could also affect flora, fauna and future generations. That a development proposal has an adverse noise impact will be of immediate local concern but it is also likely

⁴⁸ See e.g. very similar problems discussed on Radio 4's, *You and Yours*, 16th April 2008.

to have energy implications, traffic implications, light pollution problems, water consumption constraints and an impact on wildlife. While, many of these matters should be taken into account by decision makers when reaching decisions, the fact is that most people in their everyday lives and work, including planning and environmental officers will simply not be considering matters in an holistic way. It is only when applying the principles of the Aarhus Convention 1998 and including those public concerned that have such immediate and direct contact with a proposal to be able to properly inform that decision making process will the correct environmental decision be taken. The Aarhus Convention recognises this. It is why the rights of access to justice in environmental matters are something above and beyond those set out in the CPR 1998 and, indirectly, why the EIR 2004 confers wider powers of disclosure than FoIA 2000. It cannot be said that the legal justice system has fully accepted this. It has sought to provide some benefit in public law, but the courts have not truly recognised the application of the Convention.⁴⁹

In 2003, the *Prestige* paper outlined the problem of pursuing conventional economic growth and the now outdated pursuit of consumption and economic development to cure all ills. It was a critique of the legal justice system and its ability to effectively control pollution and environmental harm. The concerns were brought into sharp focus by an analysis of the serious pollution arising from the break up of an ageing oil tanker *The Prestige* in November 2002 off the North West coast of Spain. At the time, there was comment on the legal complexities in both the legal and national press and the onerous burden on prosecutors in pursuing environmental justice in terms of the criminal law.⁵⁰

The *Prestige* paper was an opportunity to use a topical and specific pollution incident to explain the broader concerns of environmental law and its application. For instance, in the introduction, the difficulty of public participation in environmental matters and specifically land use is used to

⁴⁹ See e.g. the Order of Mr Justice Lindsay refusing a PCO for a matter relating to a SSSI, EU Special Protection Area and designated Ramsar Site, *Wells v Pilling PC* [2008] EWHC 556 (Chy)

⁵⁰ See e.g. The Independent 10.12.02. *Who pays the price?* Robert Verkaik

explain the difficulties in advocating a more sustainable way of life by noting that:

A common cause of public concern is fair and participative decision-making in matters that affect a local community, particularly in relation to the land use planning system. Yet land use has the most significant potential impact of the three environmental media: land, air and water.

The paper provided a springboard for an exploration into the provision of public involvement in decision making and whether it was being secured. *Civil law aspects* was central to a much larger debate which included the publication of the *Environmental Justice* report in 2004,⁵¹ the *Cost of doing the rights thing*, the CAJE briefing and subsequent debate in 2005, *Litigating the Public Interest*,⁵² and most recently *Ensuring Access to Environmental Justice*.⁵³ What, however, is striking is that while much of the debate recognises that there is a continuing problem that public involvement in terms of access to the courts by virtue of prohibitive costs, the discussion about tinkering with the system through PCOs or discretionary remedies, is diverting the argument away from the more basis fact, that the Government has committed itself, for some time, to ensuring this right and is now failing to deliver. All the time the regulators fail to adequately protect the environment, and polluters continue to pollute there will be a need for the public to seek relief from the Courts, at present they are going to the courts on unequal terms, and without the resources of the other parties. If the Government wants the public to be more environmentally concerned for the sake of the future, it must provide the resources for this.

Current concerns revisited the broader environmental concerns which were first considered in the *Prestige* paper. However, five years on there is, arguably, a more urgent need to tackle the macro-environmental concerns. Yet without properly taking into account environmental matters

⁵¹ Castle, P *et al.*

⁵² Jones *et al* (2006). *Litigating the Public Interest*. JRF/Liberty, London, UK

⁵³ Report of the Working Group on Access to Environmental Justice (2008). *Ensuring access to environmental justice in England and Wales*. WWF-UK, Godalming, UK

in all relevant judicial decisions we will inevitably fail in helping to tackle the biggest pollution problems of our times, notably climate change. *Current concerns* argues this in express terms and outside the normal legal parameters of jurisprudential debate. The Courts and the Government can no longer ignore the tough decisions that must be made. If the Government does, in fact, want to make a difference then it must get on with providing the rights it promised to properly protect the environment and the Courts must be fully aware of the present and urgent problems we all now face and incorporate the concepts of environmental rights and sustainable development into their judicial decisions.

An environmental court won't really assist. It may help polluters have a one-stop shop to argue about how much they can pollute, but it won't help the communities presented with the significant adverse effects of development if they continue to be excluded as having only third party rights of interest. It is now time for the courts and the government not only to recognise the Aarhus Convention 1998 and the rights that they confer they must now recognise the broader environmental principles such as sustainable development and to incorporate these into their decisions. Without more our legal justice system will be limited to narrow and highly refined argument about unlawful process and procedural impropriety. In *Current concerns* the question was posed as to whether the optimism of Lord Goff⁵⁴ in the emerging environmental regulatory regime of the 1990s should now be revisited. It has not matured well. It is no longer the case that the courts should sit back and wait for our reluctant regulators to act.

There is then one final but important point that arises out of the discussion about environmental rights within a comprehensive environmental regulatory regime. It is how can the Government carry out the effective control of polluters or developers without conferring an explicit and substantive right to live in a healthy environment? Such a substantive right

⁵⁴ *Cambridge Water Company v Eastern Counties Leather* [1994] 2 AC 264

has been incorporated into the constitution of many nation states⁵⁵ but in the absence of a formal written constitution in the UK, there remains a lacuna which, it may be argued, has now been filled by the Aarhus procedural rights. That these procedural environmental rights conferred in theory are restricted in practice undermines this proposition to a degree, nevertheless is it possible that the preamble to the Aarhus Convention 1998 provides some substance to what appear to be purely procedural rights. The reason for this is that the preamble includes the following clauses which provide the rationale for the Convention itself:

Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.

Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights.

Does the preamble then confer substantive environmental rights? Not explicitly, but without recognition of the essential adequate protection of the environment or that every person has the right to live in an environment adequate to his or her health and well-being it could arguably be that the express procedural rights are meaningless. This is something for further consideration. In the meantime, the UK Government needs to ensure that even the procedural rights now provided meet the Convention requirements.

⁵⁵ cf. p. 137 Stookes P, *Chapter 2: Environmental Rights and Principles in A Practical Approach to Environmental Law* (2005, OUP, Oxford).

The *Prestige* oil disaster: another example of the West living beyond its means*

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Environmental law has been hailed as the next big thing in the legal profession for the last 15 years, but in 2003 it remains a specialist area in most legal practices. This does not reflect society's notional awareness about environmental concern, but does mimic the fact that most people are prepared to take only limited steps themselves to protect the environment and only those that will not encroach into their lifestyle; witness the predilection for travel and particularly the appetite for low-cost air fares and car use. When our social and increasingly cosmetic demands are threatened, modern society suffers from environmental amnesia.

One of the difficulties we have in trying to advocate a more sustainable way of life is that the environment is very complex. The interrelation between different species, ecosystems and life cycles is not properly understood and is often ignored as a result. Similarly, environmental law is complex: it does not operate in a broadly autonomous legal system such as probate, housing or employment law. It cuts across a number of disciplines and it is rare for even environmental practitioners to be familiar with all its different facets. A common cause of public concern is fair and participative decision-making in matters that affect a local community, particularly in relation to the land use planning system. Yet land use has the most significant potential impact of the three environmental media: land, air and water. Thus, it is surprising that the European Union has not enacted a land use framework, as it has with waste and water,¹ but relies on a small number of specific directives such as the Environmental Impact Assessment Directive,² parts of other directives such as the Habitats Directive³ and other non-binding policy documents such as the European Spatial Development Perspective.⁴

Other areas of environmental law include negligence,

nuisance, elements of property law, and crime. Much of the legislative control of pollution is underpinned by sanctions, with fines and punishment for activities that do not comply with the regulatory system. Environmental crime itself is broad. The recent guidance for magistrates in the UK, *Costing the Earth*,⁵ covers ten areas including air quality, animal health, GMOs, radioactive substances, waste, water pollution and wildlife.

Not only is there a wide range of legal areas that interlink to make up environmental law, but the law itself often derives from international treaties that cascade down to the national and regional level. The right of individuals and communities to participate in environmental decisions affecting them begins life as Principle 10 of the Rio Declaration 1992. This states that:

'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceeding, including redress and remedy, shall be provided.'

In Europe, this principle is set out in the Aarhus Convention⁶ which aims to secure citizens' rights by securing minimum levels of access to information, public participation and access to justice. The Convention was signed by the then EU Member States, and the EU itself in 1998. The UK has yet to ratify the treaty. If ultimately it fails to do so it will, in any event, have to comply with a trio of EU Directives either just in force or under preparation.⁷ To meet the requirements of the Declaration, the Convention and the proposed Directives, the UK is

* This article is based on a presentation on 31 January 2003 to the British Spanish Law Association, London.

1 Waste Framework Directive 75/442/EEC (OJ 1975 L 194) and the Water Framework Directive 2000/60/EC (OJ 2000 L 327).

2 Council Directive 85/337/EEC (OJ 1985 L 175) on the assessment of the effects of certain public and private projects on the environment (amended by Directive 97/11/EC (OJ 1997 L 073)).

3 Habitats Directive 92/43/EC (OJ 1992 L206).

4 European Spatial Development Perspective 1999 (ESDP). Approved by a council of European Planning Ministers at Potsdam in 1999 the ESDP was created as a broad policy framework identifying the spatial impacts of the various policies and initiatives of the EU. It is designed to assist national, regional and strategic policy makers in EU member states in spatial, including land use, planning matters.

5 *Costing the Earth: Guidance for Sentencers* (London: Environmental Law Foundation, 2002).

6 The United Nations Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 1998.

7 Directive 2003/4/EC (OJ 14.2.03) on public access to environmental information, the Public Participation Directive: COM/2002/42 (OJ 2002 L 134) and the Access to Justice Directive Working Document, April 2002.

enacting new legislation on access to environmental information, which is being integrated with the Freedom of Information Act 2000. But, this is unlikely to counter the present criticism of complexity and cost; Lord Justice Sedley recently commented that the English justice system could never meet the Aarhus standard of affording remedies that are not prohibitively expensive.⁸

A further difficulty for the law is that environmental pollution does not recognise international boundaries nor agreements between states. If something is going to pollute then it is likely to do so regardless of where it is and what it may affect. A recent example of this is the significant adverse effects, both direct and indirect, caused by the break up of an oil tanker over 250 kilometres off the North West coast of Spain. On 13 November 2002, a storm cracked the hull of the 26-year-old tanker *Prestige*, which was fully loaded with 77,000 tons of heavy fuel oil. A few days later, continuing heavy storms and seas caused the tanker to sink two miles to the seabed, still carrying over 50,000 tons of oil. The latest reports suggest that it is continuing to leak around 125 tons of fuel a day and that this could continue until 2006, with corrosion causing the complete disintegration of the tanker over a period of up to 40 years.

The main problem with combining environmental jurisprudence and the vast range of environmental impacts and effects is that it becomes very difficult to count the cost of pollution properly and then bring those responsible properly to account. One key rule governing such a pollution incident is the Polluter Pays Principle,⁹ ie that the cost of pollution should be borne by those creating it. The principle is to be found in a number of international treaties and national laws. The preamble to the Oil Pollution Response Convention 1990 describes it as a 'general principle of international environmental law'. But despite general support for the principle there is little to suggest that it is effectively implemented. This may be explained by considering the *Prestige* case in more detail.

To ensure that the polluter does pay presupposes that it is known who the polluter is. Under Article 3 of the Oil Pollution Liability Convention 1992 liability rests with the shipowner rather than its manager, operator, pilot etc. It is understood that the *Prestige* was registered in the Bahamas, owned by a Liberian company and managed in Athens. The cargo of oil was being shipped for a Russian company with headquarters in Switzerland. Liability is strict but may be wholly avoided if the loss resulted from war, hostilities or natural phenomena. The Convention provides that there can be no third party claim but this is

subject to intention or recklessness on the part of the third party.¹⁰ On 10 December 2002, the Spanish Justice Minister announced that legal proceedings had commenced against the shipowner, the operator and the captain. Indeed the Greek captain, Apostolos Margounas, spent nearly 80 days in jail on charges of causing pollution and disobeying orders from maritime authorities. He is currently on ~~awaiting~~ awaiting trial.¹¹

It seems that, from an apparently straightforward strict liability claim against the shipowner, there may well be a trail of blame stretching right out across the Atlantic, in which a new owner, the operator and the captain could enjoin the Spanish authorities for refusing to allow the crippled tanker into port, and possibly even the salvor for not taking effective mitigation measures. Further, liability may be avoided completely if it is considered that the incident was a result of a natural phenomenon of an 'exceptional, inevitable and irresistible character'.¹² If the shipowner is found to be liable (and therefore the polluter) then he is unlikely to pay the full cost of the pollution because first, he has compulsory insurance against such a compensation claim, secondly, his liability under the Convention is limited to a pre-determined amount and, finally, it is very unlikely that the true cost of the damage could ever be ascertained.

The shipowner is required to have insurance to operate an oil tanker although his liability is limited in any event to around €75 million.¹³ The compensation available may be topped up by the International Oil Pollution Convention (IOPC) Fund to a maximum of around €180 million.¹⁴ This sum is to increase to €250 million from November 2003. The IOPC Fund is largely financed by contributions from oil companies based in IOPC member states.

The IOPC Fund operators suggest that this may provide an acceptable form of liability and insurance. In the case of the *Erika* oil tanker which broke in two off the coast of Brittany on 12 December 1999, spilling just under 20,000 tons of heavy fuel oil, there have to date been 6,425 claims for compensation to the fund with a total value of €171 million.¹⁵ In the case of the *Exxon Valdez* it has been estimated that the clean-up costs were around €2 billion. Spain has said that it has spent €200 million so far offsetting the damage from the *Prestige* spill. Prime Minister Jose Maria Aznar has also stated that the regions whose fishing industry has been devastated by oil from the *Prestige* will receive €265 million of EU funding.¹⁶ Already, before any effective long-term evaluation can take

8 Lord Justice Sedley. Keynote address at the Aarhus Convention conference on 1 November 2002.

9 The Polluter Pays Principle was first formalised in the OECD Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies 1972 as: '[the] principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment ... [It] means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state.'

10 Birnie P and Boyle A, *International Law & the Environment* 2nd Ed (Oxford: OUP, 2002), 386.

11 International Federation of Shipmasters' Associations, 7 February 2003. www.ifsma.org.

12 Article 3 of the Oil Pollution Liability Convention 1992.

13 The Convention on Civil Liability for Oil Pollution Damage 1969 and the Oil Pollution Liability Convention 1992.

14 International Oil Pollution Compensation Fund, Claims Manual (London: IOPC, 2002), 10. The maximum sum available is set to be revised to around €250 million from November 2003.

15 *Erika*, IOPC Fund website at www.iopcfund.org/erika.htm, 30 December 2002.

16 CNN News, 19 December 2002.

place, the immediate costs of the oil spill are €465 million, about €285 million over the IOPC Fund budget.

In one sense, it is appropriate that the IOPC Fund is part-funding the cost of the clean up. It is submitted that the oil companies, as much as the shipowner, operator and captain, are the real polluters. However, the IOPC Fund does not ensure that the polluter pays the real price for carrying out its activities. It is estimated that between 10,000-15,000 seabirds have already perished from the *Prestige* oil spill and it is predicted that the Guillemot is now very likely to become extinct in the region.¹⁷ It is also reported that the heavy fuel oil contained toxins, which are fat soluble and if passed through the food chain could remain in the human body for years, possibly causing cancer.¹⁸ The bird deaths, loss of sea life and indirect effects, such as loss of recreation, will not be taken into account when counting the cost. It has been suggested that it is likely to take around 10 years for the eco-system to regain its balance; 13 years after the *Exxon Valdez* disaster in Alaska, scientists say that oil still contaminates the coastline.¹⁹ Limiting liability means that compensation payments will have to be prioritised and it is almost certain that the long-term impacts of the pollution will not come within the compensation payouts at all.

One key question that has been asked is why the incident occurred in the first place. The *Prestige* did not collide with another vessel nor hit the rocks. It was not the subject of a terrorist attack. Its hull simply gave way in strong storms. As more and more oil is being carried across the seas in order to meet the developed world's appetite for energy consumption, it is reasonable to ask that adequate precautions be taken to ensure that pollution incidents such as these do not occur. The engineering expertise and technology is readily available to minimise the risk. The Precautionary Principle supports this approach to risk. An early statement of the principle was made at the Conference on the Protection of the North Sea in 1984 and it is now found in a number of international treaties. Principle 15 of the Rio Declaration 1992 provides that:

'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'

The Precautionary Principle is based upon the notion that any uncertainty should be interpreted towards safety. When incorporated into legal provisions, it shifts the burden of proof to the polluter, potential polluter or resource user who bears the onus of proving that the contested activity is not harmful to the environment. A

simple application of the principle would be to ensure that all oil tankers are double-hull vessels and built to a standard that can withstand the more extreme weather conditions that are becoming increasingly common. Compare this to the technically basic vessels such as the *Prestige*, the *Erika* and the *Braer*, which caused an 85,000-ton oil spill off the Shetland Isles in 1993. These pre-1980 tankers were all below the internationally acceptable standards of construction now in force and there still remain around 300 of them in use out of an 1,800-strong world oil tanker fleet.²⁰ The culpability in not replacing all single-hull oil tankers with double-hull vessels lies largely with the oil companies and operators who have mounted effective resistance to the early introduction of double-hull tankers.

Instead, a significant cost of oil production, transportation and consumption (that is, the environmental and human health cost of spills) is being paid by others including sea and bird life and, as is likely with the *Prestige*, by EU funding. Only when the full cost of oil consumption is brought into the equation will it generate the necessary policy and market changes that have to take place if we are to use oil in a sustainable manner. The EU, coming to terms with yet another major oil spill on its shores, has responded aggressively to the incident. In December 2002, the European Commission published a draft Regulation immediately banning single-hull vessels carrying heavy fuel oil in its waters and providing for the early phase out of single-hull vessels completely.²¹ It accepted that actions taken in the wake of the *Erika* disaster were not sufficiently ambitious.

The transportation of oil is just one example of the West living beyond its means. If everyone on the planet consumed as much as the average person in the UK, we would need three planets to support us. If we all consumed as much as the average person in Spain, we would need over two planets. If we lived like our American neighbours we would need six planets.²² This pattern of consumption is regarded as our ecological footprint; it is the impact of the way we live and the demands we make as a society. It is possible to make these demands in the short term because we are taking resources from those living in developing countries and from our own children. For example, Bangladesh, with a population of around 130 million people, consumes about one-sixth of the resources that the UK does, despite having a population more than twice the size.

In the West, we have been consuming beyond our means since the 1970s and the evidence is now stacking up. If we continue to consume at our present rate, not only will there be a shortage of resources but it will exacerbate the greatest environmental threat facing

17 Bird Life International Press Release, 12 December 2002.

18 CNN News, 19 December 2002.

19 VOA News, 21 November 2002.

20 *The Independent*, 20 November 2002.

21 Draft Regulation (EC) No. 417/2002 on the accelerated phasing in of double hull or equivalent design requirements for single hull oil tankers and repealing Regulation (EC) No. 2978/94, 20 December 2002.

22 Desai P and Riddlestone S, *Bioregional Solutions* (Totnes: Green Books, 2002), 15-28.

mankind: climate change. In 2001, the Intergovernmental Panel on Climate Change concluded that the rate and duration of global warming during the 20th century was much greater than in any of the previous nine centuries adding that:

'Emissions of greenhouse gases due to human activities continue to alter the atmosphere in ways that are expected to affect the climate ... There is new and stronger evidence that most of the [global] warming observed over the last 50 years is attributable to human activities.'²³

The reality is that during the last century we experienced an average global sea level rise of around one cm every 10 years and an estimated increase in global temperature of 0.5°. Scientific predictions are that sea levels will continue to rise at a similar rate and that we will see global surface temperatures rise by 1.4 ° to 5.8° Celsius during this century.²⁴ We could witness the melting of the polar ice caps and the loss of many small island states. It is likely that one-third of Bangladesh will be submerged by 2100.

International law has attempted to tackle climate change. The United Nations Framework Convention on Climate Change and the supporting Kyoto Protocol is the legal mechanism that aims to reduce human-induced greenhouse gas emissions and to try and stabilise climate change. This is an ambitious task. It is generally accepted that emissions need to be immediately cut by up to 80 per cent of 1990 levels to have any long-term beneficial effect. Under the Kyoto Protocol, developed countries have targets of just 10 per cent of 1990 levels. Add to this the problem that the world's largest polluter, the US, with around 4 per cent of the world's population but generating over 25 per cent of greenhouse gas emissions, rejected the Kyoto Protocol in July 2001. For some, the Climate Change Convention is seen as too little, too late.

One of the basic problems in our attempts to reduce climate change and tackle other environmental problems such as the disposal of waste is that our patterns of consumption, living and travel are inefficient and, in terms of our global resources, excessive. Car use at an average of 15,000 kilometres per year generates around three tonnes of carbon dioxide (CO₂). One return passenger flight from Europe to the United States generates three tons of CO₂. Yet car use and ownership in the UK is increasing at around 1 per cent each year and air transport is predicted to grow by 300 per cent over the next 30 years. Society is now content to buy a pot of strawberry yoghurt that has done a 5,000 mile round trip before it reaches the dining table. We drink wine from Australia that is half the price of similar wine produced literally a few miles down the road and we discard 10 tonnes of waste for every one tonne of consumer goods used. The way

that we live, work, eat and relax cannot be sustained in the long term.

This, it is suggested, leads us to the concept of sustainable development. There have been numerous attempts to define the term but probably the most popular is that contained in the United Nations Report, *Our Common Future*.²⁵ However, even this has been popularised to ensure that it can mean all things to all people. The full definition contains two parts, the well-known statement but also an elaboration of the concept of both needs and limitations as follows:

'Sustainable development is 'development which meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of "needs", in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs.'²⁶

Considering the definition as a whole, rather than just the first sentence, places an entirely different emphasis on the meaning of sustainable development. Importantly, it clarifies the meaning of needs and makes it harder to confuse with 'desires', which is so often the case in the convenience. Further, it suggests that sustainable development incorporates limits or boundaries. This has a profound impact on economic growth, which assumes that growth must continue without end.

Tackling these macro-environmental problems is as central to the role of environmental law as responding to the individual and local environmental problems, and the two are not mutually exclusive. The different types of environmental law cases include personal injury, water, noise and air pollution, and these can relate to waste, traffic, mobile phone masts, offensive smells, contaminated land and, as indicated above, land use. Almost all of the problems arise because of inefficient or excessive use of resources. For example, communities are rightly concerned about the development of incinerators in their locality. The apparent need to build incinerators arises because we see burning waste as a relatively cheap and easy solution to a much bigger problem.

Ironically, the majority of the acts, omissions and decisions that are challenged are those taken by public bodies who are *prima facie* responsible for protecting their local areas and the environment for the long-term benefit of society. And the problems are not exclusive to the UK. There have been serious environmental concerns raised by the Itoiz Dam project, which is part of a major water management programme along the Ebro River Basin in North East Spain. It is understood that the purpose of

23 A report of Working Group 1 of the Intergovernmental Panel on Climate Change: Summary for Policymakers (2001), IPCC.

24 Ibid.

25 World Commission on Environment and Development, *Our Common Future* (Oxford: OUP, 1987).

26 Ibid, 43.

the programme is to provide irrigation and hydro-electric power. However, the Government-backed project has not been welcomed by all. Many regard the project as simply part of the 'Plan Hidrológico Nacional' which, it is claimed, will carry huge quantities of water to Catalonia and the Mediterranean coast, favouring the interests of industry, development, tourism and intensive farming. Over 300,000 people demonstrated in Barcelona to demand the scrapping of the national plan, including the development of over 200 new reservoirs. It is argued that if it goes ahead it will result in ecological destruction exacerbating the environmental imbalances that already exist in the region.²⁷ In January 2003, the Regional Government in Navarra ordered the test filling of the dam; opponents threatened criminal proceedings on the basis that there was no emergency evacuation plan in place.

Despite the numerous conventions and laws that exist, environmental and social development remains subservient to economic progress. And until recently, the legal system has generally been unsympathetic towards the environment, although in the last few years there have been encouraging signs of change. In Europe, proposals for all major development projects must now be supported by an environmental statement and, in recent years, the UK courts have taken positive steps in clarifying the rights of individuals to be informed and to participate in the decision-making relating to this type of development. In *Berkeley v Secretary of State for the Environment*²⁸ the House of Lords emphasised that token public participation was not enough and that the public should be properly involved in the decision-making process. They added that the whole point of an environmental statement was that it constituted a single and accessible compilation, produced by the applicant at the very start of the planning application process with a summary in non-technical language.²⁹ This landmark decision has been followed by a number of cases involving EIA-related planning decisions, many of which stress the importance of proper consideration of the socio-environmental factors.³⁰

In *Hatton and Others v United Kingdom*³¹ the European Court of Human Rights (ECHR) residents around Heathrow challenged the Government's decision to increase night flights from Heathrow but to change the restriction process to one of noise quota. The ECHR concluded that the applicants' complaints should be analysed in terms of a positive duty on the UK to take reasonable and appropriate measures to secure the applicants' rights under Article 8(1) of the European Convention on Human Rights. The UK was required to protect its citizens and the court should have regard to a

fair balance being struck between the competing interests of the individual and that of the community as a whole. The mere reference to economic well-being of the country was not sufficient to outweigh the rights of others. (The UK Government has since appealed to the ECHR Grand Chamber and judgment is due later this year.)

Compare this with *Hunter v Canary Wharf* [1997] 2 WLR 684, in which 500 residents in London's Docklands brought action in nuisance by interference with television signals from the Canary Wharf Tower and damage from dust emissions from road construction. The House of Lords rejected the claim by residents, saying, 'development of the common law should be rational and coherent. It should not distort its principles and create anomalies as an expedient to fill a gap'. And in *Khatun & Others v UK* (1998) ECHR (unreported), which was the subsequent application to the ECHR on the basis of an infringement of human rights under Article 8 (respect for private and family life), the court concluded that a fair balance between competing interests of the individual and of the community as a whole must be made. The development was 'necessary', and the interference was to tackle a pressing social need and was proportionate to the aim of economic development.

Despite the efforts of some leading and forward thinking members of the judiciary,³² law and policy have still not properly grasped the enormity and significance of socio-environmental matters. They are providing some respite for the worst excesses but essentially they ignore many of the very difficult decisions that need to be taken, right here and right now. Time is no longer on our side and there has to be a radical re-think and overhaul about how we live in the West. The legal system, with all its component parts, bodies and individuals, has to be part of this overhaul by encouraging more socially and environmentally benign legislation; by ensuring that unnecessary disasters such as the *Prestige* are avoided; and by helping communities and individuals not only to protect their own environment but also to promote the long-term environmental interests of society.

27 *Solidarios Con Itoiz*: Information on protests against the Reservoir and Dam of Itoiz (2002).

28 [2000] 3WLR 420.

29 *Ibid*, 430 at H.

30 See for example: *R(Prophet) v York City Council* [2002] EWHC 588 (Admin), *R(Roplas) v Kingston upon Hull City Council* [2002] EWHC 1364 (Admin) and *R(Lebus) v South Cambridgeshire District Council* [2002] EWHC 2009 Admin.

31 Application number 36022/97 (2001) ECHR.

32 See Lord Woolf, 'Environmental Risk: the Responsibilities of the Law and Science', ELM 13[2001]3 131.

GETTING TO THE REAL EIA

Paul Stookes*

1. Introduction

Throughout the last century, society and government prioritised land use over and above the other primary environmental media of air and water. The land use regulatory regime placed economic progress and construction at the heart of a process, which assumed a need for physical development and that development was always acceptable unless it was proved not to be. This priority for the development of land over other uses, such as habitats and benign agriculture, persists. The most recent planning reforms have introduced local development schemes as part of the strategic planning process when arguably they should have more accurately proposed local *land* schemes that consider land use as a whole and not simply the physical development of it and that would, in turn, more comfortably fit the emerging concept of spatial development.¹ The Royal Commission on Environmental Pollution (RCEP) in its 23rd Report: *Environmental Planning* recommended the introduction of integrated spatial strategies which take account of all spatially related activities and all spatially related aspects of environmental capacity. The report suggested that the strategies should be four dimensional, covering the atmosphere and groundwater as well as the land surface, and that they should look forward at least 25 years.²

The priority of physical development has meant that the environment is often regarded as something external to the planning process and only occasionally considered when determining land use matters. The problem in segregating the environment and placing it at the margins of policy and practice is that many land use decisions are regarded as having little or no environmental impact, significant or otherwise, when the reality is that virtually all forms of land development will have some form of impact on either visual amenity, the land itself, the atmosphere, water or elsewhere. This may arise through direct, indirect, cumulative, secondary or tertiary impacts. Both individually and collectively, the way land is used has an enormous environmental impact; and much of it adverse.

In the UK, Environmental Impact Assessment (EIA) has been incorporated into the land use regime for over 15 years and presents an opportunity to shift the present

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¹ Office of the Deputy Prime Minister (ODPM), 'Sustainable Communities: Delivering through Planning' (ODPM: London, 2002). See online version of the Journal.

² Royal Commission on Environmental Pollution (RCEP), 23rd Report, *Environmental Planning*, (RCEP: London, 2002) p 147. See online version of the Journal.

emphasis away from economic benefit towards ensuring that socio-environmental impacts are properly integrated into land use proposals, decisions and activities. It also provides a chance for communities and individuals that have to live with the long-term effects of development to inform and be part of the decision-making process.

The main reason for carrying out an EIA is to inform decision-makers and the public³ of the likely significant impacts of a proposed development on the environment, based on the polluter pays and the precautionary principle.⁴ It is a tool that attempts to prevent rather than alleviate socio-environmental harm.⁵ Glasson et al believe that one of the aims of the EIA process is to provide information to the developer, public and decision-makers so that better decisions may be made. Consultation with the public and statutory consultees can help ensure quality, comprehensiveness and effectiveness at most stages of the EIA process.⁶ Importantly, the scope of an EIA should not simply be limited to a narrow interpretation of the environment but should consider it in its broadest terms. Article 3 of the EIA Directive provides that the EIA shall identify, describe and assess the direct and indirect effects of a project on human beings, fauna and flora; soil, water, air, climate and the landscape; material assets and the cultural heritage; and the interaction between all of these.⁷

There is uncertainty as to what actually constitutes participation. A common and reasonably concise definition of participate is: 'to take part, or become actively involved or share (in)'.⁸ Legislation and policy is less clear. There is no definition of public participation in present planning policy,⁹ nor is it defined in what is arguably the most important piece of environmental rights legislation for many years; the United Nations Convention on Access to Environmental Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention). The EIA Centre Review Paper: *Consultation and Participation within EIA*¹⁰ defined public participation as a relationship between the public and the decision-maker that ranges from provision of information through various forms of increasingly interactive consultation to, ultimately, direct public control. This multi-layered description of participation is discussed below.

2. Benefits of Public Participation

Glasson et al¹¹ suggest that key benefits of public participation in EIA include the chance to convey information, clear up misunderstandings, allow a better understand-

³ See below, *Berkeley v Secretary of State for the Environment* [2000] 3 WLR 420.

⁴ Paragraphs 1 and 2 of the Preamble to the EIA Directive 97/11/EC amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.

⁵ F. Frears, *Integrated Environmental Management: Core Module* (University of Bath, 1999) pp 6-7.

⁶ J. Glasson, R. Therivel and A. Chadwick, *Introduction to Environmental Impact Assessment* (London: Spon, 1999) p161.

⁷ Article 3 of the EIA Directive 85/337/EEC as amended by Directive 97/11/EC. See online version of the Journal.

⁸ *The New Oxford Dictionary of English* (Oxford: Oxford University Press, 1998); *Collins Dictionary of the English Language* (London/Glasgow: Collins, 1979).

⁹ Department of Transport, Local Government and the Regions (DTLR), *Planning: Delivering a Fundamental Change* (London: DTLR, 2001).

¹⁰ EIA Centre, *Consultation and Public Participation within EIA* (University of Manchester, 1996) p 2.

¹¹ J. Glasson, R. Therivel and A. Chadwick, above n 6 at 162.

ing of relevant issues and identify areas of controversy while a project is still in its early planning phases. They add that project modifications made early in the planning process are more easily and cheaply accommodated than those made later; projects that do not have to go to inquiry are considerably cheaper than those that do. Early public participation can minimise public frustration and anger and so help to avoid the possibility of more forceful 'participation'. Tabb believes that including a vehicle for public participation potentially enhances public trust of government decision-making, reduces litigation and serves to coordinate and reconcile various strategies of achieving public interest objectives.¹² In practice, individuals and communities often simply want to take part in decision-making and contribute meaningfully to the debate about a particular development. And when this properly occurs, they feel more satisfied than if attempts have been made to restrict their involvement.¹³ A project generally proceeds more smoothly if local people support, or at least do not obstruct, the proposal.

There are costs in carrying out an EIA, which are principally the financial costs of commissioning and completing the study, but they should be put into context. In 1996, the European Commission carried out a cost-benefit analysis of EIA based on 18 case studies from Greece, the Netherlands, Spain and the UK.¹⁴ It found that for 60% of the projects, EIA costs amounted to less than 0.5% of the overall capital cost. Costs in excess of 1% were the exception and related to particularly controversial projects in sensitive locations. The actual cost of EIAs tended to rise in direct relation to the capital cost but as a percentage of the total costs the EIA component became proportionately smaller. In terms of time, most EIAs were completed in less than two years. Generally, they were conducted within 6–12 months and preparation of the environmental statement took a further 2–3 months. The subsequent stages of consultation, review and decision-making could take 3–6 months depending on the complexity of the issues raised. These time frames suggest that completing an effective EIA can often take up to one year and should be contrasted with many planning-related EIAs that tend to be undertaken within a much shorter period of time.

The main causes of costs and time delays were a lack of proper scoping exercise to determine the direction and focus of the EIA and a failure on the part of the developers or consultants to undertake a systematic study and provide relevant data. The study concluded that the benefits of undertaking an EIA were numerous. In the overwhelming majority of cases key environmental issues had been identified, the quality of the project design improved and higher standards of mitigation had been achieved than would otherwise have been expected. For EIAs in the planning regime it is the developer who has to cover this cost. However, it is suggested that any financial cost incurred in carrying out an EIA is simply introducing into development projects a cost that has, for far too long, been absent and should rightly be incurred if proposed development projects and their related impacts on society are to be more objectively evaluated and determined.

¹² W. Tabb, 'Environmental Impact Assessment in the European Community: Shaping International Norms' (1999) *Tulane Law Review* 953.

¹³ *Aarhus Convention Conference Report* (London: Environmental Law Foundation, 2002) p 6.

¹⁴ *EIA: A Study on Costs and Benefits* (Brussels: European Commission, 1996).

3. Levels of Participation

There are a number of levels, or tiers, of participation. Passive information provision is where a body holding information makes it available upon request, while active information provision is when specific information is published and promoted, such as environmental reports and statistics. Consultation occurs when information is made available and comments or representations are invited on that information. There is then, progressively: the right to be heard at public committee meetings, the right to appeal against decisions that have been made and, ultimately, being a decision maker or in a position of direct control.

Until the mid-1980s and prior to the introduction of EIA any level of public participation in land use decision-making was rare. There was strong criticism of the implementation of Circular 22/80: *Development Control in Practice*. In his 1981 report the Welsh Local Government Ombudsman noted that the reluctance of certain local planning authorities to exercise discretion in favour of publicising planning applications had, in his opinion, 'contributed largely towards a feeling of cynicism in relation to the planning function and a bitterness against the planning authority concerned'.¹⁵ Indeed, Moore¹⁶ explains that, prior to 1991, there was no duty on planning authorities to publicise planning applications; it was considered that land use decision-making was a matter for the applicant and the planning authority, as guardian of the public interest, alone.

The Town and Country Planning (General Development Procedure) Order 1995 introduced minimum levels of public involvement with Article 8 providing that applications for planning permission accompanied by an environmental statement shall be publicised by giving at least 21 days notice at the site and by local advertisement. Fortunately, the level of participation provided by planning authorities often goes beyond minimum legislative requirements. The Nolan Report on standards in public life¹⁷ recommended that there should be an opportunity for applicants, objectors and other interested parties, such as parish councils, to make representations to planning committees. Recent research by Manns and Wood¹⁸ found that in 2001, 62.5% of respondent planning authorities allowed public representation at planning committee meetings, compared to 49% in 1999; with speakers generally given around three minutes to present their case. However, as the percentage of authorities allowing public speaking increases, the number of applications being determined by public meetings is in decline, with the latest government targets aiming to secure up to 90% of all planning decisions being taken by unelected officers with delegated authority.¹⁹ This desire to delegate is a genuine concern for democratic decision-making, but it should not, at present, impact on EIA-related decisions, which will tend to be the largest development projects.

Winter explains that the EIA Directive goes further than information provision and requires that any information gathered under Article 5 (the environmental state-

¹⁵ 'General review', (1981) *Journal of Planning and Environmental Law* 779.

¹⁶ V. Moore, *A Practical Approach to Planning Law* (Oxford: Oxford University Press, 2002) p 200.

¹⁷ Nolan Committee (Committee on Standards in Public Life) *Third Report: Standards of Conduct in Local Government in England, Scotland and Wales*, Vol 1, Cm 3702-1 (London: HMSO, 1997).

¹⁸ S. Manns and C. Wood, *Public Representations at Committee Meeting* (London: JPPEL, 2002) pp 382-97.

¹⁹ *Local Government Best Value Performance Indicator 188 for 2002/03* (London: ODP, 2002).

ment and other relevant information on environmental impacts) are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted.²⁰

The judiciary have demonstrated their support for what they consider to be effective public involvement. In *Berkeley v Secretary of State for the Environment*²¹ the House of Lords emphasised that token participation was not enough and that the public should be properly involved in EIA-related decisions. They added that the point of an environmental statement was that it constituted a single and accessible compilation, produced by the applicant at the very start of the planning application process with a summary in non-technical language. Lord Hoffman went on to comment that the directly enforceable right of the citizen under the Directive is 'not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues'.²² Crucially, with an environmental statement in support, the public will have available much greater information about the socio-environmental impacts of a proposal and will therefore be able to make more accurate representations to the planning authority.

4. Screening: Getting EIA on the Agenda

To ensure that the public, wrongheaded or otherwise, is given an opportunity to express their view in EIA-based planning decisions requires planning authorities to decide that any given proposal falls within the EIA Regulations in the first place. Throughout the 1990s, there were around 150 planning-based EIAs carried out in England every year. In 1999 there were 236 and in 2000: 367.²³ In contrast, in 2000/01 there were around 5,000 planning decisions relating to major dwellings development,²⁴ over 10 times the number of planning proposals supported by EIAs. It would be very surprising if more than a very small proportion of those 5,000 major developments didn't, in reality, have a significant environmental impact. This is because conventional land use development in the UK is so fundamentally unsustainable, using high levels of energy and water, generating high levels of waste in both construction and use, and encouraging high levels of inefficient, environmentally damaging, travel patterns. Desai and Riddlestone explain that: 'If everyone on the planet consumed as much as the average person in the UK, we'd need three planets to support us. Our target must therefore be to reduce our consumption of raw mat-

²⁰ P. Winter, 'Environmental Impact Assessment: Professional Integrity and Public Participation', (2001) 8 *The Environmentalist* 23.

²¹ [2000] 3WLR 420.

²² *Ibid*, p 430 at H.

²³ DETR figures, cited by the Institute of Environmental Management and Assessment (2002).

²⁴ For residential developments, a major site is one where 10 or more dwellings are to be constructed or, if this is not known, where the site area is 0.5 hectares or more. For other types of development, a major site is one where the floorspace to be built is 1,000 square metres or more, or the site area is 1 hectare or more. A minor site is one which does not meet the above criteria for major sites, nor the definitions of a change of use or householder development. *Development Control Statistics England 2000/01* (London: ODPM, 2001).

erials and fossil fuels by two-thirds.²⁵ In terms of land use, Lazarus highlights the fact that of the 678 million tonnes of resources consumed annually in the UK over half is used by the construction industry.²⁶ Yet the legislation, guidance and best practice already widely available means that it doesn't have to be this way and, it is submitted, that it is the application and enforcement of the regulations that are inadequate.

Article 4 of the EIA Directive requires that all projects listed in Annex I of the Directive shall be subject to an EIA and that projects listed in Annex II shall be evaluated either on a case-by-case basis or through applying thresholds and criteria to see whether it is subject to an EIA. The EIA Regulations 1999²⁷ and government guidance²⁸ provide criteria and thresholds for the Annex II type proposals. These include a wide range of projects such as those for the use of uncultivated land and urban development exceeding 0.5 hectare.²⁹ There is no specific threshold in relation to housing development and, while the urban development criteria implies that an EIA could be required for housing development over 0.5 hectare, this is not explicit and does not cover non-urban settings. Government planning guidance on housing³⁰ states that new housing development is currently built at an average of 25 dwellings per hectare with more than half being built at less than 20 dwellings per hectare.³¹ This suggests that an apparently modest housing development of over 10 homes could, in theory, fall within the EIA Regulations, and should certainly require planning authorities to undertake a screening opinion.

In contrast, Circular 02/99 which offers guidance for the Regulations provides indicative criteria for Annex 2 development that are 10 times higher than those contained in the Regulations themselves, for example, by stating that the urban development projects are more likely to require an EIA if the site is more than 5 hectares. It suggests that an EIA will be regarded for three main types of Annex II case: (a) major developments of more than local importance, (b) developments which are proposed for particularly environmentally sensitive or vulnerable locations and (c) developments with unusually complex and potentially hazardous environmental effects. It is submitted that these indicative criteria contained in the Circular are too high and that many major development projects with significant impacts are slipping through the EIA net. Upton³² notes that in *Berkeley v Secretary of State for the Environment* (2)³³ Counsel for the applicant stated that a very large and significant project can be accommodated on a site much smaller than 0.5 hectare, for example, the London Eye or a city skyscraper. The importance of the EIA screening process for Annex II proposals is that it determines when an EIA will be required and when, therefore, the right to participate arises through improved information provision and the oppor-

²⁵ P. Desai and R. Riddlestone, *Bioregional Solutions* (Totnes: Green Books, 2002) p 15.

²⁶ N. Lazarus, *Construction Materials Report* (London: Bioregional, 2002).

²⁷ Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999/293) (the EIA Regulations). See online version of the Journal.

²⁸ Circular 2/99: *Environmental Impact Assessment* (London: ODPM, 2002); *Environmental Impact Assessment: A Guide to Procedures* (London: DETR, 2001). See online version of the Journal.

²⁹ Paragraph 2, Schedule 2 of the EIA Regulations.

³⁰ PPG3: Housing (London: ODPM, 2000).

³¹ PPG3: Housing (London: ODPM, 2000) para 57.

³² W. Upton, 'Case Law Analysis: Thresholds and Environmental Impact Assessment' (2002) 14 JEL 3 at

350.

³³ [2001] EWCA Civ 1012.

tunity to respond to that information. However, if a planning authority is reluctant to request an EIA from a developer, or fails to properly carry out a screening opinion in the first place then it may be difficult to persuade them otherwise. Unsurprisingly, the screening of development proposals has generated a flurry of litigation.

In *R v Swale Borough Council ex parte the Royal Society for the Protection of Birds*³⁴ the court held that the decision as to whether any particular development fell within the EIA regime was entirely a matter for the planning authority, subject to *Wednesbury* unreasonableness, and for some years the courts appeared to avoid the question altogether. However, alongside the introduction of the amending Directive, courts began to more thoroughly explore the implications of EIA and their importance in land use planning. In *R v St Edmundsbury Borough Council ex parte Walton*³⁵ a local resident challenged the grant of conditional planning permission to build an access road on the grounds that the planning authority failed to carry out an EIA. Hooper J noted that simply because the guidance provided 'that an EIA would be needed for projects of more than local importance' (then contained in Circular 15/88) it did not necessarily mean that projects of local importance with significant effects were excluded. He concluded that 'one of the dangers of a planning application which, like this one, present two choices "new road" or "heavy lorries continuing to use old town" is that, in the absence of a thorough environmental assessment of the "new road", it is too easy to choose "new road"'.³⁶

There have been a number of other cases that have considered the question of size and scale, including *Berkeley (2)* discussed above. Pugh-Smith³⁶ notes that in *R (Roplas) v Kingston upon Hull City Council*³⁷ the local planning authority accepted that it had failed to provide a screening opinion for what may be regarded as an urban development project of just over 0.5 hectares. In *R (Prophet) v York City Council*³⁸ the Court agreed that a screening opinion was desirable for a development of 24 flats on a site of 0.51 hectare. These cases tend to support the argument that the Circular 02/99 EIA thresholds are far too high and should be brought in line with those contained in the 1999 Regulations.

The inconsistency in guidance is likely to encourage inconsistency in operation. In *R (Francis) v London Borough of Brent*³⁹ the planning authority resolved to grant planning permission to develop around 350 homes on a 3.4 hectare derelict business site. The authority had not carried out an EIA screening opinion and because of this a local resident applied for judicial review of the resolution. The application was subsequently withdrawn by consent on the basis that the council would reconsider its resolution to grant planning permission. The authority then carried out a screening opinion and concluded that an EIA was unnecessary because the proposal would not generate significant environmental impacts. The screening opinion did not consider another recent development adjacent to the site and the cumulative impact of over 500 new homes in the immediate locality (something required under the Directive and contained in paragraph 46 of Circular 02/99). Nor did it properly assess the

³⁴ [1991] JPL 39.

³⁵ [1999] Env LR 879.

³⁶ J. Pugh-Smith, 'Environmental Impact Assessments: The Continuing Jurisprudence' [2002] JPL 1317.

³⁷ [2002] EWHC 1364 (Admin).

³⁸ [2002] EWHC 588 (Admin).

³⁹ CO/1939/2001.

1 (Annex I) projects. It should then be for the developer to prove that any given proposal will not generate adverse impacts.

We have been informed on a number of occasions that active public participation, including a formal right of appeal, is unnecessary in the UK land use regime. In *R v Secretary of State for the Environment, Transport and the Regions (ex parte Alconbury)*⁵² the House of Lords reminded us that it was the role of the elected representatives to take decisions on behalf of the local communities they represent stating that 'in a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them.' But there is concern that democracy, in its current form, is wearing thin. This is can be seen in the drive to delegate more and more planning decisions to unelected officers and, with less than one third of voters turning out for local elections, it can be argued that our elected members are no longer representative of the community; the people of Hartlepool recently elected a man-size cartoon monkey as their Mayor.

EIA provides a real opportunity to secure effective and meaningful participation in land use planning and this is critical if the democracy alluded to in *Alconbury* no longer meets the needs of local communities. Certainly, democracy as it stands does not provide effective public participation. Planning authorities attempting to avoid an EIA whenever possible does not secure effective public participation; nor does limiting the scope of an EIA to an unduly restrictive definition of the environment that ignores the interaction between people, pollution, land, air, water and wildlife. Maybe now is the time to take up the challenge that is arguably implicit in the judgment of Sullivan J in *Malster* and properly pilot an environmental court. If so, it will be vital that such a tribunal takes a robust approach to the concept of sustainable development whereby development meets the *needs* rather than the *desires* of present generations. It will also be necessary to ensure that all aspects of land use that have an environmental impact have access to such a court.

Over the last two years the Environmental Law Foundation, the national charity that helps communities and individuals tackle environmental problems, has witnessed a dramatic rise in the number of people concerned about what they regard as inappropriate development in their community. One of the reasons for this is, almost certainly, that society can no longer accommodate insensitive, uncoordinated, non-negotiated development furthered in the pursuit of profit. A genuine, real EIA that is independent, objective and secures early and participative public involvement is now necessary. Further, it should be carried out for all, not just selected, major developments. EIA has the potential to improve land use decision-making for the benefit of everyone, our future generations and the wider world.

⁵² [2001] UKHL 23.



Environmental Law Foundation

Civil law aspects of environmental justice

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Chief Executive, Environmental Law Foundation

This report is part of the Environmental Justice Project being undertaken by the Environmental Law Foundation, Leigh Day and Co. solicitors and WWF-UK

Environmental Justice Project

The purpose of the Environmental Justice Project (EJP) is to identify and address any inadequacies in access to justice under environmental law in England and Wales covering the full range of criminal, administrative and civil law. It is intended that the implications of its findings will be reported on or about December 2003.

Pamela Castle, Chairman, Environmental Law Foundation

About the Author

Paul Stookes is a solicitor, Member of the Institute of Environmental Management and Assessment and Chief Executive of the Environmental Law Foundation. He is co-author of *Environmental Action: a guide for communities and individuals* and editor of the environmental sentencing guidelines *Costing the Earth* published by the Magistrates Association and ELF. He has published numerous articles in the environmental and legal press. He recently completed a Masters degree in Environmental Management at the University of Bath.

The **Environmental Law Foundation** is the leading national charity providing legal advice for all communities and individuals facing a threat to their environment. Through its nationwide network of specialist lawyers and consultants, it provides pro bono guidance and continuing support to those in such need. ELF is particularly concerned with securing access to justice for the socially disadvantaged and has been involved in some of the most significant environmental test cases in recent years. Since its launch in 1992, ELF has won a number of awards for justice and community action.

Acknowledgements

The Environmental Law Foundation would like to express its sincere thanks to all the volunteer caseworkers that made invaluable contributions to the study and the report. In particular, we thank Karin Crosby, Sarah Hamylton, Paul Iwezulu, Evelyn Iwheta, Christina Mahoney, Shoba Nambiar and Joanna Perks. We would also like to thank Christine Craig and Kevin Dibdin at the Lord Chancellor's Department and the staff and managers at Bow, Gloucester, Llangefni, Oxford, Sheffield and Stockport County Courts and at the High Court in London all of whom were extremely helpful in assisting us with the study. We thank Richard Macrory and Michael Woods at the Centre for Environmental Law, University College London for their co-operation and support, and Dr Jona Razzaque at FIELD for her kind assistance. Finally, we thank Carole Hatton at WWF-UK and Martyn Day at Leigh Day & Co solicitors for assistance, guidance and collaborative working.

We hope that this report demonstrates the case for providing an environmental justice system that is fair, timely, effective and not prohibitively expensive; something, it may be argued, that it is not at present. It cannot be right that communities and individuals must pay, through general taxation, for public bodies to protect and preserve the environment and then be subject to environmental harm and/or have to pay once again when it appears that that task isn't being done. Environmental law is unique in that it provides the opportunity to protect and enhance living things and humankind, our neighbours, children and grandchildren, the majority of whom do not have any direct rights or access to law. This uniqueness should be accepted and then taken into account in its treatment of citizens aiming to protect the environment for the benefit of all through equality in access, cost and treatment before the law.

Published by the Environmental Law Foundation © 2003
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ISBN: 1 900 160 09 9

Price: £10.00 when sold.

Executive summary

This report, *Civil law aspects of environmental justice*, publishes the conclusions of a six-month project, the Environmental Law Study (ELS), which was grant-funded by the Sustainable Development Unit at Defra in order to investigate aspects of access to environmental justice. The ELS was itself a component of the Environmental Justice Project being co-ordinated by the Environmental Law Foundation (ELF), Leigh Day & Co. solicitors and WWF-UK.

The primary purpose of the ELS was to begin to evaluate the effectiveness of environmental justice for communities and individuals experiencing environmental problems and how they are assisted by the present judicial system. It was carried out in three distinct parts: Part I was a review of cases from ELF's Advice and Referral Service. Part II was an evaluation of concluded environmental cases from the County Courts and High Court of Justice in England and Wales relating to private civil law matters. Finally, Part III was an analysis of reported environmental law cases.

The review of ELF's A&R service highlighted one of the unique aspects of environmental law; that the impact from one polluting activity or from a specific decision being taken often results in 100's if not 1000's of people being potentially affected. The review itself found an average of 869 people affected by each environmental problem.

The review of ELF's equal opportunities monitoring programme found that, in terms of the respondents' financial status of those people contacting ELF, the largest majority stated that they had incomes in the lowest income group (45% under £10,000) and over 65% stating that they had annual incomes under £15,000. The review also found that people in the 51-60 year old age group were the most frequent users of ELF's service and it may well be that they are most likely to consider taking legal or other action to resolve an environmental concern. The gender of people being referred by ELF to its members were 54% male and 46% female, although there was a clear trend over the four year study period of an increase in the number of female respondents to the extent that by 2002 it was 50% male and 50% female respondents. The single largest ethnic group was English/Welsh which accounted for 85% of respondents. There had been an increase in the number of Indian respondents contacting ELF over the study period but no Pakistani, Black African or Black Caribbean respondents after 1999, the first year considered by the study.

The ELF review found that environmental concerns involved more than 21 discrete areas of civil and public law. The area that the overwhelming majority of environmental concerns were based upon was the land use planning system. Over 61% of all concerns related to decisions, acts or omissions arising out of the Town and Country Planning regime. This was five times as common as the next legal area, statutory nuisance.

Over one third of ELF referrals were regarded by the client as successful in that the environmental concern had been resolved. Of the concluded cases that were not regarded as reaching a satisfactory outcome over 30% of respondents stated that they had been advised that their case had merits but that they did not pursue the matter because of the cost in taking legal action.

From the outcome of the Reported Cases Analysis, environmental action appeared to be moderately successful; 47% of decisions were successful compared to 53% that were regarded as unsuccessful in terms of environmental benefit. The most frequent court users according to the reported cases were residents, which accounted for 36% of claimants. Company or business organisations made up 27%, local authorities 21%, Government agencies (eg. health authorities) 7% and Non Governmental Organisations (NGOs) 5%.

The results of the ELS questioned the effectiveness of the private civil law system in offering an effective form of environmental protection. Most often, the only relief that can realistically be achieved is to financially compensate for someone with an interest in property and for environmental harm that has already occurred. Moreover, there is no compulsion on a successful claimant to use the damages awarded to make good the environmental harm. It seems that, in practice, private civil law remedies are not an adequate form of resolving environmental disputes. They remain expensive and generally fall outside any benefits in time and cost that the Civil Procedure Rules may offer. It is accepted that if the limitations of complexity and cost are overcome it remains an option for environmental protection that could be of use in certain circumstances. However, the present operation of the Civil Rules appears to perpetuate the belief that there is one law for the rich and no law for the poor.

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Introduction

1. This report, *Civil law aspects of environmental justice*, publishes the conclusions of a six-month project, the Environmental Law Study (ELS), which was grant-funded by the Sustainable Development Unit at Defra¹ in order to review ELF's own referral system, evaluate private environmental cases in the County Courts and High Court and to undertake a desktop study of reported environmental cases. It is also a component of the Environmental Justice Project being co-ordinated by the Environmental Law Foundation (ELF), Leigh Day & Co solicitors and WWF-UK.²
2. One of the main reasons why environmental justice and law is so important and deserves perhaps greater analysis and consideration than it is, at present, afforded is that, unlike many legal areas, each issue that arises has the potential to affect a large number of individuals and other living things - in that sense, it is unique. Further, it relies upon a range of laws that cross the public/private law divide and each of which, alone, may not be regarded as substantive environmental laws. An example of this is the role of personal injury law in settling environmental poisoning claims.
3. Much of the tension in environmental law that cause concern to people and can result in litigation arises from conflicting pressures on the environment from a number of stakeholders. Landowners want to develop their land, principally for profit, whereas local communities are keen to preserve open space and limit traffic congestion (and the related pollutants) in order to protect their health. Yet, at present, there is inequality of rights. The landowner has a right, albeit restricted by legislation, to develop his or her land but there is, as yet, no equivalent fundamental right to a healthy environment. Instead, the environment and its agents including public authorities, the Environment Agency and communities must work within the existing legal parameters to best protect humankind and other living things.
4. Another reason why environmental law is important has been explained by David Wilkinson³ who notes that left to its own devices, humanity will eventually bring about complete environmental degradation. Yet, one of the difficulties in trying to advocate a more environmentally benign or sustainable way of life is that the environment itself is very complex. The interrelation between different species, ecosystems and life cycles is

¹ Department for Environment, Food and Rural Affairs

² Worldwide Fund for Nature - UK

³ pp. 8-9 Wilkinson, D (2002). *Environment and Law*, Routledge: London.

not readily understood and is often ignored as a result. Wilkinson concludes that environmental law provides the overarching framework for the multidisciplinary approaches that are necessary if we are to halt the trend of environmental decay. And while ethics, economics and education can provide strategies for change, each of these require 'legal embeddedness' to have the necessary strength to succeed. The environment needs good law if it is to avoid suffering further serious harm.

5. The primary purpose of the ELS was to begin to evaluate how effective environmental justice is for communities and individuals experiencing environmental problems and how they are assisted by the present judicial system. It was carried out in three distinct parts:

- Part I: a review of cases from ELF's Advice and Referral (A&R) service.
- Part II: an evaluation of concluded environmental cases commencing in the County Courts and High Court of England and Wales relating to private civil law matters.
- Part III: an analysis of reported environmental law cases.

This report considers the findings of the study areas and draws conclusions from each.

Background to the Environmental Law Study

6. The UK government and judiciary are committed to helping to secure access to environmental justice. This is demonstrated by the signing and anticipated ratification of the UN Convention on Access to Environmental Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention),⁴ which lays down minimum standards for securing access to information, public participation in decision making and access to justice in environmental matters. It is also evident by recent support for more effective sentencing in environmental crime cases with, for example, the publication of magistrates guidelines on sentencing: *Costing the Earth: information for sentencers*.⁵

7. Environmental justice itself comprises at least two key parts. The first and more straightforward aspect involves access to the law in resolving environmental problems and providing the opportunity to have a voice in relation to the environment.

⁴ For the full text of the Convention visit: www.unece.org/env/pp.

⁵ Edited by Stookes, P (2002). *Costing the Earth: information for sentencers*. Magistrates Association/ Environmental Law Foundation: London.

Environmental justice in its broader sense means securing environmental equity on a local, national and international scale to help ensure that everyone enjoys a clean, healthy environment regardless of their means, where they live or their background. It includes equity between nations and between generations, as set out in Principle 3 of the Rio Declaration 1992.⁶ The more direct notion of access to the law and environmental justice is the focus of this report, although it will be evident that the two aspects are often inextricably linked. For simplicity, the distinction between the two is made with reference to environmental justice and equity respectively.

8. Something that must be regarded as fundamental to securing access to environmental justice is being aware of, or understanding, how effective the present judicial system is in terms of resolving environmental problems; understanding the present position is critical to preparing and planning where to go and how to get there. Thus, one of the first tasks of the ELS was to consider whether there were any existing reports, studies or information setting out key judicial data on environmental law. For example, prior to the study there was no way of estimating how many environmental cases were taken to court each year, the success of any cases that were taken, the areas of law that the cases derived from and who the claimants for these cases may have been. Further, it was not clearly known what factors influenced potential claimants in deciding to pursue a claim. Importantly, without key information it was found impossible to assess where any gaps may have been in the provision of access to justice and therefore begin to fill any potential gaps. While the ELS did not attempt to answer all of these questions, it is submitted that it provides a good base, together with the related projects (discussed below) with which to start to build a comprehensive picture of the reality of environmental law and justice.
9. A desk top study carried out at the start of the ELS found that there were no known specific studies completed on access to environmental justice in England and Wales that provided even basic information on the number of environmental cases taken each year. As a result, the ELS started with a blank canvass having to carry out primary research in law to get even core data together and, as it will be seen below, it was found necessary to set out quite clearly the scope and boundaries for the project.

⁶ UN Declaration on Environment and Development 1992 (the Rio Declaration).

Related environmental justice projects

10. Part I reports on the findings from research undertaken on ELF's own data and further research carried out to clarify that data where necessary. It directly considers the experience and opinion of community groups and individuals faced with an environmental concern and making efforts to use the law to resolve that concern. One aspect of the *Environmental Justice Project (EJP)* being undertaken by Leigh Day & Co solicitors and WWF-UK complements this research by asking environmental practitioners of their experiences when taking cases on behalf of communities and individuals and of practising within the field of environmental law. Part I does not consider the action taken by corporate or public bodies in pursuing an environmental action, although the associated studies consider this in some detail. They are complementary and provide a contrast for corporate activity. This is further supported in Part III of this report, the Reported Cases Analysis, which provides a benchmark on which to contrast the findings of the respective studies with the public reporting of environmental law.
11. Part II of this report considers private environmental law cases that began and concluded in either the County Courts or the High Court. The key aim was to begin to understand how effective the private civil law system was in resolving environmental disputes. This part was complemented by two other studies being undertaken concurrently; another aspect of the EJP considered the criminal justice system and includes an analysis of the number of prosecutions pursued, on average, each year.⁷ Also, the report *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal (MEJ)*,⁸ carried out by the Centre for Law and the Environment at University College London, tested the merits of the Royal Commission of Environmental Pollution's proposal for an environmental tribunal and investigated systems of appeal currently in place for environmental regulation.

Study scope and boundaries

12. In order to provide consistency across the study and report, certain boundaries and definitions were used. This aimed to ensure that the review of ELF's Advice and Referral service in Part I was comparable to evaluation of environmental court cases

⁷ For further details about the project contact: WWF-UK at www.wwf.org.uk.

⁸ To download the report see: www.ucl.ac.uk/laws/environment.

(Part II) and to the Reported Cases Analysis (Part III). The study boundaries are detailed below.

Spatial boundaries

13. Each part of the study was evaluated according to which region in England and Wales cases began. To achieve this, geographical, or spatial, boundaries were used in analysing data. These were based on the Regional Circuits of the Court Service including the Midlands, the North East, the North, the South East (including London), Wales and the West. The Court Service clearly plays a critical role in determining access to environmental justice and it was considered appropriate to base regional evaluation on that system. While the scope of each region may not fit other distinct regional sectors such as regional government sectors or the Legal Services Commission regions, it did provide consistency across the ELS itself and provides a base for any future analysis that may take place. For a detailed breakdown of each region see Appendix 3.

Jurisdiction

14. The study focused on environmental action and court cases that relate to activity within England and Wales. However, as part of the study it was necessary to consider matters outside this jurisdiction. For example, the Reported Cases Analysis involved checking all reported cases and then making a distinction between those for England and Wales and those outside the jurisdiction for example in Northern Ireland, Scotland and the European Union.

Historical period

15. The review of ELF's A&R service (Part I) and the Reported Cases Analysis (Part III) covered a period of four years from January 1999 to December 2002. The Civil Court Evaluation (Part II) considered sample cases taken from 2002.

The public/private law divide

16. In the UK and most other common law countries there are two broad legal categories: private and public law. Private law covers relationships, agreements and disputes between two or more person (including corporate law). Public law covers the administration and regulation of activities taken on behalf of, and for the benefit of, society. It includes criminal law, which aims to protect society and punish those who act unlawfully, and administrative law, which includes the regulation of public bodies and agencies.⁹ For the purposes of the ELS and the related studies there were three distinct legal divisions: private, public and criminal law. Part I of the ELS focussed on private and public law matters as they related to individuals and community groups. Part II

⁹ Extract from Section 3.1 of the proposed *Environmental Management Handbook*. IEMA: Lincoln.

considered only private law matters arising in the County Courts and High Court. Part III considered reported cases that related to either private or public law.

Court case

17. A court case was defined as legal action where court proceedings had been issued. For the Civil Court Evaluation (Part II), the case conclusion was where judgement had been given.

Environmental case

18. An environmental case was defined as any legal activity (including but not exclusively court proceedings) that was substantially about the environment or had a significant aspect of the case relating to impacts on the environment and the environmental implications on quality of life.

Environment

19. The definition of the environment was transposed from that contained in the new draft Environmental Information Regulations.¹⁰ Draft Regulation 2 provides that environmental information is any information relating to the direct and indirect effects on human beings, fauna, flora, cultural sites, and built structures, soil, water, air, atmosphere, climate, the land, landscape, natural sites (including wetlands, coastal and marine areas), biological diversity (including Genetically Modified Organisms (GMOs)), energy, noise, radiation, waste, material assets and the cultural heritage; and the interaction between these elements.

Type of claimant

20. The study considered a range of claims taken by a variety of claimants although, by the very nature of that part of the study, the review of ELF's A&R service this was almost exclusively an individual and/or community group seeking to resolve an environmental concern or problem. In the Reported Cases Analysis, all environmental-based cases were considered and a breakdown of the type of claimant was made.

¹⁰ The new draft Regulations can be downloaded from: www.defra.gov.uk/environment/consult/env.info.

Part I: Review of ELF's Advice and Referral service

1.1 Introduction

21. ELF provides advice and assistance to communities and individuals throughout the UK via a nationwide network of over 150 specialist environmental solicitors, barristers and technical consultants. These experts make up its referral member base, which enables ELF to provide community support through a range of services including the Advice and Referral (A&R) service.
22. In 2002, ELF was awarded Quality Mark status by the Community Legal Service (CLS) for its services to individuals and communities. Attaining Quality Mark status means that ELF's services operate to a required standard determined by the CLS and which is monitored on an annual basis. ELF services are also subject to internal management based on review, planning, monitoring, auditing and then further review. In this way, ELF's service aims to secure continuous improvement in operation and performance.
23. ELF has, since its launch in 1992, referred over 1,700 cases to its members and dealt with many tens of thousands of inquiries. It is estimated that 100,000s of people across the UK have benefited from its services. ELF cases have included matters heard in the House of Lords and the European Court of Human Rights. Accordingly, it is believed that ELF's collection of cases is the single largest collection of data relating to citizen environmental action in the country and a key factor in securing Defra's support for the study. It offers the opportunity of providing a useful insight into many aspects of environmental legal action and access to justice. It also provides the opportunity of showing how the law may be used to resolve environmental concerns prior to taking formal legal action. The particular areas of interest arising from the A&R service review were:
 - The type of the environmental problems that were of concern to people eg, noise, air or water pollution.
 - The areas of law that regulate or control pollution or environmental harm (eg, the pollution control regime or statutory nuisance) or the particular area of law forming the basis of a claim (eg, nuisance or negligence).
 - The estimated number of people affected by any particular environmental problem.

- The types of people who contact ELF for help in terms of age, gender, ethnicity, income and region.
- How the case concluded. For example, was the case environmentally successful?
- Were there any barriers to taking legal action? And if so, what?

24. Each one of these areas of interest is considered in more detail below. There is clearly a need for such information when considering access to environmental justice because, along with most other areas of law, the vast majority of environmental problems are resolved before formal legal action begins. As indicated in Part II for every 1,000 legal cases concluded, just 140 will result in proceedings being issued and six will result in judgement following trial.

25. ELF currently refers around 200 community groups and individuals to its members for further advice and assistance each year. Table 1.1 sets out the total number of inquiries received by ELF and referred to its members between 1999 and 2002 throughout the UK. Due to the range of experience of ELF members, it is likely that individuals or community groups will often be referred to more than one member. For example, after a first referral to a member solicitor the matter may then also be referred to either a barrister or technical consultant, or both. However, for the purpose of the ELS, referrals have been considered on a case-by-case, rather than referral, basis.

	1999	2000	2001	2002	1999-2002
<i>Inquiries about environmental concerns</i>	450	615	619	635	2319
<i>Cases referred</i>	141	136	203	188	668

Table 1.1: ELF inquiries and referrals 1999-2002 throughout the UK

26. As shown in Table 1.1, a significant number of the inquiries received by ELF from the public are not referred on to an ELF member. Reasons for this include:

- That there is no substantive environmental problem. That is, after discussing the query with a caseworker, there is no identifiable environmental aspect to the problem. If so, that person will be signposted to the most appropriate organisation, which may be a similar voluntary advice agency, such as a local-law centre.
- That there may be a more appropriate course of action. At times, an inquirer will contact ELF about an environmental problem and the caseworker concludes after discussing the matter with the inquirer, that they have not yet exhausted all other

avenues that may be available. For example, someone concerned about a factory emitting black smoke should initially contact their local authority environmental health team, who are most likely to be the public body responsible for controlling air emissions. If this option has not yet been pursued then the environmental problem may well be resolved by the local authority taking action against the polluter.

- The inquirer decides not to proceed with the referral. At times, an inquirer who will be given initial advice and details of how to refer the matter on to one of ELF's members, declines to pursue the matter and accept the option of a free initial opinion on whether the case has any legal merits. Reasons for this may include a more general reluctance to instruct a lawyer.¹¹

1.2 Methodology

27. The review of ELF's A&R service involved detailed consideration of the ELF referrals from January 1999 to December 2002. The research programme included an initial review of any earlier monitoring and reviews over this period that had been undertaken for other purposes such as the initial four-week case review, carried out as part of the normal A&R service.
28. The initial scoping review found that there was insufficient consistency in any previous analytical studies carried out and it was therefore necessary to undertake fresh research within the referral case files to ensure consistency in approach when using data. In total, 668 ELF cases were reviewed, of these 35 related to Scotland and Northern Ireland. For the purposes of the ELS, 633 cases were analysed in detail. Thus, totals between analyses differ eg, there were 136 cases referred throughout the UK in 2000 (table 1.1) yet the total areas in 2000 (table 1.3) for England and Wales was 132.
29. Once the data relevant to the study had been taken from the case files, the research and findings were peer-reviewed and then cross-checked for accuracy. Gaps in the data were then identified and it was necessary to undertake further research on many of the files. One of the difficulties in the file review was that, despite regular monitoring, a

¹¹ See for example other studies in this area such as: Genn, H and Paterson, A (1999). *Paths to Justice. Scotland: What People in Scotland Do and Think About Going to Law*. Hart Publishing: Oxford. – its summary notes that 'with the exception of divorce and separation problems and accidental injury, involvement in legal proceedings is a rare event for most members of the public ... Reluctance to become involved in legal proceedings stems from beliefs about cost, discomfort and uncertainty about outcome. These factors will continue to affect the threshold at which people will take steps to access the legal system.'

conclusion to the case could not be determined with accuracy and it was often necessary to contact the original inquirer and check the status of their case and whether or not the matter had concluded.

1.3 The type of environmental concerns

30. The environmental concern(s) affecting, or potentially affecting, the communities and individuals was identified in each case and allocated to a specific range that fell within the study definition of the environment (see paragraph 18 above). The range of environmental concerns raised is detailed in Table 1.2, and includes 13 specific types and a residual 'other' section for uncommon concerns.

<i>Environmental concern</i>	Number and percentage of environmental concerns raised on referral									
	1999		2000		2001		2002		1999-2002	
	No.	%	No.	%	No.	%	No.	%	No.	%**
Land including open space, landscape, CPOs** rights of way & visual amenity	31	19%	35	21%	37	14%	54	23%	157	19%
Noise	24	15%	27	17%	50	18%	43	18%	144	17%
Biodiversity including wildlife and habitat conservation	31	19%	28	17%	45	16%	35	15%	139	17%
Air pollution inc. odours dust & smell	25	16%	25	15%	36	13%	24	10%	110	13%
Human health	11	7%	11	7%	38	14%	20	8%	80	10%
Radiation including telecommunications mast emissions and radioactive waste	6	4%	9	6%	14	5%	5	2%	34	4%
Built environment including cultural and heritage sites	7	4%	4	2%	11	4%	11	5%	33	4%
Water pollution including contamination from sewage	3	2%	8	5%	9	3%	8	3%	27	3%
Flooding	2	1%	5	3%	6	2%	12	5%	25	3%
Light pollution	6	4%	2	1%	11	4%	3	1%	22	3%
Waste inc. fly-tipping & hazardous waste	5	3%	4	2%	3	1%	9	4%	20	2%
EIA concerns (or lack of one)	1	1%	0	0%	5	3%	6	3%	12	1%
Vibration	0	0%	2	1%	1	0%	1	0%	4	0.5%
Other including eviction, access to information, costs, participation, tax, trusts	7	4%	3	2%	10	4%	8	3%	29	4%
Totals	159		163		276		239		836	

*Variation arising from rounding up/down of percentage figures. **Compulsory Purchase Orders

Table 1.2: Type of environmental concerns

Highlights of results

31. Many people contacting ELF stated that there were two or more environmental concerns. For example, proposals to develop a rail freight yard in a residential area raised concerns about dust, vibration and noise. Where there was clearly more than one environmental concern these were recorded as separate items. The most common problem for people contacting ELF (19% of all concerns raised) was to do with land use: This included the loss of open space, impact on landscape and visual amenity and restricted access to public rights of way. The second largest cause for concern was noise (17%), followed closely by the impact of decisions and actions on biodiversity, wildlife and habitat conservation (nearly 17%). Problems of air pollution were significant (over 13%) with the impact of problems on human health also featuring significantly (nearly 10% of concerns).

Trends

32. Land use matters were the primary concern for people in every year of the study, except 2001 when noise was of more concern. The comparable levels of concerns about land use remained consistent (2001 excepted) at around the 20% level. There was a slight year on year increase in concerns about noise level with an average annual increase of 1%. There was an equivalent fall in concerns over biodiversity, and a greater drop in concerns about air pollution. This mirrors the general trends in the UK which suggest that levels of air pollution tend to be falling.¹² There were increases in concern over the lack or inadequacy of environmental impact assessment (EIA) relating to land use planning (something that is reflected in the increasing level of litigation in this area over the past four years¹³) and also in relation to flooding. Referrals about water pollution and waste were comparatively uncommon. This contrasts with the Reported Cases Analysis (Part III) and it may well be that concerned individuals are, at an earlier stage, referred to the appropriate public bodies to resolve these matters and that the regulatory bodies, such as the Environment Agency and local authorities, are well placed to tackle these concerns directly. This will be of interest when considering the comparative studies, particularly in relation to prosecutions.

¹² See pp 17-23 Defra (2002). *The environment in your pocket 2002*. Defra/National Statistics: London.

¹³ See further: pp 661-664 Purdue, M (Ed.) (2003), *Current Topics, Journal of Planning and Environment Law June 2003*. Sweet & Maxwell: London,

1.4 Areas of environmental law

33. An important aspect of access to environmental justice is the ability to resolve the environmental problem through either the common law or a regulatory system. The review examined which areas of law each concern was most closely based upon. Importantly, some concerns may have been based on two or more legal areas eg, a civil claim may commonly arise in nuisance and/or negligence. The results of the analysis are provided in Table 1.3.

Area of environmental law	Number and annual percentage of referrals to ELF members in England and Wales									
	1999		2000		2001		2002		1999-2002	
	No.	%	No.	%	No.	%	No.	%	No.	%
Planning all aspects of strategic planning and development control including Tree Preservation Orders but excluding breach of conditions	81	60%	74	56%	133	62%	121	65%	409	61%
Statutory nuisance	16	12%	16	12%	27	13%	19	10%	144	12%
Private nuisance	6	4%	11	8%	16	8%	6	3%	39	6%
Negligence	2	1%	3	2%	8	4%	5	3%	18	3%
Housing (landlord & tenant)	3	2%	6	5%	1	0.5%	5	3%	15	2%
Water	2	1%	3	2%	4	2%	6	3%	15	2%
Transport	3	2%	3	2%	3	1%	2	1%	11	2%
Contract including land and property	4	3%	1	1%	0	0%	5	3%	9	1%
Waste	2	1%	2	2%	0	0%	5	3%	9	1%
Breach of planning conditions	3	2%	0	0%	1	0.5%	3	2%	7	1%
Integrated pollution control	5	4%	0	0%	2	1%	0	0%	7	1%
Radiation-inc Rad. Substances Act	1	1%	1	1%	2	1%	3	2%	7	1%
Village green applications	1	1%	1	1%	4	2%	1	0.5%	7	1%
Biodiversity including hedgerow wildlife and habitats	1	1%	1	1%	0	0%	1	0.5%	3	0%
Contaminated land	0	0%	0	0%	2	1%	1	0.5%	3	0%
Intellectual property rights	3	2%	0	0%	0	0%	0	0%	3	0%
Other including trespass, allotments ombudsman, tax & human rights	3	2%	10	8%	7	4%	8	4%	28	4%
Totals	136		132		210		191		734	

*Variation arising from rounding up/down of percentage figures

Table 1.3: Areas of environmental law

Highlights of results

34. The area of law that the overwhelming majority of environmental concerns arise from is the land use planning system. Over 61% of all concerns relating to decisions, acts or omissions arose out of the Town and Country Planning regime (excluding breach of planning conditions). It was over five times as common as the next legal area, which was statutory nuisance with nearly 12% of relevant legal areas. The only other reasonably significant legal area was the common law area of nuisance as the legal basis of claims at around 6%. Beyond this, the range of legal areas was wide but with modest percentages from each group with, for example, negligence, housing, water and transport comprising around 2% of legal areas respectively. Areas of law making up 1% of cases included contract, waste law, breach of land use planning conditions, village green applications, specific radiation legislation, and legislation relating to contaminated land. One of the clearest outcomes from this section of the study was that the number of areas of law covering environmental concerns is high; with more than 21 discrete areas.

Trends

35. In terms of land use planning, there is an overall percentage increase in the number of matters arising from the legislative regime, with a slight dip in 2000. In relation to statutory nuisance, the proportion of cases remained reasonably constant at around 12%, although 2002 recorded a slight reduction. The civil law claims of nuisance (6% of all legal areas) and negligence (nearly 3%) did not provide any clear trends except that nuisance, as a legal remedy, provided more opportunity than other legal areas for formulating claims although the frequency fluctuated year on year.

1.5 Number of people affected

36. The ELS included an analysis of the number of people estimated to be affected by each concern¹⁴ being raised by people contacting ELF. This information was requested at the initial inquiry stage and was usually confirmed by the inquirer when formally requesting assistance through the A&R service. In some instances, the inquirer was not able to specify the numbers of people affected in numerical form and, instead, provided a description such as '10 neighbours' or 'a small village'. In these circumstances, a best estimate was made to provide the total number of people likely to be directly affected.

¹⁴ The years 1999 and 2000 were not assessed. The question of how many people were affected was not put to inquirers during these years. Any attempt to second-guess numbers some three to four years later would not provide accurate information. It was considered that such estimated information would not add to the ELS.

by the problem.¹⁵ The numbers recorded tend to be conservative, with under-estimating of numbers wherever there was uncertainty. For the purpose of the study, referrals that were county-wide, regional or that related to general environmental/government policy, were recorded as nought to avoid distorting the final analysis. Similarly, concerns that were identified as primarily causing harm to wildlife were not registered as directly affecting people. According to information from inquirers when requesting assistance, the total number of people affected by the specified environmental problems was 98,981 during 2001 and 224,141 in 2002. Overall, these figures provided an average of 869 people affected by each environmental problem.

1.6 Who contacts ELF?

37. ELF operates an equal opportunities (EO) programme, which includes monitoring its A&R service to help ensure that it is made available to everyone regardless of means, ethnicity and gender. As part of the programme, people requesting referral to an ELF member are asked to anonymously complete an EO form. In this way, ELF can more effectively understand the representation of its service users and address any gaps in service provision as required.
38. Completion of the EO form is voluntary and does not influence any further action taken by ELF or its members. Completed forms are not returned with all requests for assistance. Almost always, someone requesting assistance is doing so on behalf of a community group and often they do not find it appropriate to complete and return an EO form. Nevertheless, over the study period, a high number of EO forms were completed and returned and provided the data for this part of the ELS, including the age, gender, ethnicity, disability and income group of those people using ELF's service and returning completed EO forms (respondents). As part of the study, 569 EO forms between 1999 and 2002 were analysed (see Table 1.4). The subsections below highlight some of the key data from the EO analysis.¹⁶ Because of the anonymous nature of the EO programme it was not possible to make a distinction between England, Scotland, Northern Ireland and Wales and the analysis covered the UK as a whole.

¹⁵ Pre-set numbers to estimate numbers of people affected by environmental concerns included assessing the number of people per household as 2.4 in accordance with the National Census 2001 statistics.

¹⁶ Not all equal opportunity forms were fully completed. This accounts for the disparity between data sets. Further, the style of the EO forms changed from 2001 resulting in more detailed information being secured.

	1999	2000	2001	2002	1999-2002
<i>Cases referred</i>	141	136	203	188	668
<i>EO forms received</i>	106	134	181	148	569

Table 1.4: Comparison between cases referred and EO forms received

39. Table 1.5 indicates the age of respondents to ELF's EO monitoring programme. The most common age of people contacting ELF was from the 51-60 year group with over 32% of all respondents stating that they fell into this group. Over 25% of respondents stated that they were from the 41-50 year group. The 61-70 and 31-40 year groups each attracted around 17%. While the 70+ and 21-30 year groups accounted for 4% of respondents. There were no referrals from the under 21 age group.
40. Trends in the respondents ages are that the 51-60 year olds were consistently the most frequent users of ELF's A&R service and it may be implied that they are most likely to consider taking legal or other action to resolve an environmental concern. The 41-50 year group was the second most common age of respondent for all years. There was an interesting rise in the number of people aged over 70 years contacting ELF in 2001 and 2002 compared to 1999 and 2000. There was also a slight decline in the number of 21-30 year olds responding to ELF's equal opportunities monitoring.

<i>Age group</i>	<i>Number of respondents and percentage according to each year</i>									
	<i>1999</i>		<i>2000</i>		<i>2001</i>		<i>2002</i>		<i>1999-2002</i>	
	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>
<i>Under 21s</i>	0	0%	0	0%	0	0%	0	0%	0	0%
<i>Age 21-30</i>	5	5%	5	4%	6	3%	5	3%	21	4%
<i>Age 31-40</i>	19	18%	22	17%	26	14%	28	19%	95	17%
<i>Age 41-50</i>	28	26%	29	23%	51	28%	34	23%	142	25%
<i>Age 51-60</i>	41	39%	42	33%	54	30%	45	30%	182	32%
<i>Age 61-70</i>	12	11%	28	22%	31	17%	26	18%	97	17%
<i>Over 70 years</i>	1	1%	1	1%	12	7%	10	7%	24	4%
<i>Totals</i>	106		127		180		148		561	

*Variation arising from rounding up/down of percentage figures. See also footnote 14 above.

Table 1.5: Age of respondents in equal opportunities programme

Gender

41. Gender analysis of respondents over the 1999-2002 period found that 54% were male and 46% female. However, there was a clear trend over the four years of an increase in the number of female respondents and a corresponding decline in male respondents. In 1999 the ratio was 43% female to 57% male, 2000 was 46% female to 54% male, 2001 was 45% female to 55% male and in 2002 it was 50% male and female.

Disability

42. Nearly 11% of respondents to ELF's EO programme stated that they had a disability. These included arthritis, asthma, deafness, epilepsy, heart conditions, multiple sclerosis, nerve disease, quadraplegia, spinal injuries and blindness. There was no particular trend in the figures. The level of respondents with a disability remained broadly constant with a slight decrease in 2002.

Ethnic origin

43. Table 1.6 provides a detailed breakdown of the ethnic origin of respondents during 1999-2002. The single largest group was the English/Welsh group, which accounted for 85% of respondents. Approximately 2% of respondents were Scottish and 3% Irish. Over 1% of respondents indicated that they were English/Irish and 1% Polish.

<i>Ethnic origin</i>	Number of respondents and the annual percentage of ethnic groups									
	1999		2000		2001		2002		1999-2002	
	No.	%	No.	%	No.	%	No.	%	No.	%*
Asian British	0	0%	1	1%	0	0%	1	1%	2	0.5%
Black African	2	2%	0	0%	0	0%	0	0%	2	0.5%
Black Caribbean	3	3%	0	0%	0	0%	0	0%	3	1%
Chinese	0	0%	0	0%	2	1%	0	0%	2	0.5%
Dutch	0	0%	2	2%	0	0%	0	0%	2	0.5%
English/French	0	0%	0	0%	3	2%	0	0%	3	1%
English/Irish	0	0%	0	0%	4	2.5%	3	2%	7	1%
English/Scottish	0	0%	0	0%	2	1%	0	0%	2	0.5%
English/Welsh	90	89%	94	84%	136	84%	108	84%	428	85%
German	0	0%	0	0%	0	0%	2	2%	2	0.5%
Greek	0	0%	1	1%	1	0.5%	1	1%	3	1%
Indian	0	0%	0	0%	2	1%	2	2%	4	1%
Iranian	0	0%	0	0%	0	0%	1	0.1%	1	0%
Irish	1	1%	6	5%	5	3%	2	0.2%	14	3%
Mexican	0	0%	2	2%	0	0%	0	0%	2	0.5%
Pakistani	4	4%	0	0%	0	0%	0	0%	4	1%
Polish	0	0%	2	2%	4	3%	0	0%	6	2%
Scottish	0	0%	0	0%	3	2%	9	7%	12	3%
Turkish	1	1%	4	4%	0	0%	0	0%	5	1%
Totals	136		132		210		191		504	

*Variation arising from rounding up/down of percentage figures. See also footnote 14 above.

Table 1.6: *Ethnic origin of respondents to ELF's equal opportunities programme*

The level of English and Welsh respondents declined from 89% in 1999 to 84% in 2000 and then remained constant during 2001 and 2002. Other trends were that there was an increase in the number of Indian respondents over the study period but no Pakistani, Black African and Black Caribbean respondents after 1999.

Income group

44. The stated income of respondents over the study period provides that the lowest income bracket (under £10,000) was the highest group with nearly 45% of all respondents. This was the case for each study year period. Further, over 65% of all respondents stated that they had incomes of under £15,000. Table 1.7 provides a detailed breakdown of income groups. A clear trend is that there were fewer respondents in each income group as incomes increased. This was, with one or two minor exceptions, consistent over the four-year period.

<i>Income group</i>	Annual number of respondents and percentage according to income group									
	1999		2000		2001		2002		1999-2002	
	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>	<i>No.</i>	<i>%</i>
Under £10,000	19	36%	67	57%	63	38%	60	46%	209	45%
£10-14,999	14	26%	21	18%	41	25%	19	15%	95	20%
£15-19,999	9	17%	10	9%	20	12%	19	15%	58	12%
£20-29,999	7	13%	13	11%	20	12%	14	11%	54	12%
£30-39,999	3	6%	3	6%	7	4%	10	8%	23	5%
£40-49,999	0	0%	3	6%	8	5%	4	3%	15	3%
£50,000+	1	2%	0	0%	5	3%	5	4%	11	2%
Totals	53		117		164		131		465	

*Variation arising from rounding up/down of percentage figures. See also footnote 14 above.

Table 1.7: Income group of respondents in equal opportunities programme

1.7 Locality of cases

45. The analysis of regional distribution of cases was carried out according to the Regional Court Circuit. The majority of referrals came from the South East of England with just over 50% of all referrals being based in the region. The second highest number of referral requests came from the West of England with over 16% of referrals being located in the area. 12% were from the Midlands, 8% from Wales 7% from the North East and 6% from the North. Table 1.8 provides a breakdown.

Region	Annual number and percentage of ELF referrals according to region									
	1999		2000		2001		2002		1999-2002	
	No.	%	No.	%	No.	%	No.	%	No.	%
South East	58	43%	60	47%	99	51%	101	57%	318	50%
West	33	25%	18	14%	28	15%	24	13%	103	16%
Midlands	19	14%	18	14%	22	11%	19	11%	78	12%
Wales	5	4%	11	9%	17	9%	17	10%	50	8%
North East	7	5%	9	7%	16	8%	12	7%	44	7%
North	12	9%	12	9%	11	6%	5	3%	40	6%
Totals	134		128		193		178		633	

*Variation arising from rounding up/down of percentage figures

Table 1.8: Regional analysis of ELF case referrals

Trends

46. The proportion of cases from the South East is particularly high and increased year on year over the study period with a corresponding percentage reduction in cases from the West and the Midlands, although on a case-by-case basis the number of referrals from the Midlands remained constant. There was a large increase in the number of referrals from Wales accounting for a proportionate increase from 4% in 1999 to 10% in 2002. Proportionately, the number of cases arising from the South East is significantly higher than the demographic distribution of the UK population, which is around 40%.¹⁷ There is no apparent explanation for this in the way that ELF provides its services. It relies on a national network of members and provides community outreach services throughout the UK, specifically designed to raise the profile of ELF across the country.

1.8 The conclusion of a case

47. As indicated above, clarifying the conclusion to many environmental cases required further investigation including contacting the original inquirer to ask how their case had progressed. Further research was undertaken for 2001 and 2002. Table 1.9 summarises this.

Status of case	2001		2002		2001-2002	
	No.	%	No.	%	No.	%
Successful	46	42%	33	30%	79	36%
No successful conclusion	64	58%	76	70%	140	64%
Ongoing matter	10		39		49	
No recent response	74		30		104	
Total respondents	194		178		372	

*Percentage between successful and unsuccessful

Table 1.9: Status of cases

¹⁷ National Statistics – Census 2001: www.statistics.gov.uk

Highlights of results

48. From the research, it was possible to clarify, with reasonable certainty, the conclusions to over two-thirds of referrals in 2001 and 2002. 36% of concluded outcomes were successful ie, the environmental problem was completely or substantially resolved. This was achieved through a mix of quasi-legal and pre-proceedings advice coupled with more conventional assistance such as issuing court proceedings. Further, with a high proportion of cases being based on the land use planning regime, many cases were concluded by successful representations to planning committee meetings and appeals.

How success was attained	2001		2002		2001-2002	
	No.	%	No.	%	No.	%*
<i>Planning meeting/inquiry/appeal</i>	19	41%	17	52%	36	46%
<i>Alternative/extra legal success</i>	10	22%	10	30%	20	25%
<i>Pre-proceedings legal assistance</i>	5	10%	4	12%	9	11%
<i>Problem resolved by its own accord</i>	8	17%	1	3%	9	11%
<i>Court judgement</i>	4	9%	0	0%	4	5%
<i>Mediation</i>	0	0%	1	3%	1	1%
<i>Proceedings settled</i>	0	0%	0	0%	0	0%
<i>Total</i>	46		33		79	

*Variation arising from rounding up/down of percentage figures

Table 1.10: Successful outcomes from referrals

49. Table 1.10 provides an indication of the range of solutions to environmental problems. The most frequent successful resolution of cases was via the land use planning system accounting for 46% of successfully concluded cases. This would have included representations to local authority planning committees, appeals and inquiries and is likely to be influenced by the high number of planning cases that are referred by ELF. The role of mediation in environmental disputes has begun to arise, although it is the author's opinion that there is still greater opportunity in this area.

1.9 Barriers to a satisfactory conclusion

50. Over two thirds of the concluded cases did not according to respondents reach a satisfactory conclusion. In 35% of these cases the clients were advised that there were no reasonable prospects of success. In a further 31% of cases the cost of pursuing legal action was the main reason for its failure ie, they were advised that they could reasonably pursue the matter and were likely to have done so *but for* the cost or potential costs that may be incurred. In 9% of cases potential claimants were time-barred from taking action. A further 9% cited personal reasons for deciding not to pursue a remedy. Four cases went to court (3%) and judgement was given against the respondent. Finally, there was a range of other reasons given for not concluding the matter, this included

not having any further contact with the ELF member despite being advised of the prospects of success. Table 1.11 provides a breakdown of reasons for unsuccessful cases.

Reason for lack of success	2001		2002		2001-2002	
	No.	%	No.	%	No.	%
<i>No reasonable prospect of success</i>	28	41%	23	29%	51	35%
<i>Cost</i>	23	34%	23	29%	46	31%
<i>Time-barred</i>	5	7%	8	10%	13	9%
<i>Personal</i>	4	6%	9	11%	13	9%
<i>Court judgement</i>	2	3%	2	3%	4	3%
<i>Stress</i>	1	1%	0	0%	1	1%
<i>Other</i>	5	7%	14	17%	19	13%
<i>Total</i>	68		79		147	

*Variation arising from rounding up/down of percentage figures

Table 1.11: Reasons for unsuccessful cases

1.10 Conclusions

51. Certain conclusions can be drawn from the review of ELF's A&R service, some of which may clarify the perceptions and/or assumptions already being made in relation to environmental law.
52. The wide range of concerns raised by individuals emphasises the complexity of environmental law and demonstrates the need for greater awareness and understanding when deciding environmentally related matters. Over 33 separate environmental issues were raised ranging from air, noise and water pollution to less indirect measures such as the right to participate or to be informed about environmental matters.
53. There is a particularly high number of referrals arising in the South East of England. Even allowing for the demographic distribution of the population, there is a disproportionately high number of problems arising. This trend is likely to persist with the latest government proposals to increase development in the region.¹⁸
54. While a few concerns raised only impacted on one or two individuals or the immediate environment, the overwhelming majority affected a high number of people, often whole communities. Frequently, the number of people affected ran into thousands.

¹⁸ ODPM (2003). *Communities Plan*. ODPM: London.

55. A range of legal areas provide either the source of the environmental concern, or the remedy. However, the land use planning regime dominates civil litigation in relation to the environment and is by far the most visible factor influencing the environment in England and Wales. While direct land use concerns such as loss of open space and impact on landscape are of importance they arise only as frequently as other concerns such as noise, biodiversity and air pollution. Further, matters that are quite prominent in terms of environmental crime such as water pollution and waste¹⁹ appear to be relatively rare concerns for communities and individuals. This may be due to the regulatory regime in place. It may also be that people do not perceive these environmental concerns as much of a threat compared to developments proposed in their neighbourhood.
56. Significantly, the overwhelming majority of the people contacting ELF on behalf of either themselves or their communities do so as third parties to any activity or decision being taken. Communities and individuals often find themselves in a position where there are unable or prevented from taking direct action to resolve a dispute because of the rules of engagement within the legal system. In particular, with so many environmental and social concerns arising out of the land-use planning system it seems perverse to continue to deny even a limited third party right of appeal²⁰ (although it is understood that the National Assembly for Wales is now reviewing this position).
57. Many of the people contacting ELF have low incomes. This could imply that communities within lower income groups are suffering disproportionately from environmental problems. This supports recent research,²¹ which concluded that most often it is the poorest people in society who suffer from a poor environment. It also suggests that people in lower income groups may be more likely to need and value the free initial consultation provided by ELF members as part of its A&R service. However, how far those people are able to take legal action depends on the availability of pro-bono support by the legal and technical experts and/or the availability of public funding. The provision of pro-bono services is invaluable but can only assist up to the point where costs arise external to the pro-bono service provider (such as the liability for another party's costs, court fees or expert evidence) or to the extent that the provide

¹⁹ 'The waste industry is still responsible for more pollution incidents than any other sector ... while the water industry remains responsible for many serious pollution incidents' pp 22-26 Environment Agency (2003). *Spotlight on business environmental performance 2002*. Environment Agency: Bristol

²⁰ pp. 54-55, DTLR (2001). *Delivering a fundamental change*. DTLR: London.

²¹ Stephens, C, Bullock, S and Scott, A (2001). *Environmental Justice: rights and means to a healthy environment*. ESRC, Friends of the Earth and University of Sussex. See: www.foe.co.uk.

is able to provide advice and assistance without charge.²² This is evident from the high number of people citing cost as a barrier to success. Access to a legal remedy whereby each party pays their own costs is largely unavailable in environmental cases; it is not, in practical terms, available in the civil courts (see Part II) and for people on low incomes the risk of losing a court case is proportionately much greater than those who are not. Further, public funding is not widely available for environmental cases not least because of the small number of expert environmental lawyers with relevant public funding certificates and also because of the financial and other restrictions placed on applicants for public funding.²³

58. The number of people contacting ELF about concerns for their environment is increasing with the half-year to the end of June 2003 showing a significant increase (28%) on the number of case referrals for the same period in 2002 to ELF members. The need for access to environmental justice for all remains.
59. Over one third of concluded cases referred by ELF to its members were regarded by the client as successful in that the environmental concern had been resolved; success being achieved through a variety of means including, in some instances, issuing proceedings. Of the 64% of concluded cases that were not regarded as reaching a satisfactory outcome over 30% of respondents stated that they had been advised that their case had merits but that they did not pursue the matter because of the cost in taking legal action.

²² ELF members undertake to provide a free initial consultation. While this undertaking is given on the basis of providing up to one hour of time, in practice ELF members invariably dedicate many hours of free time to each referral.

²³ In March 2002, just 30 out of 8,319 solicitors firms in England had a full legal aid franchise for public law: p. 51, Stookes, P & Razzaque, J (2002): *Community Participation: The UK planning reforms and international obligations*. ELF: London. This may be as a result of the comparative remuneration available in comparison to the administrative work required to secure a public funding certificate.

Part II Civil Court Evaluation

2.1 Introduction

60. The evaluation of the private civil legal system aimed to provide an indication of how often the County Courts and High Court were used as a means of protecting the environment. It has long been argued that many civil law remedies to environmental problems were inadequate.²⁴ The disadvantages include the cost of taking action, the question of reasonableness and foresight of defendants and that, while injunctive relief may be available in some instances, most often decisions are based on compensation being paid to a claimant, rather than any preventative actions being taken or ordered. Further, the House of Lords in *Hunter v Canary Wharf* [1997]²⁵ affirmed that the availability of private nuisance was limited to those with rights to any land affected by the environmental harm. The judgement in *Hunter* also restated the approach taken in *Cambridge Water Company v Eastern Counties Leather* [1994]²⁶ that there was less need for the courts to develop a common law principle to protect against the escape of pollution when that should really be left to Parliament and legislation. Nevertheless, action in the civil courts does remain an option for environmental protection and a means of redress.
61. The need for this part of the study was confirmed by the fact that, to date, there has been no way of calculating or even estimating with any certainty how many civil environmental cases are taken to court each year. Accordingly, there has been no opportunity to identify any trends occurring or to tackle any problems that may be identified within the judicial system. This contrasts with other legal areas of law such as family law, debt or personal injury cases for which the Department for Constitutional Affairs (DCA) (formerly the Lord Chancellor's Department) provides annual judicial statistics and analysis.²⁷ To complement this part of the ELS, similar evaluation work was carried out in the criminal and public law field.²⁸
62. Finally, it is important to emphasise that the evaluation was a starting point and, although the outcomes should be of real value, they cannot conclusively state the position in relation to civil environmental action. The limitations to the study were that

²⁴ Richard Burnett-Hall (1995) cites McClaren from 'The Common Law of Nuisance Actions' that by the 1970's, nuisance reached a point where the English and Canadian authorities present a confused picture: "In the minds of many judges nuisance seems to conjure up a rather messy collage of strict liability and negligence, with no clear pointers to the applicability of either." *Environmental Law*. Sweet & Maxwell.

²⁵ 2 WLR 684

²⁶ 2 AC 264

²⁷ See the Department for Constitutional Affairs (formerly the Lord Chancellor's Department) www.lcd.gov.uk

²⁸ See paragraphs 10-13 above.

the evaluation was based on a sample case study from selected courts, that the evaluation only considered tried cases and not those that had settled prior to trial and that the case sample was taken from 2002 only.

2.2 Methodology

63. To ensure that the ELS was not duplicating other studies, a scoping review of recent environmental law literature was undertaken. This included reviewing journals such as *Environmental Law & Management* (ELM), the *Journal of Environmental Law* (JEL), the *Journal of Planning and Environmental Law* (JPL), *Environment Action*, *the environmentalist*, the *Environment Times* and the *ENDs Reports* (ENDs).²⁹ It was also necessary to confirm with the DCA whether it had carried out or knew of any comparable studies. The scoping review confirmed that there were no known judicial statistics on environmental law matters and that there was value and originality in proceeding with this part of the ELS. The DCA then provided sample data from selected County Courts and the High Court. From this, it was possible to identify those cases that potentially related to environmental problems and, as a result, consider those cases in more detail.
64. After an initial analysis of the DCA information, a sample set of 466 cases from six of the 220 County Courts in England and Wales and the High Court in London was prepared. The County Courts were:
- Bow County Court (South Eastern Circuit)
 - Gloucester Crown and County Court (Western Circuit)
 - Llangefni County Court (Wales and Chester Circuit)
 - Oxford Combined Court Centre (Midlands Circuit)
 - Sheffield Combined Court (North Eastern Circuit)
 - Stockport County Court (Northern Circuit)
65. From the sample set of 466 cases, 157 were identified as potentially having an environmental aspect. In particular, some of these were classified as personal injury cases and it was necessary to clarify whether any of these would also fall within the environment category. A Privileged Access Agreement prepared by the DCA was entered into so that the potential cases could be inspected in detail. The cases examined had concluded by trial and for which judgement had been given. They included a

²⁹ See Appendix 2: References for details.

mixture from the Small Claims, Fast Track and Multi-Track Court systems in the County Courts³⁰ and from the Queen's Bench Division of the High Court, the appropriate court dealing with the major private civil law claims.

66. A case was regarded as an environmental case in accordance with the study boundaries³¹ and any discretion was determined by the research and report author. For instance, if an environmental aspect, say noise, was only a minor element of a claim, this would not be regarded as an environmental case. However, if the primary particulars of a claim arose out of noise nuisance then this would be regarded as an environmental case.
67. For each potential environmental case the court file was inspected or a copy of the Particulars of Claim or judgement obtained. For those cases where no court file was available, a copy of the Judges summary was provided from which an assessment of the case was made.

2.3 Findings

68. From the 466 case samples, just two were found to be environmental cases. These were both claims for compensation arising out of nuisance, negligence and/or trespass and related to the alleged unlawful interference with land and property. Injunctive relief was not claimed. One of the claims was dismissed completely and the other was dismissed in terms of the general environmental claim although a related claim for special damages was allowed. In short, neither of the environmental civil cases could be regarded as successful in terms of resolving the environmental problem or securing compensation for it. Each of the cases identified in the sample set as personal injury cases related to individual claimants almost entirely from road traffic accidents. It was concluded that all the personal injury claims did not fall within the study definitions of an environmental case.
69. With such a low number of environmental cases it was impossible to reach any rational conclusion or to try and attempt to extrapolate the findings to national statistics. By way of example during 2001 71,763 cases were disposed of by the court in the County

³⁰ Under Part 26 of the Civil Procedure Rules, the court will allocate a claim to a track according to the scope of each track. Part 26.8(1) provides that, when deciding the track for a claim, the matters to which the court shall have regard include (a) the financial value of the claim; (b) the nature of the remedy; (c) the likely complexity of the facts, law and evidence; (d) the number of parties; (e) the value of a counterclaim; (f) the amount of oral evidence; (g) the importance of the claim to person who are not parties to the proceedings; (h) the views expressed by the parties; and (i) the circumstances of the parties.

³¹ See paragraphs 12 to 20.

Courts (compared to 71,233 in 2000) and 460 cases concluded in the Queen's Bench Division of the High Court (590 in 2000). Table 2.1 provides an outline summary of court action in England & Wales with an indication of how many claims arise under each head.

	2001 Proceedings issued	Disposal by court*
Chancery Division of the High Court including corporate and personal insolvency, business, professional negligence, trusts, wills and contentious probate	37,034	2,736
Queen's Bench Division including contract, tort, judicial review, the Commercial and Admiralty Courts and the Construction Court. <i>This includes environmental and planning judicial review and civil claims.</i>	21,613	460
County Courts including debt, housing and other litigation of less complex matters and generally smaller sums than in the High Court. <i>This includes any private environmental claims.</i>	1,739,090	71,763
Family matters arising in both the High Courts and County Courts including public and private children cases, divorce (decree nisi), matrimonial financial matters, domestic violence and contentious probate matters.	(estimate) 656,000	656,003
Criminal cases including Crown and Magistrates Courts	2,265,000	1,031,000

* Involves the court taking a role in reaching settlement eg, providing a court order, further matters may be resolved by informal settlement.

Table 2.1: Summary of legal action in 2001

70. It may well be that there is a larger number of private civil environmental law cases than the research suggested. There may, for instance, be clusters of activity which the sample selection of cases did not highlight. Clearly, notwithstanding the lack of data, some civil environmental claims still arise and are successful, see for example the case briefings on *Milka v Chetwynd Animal By Products (1995) Ltd* (2000)³² and *Dinotaro v Marshall* (2001).³³ Although for both reports the author accepted that they did not give rise to any novel point of law, but that they were of interest simply because they illustrated that private civil law environmental cases do still arise.

2.4 Conclusions

71. The Civil Court Evaluation focussed solely on private civil law proceedings and did not include public law matters arising by way of judicial review. Further, although the study found only two out of 466 cases, it should be emphasised that this is only part of the picture and account should be made of the potential cases that do not conclude by way

³² ENDS Report 301 at 56

³³ ENDS Report 314 at 55

of court judgement. Importantly, access to environmental justice includes the opportunity of securing legal and technical expertise and advice in environmental matters and, while court proceedings are a vital element of access to justice, the concept is much broader.

72. In 1978, the Pearson Commission³⁴ concluded that 86% of cases settled without proceedings being issued. More recently, the Lord Chancellor's Department investigated the effectiveness of the Woolf Reforms in its report: *Emerging Findings: An Early Evaluation of the Civil Justice Reforms*.³⁵ It stated that, overall there had been a drop in the number of claims issued; in particular in the types of claim where the new Civil Procedure Rules had been introduced, that there was evidence to show that settlements at the door of the court were fewer, and that settlements before the hearing day had increased. Research by Goriely *et al* in 2002 affirmed this.³⁶ The present position, encouraged by the Woolf Reforms, that the success of the civil legal system is outside the court door; tends to complement the findings of the ELF review discussed in Part I with only a small fraction of cases resulting in trial yet a much greater proportion being regarded as successful.
73. Regardless of the potential number of cases that may resolve without proceedings, the results of the study question the effectiveness of private law giving any effective form of environmental protection. Most often, the only relief that the private law system can realistically achieve is to attempt to financially compensate for environmental harm. Moreover, there is no compulsion on a successful claimant to use the damages awarded to make good the environmental harm. This is illustrated by two recent nuisance claims: *Marcic v Thames Water Utilities Ltd* [2002]³⁷ and *Dennis v Ministry of Defence* [2003].³⁸ Both of these cases resulted in compensation being awarded but that it was not for the claimant to then rectify the environmental damage that arose. In *Marcic*, Thames Water have appealed to the House of Lords and the matter will be heard in October 2003. The case of *Dennis* raises some interesting questions of equality before the law and is discussed below in more detail.
74. It is submitted that the Civil Procedure Rules do not favour environmental law cases. The system of small claims, fast track and multi-track seek to produce a system that is more efficient and effective in operation in order to reduce the time it takes to resolve a

³⁴ The Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054. Chairman: Lord Pearson. LCD: London.

³⁵ LCD (2001). LCD: London.

³⁶ Goriely, T *et al* (2002). *More Civil Justice: The impact of the Woolf Reforms on pre-action behaviour. Research Study 43*. The Law Society & Civil Justice Council: London.

³⁷ AER 698

³⁸ EWHC 793 (QB)

dispute, reduce the costs involved in taking action and remove some of the stress and anxiety of taking action. However, environmental cases often involve complex issues of evidence, causation, liability or quantum and, by their nature, may well be unsuitable for the simplified court rules.

75. This should be seen as a genuine concern as it appears that one option for access to justice ie, the private civil court system has restrictions. In particular, the small claims court, which is based on the principles of speed, efficiency and, importantly, each party paying their own costs, is effectively unavailable to individuals and communities seeking to use the legal system to resolve a problem. This mirrors the position of the Administrative Court system whereby the option of challenging public decision-making on the environment is often prohibitive because of costs and time.
76. To find that such a small proportion of environmental cases are reaching the courts may be regarded as a concern for the private civil law system. In theory it provides an environmental remedy in certain circumstances but the reality is that the action available is limited to nuisance and negligence and, in practice; it is an inefficient tool to prevent environmental harm. Further, the cost-effective court system is outside the scope of environmental law, rendering environmental action expensive. The role of pre-proceedings legal action is a vital element of access to environmental justice but it remains a concern that so few cases result in legal action. Importantly, the threat of legal action is only effective if it is a real threat; otherwise it is without force.
77. It is submitted that the case of *Dennis v MoD* [2003] illustrates the inequality of access to environmental justice in the present private civil law system. Mr and Mrs Dennis owned Walcote Hall Estate, Cambridgeshire with around 1,400 acres including a large house, associated buildings, farmland and woodland. In 1986, Mr Dennis began complaining about the noise from the use of nearby land caused by the Ministry of Defence operating Hawker Harrier jets. Some years later, the Dennis' issued proceedings claiming damages of around £10,000,000 for noise nuisance. The hearing in the High Court lasted eight days with leading and junior counsel instructed by both parties. The Dennis' were awarded £950,000 in damages to compensate for past and future nuisance until around 2012 at which point it was likely that the nuisance would stop. If it continued in a different form (eg, different aircraft being tested) then the judge indicated that that would give rise to a fresh cause of action.
78. There is no suggestion that the Dennis' should not have claimed damages, however they were in a rather exceptional situation that would not have arisen for almost all other claimants suffering from nuisance, and particularly noise. This enabled them to

use the legal justice system to the best of their ability. They were, it is assumed, in a position to carry the risk of an eight-day trial and its costs. This would not be the case with most other noise sufferers. Also, they were able to claim the nuisance not only caused them to suffer personal inconvenience, but also a loss in the value of their estate. Again, this is not open to most other sufferers. In essence, much of the claim was to remedy a reduction in property value, rather than environmental harm. Finally, they were suing a defendant, who could pay the cost of such an award (ie, society and/or taxpayers).

79. The exceptional nature of the case is that if you are rich enough to use the law then it can be of assistance. If not, then the legal system provides little remedy. If you are wealthy enough for noise to materially affect your property value then the law can assist; if not, then you should not be compensated.

Part III Reported Cases Analysis

3.1 Introduction

80. The third part of the ELS involved an analysis of reported environmental law cases between 1999 and 2002. This was: a) to provide a benchmark of the type of cases being pursued by analysing those reported cases publicly available; b) to assess whether the reporting of environmental law cases is an accurate reflection of practice and; c) to offer a comparison between the number and type of environmental cases reported and the number of cases actually being pursued in court.

3.2 Methodology

81. The scope of the Reported Cases Analysis (RCA) included:
- An evaluation of the decisions reached and whether they were successful in terms of protecting and/or enhancing the environment.
 - An assessment of the type of claimants taking legal action eg, whether the claim was made by an individual/residents, a local authority or other public body.
 - An assessment of the problem the litigation was trying to resolve.
 - An evaluation of the legal area upon which the claim was based eg, if it related to a regulatory regime such as the integrated pollution prevention and control regime.
82. The survey was based on all the cases reported in the Environmental Law Reports (ELR) published by Sweet & Maxwell between 1999 and 2002. This was supported by consideration of case reports or synopses in other environmental/legal journals. The analysis of comparable reports found that over half the cases reported in ELR were also reported in JEL and ELM. For example, in the six 2001 editions of ELM there were 38 detailed environmental cases synopses on cases relating to England and Wales (compared to 29 in ELR for the same period). Of those 38 cases, 20 were also reported in ELR. However, in order not to place undue emphasis on the level of case reporting in environmental matters, the reports from the various publications were not accumulated. The purpose of considering other publications was essentially to confirm

that the ELR provided a reasonable representation of environmental case law. In total, 153 case reports were reviewed. Of these, 17 were criminal cases, 7 related to causes arising in Scotland or Northern Ireland and 12 were either European or International matters. Also, over the study period, some cases were reported at both lower and higher court stages, and in these circumstances only the highest appellate court decision was analysed. As a result, 103 cases were considered in detail.

3.3 Findings

Environmental success

83. Success was defined according to whether the environmental problem was resolved or alleviated. Importantly, in the RCA success was not only based on the success of the claimant in their particular matter but also on whether environmental benefit was secured or was likely to result from the decision. For example, if a person who had been served with a noise abatement notice, successfully appealed against that notice, this was regarded as unsuccessful because the environmental problem (the noise) is likely to continue. It is accepted that determining success in these terms, the ELS was ultimately subjective, however it was regarded that this was a necessary and unavoidable aspect of the study. Some level of subjectivity was inevitable to ensure that the study progressed and that some conclusions could be drawn. The need to import an element of subjectivity highlighted, very early in the study, one of the unique problems with securing access to environmental justice, which is that the environment itself and benefit arising from it may be regarded differently by a range of people and organisations and that it can be infinitely variable.
84. Between 1999-2002, 36% of the cases were considered successful ie, the claim or appeal was granted or allowed, compared to 64% whose claims were dismissed. However, this did not accurately reflect whether there was environmental benefit deriving from the decision. For instance, if a company was taking legal action to avoid compliance with waste regulations and failed this would be regarded as an environmental success even though the court dismissed the action. Thus, in terms of environmental benefit, 47% of decisions were successful, compared to 53% that were regarded as unsuccessful. The determination as to whether a decision was successful was ultimately subjective and determined by the researcher and author.

Types of claimants using the courts

85. The most frequent court users according to the reported cases were residents, which accounted for 36% of claimants. Company or business organisations made up 27%, local authorities 21%, Government agencies (eg, health authorities) 7%, Non Governmental Organisations (NGOs) 5% and a final residual group comprising a number of non-specific claimants accounted for the remaining 5%. This outcome, at first glance, conflicts with the findings in MEJ which found that there were more corporate bodies taking action than individuals/associations and NGOs at a ratio of 28 compared to 22 (the RCA ratio being 27:41). However, this may be explained by the fact that the UCL report does not cover land use planning matters whereas the RCA does. This is significant because judicial review of land use planning decisions is the only means of challenge for individuals and NGOs that are not applicants in the planning process. Whereas corporate bodies making planning applications have the planning appeal process as an alternative means of action. Planning appeals were not reported in the ELR during the course of the study period.³⁹

Regional basis of claims

86. The region with the largest number of reported environmental cases was the South East, including London, with 40% of all cases being based on matters arising from this area. A further 18% related to the Midlands, 12% to the North, 11% to the West, 9% to the North East and 5% to Wales. There were around 6% that were either not region specific because they were dealing with general environmental policy, or that the region could not be identified from the case report. The proportion of cases for respective regions is broadly comparable to the ELF review as far as London and the South East generated an overwhelming majority of cases. However, there were distinctions between the regions with the ELF review noting a larger number of cases in Wales (8%) and the West (16%) and less cases from the Midlands (12%), North (6%) and North East (7%).

Types of environmental problem

87. The most frequent concern or environmental problem related to waste with around 18% of all concerns based upon this. This was followed closely by the lack of an EIA in land use planning matters and complaints about noise which each accounted for 16% of the cases considered. Concerns about water pollution related to 7%, as did matters relating to the built environment. Air pollution accounted for 6% of the concerns while

³⁹ In 2002, there were 13,539 planning appeals in England of which around 350 related to major development and therefore, it is submitted, likely to have an environmental impact. ODPM (2002) *Development Control Statistics 2002* and *Further Research into Mediation in the Planning System*. See www.odpm.gov.uk.

human health and matters relating to land use (excluding EIAs) such as the loss of open spaces represented 5% each.

Legal area

88. The legal framework or regime that the environmental concerns were based upon shows that 27% of all reported cases related to the statutory nuisance regime, with the land use planning system being the basis of challenge in 25% of cases. 13% of cases related to the waste regulations. Common law claims in nuisance were the basis of 7% of reported cases and negligence 5%. The Integrated Pollution Control regime gave rise to 6% of reported cases. With the exception of the land use planning regime and waste, the legal area forming the basis of the environmental concern was broadly comparable to the ELF review with statutory nuisance prominent and nuisance and negligence playing a moderate role.

Comparable analysis

89. Due to the lack of private civil law cases arising from the study it was not reasonably practicable to provide a comparable analysis in terms of accuracy of reported cases, however this may be something that can be returned to when considering the associated studies being carried out (see paragraphs 10 and 11 above). Compared to the ELF review there were far fewer reported cases on land use planning although the prominence of EIA related decisions before the courts is significant and indicates that this aspect of regulating planning and the environment remains contentious. An interesting comparison is that issues around waste were high, yet were less of a concern overall, for communities and individuals (according to the ELF review in Part I). The high number of cases relating to noise complements the ELF review findings.
90. In terms of legal areas of cases, statutory nuisance claims were prominent in both the RCA and the ELF review. The land use planning regime was also the basis for a high number of cases in the RCA but far fewer than the ELF review.

3.4 Conclusions

91. The RCA found that the highest proportion of cases arose from individuals, residents and NGOs taking action. This was not the conclusion reached in MEJ. However, MEJ did not cover judicial review of planning decisions, many of which were taken as a means of last resort by communities and individuals having no other form of legal remedy.

92. In terms of the aims of the RCA, the environmental cases that were reported appeared to be reasonably consistent with the number of cases being referred to ELF with some important exceptions in relation to regulatory type cases such as waste, water and IPC. There was a broad mix of water, waste air pollution, land use and noise. However, it remains uncertain whether the cases reported accurately reflect environmental law in action. Overall, there were 153 case reports over the four year study period appears quite a high percentage of cases compared to the possible numbers of environmental cases subject to court proceedings. The MEJ suggested that around 600 environmental appeals may arise each year from the various regulatory regimes. It is the author's opinion from carrying out the Civil Court Evaluation (Part II above) and considering the ELF review that there could be anything from between 100 and 1500 civil law cases concluding in the courts each year. It is believed that any number of cases exceeding this should have been evident from the research carried out.
93. The fact that there is a comparatively large number of reported cases suggests that the environmental law is legally significant. Indeed, its uniqueness derives from the fact that pollution and environmental decision-making has many implications in terms of permanence, uncertainty, associated consequences of quality of life, ecology and health and the impact on future generations. It also gives the impression that there are more environmental cases than may be suggested by the Civil Court Evaluation and MEJ. However, if they raise important points of law, then this may be justified.
94. In recent years there has been an increase in the number of cases relating to EIAs. It is recommended that further research is carried out in this area and in particular whether the thresholds that determine whether development constitutes EIA development are too high and whether there is sufficient expertise among officers deciding when EIAs should be carried out.⁴⁰

⁴⁰ pp 143-151 Stookes, P (2003). *Getting to the real EIA. Journal of Environmental Law. Vol. 15 No. 2.* Oxford University Press: Oxford.

Part IV Overall conclusions

95. Environmental justice operates across a wide range of legal areas from land acquisition to trespass, housing to eviction, taxation to transport. It is also based on a range of discrete environmentally specific regulation and case law on biodiversity, water law, integrated pollution prevention control, radioactive substances and land use. Moreover, there are as many different types of environmental concern operating across these legal areas including air pollution, human health, noise, flooding and loss of open spaces. Over 33 separate environmental issues were raised ranging from air, noise and water pollution to less indirect measures such as the right to participate or to be informed about environmental matters (paragraph 33 of the Report). Finally, environmental law operates within the civil, public and criminal law fields. This complex, cross-cutting characteristic of environmental justice is unique in law. The purpose of the ELS was to begin to evaluate the effectiveness of environmental justice. Hopefully, it has achieved this.
96. The review of ELF's A&R service highlighted one of the unique aspects of environmental law in that the impact from specific environmental damage, one polluting activity or a specific decision regularly results in many 100's and 1,000's of people being potentially affected. According to information from inquirers when requesting assistance, the total number of people affected by the specified environmental problems was 98,981 during 2001 and 224,141 in 2002. Overall, these figures provided an average of 869 people affected by each environmental problem (paragraph 36). This should be effectively recognised when considering the public nature of environmental law.
97. The ELF review also found a disproportionate number of environmental problems arising in London and the South East compared to other regions of England and Wales (paragraphs 45 and 46). It is recommended that the latest government proposals for further intensive development in the region recognise this and take it into account when implementing policy.
98. The ELF review included an analysis of respondents to ELF equal opportunities monitoring programme. In terms of the respondent's financial status, the largest majority of people stated that they had incomes in the lowest income group. The stated income of respondents over the study period provides that the lowest income bracket (under £10,000) was the highest group with nearly 45% of all respondents. This was the

case for each study year period. Further, over 65% of all respondents stated that they had incomes of under £15,000. (paragraph 44). This suggests that people in this income group were in the greatest need of legal assistance. Yet the availability of public funding for environmental matters is, at best, uncertain and there is a real need to examine this further and to resolve any inequity that arises. The lack of public funding and therefore access to environmental justice is exacerbated by the operation of the Civil Procedure Rules (paragraph 74) and illustrated by recent case law. There remains, it seems, one law for the rich and another for the poor. It is recommended that there is examination and review of the role public funding plays in supporting environmental legal action.

99. The ELF review also found that people in the 51-60 year old age group were the most frequent users of ELF's service and it may be that they are most likely to consider taking legal or other action to resolve an environmental concern (paragraph 40). The gender of people being referred by ELF were 54% male and 46% female. However, there was a clear trend over the four years of an increase in the number of female respondents and a corresponding decline in male respondents; in 2002 it was 50% male and female (paragraph 41). The single largest ethnic group was English/Welsh which accounted for 85% of respondents. There was an increase in the number of Indian respondents over the four year study period but no Pakistani, Black African or Black Caribbean respondents after 1999, the first year of the study (paragraph 43).
100. The ELF review found that environmental concerns were covered by more than 21 discrete areas of law. The area that the overwhelming majority of environmental concerns were based upon was the land use planning system. Over 61% of all concerns relating to decisions, acts or omissions arose out of the Town and Country Planning regime (excluding breach of planning conditions). It was over five times as common as the next legal area, which was statutory nuisance (paragraph 34).
101. From the outcome of the A&R review, and the fact that other areas of related research have not considered the land use planning system, it seems that planning remains comfortably detached from environmental matters and continues to fall largely outside the scope of environmental matters. It is recommended that land use planning reforms incorporate greater access of review for all interested parties. The simplest and most effective mechanism for this would be a limited third party right of appeal on the occasions that justify this. It is recommended that further research is carried out in this area. It must be acknowledged that land is only one environmental media together with air and water; yet its use, or misuse, gives rise to a vast array of adverse environmental impacts.

102. Over one third of ELF referrals were regarded by the client as successful in that the environmental concern had been resolved. Of the concluded cases that were not regarded as reaching a satisfactory outcome over 30% of respondents stated that they had been advised that their case had merits but that they did not pursue the matter because of the cost in taking legal action (paragraph 59).
103. From the outcome of the Reported Cases Analysis (Part III), environmental action appeared to be moderately successful; in terms of environmental benefit, 47% of decisions were successful, compared to 53% that were regarded as unsuccessful (paragraph 84). The most frequent court users according to the reported cases were residents, which accounted for 36% of claimants. Company or business organisations made up 27%, local authorities 21%, Government agencies (eg, health authorities) 7%, Non Governmental Organisations (NGOs) 5% and a final residual group comprising a number of non-specific claimants accounted for the remaining 5% (paragraph 85).
104. The RCA found that the most frequent concern or environmental problem related to waste with around 18% of all concerns based upon this. This was followed closely by the lack of an EIA in land use planning decisions and complaints about noise which each accounted for 16% of the cases considered. In terms of EIA this raises concern whether the EIA regime is working effectively when it is giving rise to a comparatively large number of complaints. It is suggested that further research may be needed in this area and in particular whether the thresholds that determine whether development constitutes EIA development are too high and whether there is sufficient expertise among officers deciding when EIAs should be carried out. Interestingly, and in contrast to the RCA, ELF referrals about water pollution and waste were comparatively rare which suggests that individuals concerned about these types of problems are, at an earlier stage, referred to the appropriate public bodies to resolve these matters and that the regulatory bodies, such as the Environment Agency and local authorities, are well placed to tackle these concerns directly (paragraph 33).
105. The results of the ELS question the effectiveness of private civil law giving any effective form of environmental protection. Most often, the only relief that the can realistically achieve is to attempt to financially compensate for environmental harm. Moreover, there is no compulsion on a successful claimant to use the damages awarded to make good the environmental harm (paragraph 73).
106. It seems that, in practice, private civil law remedies are not an adequate form of resolving environmental disputes. They remain expensive and generally fall outside any benefits in time and cost that the Civil Procedure Rules may offer. However, it is

accepted that if the limitations of complexity and cost are overcome it remains an option for environmental protection that could be of use in limited circumstances. There are clearly some words of wisdom in the House of Lords suggesting that environmental protection should be left for Parliament and legislation and that, given the complexities of environmental law, its protection and enhancement is left to public bodies who have the responsibilities, duties and resources for this. If so, all those responsible for environmental protection must fully understand the broad principles underpinning environmental protection.

107. If public bodies are given greater responsibilities, powers and duties, then the ability to challenge public decisions, acts or omissions taken on behalf of society must be made more accessible. The Government is confident that the present system of judicial review complies with the requirements of the Aarhus Convention but the findings of the ELS test this reasoning. With so many individuals and communities concluding that the reason for not taking legal action was one of cost and liability (see paragraph 50) it cannot be correct to assume that the present system provides a means of review that is 'fair, equitable, timely and not prohibitively expensive'.⁴¹ Clearly access to environmental justice must mean access for all, regardless of means and the outcome of both the ELF review and the ELS test this.
108. There needs to be further investigation into the role and ability of public bodies taking greater positive action to protect the environment. If there are gaps in operation, for example, that resources are limited, then there should be serious consideration on securing greater finance for these areas. There is inconsistency in a Government that promotes sustainable development and produces a strategy to that effect,⁴² yet advocates a large road building programme⁴³ which will exacerbate the problems most citizens feel most strongly about.
109. There should be a review of the role of judicial review in supporting environmental justice and in particular the potential for establishing the principle that each party pays their own costs. Too often, legal action that had reasonable prospects of success has not been pursued because it has been prohibitively expensive. The traditional court approach of the loser paying the winners costs is discriminating against those without adequate resources to cover the potential of losing. Some leading judiciary have raised the principle of greater use of no-costs orders.⁴⁴ This principle should be adopted so

⁴¹ This is required under Article 9(4) of the Aarhus Convention 1998.

⁴² DETR (1999). *A better quality of life: UK Sustainable Development Strategy*. DETR: London (currently under review).

⁴³ The Observer 15 June 2003, see: www.observer.co.uk

⁴⁴ p. 6, LJ Sedley (2002). *Aarhus Convention Conference Report*. Environmental Law Foundation: London.

that it provides some certainty, prior to issuing proceedings, for environmental matters that affect a significant proportion of a locality. Environmental champions should be praised not financially persecuted.

Appendix 1

Glossary

A&R	Advice & Referral
CLS	Community Legal Services
CPO	Compulsory Purchase Order
DCA	Department for Constitutional Affairs
Defra	Department for Environment, Food and Rural Affairs
EIA	Environmental Impact Assessment
ELF	Environmental Law Foundation
ELM	Environmental Law and Management
ELR	Environmental Law Reports
ELS	Environmental Law Study
ENDs report	Environmental Data Services report
EO	Equal Opportunities
GMOs	Genetically modified organisms
IEMA	Institute of Environmental Management and Assessment
JEL	Journal of Environmental Law
LCD	Lord Chancellor's Department
MEJ	Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal
NGOs	Non Governmental Organisations
RCA	Reported Cases Analysis
UCL	University College London

Appendix 2

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Appendix 3

Geographical regions of study

Midland Circuit

Banbury
Birmingham
Boston
Burton upon Trent
Buxton
Chesterfield
Coventry
Derby
Dudley

Hereford
Evesham
Grantham
Herford
Kettering
Kidderminster
Leicester
Lincoln
Ludlow

Mansfield
Melton Mowbray
Newark
Northampton (bulk
centre)
Northampton
Nottingham
Nuneaton
Oswestry

Oxford
Redditch
Rugby
Shrewsbury
Skegness
Stafford
Stoke On Trent
Stourbridge
Stratford Upon Avon

Tamworth
Telford
Walsall
Warwick
Wellingborough
Wolverhampton
Worcester
Worksop

Northern Circuit

Accrington
Altrincham
Barrow-in-Furness
Birkenhead
Blackburn
Blackpool

Bolton
Burnley
Bury
Carlisle
Chorley
Kendal

Lancaster
Leigh
Liverpool
Manchester
Nelson
Oldham

Penrith
Preston
Rawtenstall
Salford
Southport
St. Helens

Stockport
Tameside
Whitehaven
Wigan

North Eastern
Circuit

Barnsley
Bishop Auckland
Bradford
Consett
Darlington
Dewsbury
Doncaster

Durham
Gateshead
Great Grimsby
Halifax
Harrogate
Hartlepool
Huddersfield

Hull
Keighley
Kingston Upon Hull
Leeds
Morpeth & Berwick
Newcastle Upon Tyne
North Shields

Pontefract
Rotherham
Scarborough
Scunthorpe
Sheffield
Skipton

South Shields
Sunderland
Teesside
Wakefield
York

South Eastern
Circuit

Ashford
Aylesbury
Barnet
Basildon
Bedford
Bow
Brentford
Brighton
Bromley
Bury St Edmunds
Cambridge
Canterbury
Central London

Chelmsford
Chichester
Clerkenwell
Colchester
Croydon
Dartford
Eastbourne
Edmonton
Epsom
Gravesend
Guildford
Harlow
Hastings

Haywards Heath
Hertford
High Wycombe
Hitchin
Horsham
Hove
Huntington
Ilford
Ipswich
King's Lynn
Kingston-Upon-
Thames
Lambeth

Lewes
Lowestoft
Luton
Maidstone
Mayor's & City of
London
Medway
Milton Keynes
Newbury
Norwich
Peterborough
Reading
Reigate
Romford

Shoreditch
Slough
Southend
St Albans
Staines
Thanet
Tunbridge Wells
Uxbridge
Wandsworth
Watford
West London
Willesden
Woolwich
Worthing

Wales & Chester
Circuit

Aberdare
Aberystwyth
Blackwood
Brecknock
Bridgend
Caerarfon

Cardiff
Cardarthen
Chester
Conwy & Colwyn
Crewe
Haverfordwest

Llanelli
Llangefni
Macclesfield
Merthyr Tydfil
Mold
Neath & Port Talbot

Newport (South Wales)
Northwich
Pontypridd
Pontypool
Rhyl
Runcorn

Swansea
Warrington
Welshpool and
Newtown
Wrexham

Western Circuit

Aldershot & Farnham
Barnstaple
Basingstoke
Bath
Bodmin
Bournemouth

Bristol
Cheltenham
Exeter
Gloucester
Newport (Isle of Wight)
Penzance

Plymouth
Poole
Portsmouth
Salisbury
Southampton
Swindon

Taunton
Torquay & Newton Abbot
Trowbridge
Truro
Weston Super Mare

Weymouth & Dorchester
Winchester
Yeovil

Environmental Law Foundation

Advice and Referral

This national service provides advice and assistance in all matters relating to the law and the environment, using ELF's network of expert environmental solicitors, barristers, scientists and consultants, who help people resolve their environmental and community problems.

Should legal or technical assistance be required, the case is referred to a solicitor, barrister or technical expert for further advice. The initial consultation is free and any further assistance is provided free, at cost or at an agreed reduced rate. To find out more please call 020 7404 1030.

Outreach

ELF has been running an Outreach programme since 1999. Its objective is to help and support community groups on all aspects of environmental law by organising and running workshops, seminars, environmental law surgeries and other events in their region. It provides information and publications for individuals and groups, raises awareness about environmental rights and justice and informs people about ELF and its services.

The programme emphasises the importance of community empowerment. It has been very successful in helping groups to help themselves, advising them on the current state of the law and how it impacts on their particular concern.

Events

ELF organises at least two major events each year to raise awareness about specific aspects of environmental law. In 2001 it presented the inaugural Professor David Hall Lecture, entitled *Environmental Risk: The Responsibilities of the Law and Science*, by Lord Woolf, the Lord Chief Justice. In 2003, the David Hall Lecture was presented by Fiona Reynolds CBE, Director-General of the National Trust and ELF Patron entitled, *Planning for a Small Island*. Other recent events have included the Aarhus Convention Conference in November 2002.

Training and Education

The skills and expertise of ELF and its members are used to inform the legal and other professions about topical environmental issues through the provision of training programmes.

ELF provides Continuing Professional Development training that is accredited by the Law Society, the Bar Council and the Institute of Legal Executives and the Council for Licensed Conveyancers. It also runs a training programme for volunteers and interns covering the practice and process of environmental law, case management and the principles of sustainable development.

Policy Development

ELF aims to promote access to environmental justice for communities throughout the UK and to encourage environmental awareness at every opportunity. It seeks to empower communities and individuals to take action and make real change for the better, for the environment and for the future.

We hope that this report demonstrates the case for providing an environmental justice system that is fair, timely, effective and not prohibitively expensive; something, it may be argued, that it is not at present. It cannot be right that communities and individuals must pay, through general taxation, for public bodies to protect and preserve the environment and then be subject to environmental harm and/or have to pay once again when it appears that that task isn't being done.

Environmental law is unique in that it provides the opportunity to protect and enhance living things and humankind, our neighbours, children and grandchildren, the majority of whom do not have any direct rights or access to law. This uniqueness should be accepted and then taken into account in its treatment of citizens aiming to protect the environment for the benefit of all through equality in access, cost and treatment before the law.

Published by the Environmental Law Foundation © 2003
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ISBN: 1 900 160 09 9

112-3

Price: £10.00 when sold.

The cost of doing the *rights* thing

Overcoming the problem that environmental justice remains prohibitively expensive for the majority of the public concerned'

Paul Stookes and Phil Michaels*

Introduction

The Environmental Justice Project (EJP), a collaboration between the Environmental Law Foundation (ELF), Leigh Day & Co Solicitors and WWF-UK, recently published the conclusions of a year-long study on access to the courts in environmental matters: *Environmental Justice*.¹ The primary purpose of the EJP was to review the operation of environmental law in England and Wales in order to identify any inadequacies in relation to environmental justice and to make recommendations for change. The project carried out key research and analysis. It also considered contemporary reports by, among others, the Centre for Law and the Environment at University College, London, ELF and Environmental Resources Management Ltd.² The studies were all supported by Defra³ so that they may clarify how effective access to justice is in terms of emerging international obligations and the proposed ratification by the UK of the UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention).

The key conclusions from the Environmental Justice report were that nearly two-thirds of the practitioners and non-governmental organizations (NGOs) operating in the field of environmental law who responded to the research analysis did not think that the courts properly understood environmental matters, and over one quarter raised concerns about the limited scope of judicial review proceedings. Almost all respondents (97 per cent) believed that the civil law system failed to provide environmental justice and that the most significant single barrier was the application of the current rules on costs.

The costs concern of practitioners and NGOs found support from ELF's own analysis of its Advice and Referral

service which concluded that potential claimants did not pursue legal action because they were concerned about the cost of taking legal action.

The costs barrier to environmental legal action is of concern, not only because it is another example of law inaction, but because the government and the legal system are sending out highly contradictory messages about what they want from the public and society in protecting the environment.

The message coming over is that:

First, we want you to take an active role in protecting your environment. We want you to pay for it by way of taxes to cover the cost of public bodies carrying out that protection. We also want you to pay for any review of a public body when they fail to look after the environment on your behalf. Finally, we will ensure that the potential cost of reviewing that public body will be so high that you will not risk legal action for fear of personal financial ruin.

This article considers the cost of public interest environmental litigation and whether the concerns highlighted by practitioners and claimants alike are justified.

The public concerned

The Aarhus Convention defines 'the public concerned' as 'the public affected or likely to be affected by, or having an interest in, environmental decision-making'. This also includes 'non-governmental organizations (NGOs) promoting environmental protection and meeting any requirements under national law [whereby they] shall be deemed to have an interest'.⁴

Most people considering environmental action will initially be trying to resolve an immediate, local concern. In trying to resolve this, the wider environmental implications of the problem become apparent.⁵ It should

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1 P Castle, M Day, C Watson (2004). In the context of this article we use the term 'environmental justice' to refer to matters relating to the legal system insofar as it relates to environmental issues rather than to issues concerning unequal distribution of environmental 'goods' between different socio-economic groups.

2 R Macrory and M Woods *Modernising Environmental Justice* (Centre for Law and the Environment UCL London 2003), P Stookes *Civil law aspects of environmental justice* (Environmental Law Foundation London 2003) C Dupont and P Zakkour *Trends in Environmental Sentencing in England and Wales* (Defra London 2003).

3 Department for Environment, Food and Rural Affairs.

4 Article 2(5) of the Aarhus Convention.

5 SAGE (Sandwich Action Group for the Environment) began with six local residents resisting a proposal for an incinerator. The group grew to 1500 members very quickly. The incinerator was successfully opposed but the group continued to call for sustainable waste options, knowing the incineration was really a reactive response to a much greater

be noted that the public is becoming increasingly aware of the state of the environment. While a large proportion of the population prefers to pollute (note the high sales of 4x4s, the predilection for frivolous air travel and unsustainable consumption patterns) there are also those who express concern about environmental issues.⁶ Similarly, ELF is experiencing a year on year increase in the number of inquiries and referrals about environmental problems.⁷ As far as the state is concerned, the public and local communities are at the forefront of environmental protection; the Environment Agency's pollution hotline encourages the public to report any signs of pollution while the statutory nuisance provisions in Part III of the Environmental Protection Act 1990 (EPA) are most regularly used following the investigation of a complaint by a resident rather than the local authority carrying out routine inspections.

The latest documents published on the land use planning reforms (the *Consultation Paper on Planning Policy Statement 1: Creating Sustainable Communities* and its daughter document *Community Involvement in Planning*⁸) state that it is right that people should be enabled, empowered and take an active part in the planning process, adding that the Government believes that community involvement is vitally important. Organizations such as English Nature and the Rights of Way officers in local authorities rely on public assistance to keep them informed about harm to nature conservation sites including SSSIs, nature reserves and other environmental sites.

In practice, the concerned public are the most common instigators of initial investigation into pollution and environmental harm incidents. Indeed, individuals often take matters much further than preliminary reporting. For example, Mr Hart, the private prosecutor in the case of *R v Anglian Water Services Ltd* [2003] EWCA Crim 2243 secured a guilty plea and a fine of £200,000 in the Crown Court, only to be reduced on appeal to £60,000. At first glance, it seems that the state welcomes public involvement in environmental matters at every opportunity.

But if the state, a corporate body or other person fails to act in compliance with environmental law and a concerned individual or community group wishes to challenge such an act to enforce compliance, then any potential defendant will enjoy not only the usual protections of a sophisticated legal system with its various statutory and legal defences, but also the extra-legal (and unintended) protection of a legal system that makes it prohibitively expensive for most members of the public

to challenge such decisions or actions. The question of paying for litigation is a substantial barrier that any potential claimant must effectively and confidently overcome before seriously considering legal action.

Cost barriers

The Aarhus Convention sets out the public's procedural rights in access to environmental justice. Article 9(3) of the Convention provides that: '... each Party shall ensure that ... members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'. It continues in Article 9(4) that these procedures should be '... fair, equitable, timely and not prohibitively expensive'. At the present time the UK legal justice system does not comply with Articles 9(3) and (4) for the reasons discussed, including the restrictions on public funding and the general legal rules on costs.

In the UK, the two main financial barriers to legal action are the cost of the claimant's own legal support and the risk of being required to pay the state's (or the polluter's) legal fees and, on occasion, the cost of an interested third party's (usually the polluter or a developer) legal fees, should that third party wish to be involved in the case and should that party successfully obtain an order for its own costs. A claimant may overcome the first barrier of its own legal costs by either securing legal support on a *pro bono* or conditional fee basis or by pursuing the matter as a litigant in person. However, the financial risk of liability for the other side's costs remains.

A general principle in UK law is that 'costs follow the event' (ie that the 'loser' pays the 'winner's' costs). This is based upon the notion that, if it has been necessary for a defendant to come to court to defend his/her position and is successful in doing so, then that claimant's costs should be met by the 'erroneous' challenger. This principle was re-affirmed in the case of *McDonald v Horn* [1995] 1 All ER at 969 d-j. It is also argued that the risk of an unfavourable costs order operates as a filter to prevent unmeritorious cases; Dyson J in *R v Lord Chancellor; ex p CPAG* stated that the 'general rule promotes discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim'.⁹ Rule 44(3) of the Civil Procedure Rules preserves the courts' discretion as to costs and retains the rebuttable presumption that the loser pays the winner's costs, although the court must have regard to all the circumstances of the case.

The public is usually involved in environmental action through private civil cases relating to nuisance, negligence and trespass or when challenging the decisions, acts or omissions of the state by way of an application for judicial review. Over two-thirds of the cases referred by ELF to its members relate to judicial review proceedings. This may be no surprise, when it is primarily the responsibility of

concern. SAGE now operates and works with other local groups on waste minimisation including opposition to the development of incinerators. P Scott 'SAGE Words of Wisdom' ELFline April 2004 (Environmental Law Foundation London).

6 See generally, the Government's environmental statistics and survey of public attitudes to quality of life and to the environment 2001, www.defra.gov.uk.

7 The number of environmental cases ELF referred to its members was 136 in 2000, 203 in 2001, 188 in 2002 and 256 during 2003.

8 Available at www.odpm.gov.uk. The consultation closed on 21 May 2004.

9 [1998] 2 All ER 755, 764f.

the state to protect the environment on behalf of society. Both private civil claims and judicial review fall under the 'costs follow the event' principle.¹⁰

The Aarhus Convention 1998 requires that access to justice in environmental matters must not be prohibitively expensive.¹¹ The UK currently considers that, in terms of access to justice, the present legal system complies with the Convention. It relies on the Administrative Court and judicial review as the option for reviewing public decisions on the environment. It is suggested that the availability of public funding through the Legal Services Commission ensures that judicial review is not prohibitively expensive. Yet recent research has found that the potential cost of bringing environmental cases to court and losing is in fact prohibitive. ELF's study of its own referrals to members found that over 30 per cent of respondents who had been advised that their case had merits nevertheless did not pursue the matter because of the cost (including potential adverse costs) of taking legal action.¹²

There is ample evidence (anecdotal and research based) that communities and individuals are often unwilling to bring legal proceedings (regardless of the public interest in doing so and regardless of the individual merits of their cases) because of the expense, and in particular because of the uncertainty of their exposure to an adverse costs order of unlimited size at the end of a case. The examples below illustrate the problem.

In a case involving Nestlé Purina, local residents in Wisbech, Cambridgeshire have been trying to stop odour and noise pollution from the nearby pet food factory for some years. More recently, an application for planning permission to extend the factory was granted and any money raised by residents was used to pay for legal representation at the planning committee hearing. Mike Green, a member of Nestlé Purina Action Group commented in 2004 that:

these large companies realise that the cost of opposing planning application or obtaining basic human rights is beyond the financial power of most action groups. ... Wisbech is an environmental nightmare as effects are felt from four other factories in the town. Time and again, residents formed action groups to try and resolve these problems, yet each group has failed through lack of finance. ... [T]ackling local environmental problems are a struggle, which often requires expensive legal assistance. In many cases, such expenses act as an insurmountable

obstacle to citizens obtaining the justice to which they are entitled. It is difficult for us to remain hopeful in the face of such recurrent problems.

In Bradford, a local group, Spen Clearwater Revival (SCR), has been trying to prevent continuing pollution of a tributary into the River Spen for over three years. The Environment Agency accepts that tackling the pollution is its responsibility but has failed to resolve the problem effectively. SCR sought advice from ELF and a member advised on legal action. The group was advised of the potential cost of taking action and felt that it was too much for a small group to pay. It considered that they have fallen at the first hurdle in securing a legal remedy.

Funding options in environmental action

There are, in theory, a number of options for public interest funding. Private funding is one option. However, Sir Robert Carnwath, as he then was, noted some years ago that: 'litigation through the courts is prohibitively expensive for most people, unless they are poor enough to qualify for legal aid or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds.'¹³ The latter, of course, was the case in *Dennis v Ministry of Defence* 15[2003]3 ELM 192.

Some solicitors will act for clients on the basis of conditional fee agreements. Michael Cook notes¹⁴ that there are at least four varieties of these; conditional fees with a success fee, conditional fees without a success fee, discounted conditional fee agreements and 'speccing' agreements, where a solicitor speculates by acting for an impecunious client who has no prospect of paying the fees unless the proceedings are successful. This system allows lawyers to take on cases without charging their clients. The client or the lawyer can take out insurance to cover the risk of losing or having to pay the other side's costs.

Last year, the Government proposed changes to conditional fee agreements (CFAs) to introduce a 'lighter and simpler' regime that will enable solicitors to enter into agreements with their clients in which they can plainly state that they will not seek to recover more than is allowed between the parties, subject to such an arrangement being drawn up in the CFA. This is encouraging, although more recently a case on costs found that CFAs relating to housing disrepair cases were unenforceable, due to a failure to give adequate advice about seeking public funding. In *Bowen & others v Bridgend County Council* (2004), Master O'Hare applied 'by analogy' the ruling in *Sarvar v Alam* (2001) a motor-accident case in which it was decided that clients should

10 There is, in theory, the small claims court option for private civil claims starting in the county court. Part 26 of the Civil Procedure Rules provides that the court will allocate a claim to either the small claims, fast track or multi track according to, among other things, its financial value, the nature of the remedy and the complexity of the facts, law and evidence. With environmental cases requiring either an injunction or involving a reasonable level of complexity it is highly unlikely that such cases will be allocated to the small claims track.

11 Article 9(3) of the UN Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters 1998.

12 Stookes (n 2) p 26.

13 R Carnwath (1999) 'Environmental Litigation - A way through the Maze?' *The Journal of Environmental Law* Vol 11 No 1 (Oxford University Press Oxford 1999).

14 M Cook *Cook on Costs 2004* (ButterworthsLexisNexis London 2004) p 508-11.

use alternative funding such as legal expenses insurance if it was available.¹⁵

Local communities may fund litigation collectively. The funding is essentially private, but relies on donations from local residents and any other fundraising carried on by the local community group. The philosophy behind local fundraising is encouraging; that the local community is committed to protecting its local environment. And, as Fatema Patwa states:¹⁶ 'Although it may seem financially futile, fund raising covers legal costs and is often an excellent way to raise local awareness about the issue at hand.' Local residents in Kent facing potential environmentally damaging development instigated some innovative fundraising schemes. In *PACE v Canterbury College* [2002] the local environmental group sought to resist a proposal by Canterbury College to develop a travel plan, something that they believed would have a significant adverse environmental impact with little real gain. Unfortunately, Canterbury City Council approved the planning permission. The group decided to raise sufficient funds to make an application for judicial review. It joined forces with a local resident's group and raised around £750, enough to issue the claim form. PACE then took the decision to take the case further and estimated that this would cost around £15,000, even though ELF members had agreed to advise the group at a reduced rate.

The group had to raise money quickly and launched an intensive public appeal raising around £10,000. One of the hurdles of taking the action was that PACE had to prove to the court that it or its members had sufficient funds to pay costs before the case could proceed. Later, as the case progressed, lawyers representing the College threatened that if the matter went to court the group would face a costs bill from them of £126,000. It is hard to avoid the conclusion that such a tactic was intended to dissuade the group from continuing with the case. PACE pursued the case and the court found that the decision by Canterbury City Council was unlawful and quashed it. Even though PACE won the case and its own legal fees were largely paid by the respondent Council, it still had a costs bill of £2,350.

In a recent judicial review Friends of the Earth (FoE) challenged the Environment Agency's decision to modify a company's licence, permitting it to scrap a large number of contaminated ships from the so-called US Ghost Fleet next to a protected conservation site in Hartlepool. During the proceedings the company whose licence was being challenged warned that it had incurred £100,000 of recoverable legal costs (for a one day hearing on a preliminary issue). Had FoE not succeeded in its judicial review application then it is likely that it would have been ordered to pay the company's costs, despite the clear public interest element relating both to the import of contaminated ships from the United States to the UK for

disposal and the evolving law concerning the protection of species and habitats.¹⁷

The availability of public funding, as indicated above, remains the Government's justification that the present judicial review position complies with the Aarhus Convention 1998. John Dunkley concisely set out the four tests to be passed in order to be granted legal aid.¹⁸ These are:

- a) that the applicant qualifies financially, ie that the applicant's disposable income and capital come within the prescribed limits
- b) that the case has legal merit, or a *probabilis causa litigandi* in Scotland
- c) that it is reasonable for public funding to be spent on the case—this includes ensuring that the case satisfies a cost/benefit analysis
- d) that there is no other source of funding, including other members of the community, to cover the case.

If there is, then the Legal Services Commission (LSC) may seek a contribution from the community. Patwa suggests that:

'the most difficult test to overcome is whether others should contribute to the case. If a campaign is led by a group, such as a residents association, the LSC has to be persuaded first, that there is genuinely a public interest in the outcome of the case and, secondly, that the residents' association is putting up as much money as it can afford towards the case.'

Patwa believes that: 'public funding of environmental cases should not be based upon an individual's entitlement to such financing. ... This overlooks the fact that there are many of us who cannot afford High Court cases, yet are not so poor as to be eligible for public funding. We are effectively barred from the right to challenge public law decisions.'¹⁹

The limited scope of public funding in public interest environmental cases may be illustrated by the fact that just 10 of the 212 decisions of the Public Interest Advisory Panel reported on the LSC website relate to environmental cases. There is a growing concern that the number of solicitors firms prepared to carry out legal aid work in public law matters is decreasing. In April 2004, the Community Legal Services believed that there were around 40 solicitors firms with a public law franchise compared to a total of 5,861 firms registered as providing public funding. This is from a total of 9,198 firms in England and Wales.²⁰

The courts have, at times, found empathy with public interest litigation by departing from the general rule that

15 P Rohan 'Disrepair CFAs "unenforceable"' Law Society Gazette 1.4.04 (The Law Society London) www.lawgazette.co.uk/

16 F Patwa 'Reforming Funding for Local Environmental Action' ELFlne April 2004 (Environmental Law Foundation London) p 7.

17 *R (Friends of the Earth) v Environment Agency* [2003] EWHC 3193 (Admin).

18 J Dunkley *Legal Aid Rules for Environmental Cases (January 2004)*. (Environmental Law Foundation London 2004) p 1.

19 Patwa (n 16) p 7.

costs follow the event. As mentioned above, the court has wide discretion under Part 44(3) of the Civil Procedure Rules and options are open to the court whereby the public interest aspect of proceedings can be recognized by judges when deciding on costs. In *R v Secretary of State for the Environment, Transport and Regions ex p Challenger* [2001] Env LR 209, Harrison J noted that:

question of costs is a matter for the discretion of the court, and it is a question of what is just and reasonable in the circumstances. Although I have found against the applicants ... I am satisfied that their case was not only a genuine case but also that it did involve points that are potentially of some importance. ... Exercising my discretion as best I may, I have formed the conclusion that it would not be just or reasonable to order them to pay the respondent's costs.

In *The Belize Alliance of Conservation Non-Government Organizations v the Department of Environment and Belize Electricity Company Ltd* [2003] PC the claimants challenged the Belizean Government's decision to construct a hydroelectric dam and destroy an invaluable site of nature conservation. The Privy Council held that 'because this was a public interest case' the claimants would not be ordered to pay the Belizean Government's costs.

Finally, in *R v Secretary of State for the Environment, Food and Rural Affairs ex p Friends of the Earth and Greenpeace* (2001) 47 EG 148 (CS) (the MOX case) the claimants challenged the Secretary of State in relation to the decision to approve the operation of the MOX nuclear reprocessing plant at Sellafield. The Court of Appeal held that because 'the public interest in this particular area, the area of public health and well-being, is obviously very great and very exceptional, ... it is right that public interest be borne clearly in mind'. The claimants were not required to pay costs in the Court of Appeal.

It is important to note that none of these claimants had any idea, until the conclusion of the case, that they would not be required to pay the respondent's and any third party legal costs, and that they would have had to prepare themselves for the possibility of such a financial liability. It is also notable that orders such as these are very much the exception. In the MOX case the court held that its decision was 'to be regarded as a highly exceptional course. It should not encourage public interest groups generally to suppose they will be immune from any adverse orders for costs on appeal...'

Other court orders may help to provide some certainty or to clarify the potential liability for costs. Speaking at ELF's Aarhus Convention Conference in November 2002, Stephen Sedley LJ stated that:

We have some tentative case-law on protective costs orders, and a new practice direction is coming which will facilitate third party interventions; but people need more certainty than this, and it may be that the Bowman reforms in judicial review offer a key. Now that the defendant public authority gets prior notice of a permission application and is able to put its response to the court, a grant of permission in an environmental judicial review case can more readily carry with it—provided clear guidelines are put in place—an order which tells the parties in advance how costs are going to be allocated in the absence of misconduct or surprises, including a no-costs provision in worthwhile cases.²¹

A pre-emptive costs order may follow an application heard at the permission stage of judicial review, whereby the court limits the claimant's cost liability to an upper value in the event that the claimant loses the case. The use of such an order is subject to the case and the facts meeting certain criteria. The court in *R v London Borough of Hammersmith & Fulham ex p CPRE London (re: costs)* High Court 26.10.99 reaffirmed the position as set out in *R v Lord Chancellor ex p CPAG* stating:

First, that the court is satisfied that the issues raised are truly ones of general importance. Secondly, that it has sufficient appreciation of the merits of the claim that it can conclude it is in the public interest to make the order. Thirdly, the court should have regard to the financial resources of the applicant and the respondent and the amount of the costs likely to be in issue and it would be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant and where it is satisfied that unless the order is made the applicant would probably discontinue the proceedings and will be acting reasonably in so doing.²²

The court recently made a pre-emptive costs order in *R v (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2712. In this case the Campaign for Nuclear Disarmament (CND) sought a declaration that UN Security Council Resolution 1441 did not authorize the use of force against Iraq and that a further resolution would be needed to sanction war. The claimants also sought an order that, in the event of costs being awarded against them, those costs be limited to £25,000. The pre-emptive costs order was granted by the Court of Appeal, despite the fact that permission to pursue the review had yet to be given.

In such cases a considerable amount of expense and court time can be taken up seeking such an order. If unsuccessful, then the public interest challenger will normally be required to pay the (potentially large) costs of seeking such an order, with the result that there are potentially significant costs risks attached even to seeking

20 Data from personal correspondence with the Legal Service Commission and Law Society Research department on 24 April 2004. For information on the Public Interest Advisory Panel www.legalservices.gov.uk.

21 Sedley LJ *The Aarhus Convention Conference. the Old Inn, Lincoln's Inn* (Environmental Law Foundation London 2002) p 3.

22 M Sheridan *Access to Justice in the EU (2003)* (European Commission Brussels) p 143.

a pre-emptive costs order. It is also notable that such an order will be made only in very exceptional circumstances. Therefore, although some limited mechanisms already exist whereby the courts can recognize the public interest nature of the challenge when making costs orders, those mechanisms are much too limited in scope (and too exceptional in usage) to overcome the barrier of prohibitive expense in public interest environmental cases.

While these legal options are as interesting as they are diverse, in reality they are complex, time consuming, uncertain and potentially expensive. Compared to the polluter or the public body, who will quite possibly have resources secured respectively either from carrying on the polluting activity or from the public, the local community remains a pecuniary David against an affluent Goliath, with the result that access to justice is far from equal.

Options for change

Reform or revision of the public funding scheme is one option. On the future of public funding, recent comments by David Lammy MP, a minister for the Department for Constitutional Affairs, have re-affirmed the Government's position stating that we will effectively have to live with the £2 billion legal aid budget.²³ This suggests that an adjustment to the financial means test, such as raising the prescribed limits of income and capital to include a greater number of slightly less impecunious claimants, is unlikely to occur.

Patwa suggests that major, more radical, reform is necessary, believing that the state could administer funding for environmental cases in the same way as it funds other things which are generally agreed to be its responsibility. Funding could be given to locally accountable bodies, including Citizens' Advice Bureaux and law centres, who would receive grants and decide which cases to support based upon the significance of the matter to local people. Patwa believes that this method of funding is cost effective and enables local groups to access legal services which they may otherwise be unable to afford. It also enables legal services to be delivered in a flexible way.²⁴

Chakrabarti and others²⁵ suggest that Parliament could legislate for a more structured provision for the financing of public interest litigation. They suggest that a public interest fund could depart from the 'all or nothing' approach which currently characterizes legal aid and adopt a broad spectrum of funding, including legal aid protection against adverse costs orders, instead of providing full funding in all cases. The art in advocating such an approach would be to introduce such measures without the need for introducing or revising primary legislation. It is, however, unlikely that such measures will get political time

and support in the near future. It remains to be seen whether this could be an option.

Similarly, there could be a revision of the Civil Procedure Rules to bring public interest cases more closely in line with criminal prosecutions, which are considered to be taken on behalf of society and so have a public interest element resembling that of many judicial review cases. When prosecutions fail, the costs of the successful defendant or appellant are commonly ordered to be paid out of central funds, further to section 16 of the Prosecution of Offences Act 1985 and in accordance with Practice Direction (Costs in Criminal Proceedings), 93 CrAppR 89. But this rule is limited to criminal proceedings. The White Book notes in relation to Part 48 of the CPR (Special Cases) that the Administrative Court has no jurisdiction on an application for judicial review to award costs out of central funds; although Section 51 of the Contempt of Court Act 1981 gives the court a general and wide discretion to make such orders as to costs as it thinks fit, this does not include the power to make an award out of central funds, even where there is 'no other possible source of costs in an application for judicial review'.²⁶

Another option would be for the state, whether central government, agencies or local authorities, not to seek costs from the claimants by advance agreement as a matter of policy. This option is raised by Chakrabarti et al, who suggest that there be some inter-departmental guidance to government litigators in relation to the quite narrow field of the declaration of incompatibility of human rights matters. In Ireland, where legal aid is not normally available for environmental cases and where the general rule is that costs follow the event, public authorities and profitable organizations rarely enforce orders for costs. Indeed, Yvonne Scannell comments that she knows of no case where costs were enforced against NGOs or unsuccessful applications for judicial review in environmental cases. Developers and industrialists are deterred from enforcing costs against groups who may have attracted a good deal of public support by the prospect of bad publicity and continuing vendettas.²⁷ There is, however, concern that there may be no rational, transparent and fair policy in play and that any 'gentlemanly conduct' may be inconsistent in application. This may be all the more so when the demands of best value, comprehensive performance assessment and the continuing demands of performance-led government place increased pressure on legal departments to keep running costs to a minimum, not seeing the wider public interest argument as relevant to their domain.

The Public Interest Certificate

One way forward would be to incorporate some of these measures into a court order that could be applied for at

²³ D Lammy 'Legal aid: keeping the faith, updating the service' *The Times* Law supplement 27.1.04.

²⁴ Patwa (n 16) p 7.

²⁵ S Chakrabarti, J Stephens and C Gallagher (2003). 'Whose Cost the Public Interest?' *Public Law* (Sweet & Maxwell London 2003) pp 697–715.

²⁶ *Civil Procedure Vol 1 (2002)* (Sweet & Maxwell London) p 1279.

²⁷ Y Scannell 'Ireland' ch in *Access to Justice in Environmental Matters in the EU ed J Ebbesson* (Kluwer Law International The Hague 2002) p 302.

the start of the case. Certain rules on costs would apply if this were granted. The court could then issue an order or certificate to this effect; the Public Interest Certificate (in environmental cases an 'Aarhus Certificate'). In order to obtain a Public Interest Certificate, the claimant would need to show that:

- a) the case was a 'public interest' case (see below)
- b) if it was an environmental matter that it fell within the ambit of the Aarhus Convention ie 'law relating to the environment'.²⁸

There are certain key differences to a pre-emptive costs order, although the form is similar. The main difference is that there would be a presumption in favour of granting a Public Interest Certificate for environmental law cases held to satisfy the public interest test. Second, unlike pre-emptive costs orders generally, there would be no need to demonstrate that without the grant of such an order the case would not be brought.

A Public Interest Certificate would normally mean that an unsuccessful claimant would not be required to pay the costs of the public body. However, the Certificate would be a flexible instrument; other types of orders could also be applied for and made, and other conditions imposed. For example, the court might consider it appropriate to order that each party should bear its own costs, regardless of which side was successful. In some cases it might be appropriate for the court to order that the public body would be entitled (if successful) to recover a certain maximum sum or to impose limits on the amount which the public interest challenger could recover. Judicial review is particularly suited to such a system due to its approach, with a permission stage (often not requiring a full hearing) before moving to a substantive hearing. The judicial review procedure therefore already includes an appropriate procedural opportunity for the court to consider an application for a Public Interest Certificate.

The need to establish that the case is a 'public interest case' is at the heart of the concept of the Public Interest Certificate. While it is beyond the scope of this article to engage in a detailed discussion of the issue, a key distinction would clearly be between a case brought to protect a solely private interest, such as, in the environmental context, the immediate enjoyment of or interest in land, and a case brought to protect a wider public interest, such as the protection of a conservation area or the upholding or interpretation of an important principle of environmental law. Judicial scrutiny, based upon an informed understanding of the purpose of and background to the Aarhus Convention, would ensure that a Public Interest Certificate would only be granted to cases that are genuinely in the public interest. This is important in public policy terms because of the need to prioritize competing demands on public resources.

The question of public interest will be obvious in many cases, but in others it is likely to be less clear and guidance

(or at least factors to be considered) will probably be necessary. Such guidance could perhaps be incorporated into the Part 54 Practice Direction, although more detailed policy guidance might be needed in some other form. There may be scope for an independent body to advise generally on such matters and to provide the courts with guidance. It is worth noting that the Legal Services Commission's Public Interest Advisory Panel regularly makes determinations on the question of 'public interest' in environmental cases for the related purpose of determining public funding.

Notwithstanding the above, it is important to note that making a determination as to public interest is something that certainly does fall within the competence of the courts. For example, in a public law context, in *R v Lord Chancellor ex p CPAG* [1999] 1 WLR J Dyson described a public interest challenge as having the 'essential characteristics ... that it raises public law issues which are of general importance'.

While it is likely, indeed anticipated, that the number of environmental public law challenges will increase, there are several reasons why any increase will be modest.

First, the Public Interest Certificate would be discretionary and the court would only grant it for cases that are genuinely in the public interest.

Second, in terms of the environmental NGOs and conservation groups, in practice the number of cases that such groups could bring under a Public Interest Certificate would be significantly limited by other resource factors eg the number of legal staff that they employ.²⁹

Third, as outlined above, an inbuilt procedure already exists in judicial review (the permission stage) when the courts can dismiss frivolous and vexatious cases; the Public Interest Certificate process would work alongside that.

Fourth, the experience in other jurisdictions where administrative review is, in practice, less prohibitively expensive has shown that the caseload tends not to rise significantly when an 'each party-own costs' rule replaces the conventional 'costs follow the event' principles. For example, the administrative review system in France operates on the basis that the public take proceedings without the need for significant legal support, thus keeping the costs down. Further, Chakrabarti et al highlight the Australian case of *Oshlack v Richmond River Council* in which J Kirby stated that when test cases without a costs penalty failed, they would not open the floodgates. What could be expected was 'little more than a modest flow barely wetting the wellies'.³⁰

Piloting the Public Interest Certificate

In order to test the effectiveness of a Public Interest Certificate, it is proposed that it is applied initially to the category of cases falling within the terms of the Aarhus Convention (broadly speaking environmental cases). While

²⁹ The largest environmental NGOs in the country, except the Environmental Law Foundation, have on average one lawyer per organization.

³⁰ *Oshlack v Richmond River Council* [1998] HCA 11, HC (Aus).

²⁸ Article 9(3).

the idea of a Public Interest Certificate could be applicable to other areas of public law there are a number of reasons why it is particularly appropriate to environmental matters.

The first is that the Government, as a party to the Aarhus Convention, has a legal obligation to provide access to legal procedures to challenge contraventions of environmental law in a manner that is 'not prohibitively expensive'. The current system continues to be subject to powerful criticism that it is 'prohibitively expensive' and that members of the public and NGOs are regularly prohibited from challenging perceived contraventions of environmental law by the fear of large adverse costs orders.

The second is that the environment is unusual in that it does not have a voice and that concerned citizens or their groups must necessarily represent its interests. A claimant in an environmental case will often have no private interest in the outcome, but will be bringing the case in the interest of the local community, future generations, the wider world, flora and fauna. Faced with the threat of personal liability for costs, and without any countervailing possibility of private gain, the potential public interest environmental challenger is strongly dissuaded from bringing a case.

The third reason is that, more than in the case with most other areas of law, environmental decisions will directly affect very large numbers of people (now and future generations) as well as the environment itself. ELF's recent analysis found that every person using its Advice and Referral Service was representing, on average, 869 local people. In some cases the numbers who are affected by a decision or policy are obviously much greater. The fact that the law requires specifically named persons to commence proceedings should not result in those specifically named persons being the ones to bear the costs of an unsuccessful challenge.

Finally, it is recognized internationally (including by the UK) that 'environmental issues are best handled with the participation of all concerned citizens' and that such participation includes 'effective access to judicial and administrative proceedings'.³¹

The adoption of the Public Interest Certificate would obviously improve the position of claimants taking action to protect the environment. It is vital that the system does not unduly favour any particular party and that any defendant to a judicial review claim should be able to oppose an application for a Public Interest Certificate in the same way that he or she can oppose an application

for permission to bring judicial review proceedings. Further, on most likely variations of the Public Interest Certificate, successful defendants would simply be covering their own costs. These costs are likely to be relatively modest for most public authorities, as cases are usually conducted by the authorities' own lawyers.

Finally, in terms of considering the regulatory impact of the proposed changes to the costs rules, it is worth noting that those changes would not require primary legislation. All of the changes required could be brought about by amendments to the Civil Procedure Rules ie delegated to the Rules Committee under the Civil Procedure Act 1997 and by amendments to the practice directions to those Rules (inherent power of the court exercised by the heads of division).

Conclusion

The purpose of this article is to help clarify and resolve the single, biggest obstacle to securing access to environmental justice for concerned members of the public, namely the justifiable fear and unquantifiable risk of facing high financial costs in taking legal action. The Public Interest Certificate could be a very significant step towards helping the UK to comply properly with its obligations under the Aarhus Convention and, in particular, ensuring that the public concerned have access to an effective review system that is not prohibitively expensive.

The fear is sometimes expressed that revising the conventional rules on costs will increase the overall number of public law claims coming before the courts. The authors are not convinced that there is any evidence to justify such a fear, for the reasons explained above. That said, the authors hope that the proposed changes will encourage people with a bona fide public interest case to initiate legal proceedings, so as to reverse the present position whereby nearly one-third of potential claimants (who actually go so far as to take legal advice) do not commence proceedings, despite having been advised that their case has merits, because of they fear the costs of so doing. The consequence of the present system is that people trying to protect the environment, principally for the sake of their community and future generations, risk paying twice. They must pay the state to protect the environment on their behalf, by way of taxation. They must also pay when they seek to uphold the law and to ensure that a public body carries out its functions properly.³²

31 Principle 10 of the Rio Declaration on Environment and Development

32 P Stookes 'What price environmental justice?' *New Law Journal* 2 April 2004 (Butterworths LexisNexis London) p 481.

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**Paul Stookes: PhD by Published Work
Public participation in environmental decision-making**

Co-authored publication: 'The cost of doing the *rights* thing'

Co-authors: Paul Stookes, Phil Michaels

	Paul Stookes	Phil Michaels
	%	%
Design	90	10
Execution	90	10
Analysis	90	10
Publication	100	0

Signed



.....
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12/A

2

ENVIRONMENTAL RIGHTS AND PRINCIPLES

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A SUSTAINABLE DEVELOPMENT

The concept of sustainable development is the most important principle of environmental law. It is, in the author's view, unfamiliar to most people and properly understood by even fewer. This is no surprise. It has been given a multitude of meanings, often self-serving, and its definitions tend to be long and various. 2.01

Defining sustainable development

2.02 Put simply, sustainable development means leaving the planet as we found it. The World Commission on Environment and Development, in its report *Our Common Future* (1987) (the Brundtland Report — after the Commission's President; Gro Harlem Brundtland), emphasized the needs of the world's poor in the now popular definition of sustainable development as:

... development that meets the needs of the present without compromising the ability of future generations to meet their needs. It contains within it two concepts: the concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organisation on the environment's ability to meet present and future needs.

2.03 The Brundtland Report and definition provided the backdrop for the Rio Earth Summit in 1992 and subsequent Rio Declaration 1992. The present needs of the world's poor and how they interrelate with the environment was reiterated at the Johannesburg Summit in 2002, ten years after Rio.

2.04 The UK Government published a new sustainable development report: *Securing the Future* in March 2005. It provides that:

The goal of sustainable development is to enable all people throughout the world to satisfy their basic needs and enjoy a better quality of life, without compromising the quality of life of future generations. For the UK Government and the Devolved Administrations, that goal will be pursued in an integrated way through a sustainable, innovative and productive economy that delivers high levels of employment; and a just society that promotes social inclusion, sustainable communities and personal wellbeing. This will be done in ways that protect and enhance the physical and natural environment, and use resources and energy as efficiently as possible. Government must promote a clear understanding of, and commitment to, sustainable development so that all people can contribute to the overall goal through their individual decisions. Similar objectives will inform all our international endeavours, with the UK actively promoting multilateral and sustainable solutions to today's most pressing environmental, economic and social problems. There is a clear obligation on more prosperous nations both to put their own house in order, and to support other countries in the transition towards a more equitable and sustainable world.

2.05 The strategy states that the UK Government and devolved administrations will pursue the primary goal using the following five guiding principles:

- *Living within environmental limits* Respecting the limits of the planet's environment, resources, and biodiversity — to improve our environment and ensure that the natural resources needed for life are unimpaired and remain so for future generations.
- *Ensuring a strong, healthy, and just society* Meeting the diverse needs of all people in existing and future communities, promoting personal wellbeing, social cohesion and inclusion, and creating equal opportunity for all.
- *Achieving a sustainable economy* Building a strong, stable, and sustainable economy, which provides prosperity and opportunities for all, and in which environmental and social costs fall on those who impose them (polluter pays), and efficient resource use is incentivized.

- *Using sound science responsibly* Ensuring policy is developed and implemented on the basis of strong scientific evidence, whilst taking into account scientific uncertainty (through the precautionary principle) as well as public attitudes and values.
- *Promoting good governance* Actively promoting effective, participative systems of governance in all levels of society — engaging people's creativity, energy, and diversity.

All environmental legal activity including property transactions, environmental auditing, and concerns about pollution, will always have at least one and often two or more aspects of sustainable development. Communicating the principles and justification of sustainable development to the client, court, or any other party should be central to advising on environmental law matters. 2.06

Development within the earth's environmental capacity

Sustainable development is often regarded as pursuing the three goals of: 2.07

- (1) social development;
- (2) economic development; and
- (3) environmental protection and enhancement.

These broadly match the UK Government's five guiding principles of sustainable development set out above. However, taking these in isolation can be misleading. First, consideration of the goals should not be restricted to a balancing exercise between these apparently competing aims. For example, if we want to achieve a particular social goal of providing homes for all, then this cannot be achieved in a sustainable way simply by subsidizing development and building a few parks close to housing development. These balancing factors may assist but they should not be regarded as successfully achieving sustainable development. Rather, when seeking to achieve a certain aim, say homes for all, then economic and environmental development should be integrated within the decision-making process taken. 2.08

Achieving effective sustainable development will be difficult; and is why legislation, which itself begins life as politics and policy, always works towards it, rather than making a commitment to securing it. Perhaps most important of all is that the pursuit of economic, social, or environmental development must be undertaken within the environmental capacity of the earth. It requires rethinking how we all live our lives and not necessarily following current patterns of economic growth, consumption, and travel. It means taking economic, social, and environmental decisions within the carrying capacity (the environmental limits) of the planet. It means building homes that, when occupied and used, do not have an overall adverse impact on the environment, whether through energy use, construction, loss of open land, or waste arising. It means ensuring that travel patterns do not produce carbon emissions that cannot be wholly used up (sequestered) by the earth itself. To put *sustainable* development into perspective, by pursuing conventional economic development policy the world is presently using *three* planet's worth of resources (and generating the subsequent pollution) in the pursuit of progress and development. This cannot continue in the long term; and is therefore unsustainable. It is vital that, sooner rather than later, decision-makers begin to tackle the issue. 2.09

- 2.10 There are some tough and politically unpopular decisions to be taken if society is to make any significant progress in tackling some of the biggest environmental problems we now face, such as climate change. And, whether it is a local community seeking to protect a village green or a large multinational company committing itself to an effective management system that ensures compliance with the latest regulatory regime, environmental law will be at the heart of this.

Sustainable development in legislation

- 2.11 Sustainable development was introduced into UK legislation in the Environment Act 1995, which, among other things, established the Environment Agency and the Scottish Environment Protection Agency. Section 4(1) of the Act provides that:

It shall be the principal aim of the Agency (subject to and in accordance with the provisions of this Act or any other enactment and taking into account any likely costs) in discharging its functions so to protect or enhance the environment, taken as a whole, as to make the contribution towards attaining the objective of achieving sustainable development . . .

- 2.12 It is encouraging to see that sustainable development is the Agency's principal aim, but it is important to note that it is qualified by aspiration (. . . contributing towards attaining . . .) and the need to carry out cost-benefit analysis (. . . taking into account any likely costs . . .). The requirement to contribute towards achieving sustainable development is also contained in local government legislation. Section 4(1) of the Local Government Act 2000 provides that:

Every local authority must prepare a strategy . . . for promoting and improving the economic, social and environmental well-being of their area and contributing to the achievement of sustainable development in the UK.

- 2.13 Further, s 39 of the Planning and Compulsory Purchase Act 2004 provides that local planning authorities in England and Wales must exercise the functions conferred by the Act with the objective of contributing to the achievement of sustainable development.

- 2.14 While the inclusion of sustainable development into national legislation should be seen as a positive step, the UK's efforts may best be regarded as 'modest' and falling somewhat short of its enactment in other jurisdictions. For instance, Art 24 of the South African Constitution 1994 states that everyone has the right to:

- (a) have an environment that is not harmful to his or her health or well-being;
- (b) an environment protected for the benefit of present and future generations, through reasonable legislative and other measures that—
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.

Sustainable development and the courts

- 2.15 In the Indian case of *Vellore Citizens Welfare Forum v Union of India* (1996) SC 2715 Kuldeep Singh, J commented that the Supreme Court had:

no hesitation in holding that 'Sustainable Development' [defined by the Brundtland Report] as a balancing concept between ecology and development has been accepted as a part of the customary international law . . .

In the case of *Rajendra Parajuli and ors v Shree Distillery Ltd and ors* (1996) Nepal 2 UNEP Compendia, the Supreme Court of Nepal held that having a licence for the operation of industry does not excuse its obligation to protect the environment. It added that in line with the principle of sustainable development 'every industry has an obligation to run its development activities without creating environmental deterioration' and that the environment should not be viewed narrowly. While in the case of *Contact Energy Ltd v Waikato Regional Council* (2000) ECD A04/2000 the New Zealand Environment Court held that a modified proposal to build a geo-thermal power station would overall serve the purpose of sustainable management of natural and physical resources, and that the resource consents needed should be granted subject to conditions imposed by the court. 2.16

English and Welsh courts have considered sustainable development on a number of occasions. In *Fairlie v Secretary of State for the Environment and South Somerset DC* [1997] EWCA Civ 1677 the court considered an appeal against planning enforcement against Tinkers Bubble Trust; a group who had set up a permaculture farm with the aim of living off the land, i.e. growing organic produce, relying on renewable energy and causing little or no impact on the environment. The enforcement action was for siting and occupying seven tents without planning permission. Part of the appeal was because the Secretary of State misunderstood his own planning guidance when applying the concept of sustainable development as contained in para 4 of Planning Policy Guidance (PPG) 1. The appeal by the Trust was dismissed. However, it seems that the difficulty wasn't so much the understanding or application of PPG1 but the mistaken objective of sustainable development contained in the guidance with emphasis on economic goals. This has been rectified in the new Planning Policy Statement (PPS) 1: *Delivering Sustainable Development* (2005), which, at para 4, seeks to ensure that the four aims of sustainable development are tackled in an integrated way. 2.17

In the case of *Goldfinch (Projects) Ltd v National Assembly for Wales and Flintshire County Council* [2002] EWHC 1275 (Admin) the claimant challenged a planning inspector's decision to dismiss an appeal against the refusal of planning permission for the development of 23 homes. There had been a previous grant of permission that had lapsed. The inspector found that the proposal was objectionable on the grounds that it would not be well integrated with the existing pattern of settlement and was in conflict with the objectives of sustainable development. In his judgment, Scott Baker J stated that 'sustainable development is defined as development that meets the needs of the present without compromising the ability of future generations to meet their needs.' He noted the Government's vision based upon the four aspects of: use of natural resources, social progress, economic growth, and full employment. However, he concluded that the inspector had elevated the seriousness of flooding to a serious issue, which it was not, and that he had failed to give adequate weight to why permission had originally been granted. On this basis the inspector had erred in law and the decision was quashed and remitted for a rehearing by a different inspector. 2.18

In *Sherburn Sand Company Ltd v First Secretary of State and Durham County Council* [2004] EWCH 1314 (Admin), the High Court dismissed a challenge to a planning inspector's decision refusing permission to mine 56,320 tonnes of magnesium limestone and 288,800 2.19

tonnes of sand. In summary, the county's sand and gravel needs until 2016 could be met from existing permitted sources. See also *LB Bromley v Susanna and ors* [1998] EWCA Civ 1444 and *Fagg v Secretary of State for Transport and ors* [2002] EWHC 1327.

B PREVENTION, PRECAUTION, AND THE POLLUTER PAYS PRINCIPLES

- 2.20 There are three key environmental principles that can be considered as a hierarchy of effective environmental protection. These principles have been incorporated into EU law. Article 174(2) of the Consolidated EU Treaty (OJ C325/107) affirms that EU policy on the environment shall be based on the precautionary principle, that preventative action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay.

Figure 2.1 The hierarchy of environmental principles

Prevention of environmental harm should be the ultimate goal when taking decisions, actions, or omissions with potentially adverse environmental impacts.

A *precautionary* approach should be taken whenever there is uncertainty as to whether environmental harm will arise.

The *polluter should pay* for any environmental harm that does arise from its decisions, acts, or omissions.

The preventative principle

- 2.21 The preventative principle is based on an obligation to avoid environmental harm. It is similar to the duty of care doctrine in negligence. It is also, to an extent, implied in private nuisance claims where a neighbour may be prevented by way of an injunction from the unlawful interference with a person's use or enjoyment of land or some right over, or in connection with it (*Read v Lyons* [1947] AC 156). Although there should be caution in relying on a nuisance action as a means of environmental protection, with the courts more willing to award compensation and allow the polluting activity to continue rather than grant injunctive relief to prevent it; see e.g. *Dennis v Ministry of Defence* [2003] EWHC 793 (QB). Injunctions are always at the discretion of the trial judge with an appeal court unable to consider the merits of the case (see also Chapter 17: Civil law practice and procedure). Further, if any claim relates to obligations imposed by statute then the administrative remedies under that statute should be exhausted and if necessary make an application for judicial review. In *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66 Lord Nichols commented in para 33 that: 'The common law of nuisance should not impose on Thames Water obligations inconsistent with the statutory scheme', which, in this instance, was the Water Industry Act 1991.
- 2.22 The preventative principle has evolved in the international arena over many years. In the *Trail Smelter Arbitration (US v Canada)* 3 RIAA (1941) the tribunal held that no state had the right to permit the use of its territory in a way that would cause injury by fumes to

the territory, people, or property of another; in this instance that Canada should prevent pollution entering the US. The principle has been recognized in both international and national legislation. Article 2 of the Framework Convention on Climate Change 1992 states that: 'the ultimate objective is to achieve the stabilization of greenhouse gas emissions in the atmosphere to a level that would prevent dangerous anthropogenic interference with the climate system'.

In the Pollution Prevention and Control Act 1999 (transposing Directive 96/61/EC concerning integrated pollution prevention and control (IPPC Directive)), s 1 states that regulations may make provision for regulating activities that are capable of causing any environmental pollution and otherwise preventing or controlling emissions capable of causing pollution. 2.23

The precautionary principle

The precautionary principle has a more recent history in environmental law, arising from the West German environmental policy of *Vorsorgeprinzip* meaning 'prior worry or care' (see Royal Commission on Environmental Pollution 12th Report Cm310 1988). The courts were initially reluctant to recognize precaution. In *R v Secretary of State for Trade and Industry ex p Dudderidge* [1995] (The Times 26 October 1995), the Court of Appeal held that the precautionary principle had no distinct legal effect in the UK and, although there may be a need to take environmental risk into account as a material consideration in decision-making, Art 130r of the EC Treaty did not impose any obligation on the Secretary of State to issue regulations restricting electromagnetic fields from electric cables being laid as part of the national grid. However, in the case of *R (AMVAC Chemical UK Ltd) v The Secretary of State for Environment, Food & Rural Affairs and ors* [2001] EWHC Admin 1011 the court considered the precautionary principle in some detail. Crane J stated that the precautionary principle as defined in the Rio Declaration 1992, requires that where there are threats of serious or irreversible damage, lack of scientific certainty should not be posed as a reason for postponing cost-effective measures to prevent environmental degradation (Principle 15 of the Declaration). He then referred to the UK Sustainable Development Strategy 1999 that states: 2.24

The precautionary principle means that it is not acceptable just to say we can't be sure that serious damage will happen, so we'll do nothing to prevent it. Precaution is not just relevant to environmental damage — for example, chemicals which may affect wildlife may also affect human health.

Crane J then continued referring also to the EU Communication in February 2000 on the precautionary principle, the Cartagena Protocol on Biosafety 2000, and then finally the Art 174(2) of the EU Treaty. In conclusion, the judge found that the claim failed on the issues relating to the precautionary principle but nevertheless found the Respondent's decision procedurally flawed and made a quashing order. 2.25

In *UK v Commission* [1998] Case C-180/96, the UK Government applied under Art 173 of the EU Treaty to annul Commission Decision 96/239/EC on emergency measures to protect against BSE. The ECJ held that the EU institutions could take protective measures without having to wait until the reality and seriousness of those risks became fully apparent. More recently, in *Pfizer Animal Health SA v Council of the European Union* [2002] T13-99 the EU Court of First Instance affirmed that under the precautionary principle EU institutions are entitled in the interests of human health to adopt on the basis of as yet incomplete scientific 2.26

knowledge, protective measures that may seriously harm legally protected provisions, and that they enjoy a broad discretion in this respect.

- 2.27 The precautionary principle is now being incorporated into land use policy. PPG 25: *Development and flood risk* (2001) notes that the principle is particularly relevant to dealing with the hazard of flooding. Its application acknowledges the uncertainty inherent in flood estimation and, by proceeding from the known facts and taking a precautionary approach to uncertainties, enables more open and better-informed decisions to be made. This can reduce the environmental impact and improve the safety of people and property, despite the existence of risk that may change with time.

The polluter pays principle

- 2.28 The polluter pays principle may be regarded as a response to pollution and environmental harm rather than an effective mechanism for environmental protection. By implication, it accepts that pollution will arise, but that the polluter should pay for it. It is used as a financial incentive to operate more efficiently and as a sanction for carrying out polluting activities. It should also operate as a deterrent in helping to ensure that prevention of harm arises in similar situations in the future. Importantly, it is not a polluter's charter relying on the fact that those that can afford to pollute may do so with impunity. In international law, Principle 16 of the Rio Declaration 1992 provides that:

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution, with due regard to the public interest and without unduly distorting international trade and investment.

- 2.29 Countries adopt the principle, rather than individual or corporate polluters, placing the obligation on states to ensure that the polluters within their jurisdiction pay the price of polluting. The principle acknowledges the concept of internalizing the cost of pollution, i.e. that the full cost of many polluting activities such as emissions to air and water are often paid by society as a whole, e.g. by suffering poor air and water quality. Often, these costs are not incurred by the polluter and are therefore said to be external to their business. Internalizing the costs of pollution means that the polluter should pay the full cost of pollution. However, Principle 16 notes the potentially adverse financial consequences of paying the price for pollution control and so qualifies the principle to avoid distorting trade and investment. Internalizing costs may be achieved by introducing state of the art technology to reduce or eliminate emissions. It may be by paying additional taxes for using polluting energy processes, e.g. the climate change levy imposed by s 30 of the Finance Act 2000 and designed to encourage business and other organizations to reduce energy use or transfer energy supply to a more environmentally friendly means.
- 2.30 In the UK, the principle underpins much of the environmental regulatory regime and in particular the criminal sanctions used as a means of enforcement. Many sentences for environmental crimes greatly exceed Level 5 of the standard scale of maximum fines for summary offences contained in s 37(2) of the Criminal Justice Act 1982 by a factor of four. For example, maximum summary fines for most waste, water, and air offences are £20,000 compared to the current Level 5 maximum of £5,000.

C PROCEDURAL RIGHTS: INFORMATION, PARTICIPATION, AND ACCESS TO JUSTICE

- One of the most important pieces of environmental legislation in recent years has been the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention). This is reproduced in Appendix 1. Although regional in scope it sets out a comprehensive framework for procedural environmental rights and is a model that is being used in countries throughout the world. 2.31
- The UK Government ratified the Aarhus Convention in February 2005 and considers that since the introduction of new Environmental Information Regulations 2004 (SI 2004/3391) (the Environmental Information Regs 2004), the UK is Aarhus compliant. 2.32
- The EU also signed the Aarhus Convention to ensure that all Member States would meet the environmental obligations equally and to ensure that all EU citizens would have at least a minimum standard of environmental rights under the Convention. EU legislation is being implemented to secure certain rights being imposed on Member States. This includes Directive 2003/4/EC on public access to environmental information and repealing Directive 90/313/EEC to be transposed by February 2005; Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Directives 85/337/EEC and 96/61/EC to be transposed by June 2005; and the draft Directive on access to justice in environmental matters COM(2003) 614 final, which has yet to enter into force. The EU has also prepared legislation to ensure that the EU's own institutions comply with the Aarhus Convention with the proposed Regulation on the application of the Aarhus Convention COM (2003) 622 Final. 2.33
- As its title suggests, there are three key parts to the Convention. These may be regarded as the environmental procedural rights of: 2.34
- (1) access to information;
 - (2) public participation in decision-making; and
 - (3) access to justice.
- The rights afforded by the Convention should be regarded as minimum requirements rather than an optimum level to be attained; a floor, not a ceiling. Articles 3(5) and (6) state that the Convention provisions: 2.35
- shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation and wider access to justice than required by [the Convention] ... and shall not require any derogation from existing rights.
- Access to information**
- Effective access to environmental information is vital if any representations or potential challenge is proposed relating to the environment. Without proper access to information, 2.36

the other procedural rights of public participation and access to justice are likely to be far less effective.

- 2.37 Access to information usually comes in two forms: passive information provision covered by Art 4 of the Aarhus Convention and active information provision contained in Art 5.

Passive information provision

- 2.38 Passive information provision is where a public body, such as a local authority, provides information following the request by an individual or organization. If no request for information is made then that particular information may not necessarily be put into the public domain and the public body will simply hold the information and publish upon request. This should not be seen as withholding the information but rather that it requires a positive request to disclose it. A simple example is making available the public file in relation to an application for planning permission. Article 4 obligations under the Aarhus Convention include a requirement that public authorities make information available upon request and supply it, subject to exceptions, within set time limits.

Active information provision

- 2.39 Active information provision is where a public body, such as central government, publishes and promotes information generally. The information should be widely and easily available for all. An example of this type of published information is a 'state of the environment' report setting out how well a country or region is performing in terms of the environment, e.g. the UK Government report *Achieving a better quality of life 2004*. Other important information is the digest of environmental statistics published on Defra's website setting out general information on a range of environmental matters. Importantly, this information should be actively promoted to help ensure that all members of the public are made aware of the environmental information made available. Article 5 of the Convention requires public authorities to collect, possess, and disseminate environmental information including that on decision and policy making.

The Environmental Information Regulations 2004

- 2.40 The Environmental Information Regs 2004 are made pursuant to s 82(2) of the Freedom of Information Act 2000 (FoI Act 2000). Under reg 2(1) environmental information is given a wide meaning and includes information in written, visual, aural, electronic, or any other material form on:
- (a) the state of the elements of the environment such as air and atmosphere, water, soil, land, landscape, and natural sites including wetlands, coastlands, and marine areas, biological diversity and its components, including GMOs, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation, or waste, including radioactive waste, emissions, discharges, and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the frameworks of the measures in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or through those elements, by any of the matters referred to in (b) or (c).

In *R v British Coal Corporation ex p Istock Building Products Ltd* [1995] JPL 836, a case relating to the earlier Environmental Information Regulations 1992, the court held that the name of someone providing information about the state of land was 'environmental information' on the basis that the information was necessary to assess the credibility of other information on the state of the land. In *R v Secretary of State for the Environment and Midland Expressway Ltd ex p Alliance Against Birmingham Northern Relief Road and ors* [1998] EWHC Admin 797, the court held that the test as to whether or not information was 'environmental information' was objective. 2.41

Regulation 3 of the Environmental Information Regs 2004 sets out who is covered by the regulations and who can be required to provide information. Regulation 3(2) states that the regulations apply to public authorities. Regulation 2(1) defines public authority as: 2.42

- (a) government departments;
- (b) any other public body as defined in s 3(1) of the Freedom of Information Act 2000 (FoI Act 2000), subject to exceptions;
- (c) any other body or other person, that carries out functions of public administration; or
- (d) any other body or other person, that is under the control of a person under sub-para (a), (b), or (c) and:
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment.

Regulation 4 of the Environmental Information Regs 2004, requires that a public authority must make environmental information that it holds progressively more available to the public by electronic means and take reasonable steps to organize the information with a view to the active and systematic dissemination to the public of the information. This is the obligation for active information provision. 2.43

Regulation 5 provides that a public authority that holds environmental information shall make it available on request. This is passive information provision, where the information won't be made publicly available until a request has been received. Under reg 5(2), public authorities have 20 working days to provide information. An extension to this period may be secured under reg 7 if the authority believes that the complexity and volume of the information requested means that it is impracticable either to comply with the request within the earlier period or to make a decision to refuse the request. Regulation 8 provides that public authorities may charge for costs reasonably attributable to the supply of information, which is conditional on payment of any charge, although this is subject to exceptions such as when allowing access to public registers or lists of environmental information held by the public authority (reg 8(2)(a)). 2.44

- 2.45 Regulation 9 of the Environmental Information Regs 2004 provides that public authorities must provide advice and assistance in relation to environmental information so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants. For example, under reg 9(2), where an applicant has requested information in too general a manner the authority shall ask the applicant as soon as possible and within 20 working days, to provide more particulars in relation to the request.
- 2.46 Public bodies must disclose the environmental information requested unless one of the exceptions to the disclosure duty under Pt 3 of the Regulations applies. Regulation 12(1) provides that, subject to exceptions, a public body may refuse to disclose environmental information if requested if:
- (a) an exception to disclosure applies under paras (4) or (5); and
 - (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
- 2.47 Regulation 12(2) adds that a public authority shall apply a presumption in favour of disclosure. Phil Michaels, in an article in *Environmental Law and Management: 'Guide to the Environmental Information Regulations'* (Lawtext, 2004), emphasizes the presumption in favour of disclosure by explaining that: 'in contrast to the FoI Act 2000, there are no absolute exceptions under the regulations and an authority wishing to refuse to release information must satisfy itself as to the balance of public interest.'
- 2.48 The reg 12 exceptions to disclosure of information arise in two ways, under subparas:
- (4) where the disclosure relates to, among other things, procedural matters such as: that the authority does not hold the information when the applicant's request is made; and
 - (5) where the disclosure would adversely affect specified matters which include defence, national security, commercial confidentiality, or intellectual property rights.
- 2.49 Unless the exceptions apply, taking into account the public interest presumption in favour of disclosure, any failure by a public authority to provide information following a request may be subject to review and/or enforcement action. An internal review procedure is required by reg 11. Regulation 11(1) provides that an applicant may make representations to a public authority in relation to a request for environmental information if it appears to the applicant that the authority has failed to comply with the Regulations. Representations must be made within 40 working days after the date on which the applicant believes that the public authority has failed to comply with the requirement. The review process is free of charge. A public authority shall notify the applicant within 40 days of the date of representations.
- 2.50 Regulation 18 of the Environmental Information Regs 2004 applies the enforcement and appeal provisions of the FoI Act 2000. A person who has made a request for environmental information from a public authority may complain to the Information Commissioner if he believes that the public authority has not dealt with the request, or representations to the authority about the request, in accordance with the requirements of these Regulations. The Commissioner has equivalent powers to enforce the Regulations as under Pt IV of the FoI Act 2000. These include powers of entry and inspection and, in respect of the exercise of those powers, the offence of obstruction. There is also a right of appeal from a Commissioner's decision to the Information Tribunal.

Further, there is an offence under reg 19(1) whereby if a request for environmental information has been made and the applicant would have been entitled to the information, a person is guilty of an offence if he alters, defaces, blocks, erases, destroys, or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to which the applicant would have been entitled. The offence does not cover a government department. The prosecuting authority is the Commissioner or the Director of Public Prosecutions. The offence, which is a summary offence, is liable to a maximum penalty of a £5,000 fine. 2.51

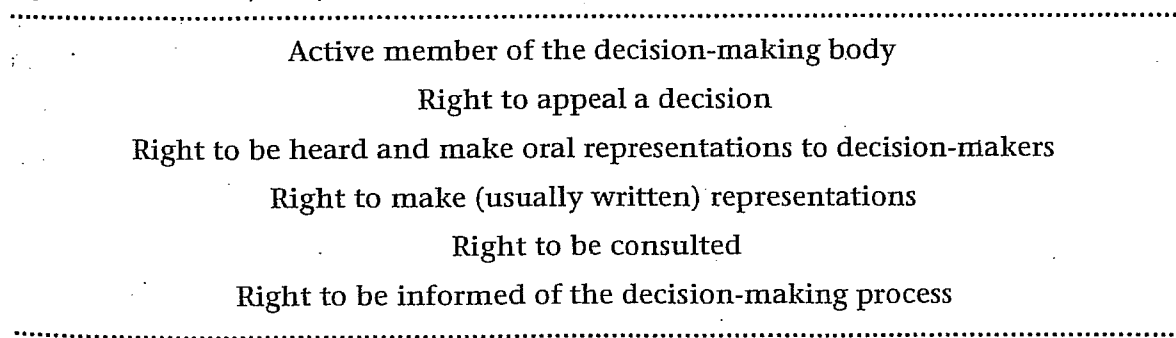
There are a number of cases relating to the former EU Directive 90/313/EEC on the Freedom of Access to Information on the Environment and the related Environmental Information Regulations 1992. In the *Salisbury Bypass* case [1996] (unreported but considered in the REC Handbook on Access to Justice (2003) (REC Handbook)) Friends of the Earth asked the Department of Transport (DoT) for a copy of an 'induced traffic assessment report', which had been prepared on a proposed bypass and had predicted how much extra traffic would be generated by building the new road. DoT refused the request arguing that, among other things, the report was not 'environmental information' within the meaning of 1992 Regulations. Friends of the Earth made an application for judicial review and two weeks before the hearing the DoT provided a copy of the report accepting that it was 'capable of falling within the scope of "environmental information"'. 2.52

The *Birmingham Northern Relief Road* case concerned a concession agreement for the construction of a toll road scheme containing commercially confidential information. The court held that as a matter of precedent fact the agreement was 'information relating to the environment'. Also, even though the agreement could contain genuine commercially confidential information that argument could not be used to prevent disclosure of the main body of the agreement. And finally, that the applicant's purpose in seeking the information was irrelevant. 2.53

Publication participation in decision-making

There are a number of levels of participation. There is the right to be informed, the right to be consulted, to make representations, to be heard, the right of appeal (considered in more detail below under access to justice), and, ultimately, being in a position of direct control of the relevant decision, act, or omission. This is illustrated below. 2.54

Figure 2.2 Levels of participation in decision-making



Articles 6 to 8 of the Aarhus Convention require all signatory states to provide for early public participation, adding that only when all options are open and effective can public 2.55

participation take place. Public participation is not defined, although the Preamble to the Convention suggests that the values central to participation are ensuring that there is a means for the public to assert the right to live in an environment adequate for his or her health and wellbeing. Article 6 seeks to guarantee participation in decision-making that may have potentially significant environmental impacts. Article 7 sets out the need to establish a transparent and fair framework for public involvement in plans and programmes and Art 8 promotes participation in the preparation of law and rules that may have an environmental impact.

- 2.56 The UK Government considers that its present provision for public participation in environmental decision-making complies with the Aarhus Convention. Public participation rights in environmental matters most frequently arise under the land use planning regime. Article 8 of the Town and Country Planning (General Development Procedure) Order 1995 (SI 1995/419) states that an application for planning permission shall be publicized in the manner set out within the Article and under Art 19 representations made to the local planning authority about planning applications shall be taken into account. This level of participation is at the lower end of the participation ladder but nevertheless complies with the basic requirements of the Aarhus Convention.
- 2.57 The level of participation conferred by local planning authorities often goes much further than the minimum legislative requirements with many allowing oral representations to be made to planning committees. Further, under Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (as amended by Directive 97/11/EC) (the EIA Directive) major development projects may be subject to environmental impact assessment (EIA) and requires that any information gathered under Art 5 of the Directive is made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before planning permission is granted. The judiciary have expressed their support for meaningful public involvement. In *Berkeley v Secretary of State for the Environment* [2000] 2 AC 603, the House of Lords emphasized that token participation was not enough and that the public should be properly involved in EIA-related decisions. This is discussed more fully in Chapter 8: Land use.
- 2.58 The infringement of the participation rights of NABU, a German nature conservation group, was found to be unlawful in the case of *NABU Landesverband Sachsen-Anhalt v Federal Republic of Germany* (12 November 1997) file no. 11 A 49/96. NABU were participating in the development stage of a rail track extension and were denied access to amended expert reports. The Federal Administrative Court held that the development permit issued following the planning proceedings was unenforceable and could not be rectified by holding supplementary planning proceedings.
- 2.59 The REC Handbook (p 27) suggests that there are three categories of procedural errors in public participation:
- failure to disclose all information to the public relevant to its participation;
 - improper procedures for public participation, such as timely or adequate notice, opportunity to comment, timeframes, restrictions on 'administrative standing' or other conditions; and

- inadequate response to comments received (failure to take due account), or failure to reveal the reasons or considerations for the decision.

There are many examples of participation best practice. In 2002, IEMA published guidelines on participation in environmental decision-making, which aims to improve participation by demonstrating its importance, offering advice on how to achieve effective participation and providing practical examples of what has been achieved such as the local community participation in the Crick bypass scheme, which involved a continuous consultation process over three years. 2.60

In *R v North and East Devon Health Authority ex p Coughlan* [2001] 1 QB 213 the Court of Appeal at 258 held that: 2.61

whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be consciously taken into account when the ultimate decision is taken.

Access to justice

Environmental justice has at least two meanings. The first involves access to the law and the courts in order to resolve environmental problems and to ensure that communities and individuals have the same rights and remedies as corporate and state organizations. Environmental justice in its broader sense may be referred to as environmental equity, which means ensuring that everyone, regardless of means, where they live, or their background, enjoys a clean and healthy environment. Environmental equity includes equity between nations and between generations. 2.62

In terms of procedural rights, access to environmental justice takes the first, more direct, definition. It provides the checks and balances for the procedural rights of information and participation. It should also provide a right of review of other more substantive rights such as a right to healthy environment. It is important that if such a right exists then it must be supported by the rule of law and access to the courts, when the right is breached. Securing environmental equity will almost certainly rely on providing effective access to justice; environmental justice in its direct form. 2.63

Articles 9(1) and (2) of the Aarhus Convention provide review procedures for any breach of the access to information and participation provisions contained in Arts 4 and 6 respectively. Article 9(3) requires signatory states to ensure that there is public access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities contravening national environmental law. The principle of *actio popularis* whereby anyone can sue the government when it acts unlawfully, regardless of whether they have standing in a strict sense, is said to be consistent with Art 9. 2.64

One of the critical aspects of the Aarhus Convention, and an area that has been the subject of concern in the way the UK Government has approached compliance (see the Coalition for Access to Justice for the Environment Briefings 2004), is the need to provide a fair review process. Article 9(4) provides that: 2.65

the procedures referred to in [Art 9] shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

- 2.66 Judicial review under Pt 54 of the Civil Procedure Rules 1998 is the system of review largely relied upon by the UK to secure compliance. Using this form of administrative review has caused difficulty in securing injunctive relief and a system that is not prohibitively expensive as required by the Convention.
- 2.67 In *R v Secretary of State for the Environment ex p RSPB* [1997] Env LR 431 the House of Lords refused to grant interim relief to RSPB while the matter was referred to the ECJ without a cross-undertaking in damages in relation to the large economic loss that could have arisen from development delay. Ultimately, the ECJ ruled that the UK was not entitled to take economic requirements into account when designating a Special Protection Area under the Wild Birds Directive. However, 12 months had elapsed between the application for interim relief and the ECJ ruling during which the site, Lappel Bank mudflats in Kent, had been turned into a car park.
- 2.68 In terms of prohibitive expense, the case of *Shirley v Secretary of State for Transport Local Government and the Regions* [2002] CO/4505/2001 highlights the difficulties with costs, when lawyers representing the interested party, Canterbury College, informed the applicant that if the matter went to hearing and the applicant lost, she would face a costs bill from them of £126,000. Despite this, the applicant pursued the case, the High Court found in favour of the Applicant and quashed the Respondent's decision. A similar scenario arose in *Friends of the Earth v Environment Agency* [2003] EWHC 3193 Admin when, the day before the hearing, Friends of the Earth were served with a Schedule of Costs of just over £100,000 for a one-day judicial review hearing on a preliminary issue by the Interested Party, Able UK Ltd. Again, Friends of the Earth were successful and were not required to pay those costs. For further discussion on this see Chapter 20: Public law.

D SUBSTANTIVE ENVIRONMENTAL RIGHTS

- 2.69 Substantive environmental rights are those rights that set clear objectives and may be secured without any reference to any other rights, e.g. the right to a clean and healthy environment, and the right to clean, fresh drinking water. These could also be regarded as human rights. The UNEP Judges Guide notes that almost every national constitution adopted or revised since 1970 either states that an environment or a certain standard is a human right, or imposes environmental duties upon the state. More than 100 state constitutions guarantee a right to a clean environment, impose a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources. For example, s 4 of the National Environment Statute 1995 of Uganda provides that:
- (1) Every person has a right to a healthy environment.
 - (2) Every person has a duty to maintain and enhance the environment including the duty to inform the Authority or the local environment committees of all activities and phenomena that may affect the environment significantly.

Substantive rights can be found in a wide range of legislative texts from international treaties to local laws with many incorporating the protection of wildlife as well as human rights, e.g. the Convention on Illegal Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES), which aims to regulate international trade in endangered species, and the Wildlife and Countryside Act 1981 (as amended), which provides protection for specific species in England and Wales. The UNEP guide even points to the regional German law of Thuringen, which provides that: 'Animals are to be respected as living beings and fellow creatures. They will be protected from treatment inappropriate to the species and from avoidable suffering.'

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The UK does not confer any substantive environmental rights although Art II-37 of the draft EU Constitution provides that a 'high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.' And so, whereas national governments across the UK do not recognize or confer any substantive environmental rights for humans, EU policies may shortly be required to.

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E HUMAN RIGHTS AND THE ENVIRONMENT

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) provides a number of basic human rights and freedoms. The Human Rights Act 1998 (HRA 1998) brought the Convention closer to home by giving 'further effect to the rights and freedoms' guaranteed under the ECHR, while not formally incorporating the Convention into domestic law or restricting parliamentary sovereignty. However, the Convention has been persuasive, and the European Court of Human Rights (ECtHR) provided redress for UK citizens for some time. The *Human Rights Act Study Guide* published by the DCA explains that the HRA works in three main ways:

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- (1) It requires all legislation to be interpreted and given effect as far as possible compatibly with the Convention rights. Where this is not possible, a court may quash or disapply secondary legislation and make a declaration of incompatibility for primary legislation.
- (2) It makes it unlawful for a public authority to act incompatibly with the Convention rights and allows for a case to be brought in a UK court or tribunal against the authority if it does so.
- (3) UK courts and tribunals must take account of Convention rights in all cases that come before them. They must develop the common law compatibly with the Convention rights and they must take account of Strasbourg (ECtHR) case law.

The HRA 1998 emphasizes that the Convention governs relationships between the state and individuals, yet the Convention does cover certain matters between private persons. Section 6(3) of the Act states that a public authority includes a court and tribunal and that it will act unlawfully if it fails to develop the law in line with the Convention. However, the HRA 1998 does not create any new, free-standing, rights. *Blackstone's Guide to the Human Rights Act 1998* explains that if a claimant wishes to use a Convention argument in a case against a private defendant, then the claimant must find an existing private law argument on which to hang

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the Convention argument or, alternatively, focus the action on a public body that has failed to protect the claimant's rights from being violated by the defendant.

- 2.74 Human rights legislation draws on a number of procedural and administrative law concepts including restriction of rights available, the margin of appreciation, and proportionality. An outline of ECtHR Procedure is provided in Chapter 20: Public law.

General principles

Environmental human rights are qualified

- 2.75 The Convention is a mix of absolute and qualified rights. Absolute rights include the protection from torture (Art 3) and the near-absolute right to life (Art 2). Qualified rights such as the right to respect for private life (Art 8) are restricted in application or provide certain exceptions when the right or freedom does not apply. Many of the rights and freedoms relied upon in environmental matters (Arts 8, 10, 11, and Art 1, Protocol 1) are qualified and allow exceptions to those rights. The qualifications are usually found in the text of the Convention after the right itself has been established, e.g. Art 8(1) provides the right to respect for private life; Art 8(2) allows interference 'as is necessary in a democratic society'.

Margin of appreciation in balancing competing interests of society

- 2.76 For the Convention rights that provide for some qualification or limitation, which are generally requiring a balance to be struck between competing interests in society, public authorities enjoy a 'margin of appreciation' when exercising their functions. The ECtHR is said to recognize that national authorities should be better placed to make decisions about the merits of a case. The margin of appreciation was considered in *Hatton & ors v UK* [2003] 36022/97 (discussed in para 2.86 and Chapter 10: Noise).

Proportionality

- 2.77 When considering a restriction or qualification of a right, public authorities must act in a way that is proportionate to the legitimate aim pursued. In *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 (a prisoner's rights case) Lord Steyn noted that the principle of proportionality was familiar, suggesting that the approach taken by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 should be applied in determining whether a limitation (by an act, rule, or decision) is arbitrary or excessive and that the court should ask itself whether:
- (a) the legislative objective is sufficiently important to justify limiting a fundamental right;
 - (b) the measures designed to meet the legislative objective are rationally connected to it; and
 - (c) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.
- 2.78 Neither the Act nor the Convention provides a specific right to a clean and healthy environment, although national and international case law is defining the extent to which the Convention and its related Protocols can be relied upon to confer rights that provide some form of environmental protection and means of redress. The following rights and freedoms have been found to have some relevance in environmental matters:

- Article 2: right to life
- Article 6: right to a fair trial
- Article 8: right to respect for private and family life
- Article 10: freedom of expression
- Article 1 of Protocol 1: protection of property

Article 2: right to life

Article 2 of the Convention provides that everyone's right to life shall be protected by law. 2.79
This is qualified slightly in the event of a court sentence and if death results from the use of necessary force. For the most serious environmental concerns, the right to life may be at issue. In *Oneryildiz v Turkey* [2004] 48939/99, the applicant claimed a breach of human rights under Articles 2, 6, 8, 13 (the right to an effective remedy) and Art 1 of Protocol 1 when a council-run rubbish tip experienced a methane explosion causing a landslide and then the death of 39 people, including nine members of the applicant's family. The ECtHR held that there had been a violation of Art 2 on account of the deaths and the ineffectiveness of the Turkish judicial machinery. The Grand Chamber, which heard the final appeal noted that:

the Court reiterates that Article 2 does not solely concern deaths resulting from the use of force by agents of the State but also . . . lays down a positive obligation on States to take appropriate steps to safeguard the lives within their jurisdiction.

Article 6: right to a fair trial

The right to a fair trial under Art 6(1) is a procedural and qualified right, providing that: 2.80

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

In *Zander v Sweden* (1993) 18 EHRR 175 the claimant's land was adjacent to a waste tip, 2.81
which had polluted the local water supply. When an application to dump more waste on the tip was granted, the claimant's only means of appeal was to the government who dismissed an appeal that any permit to dump waste must be subject to the waste company taking precautionary measures to avoid further pollution. The ECtHR held that there was a breach of Art 6(1) and awarded damages of Kr30,000 (around £5,000). However, in *Balmer-Schafroth v Switzerland* [1997] ECHR 46 the ECtHR found that the claimants had failed to show that the operation of the power station exposed them to a danger that was serious, specific, and imminent. The connection between the government decision and the Art 6(1) right was regarded as too remote to qualify as a civil right.

In *Alconbury v Secretary of State for the Environment* [2001] UKHL 23 the House of Lords 2.82
reviewed Art 6(1) in terms of land use planning. The Lords found that administrative matters such as planning decisions could involve the determination of civil rights and obligations and that there could be protection under Art 6. However, in the present case the Secretary of State had not claimed that he was acting as an independent or impartial tribunal and the availability of judicial review of the Secretary of State's decision satisfied the rights under the Convention.

- 2.83 The court in *R (Kathro) v Rhondda Cynon Taff CBC* [2002] PLCR 304 suggested that where a public body had to determine a disputed issue of fact the decision-making process may not comply with Art 6(1) and in those circumstances there would be no review of the substantive merits of the case, thus leaving a potential gap in human rights provision. However in *R (Vetterlein) v Hampshire CC* [2001] EWHC Admin 560 the court held that the claimants' opportunity to make detailed representations during a public consultation process and then to address the planning committee had satisfied the Art 6(1) obligations.
- 2.84 In *Steel & Morris v UK* (2005) (No. 68416/01), a claim arising out of breaches relating to the 'McLibel' case *Steel & Morris v McDonald's Corporation* [1999] (CA) QBENF 97/1281/1, the applicants' principal complaint under Art 6(1) was that they were denied a fair trial because of the lack of legal aid. The ECtHR held that:

the question before the court was whether the provision of legal aid was necessary for a fair hearing to be determined on the basis of the particular facts and circumstances of each case and depended *inter alia* upon the importance of what was at stake for the applicant in the proceedings, the complexity of the relevant law and procedure, and the applicant's capacity to represent him or herself effectively.

- 2.85 The Court held unanimously that there had been a violation of Art 6.1 and of Art 10 (freedom of expression) of the Convention. Under Art 41 of the ECHR (just satisfaction), the Court also awarded €20,000 to the first applicant and €15,000 to the second applicant for non-pecuniary damage, and €47,311.17 for costs and expenses.

Article 8: right to respect for private and family life

- 2.86 Article 8 provides that:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others.

- 2.87 The main purpose of Art 8 is to protect against public interference or action in private matters. The provisions in Art 8(2) restrict the right conferred under Art 8(1). It imposes positive and negative obligations on public bodies; positive obligations include taking measures to secure the rights conferred, negative obligations involve refraining from interfering action. The approach to whether there may be a breach of Art 8 is:
- (a) To decide whether there is, in principle, a right protected under Art 8(1). The definitions of private life, family life, and home are broad and the indirect intrusion from pollution and environmental harm is covered, see e.g. *Hatton & ors v UK* where although, ultimately, the ECtHR found against the applicants this has been based upon the qualifications or the Art 8 right, not on its initial scope.
 - (b) If a right exists under Art 8, there should be consideration of whether there has been any state interference with that right.

- (c) Finally, if there has been interference, is that interference within the law? Does it pursue a legitimate aim? And, is it necessary in a democratic society?

The right is regularly relied upon in environmental matters and a common concern has been noise. In *Powell and Rayner v UK* (1986) 12 EHRR 335, the court found that interference of private life from aircraft noise was justified. The problem of aircraft noise was revisited in the case of *Hatton & ors v UK*. In *Hatton* the ECtHR Grand Chamber considered a referral from its own Third Chamber following a request (as an appeal) from the UK Government. The Court held that the Government policy on night flights at Heathrow airport did not violate the applicants' Art 8 right to respect for private life. Both courts considered that there was a balance between competing interests of society. The first court found in favour of the applicants, the Grand Chamber tended towards more general economic interests adding that authorities, when balancing interests, were afforded a 'margin of appreciation'. It stated that:

The Court must consider whether the Government can be said to have struck a fair balance between [the interests of the economic well-being of the country and for the protection of the rights and freedoms of others] and the conflicting interests of the persons affected by noise disturbances, including the applicants. Environmental protection should be taken into consideration by Governments acting within the margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights.

Relying on the Art 8(2) qualification the ECtHR held that it was legitimate for the Government to have taken the economic interests of the airline operators, other businesses and their clients, and those of the country as a whole when developing policy. Although the substantive right in Art 8 was found not to be violated the Court held the scope of the review by the domestic courts was not sufficient to comply with Art 13 (the right to an effective remedy before a national authority).

One of the leading cases on environmental protection under the Art 8 is *Lopez Ostra v Spain* (1994) 20 EHRR 277 in which the applicant complained that a neighbouring waste treatment plant emitting fumes, noise, and strong smells made her family's living conditions unbearable and was causing serious health problems. Prior to the ECtHR hearing, Mrs Lopez Ostra, had tried numerous civil and criminal actions in domestic law, each of which failed to adequately resolve the problem. The court found that there had been a breach of Art 8 and awarded the applicant 4 million pesetas (around £20,000) in damages. It held that, despite the margin of appreciation left to the state, it had not succeeded in striking a fair balance between the interests of the town's economic wellbeing, that of having a waste treatment plant, and the applicant's effective enjoyment of her right to respect for her home and her private and family life.

Guerra & ors v Italy (1998) 26 EHRR 3577 concerned the failure to provide a local community with information about risk and how to proceed in the event of an accident at a nearby chemical factory. The Court held that the potential direct effect of toxic emissions on the applicants' right to respect for their private and family life meant that Art 8 was applicable. The applicants had complained of an omission by state authority in its failure to act, rather than positive interference.

- 2.92 In *Chapman v UK* (2001) 33 EHRR 18 the ECtHR found that the interference of rights to private life by a local planning authority's enforcement of planning controls were expressed primarily in terms of environmental policy and, in those circumstances, the local authority were pursuing the legitimate aim of protecting the 'rights of others' through the preservation of the environment.

Article 10: freedom of expression

- 2.93 Article 10 provides that:

everyone has the right to freedom of expression, which includes holding opinions, receiving and imparting information. The right may be restricted by a licensing regime or any restrictions or penalties necessary in a democratic society.

- 2.94 The right to freedom of expression may be relevant in instances where environmental activists are prosecuted for carrying out protesting activities. In *Percy v DPP* [2001] EWHC Admin 1125, a protestor who defaced a US flag in front of servicemen was convicted of causing harassment, alarm, or distress under s 5 of the Public Order Act 1986. The claimant challenged the conviction relying on Art 10 (holding an opinion). The Divisional Court held that the conviction was excessive and that peaceful protest may cause affront, which is not criminal. The conviction was quashed having failed to give sufficient weight to the defendant's Art 10 right.

- 2.95 However, in *Persey v SSEFR* [2002] EWHC 371 (Admin) the decision to hold private rather than public inquiries into the Foot & Mouth outbreak was held not to breach Art 10 and the right to receive information. The court noted that Art 10 imposes no positive obligation on government to provide, in addition to existing means of communication, an open forum to achieve yet wider dissemination of views.

- 2.96 In *Steel & Morris v UK* the ECtHR held that, in relation to the Art 10 point, the central issue that fell to be determined was whether the interference with the applicants' freedom of expression had been 'necessary in a democratic society'. It noted that:

The Government had contended that, as the applicants were not journalists, they should not attract the high level of protection afforded to the press under Article 10. However, in a democratic society even small and informal campaign groups, such as London Greenpeace, had to be able to carry on their activities effectively. There existed a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.

Article 1 of Protocol 1: protection of property

- 2.97 Article 1, Protocol 1 provides that:

Every natural person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to conditions provided by law and by the general principles of international law.

The preceding provisions shall not, however, impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The term 'possessions' referred to in Art 1, Protocol 1 is broad and, importantly for environmental matters, includes land and other property. It may also include the maintenance of a licence: *Tre Traktor v Sweden* (1989) 13 EHRR 309, and a permit to exploit a gravel pit: *Fredin v Sweden* (1991) 13 EHRR 784. However, a possession does not extend to a regulatory approval for the production of chemical pesticides: *R (Amvac) v SSEFR and ors* [2001] EWHC Admin 1011. 2.98

In *Aston Cantlow & ors v Wallbank* [2003] UKHL 37 Lord Hope stated at para 67 that there were three rules within Art 1, Protocol 1: 2.99

- (1) the right to peaceful enjoyment of possessions as set out in the first sentence is of a general nature;
- (2) there are then two forms of interference; the deprivation of possessions that it subjects to conditions, and the control of the use of property in accordance with the general interest.

He added that:

2.100

- (3) In each case a balance must be struck between the rights of the individual and the public interest to determine whether the interference was justified. These rules are not unconnected, as before considering whether the first rule has been complied with, the court must first determine whether the last two rules are applicable.

In *Sporrong & Lonnroth v Sweden* (1982) 5 EHRR 35, the ECtHR found that Stockholm City Council had interfered with the applicants' right to enjoyment of their possessions due to development and construction restrictions in an area where they owned property. In the case of *Chassagnou & ors v France* [1999] ECHR 22 the Grand Chamber considered the objections by small landowners to a municipal hunting association requiring rights of hunting across all land in the region. The court found that: 2.101

compelling landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified under the second paragraph of Article 1 of Protocol 1.

It also held that there had been a violation of Art 1, Protocol 1 in conjunction with Art 14 of the Convention (the enjoyment of rights and freedoms without discrimination) and Art 11 (the right to freedom of peaceful assembly and association). The Grand Chamber considered an alleged violation of Art 9 (the right to freedom of thought, conscience, and religion), but found that it was unnecessary to conduct a separate examination from that standpoint. However, Judge Fischbach, in a separate opinion stated that he took the view that: 2.102

'environmentalist' or 'ecological' beliefs come within the scope of Article 9 in so far as they are informed by what is a truly societal stance. They are closely bound up with the personality of each individual and determine the decisions he takes about the type of life he wishes to lead. Moreover, it is undeniable that the question of preservation of our environment, and of wild animals in particular, is now a much-debated one in our societies.

In *R (Langton & Allen) v Defra and Derbyshire CC* [2002] Env LR 20 the issue and enforcement of a notice under the Animal By-Products Order 1999 by the local authority after a failure to dispose of maggot waste adequately was proportionate to the interference rights under Art 1, Protocol 1 because matters of public and animal health required prompt action. 2.103

KEY DOCUMENTS AND MATERIALS

The Human Rights Act 1998.

Freedom of Information Act 2000

Environmental Information Regulations 2004 (SI 2004/3391)

UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention).

www.unece.org (reproduced in Appendix 1)

Department of Constitutional Affairs (2002). *Human Rights Act 1998 Study Guide*. 2nd ed. DCA: London


IEMA (2002): *Perspectives: Guidelines on Participation in Environmental Decision-making*. IEMA: Lincoln. www.iema.net

Regional Environment Center (2003). *Handbook on Access to Justice under the Aarhus Convention*. REC: Hungary. www.rec.org

Wadham and others (2003). *Blackstone's Guide to the Human Rights Act 1998*. 3rd ed. Oxford University Press: Oxford

Current Concerns in Environmental Decision-making

Paul Stookes¹

 Best practicable means; Climate change; Economic development; Environmental policy; Legal advice and funding; Public participation; Statutory nuisance

Introduction

Environmental concerns have shifted in recent years. Last century's pollution included contaminated waters and urban smogs. These were tangible pollution problems. Today, many of our watercourses are the cleanest they have been since before the Industrial Revolution and river quality is, in general, continuing to improve.² Our cities do not now experience the pea-soups of the 1950s. Yet pressure on the environment is increasing. The harm may now be less readily apparent, but it is equally, if not more, acute. Historically, pollution and nuisances came largely from industry and manufacturing. Today, they arise as much through individual activity and decision-making. Current concerns are that UK households now generate well over half a tonne of waste a year and that this figure is rising by three per cent per year,³ that noise complaints have increased in recent years towards around 300,000 a year in England and Wales⁴ and that light pollution is causing an increasing adverse impact on local neighbourhoods and the night sky.⁵

In terms of local air pollution more than half of the local authorities in the United Kingdom have one or more areas designated as an Air Quality Management Area (AQMA)⁶ within which air pollution exceeds the maximum levels set by government.⁷ Poor air quality in urban areas may be less apparent today, yet it remains the cause of up to 24,000 premature deaths every year.⁸

For atmospheric pollution, global emissions are now so great that they are altering the global climate. The Stern Review published in October 2006 announced that "the scientific evidence is now overwhelming: climate change presents very serious global risks, and it demands an urgent global response".⁹ We are experiencing a significant rise in sea levels here and abroad as global

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² Defra statistical release 5.10.4:

"It is estimated that about 95% of rivers in the UK were of good or fair chemical and biological quality in 2003. There has been little overall change in quality since 2000, but there has been an improvement since 1990."

www.defra.gov.uk

³ See, e.g. Dr Jones *et al.*, *Working our how much household waste is produced in England* (OU, Milton Keynes, 2006) and www.defra.gov.uk.

⁴ See, e.g. "CIEH Annual Noise Complaints statistics 2004/05": www.cieh.org.

⁵ See, e.g. M. M. Taylor, "Light Pollution and Nuisance: The Enforcement Guidance for Light as a Statutory Nuisance" [2006] J.P.L. August at pp.1114–1127; *Yeadell v Oakwood Construction Services Ltd* (2006) C.A., unreported, www.richardbuxton.co.uk for transcript; and "The Campaign for Dark Skies" (www.britastro.org/dark-skies).

⁶ Local Air Quality Management (www.airquality.co.uk).

⁷ Defra *et al.*, *UK Air Pollution* (Defra, London, 2004). The particular pollutants in any given AQMA will be one or more of eight key pollutants which have targets for maximum pollution levels based on the best available medical and scientific understanding of their effects on health.

⁸ Committee on the Medical Effects of Air Pollutants. See, e.g.: www.advisorybodies.doh.gov.uk/comeap

⁹ "The Stern Review: The Economics of Climate Change" (HM Treasury, London, 2006).

temperatures rise causing oceans to expand and vast ice sheets to melt.¹⁰ In the United Kingdom, this is causing extensive coastal erosion. In low lying areas such as Bangladesh it could well mean a loss of up to one-third of the country's land mass; in an area which is already over-populated and under-nourished. Stern predicted that:

"All countries will be affected. The most vulnerable—the poorest countries and populations—will suffer earliest and most, even though they have contributed least to the causes of climate change. The costs of extreme weather, including floods, droughts and storms, are already rising, including for rich countries."¹¹

With such stark findings, it is no longer acceptable to sit back and let inaction within the environmental justice system aggravate our environmental problems. There are at least two key problems. The first is that at both local and national level there is continuing government inertia in genuinely responding to and resolving environmental harm. The second is that, when faced with a lack of state intervention, individuals and local communities continue to face an uphill struggle to effectively resolve the problems themselves.

If one considers local air pollution, it soon becomes clear that, despite the high number of designations, few local authorities are taking meaningful action to reduce pollution levels. For example, in November 2005, Tunbridge Wells Borough Council designated an AQMA that affected over 10,000 local residents.¹² The designation received popular support by residents and local community groups. One year on, the council had failed to take a single positive step to actually reduce pollution levels. It had undertaken further surveys and initiatives, worked towards action plans, and, surprisingly, approved the increase vehicle flows on the key problem roads causing the air pollution. In the short term, such measures could slightly reduce air pollution levels and, indeed, that appeared to be the conclusion of recent monitoring activities. However, increasing traffic flow is misguided in that it will encourage vehicle use on the problem roads and result in even greater levels of air pollution. In effect, the council had failed to tackle the underlying problem and it appears that poor air quality for a local community is an acceptable price to pay for individual travel and transportation. At a national level there is a continuing reluctance to tackle the more obvious causes of climate change by restricting unnecessary and highly polluting activities. The government is continuing to back the unfettered growth in air travel and transport as set out in its White Paper, *The Future of Air Transport*, published on December 16, 2003.^{13 14} The consequence of unnecessary travel and transportation of goods is not limited to the production of greenhouse gas emissions. There are frequent reports that the availability of air transport has secondary and tertiary impacts. For instance, British and European-owned flower companies grow vast quantities of blooms and vegetables in Kenya for export to Europe. In October 2006, the official Kenyan water authority, regional bodies, human rights and development groups as well as small-scale farmers accused the flower companies based near Mount Kenya of "stealing" water which would normally fill local rivers for 100,000 small farmers.¹⁵

¹⁰ www.peopleandplanet.net. "Record CO₂ emissions as ice sheets shrink" (March 14, 2006). In the United Kingdom, sea level rise is occurring at a rate of 1cm every 10 years. See, e.g.: www.defra.gov.uk/environment/statistics/globalatmos

¹¹ Stern Review: executive summary.

¹² See further: www.tunbridgewells.gov.uk

¹³ Department for Transport, London (see also: www.dft.gov.uk).

¹⁴ The consultation process leading up to the adoption of policies in the White Paper was challenged in *Wandsworth LBC v Secretary of State for Transport* [2005] EWHC 20 (Admin), in which the High Court declared that insufficient consultation had been carried out in relation to proposals for runways at Stansted and Luton airports.

¹⁵ J. Vidal, "How your supermarket flowers empty Kenya's rivers: Farms that supply Europe accused of stealing from depleted river", *Guardian*, October 21, 2006.

Of equal concern is that government is highly hypocritical in policy and decision-making. At the launch of the Welsh Climate Change Conference in October 2006, Mr Carwyn Jones A.M., Minister for Environment, Planning and the Countryside in Wales, set out the national commitment to global warming with the headline statement "We must all pull together to tackle climate change".¹⁶ Yet Mr Jones and the Welsh Labour Government has been a keen supporter of opencast coal mining in Wales, thereby encouraging one of the most polluting forms of energy production and use today.¹⁷ This was evident during the proceedings in *Condron v National Assembly for Wales* [2005] EWHC 3007 (Admin) and the Welsh Assembly debate on the publication of the Welsh Mineral Technical Advice Note on Coal.¹⁸

An analysis of the statutory nuisance regime and the best practical means defence

Leaving to one side policy and posturing, for most forms of pollution and nuisance, public bodies have the statutory power and ability to resolve environmental problems, but are consistently failing to do so. To illustrate this it is helpful to analyse aspects of the statutory nuisance regime contained in Pt III of the Environmental Protection Act 1990 (EPA 1990). Statutory nuisance is recognised as an important environmental protection tool. It has been similar in style and form for around 150 years.¹⁹ However, there is growing disquiet over the lack of positive action by local authorities to resolve neighbourhood nuisances and all too frequently local residents are left only with excuses as to why action cannot be taken on their behalf. Added to this are the consequences of a cautious judicial approach to environmental prosecutions and appeals highlighted in the article, "Statutory nuisance, The Sanitary Paradigm and Judicial Conservatism", by Malcolm and Ponting.²⁰

The statutory nuisance legislation was introduced and developed to improve living conditions, help prevent disease and protect public health. It has been adapted in recent years in order to curb pollution and resolve local nuisance problems such as noise and odours. However, the pollution control mechanism has always been qualified in order to avoid undue restriction of economic activity and interests. For example, it was an offence under s.112 of the Public Health Act 1875 to: "carry on any offensive trade including blood boiler, bone boiler, fell monger . . . or any other noxious or offensive trade, business or manufacture":

"... unless it be shown that such person has used the best practicable means for abating such nuisance, or preventing or counteracting such effluvia, the person so offending . . . shall be liable to a penalty . . ."

This defence of Best Practicable Means (BPM) has been retained in successive legislation including the Alkali, etc. Works Regulation Act 1906, the Public Health Act 1936, and most recently in s.80(7) of the EPA 1990 which provides, subject to qualification, that:

"... in any proceedings for an offence . . . in respect of a statutory nuisance it shall be a defence to prove that the best practicable means were used to prevent, or to counteract the effects of, the nuisance."

¹⁶ <http://new.wales.gov.uk/news/presreleasearchive/251006climatechange>

¹⁷ The British Geological Survey (2005) provides that open cast coal mining releases significant quantities of methane, a potent greenhouse gas, during the extraction process. Once extracted, the burning of coal emits further significant releases of Carbon Dioxide and other pollutants. Of further concern is that the BGS states that the fitting of desulphurisation processes, as required by the Large Combustion Plant Directive 2001/80, increases the level of CO₂ into the atmosphere in the desulphurisation process.

¹⁸ See also the transcripts of proceedings relating to debate on the draft Minerals Technical Advice Note 2: Coal of February 16, 2006, July 13, 2006 and September 28, 2006

¹⁹ The Alkali Act, etc. 1863.

²⁰ *Journal of Environmental Law* (2006) Vol.18, No.1, pp.37-54.

Similarly, reg.2(2)(e) of the Statutory Nuisance (Appeals) Regulations 1995 also provides the following ground of appeal:

“... that (for nuisances under s 79(1)(a), (b), (d), (e), (f), (fa), (fb), (g) or (ga) arising from industrial, trade, or business premises) the best practicable means were used to prevent, or to counteract, the effects of the nuisance.”

At first glance, the defence and appeal grounds appear sensible; i.e. providing polluters use their best possible effort to reduce or minimise their polluting activities, then they should not be prosecuted for breaching an abatement notice served on them in an effort to curb or control that pollution. The problem is that this defence is ambiguous. The legislation provides that the “practicable” element of BPM is defined in s.79(9)(a) as:

“... reasonably practicable ... having regard among other things to local conditions and circumstances, to the current state of technical knowledge and to the financial implications.”

This defeats the “best” element of the defence and is in contrast with the “best” provisions contained in other regulation such as the “best available techniques” in the pollution prevention control regime, where “best” means in relation to techniques “the most effective in achieving a high general level of protection of the environment as a whole”.²¹ As a result, the “best practicable means” defence is in reality a “reasonably practicable means” defence, which polluters argue is satisfied if reasonably practicable measures are taken to prevent or minimise pollution. In *Chapman v Gosberton* [1993] Env. L.R. 218, the High Court held that the BPM defence involved the defendant having to discharge the onus of proof, on a balance of probabilities, in that they had taken reasonably practicable means to prevent or counteract the effect of their noise.

The weakness in the reasonably practicable means defence threshold is compounded by the misapplication and scope of the defence. Best Practicable Means only applies to nuisance that arises on industrial, trade or business premises.²² In *Manley v New Forest DC* (1999) CO/1050/99, Newman J. noted that it reflected:

“... a conciliatory and co-operational approach, so that the method of enforcement would not place an undue burden on manufacturing industry and on businesses”.²³

This, again, is sensible, but should the BPM defence really be available to non-manufacturing business where the nuisance activity is central or even the main purpose of the operation? One particular category of operations is leisure facilities including, e.g. nightclubs, bars, theme parks, leisure parks, sports centres, etc. where the common offenders of noise, odours and light pollution are particularly prevalent. Should such facilities be entitled to rely upon a defence that was designed to mitigate the burden on manufacturing and industry when often the *primary* activity carried on at such a facility will be to cause an effect which may be acceptable to the comparatively few users of the facility, but a nuisance to everyone else? At present, such facilities can rely upon the BPM defence on the

²¹ Reg.3 of the Pollution Prevention and Control (England and Wales) Regulations 2000 (SI 2000/1973) as amended.

²² EPA 1990, s.80(8).

²³ In *Manley*, the polluters bred Siberian Huskies in a residential area; the back garden of their home. The nuisance was barking and howling from 24 dogs. It was held that moving the dogs and kennels to another location was not within the best practicable means defence, although other efforts to minimise the nuisance did amount to “best practicable means”. However, it is not correct to assume that a business can intensify operations and then rely upon the “best practicable means” defence to justify increased nuisance activity. Newman J. stated that the concept of “best practicable means” includes reducing the effects of a nuisance to any level including a pre-existing one.

grounds that they fall within the definition of business premises. Yet, with many nuisances arising from leisure facilities, the nuisance is central rather than incidental to the activity being carried out. In these situations, the nuisance is not a necessary or unavoidable outcome of the primary activity. Contrast this with, say, air pollution from a cement works or noise from a printing press. Often, the leisure activity would not be carried on at all if the nuisance was to be avoided or reduced to an acceptable non-nuisance level; for example, regular fireworks displays or rock concerts.

One of the reasons why the BPM defence is so readily available is that it applies to most activities carried on at "industrial, trade or business premises". The statutory definition of premises is not very helpful. Section 79(7) of the EPA 1990 provides that:

"... 'industrial, trade or business premises' means premises used for any industrial, trade or business purposes or premises not so used on which matter is burnt in connection with any industrial, trade or business process, and premises are used for industrial purposes where they are used for the purposes of any treatment or process as well as where they are used for the purposes of manufacturing ..."

There is no real difficulty in the defence applying to industrial or trade premises. It is reasonably clear what types of activity would or could be carried on at such sites. It is the scope of the phrase "business premises" which is the cause for concern. In *Rolls v Miller* (1884) 27 Ch. D. 71, Lindley L.J. concluded that business premises could include almost anything, including, as in that case, lodgings for prostitutes. At p.88, he commented that:

"The defendants are associated together for the purpose of finding a home for these working girls, and they invite them to come and board and lodge there. They do not take any payment now—I do not think that is material—but they have a staff. They have a superintendent in this house whose business it is to look after the lodging-house, and that appears to me to fall both within the words of the covenant and within the mischief. That it is within the mischief I am afraid is too plain; persons complain of it, and it is clear that it was not the kind of thing that was contemplated when the covenant was entered into. But the great difficulty is, is it within the words? Can it be said to be carrying on, or allowing to be carried on a business, on these premises? When we look into the dictionaries as to the meaning of the word 'business', I do not think they throw much light upon it. The word means almost anything which is an occupation, as distinguished from a pleasure—anything which is an occupation or duty which requires attention is a business—I do not think we can get much aid from the dictionary. We must look at the words in the ordinary sense ..."

Lindley J. confers a broad meaning to the term "business premises", but does make a distinction between business and pleasure activities which, as is argued, is a matter in urgent need of review. At present it appears that providing there is some business element in an activity or operation, however modest, the BPM defence applies. But at what point does the nuisance shift from deriving from a business activity to one of purely pleasure? For example, the screams of fear, nerves and adrenalin from a leisure park ride arise from users rather than any manufacturing or business process. In *Roper v Tussauds Theme Parks Ltd* (Crown Court), July 21, 2005, ref.A20040143, the primary noise pollution complaint was from individuals who were not carrying on a business activity. This is not an insignificant concern; the statutory nuisance provisions are supposed to be central to protecting the local community from environmental harm, yet a sizeable proportion of nuisance activity is often unjustifiably evading control.

Is it really the continuing intention of Parliament to condone a nuisance when such activity is not the unavoidable consequence of industry or manufacturing, but the primary purpose of a leisure pursuit? Arguably not. There may be some justification in suffering nuisance for the sake of some social and economic utility, but the argument wears thin when the social benefit is limited to pleasure-seeking individuals to the detriment of others whose lives become miserable as a result.

The statutory nuisance system is further undermined by the misapplication of the BPM defence, usually by local authority environmental health officers (EHOs). Whether or not BPM have been used to control or avert the nuisance is a matter to be determined by the court. It is not a matter to be determined by EHOs in assessing whether or not a statutory nuisance exists. This is evident by reference to the defence itself. The relevant part of s.80(7) of the EPA 1990 is that *in any proceedings for an offence* it shall be a defence to prove that BPM were used to prevent or counteract the effects of the nuisance. This requires proceedings to have been issued and for an offence to have been committed.

Best Practicable Means is not an element of statutory nuisance or a qualification to its existence. Yet often, EHOs, when assessing whether or not to serve an abatement notice, will pre-judge whether a BPM defence may be relied upon. This is misunderstanding the purpose of the abatement notice as some form of pre-action procedure which will inevitably lead to the issue of proceedings. The abatement notice is served to affirm and advise the nuisance maker that a nuisance exists. It is a formal request to stop the nuisance or to prevent its recurrence. At the point of serving the notice, there is no criminal offence and proceedings have not yet begun. An EHO is not in any way obliged to consider or assist the nuisance-maker in preparing a defence to any proceedings that may or may not arise at a future date. Similarly, the BPM ground of appeal under s.2(2)(e) of the Appeal Regulations 1995 is just that; a ground of appeal that any nuisance-maker must raise and prove on a balance of probabilities. What should be anticipated from service of an abatement notice is not that an appeal may ensue, but that the recipient will respect the terms of the notice and that the nuisance will cease. Yet, when investigating a nuisance complaint, EHOs frequently conclude that a nuisance exists, but believe that there is little point serving a notice because the nuisance-maker will rely upon the BPM defence, or that a nuisance doesn't exist because BPM have been used. These are not conclusions open for an EHO to reach. Under s.80(1) of the EPA 1990, once a nuisance is found to exist an abatement notice must be served. From there, any BPM defence or ground of appeal must be left for consideration by the court.

The common outcome of pre-judicial determination of BPM and the general misunderstanding of what constitutes a nuisance by local authorities is that local communities and residents are unnecessarily suffering pollution and nuisance. As a result, local people have to either accept the nuisance or take matters into their own hands.²⁴

The failure to act is widespread. By way of example, in *Bloxham v AP Foods* [2006] (unreported), the High Court granted a permanent injunction in private nuisance proceedings to prevent noise arising from shop refrigeration units. The local council had earlier concluded that a statutory nuisance did not exist.

²⁴ See Newman J. in *Manley*.

"the local authority's duty is to issue a notice, but that done, the effect of the notice is not dictated by their duty but by the terms of the Act, the appeal regulations and the availability of a ground of appeal."

Malcolm and Ponting conclude that the concept of statutory nuisance needs updating to meet the needs of a modern public health system. In the light of the continuing ambivalence of government and its agencies at national and local level, it is also legitimate to ask that individuals and communities suffering pollution and the consequences of adverse land-use development be assisted in their efforts to curb the problems arising on the doorstep. Lord Goff, in *Cambridge Water Company v Eastern Counties Leather* [1994] [1994] 2 A.C. 264, placed emphasis on the emerging environmental regulatory regime in the early 1990s as justification for avoiding judicial intervention, stating that:

“The protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind; and public bodies, both national and international, are taking significant steps towards the establishment of legislation which will promote the protection of the environment . . . [G]iven that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so.”

Thirteen years on and the well-informed and structured legislation has failed to fulfil its function and provide the necessary protection for modern living. There is a need to revisit the optimism placed in the emerging environmental regulatory regime and a need for the courts fully to appreciate their role in environmental protection and conservation. It is right that public bodies such as local authorities and the Environment Agency are best placed to protect the environment. They have the mandate to do this.²⁵ They have, or should have, the resources, expertise and authority to pursue and control pollution and nuisance activity on behalf of their local community. However, with those public bodies often unwilling, impotent or incompetent it remains necessary for the public to look elsewhere for a remedy; including the courts.

Public participation in decision-making

Individuals and communities having to take direct action to protect their environment have certain procedural environmental rights under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention 1998). As its name suggests, the Convention confers rights relating to environmental information, public participation and access to justice. The justification for express environmental procedural rights is that environmental problems usually involve matters of much wider public interest. For example, a land-use planning decision will, almost without fail, have additional environmental impacts over and above the immediate and direct impact being considered by a local planning authority. There is likely to be an effect caused by the use of natural resources and energy, the increased pressure on existing services and the impact on visual amenity. Many of these effects may not necessarily be material planning considerations, but they remain environmental impacts and, as such, could directly affect the immediate neighbours to the land to be developed. They may also impact on those surrendering their natural resources and who may live many hundreds or even thousands of miles away. What is clear is that the local community will have to live with the development long after the developer has cleared up and moved on to its next development. Land being developed will affect many persons for some time in the future.

²⁵ For example, the well-being powers of local authorities under s.4(1) of the Local Government Act 2000 and objective of sustainable developments under s.4(1) of the Environment Act 1995.

The UK and EU governments ratified the Convention in February 2005 and following enactment of the Environmental Information Regulations 2004 (SI 2004/3391), the United Kingdom considers itself Aarhus-compliant. A number of EU Directives underpin the Convention, helping to ensure that all Member States comply with its obligations.²⁶

In the United Kingdom, the procedural right of access to environmental justice may arise in a number of ways. In land-use planning, developers can appeal to the Planning Inspectorate²⁷ on the merits of any adverse development decision. Indeed, the Planning Inspectorate is widening its appellate functions and now considers a number of environmental appeals relating to, among other things, rights of way and access, pollution prevention control, waste management and water. The Information Commissioner and Information Tribunal also provide a review function in relation to environmental information. However, for local communities suffering the consequences of polluting activities, nuisance or adverse development and who are seeking to resolve those problems, the only realistic form of review is by issuing legal proceedings either by a private action directly against the polluter or by way of an application for judicial review in challenging the public decision-making process. Either option is likely to involve substantial costs in pursuing the claim. A quite simple matter being determined at a one-day hearing is likely to involve costs to each party of between £15,000 and £20,000.

The government relies on the public funding system (formerly legal aid) administered by the Legal Services Commission (LSC) to counter the allegation that access to justice is prohibitively expensive and so comply with Art.9(4) of the Aarhus Convention 1998. It is recognised that the poorest in society may be financially eligible for public funding, yet it remains unavailable to the majority of the population who are excluded by the fact that they enjoy (very) modest financial income or savings. This renders access to the courts outside the scope of all but the very poor and the very rich.²⁸ Further, the application of the LSC Funding Code 5.4.2 on Alternative Funding provides an option for refusing funding when there are reasonable prospects of success and the potential claimant is financially eligible. Code 5.4.2 provides that an application for public funding may be refused if alternative funding is available to the client (through insurance or otherwise) or if there are other persons or bodies, including those who might benefit from the proceedings, and who can reasonably be expected to bring or fund the case. This may be reasonable if the matter is being pursued by a local community group or residents association, but can operate unfairly if other local residents are unwilling to get involved, even though there is a reasonable case for action.

It is not just the claimant's own legal fees that restrict legal rights. It is the risk of having to pay the other side's cost which is a common reason for not pursuing legal proceedings in environmental cases.²⁹ In *Shirley v Secretary of State for Transport Local Government and the Regions* [2002] CO/4505/2001 (unreported), the interested party informed the applicant shortly before the hearing that if she chose to pursue the claim they would seek their costs of £126,000 from her. Mrs Shirley continued the case and the High Court quashed the defendant's decision; however, there was a very real risk that if the court had found against her she would have lost her home. A similar threat arose in *Friends of the*

²⁶ These include Directive 2003/4 on public access to environmental information, Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and the draft Directive on access to justice in environmental matters COM(2003)614 final, which has yet to enter into force.

²⁷ The Planning Inspectorate is carrying out the functions of the Secretary of State under s.78 of the Town and Country Planning Act 1990, see e.g.: www.planning-inspectorate.gov.uk.

²⁸ This was highlighted in the article by R. Carnwath, "Environmental Litigation—A way through the Maze?" (1999) J.E.L. Law 11, 1 OUP.

²⁹ P. Stookes, *Civil law aspects of environmental justice* (Environmental Law Foundation, London, 2003).

Earth v Environment Agency [2003] EWHC 3193 Admin, when the day before the hearing Friends of the Earth were served a Schedule of Costs by the interested party for just over £100,000. Again, Friends of the Earth were successful and were not required to pay those costs.³⁰

The risk of paying the other side's costs derives from r.44.3(2)(a) of the Civil Procedure Rules, which provides that "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party . . ." The court then, under r.44.3(2)(b), has a discretion whether to make a different order. The application of the general costs rule in public law matters, which may be of significant wider public importance, has prompted some empathy for dis-applying the conventional costs rule and, in some instances, granting a Protective Costs Order (PCO) to a party which limits the cost liability of that party, should they be unsuccessful in the proceedings. Lord Justice Brooke in *R. (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192 clarified this.

Public interest environmental claims, by their nature, raise matters that go far beyond the immediate interest of the particular parties. They have, often at their heart, the interests of many others including, at times, non-human species, and those yet unborn (future generations). It is appropriate that, when justified, the risk of incurring costs of such legal proceedings should not rest upon the individual claimant and that the state, as the primary body responsible for the environment and sustainable development, should underpin the reasonable costs of any determination.

The PCO question continues to attract discussion.³¹ In July 2006, the report "Litigating the Public Interest" recommended development of the *Corner House* principles, including the removal of the requirement that a claimant must not have a private interest in the outcome of the case. Yet, there remains an inconsistent judicial approach to the issue. In *R. (on the application of Goodson) v Bedfordshire and Luton Coroner* [2005] EWCA 1172, the Court of Appeal held that a private interest precluded a PCO, whereas in *R. (on the application of Ministry of Defence) v Wiltshire & Swindon Coroner* [2005] EWHC 889, the High Court granted a part-PCO to the defendant. In *River Thames Society v First Secretary of State* (unreported, September 22, 2006), a PCO was refused where a party had applied to be substituted as the claimant in proceedings under s.288 of the TCPA 1990.³² The judge concluded that Pt 19 of the CPR on the joining of parties did not apply to public law proceedings and that the issue of substitution fell to be decided under the court's inherent jurisdiction. Further, in *Takeley PC v Stansted Airport Plc* (2006) C.A., unreported, the permission judge on appeal refused a PCO without providing any reason whatsoever.³³

The continued use of PCOs in public law cases may assist in pursuing public interest claims, but it should be seen against a backdrop of year-on-year increases in the cost of litigation, e.g. in the increase in court fees. A more liberal and consistent application of PCOs may temper the prohibitive costs problem, but without fundamental review, the reality is that a high proportion of genuine environmental challenges will not proceed simply because they are too expensive to pursue. Meanwhile, the United Kingdom will continue to fall foul of the Aarhus Convention prohibition on prohibitive expense. The government will now have to turn its mind to the problem following formal complaints to the European Commission and the failure to comply with Art.10a of the EIA Directive 85/337, as amended.

³⁰ Friends of the Earth were challenging the decision to scrap a number of contaminated ex-military ships (Ghost Ships) sent from the United States.

³¹ The issue of Protective Costs Orders is discussed in detail in *Current Topics* of J.P.L. December 2006.

³² See discussion of this use in *Current Topics* in this issue.

³³ See the important comments in *R. (on the application of England) v London Borough of Tower Hamlets* [2006] EWCA Civ 1742.

An effective environmental justice system cannot properly be based upon a discretionary public funding system and a patchwork of inconsistent cost protection measures such as conditional fee agreements, before the event insurance, after the event insurance, legal expenses insurance and pro-bono service providers. The government is placing great emphasis on the importance of environmental protection and preservation yet its environmental access to justice provisions are, quite frankly, a mess. There may be adequate review procedures for developers and polluters as part of the regulatory control provisions, but for those seeking to assert their environmental rights, the outlook is unclear. Perhaps most disturbing of all is that, on occasions, not only is the legal justice system weighted against communities seeking to protect their environment, but the very public bodies that should be protecting their interests appear to be more willing to assist the polluter. The inequality of arms among litigants is widespread and is often worsened in the courts with the polluted frequently coming off second-best. This is beginning to receive judicial recognition. In *R. (on the application of Condrón) v National Assembly for Wales* [2005] EWHC 3316 (Admin), Lindsay J. raised the issue when dismissing an application for late evidence, noting that:

“... there is something to be said for the inequality of arms that was argued as a feature of the case at an earlier stage. The objectors did not have legal representation at the inquiry but the developer did have ... At the inquiry the local authority, Merthyr Tydfil, had the services of its own planning officer and staff. The objectors had no legal representation. By the time it came to me, Mrs Condrón had the benefit of being able to instruct leading counsel, Mr George, and junior counsel. But even then, there were four counsel ranged against them ...”

In *Condrón*, the inequality of arms at the planning inquiry was startling; not only did Merthyr Council support the developer at the inquiry and oppose the local community, it had also agreed to underwrite up to £800,000 of the developer's costs for the inquiry, should the opencast coal extraction scheme proceed.

In conclusion, environmental protection and improvement and the need to resolve the difficulties within a confused legal justice system clearly needs action by government. There is need for change in the law and a change in the approach to law. However, perhaps more importantly, the big problems we all now face also need a change in our perception and a change in our approach to basic societal principles, such as economic growth. George Monbiot suggests that the problems arise from misguided perception and faulty economics. He regards our perception of the future as a snapshot of today as illusory and that conventional economics, whether informed by Marx, Keynes or Hayek, are based upon the notion that human welfare will be delivered by continued economic growth and that the resources to fuel that growth are infinite. Achieving genuine sustainable development must challenge that conventional assumption of growth.³⁴ Effective sustainable development must accept that there has to be a reduction in production and consumption. Monbiot concludes:

“We are faced with a very, very big problem and it's a problem which is incredibly hard for people to get their heads around. What climate change does is to challenge the whole ethical basis of society. Everything that was good before becomes bad. It's a good thing to fly to your friend's wedding in New York but what we understand now from climate change is that it's also a bad thing. It's a good thing to light the streets at night, it's also a bad thing. Everything that was good becomes bad, everything that was bad becomes good. It requires

³⁴ G. Monbiot, “Climate Change: A crisis of collective denial?” at the Professor David Hall Lecture delivered to the Environmental Law Foundation, May 4, 2005.

a massive reversal of our world view. It requires an acknowledgement that if we in the rich world carry on the way we are, and this is another profoundly heretical thing to say which people absolutely hate me saying but as a result I shall say it, if we carry on the way we are every one of us, however well-intentioned we are, however meek and mild we are, will be responsible, in terms of humanitarian suffering, for the equivalent of a medium-sized act of terrorism.”

This philosophical approach is also relevant to the effective application of environmental law. Until we recognise the real value of genuine environmental protection and improvement, we stand little chance of securing any real benefit from our legislation and legal justice system. The BPM defence will continue to provide a polluter’s charter, our policy and law will remain environmentally weak and our legal justice system will remain prohibitively expensive. If we continue to place economic value and our own wants or demands above all else, be they flowers from Kenya, a weekend in New York, or a brand-new, big fat 4x4, then we will all, ultimately, lose out.

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