AN INTRODUCTION TO
ENVIRONMENTAL LAW

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Introduction
1. This talk will look at:
   i. What is environmental law?
   ii. The sources of environmental law
   iii. Some key concepts in environmental law: the precautionary principle, the polluter pays, public participation and access to environmental justice
   iv. An introduction to the main areas of environmental law:
      a. air quality
      b. climate change
      c. contaminated land
      d. noise
      e. environmental permitting
      f. waste
      g. water
      h. nature conservation
      i. nuisance
      j. environmental impact assessment
      k. strategic environmental assessment
      l. REACH
   v. Some recent important environmental cases.


What is environmental law?
3. There is no agreement on what environmental law is. This is a source of endless (academic) debate.

4. What is the “environment”? Some legal definitions …
   i. S. 1(2) of the Environmental Protection Act 1990 (“the EPA 1990”) “The “environment” consists of all, or any, of the following media, namely, the air, water and land; and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground.”
   ii. Environmental Management Standard ISO 14001 “… air, water, land, natural resources, flora, fauna, humans and their interrelationship …”;
   iii. See also Annex I to the Aarhus Convention, of which more later …

6. Fundamental questions about environmental law:
   ii. Wild Law? The term "wild law" was first coined by Cormac Cullinan, a lawyer based in Cape Town, South Africa (Wild Law: A Manifesto for Earth Justice, Green Books, Totnes, Devon, 2003): see http://www.ukela.org/rte.asp?id=5 and "On thin ice - Could 'wild laws' protecting all the Earth's community - including animals, plants, rivers and ecosystems - save our natural world?", by Boyle and Elcoate (The Guardian, 8 November 2006) – the idea is “Fish, trees, fresh water, or any elements of the environment, … having legal rights” which can be vindicated by local communities (http://www.guardian.co.uk/environment/2006/nov/08/ethicalliving.society).

7. Environmental law has many aspects:
   i. Private law: tort – especially nuisance (public and private), and also property law;
   ii. Public law – state regulation:
      a. Setting standards: water quality, air quality;
      b. requiring authorisation of activities – town planning, environmental permitting;
      c. Prescribing procedures to be carried out – EIA, SEA;
      d. Identifying land or species that must be protected - nature conservation, Sites of Special Scientific Interest (“SSSIs”), the Green Belt, AONBs etc;
      e. Banning activities – fly tipping;
      f. Creating civil liability - contaminated land regime (see below); the Environmental Liability Directive 2004/35 implemented by the Environmental Damage (Prevention and Remediation) Regulations 2009 (http://www.defra.gov.uk/environment/policy/liability/) etc.
   iii. Criminal law: environmental crime:
      a. Numerous offences in many Acts;
      b. Environment Agency (formerly National Rivers Authority) v Empress Car Co [1999] 2 A.C. 22: unknown person opened the unlockable tap of a diesel tank kept by Empress in a yard which drained directly into a river, with the result that the contents of the tank overflowed and drained into the river's waters. Empress’s conviction for causing poisonous, noxious or polluting matter to enter controlled waters contrary to the Water Resources Act 1991 s.85(1) on a prosecution brought by the NRA upheld by HL;

d. A new approach: The Regulatory Enforcement and Sanctions Act 2008 (“RESA 2008”) – main provisions brought into force 1 October 2008. The Act gives Government the power to give regulators, including local authorities, the Environment Agency, Natural England, English Heritage, the Countryside Council for Wales and others range of new enforcement powers (called “civil sanctions”). The Act was a response to a review by Richard Macrory\(^1\) that criticised the heavy reliance of most areas of regulation on criminal sanctions. The civil sanctions introduced are intended to provide regulators with an alternative to prosecutions and formal cautions. The intention is that the new sanctions will create a more proportionate regulatory framework, and reduce the administrative burden for regulators and businesses alike.

1. The civil sanctions created by RESA 2008 include:
   a. fixed monetary penalties in respect of relevant offences (ss. 39-41);
   b. discretionary requirements which may include variable monetary penalties, compliance requirements, and restoration requirements (ss. 42-45);
   c. stop notices, which prohibit a regulated person from carrying on a particular activity (ss. 46-49);
   d. enforcement undertakings, whereby regulated persons avoid the effects of other civil sanctions by undertaking to take certain actions (s. 50).

2. The actual schemes for these civil sanctions are to be made by the relevant government departments in respect of the matters falling within their respective competences. RESA 2008 simply provides the statutory basis for such enforcement mechanisms. In the environmental context, the Environment Agency and Natural England are the first to be given powers under RESA. The Environmental Civil Sanctions (England) Order 2010 and the Environmental Sanctions (Misc. Amendments) (England) Regulations 2010 have now been laid before Parliament. The Welsh Assembly Government is drawing up co-ordinated secondary legislation in Wales to extend civil sanctioning powers to the Environment Agency in Wales.

3. The Environment Agency press release on 3 February 2010 says “The Environment Agency will be consulting business from 15 February 2010 to help shape how the new powers will be implemented”. The Orders provide further detail on the level of the penalties to be provided for:

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\(^1\) R Macrory “Regulatory Justice: Making Sanctions Effective” Cabinet Office November 2006
a. In relation to fixed monetary penalties, the level of penalty is set at between £100 - £300 (Para.3, Sch.1);
b. In relation to variable monetary penalties, no maximum level is set by the RESA 2008, save that where the offence is triable only summarily, the penalty must not exceed the maximum amount for that fine (Para.4, Sch.2). An example case in the DEFRA consultation proposes a variable monetary penalty of £38,500 for a water pollution incident as a result of poor site maintenance. The Environmental Civil Sanctions (England) Order 2010 though sets a maximum limit of £250,000.

4. RESA 2008 provides that the regulator may only impose a monetary penalty in respect of a relevant offence where it is “satisfied beyond reasonable doubt" that the subject of the penalty has committed the relevant offence (s 39(2); s.42(2)). Both fixed and discretionary monetary penalties are to be imposed by the service of a “notice of intent” to impose a penalty, which affords the subject of the penalty an opportunity to make representations to the regulator. If the person fails to convince the regulator that the penalty should not be issued (or perhaps that the amount of the penalty should be reduced), the regulator will then issue a final notice requiring the payment of a penalty.

5. Where a fixed or variable monetary penalty is imposed on a person, or when a notice of intent is served, criminal proceedings cannot be taken in respect of that person (ss 41, 44). As such, the monetary penalty is intended to replace the criminal offence.

6. Stop notices are notices issued by a regulator with the intention of prohibiting a person from carrying on a certain activity until the steps specified in the notice have been taken. They can be imposed where the regulator reasonably believes that an activity (presently occurring or likely to occur) is causing, or presents a significant risk of causing, serious harm to human health, the environment, and the financial interests of consumers, and the regulator reasonably believes that the activity as carried on involves or is likely to involve the commission of a relevant offence (s 46(4)).

7. Persons receiving a final notice, or a stop notice, have a right of appeal. That right of appeal must allow the subject of the penalty to challenge the decision on (at least) the following bases – see RESA 2008:
   a. That the decision to impose the penalty was based on an error of fact;
   b. That the decision was wrong in law;
c. That the decision was unreasonable (and in the case of variable penalties, that the amount of the penalty was unreasonable);

d. In relation to stop notices only, that the person has not committed the offence and would not have committed the offence if the stop notice was not served.

8. In common with the other civil sanctions, the appeal is made to the new Regulatory Chamber of the First-tier Tribunal created under the Tribunals, Courts and Enforcement Act 2007. RESA 2008 itself contains no indication of what level of scrutiny the Tribunal will apply to a decision of a regulator. On the face of the Act, it is not clear whether it should apply a *Wednesbury* test, or whether it should (in effect) retake the decision. However, the draft Order provides that “the regulator must prove the commission of the offence beyond reasonable doubt” on appeal and that “the tribunal must determine the standard of proof in any other matter”. An appeal from the First-tier Tribunal is to the Upper Tribunal on a point of law only.


iv. EC law: generally said 80% of environmental law in UK derives from EU – see below.

v. International law: see further below, increasingly important.


9. Who are the regulators?

i. Central Government: Defra, DCLG, DECC but also DfT, BERR;

ii. Local Government: historical role in public health protection. Now: Town & Country Planning, EPA 1990 (statutory nuisance); noise; also air quality and management and contaminated land (for non-special sites). Also a regulator under Environmental Permitting Regulations 2007 (soon to be 2010, “the EPR”) for certain installations;

iii. The Environment Agency: an executive non-departmental government body, principal environmental regulator in England & Wales. Responsible for: environmental permitting, water resources, flooding and coast management, waste, emissions trading. 13,000 employees. In Scotland SEPA;


v. Others: Maritime and Coastguard Agency; Drinking Water Inspectorate; Nuclear Installations Inspectorate.
The sources of environmental law

(1) International Environmental Law

10. Important – direct influence on domestic law, but also on EC law and through that domestic law.


12. Illustrate importance of International Law by reference to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“the Aarhus Convention”). The Aarhus Convention entered into force in October 2001. It was ratified by the UK in February 2005, and by the EU in the same month. As of 8 September 2009, there were 43 Parties to the Convention.

13. Article 1: In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well being, each Party shall guarantee the rights of access to information, public participation in decision making, and access to justice in environmental matters in accordance with the provisions of this Convention.

14. The Convention contains three broad themes or 'pillars':
   i. access to environmental information (Articles 4 -5);
   ii. public participation in environmental decision-making (Articles 6 -8); and
   iii. access to justice in environmental matters (Article 9).

15. Former United Nations Secretary-General Kofi Annan said "Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations" (emphasis added).

16. It has had, and continues to have a profound impact on the development of EC and UK environmental law.

17. Access to environmental information:
   i. the Environmental Information Regulations 2004 (SI 2004/3391) (“the EIR”);
18. The EIR apply to “environmental information”, which is defined in regulation 2 in the following way:

“environmental information” has the same meaning as in Article 2(1) of the Directive, namely any 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, coastal and marine areas, biological diversity and its components, including genetically modified organisms, 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 framework of the measures and activities referred to 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) and (c)"

19. As is clear from the EIR, that definition replicates that in the EI Directive, which in turn is in similar terms to the definition of environmental information in the Aarhus Convention. The ECJ has treated “environmental information” as having a broad meaning under Directive 90/313/EEC. In Case C-321/96 Mecklenburg v Kreis Pinneberg – Der Landrat [1998] ECR I-3809, the ECJ found the wording of the definition (albeit different from that in the present version of the EI Directive) to create a broad concept of what can constitute environmental information.

20. A broad interpretation of the meaning of environmental information is also advocated by the Information Commissioner’s Office (“ICO”), see http://www.ico.gov.uk/what_we_cover/environmental_information_regulation/guidance.aspx. Requests falling under the EIR must be dealt with under those regulations and not as an FOIA request. NB the procedures and exemptions are different.

21. The Supreme Court in Office of Communications v Information Commissioner [2010] UKSC 3 referred to ECJ the following question: “Under Council Directive 2003/4/EC , where a public authority holds environmental information, disclosure of which would have some adverse effects on the separate interests served by more than one exception (in casu, the interests of public security served by article 4(2)(b) and those of intellectual property rights served by article 4(2)(e)), but it would not do so, in the case of either exception viewed separately, to any extent sufficient to outweigh the public interest in disclosure, does the Directive require a further exercise involving the cumulation of the separate interests served by the two exceptions and their weighing together against the public interest in disclosure?”. The information requested relates to the precise location of mobile phone base stations in the United Kingdom.
22. For other cases touching on the EIR: see *Veolia ES Nottinghamshire Ltd v Nottinghamshire CC* [2010] Env. L.R. 12 and the *BARD* case discussed in the Annex below.

23. **Public participation in environmental decision-making:** In *R(Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] Env. L.R. 29 (a challenge to the consultation process in relation to new build nuclear) Sullivan J said:

   “49. 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 by the executive. The United Kingdom Government is a signatory to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention). The Preamble records the parties to the Convention:

   “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,

   Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns

   Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment, …”

50 Article 7 deals with “Public Participation concerning Plans, Programmes and Policies relating to the Environment”. The final sentence says:

   “To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.”

51 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 …”.

24. See also what Lord Hoffmann said on public participation in the context of EIA in *Berkeley* (see below).

25. **Access to justice in environmental matters:** Article 9 requires that members of the public have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of environmental decision-making. Article 9(4) requires that the procedures for rights of access to justice in environmental matters shall “provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely, and not prohibitively expensive”. In recent times the key issue in England & Wales has been the “not prohibitively expensive” requirement: see below.
26. **What is the status of the Aarhus Convention?**

i. It is an international convention, and the parties to the convention have established a Compliance Committee that can investigate alleged instances of non-compliance. There are currently three complaints relating to the UK in which decisions are awaited:

   a. ACCC/C/2008/27: this is a complaint brought by the Cultra Residents’ Association, County Down. The Association was one of five who were applicants in judicial review proceedings brought in the High Court in Northern Ireland. The judicial review proceedings related to the expansion of City Airport in Belfast. The proceedings were dismissed as being premature (*Kinnegar Residents’ Action Group & Ors, Re Judicial Review* [2007] NIQB 90 (7 November 2007)). The Department’s costs were awarded against the applicants in the sum of £39,454. The Association alleged that the award of costs violated its rights under Article 9 of the Aarhus Convention.

   b. ACCC/C/2008/23: this arises out of the *Morgan v Hinton Organics* case considered below. A summary of that case records the complaint as being that the communicants “rights under article 9, paragraph 4, of the Convention were violated when they were ordered to pay costs amounting to approximately £25,000, which, in the opinion of the communicants, is prohibitive expensive. The costs order was issued following a discharge of an interim injunction obtained by them earlier in private nuisance proceedings for an injunction to prohibit offensive odours arising from Hinton Organics (Wessex) Ltd operating a waste composting site. The communicants allege that the issuing of the costs order by the Court, in circumstances where one month before it had agreed and made an order that there was a serious issue to be tried and that the Claimants should enjoy interim injunctive relief, amounts to non-compliance with article 9, paragraph 4, of the Convention”.

   c. A third communication concerning the UK has been brought Mr. James Thornton, the CEO of ClientEarth. The complaint there is that the “law and jurisprudence of the [UK] fail to comply with the requirements of article 9, paragraphs 2 to 5, in particular in connection with restriction on review of substantive legality in the course of judicial review, limitations on possibility for individuals and NGOs to challenge act or omissions of private persons which contradict environmental law, prohibitive nature of costs related to access to justice and uncertain and overly restrictive nature of rules related to time limits within which an action for judicial review can be brought”.

ii. The status of the Convention in the domestic law of the UK was recently considered by the Court of Appeal of England & Wales in *Morgan v Hinton Organics (Wessex) Ltd* [2009] C.P. Rep. 26 – see further below. Carnwath LJ explained (see para. 22) that “[f]or the purposes of domestic law, the convention has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts, but may be
taken into account in resolving ambiguities in legislation intended to give it effect (see Halsbury’s Laws Vol 44(1) Statutes para.1439)).

iii. The EC dimension: The EU itself has ratified the Aarhus Convention. As a result its institutions can take enforcement action against Member States for non-compliance. Indeed the provisions of Article 9 of the Aarhus Convention concerning access to justice have been inserted into two key EC environmental directives. Article 10A of the 1985 EC Directive on Environmental Impact Assessment (“EIA”) provides that Member States must ensure that members of the public have access to a review procedure before a court of law or other independent body to challenge the substantive or procedural decisions, acts or omissions subject to the public participation provisions of the Directive, and that “any such procedure shall be fair, equitable, timely, and not prohibitively expensive”. Directive 96/61/EC on Integrated Pollution Prevention and Control (“IPPC”), which provides for a consent system for a wide range of industrial activities, is similarly amended with a new Article 15a, which also provides that procedures for legal challenges must be fair, equitable, timely, and not prohibitively expensive. Also:

a. The requirements of Article 9 have been recently considered by the ECJ: Case C-427/07 Commission v Ireland 17 July 2009;

b. It is well known that in 2006 CAJE (Capacity Global, Friends of the Earth, the Royal Society for the Protection of Birds and WWF) complained to the EC Commission about UK non-compliance with Aarhus in particular as regards the “not prohibitively expensive” obligation. A Letter of Formal Notice was sent to the UK in December 2007. It is understood that the Commission is currently considering whether to issue the UK with a Reasoned Opinion. It is said in Morgan v Hinton Organics that the Commission decision was awaiting the Sullivan Report (www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf, see below)

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2 This arose in the context of infraction proceedings against the Republic of Ireland. In the proceedings it was alleged, inter alia, that Ireland had failed to transpose requirements in Article 10a of the EIA Directive and Article 15a of the IPPC Directive by ensuring that procedures for access to justice in respect of decisions made under those Directives were not prohibitively expensive. The Commission complained that “there is no applicable ceiling as regards the amount that an unsuccessful applicant will have to pay, as there is no legal provision which refers to the fact that the procedure will not be prohibitively expensive”. The ECJ concluded that:

“92. As regards the fourth argument concerning the costs of proceedings, it is clear … that the procedures established in the context of those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement.

93 Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts.

94 That mere practice which cannot, by definition, be certain, in the light of the requirements laid down by the settled case-law of the Court, … cannot be regarded as valid implementation of the obligations arising from [the EIA and IPPC Directives]”
and the UK’s response to it. This is because the UK Government had indicated in would respond to the Sullivan Report. It then did not do so. The first public response to the Sullivan Report came in the form of the submissions of the UK to the Aarhus Compliance Committee in the Cultra Residents Association communication and related communications (see above). Some of the correspondence between the Commission and the UK is recorded in the judgment in Morgan (see below) as is correspondence between the Aarhus compliance authorities and the UK.

27. **The influence of Aarhus in the English Courts:** there have been numerous cases in England & Wales that have made reference to the Aarhus Convention in the costs context. The most common context in which this consideration has arisen is in respect of applications for a protective costs order or PCO – about which much more below.

28. The first time that Aarhus was mentioned by the Courts of England & Wales was in *R. (Burkett) v Hammersmith and Fulham LBC (Costs)* [2004] EWCA [2005] C.P. Rep. 11. Since then Aarhus been at the forefront of the liberalisation of the PCO case-law. The restrictive approach evident in the (non-environmental cases) of *R (Corner House Research) v. Secretary of State for Trade and Industry* [2005] 1 WLR 2600 and *R (Goodson) v Bedfordshire & Luton Coroner* [2006] C.P. Rep. 6 has been relaxed and Aarhus has been at the forefront of this:

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3 The Court of Appeal in an addendum to their judgment having referred to the requirement in the Aarhus Convention that judicial procedures in environmental law “not be prohibitively expensive” said:

“75. A recent study of the environmental justice system (“Environmental Justice: a report by the Environmental Justice Project”, sponsored by the Environmental Law Foundation and others) recorded the concern of many respondents that the current costs regime “precludes compliance with the Aarhus Convention”. It also reported, in the context of public civil law, the view of practitioners that the very limited profit yielded by environmental cases has led to little interest in the subject by lawyers “save for a few concerned and interested individuals”. It made a number of recommendations, including changes to the costs rules, and the formation of a new environmental court or tribunal.

76. …. 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 possibility of ever living up to the Aarhus ideals within our present legal system. …

77. Equally disturbing, perhaps, is the fact that this large expenditure on Mrs Burkett’s behalf has not, as far as we know, yielded any practical benefit to her or her neighbours.

…

80. We would strongly welcome a broader study of this difficult issue, with the support of the relevant government departments, the professions and the Legal Services Commission. However, it is important that such a study should be conducted in the real world, and should look at the issue not only from the point of view of the lawyers involved, but also taking account of the likely practical benefits to their clients and the public. It may be thought desirable to include in such a study certain issues that relate to a quite different contemporary concern (which did not arise on the present appeal), namely that 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 that this may be a potent factor in deterring litigation directed towards protecting the environment from harm.”
i. **R (England) v LB of Tower Hamlets** [2006] EWCA Civ 1742 – restrictive approach to “no private interest” not applicable in environmental context, Carnwath LJ refers to Aarhus;

ii. May 2008 the report of the Working Group on Access to Environmental Justice *Ensuring access to environmental justice in England and Wales* chaired by Sullivan J. – Aarhus central to this report and report itself sience driven the case-law;

iii. **R (Compton) v Wiltshire Primary Care Trust;** [2008] CP Rep 36 – a non-environmental case but Court of Appeal in relaxing requirements refers to Aarhus and the Sullivan Report;

iv. Further consideration in **R (Buglife) v Thurrock Thames Gateway Development Corporation** [2009] C.P. Rep. 8 – environmental case further considering criteria for grant of a PCO;

v. **Morgan v Hinton Organics (Wessex) Ltd** – see above, further relaxation and citation of Aarhus;

vi. Aarhus features prominently in Jackson Report – recommendation for judicial review generally and environmental cases for qualified *one way costs shifting*.

(2) **EC law**

29. Hugely important – all environmental lawyers must be EC lawyers.

30. The TEU:

   i. Article 4: the environment an area of shared competence: EC and Member States;

   ii. Article 11(ex Article 6 TEC): “Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development”;

   iii. Article 114(3) (ex Article 95 TEC): “The Commission, in its proposals envisaged in paragraph 1 concerning … environmental protection … will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective”;

   iv. Article 191 – 193 (ex Articles 174 – 176 TEC)

   “Article 191 (ex Article 174 TEC)

   Union policy on the environment shall contribute to pursuit of the following objectives:

   — preserving, protecting and improving the quality of the environment,
   — protecting human health,
   — prudent and rational utilisation of natural resources,
   — promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

   2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

   …

   3. In preparing its policy on the environment, the Union shall take account of:

   — available scientific and technical data,
   — environmental conditions in the various regions of the Union,
— the potential benefits and costs of action or lack of action,
— the economic and social development of the Union as a whole and the balanced
development of its regions.

...

Article 192 (ex Article 175 TEC)
1. The European Parliament and the Council, acting in accordance with the ordinary
legislative procedure and after consulting the Economic and Social Committee and the
Committee of the Regions, shall decide what action is to be taken by the Union in order
to achieve the objectives referred to in Article 191.
2. By way of derogation from the decision-making procedure provided for in paragraph 1
and without prejudice to Article 114, the Council acting unanimously in accordance with
a special legislative procedure and after consulting the European Parliament, the
Economic and Social Committee and the Committee of the Regions, shall adopt:
(a) provisions primarily of a fiscal nature;
(b) measures affecting:
— town and country planning,
— quantitative management of water resources or affecting, directly or indirectly, the
availability of those resources,
— land use, with the exception of waste management;
(c) measures significantly affecting a Member State’s choice between different energy
sources and the general structure of its energy supply.
The Council, acting unanimously on a proposal from the Commission and after
consulting the European Parliament, the Economic and Social Committee and the
Committee of the Regions, may make the ordinary legislative procedure applicable to the
matters referred to in the first subparagraph.
3. General action programmes setting out priority objectives to be attained shall be
adopted by the European Parliament and the Council, acting in accordance with the
ordinary legislative procedure and after consulting the Economic and Social Committee
and the Committee of the Regions.
The measures necessary for the implementation of these programmes shall be adopted
under the terms of paragraph 1 or 2, as the case may be.
4. Without prejudice to certain measures adopted by the Union, the Member States shall
finance and implement the environment policy.
5. Without prejudice to the principle that the polluter should pay, if a measure based on
the provisions of paragraph 1 involves costs deemed disproportionate for the public
authorities of a Member State, such measure shall lay down appropriate provisions in the
form of:
— temporary derogations, and/or
— financial support from the Cohesion Fund set up pursuant to Article 177.

Article 193 (ex Article 176 TEC)
The protective measures adopted pursuant to Article 192 shall not prevent any Member
State from maintaining or introducing more stringent protective measures. Such measures
must be compatible with the Treaties. They shall be notified to the Commission.”

31. Numerous Directives (as well as Regulations and Decisions) on environmental law
will look at a number below but some examples:
   i. The Environmental Liability Directive 2004/25;
   ii. The Environmental Impact Assessment Directive;
   iii. The Waste Framework Directive;
   iv. Directive 2000/60 establishing a framework for EC action in the field of water
      policy.

32. Decisions of the ECJ: hugely important – purposive approach to interpretation
especially visible in environmental context. A classic example is in relation to EIA
Directive “… the Court has frequently pointed out that the scope of Directive 85/337 is wide and its purpose very broad”.

33. Why EC law so important? Directly effective, and supreme!

34. And there is a further matter - Francovich liability and Kobler … In Cooper v Attorney General [2008] 3 C.M.L.R. 45 Plender J. dismissed the first claim brought in the UK for damages, pursuant to the ECJ’s decision in Case C-224/01 Kobler v Republik Österreich [2003] ECR I-10239. In that case the ECJ held that a Member State may be answerable in damages for failures by its courts of final instance to give effect to EC law, where the failure amounts to a sufficiently serious breach of EC law. The case arises out of what are alleged to have been sufficiently serious/manifest errors of EC law by the Court of Appeal when dismissing judicial review proceedings commenced by Stephen Cooper and the other then trustees of the CPRE London Branch in October 1999 in respect of the Westfields development: see R. v London Borough of Hammersmith and Fulham [2000] 2 C.M.L.R. 1021; [2000] Env. L.R. 549 and [2000] Env. L.R. 532. In dismissing the claim for judicial review the Court of Appeal’s reasoning was in part based on: (i) a finding that EIA could not be required at the reserved matters stage of the planning permission procedure; and (ii) that the EIA Directive did not require the Council to revoke a permission if it was granted in breach of the EIA Directive. Both findings have in effect been subsequently been overruled by the ECJ; see R (Wells) v Secretary of State for Transport, Local Government and the Regions, [2004] ECR I-723 on 7 January 2004; Case C-508/03 Commission v UK (Article 226 (as was) EC proceedings involving, inter alia, Westfields shopping centre); C-590/03 Barker and the House of Lords decision in Barker [2007] 1 AC 470.

35. As well as dismissing the judicial review in 2000 the Court of Appeal awarded against the trustees of the CPRE two sets of costs. The Kobler damages claimed were the recovery of those costs. Plender J. concluded that the case fell “far below the standard required to constitute a manifest infringement of the applicable law so as to give rise to a claim for damages”. He said: “[a]ny contention that a court adjudicating at last instance can be said to have made a manifest error of Community law when its judgment is, in some respect, inconsistent with a later judgment of the ECJ is as misconceived as it is inconsistent with the judgment in Köbler. Community law is a system in the process of constant development. This is recognized in the many judgments of the ECJ that refer to “the subsequent development of Community law applicable to this domain” (see most recently Case C 375/05, Erhard Geuting v Direktor der Landwirtschaftskammer Nordrhein-Westfalen für den Bereich Landwirtschaft, 4th October 2007, § 18.) This being the case, inconsistencies between national decisions and subsequent judgments of the Court of Justice can be expected to arise. Claims based on the Köbler case are to be reserved for exceptional cases, involving errors that are manifest; and in assessing whether this is the case, account must be taken of the specific characteristics of the judicial function, which entails the application of judgment to the interpretation of provisions capable of bearing more than one meaning.”

36. The Court of Appeal decision awaited, other Kobler damages claims – all in environmental cases pending …
(3) Domestic law

37. Primary legislation: the ever growing nature of environmental law:
   iii. 2010: Climate Change (Sectoral Targets) Bill; the Consumer Emissions (Climate Change) Bill; the Development on Flood Plains (Environment Agency Powers) Bill; the Energy Bill; the Environmental Protection (Fly-Tipping Reporting) Bill; Flood and Water Management Bill.

38. Most EC Directives transposed via secondary legislation via EC Act: Westlaw suggests that 596 statutory instruments concerned with the environment have been made since 1 January 2008!


40. Case-law: environmental law occupies Courts from Magistrates Courts to the House of Lords:
   i. Recent environmental cases before the House of Lords include: R. (Edwards) v Environment Agency (No.2) [2008] 1 W.L.R. 1587 and Wasa International Insurance Co Ltd v Lexington Insurance Co [2009] 3 W.L.R. 575. And again to illustrate how broad is environmental law: the first was a judicial review challenge to the grant of a pollution prevention control permit to allow the burn shredded and chipped tyres as a partial substitute fuel in cement kilns in Rugby and the second was about the construction and choice of law for a reinsurance contract concerned with environmental damage clean up.
   ii. Magistrates Court decisions in environmental cases can end up before the ECJ: see Case C-252/05 R. (Thames Water Utilities Ltd) v Bromley Magistrates’ Court [2007] 1 W.L.R. 1945 (on the meaning of waste).

41. There have over the years been calls for the setting up of a specialist environmental court, see: H Woolf: ‘Are the Judiciary Environmentally Myopic?’ (1992) 4 Journal of Env Law 1; Professor Malcolm Grant’s Environmental Court Project: Final Report (2000, DETR) and R Macrory & M Woods Modernising Environmental Justice – Regulation and the Role of the Environmental Tribunal (UCL London, 2003).

(4) The interface with human rights

42. The European Convention on Human Rights does not have any explicit environmental rights but there is a growing body of case-law – Article 8, (also Articles 2 and 3):
   i. Lopez Ostra v Spain 20 EHRR 277
   ii. Guerra and others v Italy 26 EHRR 357;
iii. *S v France* 65 DR 250;

**Some key concepts in Environmental law**

43. We have looked at some key concepts already: public participation; access to environmental information and access to environmental justice.

44. There are two other key concepts both of which we have seen mentioned directly in the text of the TEU: (i) the polluter pays principle; and (ii) the precautionary principle.

**(1) the polluter pays principle**

45. In environmental law this is the principle that the party responsible for producing pollution should also be responsible for paying the damage done as a result of that pollution to the national environment.

46. International Law
   i. Possible regional ‘customary international law’ as a result of strong support by both EC countries and countries of OECD.
   ii. OECD early documents on ‘polluter pays’:
      a. Environment and Economics: Guiding Principle concerning international economic aspects of environmental policies (1972)
      b. The implementation of the Polluter Pays Principle (1974)
   iii. Rio Declaration on Environment and Development 1992: Set out in Principle 16 (Rio Declaration was document produced at 1992 UN Conference ‘the Earth Summit’ of 27 principles intended to guide future sustainable development around the world. Some regard the principles as ‘third generation rights’).

47. Applications in countries around the world
   i. Eco-taxes e.g. US: ‘Gas-Guzzler tax’ where cars with increased pollution pay more.
   ii. ‘US Superfund’ law requires polluters to pay for cleanup of hazardous waste sites.
   iii. Extended polluter responsibility - First described by the Swedish government in 1975 and applied by economies where the cost of pollution is internalised into the cost of the product to shift responsibility of dealing with pollution from governments to those responsible. See also OECD document ‘Extended Polluter Responsibility’ (2006).

48. EC Law:
   i. Article 191 TEU (ex Article 174 TEC): “2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the
precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”


iii. EC Directive 2004/35/EC - Environmental Liability Directive – Embodiment of polluter pays principle and provides that the one responsible for the pollution should pay for the damage caused to the environment.

iv. Council Recommendation (75/436/Euratom, ECSC, EEC and the attached Communication): As a result of Article 174, the Commission set out the ‘Polluter Pays’ principle as well as a number of exceptions to the Polluter Pays Principle, which are also provided for under Article 175(5) of the Treaty.


(2) the precautionary principle

50. The Preventative principle: Prevention of environmental harm should be the ultimate goal when taking decisions, actions or omissions with potentially adverse environmental impacts. And an important corollary of this is the precautionary principle: A precautionary approach should be taken whenever there is uncertainty as to whether environmental harm will arise, even if the remedy involves a substantial cost.

51. International law

i. Rio Declaration on Environment and Development 1992:

   a. Set out in principle 15.

   b. In addition, Principle 2 effecting the Preventative principle: States have...the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

ii. Article 2 of the Framework Convention on Climate Change 1992: “The ultimate objective is to achieve the stabilization of a greenhouse gas emissions in the atmosphere to a level that would prevent dangerous anthropogenic interference with the climate system”.
iii. International cases: *Trail Smelter Arbitration* (US v Canada) 3 RIAA (1941): 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 case that Canada should prevent pollution entering the US.

iv. Ad hoc expert group established by UNESCO to study the ‘precautionary principle’ and its application.

52. EC Law:

i. Article 191 TEU (ex Article 174 TEC): “2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”

ii. European Commission Communication on Precautionary Principle, endorsed by Heads of Government at a General Affairs Council at Nice in December 2000 (COM 2000 1) establishes essence of precautionary Principle and how it should be applied: “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”.


iv. Cases, examples:
   b. *UK v Commission* [1998] Case C-180/96: ECJ held EC institutions could take protective measures without having to wait until the reality and seriousness of those risks became fully apparent (in this case Commission had issued decision on emergency measures to protect against BSE which UK was seeking to annul).
   c. *Pfizer Animal Health SA v Council of the European Union* [2002] T13-99: CFI affirmed that under the precautionary principle, EC institutions are entitled in the interests of human health to adopt; on the basis of currently incomplete scientific knowledge protective measures and that they have a broad discretion in this respect.

v. Application in European directives relating to environment. Examples:
   b. Directive on Hazardous waste particularly refers to precautionary principle.

53. Domestic Law:

i. *R v Secretary of State for Trade and Industry ex p Dudderidge* [1995] (The Times 26 October 1995): Challenge brought that Secretary of State should
issue regulations restricting electromagnetic fields from electric cables being laid as part of national grid under precautionary principle and Article 130r [now Art. 191] of EC Treaty. Court of Appeal held that precautionary principle had no distinct legal effect in the UK and Article 130r of EC Treaty did not impose such an obligation on the Secretary of State.

ii. **R (AMVAC Chemical UK Ltd) v The Secretary of State Environment, Food, & Rural Affairs and others** [2001] EWHC Admin 1011: Court considered precautionary principle in detail. Crane J state precautionary principle requires that where threats of serious or irreversible damage, lack of scientific certainty should not be posed as reasoning for postponing cost-effective measures to prevent environmental degradation. Referred to UK Sustainable Development Strategy 1999 referring to precautionary principle, EC communication, Caragena Protocol on Biosafety 2000, Article 174(2) EU Treaty (Community policy on the environment….shall be based on the precautionary principle and on the principles that preventative action should be taken’).


iv. Application seen in domestic law: Incorporation in PPS25 (2001), development and flood risk where preventative principle is seen to be of particular importance.

v. Included in White Paper 2007 on sustainable development.

vi. UK ‘Sustainable development Strategy’ Chapter 4 specifically refers to the precautionary principle (available on defra website).

vii. Included in defra ‘Guidelines on Environmental Risk Assessment and Management’ (1.6: ‘Risk Management and the precautionary principle’).

### **An introduction to the main areas of environmental law**

54. This can be no more than the briefest of introductions:

(1) **Air Quality**

55. Human activities across the spectrum produce pollutants that affect the quality of the air around us, ranging from the everyday of driving to complicated industrial processes producing highly toxic fumes. Regulatory measures are put forward as a response to try and regulate the production of air pollutants that are produced. Initially there was a more reactive approach of addressing specific problems as they arose. Recently, with increasing concerns about air quality and climate change there is a more proactive and integrated approach to regulating the emission of pollutants.

56. **Sources of Air Quality Law:**

i. International Law: Air pollution is not confined to boundaries – pollution caused by one country affects the air quality of another’s. International law has therefore long been concerned with pollution of the atmosphere. International treaties concluded tend to be framework treaties setting out broad principles which can then be implemented with more detail into domestic laws. Sources include:
b. The 1985 Vienna Convention for the Protection of the Ozone layer – Takes Action against activities that were likely to modify the ozone layer. Followed by the Montreal Protocol setting concrete targets and the 1999 Gothenburg Protocol aiming setting emissions ceilings for particularly acidic and ground-level ozone emissions, namely SO2, NOx, VOCs and ammonia.
c. The 1992 Framework Convention on Climate Change – Starts with the position of ‘common but differentiated responsibility’ imposing lesser burdens on developing countries in order to allow sustainable development. Stabilize greenhouse gas emissions at a level that would not interfere with the climate system of food production. Provides for national inventories of emissions, integration of climate change issues.
d. The Kyoto Protocol – Sets binding reduction targets for parties signed up to it (listed in Annex I). Adopted in 1997 and entered into force in 2005. Sets out specific reduction targets for different countries in relation to six gases: CO2, NOx, HFC’s, PFCs, methane, ground-level ozone.

ii. EC Law:
   b. Daughter directives:
      1. 1st Daughter Directive, 1999/30/EC: Set limit values for SO2, NO2, NOx, PM and lead;
      2. 2nd Daughter Directive, 2000/69/EC: Set limit values for benzene and CO2
      5. Integrated Pollution Prevention and Control Directive (IPPC) (96/61/EC) – Creates a regime for controlling polluting releases from certain industrial activities to air, water and land. Implemented by UK EPR 2007 (see below)
6. National Emissions Ceilings Directives (Directive 2001/81/EC) - Effects the Gothenburg Protocol by setting ceilings for each MS for emissions of Ammonia, SO2, NOx and VOCs which must have been met by 2010. Implemented by The National Emissions Ceilings Regulations 2002. UK must report emissions of four NECD Pollutants annually, DEFRA produces yearly emission data.

7. Large Combustion Plant Directive (2001/80/EC) – Controls emissions of SO2, NOx and dust from large combustion plants with aim of reducing acidification by providing emission limit values for such pollutants.


12. Waste Incineration Device (WID) (2000/76/EC) – Applies to most activities that involve burning waste, including burning waste to fuels. Regulates standards and methodologies for incineration of waste.

13. The European Pollutants Release and Transfer Register. Commission Decision 2000/479/EC - Provides for a European register of air emissions, allows direct comparison of air emissions across all member states. Member states have to produce a three yearly report on emissions to air and water at industrial installations if certain threshold values exceeded which are then recorded and maintained on the register.

c. Domestic Law

1. Environment Permitting Regulations 2007 (see below) - Brings series of environmental controls together, including PPC and waste management licensing by requiring that an environmental permit must be granted for operation of a ‘regulated facility’. Permit requires regulators to exercise permit-related functions to deliver obligations with various
directives include large combustion plan directive, solvent emissions directive, waste incineration directive and petrol vapour recover directive.


3. National Air Quality Strategy:
   a. UK Air Quality Strategy: Strategy published by the Secretary of State containing policies with respect to assessment or management of quality of air. Required by s.80(1) of Environment Act 1995. Sets specific objectives for different air pollutants.
   b. Local Air Quality Management: Environment Act 1995 imposes duty on LA’s to conduct reviews of present and future air quality within area, formulating ‘air quality management area’ (AQMA) where objectives not being met and formulating action plans if necessary.
   c. In addition: Advice in PS23 on relationship between determination of planning applications and pollution control (paras 8 to 10 and Annex 1). EIA requires inter alia air quality assessment.

(2) Climate Change

57. This is of course big news:
   i. The Kyoto Protocol - Sets binding carbon reduction commitments for states.
      a. On 1 January 2005 the EU ETS came into force. It is the largest multi-country, multi-sector greenhouse gas emission trading scheme worldwide. In total approximately 11,500 installations are presently covered by the EU ETS and it accounts for nearly 45% of total CO2 emissions, and about 30% of all greenhouse gases in the EU (see EU Action against Climate Change: EU Emissions Trading – An Open Scheme Promoting Global Innovation, CEC, Brussels).
      b. The EU ETS is the key policy introduced by the EU to help reduce the EU’s greenhouse gas emissions. The importance of the EU ETS is further emphasised by the recitals to Directive 2003/87 (see recitals (1) and (2)). Article 1 of Directive 2003/87/EC states: “This Directive establishes a scheme for greenhouse gas emission allowance trading within the Community (hereinafter referred to as the "Community scheme") in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner." The importance of the EU ETS has further been confirmed by the Court in Case T-178/05 UK v Commission; Case T-374/04 Germany v Commission and Case T-387/04 EnBW: see especially in Case T-
374/04 Germany v Commission paragraphs 1 -5. In his opinion in Case C-127/07 Arcelor Advocate-General Maduron referred to the EU ETS as being “one of the cornerstones of Community environmental protection policy”.

c. Under the Kyoto Protocol the EU is required to make an 8% reduction in emissions compared to 1990 by the first Kyoto Protocol commitment period (2008 – 2012).4

d. Recital (10) to Council Decision 2002/358/EC concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the UNFCCC and the joint fulfilment of commitments thereunder states:

“In deciding to fulfil their commitments jointly in accordance with article 4 of the Kyoto Protocol, the Community and the Member States are jointly responsible, under paragraph 6 of that article and in accordance with article 24(2) of the Protocol, for the fulfilment by the Community of its quantified emission reduction commitment under Article 3(1) of the Protocol. Consequently, and in accordance with Article 10 of the Treaty establishing the European Community, Member States individually and collectively have the obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from action taken by the institutions of the Community, including the Community's quantified emission reduction commitment under the Protocol, to facilitate the achievement of this commitment and to abstain from any measure that could jeopardise the attainment of this commitment.”

e. Decision 2002/358/EC binds only those 15 Member States that were part of the Community as at the date of the Decision (25 April 2002). Those Member States joining since have their own individual targets under the Kyoto Protocol5.

f. The EU ETS is based on Directive 2003/87EC establishing a scheme for greenhouse gas emission allowance trading within the Community (“Directive 2003/87”). All 27 Member States are bound by Directive 2003/87. The EU ETS has 3 phases. Phase I (2005 – 2007); Phase II (2008 – 2012) and Phase III (post 2012). Fixed installations (e.g. power stations and factories) covered by the EU ETS must have a permit in order to emit CO2. (When aviation is brought within the EU ETS (see below) aircraft operators will not be required to have permits in order to emit CO2. However, such operators must submit plans to their appropriate regulator by 31 August 2009).

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4 The Kyoto Protocol was adopted under the auspices of the Framework Convention on Climate Change (“UNFCCC”). The Kyoto Protocol was adopted at the third Conference of the Parties to the UNFCCC on 11 December 1997. The ultimate objective of the UNFCCC which was approved on behalf of the Community by Council Decision 94/69/EC of 15 December 1993 concerning the conclusion of the UNFCCC, is to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level which prevents dangerous anthropogenic interference with the climate system.

5 Article 4(4) of the Kyoto Protocol provides that any alteration in the composition of an international organisation jointly fulfilling commitments under the Kyoto Protocol is not to affect existing commitments thereunder unless the alteration in the commitments under the Kyoto Protocol is to take place after the alteration in the composition of the international organization.
The EU ETS works on a "Cap and Trade" basis. In Phases I and II for the current scheme, an overall "cap" is set by each EU Member State on the total number of allowances issued to installations within its jurisdiction which are within the EU ETS. The allowances are allocated to the installations in accordance with a National Allocation Plan ("NAP") which must be published and notified to the Commission, which has the power to reject a NAP. Operators of installations must, by 30 April in each year, surrender allowances equal to their emissions for the previous year. Failure to do so results in significant financial penalties in addition to a requirement to make up the shortfall when surrendering allowances for the following year. Installations can trade by buying additional allowances or selling surpluses generated from reducing emissions. The trading of allowances takes place in an EU wide market.

Thus an installation generating more CO2 than it is allocated free allowances under a NAP is forced to purchase additional allowances in the market. The result is to induce in such installations a demand for innovative, energy/carbon saving processes, products and services. The only alternative to reducing emissions is to bear the additional costs of purchasing the necessary allowances (which in turn secures reductions by others in the EU ETS): see the Stern Report.

The aviation sector is to be brought within the EU ETS from 2012, in Phase III: see Directive 2008/101/EC.

Aviation activities of aircraft operators that operate flights arriving at and departing from Community aerodromes are included in the EU ETS as of 1 January 2012, including therefore flights from and to the US which arrive and depart from Community aerodromes.

The previous US administration warned that it considered that the inclusion of airlines from outside the Community may contravene the Chicago Convention, the international treaty governing civil aviation. The Commission has taken the view that there is no such contravention. The Commission takes the view that the inclusion of aviation in the EU ETS is consistent with the Chicago Convention and bilateral air service agreements, which require aircraft to comply with the laws and regulations of the State to/from which they fly. Such laws and regulations could include laws requiring airlines to report their emissions and surrender allowances to cover those emissions, as the proposed directive does.

The Commission has said that “[t]he scheme will be enforced in the same way as for other sectors in the EU ETS. This means that if an operator fails to surrender sufficient allowances to cover its emissions...”

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6 The total cap on emissions from the sector and the level of allowances have been determined and agreed centrally and will be overseen by the EU Commission. The cap in 2012 will be 97% of the annual average level of emissions from the sector in the period 2004-2006. In 2013, the cap will tighten to 95% of average 2004-2006 emissions. There has been criticism of the provisions incorporating aviation on the basis that they do not provide for the effects of “radiative forcing”.
in a given year, a financial penalty would be imposed (100€ for every
tonne of CO2 not covered by allowances) and the aircraft operator
would no longer be able to sell allowances. As an ultimate sanction,
the State responsible for administering the airline under the EU ETS
can apply to the Commission for the imposition of an EU-wide
operating ban”.

Further amendments for Phase III - Directive 2009/29/EC (replacing
Directive 2003/87/EC) for Phase III: There is to be a centralized cap
within the Community with National Implementation Measures
replacing NAPs. There is also a fundamental shift in allocation
methodology for Phase III in that auctioning, rather than allocation
free of charge, will be the principal method of allocation

See: Litigation and the EU Emissions Trading Scheme Env. Law
2009, 50, 7-24

The Energy Act 2008 - Updates energy legislation to reflect the available of
new technologies such as Carbon Capture & Storage and emerging renewable
technologies. Creates regulation that enables private investment in CCS.
Strengthens renewable obligation to increase diversity of electricity mix.

The Climate Change Act 2008 - Key aim of the act was to improve carbon
management and help the transition towards a low-carbon economy in the
UK. Sets legally binding target of at least 80% cut below 1990 levels in
greenhouse gas emissions by 2050, and reduction of at least 34% by 2020.
Carbon budgeting system which caps emissions over five years periods,
starting with three 3-year periods for the initial phases of the scheme. To
implement this, established the Carbon Reduction Commitment.

CRC Energy Efficiency Scheme (formerly known as the Carbon Reduction
Commitment) - Mandatory scheme requiring organisations to purchase and
submit sufficient allowances to meet annual emissions (in a similar manner to
EU ETS but covers a wider range of organisations). Starts with reporting year
from April 2010, with the first sale of allowances held in April 2011. During
introductory phase all carbon emission allowances will be sold at fixed price
of £12/tonne. From April 2013, allowances will be auctioned by government,
with fewer available each year.

The Energy Bill (2009) - Introduced in the House of Commons on 19
November 2009, debated in Public Bill Committee in January 2010.
Implements some key measures outlined in the UK Low Carbon Transition
Plan that is considered to require primary legislation including introducing
new CCS incentive.

Future issues: Carbon Capture and storage - An internationally formulated technique
under which emissions are captured before entering the atmosphere and then stored,
for example in geological formations such as exhausted oil-bearing strata.

(3) Contaminated Land

Soil quality is affected by many activities, but contamination from activities that
used to be on sites may present one of the most significant problems. The
contaminated land regime generally deals with the clean-up of contamination caused by historical sources. Some pre-existing liability systems interact with regime: Private law mechanisms such as nuisance and negligence can impose liability for certain heads of damage, but development of liability under private law been discouraged and as a result a patchwork system of liability rules spread across a wide range of areas addressing specific problems of contamination and clean-up. Possibility of overlapping controls: often ‘contamination’ synonymous with pollution and relevant pollution control regimes apply e.g. water pollution when contaminating substances migrate into water.

60. EC law:
   i. EC Directive 2004/35/EC on Environmental Liability with regard to the Prevention and Remedyng of Environmental Damage:
      a. Environmental damage is ‘damage to protected species and natural habitats or in a site of special scientific interest’, ‘damage to water’ and ‘land damage’.
      b. Strict liability for environmental damage caused by specified range of ‘occupational activities’ described in Annex III of the ELD.
      c. Requires the operator to inform the competent authority when damage has occurred and the authority then has a range of powers to require the operator to take remedial measures to take such measures itself (Investigative duty therefore on operators, contrast provisions of EPA below).
      d. Article 5 provides for ability to take preventative action, Article 6 provides for ability to take remedial action.
      e. The Environmental Damage (Prevention and Remediation) Regulations 2009 implement this. Reinforces the ‘polluter pays’ principle: Making operators financially liable for threats of or actual damage. Calls for a common definition of contaminated sites, a common list of potentially polluting activities. Directive requires member states to report to Commission on experience in application of the Directive by 30 April 2013. Authorities need to report details of all qualifying incidents to government using incident data return, form available on defra website.
   ii. Soil Strategy Framework directive:
      a. In the sixth (most recent) Environmental Action Programme, EU commitment was made to develop a soil strategy.
      c. Last reading of directive not supported, currently being amended.

61. Domestic Law:
   i. Part 2A Environmental Protection Act 1990 –
      a. Set out in Part 2A of the EPA 1990 (which was inserted by s.57 of the Environment Act 1995).
b. In 2006 the regime was extended to cover radioactive contaminated land.
c. Part 2A provides a ‘risk-based approach’ to the identification and remediation of land.
d. It requires that local authorities identify contaminated land and ensures that significant risks are dealt with through remediation measures.
e. A central tenet of the regime is to encourage voluntary remediation. There are rules set out on who should pay for remediation if there is no voluntary remediation.

ii. Circular 01/2006
a. Part 2A of the legal regime provides that many provisions shall be expanded on by statutory guidance issued by the Secretary of State and this guidance forms part of the Part 2A legal regime.
b. Most importantly, it includes the definition of ‘contaminated land’, identification and remediation, and liability as to who pays for remediation.
c. Rules on who should pay for remediation are based on the ‘Polluter pays’ principle: Persons who caused or knowingly permitted contamination, if not possible responsibility passes to current owner or occupier of land.
d. In February 2010 Defra announced plans to review this statutory guidance.

iii. The Contaminated Land (England) Regulations 2006 - elaborate on details of the regime – it deals with issues such as what qualifies as a ‘special site’, it provides provisions for public registers and remediation notices and sets out the procedure for appeals against decisions made under Part 2A.


v. Contaminated Land in the Planning System – beyond scope of this talk;

(4) Noise
62. Noise is one aspect of nuisance, and especially statutory nuisance – see below.

63. There are other legislative provisions of relevance though including the Noise Act 1996.

64. Noise is also an issue in the planning regime, and subject to national policy guidance.

65. See http://www.defra.gov.uk/environment/quality/noise/

(5) Environmental Permitting
66. The Environmental Permitting (England and Wales) Regulations 2007 (“the EPR”) were introduced to create a single set of controls applying to activities previously regulated under the Waste Management Licensing Regulations 1994 and the Pollution Prevention and Control Regulations 2000. The intention of the new
consolidated system was to simplify the licensing system. On 6 April 2008 when the EPR came into force all existing PPC permits and waste management licences automatically became environmental permits.


68. The scope of the EPR has since their entry into force been widened to include the Waste Batteries and Accumulators Regulations 2009 (from 5 May 2009) and the Mining Waste Directive (from 7 July 2009). Moreover, the EPR are soon be extended also to include from April 2010: Water Discharge consents; Groundwater Authorisations and Radioactive Substances Regulation. The current EPR are to be replaced by the Environmental Permitting Regulations 2010.

69. Under the EPR, an application for a permit is determined, in the first instance, by the regulator – which for most purposes is the Environment Agency, but in respect of certain matters is a local authority. The regulator may grant or refuse the permit (regulation13) and if granting it may impose conditions. An applicant may also seek the variation, transfer or surrender of a permit. The regulator has a duty under the IPPCD keep abreast of technological developments, and must keep the permit under review (including but not limited to periodic statutory reviews under regulation 34(1)). So the permit is a living document and comes to an end only with the regulator’s acceptance of surrender. This provides multiple opportunities for disagreements, appeals and judicial reviews.

70. By regulation 62, the Secretary of State may direct that he will determine an application for, or for the variation of, a permit in the first instance. This power is comparable to the power of the Secretary of State to “call-in” a planning application under section 77 of the Town and Country Planning Act 1990. As a matter of policy, the power under regulation 62 will only be exercised exceptionally, where the permit application i) is of substantial regional or national significance, or ii) is of substantial regional or national controversy, or iii) may involve issues of national security or of foreign governments.

71. Regulation 31 provides the applicant a right to appeal a decision of the regulator on any application for, *inter alia*, the grant, variation, transfer or surrender of an environmental permit, and provides the right to appeal to any “person who is aggrieved” by the imposition of an environmental permit condition. All appeals are heard by the Secretary of State. There is no right to appeal from the Secretary of State and so judicial review lies against the Secretary of State’s decision on appeal just as it did under the PPC and other such regimes.

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7 See para.5.45 of DEFRA’s Core Guidance on the Environmental Permitting Regulations 2007.
72. The regulator has substantial enforcement powers. By regulation 36 of the EPR, the regulator may issue an enforcement notice where it considers that an operator is in breach of its permit conditions. By regulation 37, it may (in relatively extreme situations) issue a suspension notice requiring the suspension of operations. Enforcement notices and suspension notices may be appealed to the Secretary of State (see regulation 31(e)). The regulator also has power to issue information notices, and has the power of its own to vary and revoke permits (again subject to an appeal).

(6) Waste
73. The Waste Framework Directive (75/442/EEC, now consolidated as 2006/12/EC) (the "WFD") by Article 1(a) provides that "‘waste’ shall mean any substance or object in the categories set out in Annex 1 which the holder discards or intends or is required to discard”. “Holder” means “the producer of the waste or the natural or legal person who is in possession of it” (Article 1(c)). (Article 2(1) of the WFD provides that “where they are already covered by other legislation … waste resulting from prospecting, extraction, treatment and storage of mineral resources and the working of quarries” is excluded from the concept of waste).

74. Annex I to the WFD lists a number of categories of waste. Annex I of the WFD at Q11 identifies “residues from raw materials extraction and processing (e.g. mining residues, oil field slops etc)”. However, inclusion in Annex I is not conclusive evidence that materials constitute waste. Category Q16 in Annex I is a residual category applying to “[a]ny materials, substances or products which are not contained in the abovementioned categories”. Accordingly, it has been held that “that list is of limited help” in defining waste: see the comments of Carnwath LJ in OSS Group Ltd v Environment Agency [2008] Env. L.R. 8 at para. 10. In Case C-9/00 Palin Granit Oy v Vehmassalon kansanterveystyön kuntayhtymän hallitus [2002] E.C.R. I-3533 the ECJ noted at para. 22 that Annex I clarifies and illustrates the definition of “waste” in Article 1:

“… by providing lists of substances and objects which may be classified as waste. However, those lists are only intended as guidance and the classification of a substance or object as waste is, as the Commission rightly submits, primarily to be inferred from the holder's actions, which depend on whether or not he intends to discard the substances in question”.

75. The WFD also contains two definitional lists in Annexes IIA and B of “Disposal Operations” and “Operations which may lead to recovery”. While there is no direct connection between the definition of waste in Article 1 and these Annexes their presence indicates clearly that waste can be “discarded” not only to disposal facilities but also to recovery activities. In Case C-129/96 Inter-Environnement Wallonie ASBL v Région Wallonne [1997] ECR I-7411, at paras. 26 – 27 the ECJ said:

“26. … it follows from the wording of Article 1(a) of Directive 75/442, as amended, that the scope of the term ‘waste’ turns on the meaning of the term ‘discard’.
27. It is also clear from the provisions of Directive 75/442, as amended, in particular from Article 4, Articles 8 to 12 and Annexes IIA and IIB, that the term ‘discard’ covers both disposal and recovery of a substance or object.

76. The ECJ has consistently held that the definition of waste in Article 1 of the WFD is not to be understood as excluding substances and objects which were capable of economic reutilisation (Case C-359/88 Zanetti and Others [1990] ECR I-1509, paras. 12 and 13; Case C-422/92 Commission v Germany [1995] ECR I-1097, paras. 22 and 23, and Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 Tombesi and Others [1997] ECR I-3561, paras. 47 and 48).

77. In Palin Granit (see above) the ECJ said:

“23. The term discard must be interpreted in light of the aim of Directive 75/442 which, according to its third recital, is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste, and Article 174(2) EC, which provides that Community policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken. It follows that the concept of waste cannot be interpreted restrictively (see Joined Cases C-418/97 and C-419/97 ARCO Chemie Nederland and Others [2000] ECR I-4475, paragraphs 36 to 40).

24. More specifically, the question whether a given substance is waste must be determined in the light of all the circumstances, regard being had to the aim of Directive 75/442 and the need to ensure that its effectiveness is not undermined (ARCO Chemie Nederland, paragraphs 73, 88 and 97)”.

78. In Joined Cases C-418/97 and C-419/97 ARCO Chemie Nederland and Others [2000] ECR I-4475 the ECJ noted at para. 64 that the method of treatment or use of a substance does not determine conclusively whether or not it is to be classified as waste “[w]hat subsequently happens to an object or a substance does not affect its nature as waste, which, in accordance with Article 1(a) of the directive, is defined in terms of the holder discarding it or intending or being required to discard it” (see also paras. 65 – 73).

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8 In the OSS case Carnwath LJ said:

“13 The ordinary English meaning of the word “discard” is an imperfect guide to its significance in the definition of waste. Other language versions have equal status in European law, and may have a slightly different emphasis. For example, the French “se défaire de”, or the German “entledigen”, might perhaps be better translated as “get rid of”: see my discussion in Mayer Parry Recycling Ltd v Environment Agency [1999] 1 C.M.L.R. 963 at [24]–[30]. I there concluded on the then state of the authorities (including Vessaso ( C-206/88) [1990] E.C.R. I-1461; Tombesi and Others, Re ( C 304, 330 & 342/94 and C-224/95) [1997] E.C.R. I-3561; [1997] 3 C.M.L.R. 673; Inter-Environnement Wallonie Asbl v Region Wallonie ( C-129/96) [1997] E.C.R. I-7411; [1998] 1 C.M.L.R. 1057):

“The general concept is now reasonably clear. The term ‘discard’ is used in a broad sense equivalent to ‘get rid of’; but it is coloured by the examples of waste given in Annex I and the Waste Catalogue, which indicate that it is concerned generally with materials which have ceased to be required for their original purpose, normally because they are unsuitable, unwanted or surplus to requirements …”. Although much of the rest of the judgment has been overtaken by subsequent authority, that still seems to me a fair general summary of the intended meaning of the word “discard”, taken on its own.”
79. In the **OSS** case Carnwath LJ summarised the following matters as being relevant to the definition of waste as a matter of Community law (see para. 14):

i) The concept of waste “cannot be interpreted restrictively” ([Arco](#) at [40]).

ii) Waste, according to its ordinary meaning, is “what falls away when one processes a material or an object, and is not the end product which the manufacturing process directly seeks to produce” ([Palin Granit Oy](#) at [32]).

iii) The term “discard” “covers” or “includes” disposal or recovery within the terms of Annex IIA and B ([Wallonie](#) at [27]; [Arco](#) at [47]); but the fact that a substance is treated by one of the methods described in those Annexes does not lead to the necessary inference that it is waste ([Arco](#) at [48]–[49]).

iv) The term “discard” must be interpreted in the light of the aims of the WFD, and of Article 174(2) of the Treaty, respectively:

   a) The protection of human health and the environment against the harmful effects caused by the collection, transport, treatment, storage and tipping of waste; and

   b) Community policy on the environment, which aims at a high level of protection and is based on the precautionary principle and the principle that preventive action should be taken ([Palin Granit Oy](#) at [23]).

v) Waste includes substances discarded by their owners, even if they are “capable of economic reutilisation” ([Vessoso & Zanetti](#) at [9]) or “have a commercial value and are collected on a commercial basis for recycling, reclamation or re-use” ([Tombesi](#) at [52]).

vi) In deciding whether use of a substance for burning is to be regarded as “discarding” it is irrelevant that it may be recovered as fuel in an environmentally responsible manner and without substantial treatment ([Arco](#) at [73]).

vii) Other distinctions, which may be relevant depending on the nature of the processes, are—

   a) between “waste recovery” within the meaning of the WFD and “normal industrial treatment” of products which are not waste (“no matter how difficult that distinction may be”) ([Wallonie](#) at [33]);

   b) between a “by-product” of an industrial process, which is not waste, and a “production residue”, which is ([Palin Granit Oy](#) at [32]–[37]).

80. In the **OSS** case Carnwath LJ observed that a “search for logical coherence in the Luxembourg case law is probably doomed to failure. A fundamental problem is the court’s professed adherence to the Article1(a) definition, even where it can be of no practical relevance…” (see para. 55). In the earlier case of *Castle Cement Ltd v Environment Agency* [2001] 2 C.M.L.R. 19 Stanley Burnton J. said that the ECJ “has had considerable difficulty in extracting a coherent meaning from the definition of waste in the Waste Framework Directive” (see para. 18) and he referred to the ECJ’s jurisprudence as being “less than pellucid” (see para. 18) and “Delphic” (see para. 19).

81. A new WFD: A revised Directive 2008/98/EC (“the revised WFD”) was signed on behalf of the European Parliament and the Council on 19 November 2008 and has been published in the Official Journal (OJ) of the European Union L312/3. The revised WFD clarifies and rationalises EU legislation on waste and replaces the existing WFD, Directive 91/689/EEC on Hazardous Waste (“the HWD”) and

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* Advocate General Alba in the *Arco* case noted:

“There is general acknowledgement that the definition of waste in the Waste Framework Directive is too vague to provide a generally valid, comprehensive definition of waste. Instead the question of whether or not the substance concerned is to be regarded as waste has to be determined on a case by case basis in the particular circumstances.”

82. Currently a DEFRA consultation on “draft guidance on the legal definition of waste and its application”: 118 pages long!

83. There are numerous daughter Directives on particular wastes: batteries, packaging, hazardous waste.

84. Regulation of waste is extensive: transfer, storage, disposal etc. hence the importance of the question “what is waste?”

(7) Water

85. This is a huge and complex area of environmental law: http://www.defra.gov.uk/environment/quality/water/legislation/index.htm


87. EC law: dramatic impact:
   i. Urban Waste Water Treatment Directive 91/271
   ii. Water Framework Directive 2000/60
   iii. Nitrates in Water 91/676.


89. A wide range of regulation: water standards setting, water pollution control, regulation of bodies providing water services, fisheries, navigation, flood defence and land drainage, coastal protection, marine pollution, conservation etc. Numerous water pollution offences.

(8) Nature conservation

90. Aims: Controlling land management with the objective of seeking to conserve, protect and restore habitats areas for wild plants and animals preventing their extinction, their fragmentation or the reduction in the range of species.

91. International Law
   i. RAMSAR Convention (1971) on the conservation and sustainable utilisation of wetlands.
to ensure that international trade in specimens of wild animals and plants do not threaten survival.

iii. Convention on Migratory Species (CMS (1979)) – Aims to conserve terrestrial, marine and avian migratory species throughout their range. Concluded under UN Environment Programme, migratory species listed on Appendix I of Convention. Acts as a framework convention and several agreements been concluded under it aiming to conserve inter alia populations of European bats, cetaceans of Mediterranean Sea.


v. Darwin Initiative – International imitative assisting countries that are rich in biodiversity but poor in financial resources to meet objectives under one or more of three major biodiversity Conventions: CBD, CITES, CMS.

vi. The Pan-European Biological and Landscape Diversity Strategy (2007) – Set up following the Earth Summit and UN CBD, sets up strategy to find consistent response to decline of biological and landscape diversity in Europe.


92. EC Law:

i. Directive 79/409/EC on the conservation of Wild Birds (the Wild Birds directive) - Sets broad objectives and wide range of activities for protection of birds, but precise legal mechanisms at the discretion of member states. Implemented by the Wildlife & Countryside Act 1981 and the Conservation (Natural Habitats & c.) Regulations 1994. Requires member states to take general measures including the creation of protected areas to maintain a sufficient diversity of habitats for all European bird species. Must take special conservation measures to conserve habitats of rare or vulnerable species listed in Annex I and all regularly occurring migratory species (Art 4), including designation of SPA’s for birds.

ii. Directive 92/43/EC on the Conservation of Natural Habitats and of Wild Fauna and Flora (‘the Habitats directive’). Implemented by the Conservation (Natural Habitats & c.) Regulations 1994. Provide for the designation and protection of ‘European sites’, the protection of ‘European protected species’ and the adaptation of planning and other controls for the protection of European sites. Under Regulations, competent authorities have a general duty in the exercise of their functions to have regard to EC Habitats directive.

iii. ‘Natura 2000’ - Central aim of EC law is to designate a community-wide network of sites (known as ‘Natura 2000’) that are important for their conservation importance. Designated and conserved under community law and the legal tool used is the Directive. Political commitment to halt biodiversity loss within EU by 2010. Consists of ‘Special Areas of
Conservation’ (‘SAC’s). These are sites containing the natural habitat types listed in Annex I of the Habitats Directive e.g. raised bogs. And sites containing the habitats of species listed in Annex II of Directive. Incorporates the special protection areas (SPAs) classified under the Wild Birds Directive.

iv. Environmental Liability, EC Directive 2004/35/EC - on Environmental Liability with Regard to the Prevention and Remedy of Environmental Damage. Environmental damage is ‘damage to protected species and natural habitats or in a site of special scientific interest’, ‘damage to water’ and ‘land damage’. Two types of liability: Fault-based liability is relevant in respect of environmental damage to protected species and natural habitats. Requires the operator to inform the competent authority when damage has occurred and the authority then has a range of powers to require the operator to take remedial measures to take such measures itself (Investigative duty therefore on operators, contrast provisions of EPA below). Article 5 provides for ability to take preventative action, Article 6 provides for ability to take remedial action. The Environmental Damage (Prevention and Remediation) Regulations 2009 implement this.

v. Much case-law e.g.:
   a. Case C-355/90 **Commission v Spain** [1993] ECR I – 4221, - ECJ held Spanish government in breach of Article 4 by failing to designate important wetland area as SPA. Case established that member state effectively under duty to designate an area as an SPA and thus to protect it if it fulfils the criteria in Directive.
   b. Case C-166/97 **Commission v France** [1999] Env LR 78 - ECJ rejected arguments that SPA could not be designated due to delays in public consultation or that the land is state-owned
   c. Case C-247/85 **Commission v. Belgium** - Wild birds allowed to be captured under national law according to article 7 of the directive must be regulated and can not be based on the discretion of national authorities; the listed reasons for derogation on ban of hunting in article 9 is exhaustive.

93. Domestic Law:
   i. Habitats Regulations
      a. Provides for the designation and protection of ‘European protected sites’, protection of ‘European protected species’ and adaptation of planning and other controls for European sites.
      b. Place duty on secretary of state to propose list of sites which are important for either habitats or species. Once Commission and member states have agreed that sites submitted are worthy of designation they are identified as Sites of Community Importance (SCI’s). EU member states must then designate these sites as special areas of conservation (SAC’s) within six years.
      c. Regulations enable country agencies to enter into management agreements on land within or adjacent to European site in order to
secure conservation. If unable to conclude such agreement may acquire interest in land compulsorily.

d. Creates criminal offence (subject to exceptions) to deliberately capture, kill, disturb or trade in animals listed in Schedule 2. Or pick, collect, cut, uproot, destroy or trade in plants listed in Schedule 4. Actions made lawful by granting licenses by appropriate authorities. Licenses can only be granted for number of purposes e.g. Science, education, conservation, but only after authority satisfied that no satisfactory alternative and no detrimental effect on wild population of species concerned. Regulator for licenses is Natural England

e. Case C-6/04, Commission v United Kingdom: Found UK in breach of Habitats directive by incorrect transposition, led to further Regulations.


g. The Offshore Marine Conservation (Natural Habitats &c.) Regulations 2007 – Transpose the Habitats Directive beyond the UK’s territorial waters (beyond 12 nautical miles) and recently amended by 2009 Regulations. Special provisions for protection of European marine sites, requiring country agencies to advise other authorities on conservation objectives for a site and the operations which may affect is integrity.

h. Circular 06/2005: ‘Biodiversity and geological conservation’

i. PPS9: ‘Planning for biodiversity and geological conservation’ guide to good practise. In circumstances where protected species present LPA’s should consult Natural England before granting Planning Permission.

j. The Planning Inspectorate Guidance: Natural England’s Changed Approach - Changed approach: NE stating that should no longer be routinely consulted when there is protected species involved, will only consult on cases involving SAC’s, SPA’s, sites of special scientific interest (SSSIs) and cases that would affect for example populations of biodiversity action plan species/habitats or green infrastructure provision.


l. Countryside and Rights of Way Act 2000 - Natural England has statutory power to designate land as Areas of Outstanding Natural Beauty


n. The UK BAP is the government’s response to the Convention on Biological Diversity (CBD) signed in 1992. Describes UK’s biological resources and commits detailed plan for protection of resources - Sets out UK Biodiversity action plans. Local biodiversity action plans: work on the basis of partnerships to identify local
priority, conform to county boundaries. ‘Grouped’ species action plans: Common policies actions and targets for similar species

o. Much domestic case-law: see e.g. R. (Woolley) v Cheshire East BC [2010] Env. L.R. 55

(9) Nuisance


95. Private law nuisance continues to play an important role, see:
   i. Dennis v Mod [2003] Env LR 34 (nuisance claim relating to Harrier jump jets);
   ii. Hunter v Canary Wharf [1997] A.C. 655 (nuisance claim based on interference caused to their television reception as a result of the construction of the Canary Wharf Tower);

96. Some notable exclusions from nuisance liability:


99. Public nuisance featured in recent high profile case: Corby Group Litigation v Corby DC [2009] EWHC 1944 (TCC); [2009] N.P.C. 100. Case involved alleged negligence, breach of statutory duty and public nuisance on the part of the defendant local authority in connection with the reclamation of an extensive industrial site to the east of the town of Corby. The claim related to birth defects said to have been caused to a group of children born between 1986 and 1999 consisting of shortened or missing arms, legs and fingers.

100. Rylands v Fletcher (1868) LR 3 HL 330 non-natural user: and in more recent times Cambridge Water v Eastern Counties Leather plc [1994] 2 AC 264 (Pollution of underground water supply by industrial process, spillage resulting in chemical being carried in percolating water to plaintiffs' borehole) and Transco v. Stockport
**Metropolitan Borough Council** [2004] 2 A.C. 1 (Provision of piped water supply—Fractured pipe—Damage caused by escape of water from pipe constructed to serve block of flats, outside *Rylands v Fletcher*).

101. **Statutory nuisance**: currently provided for by Environmental Protection Act 1990 – a lecture in itself. Origins in public health legislation of nineteenth century. Generates much case-law some recent examples being: *Roper v Tussauds Theme Parks Ltd* [2007] Env.L.R. 31 (nuisance from theme park). The list of statutory nuisances:

   i. any premises in such a state as to be prejudicial to health or a nuisance;
   ii. smoke emitted from premises so as to be prejudicial to health or a nuisance;
   iii. fumes or gases emitted from premises so as to be prejudicial to health or a nuisance;
   iv. any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance;
   v. any accumulation or deposit which is prejudicial to health or a nuisance;
   vi. any animal kept in such a place or manner as to be prejudicial to health or a nuisance;
   vii. any insects emanating from relevant industrial, trade or business premises and being prejudicial to health or a nuisance;
   viii. artificial light emitted from premises so as to be prejudicial to health or a nuisance;
   ix. noise emitted from premises so as to be prejudicial to health or a nuisance;
   x. noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street; and
   xi. smoke, fumes or gases emitted from any vehicle, machinery or equipment on a street so as to be prejudicial to health or a nuisance other than from any vehicle, machinery or equipment being used for fire brigade purpose;
   xii. any other matter declared by any enactment to be a statutory nuisance.

102. To be within the statutory nuisance regime the offending activity must be “prejudicial to health or a nuisance” – the latter requires there to be a private or public nuisance. The last category “any other matter declared by any enactment to be a statutory nuisance” incorporates statutory nuisances from the Public Health Act 1936 relating to: ponds, ditches, gutters and watercourses, wells tanks cisterns etc.

103. Enforcement lies mainly with local authorities: can serve abatement notice, which can then be appealed to the Magistrates Court. Failure to comply with note is a criminal offence. But s. 82 of the 1990 Act allows proceedings to be brought in the Magistrates Court by a person aggrieved by the existence of a statutory nuisance.

104. See: *Statutory Nuisance* (2nd ed) by McCracken, Jones and Pereira and the now quite old but still useful *Statutory Nuisance: Law and Practice* by Malcolm and Pointing.

*(10) EIA*
105. EIA originated in the US s. 103 of NEPA 1969 and this has been called the magna carta of US environmental law.

106. Directive 85/337/EEC amended significantly by 2 later Directives: Directive 97/11 and 2003/35 – the latter incorporates into this area requirements from the Aarhus Convention (see above).

107. The basic framework:
   i. Article 2(1): Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects;
   ii. 'project' means: the execution of construction works or of other installations or schemes, other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;
   iii. 'development consent' means: the decision of the competent authority or authorities which entitles the developer to proceed with the project;
   iv. Article 4:
      a. Projects in Annex 1: must always be subject of EIA
      b. Projects in Annex 2 to be “screened” to see if EIA required – discretion to Member States to assess when EIA required can exercise this via thresholds or case-by-case examination;
      c. Annex 1 projects include: Crude-oil refineries; Thermal power stations with a heat output of 300 megawatts or more; nuclear power stations; motorways and more;
      d. Annex 2: wide range of other projects including “Urban development projects, including the construction of shopping centres and car parks” – interpreted by ECJ and domestic courts so can include almost anything;
      e. Scoping: see Article 5(2) (post 1997 requirement): opinion of authorities on what EIA must include;
      f. Information required for EIA (see Article 5(1) and (3) and Annex IV:
         1. a description of the project comprising information on the site, design and size of the project,
         2. a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,
         3. the data required to identify and assess the main effects which the project is likely to have on the environment,
         4. an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects,
         5. a non-technical summary of the information mentioned in the previous indents.
      g. Public Participation: must allow public views to be expressed on EIA and project – see Article 6 – Lord Hoffmann in *Berkeley v Secretary*
of State for the Environment [2001] 2 A.C. 603 “The directly enforceable right of the citizen which is accorded by 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”;

h. Article 8 – duty to take into account EIA and views expressed on it in deciding whether to grant consent.

108. In UK implemented and integrated into planning regime:
   iii. Circular 2/99 on Environmental Impact Assessment;

109. The 1999 Regulations:
   i. Key provisions: Reg 3(2) “The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so”
   ii. Different ways in which a project becomes subject to an EIA obligation: Regs 4(2)(b), 4(3), (7) & (8)); screening opinion (Reg 5(1); and developer Reg 4(2)(a);
   iii. Schedule 2 – indicative thresholds.

110. Spread beyond planning: now EIA regulations for Harbour works, Marine works, Uncultivated Land and Semi-natural Areas, Marine Dredging, Agriculture, Land Drainage Improvement and Forestry. Also note Edwards v Environment Agency (above) recognising EIA can extend to environmental permitting there the PPC regime.

111. EIA since Berkeley v Secretary of State for the Environment [2001] 2 A.C. 603 hugely important in UK. A major weapon used vs. Development by objectors. Huge number of cases in domestic courts and ECJ. In Berkeley HL emphasise direct effect, and importance of requirements and narrow discretion to quash if get wrong (although latter revisited in Edwards). UK implementation found inadequate in many ways: see e.g. the recent Baker and Mellor cases in the Annex to this talk below and also the Cooper case above which deals with the fall out of Barker on EIA and outline planning permission. EIA a major development cost now – what has
it added? An obstacle course for developers (see Carnwath LJ in *Jones v Mansfield* [2004] Env LR 21)?

**(11) SEA**

112. Directive 2001/42/EC (the SEA Directive) “on the assessment of the effects of certain plans and programmes on the environment” requires a formal environmental assessment of certain plans and programmes which are likely to have significant effects on the environment. Authorities which prepare and/or adopt such a plan or programme must prepare a report on its likely significant environmental effects, consult environmental authorities and the public, and take the report and the results of the consultation into account during the preparation process and before the plan or programme is adopted. They must also make information available on the plan or programme as adopted and how the environmental assessment was taken into account.

113. What does it extend to: land use and spatial planning; possibly national planning policies; local housing strategies, local transport plans, local air quality action plans, any environmental protection and management plans, regional economic development strategies etc. – see the ODPM guide referred to below for an indicative list.

114. The SEA Directive is transposed into United Kingdom law by the Environmental Assessment of Plans and Programmes Regulations 2004, and in Scotland by the Environmental Assessment (Scotland) Act 2005.


116. In terms of case-law this a new and developing area: see in the Annex to this talk the *Bard* and *St Alban’s* cases. The most important cases have though been in Northern Ireland and are the subject of pending references to the ECJ: see the *Seaport* litigation [2007] NIQB 62.

**(12) REACH**

117. In 2006 the EC’s new chemical regulation regime was passed. The regime will not be fully operation for another ten years but the regime has been one of the most controversial that the EC has ever debated. That controversy has arisen for many reasons including the role of information under the new regime, the fact that the regime is an attempt to implement sustainable development, and its globalization implications.


and Restriction of Chemicals (REACH) and establishing a European Chemicals Agency;


Conclusions

121. The future of environmental law: RESA 2008, Water scarcity, GMO regulation, nanotechnology ...
1. **CASE 1**: Case C-75/08 *R (Mellor) v SSCLG* [2009] 18 E.G. 84 (C.S.) was a reference from the Court of Appeal in judicial review proceedings concerning the need for reasons for negative screening decisions under the Environmental Impact Assessment (“EIA”) Directive i.e. decisions that a project does not need to be the subject of an EIA. In *Mellor* the Secretary of State’s negative screening decision was recorded in a letter dated 4 December 2006 as being that the proposed development “would not be likely to have significant effect on the environment by virtue of factors such as its nature, size and location”.

2. The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 Sch.2 para.13 column 2 (“the EIA Regulations”) do not require reasons for a negative screening decision. In direct contrast under regulation 4(6) of the 1999 Regulations where a positive screening decision is given i.e. that development is EIA development there is an express duty to give “a written statement giving precisely and clearly the full reasons for that conclusion”. This would suggest that the drafter of the 1999 Regulations made a deliberate choice not to require the giving of reasons for negative, as opposed to positive, screening decisions under regulation 4.

3. Moreover, there is not much in the EIA Directive itself that supports any requirement for reasons for negative screening decisions. Article 4 makes no reference to a need to provide reasons in determining whether EIA is required. This is in marked contrast with the wording at Article 9 of the EIA Directive relating to decisions to grant or refuse development consent. The wording here expressly requires the competent authority to make reasons for their decision available to the public. Had it been the purpose and intention of the EIA Directive that competent authorities were required to make available to the public reasons why, in a specific case, EIA was not required, is it not reasonable to assume the wording would have been more explicit, and in line with that used in Article 9? Furthermore, Article 3(7) of the more recent Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (“the SEA Directive”) expressly requires that reasons be given “for not requiring an environmental assessment”. The contrast with Article 4 of the EIA Directive could not be clearer.

4. In *R v Secretary of State for the Environment, Transport and Regions, ex p. Marson* [1998] Env LR 761 the Court of Appeal had held (in a permission judgment) that there was no duty to give reasons for a negative screening decision.

5. However, two subsequent ECJ decisions Case C-87/02 *Commission v Italy* and Case C-83/03 *Commission v Italy* at least hinted at the possibility that there was a requirement to give reasons for a negative screening decision. In *R (on the application of Probyn) v First Secretary of State* [2005] EWHC 398 (Admin)
Burton J. remarked “it is plain that the drift of the European Courts –or, at any rate, that of those arguing before the European Court –is flowing in the other direction from *Marson*”.

6. The questions referred by the Court of Appeal in *Mellor* were:
   i. Whether under Article 4 of the EIA Directive Member States must make available to the public reasons for a negative screening decision?
   ii. If the answer to Question i. is in the affirmative whether that requirement was satisfied by the content of the letter dated 4 December 2006 from the Secretary of State?
   iii. If the answer to Question ii. is in the negative, what is the extent of the requirement to give reasons in this context?

7. The ECJ answered those questions thus:
   “1. Article 4 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as not requiring that a determination, that it is unnecessary to subject a project falling within Annex II to that directive to an environmental impact assessment, should itself contain the reasons for the competent authority’s decision that the latter was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents in response to the request made. 2. If a determination of a Member State not to subject a project, falling within Annex II to Directive 85/337 as amended by Directive 2003/35, to an environmental impact assessment in accordance with Articles 5 to 10 of that directive, states the reasons on which it is based, that determination is sufficiently reasoned where the reasons which it contains, added to factors which have already been brought to the attention of interested parties, and supplemented by any necessary additional information which the competent national administration is required to provide to those interested parties at their request, can enable them to decide whether to appeal against that decision.”

8. Accordingly, the effect of the judgment is that:
   i. there is no need for a negative screening decision to itself contain reasons;
   ii. but there is a duty to provide further information on the reasons for the decision if an interested person subsequently requests the same;
   iii. that request need not be met by a formal statement of reasons but also by providing “information and relevant documents”;
   iv. reasons, when given, can be very short.

9. The JPL commentary suggested the outcome was a draw. The Court of Appeal though ([2009] EWCA Civ 1201) when the matter returned for consideration of costs held that the Secretary of State had effectively lost and should pay the costs. This was because it was said that the Secretary of State had sought to uphold the Court of Appeal’s decision in *R v Secretary of State for the Environment, Transport and Regions, ex p. Marson* [1998] Env LR 761 that no reasons for negative screening decisions were needed and in this regard he failed. The Court of Appeal said “that what the European Court of Justice has ruled is now the law and is different from that which was declared to be the law in *Marson*”. But it seems that the EC Commission does not agree. The *Marson* case was at the same time as the *Mellor* proceedings were ongoing the subject of infraction proceedings (Case C-
495/08 *Commission v UK*. The Commission in the light of *Mellor* withdrew its case – indicating that the Commission considered that the Secretary of State had won in *Mellor*!

10. **CASE 2: R (Ardagh Glass Limited) v Chester CC & Another** [2009] EWHC 745 (Admin) is a “further chapter in the history of the Quinn Glass works at Elton, near Chester”. The Elton works are the largest container glass factory in Europe and have been producing glass since May 2005. The factory was constructed without planning permission. Quinn took a “calculated risk” to build without permission. In early 2007 the Secretary of State refused an application for retrospective planning permission which had been called in. Quinn made a further application for retrospective permission to the local planning authority in early 2008 which was accompanied by an EIA. This though had yet to be determined at the time when the High Court was considering these judicial review proceedings. The situation before the High Court was that the Elton works were unlawful development which were imminently about to become immune from enforcement under the 4 year rule (see s. 171B of the TCPA 1990). The exact date on which immunity would accrue was a matter of dispute.

11. Ardagh a commercial rival of Quinn brought judicial review proceedings seeking: (i) a mandatory order that the Defendant Councils take enforcement action on a “precautionary basis” in order to prevent immunity accruing; and (ii) an order prohibiting the grant of permission, alternatively a declaration that the grant of permission would be lawful. Ardagh argued that as the unlawful development was EIA development not subject to EIA before it was constructed: (i) EU law required that the Defendant Councils enforce; and (ii) the grant of retrospective planning permission was, following the ECJ’s decision in Case 125/06 *Commission v Ireland*, prohibited by the EIA Directive.

12. The learned Judge (HHJ Mole QC sitting as a Deputy High Court Judge) granted the mandatory order remarking that not to enforce and so allow immunity to accrue “would be a betrayal by the planning authorities of their responsibilities and a disgrace upon the proper planning of this country”. The learned Judge considered that it would be a breach of the EIA Directive if EIA development were granted without permission and the planning authorities stood by and did nothing: see further *R (Prokopp) v LUL* [2003] EWCA Civ 961 and also Case C-98/04 *Commission v UK*.

13. However, he rejected the contention that the grant of retrospective permission for EIA development was prohibited by the EIA Directive. He considered that permission could be granted retrospectively consistently with the EIA Directive in *exceptional* circumstances so long as no advantage was gained by the developer in having unlawfully commenced the development without undertaking EIA. The learned Judge noted that that was very close to the approach applied by the Secretary of State in refusing retrospective permission in 2007.
14. On 3 February 2010 the Court of Appeal dismissed an appeal by Ardagh and upheld the decision below. Between the time of the High Court’s decision and the decision of the Court of Appeal the local planning authority had granted planning permission – although that decision is the subject of separate judicial review proceedings. At the time of writing the transcript of the Court of Appeal’s judgment is not available.

15. **CASE 3: R. (Baker) v Bath and North East Somerset DC** [2009] EWHC 595 (Admin) was a challenge to the grant of a number of permissions for a waste disposal facility that composted "green" waste. The same site is also the subject of nuisance proceedings (see *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107). The main thrust of the challenge concerned a failure to carry out EIA. As the grants of planning permission in issue were modifications/extensions to an already authorised development it was argued that the further development did not cross the threshold contained in the EIA Regulations so that there was no need to screen (i.e. consider whether the permissions were likely to have significant effects) the further permissions for EIA. The threshold in the Regulations requires that in assessing whether a modification/extension exceeds the threshold one is required apply the threshold “to the change or extension (and not to the development as changed or extended).”

16. Collins J. held, contrary to the arguments of the Secretary of State as intervener, that in this regard the EIA Regulations did not properly transpose the EIA Directive. The thresholds should not be applied by reference only to the modification/extension itself as opposed to the whole project as proposed to be modified/extended.

17. The Secretary of State has not appealed the decision.

18. The consequence is, pending amendment of the EIA Regulations, that in applying the threshold for changes or extensions planning authorities should apply the thresholds to the development as changed or extended. The result is that if there is an existing development or permission which was itself over the threshold in Schedule 2 any application for a change/extension of the same would also exceed the threshold and require screening. The impact is most likely to be felt in respect of very large developments where having obtained permission developers make an application which seems to amend even in a minor way the scheme.

19. **CASE 4: Finn-Kelcey v Milton Keynes BC** [2009] Env LR 17 concerned a proposed wind farm. The planning application had included an EIA and supplementary information was provided which included wind speed data, following a request “on a non-regulatory basis” by the Council. That information was provided to representatives of the local group opposing the development in hard copy, but not the accompanying CDs which held the raw data, including wind speeds, or the letter enclosing the supplementary information, which stated that the wind speed data was included on the CDs. Nor was this information placed on the public files although it was advertised in a local paper that the information was
available for inspection and that copies could be purchased. The Claimant complained about the lack of availability of the raw wind data to objectors.

20. The case had been dealt with on the erroneous legal basis before the Administrative Court. Collins J. had proceeded on the basis that the applicable regulations were the 1999 Regulations as amended by the Town and Country Planning (Environmental Impact Assessment)(Amendment) Regulations 2006. In fact the case was governed by the 1999 Regulations in their unamended form. The Court of Appeal held that there had been no breach of regulation 19 of the 1999 Regulations in their original form. Regulation 19(4) required the recipient of further information to send a copy to “each person to whom, in accordance with these Regulations, the statement to which it relates was sent”. The Court doubted if the objectors were such a person but in any event took the view that regulation 19(4) applied only to information provided pursuant to a request under regulation 19(1) and the provision of the wind data in this case had been in response to a non-regulatory request not an exercise of the Council’s powers under regulation 19.

21. The case is also of real interest on the issue of promptness and delay in judicial review challenges to the grant of planning permission. CPR r.54.5 requires that claims be brought promptly and in any event within 3 months. The planning permission was granted on 14 January 2008 and the claim lodged on 10 April 2008 i.e. just within the 3 months. The Court of Appeal upheld Collins J’s view that the claim had not been made promptly. The Court emphasised the importance of acting promptly in cases which sought to challenge the grant of planning permission and indicated that the need for promptness in challenging planning decisions was also particularly acute in the case of renewable energy projects. The de facto 6 week rule for planning challenges in judicial review that was rejected by the House of Lords in *R. (Burkett) v Hammersmith and Fulham LBC (No.1)* [2002] UKHL 23; [2002] 1 W.L.R. 1593. However, in *Finn-Kelcey* the Court of Appeal considered the existence of a 6 week rule under the TCPA 1990 for challenges to the grant of permission by the Secretary of State was relevant in considering promptness. The House of Lords in *Burkett* also held that time ran from the grant of the permission not the resolution to grant but the Court of Appeal held that knowledge of the resolution to grant remained relevant to the issue of promptness.

22. This judgment needs now to be read in the light of the ECJ’s very recent decision in *Uniplex (UK) Ltd v NHS Business Services Authority*. The case concerned a requirement in the Public Contracts Regulations 2006 that “proceedings are brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought” thus mirroring exactly the judicial review rules. The ECJ held:

“42. A national provision such as Regulation 47(7)(b) of the 2006 Regulations, under which proceedings must not be brought ‘unless … those proceedings are brought promptly and in any event within three months’, gives rise to uncertainty. The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the
expiry of the three-month period if those courts take the view that the application was not made ‘promptly’ within the terms of that provision.

42 As the Advocate General observed in point 69 of her Opinion, a limitation period, the duration of which is placed at the discretion of the competent court, is not predictable in its effects. Consequently, a national provision providing for such a period does not ensure effective transposition of Directive 89/665.

43 It follows that the answer to the first part of the second question is that Article 1(1) of Directive 89/665 precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.”

23. The implications for the judicial review promptness requirement, especially in a case with a European law backdrop such as Finn-Kelcey are obvious and a lot of people are saying the judicial review delay rules will now have to be changed.

24. **CASE 5: St. Albans City and DC v Secretary of State for Communities and Local Government** [2010] J.P.L. 70. In this case Mitting J. has held in response to a challenge by Hertfordshire County Council and St Albans' District Council under s. 113 of the Planning & Compulsory Purchase Act 2004, that the Secretary of State's approval of the East of England Plan (RSS for the east of the country) has breached certain requirements for strategic environmental assessment in regulation 12 of the Environmental Assessment of Plans and Programmes Regulations 2004.

25. The challenge concerned the decision to require significant additional housing to be met in Hemel Hempstead, Welwyn Garden City, Hatfield and Harlow by means of significant releases of land from the Green Belt without a lawful strategic environmental assessment which considered the reasonable alternatives to the proposals, given the changes made to the policies at the Proposed Changes stage. The Judge rejected the claim so far as it related to Harlow, but upheld the claim relating to the other settlements (and the implications for St Albans).

26. The learned Judge held that Article 5 of the SEA Directive and regulation 12 of the Environmental Assessment of Plans and Programmes Regulations 2004 required that reasonable alternatives to development should be described and evaluated before a choice was made as to how a plan should be modified.

27. **CASE 6: R. (Bard Campaign) v Secretary of State for Communities and Local Government** [2009] EWHC 624 (Admin) This was a challenge to the Government’s Eco-towns policy and a decision to include a particular location in a shortlist of sites for possible development of an "eco-town". A consultation paper entitled "Eco-towns - Living a Greener Future" was issued seeking views on eco-town benefits and on the shortlisted locations. The Claimants alleged that the Secretary of State had failed to (1) consult, or to consult properly, on the principle of eco-towns; (2) consult on the key locational criteria for eco-towns; (3) consult only on the shortlisted locations; (4) provide adequate information to enable informed representation to be made; (5) provide adequate time for consultation given the late production of material. All these claim were rejected.
28. The Claimants also sought a declaration that the SEA Directive, Directive 2001/42 was applicable to the eco-towns policy. However the Secretary of State indicated that she would voluntarily undertake a Sustainability Appraisal in full compliance with the SEA Directive. Accordingly, for the most part, the issue of whether the draft PPS is subject to the SEA Directive was academic. The only other issue was whether the SEA Directive required the assessment prior to the draft PPS stage e.g. when the Government was consulting on the policy in an earlier Green paper and related documents. The learned Judge held that the SEA process was not required to have started earlier than it had. The relevant draft plan was the draft PPS. There were also complaints about lack of consultation which failed. The Court of Appeal refused permission to appeal in June 2009.

29. **CASE 7: R (Buglife) v Thurrock Thames Gateway Development Corporation** [2008] EWCA Civ 1209 (4 November 2008). Buglife applied for a PCO capping its liability in costs in a dispute with the respondent local planning authority. Buglife had applied for judicial review of the decision of the local authority to grant planning permission for the development of a site which contained endangered invertebrate species. Sullivan J. ordered that there be an upper limit of £10,000 on the total amount of costs recoverable from and by Buglife in the proceedings. The judge gave reasons for limiting the amount payable by Buglife but did not give reasons for limiting the amount payable to Buglife if it won. Buglife were subsequently refused permission at a rolled up hearing. Buglife then renewed its application for permission which was granted by the Court of Appeal on the basis of public interest. Buglife sought two orders, the first of which would extend the costs protection granted to the proceedings in the Court of Appeal, so that the total amount of costs payable by Buglife if the appeal failed would be £10,000. Buglife also sought an order varying the PCO so as to remove the reciprocal costs cap of £10,000 on any costs recoverable by Buglife if the appeal succeeded.

30. The Court of Appeal again reviewed the relevant principles and the procedures governing applying for PCOs at first instance and on appeal.

31. The Court of Appeal held that following **R (Corner House Research) v. Secretary of State for Trade and Industry** [2005] 1 WLR 2600 and **R (Compton) v Wiltshire Primary Care Trust** [2008] CP Rep 36 that the beneficiary of a PCO should generally have the recoverability of its costs limited to a reasonably modest amount and should also expect the costs to be capped. The Court rejected the notion that generally the defendant’s liability for costs should be capped in the same amount as the claimant. It would depend on the circumstances. The Court of Appeal also affirmed that the fact that a claimant’s lawyers were acting on a CFA with the possibility of a success fee was relevant to the setting of any caps on liability and that the uplift would thus have to be disclosed. The Court indicated that not all the uplift might be allowed to be recovered if a PCO were sought.
32. In *Buglife* the Court of Appeal extended the PCO to the appeal and ordered that there again be an upper limit of £10,000 on the total amount of costs recoverable by and from Buglife on the appeal.

33. The PCO in *Buglife* was granted despite the parties not acting on a pro bono basis. Indeed this factor emphasised in *Corner House* seems to have lost importance. There are other examples of PCOs being granted where the claimants lawyers were not acting pro bono. Indeed in *Corner House* itself the claimant’s lawyers were on a CFA.

34. The Aarhus Convention (the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) was mentioned specifically in paras. 16 and 24 of the judgment. This included reference to the Sullivan Report App. 3 and the concern expressed therein that “claimant costs are being set at levels that (in general even if not necessarily in each particular case) are unsustainable and as a result stifle litigation. If unrealistic caps are set on a claimant's costs, lawyers who specialise in such cases will not be able to continue to work in this field. The impact of this requirement therefore threatens to undermine the contribution PCOs can make to access to justice generally and, if applied to environmental cases, to Aarhus compliance.”

35. On PCOs and costs in environmental cases see also: *Morgan v Hinton Organics (Wesssex) Ltd* [2009] EWCA Civ 107 and also the recommendations in Jackson LJ’s recent report on costs.

36. **CASE 8: R (Boggis) v Natural England** [2009] EWCA Civ 1061. Natural England successfully appealed against a decision ([2009] 3 All ER 879) quashing the confirmation of part of a Site of Special Scientific Interest (“SSSI”). The SSSI was located along, and inland from, the Suffolk coast between Southwold and Lowestoft. The site included areas protected under the Habitats Directive. At the southernmost end of the SSSI were cliffs which were being eroded by the sea. Residents whose properties were near the cliff edge, including Mr Boggis, formed an organisation which constructed a sacrificial sea defence without planning permission or consent under the coastal protection legislation. Natural England decided to adjust the boundary of the SSSI to reflect the erosion of the cliffs thereby including the property of Mr Boggis and other residents. They objected to the notification of the SSSI because they feared that if confirmed it would prevent them from continuing to replenish the sacrificial sea defence. Natural England considered the objections to the notification of the SSSI and confirmed the designation. The respondents challenged that decision on the grounds that it was wrongly based on the approach that "the process of exposure" of the cliffs was a geological feature of special interest. The judge rejected that ground of challenge, but accepted that the notification and confirmation of the SSSI in respect of the sea defences constituted a "plan" for the purposes of art.6(3) of the Directive giving rise to an obligation to make an assessment which had not been carried out. He therefore concluded that the
SSSI was unlawful so far as it applied to the coastline area. Mr Boggis cross-appealed on the ground he lost on.

37. The Court of Appeal held that Natural England had not wrongly thought that the act, or process, of exposure of the cliffs was a geological feature. The Court of Appeal held that the notification and confirmation of the SSSI did not constitute a "project" within the meaning of art.6(3) of the Habitats Directive. Notification of an SSSI was not itself a plan, but a means of ensuring that land use and other plans took proper account of environmental features of special interest. In any event, even if the notification of the SSSI was a plan or project for the purposes of art.6(3), there was no breach of that article because there was no evidence that there was any real risk to the special protection area which required an assessment. The Court said that even if there had been a breach of the Directive, it would have been appropriate for the court to exercise its discretion not to quash the confirmation of the SSSI considering that the expert evidence was that maintaining the sea defences would have no significant physical effects; the purpose of the proceedings was not to secure the protection of the special protection area, but to enable the continued replenishment of the respondents' sacrificial sea defences; and the construction of those defences and their continued replenishment were not lawful.

38. **CASE 9**: The Supreme Court Costs Officers (Mrs Registrar Di Mambro and Master O'Hare) handed an important judgment in *R (Edwards & Pallikaropoulos) v Environment Agency, the First Secretary of State and & the Secretary of State for the Environment Food and Rural Affairs* in January 2010 – their decision having been indicated in outline in December 2009. The appeal to which the order for costs in issue relates arose out of an application for judicial review seeking to quash a permit issued on 12 August 2003 by the Environment Agency ("the Agency") for the operation of a cement works in Rugby. The grounds alleged that the Agency did not disclose enough information about the environmental impact of the plant to satisfy its statutory and common law duties of public consultation. The grounds included argument on the provisions contained in Council Directive 96/61/EC concerning integrated pollution prevention and control ("the IPPC Directive") and Council Directive 85/337/EEC concerning Environmental Impact Assessment ("the EIA Directive"). Those Directives implement provisions of the Aarhus Convention (see above) requiring that access to environmental justice not be "prohibitively expensive".

39. The claim having failed in the High Court and Court of Appeal, Mrs Pallikaropoulos obtained leave to appeal to the House of Lords and made an application to the House of Lords for an order varying or dispensing with the requirement to give security for costs in accordance with House of Lords Practice Direction 10.6 and an application for a protective costs order ("PCO") seeking to cap her liability for costs on the appeal to the House of Lords to £10,000 (pp. 29-35). The submissions made relied upon the Aarhus Convention and the Public Participation Directive 2003/355/EC amending the EIA and IPPC Directives to include the requirement that access to courts not be "prohibitively expensive" (see p.
The applications for waiver of security and a PCO were opposed by the Respondents. By letter dated 22 March 2007 the Judicial Office wrote indicating that the Appeal Committee had rejected the applications for waiver of security and for a PCO. The Appeal Committee determined that it did not consider "the suggested protective costs orders regarding costs appear proportionate on the information which is before them and in the light of the nature of the issues involved; and they do not consider that any case has been made for saying that the proposed appeal would be "prohibitively expensive" or that Directive 2003/35/EC would be breached without a special order".

The appeal before the Judicial Committee lasted 3 days between 21 and 23 January 2008. On 16 April 2008 the Judicial Committee unanimously affirmed the Court of Appeal's decision and dismissed the appeal ([2008] UKHL 22; [2008] 1 W.L.R. 1587). The issue of costs was adjourned so that the parties could make written representations. Mrs Pallikaropoulos' written submissions on costs argued that there should be no order as to costs on the appeal. Those submissions again relied on Directive 2003/355/EC and the Aarhus Convention and the requirement that the procedure not be "prohibitively expensive". On 18 July 2008 the House of Lords ordered that Mrs Pallikaropoulos "do pay or cause to be paid to the respondents their costs of the appeal to this House, the amount of such costs to be certified by the Clerk of the Parliaments if not agreed between the parties". Correspondence between the parties ensued on the issue of costs. The Agency claimed costs of £55,810, the Secretary of State costs of £32,290.

Mrs Pallikaropoulos then argued at the detailed assessment of the bills costs stage that the Supreme Court's Costs Officers were required by "(1) the EIA Directive and IPPC Directive; and/or (2) the Aarhus Convention to assess Mrs Pallikaropoulos' liability for the Secretary of State's and Environment Agency's costs here (being the costs of the appeal in the House of Lords) at a level which is not "prohibitively expensive" within the meaning of those legal regimes; which, in the circumstances is nil". The Supreme Court costs officers on 4 December 2009 held a hearing to determine the following preliminary issues: i) Where an order for costs has been made, whether, as a general rule, the court assessing those costs has any jurisdiction to implement the IPPC and EIA Directives; and ii) If so, whether, in the particular circumstances of this case, we should seek to implement the EIA and IPPC Directives.

The Supreme Court Costs officers held that their jurisdiction to consider whether costs were "unreasonably incurred" and "unreasonable in amount" (see the Supreme Court Practice Direction 13, para. 16.1) when read in the light of the requirements of the Directives allowed consideration of whether the costs sought were "prohibitively expensive", and that such a jurisdiction was similar to that conferred under s. 11 of the Access to Justice Act when a party ordered to pay costs has the benefit of LSC funding.
43. The Supreme Court Costs Officers also held that the test of "prohibitively expensive" they were minded to adopt was that in the Sullivan Report namely: "… costs, actual or risked, should be regarded as "prohibitively expensive" if they would reasonably prevent an "ordinary" member of the public (that is, "one who is neither very rich nor very poor, and would not be entitled to legal aid") from embarking on the challenge falling within the terms of Aarhus". They said: "That seems to us to require us to start by making an objective assessment of what costs are reasonable costs. However, any allowance or disallowance of costs we make must be made in the light of all the circumstances. We presently take the view that we should also have regard to the following:
   i) The financial resources of both parties.
   ii) Their conduct in connection with the appeal.
   iii) The fact that the threat of an adverse costs order did not in fact prohibit the appeal.
   iv) The fact that a request to waive security money was refused and security was in fact provided.
   v) The amount raised and paid for the Appellant's own costs".

44. The Supreme Court Costs Officers also held that the previous consideration of the Directives and Aarhus by the House of Lords in this case did not prevent their considering these issues again at the assessment stage, they held there was no issue estoppel.

45. The respondents are seeking to appeal the decision to the Justices in accordance para. 49 of the Supreme Court Rules 2009.

46. **CASE 10: Secretary of State for Environment, Food and Rural Affairs v Downs** [2009] 3 C.M.L.R. 46. The Secretary of State successfully appealed against a decision granting the respondent a declaration in judicial review proceedings that his approach to controlling the spraying of crops with pesticides did not comply with Directive 91/414 and ordering him to reconsider and as necessary amend his policy in that respect.

47. Miss Downs lived in a house adjoining fields which had been sprayed regularly with pesticides. She claimed that exposure to the pesticides had caused her to suffer ill-health. The Secretary of State commissioned a study by the Royal Commission on Environmental Pollution (RCEP) to examine the scientific evidence on which government decisions on the risks to people from pesticide exposure had been based. The study concluded that there could be a link between the exposure of residents and bystanders to pesticides and chronic ill-health and recommended the introduction of no-spray buffer zones around agricultural land to protect rural residents from the use of pesticides by farmers. The Secretary of State, acting on the advice of the Advisory Committee on Pesticides (ACP), rejected that recommendation. Miss Downs applied for judicial review of that decision.

48. The Court of Appeal held that Directive required member states to establish that a pesticide had no harmful effect on human health by applying the uniform principles in Annex VI, and if, applying those principles, authorisation of a pesticide might be granted, the authorisation would be in compliance with art.4.1. The "uniform principles" were a comprehensive code. If each member state was free to adopt its
own principles or policies for the purpose of establishing that a pesticide had no harmful effect on human health, the underlying purpose of the Directive, harmonisation of authorisation procedures enabling mutual recognition by member states of each other's authorisations, would be frustrated. The Court considered that as the Secretary of State had applied the principles of Annex VI, in particular in having regard to expert opinion, his crop-spraying policy had complied with the Directive.

49. The Court also considered that the judge below had wrongly substituted his own evaluation of the available evidence for that of the Secretary of State.