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20th Anniversary Editorial

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Twenty years ago, when the forerunner of this journal (then called the *Land Management and Environmental Law Review*) first appeared, I was its Managing Editor. Recently, I had occasion to look back at the first half-dozen issues of the journal. At about the same time, I also happened to review the most recent version of the legal work programme of the United Nations Environment Programme (UNEP). I found both exercises quirkily unsettling, as my first reaction was not how many things have changed, but how many things remain the same.

There have, of course, been significant developments in environmental law over the past two decades and most of those developments have been positive. Twenty years ago, this country's law relating to the disposal of waste was in an antediluvian state and the concept of liability for contamination of land was more accurately to be described as embryonic than as in its infancy. Both are now highly sophisticated areas of law (perhaps too sophisticated in the case of the definition of waste!). An early article in the journal commented with some scepticism on the prospects for the adoption of environmental audit techniques in industry, yet ISO 14000 and its derivatives have become part of the sound management toolkit. At the international level, the damage to the ozone layer was beginning to be recognised as a genuine 'common concern of humanity', to misuse a later phrase, and there was much head-scratching about how an effective response could be achieved. The protection of the ozone layer was the headline issue in early versions of UNEP's Montevideo Programme for Environmental Law Development. Today, the issue belongs to environmental legal history, as a result of a stupendously successful treaty.

On the other hand, many of the topics treated in the early issues remain depressingly familiar. The comparative efficacy (or lack of it) of penal and administrative sanctions in controlling or preventing environmental misdeeds, a major preoccupation twenty years ago, remains so today as we wait with far from total confidence to gauge the effects of the soon-to-be-enacted Regulatory Enforcement and Sanctions Act. Neighbourhood noise has received more than its share of legislative attention since 1988, yet few readers will be satisfied that the problems caused by anti-social noise have been resolved or even much diminished. At the international level, the unrelenting litany of calls for further capacity-building and effective implementation has continued uninterrupted throughout the two decades.

Early issues of LMELR contained discontented grumblings about the sectoral nature of environmental regulation and the consequent lack of 'joined-up thinking' (if that discredited phrase still retains any meaning). At the international level, the consciously 'catalytic' role adopted by UNEP and the genuine jurisdictional difficulties caused by the purpose-driven competences of international organisations make this understandable, if regrettable, but at the national level there is no excuse. If anything, the problem appears to have intensified over the two decades and constant reinventions of the environmental regulatory structure seem to have done little to ameliorate the mess.

There is today much more environmental law than there was in 1988, a significant proportion of it stemming from international law sources. The pervasive nature of some of the subjects which that law now has to address, such as the possibility of climate change and the undoubted but largely ignored erosion of genetic diversity, makes it imperative that treaty responses must attract global support. To achieve that support, there is necessarily a dilution in the precision which can be achieved in the texts. Compare the text of an IMO convention of operational oil pollution control with, say, the Convention of Biological Diversity and the difference is striking. This is unfortunate as there is a good case to be made that it is in relation to regulation of the carbon economy that there is as great or greater need for clarity in the obligations. It is also disappointing that some international bodies, especially the European Union, appear to fail to appreciate that some environmental regulation, if it is to succeed, must be genuinely global and that there is no place for stricter regional measures in relation to these.

In addition, much thinking remains to be done on the environment and development conundrum. Is there really a justiciable right to development? What is its relationship to environmental norms? Is there a limit to the tolerance of OECD states in bankrolling environmental effort in, for example, climate change without some *quid pro quo* from the rest of the international community?

There seems to be plenty of potential for an editorial very similar to this one in the fortieth anniversary issue!

The Bali Roadmap – new horizons for global climate policy[1]

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What is the significance of the 2007 United Nations Climate Change Conference in Bali? The formal outcomes, especially the 'Bali Action Plan', are described and commented on, along with the challenges for negotiating a post–2012 agreement in Copenhagen during 2008 and 2009. The article concludes that the outcome of Bali is insufficient when compared with the nature of the challenge posed by climate change. However, it can nevertheless be considered a success in terms of 'Realpolitik' in paving the way for the negotiations ahead, because some real changes have been discerned in the political landscape. The challenges for the road towards Copenhagen are manifold: the sheer volume and complexity of the issues and the far-reaching nature of decisions such as differentiation between non-Annex I countries pose significant challenges in themselves, while the dependency on the electoral process in the USA introduces a high element of risk into the whole process. The emergence of social justice as an issue turns climate policy into an endeavour to improve the world at large – thereby adding to the complexity. And, finally, the biggest challenge is the recognition that the climate problem requires a global solution, that Annex I and non-Annex I countries are mutually dependent on each other and that only cooperation regarding technology in combination with significant financial support will provide the chance successfully to tackle climate change.

When the climate meeting in Bali came to a close at 6.27 pm on Saturday, 15 December 2007, the longest diplomatic battle in the history of global climate policy had finally ended, a full day behind schedule. Not even the legendary COP-3, which had seen the adoption of the Kyoto Protocol in 1997, exceeded its schedule by this much. The length and fierceness of the negotiations bear witness to the fact that never before had climate policy been so complex, involving such a multitude of actors and issues. And, of course, never before had the prospect of negotiating concrete measures for both developed and developing countries been on the agenda.

Also never before had the science been so unequivocal and the public expectation been so strong. The fourth assessment report of the IPCC, adopted in 2007, provided the strongest evidence for man-made climate change. It also provided the strong message that decisive action was required in order to keep the rise in global temperatures below a threshold that would present a chance of averting massive disturbances of the climate system.

The stage was further set by an unprecedented number of high-level diplomatic meetings in the same year dealing with climate change, ranging from the G8 Summit in Heiligendamm, Germany (6–8 June 2007) and the Gleneagles Dialogue meeting in Berlin (10–11 September 2007) to the special sessions of the UN Security Council and the General Assembly that involved most heads of state or government. Shortly before the Bali conference, the Australian Labour Party had won the elections – with the promise to act strongly on climate policy. Ratification of the Kyoto Protocol was accordingly one of the first acts of the new Prime Minister, Kevin Rudd. The year 2007 can thus be regarded as a watershed in the global endeavour to stave off the looming danger of climate change by multilateral cooperation.

Compared to these preconditions and expectations, the process and the outcome of the Bali Conference appears to be rather meagre and inadequate. But in real-world politics, where not only the sole remaining superpower (USA) which has not ratified the Kyoto Protocol but also other Parties, including Canada, Japan and Russia as well as OPEC were doing their best to keep the agreement as weak as possible, the success of a conference must be measured differently. By this measure, the Bali Conference was not only characterised by a distinctively different atmosphere compared to the previous conference in Nairobi 2006,[3] but indeed saw a significant shift in the battle lines, a rearrangement of positions and alliances that might well announce a decisive new era in global climate policy.

The most tangible result of the Bali Conference was the agreement on the 'Bali Action Plan' establishing an 'Ad-hoc Working Group on Long-Term Cooperative Action under the Convention' (AWG-Long Term) with the

1 This article first appeared in 'Climate Policy' 8 (2008) 91–95, published by Earthscan, www.climate policy.com

2 The authors would like to thank Florian Mersmann and Christof Arens for their support in Bali.

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3 See W Sterk, H E Ott, R Watanabe, B Wittneben, 'The Nairobi Climate Change Summit (COP 12 – MOP 2): taking a deep breath before negotiating post-2012 targets?' Journal for European Environmental & Planning Law (JEEPL) (2007) 2 139–148.

participation of the United States and developing countries. The more informal 'dialogue' under the Convention that was initiated at COP-11 in Montreal in 2005 has thus been transformed into fully-fledged negotiations. It continues the two-track approach:[4] the AWG-Long Term will work in parallel with the already existing Working Group on Annex I Parties' commitments under Article 3.9 of the Kyoto Protocol, and with the same deadline (2009), in order to strike a comprehensive deal by COP-15/CMP-5 in Copenhagen.

Regarding commitments, the decision calls for developed country parties' mitigation commitments 'including quantified emission limitation and reduction objectives' while 'ensuring the comparability of efforts among them' – a major setback to the drive of the USA and others to replace Kyoto-style binding absolute targets with voluntary pledges. The decision also calls for 'nationally appropriate mitigation actions by developing country Parties in the context of sustainable development'. Due to resistance by the USA, Canada, Japan and Russia, an indicative range of mitigation commitments by industrialised countries that is considered necessary by the IPCC to stay below two degrees (25–40 per cent compared to 1990 levels) was not included in the text, but was relegated to a reference in a footnote.

One major step forward lies in the language used, because it moves away from the hitherto sacrosanct division between 'Annex I' and 'non-Annex I' countries. Using the terms 'developed country parties' and 'developing country parties' instead, this decision opens the gate for new combinations of commitments suitable for the different stages of economic development, emissions and mitigation potential in which developing countries find themselves. Finding appropriate indicators and ways for differentiation between developing countries will be one of the huge tasks of the next two years ahead.[5]

The Bali Conference also saw development in financing and technology transfer – hitherto always treated as side issues. This has led to widespread dissatisfaction on the part of non-Annex I countries, which increasingly demand more substantial offers from Annex I countries. Very important, the Adaptation Fund was made operational and the Kyoto Protocol is thus finally ready to be fully implemented – two weeks before the start of its first commitment period.

The major breakthrough on technology and finance, however, was achieved in the Bali Action Plan. According to the decision, mitigation actions by developing country Parties must be 'supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner'. This in the end proved to be the 'make or break' formulation in the final hours of the conference. While the UNFCCC already commits industrialised countries to technology transfer and financial support of mitigation measures undertaken by developing countries (Articles 4.3 and 4.5), it has become more and more obvious that mitigation activities by developing countries on the scale required to combat dangerous climate change will require support from the North in an order of magnitude that is far beyond anything so far considered. Nevertheless, the diplomatic acknowledgement had so far been missing in the post-2012 process. Moving the words 'measurable, reportable and verifiable' away from developing countries' mitigation actions to the technological and financial support was a victory for India and China and testifies to the enhanced importance of the emerging economies in the climate negotiations. Developing countries thus have a clearly worded anchor, in line with the formulations already embodied in the UNFCCC (Articles 4.3 and 4.5), that any commitments on their part have to be matched by clearly identifiable and transparent support from industrialised countries.

The Bali Action Plan therefore, despite its rather timid language, represents a real achievement in real-world politics. Considering that the USA – the most powerful country moved from a position of climate denial a few years ago to participation in an international dialogue on tackling climate change is a positive step, even though the USA, Canada and Japan had underwritten the acknowledgement in principle of multilateral approaches already at the G8 Summit in Heiligendamm. The creation of US climate policy remains one of the biggest mysteries of our time, which future historians will find difficult to comprehend. Al Gore urged the delegates, in his address to a packed plenary, to overlook the current obstructive tactics and instead anticipate where the US will be in two years' time due to national elections. With these words Gore provided the script to the drama that unfolded in the last frenzied hours of the conference. The US delegation was collectively forced to shift its position by delegates and all other participants and had to withdraw its reservations to the final agreement. The tension that had built up during the conference by the consistent obstruction was unleashed in a collective uproar and the USA 'got out of the way', as the delegate from Papua New Guinea had demanded earlier.

In contrast to many apprehensions before the conference, developing countries showed an unprecedented willingness to take up an active role in the fight against climate change. This testifies to the mature character of these countries and governments. Bali thus effectively annihilated the main excuse of the present US administration for not acting on climate change; namely that developing countries are unwilling to make a contribution. It also points to the great potential for cooperation with the European Union on the design of the post-2012 agreement. The EU for its part spent the

4 B Wittneben, W Sterk, H E Ott, B Brouns 'The Montreal Climate Summit: starting the Kyoto business and preparing for post-2012: the Kyoto Protocol's First Meeting of the Parties (MOP 1) and COP 11 of the UNFCCC' Journal for European Environmental & Planning Law (JEEPL) (2006)2 90–100.

5 See eg H E Ott, H Winkler, B Brouns, S Kartha, M J Mace, S Huq, Y Kameyama, A P Sari, J Pan, Y Sokona, P M Bhandari, A Kassenberg, E L La Rovere and A Rahman (2004) *South-North Dialogue on Equity in the Greenhouse. A proposal for an adequate and equitable global climate agreement;* GTZ Climate Protection Programme, May 2004, (http://www.wupperinst.org/uploads/tx_wiprojekt/1085_proposal.pdf); see also www.fiacc.net.

first week of the conference trying to act as a bridge leading the USA and their allies back into the fold, but in the second week reinforced its position and strongly fought back against attempts to water down the draft decisions. While weak on substance, Bali thus opened a vista on what shape a post-2012 deal could take over the next two years.

The Bali Action Plan thus paves the way for the negotiations towards a post-2012 agreement in 2009 in Copenhagen. However, the way is not a highway but rather a bumpy road filled with potholes and obstacles. There is, first, the complexity and sheer workload. The delegations will have to manage negotiations in six different arenas: the COP and the CMP of Convention and Protocol, the two subsidiary bodies of both treaties and the Ad-hoc Working Groups under the Convention and the Protocol. The AWG-Long Term initiated by the Bali Action Plan has tentatively scheduled four sessions, with the first session taking place not later than April 2008. The Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-Article 3.9) according to its work plan adopted in Bali will also hold four meetings in 2008 and 2009 respectively. In addition, there will be several meetings of the 'major economies' initiative by the US Government and a flurry of other formal and informal meetings on the same issues. If the utter exhaustion even of several 'veterans' of the diplomatic circus during the final hours of the Bali Conference is not to become a common sight in these negotiations, the participants will have to find ways of accommodating their capacities to these demands.

They will also have to find ways to deal with the enormous workload ahead, from negotiating deepened commitments for those countries that are already bound under the Kyoto Protocol, new commitments for developing countries (including methods for differentiation), integrating the USA with new commitments, adaptation, deforestation, vastly improved financial mechanisms and technology cooperation, to improving the market mechanisms that are still in the first stages of their existence. All these processes and different threads have to be kept under surveillance, kept apart, streamlined where necessary and – in the end – have to be combined into one gigantic package deal. Tying all the pieces together has already proved difficult enough in Bali.

Secondly, the issues at hand involve decisions with far-reaching political implications. For example, the necessary differentiation of commitments for developing countries implies a rethinking of the relations within the G77/China. Differentiation is not unthinkable and it has happened already in other contexts such as the trade negotiations, where interests are also extremely diverse among the group. But it will require major political will and courage. The language in the Bali Action Plan indicates that the G77/China has realised the challenge.

Thirdly, the final outcome of the negotiations up to Copenhagen will depend crucially on a single national political process – that of the USA. Despite the breath-taking developments at the level of dozens of states, hundreds of cities and millions of citizens, it is the federal level of the US Government where the most important decisions are being taken. A new president of whatever political colour may change the basic stance on climate policy. But close observers of the political process in the USA are warning that the USA after 2009 will still be a long way from where the rest of the world is already. Persuading Congress to ratify a climate agreement may prove to be impossible for the next president. One possible route out of this deadlock could be to substitute the ratification of the international agreement by, first, the establishment of a strong national climate programme in the USA, including ambitious reduction targets, and as a second step a unilateral declaration that the USA considers itself bound to these targets by international law.[6] There is a small chance that such a binding international declaration under international law in lieu of ratifying the international agreement could satisfy the rest of the world. This would, however, ask for quite a degree of goodwill on the part of the industrialised partners and especially the emerging economies.

Fourth, Bali saw the emergence of the social justice movement on climate change. The climate negotiations have never been pure environmental diplomacy because economic considerations have always loomed large at every conference. Bali, however, saw many new faces in the halls and corridors: social justice activists at the national as well as the international level have discovered in recent years that climate change is fundamentally altering the way they have been working. This is true for the impacts of climate change, which threaten to undermine social progress especially in the South. But it is also true of the response measures to climate change; for example, in the search for alternatives to fossil fuels the demand for agrofuels is threatening large forest areas in the Amazon and the Pacific, affecting local eco-systems as well as subsistence economies living on those forests. Furthermore, the sheer volume of the financial resources required – in the range of hundreds of billions of dollars per year – will dwarf the traditional flows in official development aid. Therefore, organisations ranging from Oxfam to the Third World Network and Focus on the Global South are now taking the issue of climate change seriously. As a result of their participation, the content and tone of the negotiations are beginning to change and their support has led to greatly increased confidence on part of the larger developing countries.

This is, fifth, the biggest task at hand: forging an alliance between North and South – with the emerging economies on mitigation and with the poorer countries on adaptation.[7] It has become clear that the threat of a destabilisation of the climate system can only be solved by a truly global effort. Around 50 per cent of emissions at the moment stem from Annex I countries with the

6 See H E Ott 'Climate Policy post-2012 – A Roadmap: The Global Governance of Climate Change' Discussion paper for the Tällberg Foundation, Stockholm (www.wupperinst.org/uploads/tx_wibeitrag/Ott_Taellberg_Post-2012.pdf).

7 Ott (n 6).

remaining 50 per cent from non-Annex I countries, and this is rising rapidly. Each side thus has the potential to lead the world into climate chaos if it continues a course of business-as-usual – some new form of 'mutually assured destruction'. However, there is a difference: in the cold war, both sides had to refrain from doing something, ie from pushing the button. Averting climate change, on the other hand, requires something positive; it demands activity and cooperation.

The Bali coalition between developing countries and the EU that allowed for passage of the Bali Action Plan provides some reason for optimism that it will be possible to strike an adequate post-2012 agreement. Nevertheless, while the emerging economies have made a first move and gave clear signals that they are willing to bear their fair share, the EU will have significantly to step up its efforts not only in the area of mitigation but also with regard to technology cooperation and finance. Substantial contributions from the South will require equally substantial financial and non-financial support from the North, a truth only a few negotiators are willing to acknowledge, at least publicly. Building a 'green alliance' with the South will require a significant change in attitude. But the rewards could also be substantial – for Europe, for South-North relations and for the world.

Linking environmental protection, health, and human rights in the European Union: an argument in favour of environmental justice policy

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Introduction[1]

Over the past few decades the conceptual and legal integration of environmental protection, the protection of human health and human rights has given rise to new forms of social activism, new constitutional protections in many countries, at least one major regional treaty and new human rights norms at the international level. The origins of the linkages between environment, health, and human rights derive from four streams of thought and research:

1) research showing discrimination in the distribution of environmental risks and benefits and related health impacts, which has fostered in several countries the emergence of 'environmental justice' initiatives on behalf of marginalised social groups;
2) research showing that developed countries export environmental risks to developing countries, resulting in increased attention to this problem by UN agencies;
3) the movement to establish the right to life, health, and an environment adequate for well-being as a universal human right, resulting in the provision of such a right in the constitutions of 53 nations as of 2004 and
4) arguments claiming that environmental protection and human health are enhanced when citizens are armed with civil rights that ensure that they have access to information, participation, and justice in environmental matters, resulting in the Aarhus Convention in the UN Economic Commission for Europe region, and legal directives that implement the Aarhus Convention in the European Union.

Of these four streams linking the environment, health, and human rights, the movement for environmental justice has come late to the European Union. With the EU's growing leadership in establishing a framework for environmental protection and given the recent Eastern enlargements, the time to confront the problem of environmental *in*justice in Europe has arrived.

The conjuncture of environment, health, and human rights' discourses can be described as a discourse about justice – substantive justice (the rights to life, health, and environment), procedural justice (the rights to information, participation, and access to justice), and distributive justice (the right not be discriminated against on the basis of group characteristics). This article emphasises the latter – the issue of distributive justice and environmental discrimination, which is, perhaps confusingly, commonly referred to as 'environmental justice'.[2] We will argue that while a basic framework for addressing problems of discrimination in environmental matters is emerging at the international level it is, first, far from adequate; secondly, not yet fully coherent and harmonised with other policy processes and thirdly, not widely enough known to ensure its effective implementation. At the European level the issue has hardly been engaged at all, but as we will show, Europe faces severe problems of discrimination in areas of relevance for environmental justice, especially but not exclusively in the new EU Member States.

1 The authors would like to thank Vito Buonsante for his valuable research assistance for this article.

2 As will be evident from the discussion that follows, the authors of this paper apply a definition of 'environmental justice' going beyond that suggested by the Aarhus Convention as well as beyond that of the draft EU directive aiming to bring the justice elements of the Aarhus Convention into the legal order.

This paper will also show that although a basis exists to extend anti-discrimination law (a particularly elaborated area of EU law in the field of human rights) to environmental areas, to date, the EU has confined its action on the front of human rights law and environmental regulation to the matter of securing standing for individuals and civil society organisations in environmental proceedings. In light of the remarkable growth of EU commitments in the field of human rights, this paper will argue that there is a basis for further steps by the EU institutions in these areas.

The ambitions of this paper are broadly as follows.

- To note that evidence indicates that, as elsewhere, environmental harms in Europe are very frequently clustered in poor and minority or other marginalised communities.
- To provide a summary of international developments in human rights law and related law indicating an emerging basis for EU-level rules and/or policy in the field of combating disparate environmental harms of the types understood within the framework 'environmental racism/environmental justice'.
- To describe a vacuum of law and policy in Europe in matters related to the problem of race-based or class-based environmental harms and recommendations for remedying this.

These elements are brought in order to note the need for a comprehensive treatment of environmental racism/environmental justice by European Union institutions, such that Europe can begin seriously to tackle problems of race- and class-based systemic exclusion issues as they are expressed in matters relating to the environment.

Environmental justice: a brief history and a definition

The environmental justice movement began in the United States in the late 1980s with research showing racial discrimination in the citing of hazardous waste facilities, with African American communities shown to be far more likely to be located near such facilities.[3] In many cases, the citing of waste facilities simply followed the path of least resistance – poor and marginalised communities lack the organisational capacity to influence decision making. In other cases, however, discrimination has taken a more direct form. In the United States, on the basis of the popularisation of the concept of environmental justice, some communities in the past two decades have moved to challenge the placement of hazardous industrial plants and waste sites in minority and other marginalised communities.[4] In response, the federal government developed an environmental justice policy based upon an Executive Order signed by President Clinton in 1994.[5] Secondly, the Executive Order led to the development of a broad Environmental Protection Agency (EPA) programme on environmental justice and to the development of a Draft Environmental Justice Strategy.[6] Last but not least, the Federal Government allocated money for addressing cases and the impact of industrial hazards (the Superfund). Although environmental injustices are far from being eliminated in the United States, the basic principle that governmental authorities must take positive steps in order to prevent deliberate or inadvertent unequal distribution of environmental risks and benefits is now widely accepted in the United States.

Through the work of organisations such as Friends of the Earth and the Black Environmental Network, the movement for environmental justice took root in the United Kingdom in the 1990s.[7] Julian Agyeman, a leading researcher in the field in the UK, states that '[t]here are currently at least three different constructions of environmental injustice in the UK: 1) access to the countryside among those from ethnic minority groups; 2) Friends of the Earth England, Wales and Northern Ireland's 'Pollution Injustice' campaign; and 3) Friends of the Earth Scotland's, 'Campaign for Environmental Justice'.[8]

3 Commission for Racial Justice (United Church of Christ) 'Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites' 1987.

4 For example, see B Hill 'Chester, Pennsylvania – Was It a Classic Example of Environmental Injustice?' 23 Vermont Law Review (1999); J White 'Environmental Justice: Is Disparate Impact Enough?' 50 Mercer Law Review 1999; V P Mahoney 'Environmental Justice: From Partial Victories to Complete Solutions' 21 Cardozo Law Review 1999; R J Lazarus 'The Meaning and Promotion of Environmental Justice' 5 Maryland Journal of Contemporary Legal Issues 1994; R D Bullard 'Levelling the Playing Field Through Environmental Justice' 23 Vermont Law Review 1999.

5 Executive Order 12898 on Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations, issued by President Clinton in 1994, enjoins each federal agency to: 'Make achieving environmental justice a part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations'. The order establishes a federal administrative framework for coordinating and overseeing the development of environmental justice strategies and regulations in all federal agencies. The agencies are required to develop databases and research programs capable of identifying trends in environmental discrimination and to work in cooperation with minority and low-income groups in designing the research strategies. The order also contains special provisions ensuring appropriate public participation and access to information associated with actions undertaken by the government concerning environmental justice, taking account of non-English speaking populations and the need to communicate with the public in 'concise, understandable, and readily accessible' language. Unfortunately, the Clinton era order has not led to enforceable laws and regulations that would ensure the environmental rights of poor and minority groups in the US.

6 The United States' Environmental Protection Agency defines Environmental Justice as the: 'Fair treatment for people of all races, cultures, and incomes, regarding the development of environmental laws, regulations, and policies' (EPA 2002). The draft strategy of environmental justice was developed in 1996 (EPA 1996).

7 J Agyeman and B Evans (2004) 'Just Sustainability: The Emerging Discourse of Environmental Justice in Britain?' The Geographical Journal 170 (2): 155–164.

8 J Agyeman, R Bullard and B Evans (2002) 'Exploring the nexus: bringing together sustainability, environmental justice and equity'. *Space and Polity* 1 (6): 77–90.

The official position of the former Eastern-block countries was that there were no poor people under communism, and conditions and opportunities were absolutely equal for all. However, significant inequalities did exist, and have been exacerbated with the transition to democracy and market economies.[9] The transition of the CEE economies has led to further impoverishment of groups and individuals with low adaptability to the new conditions.[10] People lacking education and marketable skills are those most hurt by the transformation (UNDP 2002; WB 2003[11]). Since 2003 the Coalition for Environmental Justice spearheaded by the Central European University, Center for Environmental Policy and Law has brought attention to major challenges to environmental justice in Central and Eastern Europe, focusing especially on the extreme environmental injustices suffered by the Roma (gypsy)[12] communities of the region.[13]

While there is no universally agreed upon definition of environmental justice, all definitions converge upon the concepts of discrimination and distribution of harms/risks and benefits.[14] For the purposes of this article we will use the definition of environmental injustice and environmental justice developed in a workshop on environmental justice held at the Central European University in 2003 that dealt specifically with environmental injustices in Europe:[15]

- An environmental injustice exists when members of disadvantaged, ethnic, minority or other groups suffer disproportionately at the local, regional (sub-national), or national levels from environmental risks or hazards, and/or suffer disproportionately from violations of fundamental human rights as a result of environmental factors, and/or are denied access to environmental investments, benefits, and/or natural resources, and/or are denied access to information and/or participation in decision-making, and/or access to justice in environment-related matters.
- A condition of environmental justice exists when environmental risks and hazards and investments and benefits are equally distributed without direct or indirect discrimination at all jurisdictional levels; and when access to environmental investments, benefits, and natural resources are equally distributed; and when access to information, participation in decision-making, and access to justice in environmental matters are enjoyed by all.

These definitions bring together issues of equitable distribution of risks and benefits, substantive rights regarding the enjoyment of environmental quality and resources, and procedural rights regarding access to information, participation, and justice in environment related matters. Neither current environmental policies nor human rights policies/rules in the European Union are adequate to address the special set of problems that environmental injustices entail. In the next section, some of these problems are outlined in brief case summaries.

Factual profiles of environmental injustice in Europe

The problem of environmental injustice in Europe is becoming evident as increasingly more research reveals discrimination in the distribution of environmental benefits and risks. Research supported by the Central European University in Budapest has found that in Central and Eastern Europe the main patterns of environmental injustice are exposure to hazardous waste and chemicals, vulnerability to floods, limitations on access to potable water, and waste management practice.[16] The situation of Roma (gypsies) has consistently been found to be most perilous, endangering the health and even lives of entire communities throughout the region.

The prevailing patterns of environmental injustice are toxic exposure from environmental liabilities, lack of basic environmental services, and disease, risk of death, and homelessness related to flood vulnerability.[17] For example, as noted in a recent submission under the new United Nations Human Rights Council Universal Periodic Review mechanism, Romani communities in a number of places in Romania face severe environmental threats as a result, for example, of forced placement near sewage and waste-water treatment plants.[18] Exposure to environmental harms is a persistent threat to

9 Steger et al 'Making the Case for Environmental Justice in Central and Eastern Europe' (2007) Health and Environment Alliance and the Center for Environmental Policy and Law, Budapest. R Filèák 'Environmental justice in the Slovak Republic: the case of Roma ethnic minority' (2007) dissertation, Department of Environmental Sciences and Policy, Central European University Budapest.

10 World Bank 2000.

11 UNDP 2002 The Roma in Central and Eastern Europe – avoiding the dependency trap, a regional human development report. Bratislava: United Nations Development Programme. World Bank 2003. Roma in expanding Europe – breaking the poverty gap. Washington DC: World Bank.

12 Because of the negative connotations of 'gypsy' (or *Tsigan*), we use Rom (plural Roma, adjective Romani), the term promoted by most Romani organisations and Roma in the region.

13 See www.cepl.ceu.hu for more information. Also see Steger, et al (2007) 'Making the Case for Environmental Justice in Central and Eastern Europe' Health and Environment Alliance and the Center for Environmental Policy and Law, Budapest, Hungary, and the special issue of *Local Governance Brief* (Summer 2004) devoted to environmental justice in Central and Eastern Europe, available online on the website of the Open Society Institute at http://www.soros.org/resources/articles_publications/publications/lgi_20040805.

14 For example, see the US Environmental Protection Agency's definition (www.epa.gov/compliance/environmentaljustice/), or that of the United Church of Christ Commission for Racial Justice (http://ecojustice.net/document/principles.htm).

15 'Improving Environmental Justice in Central and Eastern Europe' 6–7 December 2003, Budapest. The workshop was hosted by the Central European University's Center for Environmental Policy and Law and included academics, activists, and attorneys from the Central and Eastern European Region as well as from Western Europe. The project was supported by grants from the European Commission's Phare Programme and the Open Society Institute.

16 Steger, Filèák (n 9).

17 The following case studies are taken from Steger et al (n 9) unless otherwise noted.

18 See Centre on Housing Rights and Evictions (COHRE) and Romani CRISS 'Submission to the Office of the High Commissioner for Human Rights, Romania, to assist in preparation of documents for the first cycle of the Universal Periodic Review' Geneva, Bucharest, February 2008.

Romani communities throughout Europe particularly, but not only, in southeastern Europe. Extreme risks of this sort are not uncommon in Romani settlements, although the full extent of the problem across the region is unknown because no large-scale studies have been commissioned to investigate it.

The *Rudnany-Pätoracke* Roma settlement in Eastern Slovakia has been identified as one of Slovakia's 10 most problematic 'hot spots'. As a result of past mining activity and other industry, the whole territory of the settlement is contaminated by toxic emissions, waste dumps and abandoned mine tailings. The toxic mine tailings contain traces of mercury, which can cause mental illness, birth defects, kidney failure and other diseases. The abandoned mines are gradually collecting water from underground and surface sources, and in a few years they will start to release highly toxic effluents into the environment. The settlement is surrounded by a giant hill of debris of loose rock from the mine. White Slovaks were formerly evacuated from the site as the ground began to give way and homes began to sink into the ground. Other Roma in the region live on a derelict factory site (*Rudnany-Zabijanec*) where mining waste surrounds the community and the ground is contaminated by industrial waste. Children playing in their backyards are exposed to these toxins which have long-term effects on health, including a risk of neurological damage.[19]

One of the larger European Roma settlements is *Sredorek*, an exposed settlement with approximately 3500 inhabitants on the edge of the town of Kumanovo, a multi-ethnic[20] municipality in northern Macedonia. It is a poor settlement characterised by high unemployment rates (between 90 and 100 per cent),[21] low access to education, and poor health status with no water or sewage system prior to 1998. There is new generation of Roma who cannot be a part of some employment programmes or receive state-owned apartments, so they were forced to buy land and make houses near the old settlement.[22] However, the old settlement is located on an island between a split river (the Kumanovo). Part of the 'down river syndrome', it is heavily polluted and floods in most years. In January 2003, flooding took the homes of 406 families or around 3000 Roma and forced them to live in collective centres.[23] Similar flooding occurred again in 2005.

Some of the most dramatic cases of health problems caused by environmental discrimination against the Roma have occurred in Kosovo, where groups of Romani have come under the ostensible protection of the United Nations authorities. In 2004 the WHO discovered that Romani residents in Kosovar camps for internally displaced persons (IDPs) located very near a toxic waste site have extremely harmful levels of lead in their blood. The US Center for Disease Control recommends that special attention be given to blood lead levels (BLL) higher than 10 mg/dl. WHO testing of 18 Romani persons indicates that all have BLLs above 10 mg/dl, six of whom tested between 45 and 64.99 mg/dl BLL and six of whom tested above 65 mg/dl BLL. The BLLs are reportedly highest among young children, with 12 children between the ages of two and three years of age old experiencing such high BLLs that they require anti-convulsive medication. Similar cases of Romani communities being forced to live on toxic waste sites have been documented in Germany, Italy and elsewhere.

A recent UNDP survey of Slovakia illustrates the scale of the differences in access to water between Roma and non-Roma in the country. While the great majority of households were supplied by the public water main (73.2 per cent), water sources for the Roma were more diverse. Nearly a quarter of them draw water from a covered well or bore-hole (compared to a tenth of majority households) and 12.8 per cent use a public water source in the local community. 3.9 per cent of Roma households obtained water in a completely non-standard way (water from a spring or stream).[24]

Percentage of Roma populations living in households *without* access running water and sanitary facilities

	Bulgaria	Czech Republic	Hungary	Romania	Slovakia
Running water	45	4	34	65	32
Toilet in the dwelling	75	15	46	65	44
Sewage treatment	51	6	63	62	46
Bathroom in the dwelling	70	12	41	66	37

Source: UNDP/ILO Regional Survey 2002[25]

19 Filèák (n 9).

20 Besides Roma there are Macedonians and Albanians living in this place.

21 The official unemployment rate in Macedonia registered in 2005 was 37.2 per cent (see http://www.worldbank.org.mk/ for more details).

22 See M Koinova (2000). (CEDIME-SE). Minorities in southeast Europe – Roma of Macedonia. Center for Documentation and Information on Minorities in Europe – Southeast Europe. Or Dzeno Association: Flooding of Roma Settlements in Macedonia from 10 August 2005. Available at: http://www.dzeno.cz/?c_id=8355.

23 World Heath Organization 2005 'Rapid Health Assessment of Flooding in The former Yugoslav Republic of Macedonia' Final Report of Open Society Institute Macedonia: Annual Report 2003.

Or 'Internal Replacement Monitoring Centre: Floods displace some 4,000 Roma' (January 2003). Available at: http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/7ED359A43AC42657802570B8005AAAC6?OpenDocument.

24 J Filadelfiová, D Gerbery and D kobla (2007) 'Report on the living conditions of Roma in Slovakia' United Nations Development Programme: Regional Bureau for Europe and the Commonwealth of Independent States.

25 UNDP 2002 'The Roma in Central and Eastern Europe – avoiding the dependency trap, a regional human development report' Bratislava: United Nations Development Programme.

Among European Union countries outside of the Central and Eastern European area, the United Kingdom has received the most intensive research scrutiny, and also has the most developed environmental justice movement. A study in the UK comparing large factory sites with average household incomes revealed that 662 of the largest factories are located in areas where the average household income is less than £15,000.[26] Only five of the UK's largest factories are located in areas where the average household income is £30,000 or more. The communities with the lowest average incomes had the highest numbers of factories. The non-governmental organisation Friends of the Earth emphasised that whether or not this condition was the result of discrimination, the impact is clear. [27]

The United Kingdom Department of Health funded (in 2004) a study on the health status of gypsies and travellers.[28] The study has discovered that these groups have significantly greater health needs than other ethnic minority communities and that there is an inverse relationship between health needs and related services.[29] The majority of existing gypsy and traveller sites in the UK are located in areas that are fully unsuitable for housing and raising families. Some sites can be found next door to waste sewerage plants whilst others may be situated alongside busy dual carriageways.

International and Pan-European context for environmental justice

General frameworks

The international context for realising fairness in the distribution of environmental benefits and risks consists of the bodies of international human rights law, environmental law and policy, and the initiatives and principles that tie them together. While the rights to life and health have been asserted earlier in a number of international declarations, conventions and treaties,[30] the right to a healthy environment was first recognised by the United Nations Conference on the Human Environment in 1972, which issued the Stockholm Declaration in which Principle 1 asserts the right to a healthy environment.[31] The Brundtland Commission report, 'Our Common Future', proposed a set of 'Legal Principles for Environmental Protection and Sustainable Development', thereby setting the stage for much of the ensuing debate around the law of sustainable development. The first proposed principle asserts that: 'All human beings have the fundamental right to an environment adequate for their health and well-being'. Subsequent to the Brundtland Report, the United Nations Conference on Environment and Development in Rio de Janeiro (1992) made the link between human rights and environmental protection and provided the necessary forum for the adoption of Agenda 21 and the Rio Declaration on Environment and Development. Principle1 of the Rio Declaration asserts that: 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'.[32]

The UN Committee on Economic, Social and Cultural Rights (CESCR) recognised the relationship between the environment and the right to the highest attainable standards of physical and mental health, established under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In 2000, commenting on Article 12 matters in its General Comment 14 on 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights', the Committee stated: 'The right to health … extends to the underlying determinants of health, such as … a healthy environment'.[33] Further, the UN Committee on the Elimination of Discrimination against Women (CEDAW) has directly acknowledged the importance of environmental conditions including those associated with industrial accidents, in relationship to women's health.[34] The UN Committee on the Rights of the Child also acknowledged this in its 'Concluding Observations on Jordan,' pointing out the need to: '… Prevent and combat the damaging effects of environmental pollution and contamination of water supplies on children'. [35]

According to Agenda 21, one of the principles of sustainable development is combating poverty, while the long-term objective of enabling all people to achieve sustainable livelihoods should be based on an integrating factor that allows policies to address issues of development, sustainable resource management and poverty eradication simultaneously. The goal is to improve the social, economic and environmental quality of human

26 Friends of the Earth 2000: 'Pollution Injustice' http:www.foe.co.uk/pollution-injustice/.

27 J Agyeman (2002) 'Constructing Environmental (In)justice: Transatlantic Tales' *Environmental Politics*. 1:3 31–53.

28 According to the Online guide to Human Rights Law in England and Wales Gypsy is a racial definition – for a people originating in northwest India who left in the first millennium AD. In the UK the term 'travellers' refers not only to ethnic Roma, but also to other ethnic and social groups. There are in the UK Irish travellers, Scottish travellers (Nachins), Welsh gypsies (Kale) and English gypsies (Romanichals) among others. There are also travelling showpeople (fairground travellers), boat dwellers (bargees) and circus travellers. Then there are new travellers or new age travellers, often defined as people who have made a conscious decision to adopt an alternative lifestyle, seeking a perceived greater community spirit. Available at http://www.yourrights.org.uk/ (Consulted 12 July 2006).

29 P Aspinall (2004) Health status, behaviour, wider determinants of health, and use of services. University of Kent: Centre for Health Services Studies.

30 The Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social, and Cultural Rights (adopted in 1966); the World Health Organization's (WHO) Constitution's Preamble (adopted in 1945); the International Labour Organization's (ILO) Annex to its Constitution (adopted 1944).

31 Declaration of the United Nations Conference on the Human Environment, Stockholm 16 June 1972, 11 *Int'l Leg. Mat.* 1416 (1972).

32 Declaration of the United Nations Conference on Environment and Development UN Doc A/CONF.151/26 (vol. I); 31 ILM 874 (1992).

33 UN CESCR, General Comment 14 UN Doc E/C 12/2000/4 (2000).

34 UN CEDAW Concluding Observations on Romania UN Doc CEDAW/C/2000/II/Add 7 at para 38 (2000).

35 UN CRC. Concluding Observations on Jordan, UN Doc CRC/C/15/Add 125 at para 50 (2000).

settlements and the living and working environments of all people, in particular the urban and rural poor, through providing adequate shelter for all, and integrated provision of environmental infrastructure: water, sanitation, drainage and solid-waste management.

Certainly, the most important global initiative to combat the congeries of ills that afflict the world's poorest people is the effort to implement the Millennium Development Goals (MDGs). The MDGs represent a de facto international consensus in principle that poverty eradication and environmental sustainability are mutually dependent upon each other. From an environmental justice perspective, Goal 1 (Eradicate extreme poverty and hunger) and Goal 7 (Ensure environmental sustainability) are of particular importance. While Goal 1 calls for a 50 per cent decrease in the proportion of people living on less than one dollar a day and those who suffer from hunger, Goal 7 promotes the integration of the principles of sustainable development into country policies and programmes; a reversal in the loss of environmental resources; a reduction (by half) in the proportion of people without sustainable access to safe drinking water; and significant improvement in the lives of at least 100 million slum dwellers by 2020. Unfortunately, environmental protection has not been well integrated into projects that seek to achieve Goal 1, and therefore opportunities to alleviate the poor of disproportionate environmental burdens are being lost.[36] In part, surely, this is due to the fact that the international community has not fully endorsed an environmental justice agenda. As we will argue below, it need but recapture valuable work already done within the United Nations system and multiple stakeholders who have crafted a solid set of draft principles that encompass the range of environmental rights, including those pertaining to distributive justice.

The United Nations Commission on Human Rights, and its successor body, the UN Human Rights Council

The now-defunct United Nations Commission on Human Rights initiated work on the human rights/environment linkage in 1989, asking one of its members, Fatma Ksentini, to review the methodological means for studying the environment and human rights linkage.[37] In 1990, the UN General Assembly addressed the issue of environmental rights, and recognised the work begun in the Commission and its sub-bodies. General Assembly Resolution 45/94 declared that 'all individuals are entitled to live in an environment adequate for their health and well-being', and formally asked the Commission, through the Sub-Commission on Prevention of Discrimination and Protection of Minorities, to develop the environment-human rights linkage in its work. Ms Ksentini was appointed Special Rapporteur on Human Rights and the Environment for the Sub-Commission in the same year, and the following year the Commission adopted a resolution on human rights and the environment in which it welcomed the initiative of the Sub-Commission and formally endorsed the importance of the human rights and environment nexus for its own work. In 1994 the Special Rapporteur submitted her Final Report.[38]

The Ksentini Report legitimised the human rights and environment agenda that environmental and human rights non-governmental organisations such as the Friends of the Earth, the Sierra Club Legal Defense Fund,[39] and the Association of Humanitarian Lawyers, had been promoting since the early 1980s. It found widespread violation of fundamental human rights as a result of environmental degradation, and also established that some environmental harm could be traced to the violation of human rights. Fundamental human rights found to be affected by environmental degradation included the right to self-determination and sovereignty over natural resources, cultural rights, and the rights to life, health, food, housing, information, participation, safe and healthy working conditions, and association. Importantly, the report also establishes the link between environmental rights and the right to non-discrimination.

Unfortunately, the principle of non-discrimination in the context of environmental risk is not fully developed in the report, and has subsequently suffered some degree of marginalisation in debates on human rights and the environment at the international level. The Ksentini Report stresses the fact that the fundamental human rights of the poor and indigenous peoples are disproportionately violated as a result of environmental factors, noting especially that environmental rights are closely linked with the right to development, and that poor citizens of developing countries often suffer simultaneous violations of their rights to development, environmental quality, and fundamental human rights. The Report also identifies the special vulnerability of other groups such as women, children, the disabled and environmental refugees to environmental risks. The Report does not deal explicitly with the problem of racial or ethnic discrimination, and it does not fully extend the concept of environmental rights to cover non-discrimination in the distribution of environmental investments and improvements. Nor does the report directly address the human rights' problems associated with environmental risk in the developed northern countries, with the exception of the violation of the rights of indigenous peoples.

Prior to the submission of the Ksentini Report, an expert group meeting on behalf of Ms Ksentini drafted a set of principles on human rights and the environment in May 1994, which were subsequently annexed to the report itself. The 'Draft Principles on Human Rights and the Environment'[40] declare a broad range of human rights

36 The United Nations Development Programme has launched the Poverty and Environment Initiative (PEI) to promote closer integration of environment and poverty reduction. See the PEI website for details: http://www.undp.org/pei/aboutpep.html.

37 E/CN.4/Sub.2/1989/58.

38 UN Doe E/CN.4/Sub.2/1994/9 (Hereafter Ksentini Report)

39 Re-named Earthjustice.

40 Appended to the Ksentini Report (n 38).

relating to the environment, found by the expert group to be implicitly contained in existing human rights law, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Vienna Declaration and Programme of Action of the World Conference of Human Rights. The principles have not yet been formally endorsed by the UNCHR and have not led to changes in existing international human rights laws; they serve as a solid foundation upon which environmental rights can be elaborated at international, regional, and national levels.

The four principles in Part I provide the foundation for the subsequent 22 rights identified in the Draft Principles. Principle 1 establishes the interdependence and indivisibility of human rights, an ecologically sound environment, sustainable development and peace while Principle 2 establishes the right of all persons 'to a secure, healthy and ecologically sound environment'.[41] Principle 3 then establishes the foundation of a framework for environmental justice:

- all persons shall be free from any form of discrimination in regard to actions and decisions that affect the environment
- this principle can reasonably be interpreted to cover both directly injurious environmental discrimination (exposure to disproportionate risk) and indirectly injurious discrimination (disproportionate denial of environmental goods, such as infrastructure investments).

Other principles established in Part II of the Draft Declaration that are directly relevant to cases of environmental injustice include 'the right to adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment' (Principle 10); protection from eviction on the basis of decisions affecting the environment (Principle 11); the right to restitution, compensation and/or new housing if evicted (Principle 11); the right to equitably benefit from conservation and other ecological goods (Principle 13); and the rights of indigenous peoples to control and protect their lands and resources (Principle 14). Part III of the Draft Declaration reiterates the Rio Principles regarding access to information and access to participation in planning and decision-making in environmental matters (Principles 15 and 18). Principle 25 in Part V of the Declaration underscores the awareness of the especially difficult problem of environmental discrimination:

- in implementing the rights and duties of this Declaration, special attention shall be given to vulnerable persons and groups.

Given the limited list of vulnerable groups identified in the Ksentini Report itself, further elaboration of this principle is necessary. Indeed, the Special Rapporteur specifically expressed the hope that the Draft Principles would serve as a foundation for the development of 'a set of norms consolidating the right to a satisfactory environment'[42] within the United Nations system. To date, that hope has not been entirely fulfilled.

Developments in the past several years are, nevertheless, encouraging.[43] After submitting her final report, Ms Ksentini was appointed as Special Rapporteur on Toxic Waste by the Commission. Her task was to investigate the human rights implications of the illicit movement and dumping of toxic products and wastes. Finding a widespread global pattern of illegal dumping of wastes that primarily harms developing countries and has been only partially stayed by the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, her final report,[44] delivered in 2001, explicitly addresses the issue of discrimination.

Discrimination on grounds of race or social, ethnic, political or cultural affiliation is aggravated by 'environmental' discrimination, since the wastes are buried in developing countries and in zones inhabited by the needy, migrants, indigenous peoples or racial, religious, linguistic or other minorities. Moreover, these people are excluded from the decision-making and environmental monitoring processes; they are generally unable to afford medical care or to sue or seek any other form of administrative or legal remedy.[45]

The Special Rapporteur also noted at in at least one country case that came to her attention: 'Race is said to be one of the parameters from which the location of hazardous waste treatment facilities can be predicted'.[46] Given the paucity of systematic and reliable empirical research across Europe examining this issue, it cannot at this time be categorically stated that this is a widespread phenomenon in the EU. The problem here is the lack of research, for which adequate funds have not yet been made available by Member States or EU institutions.

In April of 2003 the UN Commission on Human Rights adopted Resolution 2003/71[47] on 'Human Rights and the Environment as Part of Sustainable Development', which lays out the range of issues included in the human rights and environment nexus. It cuts across issues of poverty alleviation, substantive and procedural environmental

41 Ksentini Report (n 38) + Corr 1 (13 September 1994).

42 Note at Section 261.

43 The watchdog and advocacy organisation Earthjustice provides ongoing monitoring of human rights and environment developments at international, regional, and national levels, and submits regular issue papers summarising its findings to the UNCHR. Reports are available on the Earthjustice website at http://www.earthjustice.org,

44 E/CN 4/2001/55 'Economic, Social and Cultural Rights: Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights' a Report submitted by the Special Rapporteur on Toxic Waste, Mrs Fatma-Zohra Ouhachi-Vesely.

45 ibid para 67.

46 Ibid para 68.

47 Resolution 2003/71 adopted by the 59th session of the UN Commission on Human Rights, Geneva 25 April 2003.

rights, good governance, and discrimination. It also refers to the importance of an explicitly distributive justice approach to environmental rights, stating that: '[In the development of environmental policy states should] take into account how environmental degradation may affect disadvantaged members of society, including individuals and groups of individuals who are victims of or subject to racism'.

While the statement itself is mild, suggestive, and not comprehensive, its inclusion in the resolution is indicative of the importance the Commission lays on distributive justice issues related to the environment and human rights.

In response to the Special Rapporteur's report discussed above, the Commission issued Resolution 2004/17 on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights. Strongly urging Member States and international bodies to take action on this issue, the resolution also extends the Special Rapporteur's mandate for an additional three years.

The Commission also issued a report on Human Rights and the Environment as Part of Sustainable Development during its 2004 session in which it summarised information provided by governments, international bodies, and non-governmental organisations on the human rights and environment issue. The report itself is testimony to how slowly the principles of environmental rights are being adopted into the body of human rights laws and accepted norms. The report argues that environmental rights are implicit in several international human rights treaties.

Following extensive discussion on reform of the UN Charter-based human rights machinery, the Commission was abolished in 2006 and replaced in March of that year with the new Human Rights Council. It is still too early to know how the new body – which was both upgraded in status within the UN system and at the same time shorn of some its more independent powers – will act on matters related to human rights and the environment, or indeed how effective it will be generally.

One thing that is apparent is that under the weight of growing concern over issues such as climate change, environmental matters appear to be being mainstreamed throughout a number of mandates reporting to the new Council. Thus, while the mandate of the Special Rapporteur on toxic waste continues to exist, the December 2007 Human Rights Council resolution extending the mandate for UN Special Rapporteur on the right to adequate housing now explicitly for the first time includes a link to environmental matters.[48]

Other mandates to have taken up environmental matters include those on the right to health and the right to food. And this work is only set to expand; the 7th Human Rights Council, taking place in March 2008, was slated to consider proposals including a German and Spanish proposal to create a new mandate on the right to water and sanitation, a mechanism which will inevitably be called on to address linkages between human rights and the environment. In addition, the government of Maldives has tabled a motion addressing human rights and climate change.

Relevant case law

In addition to the UN Charter-based intergovernmental proceedings addressing explicitly the environment/human rights nexus, including the issues understood to fall in the environmental justice category, the interface between human settlements and the environment also in principle benefit from fundamental legal protections available under international human rights treaty law, as well as the law of regional human right protection instruments. The International Covenant on Economic, Social and Cultural Rights and the European Convention on Human Rights have established rights that have direct bearing on environmental justice issues, including the right to adequate housing, the right to family and home life, the right to the highest attainable standard of physical and mental health, the right to the peaceful enjoyment of one's possessions and the ban on racial segregation. For example, the International Covenant on Economic, Social and Cultural Rights General Comment on the Right to Adequate Housing states that: 'Housing should not be built on polluted sites nor in proximity to pollution sources that threaten the right to health of the inhabitants'.[49] Some of these rights have been invoked by claimants in environment related complaints that have reached the European Court of Human Rights, and although issues directly related to environmental justice have not yet been heard by the court, coupled with the ban on racial discrimination form a preliminary underpinning of the right to equity in the distribution of environmental goods and risks.

The case of *Lopez Ostra v Spain*[50] represented a significant turning point for environmental claims under the European Convention on Human Rights. *Lopez Ostra* was the first case in which the court found a breach of the Convention as a consequence of environmental harm and affirmed the right to a clean environment as an extension of the rights stated in Article 8 of the Convention. The applicant resided in a Spanish village

48 The chapeau of Resolution 6/27 on the 'Right to adequate housing as a component of the right to an adequate standard of living' includes, for example, the following: '3 *Expresses concern* at the prevalence of homelessness and inadequate housing, the growth of slums worldwide, forced evictions, the increase in challenges faced by migrants in relation to adequate housing, as well as of refugees in conflict and post-conflict situations, challenges to the full enjoyment of the right to adequate housing caused by the impact of climate change, natural disasters and pollution, insecurity of tenure, unequal rights of men and women to property and inheritance, as well as other violations of and impediments to the full realisation of the right to adequate housing' (included in the report of the 6th Human Rights Council, document A/HRC/6/L.11/Add.1, 19 December 2007).

49 General Comment 4 of 13 December 1991, United Nations, *Compilation*, HRI/GEN/1/Rev.3 63 para 5.

50 *Lopez Ostra v Spain*, judgment of 9 December 1994, ECHR 41 (1994) 436–515.

called Lorca and owned a house few metres away from a privately owned solid and liquid waste-treatment facility. The pollution released from the plant had proven to have adverse effects on her health. Notwithstanding numerous complaints, after a short time of inactivity, the plant restarted its activity. The citizens of Lorca were evacuated from the toxic area for only a short period of time by the municipality.

Ms Lopez Ostra then complained to the European Court of Human Rights, and petitioned the court that she had suffered a violation of her right to privacy and freedom from inhuman or degrading treatment (Articles 8 and 3 of the ECHR respectively). The applicant supported these allegations by establishing a nexus between adverse effects on her health and the unregulated operation of the plant. In reviewing the applicant's expert testimony, the court took into account the persistent nature of environmental pollution and interpreted the rules of procedure to include evidence of: 'Facts occurring after the application has been lodged and even after the decision on admissibility has been adopted'. In finding for the applicant, the court employed the fair balance test set forth in Article 8(2) and examined whether the local authorities struck a fair balance between the interest of the town's economic well-being and the applicant's effective enjoyment of her right to respect for her home and her private and family life. The court found that Spanish authorities had failed to enforce domestic law by enabling the plant to operate without a licence and without compliance with the appropriate national standards. This amounted to a breach of its affirmative duty to ensure the respect for home and private life under Article 8(1).

In *Guerra and Others v Italy*[51] a petition was submitted on behalf of forty applicants who lived in Manfredonia, 1 km away from an Enichem chemical factory. In 1988 the factory, was classified as 'high risk' according to the criteria set out in Presidential Decree No 175 of 18 May 1988 (DPR 175/88), which transposed into Italian law Directive 82/501/EEC of the Council of the European Communities (the Seveso Directive), on the major-accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population. The government did not dispute the asserted release by the factory of large quantities of inflammable gas, sulphur dioxide, nitric oxide, sodium, ammonia, metal hydrides, benzoic acid and above all, arsenic trioxide. Accidents due to malfunctioning had already occurred in the past, and 150 people were admitted to hospital with acute arsenic poisoning. In the case, the court found an Article 8 violation, but rejected a claim that the applicants Article 2 right to life had been violated. The application of Article 8 rather than Articles 2 or 3 may be advantageous insofar as cases of pollution and interference in people's lives of a lesser scale than those required by Articles 2 or 3.

It is not yet clear if Article 8 provides only protection against actual pollution or also hazard. In the case of *Asselbourg and Others v Luxembourg*,[52] the applicants complained of the polluting effects of producing steel from scrap rather than iron ore. In this case the court rejected the application but stated that:

> It is only in wholly exceptional circumstances that the risk of a future violation may nevertheless confer the status of 'victim' on an individual applicant, and only then if he or she produces reasonable and convincing evidence of the probability of the occurrence of a violation concerning him or her personally: mere suspicions or conjectures are not enough in that respect. In the instant case, the court considers that the mere mention of the pollution risks inherent in the production of steel from scrap iron is not enough to justify the applicants' assertion that they are the victims of a violation of the Convention. They must be able to assert, arguably and in a detailed manner, that for lack of adequate precautions taken by the authorities the degree of probability of the occurrence of damage is such that it can be considered to constitute a violation, on condition that the consequences of the act complained of are not too remote.

The feature of the Convention as a 'living instrument' can be found in the creative interpretation of the court of Article 10 of the ECHR[53] as including the right for environmental information, considered of great importance for the purposes of the environmental safeguard. In *Guerra,* the Commission states that '... [The Convention] should be interpreted as granting an actual right to receive information, in particular from the competent authorities, to persons from sections of the population which have been or may be affected by an industrial or other activity dangerous to the environment'. Accordingly, the Commission held that Italy violated its Article 10 obligations by failing to disseminate sufficient information on issues concerning the protection of the environment and in failing adequately to inform the applicants that they were living in a high-risk area. By a 21 to 8 vote, the Commission agreed that a violation had occurred. But the court, deciding in the case, ruled there was no violation of Article 10 but instead that the lack of communication to the interested populations of the environmental risks constituted a violation of Article 8 of the Convention. With this interpretation, the court

51 *Guerra & Others v Italy*, 19 February 1998, ECHR App No 14967/89.

52 *Asselbourg and Others v Luxembourg* 29 June 1999, ECHR App No 29121/95.

53 Article 10 of the ECHR reads: '1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State'.

affirmed the right to environmental information as a necessary element of the right guaranteed by Article 8.

Another step forward in the interpretation of the court to recognise the right to be protected from damages to the environment can be found in the recent case of *Öneryildiz v Turkey*.[54] Relying on Articles 2, 8 and 13 of the Convention and on Article 1 of Protocol No 1, the applicants submitted that the national authorities were responsible for the deaths of their close relatives and for the destruction of their property as a result of a methane explosion on 28 April 1993 at the municipal rubbish tip in Ümraniye (Istanbul). They further complained that the administrative proceedings conducted in their case had not complied with the requirements of fairness and promptness set forth in Article 6 (1) of the Convention. Since the early 1970s a household-refuse tip had been in operation in Hekimbasi, a slum area adjoining Kazim Karabekir. When the rubbish tip started being used, the area was uninhabited and the closest built-up area was approximately 3.5km away. However, as the years passed, rudimentary dwellings were built without any authorisation in the area surrounding the rubbish tip, which eventually developed into the slums of Ümraniye. On 28 April 1993 at about 11 am a methane explosion occurred at the site. Following a landslide caused by mounting pressure, the refuse erupted from the mountain of waste and engulfed some 10 slum dwellings situated below it, including the one belonging to the applicant – 39 people died in the explosion.

Regarding the alleged violation of Article 2, the Grand Chamber noted that since the Turkish authorities had known or ought to have known that there was a real or immediate risk to persons living near the rubbish tip, they had had an obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals, especially as they themselves had set up the site and authorised its operation, which had given rise to the risk in question. However, Istanbul City Council had not only failed to take the necessary urgent measures but had also opposed the recommendation by the Prime Minister's Environment Office to bring the tip into line with the applicable standards. It had also opposed the attempt in August 1992 by the mayor of Ümraniye to obtain a court order for the temporary closure of the waste-collection site. As to the government's argument that the applicant had acted illegally in settling by the rubbish tip, the court observed that in spite of the statutory prohibitions in the field of town planning, the Turkish State's consistent policy on slum areas had encouraged the integration of such areas into the urban environment and had thus acknowledged their existence and the way of life of the citizens who had gradually caused them to build up since 1960, whether of their own free will or simply as a result of that policy. In conclusion, the court noted that the regulatory framework applicable in the present case had proved defective in that the tip had been allowed to open and operate and there had been no coherent supervisory system. That situation had been exacerbated by a general policy which had proved powerless in dealing with general town-planning issues and had undoubtedly played a part in the sequence of events leading to the accident. The court accordingly held that there had been a violation of Article 2. In the case, the court also found violations of Article 1 of Protocol 1 (right to peaceful enjoyment of one's possessions) and Article 13 (right to an effective remedy). Having regard to the findings it had already reached, the court did not consider it necessary to examine the allegations of a violation of Article 6 para 1 and Article 8.

The *Öneryildiz v Turkey* case shows that the right to life as from Article 2 of the ECHR can be a source of protection of people from environmental damages requiring not only abstention from injurious actions, but also sets positive obligations on the governments. The recognition of a violation of Article 2 sets a wider human right protection from the environmental harms on marginalised groups than the protection provided from the mentioned interpretation of Article 8.

In a more recent case of direct relevance to Roma, in 2005, the court held that degrading living conditions, combined with evident racial discrimination, could be of such a severe nature that they would rise to the level of 'degrading treatment' as banned under Convention Article 3 – a very high bar.[55] The persons concerned had been burned out of their homes in a pogrom in 1993 and forced to live for a number of years in pigsties and other humiliating circumstances. The court also found violations of the Article 14 discrimination ban of the Convention in conjunction with Articles 6(1) and 8.

Other non-discrimination principles established by the court may provide fertile ground for actions to challenge environmental racism in Europe. For example, ruling in the case of *Thlimmenos v Greece* in 2000, the court established the following principle:

> The court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification [...]. However, the court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and

54 *Öneryildiz v Turkey* 18 June 2002, ECHR App No 48939/99.

55 'In the light of the above, the court finds that the applicants' living conditions and the racial discrimination to which they have been publicly subjected by the way in which their grievances were dealt with by the various authorities, constitute an interference with their human dignity which […] amounted to "degrading treatment" within the meaning of Article 3 of the Convention.' (*Moldovan and Others v Romania* ECHR App nos 41138/98 and 64320/01, Judgment No 2 12 July 2005 para 113).

> reasonable justification fail to treat differently persons whose situations are significantly different.[56]

This reasoning may provide the nucleus for any number of future actions at the Court, for example complaints to challenge the failure by authorities to move minority groups situated in areas known to be more hazardous than areas inhabited by members of the majority society. This reasoning also supports the claims made by environmental justice advocates that authorities bear an obligation to create special policies and programmes to ensure that disadvantaged groups develop the knowledge and capacities to adequately take advantage of available rights, such as the procedural rights guaranteed by the Aarhus Convention.

Procedural rights for environmental justice

The importance of procedural rights for environmental justice lies in the fact that marginalised groups are often victim to environmental discrimination because they either lack adequate information regarding risks, fail to understand that information, are excluded from or unable to participate in decision making regarding their own environments, or lack access to justice or knowledge of judicial options to redress wrongs they have suffered. Because of their social exclusion, often exacerbated by a low level of education, marginalised groups may often suffer disproportionately from violations of their procedural rights or are unable to take effective advantage of those rights, putting an extra burden on authorities to take active measures to ensure that such populations are informed as to the environmental risks they face and are brought into policy and planning decision making processes that affect their communities.

The issue of procedural rights was formally addressed at the 1992 UN Conference on Environment and Development. Principle 10 of the Rio Declaration recognised procedural environmental rights, stating that environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Rio Principle 10 established the basis for negotiations that led to the celebrated United Nations Economic Commission for Europe's Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which has become one of the few great success stories in international environmental law in the late 1990s, albeit at a regional level. The Aarhus Convention proclaims the legal 'right of every person of present and future generations to live in an environment adequate to his or her health and well-being'[57] and seeks to ensure this right through enjoining parties to the convention to proactively and reactively make information on environmental conditions available to citizens, to provide for citizen and NGO participation in environmental decision making, and to ensure that a denial of these rights can be appealed through judicial review.

In principle the Aarhus Convention offers minorities in most European countries the kinds of protections that they need to ensure that environmental justice is established on a procedural level.[58] However, neither Rio Principle 10 nor the Aarhus Convention take account of the special conditions of marginalised groups, leaving open the possibility that these groups will not reap the benefits of the Convention, even in countries where it is adequately implemented. Without provisions that require authorities to develop special programmes that reach out to minority and marginalised groups, it is hard to see how communities such as rural Roma villages in Central Europe will develop the capacity to effectively absorb information about their immediate environmental conditions and risks, much less participate in decision making processes.

In an indication that the concept of environmental justice is penetrating the discourse on access to information, participation and justice in environmental matters, a recently released report, Environmental Democracy in Hungary,[59] explicitly refers to marginalised and minority groups, including the Roma, in the implementation of the procedural rights embodied in the Aarhus Convention, to which Hungary is a party. Specifically, the consortium of NGOs and universities that conducted the research for the report found that it could identify no cases in which 'authorities preparing [a] decision made special efforts to involve marginalised groups in the decision making process'.[60] Moreover, information regarding legal remedies is not published by the government, and the one NGO that does provide published information does not make it available in forms and forums readily accessible to the Roma minority.[61]

The European Court of Human Rights has also recently reaffirmed the procedural aspects of human rights issues related to the environment. In a recent ruling concerning the arbitrary deprivation of water to an

56 *Thlimmenos v Greece*, 6 April 2000 ECHR App No 34369/97.

57 Aarhus Convention art 1.

58 Most states in the UNECE region have signed and ratified the Aarhus Convention, with the notable exceptions of the Russian Federation, Slovakia, Uzbekistan, Serbia and Montenegro, and Bosnia and Herzegovina.

59 The Access Initiative is an NGO led multi-country effort to monitor environmental rights. Information is available on the TAI website at http://www.accessinitiative.org/.

60 ibid s II.B.–C.10.

61 ibid s IV.C.5.

applicant from Romania, the court found violations of the European Convention, but framed these in terms of Article 6, guaranteeing the right of access to an effective tribunal. The court evidently found compelling the problem that the denial of water for a period of three years was indeed a core human rights issue, but it was moved to engage the international/regional justice framework around the fact that a decision on the matter in favour of the applicant by the Romanian Supreme Court had been blatantly disregarded.[62]

The European Union context for environmental justice

Environmental rights at the level of the EC are generally under-developed, having thus far warranted no specific mention in the basic legal framework for human rights in the EU. That said, however, the EU institutions have in recent years strongly embraced the discourse on sustainability as an organising framework; anchored fundamental human rights at the heart of EU law; and dramatically expanded their competences in the field of anti-racism broadly, and anti-discrimination law in particular.

On 7 December 2000 in Nice, a Charter of Fundamental Rights of the European Union[63] was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission on behalf of their institutions. The adoption of the Charter is a move the implications of which have yet to be fully seen, but they set all EU action – including action in the field of environmental law – on a fundamental human rights basis. The implications of this move may reshape a number of policy areas in the coming years.

Actions of more immediate and clear import in the EU relating to combating discrimination and racism, including discrimination and racism against Roma, has been the adoption of a series of anti-discrimination directives, adopted pursuant to the revised Article 13 of the Treaty Establishing the European Community (TEC) after its Treaty of Amsterdam amendments.[64] Insofar as the anti-discrimination directives constitute the standard for anti-discrimination laws in Europe, they are also relevant for countries not yet members of the European Union. Particularly significant for Roma is Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Race Directive).

The Race Directive introduced legal standards throughout the EU aimed at ending differential treatment based on the arbitrary criteria of race or ethnicity. The Race Directive provides details as to the scope and content of laws banning racial discrimination. It includes, among other provisions, bans on both 'direct' and 'indirect' discrimination,[65] the requirement of legal remedies for victims of racial discrimination through 'judicial and/or administrative procedures', for the enforcement of anti-discrimination obligations 'available to all'[66] and the provision that in cases in which complainants: 'Establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'.[67] The directive also requires that domestic law impose effective, proportionate and dissuasive sanctions for violation of anti-discrimination norms. These should include: 'The payment of compensation to the victim'.[68]

The inclusion of a ban on 'indirect discrimination' is of particular relevance for environmental justice. According to Race Directive Article 2 (2)(a), 'indirect discrimination' occurs: 'Where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. The inclusion of a ban on indirect discrimination, so defined, potentially opens the way for legal challenge under EU law to issues such as systemic substandard housing, the arbitrary siting of hazardous factories in minority neighbourhoods, and unregulated hazardous waste in close proximity to minority areas.

Separately, the EU has also adopted a Community Action Programme to combat discrimination (2000–2006), managed through the DG Employment and Social Affairs. The Programme is designed to support and complement the implementation of the directives through the exchange of information and experience and the

62 European Court of Human Rights, Arrêt, Affaire Butan et Dragomir c Roumanie, *(Requête no 40067/06),* 14 février 2008.

63 2000 OJ (C 364) 1.

64 Beginning in 2000, and in particular under expanded powers provided by an amended art 13 of the Treaty Establishing the European Community, the European Union adopted a number of legal measures that have significantly expanded the scope of anti-discrimination law in Europe, notably three directives: (i) Directive 2000/43/EC 'implementing the principle of equal treatment between persons irrespective of racial or ethnic origin' (Race Directive) (ii) Directive 2000/78/EC 'establishing a general framework for equal treatment in employment and occupation' (Employment Directive) and (iii) Directive 2002/73/EC 'on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions', providing an increased level of protection against discrimination based on sex and amending an earlier directive in this area. In addition to the Directives adopted under art 13, a revised art 29 of the TEC now gives police and judicial authorities heightened powers to co-operate on matters related to, among other things, 'preventing and combating racism and xenophobia'.

65 For the purposes of the EU directive, 'direct discrimination' is defined as having occurred 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin' (EU directive art 2(2)(a), while 'indirect discrimination' occurs 'where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary' (EU directive art 2(2)(b). The full text of the European Union Race Directive is available online at: http://europa.eu.int/comm/employment_social/fundamental_rights/legis/legln_en.htm.

66 EU Race Directive art 7(1).

67 EU Race Directive art 8.

68 EU Race Directive art 15.

dissemination of best practice. The Programme promotes measures to combat discrimination based on racial or ethnic origin, religion or belief, disability, age or sexual orientation.

To date, however, the EU has not yet undertaken thoroughgoing measures to link its anti-discrimination law and social inclusion policy frameworks with its efforts in the field of environmental law and policies, issues addressed under a distinct Directorate General of the European Commission. Legal measures to address environmental justice matters adopted by the EU have to date remained for the most part within the narrow confines of the Aarhus Convention. Two directives and one regulation incorporate Aarhus within the EU legal order. These are Directive 2003/4/EC on public access to environmental information and Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, and Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. In addition, the Commission has adopted a proposal for a directive on access to justice in environmental matters.

Like the Aarhus Convention itself, none of these instruments provides for justice in the substantive terms set out above, nor do they link concepts of justice with the need for remedy for weak groups, the need to correct disparate environmental harms, or related matters. The Regulation on access to justice in environmental matters aims to set criteria for access to proceedings in environmental matters for individuals and other relevant entities. It does not, however, risk inclusion of any substantive rights matters above and beyond a statement in its pre-ambulatory provisions that the regulation: 'Respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on the European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Article 37 thereof'.[69] Stress is laid upon the environmental aspects of the Charter, to the detriment of its other provisions, including its non-discrimination provisions.

For these reasons, the Coalition for Environmental Justice, a grouping of NGOs working on environmental racism/environmental justice issues in Central and Eastern Europe, recommended, in the context of public European Commission discussion of the future of EU anti-discrimination action,[70] that explicit wording be included in the draft directive to the effect that in matters related to the environment as they pertain to racial and ethnic discrimination, the directive should be read in conjunction with Directive 2000/43/EC: 'Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin'.[71] To date, the Commission has not yet acted on this recommendation.

In the area of European Union soft law and other policy measures, the 6th Community Environment Action Programme (EAP) establishes the principles, norms, and priorities that Member States as well as EU institutions themselves should adopt in pursuing environmental goals. The Sixth EAP integrates human health objectives throughout – and devotes a full article to environment and health, coving chemical safety, chemical exposure, pesticides, air quality, water availability and quality, and other issues. All of these issues are relevant to marginalised communities. For example, Romani communities in rural areas often suffer from both restricted availability of water and from contamination of the water sources that do exist. Communities and countries not working diligently to ensure 'a high level of protection of surface and groundwater' for all citizens are not meeting the objectives of the EAP.

Unfortunately, the EAP does not directly acknowledge or address problems of environmental justice and the special burdens put on disadvantaged communities. It does, however, acknowledge the linkage between environmental and social issues within the framework of sustainable development[72] and stresses the importance of the Aarhus pillars of access to information, participation, and justice in environmental matters. However, as argued above, without explicit reference to marginalised groups the rights to access to information, participation, and justice could be made widely available and still not prevent environmental injustices from occurring within their scope.

Of potentially greater importance is the EU Strategy for Sustainable Development (SDS),[73] originally adopted by the Council at the 2001 Göteborg Summit, and now revised. At the Lisbon Summit in 2000 the Council set the EU's goals as becoming: 'The most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion'.[74] The SDS adopted in Göteborg interprets this language to mean that: 'Economic growth, social cohesion and environmental protection

69 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

70 European Commission's DG Employment and Social Affairs opening for public debate of a Green Paper on 'Equality and non-discrimination in an enlarged European Union'(COM (2004) 379 final, Brussels, 28.05.2004).

71 Signatories of the recommendation were the Center for Environmental Policy and Law at Central European University (Hungary), the European Roma Rights Centre (Hungary), the Centre for Economic Development (Bulgaria), the Alliance for Lake Cooperation in Ohrid and Prespa (Republic of Macedonia), the Milan Simecka Foundation (Slovakia) and Development Alternatives (Slovakia).

72 Paragraph 6 of the Preamble states that 'A prudent use of natural resources an the protection of the global eco-system together with economic prosperity and a balanced social development are a condition for sustainable development'. Although 'balanced social development' is a frustratingly vague phrase, it could reasonably be interpreted to include an equitable and just social development in which discrimination of all forms against marginalised groups is alleviated.

73 SDS and Summit Conclusions.

74 Summit Conclusions.

must go hand in hand'.[75] It is not far to take the final step and conclude that a healthy environment and a just society that protects especially vulnerable groups are mutually reinforcing objectives. Indeed, the SDS in the form of the Commission's communication states that: 'Poverty and social exclusion have enormous direct effects on individuals, such as ill health, suicide, and persistent unemployment'. The next step will be to acknowledge that poverty, social exclusion and the durable phenomena of racism and racial discrimination also have profound environmental dimensions, allowing increased levels of pollution to persist due to the inability of the poor and the socially excluded – including especially members of pariah minorities – to effectively combat polluters and discriminatory authorities, and exposing the poor and socially excluded to greater levels of environmental risk and lower levels of environmental improvements, thereby further entrenching deep exclusionary forces and extreme marginalisation.

Conclusions

It has been the ambition of this overview to describe the contours of a vacuum. Despite compelling and powerful exclusion issues falling along the nexus of environmental regulation and human rights law European institutions have not yet managed to tackle these issues outright. The European Union has the competence to address these matters as a result of powers included in existing treaties, and should respond to the current regulatory vacuum by providing leadership in this area. Authorities in EU Member States, as well as in EU candidate countries and elsewhere are also in a position to make powerful contributions to the elaboration of this much-needed regulatory framework by taking the initiative in advance of EU action to address these compelling needs.

Some actions require little in the way of resources and can be readily undertaken. These include:

- Establishing a working group on environmental justice and task it to produce a white paper on environmental racism/environmental justice matters in Europe;
- Amending the 6th Environment Action Programme to make explicit reference to environmental justice and set environmental justice policy objectives;
- Incorporating environmental justice objectives in the EU Strategy for Sustainable Development;
- Linking the directives implementing the Aarhus Convention to EU anti-discrimination frameworks;
- Providing funding for further research into environmental justice issues in Europe, and encouraging states to provide public research funds for similar efforts.

In addition, EU officials in particular have available several options for action in this area. Some possibilities include, for example:

- Encouraging EU Member States and candidate countries to establish coordination bodies at national level to work on development and implementation of law and policy in environmental racism/environmental justice matters, as well as to facilitate forums for non-governmental groups working on the issue to liaise with relevant policy-makers;
- Through Eurostat and other data groups at EU level, assisting states in developing data to measure possible disparate environmental impacts on pariah minorities and/or other weak groups;
- Encouraging Member States-level lawmakers to link environmental legislation to laws adopted to comply with EU anti-discrimination legal requirements.

Environmental injustices constitute a fundamental threat to the European social model and policies in support of social inclusion, anti-discrimination, and environmental protection. To date no attention has been paid these issues at policy making levels in the European Union. The civil society sector has now adopted the issue of environmental justice and can be expected to develop activist strategies and lobbying campaigns. The European Union institutions have the opportunity to anticipate the environmental justice demands arising from non-governmental organisations and marginalised communities by initiating action in this area. They should not hesitate to do so.

75 EU Presidency Conclusions, Göteborg, 15 and 16 June 2001. SN 200/1/01 REV 1.

Legislation and the market – lessons from the treatment of waste oil

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Waste, resource and value

The concepts of waste, resource, and value are fundamental to the legislation surrounding the treatment of substances and materials that are of no direct use to the original owner or producer. A major concern of early measures in this area was the prevention of harm to human health or the environment by the uncontrolled release or disposal of such materials, and this was addressed by the introduction of controls that identified them as 'waste' and specified how they might best be treated.

English[2] and European[3] jurisprudence recognised that in this context, the fact that value could be assigned to a material by those in its subsequent treatment cycle did not per se prevent its classification as 'waste'. Twenty years ago, 'waste' was not considered to be a resource, and industry's incentive for its declassification was primarily driven by a desire to avoid the associated management requirements rather than by the implications on its cost.

Since then the regulatory framework has become more complex with the introduction of: horizontal legislation; controls specific to waste treatment; controls specific to waste streams; the imposition of responsibilities on producers and manufacturers.[4] However, apart from the UK Landfill Tax, which is restricted to materials falling within the taxation regime that satisfy certain criteria,[5] there are no domestic fiscal instruments associated with 'waste'.

Nevertheless, even in the absence of fiscal instruments, legislative measures can have a direct or indirect financial impact, particularly in the area of waste management, where they may determine if or how a particular 'waste' may be used in a given situation. Examples of such instruments include:

- the direct administrative requirements associated with the designation as 'waste', and the indirect impacts of 'waste' in other legislation such as the EU Emissions Trading Scheme[6] and REACH[7]
- the classification as a 'hazardous waste' which imposes restrictions/costs on its landfill or incineration
- controls on the incineration or co-incineration of 'waste' and 'hazardous waste' as imposed by the Waste Incineration Directive (WID)
- the classification of waste treatment *process*es as 'disposal', 'recovery', 'recycling', which has an impact on:
  - export and import restrictions
  - mandatory targets in 'producer responsibility' legislation
  - PRNs and PERNs.[8]

This article reviews events over the past two to three years relating to the treatment of waste oils in the United Kingdom, culminating in the ruling of the Appeal Court in *R ex parte OSS Group Ltd* v *Environment Agency and Defra*.[9] However, important though this judgment is, it marks just one point on the time line associated with these events, during which all businesses producing or using these materials have needed to make important commercial decisions on how to comply with the changing legislative position.

The approach adopted by each of these business sectors reflects the commercial importance of burning waste-derived fuels; tempting though it may be to identify 'winning' and 'losing' strategies, success must be gauged in the context of the operation of the businesses concerned from before 2005 and the introduction of the WID until the Waste Framework Directive is finally revised and all aspects of 'complete recovery' and 'end of waste' are settled. Furthermore, such a judgment should be made in relation to the impact on the business as a whole, since some organisations encompass activities where the classification of a waste-derived fuel as 'non-waste' is beneficial, as well as other activities in which the contrary applies.

1 The views expressed in this article are those of the author, and do not necessarily reflect those of the British Cement Association or its member companies.
2 *Berridge Incinerators v Nottinghamshire CC* Nottingham Crown Court (12 June 1987) unreported, 1987.
3 *Vessoso and Zanetti*, Joined Cases C–207/88 and C–208/88, and C–359/00.
4 D N Pocklington 'Towards "a recycling society"? – An Analysis of the Waste Thematic Strategy' [2006] 14 Env Liability (2) 52.
5 That is, it is a disposal of a material as waste; it is made by way of a landfill; it is made at a landfill site. See: D N Pocklington and R E Pocklington 'The EU Landfill Tax – Externalities and External Influences' (1998 June) Journal of Planning and Environmental Law 529.
6 Carbon dioxide emissions from waste-derived fuels classified as 'biomass' are regarded as carbon neutral, and there is a financial bonus in burning these rather than other waste-derived fuels.
7 'Waste' is exempt from the REACH Regulation, and is therefore subject to less onerous management requirements.
8 Packaging Recovery Notes and Packaging Export Recovery Notes, respectively.
9 *R ex parte OSS Group Ltd v Environment Agency and Defra* (Court of Appeal) (Civil Division) 28 June 2007.

In many respects, events to date suggest that the author's '10 laws of waste management', listed in an earlier issue of ELM,[10] provide a valuable rule of thumb on which to base decisions.

Background

Within the United Kingdom, waste oil is generated in small amounts at hundreds of thousands of sites. Prior to the introduction of the WID, producers of this waste were paid by the collectors. After collection this oil was subject to one or more 'bulking-up' activities, as the batches were amalgamated into larger ones and sold as recovered fuel oil (RFO) at about 6–7p per litre. Approximately 50 per cent of the total arisings[11] was used by the power generation industry and the remaining 50 per cent in asphalt production for roadstone.

The Environment Agency had concerns that, as a result of the introduction of the Hazardous Waste Directive in July 2005 and the WID in the following December, some waste producers would be unwilling to pay for collection and disposal, and a significant quantity would be disposed of illegally. Furthermore, there was anxiety that the two traditional recipients of RFO would substantially reduce their usage and switch to non-waste fuels, although more costly.

Consequently, the Agency issued explanatory notes in July 2005 and February 2006, stating its view that both RFO and clean fuel oil (CFO) were 'waste' under the framework directive and as such subject to certain regulatory requirements. The latter note defined RFO and CFO as:

- *recovered fuel oil* is waste oil that has been processed at licensed site to remove water and solids
- *clean fuel oil* is RFO that is subject to further processing before it is used to generate energy. CFO® is a brand that was developed by OSS in anticipation of the introduction of the WID.

Clearly the impact of the WID stretches far beyond the incineration and co-incineration of waste oils, but in this context the current and potential users of these materials adopted one or more of the following strategies.

Compliance with WID

The cement industry which burns a wide range of waste-derived fuels, including waste oils, invested over £25m in making all of its plant WID-compliant for these materials.

Avoidance of WID through cessation of use of waste oils

For the current generation of coal-fired power stations, the capital expenditure on equipment to meet the stringent NO_x limits when co-firing with waste oils during start-up could not be justified, and waste-derived RFO was replaced by heavy fuel oil, although it cost fl20 per cent more. The large bunker capacity of the industry necessitated a reduction in stocks some three months before the introduction of the WID.

Asphalt manufacture falls within local authority control under Part A2 PPC,[12] and to continue using RFO would have necessitated using the derogation within the directive regarding ensuring combustion conditions of two seconds at 850°C, and a creative interpretation of the 10 microgramme dust limits (only that arising from RFO being counted).

With their smaller storage capacity, asphalt manufacturers could continue to burn RFO until 31 December 2005, during which time they sought to remove its 'waste' declassification. They had a greater commercial incentive, since the alternative to RFO was gas oil, which cost substantially more.

Treatment routes that avoid the WID

These include:

- injection of RFO into the blast furnace (which is exempt from WID as this is considered as a carbonation process, not combustion)[13]
- use in waste oil burners in England and Northern Ireland (but not Scotland)
- any use not falling within the ambit of 'technical unit' under the WID.

Lobbying at UK and European level

Almost all parties with an interest in waste have been involved in extensive lobbying to influence the changes under consideration to the Waste Framework Directive.

Action in the courts

Court action can determine the status – 'waste' or not – of specific substances.

Judicial review of SRM and the Environment Agency, and OSS Group Ltd and the Environment Agency

The implementation of the WID considerably changed the controls applied to the use of waste-derived materials as

10 'Practical Waste Management' [2006] 18 ELM (5) 260. These included inter alia: non-reliance on Defra and Environment Agency having same view; expectation of degree of irrationality in EU Law; ECJ judgment as poor basis for commercial decisions; length of time for official clarification of positions on 'waste'.

11 The total arisings of amount to ~400,000 tonnes per annum.

12 Sector Guidance Note SG9 relating to 'Roadstone Coating, Mineral and Other Processes that Burn Recovered Fuels Oil'.

13 A further commercial consideration is that the steel industry does not pay duty on the heavy fuel oil it uses in the blast furnace.

fuels, and in view of the substantial costs of compliance involved, the firms of SRM and OSS independently sought judicial review in relation to the classification of the materials produced by them as 'waste' – *Solvent Resource Management v Environment Agency*[14] and *OSS Group v Environment Agency*.[15]

These judicial reviews were heard together on account of the common legal issues involved,[16] and although the OSS case preceded that of SRM, the judge decided to address the SRM case first: there were 'considerable disputes of fact' in the OSS case which:

> [e]ither could not be resolved at this stage, or would or might require another round of evidence' and it was agreed that 'the legal questions to be decided in the SRM case, in the resolution of which Counsel for OSS would take a full, though supporting, part, would in any event be identical to, and substantially determinative of, the legal dispute to be resolved in the OSS case.

Facts of the SRM case

Solvent Resource Management Ltd (SRM) is in the business of recovering waste solvent materials by a fractional distillation operation which produces a range of solvents, known as product-grade distillates (PGD), that is sold on the open market.[17] There was no dispute that these solvents were 'fully recovered' products and no longer waste.

However, some of the distillates were used by SRM as fuel for its operations. Prior to the implementation of the WID, this was consistent with the extant legislation. The distillates that were used satisfied product and fuel specification standards which were designed to ensure their emissions were no different from those resulting from burning natural (primary) gas oil. From the end of 2005, the WID's requirements applied to existing waste incinerators. The Environment Agency argued that the distillates remained 'waste' until finally burned and that permits that met the directive's stringent conditions would be required.

The dispute between the Agency and SRM thus required a decision as to:

> [w]hether what was and/or was derived from 'waste', and has been the subject of a recovery process but is to be burned as fuel, has ceased to be 'waste' at the conclusion of such process, or only ceased to be 'waste' when it has been combusted and the 'energy recovered from it'.

There was no dispute that:

- PGDs sold on the market as *solvents* to a *product specification* are no longer 'waste'
- PGDs when burnt by SRM do not result in higher concentrations of emissions than those from gas oil, on account of their fuel specification.

SRM estimated the extra costs for the five plants involved would be about £1.13 million in capital expenditure[18] and another £400,000 in annual operating costs. The alternative was to replace the use of PGD with that of gas oil at an annual cost of fl£2.15m.

Facts of the OSS case

OSS is one of the two largest companies in the United Kingdom that collect used oils. About 75 per cent of its £17m annual turnover is raised from selling RFO, which is principally derived from waste, contaminated lubricating oils, including used engine and gear/transmission oils, collected (directly or via other collectors) from some 15,000 waste oil producer locations – garages, workshops and similar premises. After treatment, RFO was sold to the company's customers to be burned as fuel.

In anticipation of the WID, OSS invested £3m in new and improved processes, with a view to producing a higher quality fuel oil, compliant with British Standard BS2869:1998, that would be marketed as CFO® (clean fuel oil).

CFO® has a considerably lower price than the competitive natural fuels, HFO (heavy fuel oil), MFO (medium fuel oil) and LFO (light fuel oil). However, this competitive advantage is only of value to customers providing CFO® is not classified as 'waste'. The judge was critical of the Agency's lack of clear guidance on the classification of these products. Although the ECJ's rulings make issuing clear guidelines a challenging task, he held that it was not insuperable and could be summarised as:

- a 'waste' or waste-derived product that is to be burnt as fuel it does not ordinarily cease to be 'waste' until it is burnt and the energy is recovered; although
- a material that was originally a fuel, or had the potential to be used as such, can be recovered *as a fuel* and ceases to be waste if:
  - it is chemically and physically identical to the original material
  - it requires no further processing.[19]

OSS claimed that it cannot now market RFO which is dependent upon WID-compliant customers, whose only option is to buy natural oils not subject to the waste regime. It anticipates that CFO will generate £20m per annum.

14 Case No CO/2157/2006.
15 Case No CO/2434/2006.
16 *Solvent Resource Management v Environment Agency* and *OSS Group v Environment Agency* Administrative Court, High Court [2006] EWHC 3032 (30 November 2006) Case No CO/2157/2006.
17 IMS (Industrial Methylated Spirits), IPA/Methanol (a blend of iso-propanol and methanol), IPA/Water (a blend of iso-propanol and 20 per cent water), gasoline blend C, kerosene and toluene.
18 On continuous emission monitors and ancillary equipment (n 16 para 11).
19 Referred to the judge as the 'Oakley test', at para 15, following the witness statement of Mr Robert Oakley of Eco-Oil Ltd.

In challenging the Agency classification of CFO® as 'waste', OSS obtained a temporary order from the High Court preventing enforcement action being taken against it on the basis of such a classification until the matter had been decided in its judicial review. The Agency applied unsuccessfully to set aside the order, but the court held that such an action would have the effect of driving OSS out of business, and the question of whether CFO® is a waste or not would remain unresolved.

This injunctive relief was based upon CFO's® claimed equivalence to BS2869:1998. However, the Environment Agency doubted both the relevance of this standard to the claimed performance and the ability of CFO® to meet the standard even if this were to be the case.

This temporary order gave OSS a commercial advantage, since the product it manufactured, CFO®, could continue to be sold as a 'non-waste', whereas similar materials produced by other organisations could not.

Faced with this dilemma, the Agency issued further guidance in August 2006, stating: 'it would be inappropriate . . . to take enforcement action against other companies where we believe we would be precluded from doing so if the substance were CFO itself'. Its *post facto* rationalisation was that such an approach could be undertaken in the short term without significant risk of pollution or harm to human health. However, the Agency urged industry to take a 'constructive and sensible approach', and asked companies to comply with the requirements of the Hazardous Waste Regulations 2005 'without prejudice' until the outcome of OSS' challenge.

Following the High Court judgment, OSS' request to Burton J for an extension of the interim order pending the appeal decision was granted, but only until 11 December 2006, with a view to requiring OSS to apply to the Court of Appeal for any further extension of the order and to give the Environment Agency an opportunity to challenge the basis of the order. However, after OSS had lodged its appeal, on 6 December Laws LJ extended the order until the hearing of the substantive appeal. He did this without receiving representations from the Environment Agency, although it was given permission to apply to have the order set aside earlier.

Legal issues[20]

SRM and OSS based their respective claims on the fact that they had subjected wastes to treatment processes and that the resultant materials had been fully recovered and ceased to be 'waste' *before* being used as fuel. The concept of 'complete recovery' was first introduced, although not defined, in *ARCO*. They also argued that a principal tenet of EU waste policy was to encourage recycling and reuse, and if waste can be recovered into a material that is environmentally indistinguishable from its equivalent natural product, its use should be not be inhibited. Once the materials had been through a recovery process, they were no longer waste, but should be considered equivalent to a raw fuel.

In his considerations of these issues Burton J reviewed a wide range of ECJ, English and Scottish court rulings.[21] In the context of the discussion of the subsequent Appeal Court ruling below, important conclusions of this analysis on points of EU 'waste' law included, inter alia:

- the [legal] concept of determining when a substances *becomes* 'waste' is of little or no value or relevance when considering whether a product that was waste has gone through a sufficient recovery operation is no longer a 'waste', referred to in the judgment as an 'ex-waste'[22]
- European waste legislation did not intend 'waste' and non-'waste' to be treated similarly. Although virgin or natural products *may* have side effects or contain pollutants with the potential to cause harm to human health or the environment, they are not classified as 'waste' when they are burned. However, 'waste' materials are subject to more stringent controls on their handling, storage, disposal and incineration
- 'waste' products are likely to contain a diverse range of contaminants not readily identified nor anticipated, and as such a more stringent regime applied to waste disposal and treatment[23]
- the fact that a 'waste' may have the same or similar specification to an equivalent natural product may not mean that the 'waste' product or the natural equivalent is safe or can be exempted form the waste regime.[24]

The latter rules out the use of comparative tests with non-'waste' for classification purposes, and requires the application of the 'discard' criterion within the 'waste' definition.[25] Furthermore, a process that prepares 'waste' for a recovery operation itself generates a 'waste' rather than a 'product'.

Burton J dismissed the claim on the grounds that the proposed 'end of waste' provisions suggested by counsel for the claimants were 'no conceivable substitute for the control imposed by the European waste regime,'[26] citing

20 See J Hyam Case Commentary 'Recycled Waste as Fuel Goes Up in Smoke' [2007] 1 Env Liability 27.

21 *ARCO Chemie Nederland v Minister Van Volkshuisvesting etc and ors* [2002] QB 646; *Saetti v Frediani* [2004] Env LR 37; *Inter-Environement Wallonnie ABSL v Région Wallonne* [1997] ECR I–7411; *Scottish Power Generation Ltd v Scottish Environment Protection Agency* [2004] Scot (D) 38/12 [unreported]; *R (Mayer, Parry Recycling Ltd) v Environment Agency* [2004] 1 WLR 538; *Sita Ecoservice BV v Minister Van Volkhuisvesting, Ruimtelijke Ordening* [2004] QB 262; *Castle Cement v Environment Agency* [2001] 2 CMLR 19; *Palin Granit Oy* [2002] 1 WLR 2644; *Niselli* Case C–457/02; *KVZ Retec GmbH v Republic of Austria* Case C–176/05 [only the Advocate General's Opinion was available at the time of the judgment].

22 Paragraph 20(i), in which Burton J referred to *Palin Granit Oy* and *Saetti v Frediani* (n 21).

23 ibid (ii).

24 ibid (ii)(b).

25 ibid 23. It was considered that this is supported by *Wallonie* and *ARCO*.

26 Paragraph 72.

Stanley Burnton J's judgment in *Castle Cement*, that to adopt an Alber AG type test that waste was no longer waste if a process had been carried out to eliminate the danger typical of waste 'was inconsistent with the judgment of the European Court in ARCO'.

For waste to be converted into *ex-waste* and not be subject to these controls,[27] there must be a point at which this takes place and can be seen to have taken place and to be effective. A material or product cannot be waste in one place and not in another, and waste on one day of the week and not on another.[28] The proposed 'end of waste' test was unworkable, and additionally there needed to be certainty as to the relevant natural equivalent comparator. The waste regime provided the certainty that contaminants in waste-derived fuels would be eliminated by combustion in a WID-compliant process, rather than 'by way of trust' in a comparative specification.[29]

A further important conclusion in the context of the use of waste-derived fuels (or the incineration of these materials) was that for 'wastes' that are burned there can be no 'complete recovery', except in specific circumstances.[30] Here, reliance was placed upon *Sita*[31] which held that 'a waste treatment process can in practice include several successive stages of recovery or disposal', and for the recovery of energy from a waste derived fuel, there is a recovery operation (R1) when the energy is recovered following which the material is discarded.[32]

However, the ECJ's logic in *Sita* is doubtful, which in its determination of which *post*-shipment is relevant for determining the purpose of that shipment (in the context of the Waste Shipment Regulation), held that it was the first such operation that was relevant. The court artificially regarded the use of waste-derived fuel in a cement kiln as comprising an (energy) 'recovery' operation, followed by the 'discarding' of the resultant ash, despite both processes being part of the same chemical reactions.[33] Such an analysis precluded SRM's in-house use of its distillates being regarded as 'recovery'.

Injunctive relief

In addition to the commercial aspects of OSS' injunctive relief discussed earlier, important legal issues were raised. At the High Court, Burton J noted[34] that the method of enforcement of environmental law is through the criminal courts, and some authorities[35] believe that it is wrong in principle for the administrative courts to make declarations, let alone grant injunctive relief restraining enforcement action, where the question is one which will have to be determined in due course in criminal proceedings.

However, he conceded that this case was better dealt with by the administrative court than by or before a jury in view of the consideration of complicated directives and abstruse construction of judgments of the European Court.

This is a further feature that contrasts strongly with the outcome of the appeal hearing, which resulted in the 'waste/non-waste' issue being decided by the application of technical criteria rather than rigid application of strict legal principles, infra. Time will tell whether this approach will provide better protection to the environment and human health, but one suspects that the technical approach will provide less certainty, will be more difficult to administer and more open to loopholes.

Appeal Court judgment in *R ex parte OSS Group Ltd* v *Environment Agency and Defra*

Although both SRM and OSS were given leave to appeal, this option was only taken up by OSS. The focus of the Appeal Court's hearing was on the limited legal issue on which OSS was granted permission to appeal, viz 'whether a lubricating oil, thus not originally used as a fuel, which becomes waste can thereafter be burnt other than as a waste'.

Prior to the hearing, an Environment Agency Briefing of 15 January 2007 noted that 'the appeal will therefore not change the legal position, that the CFO that is currently produced by OSS remains in law waste until burned'. However, it would resolve the question of whether OSS might in future be able to process waste lubricating oils into a new product which could cease to be 'waste' before being burned for energy recovery.

Although SRM was not party to the case, in view of its role in the High Court hearing, reference was made to aspects of its operations. However, Defra belatedly joined the Appeal Court proceedings and partially undermined the Environment Agency's position by suggesting that the High Court ruling had gone too far and its restrictive approach threatened to undermine the meaningful development of UK policy in waste recycling and recovery. This prompted further judicial condemnation of the guidance that had been given – 'it is unfortunate that the difficulties of interpreting the pronouncements from Luxembourg are compounded by the failure of the national authorities to agree a common approach'.[36]

Ruling in favour of OSS, Carnwath LJ favoured a 'practical and common sense approach to the issue, which is consistent with the letter and spirit of the directive and with the case-law', as adopted in a Dutch case concerning the use of 'energy pellets' derived from 'waste'

27 Always subject to defeasibility by a subsequent intention to *discard*.
28 Paragraph 71.
29 Paragraph 73.
30 That is where the 'Oakley test' is satisfied, (n 19).
31 Paragraph 57.
32 Paragraph 61.
33 Furthermore, in some kilns, the ash is incorporated into the cement *product* itself.
34 Paragraph 19.
35 *R v DPP ex p Kebilene* [2000] 2 AC 236; *R (Rusbridger) v Attorney General* [2004] 1 AC 357; *R (Pepushi) v Crown Prosecution Service* [2004] EWHC Admin 798; and *Blackland Park Exploration Ltd v Environment Agency* [2004] Env LR 652.
36 Paragraph 68.

(*Icopower*)[37] and the judgment of Lord Reed in *Scottish Power*.[21] This approach was additionally 'consistent with the objective of encouraging the recovery of waste materials for uses which replace raw materials'. The criteria in *Scottish Power* for a 'waste' to be declassified were:

- it must be subject to a true 'recovery operation' which reclaims a distinct substance
- the substance must have the potential and certainty of further use without further processing in the same way as a non-waste material
- the substance must have the potential and certainty of further use under the same conditions of environmental protection as the non-waste material with which it is otherwise comparable, without any greater danger of harm to human health or the environment.

In summary, he stated that 'it should be enough that the holder has converted the waste material into a distinct, marketable product, which can be used in exactly the same way as an ordinary fuel, and with no worse environmental effects'. Many commentators have welcomed Carnwath LJ's departure from a rigid application of ECJ case law, of which he himself noted: 'a search for logical coherence in the Luxembourg case-law [relating to 'waste'] is probably doomed to failure'.[38]

The approaches to 'end of waste' adopted by the Environment Agency and the formulation of the Secretary of State were considered as 'too narrow',[39] and on these issues Carnwath LJ disagreed with aspects of the decisions of Burton J and Stanley Burnton J in *Castle Cement*. However, more radically, he questioned two issues that have hitherto been regarded as critical to the analysis of 'waste' issues.

- The central requirement of the 'discard' criterion within Article 1 (a) of the definition of waste, of which he stated:[40]

  > A fundamental problem is the [European] court's professed adherence to the Article 1 (a) definition, even when it can be of no practical relevance.
  >
  > The subjective 'intention to discard' may be a useful guide to the status of the material in the hands of the original producer. However, it is hard to apply to the status of the material in the hands of someone who buys it for recycling or reprocessing, or who puts it to some other valuable use.
  >
  > [The European Court] continues to insist that the 'discarding' test remains applicable, even where the 'holder' is an end-user such as EPON, [ie *ARCO & Ors*], whose only subjective intention is to use, not to get rid of,
  >
  > the materials in issue.

- The relevance of the WID (and other WFD 'daughter' directives), in relation to the definition of 'waste' in Article 1 (a). He suggested that such comparisons raise as many questions as they solve, and although they provide more specific rules for the situations to which they apply, they do not indicate any intention to modify the general meaning of the WFD definition of waste.[41]

With regard to the first issue, although the treatment of the meaning of 'discarding' has proved problematic to the ECJ, it has never sought to abandon it when considering 'recovery' or 'recycling' operations. Even the '*Tombesi* by-pass'[42] was deemed too restrictive and has never received full endorsement by the European Court. It is difficult to rationalise the view of Carnwath LJ within the current wording of the Waste Framework Directive, although this would be possible with a WFD definition of 'discarding' such as that suggested by the present author:[43] 'the meaning of "discarding" may be considered as the action or decision taken by a person when a substance or object is no longer of direct use in its present form to that person and to any other third party'.

The court's conclusion on the role of WFD 'daughter directives' in relation to the ambit of the term 'waste' is relevant in relation to the Waste Oils Directive 75/439/EEC (WOD), the precedence of which the Agency argued unsuccessfully. However, it is at odds with that of the European Court in *Mayer Parry*[44]in which it held that the Packaging and Packaging Waste Directive 94/62/EC must be considered to be 'special legislation', (a *lex specialis*), vis-à-vis Directive 75/442, so that its provisions prevail over those of Directive 75/442 in situations which it specifically seeks to regulate.[45]

However, the position vis-à-vis the WID could change further as a result of the European Commission's ongoing review of the IPPC Directive. Although the IPPC Directive will only be fully implemented after October 2007, the Commission is at an advanced stage in its review and has brought forward the programmes for the revision of the WID and the National Emissions Ceiling Directive 2001/81/EC, (NEC). The Commission has expressed a wish to see 'sectoral directives' such as the WID brought within a single revised IPPC Directive, and the WID provisions to become applicable to recycled waste (and raw materials).

37 Administrative Law Division of the Dutch Council of State, given on 14 May 2003, *Icopower BV v Secretary of State* (*Icopower*).
38 Paragraph 55.
39 Paragraphs 64 and 66 respectively.
40 Paragraphs 55 and 56.
41 Paragraphs 22 and 23.
42 In Joined Cases C–304/94, C–330/94, C–342/94 and C–224/94, *Criminal Proceedings against Euro Tombesi & ors*, Advocate General Jacobs suggested that the difficulties associated with the definition of 'discard' might be overcome through focusing on the *post*-discarding treatment operations.
43 D N Pocklington 'The Law of Waste Management' (Shaw & Sons 1997) p 316.
44 *The Queen and Environment Agency, Secretary of State for the Environment, Transport and the Regions ex parte Mayer Parry Recycling Ltd, intervener Corus (UK) Ltd, Allied Steel & Wire Ltd*, Case 444/00.
45 In *Mayer Parry*, the court argued that since packaging waste is 'waste' within the meaning of the framework directive, the latter remains applicable to such wastes in so far as the Packaging Waste Directive is concerned.

There is a fundamental difference between this and the view of Burton J regarding the burning of waste-derived fuels that have specifications similar to those of non-waste-derived fuels. In practice, these contrasting views would impose significantly different regimes of control mechanism on the use of waste-derived fuels: controls based upon *input* criteria – the fuel specification, or controls based upon *output* criteria – the emission limits within the WID. In terms of environmental rigour, the WID requires *continuous* monitoring of several components of the emissions from the burned fuels in addition to spot analyses, whereas product controls are likely to be much less stringent and less able to remove the 'diverse range of contaminants not readily identified nor anticipated' at source.

In addition to the above two points, Carnwath LJ endorsed the view of the European Court in *Niselli* that, in the absence of Community provisions, Member States are free to choose the modes of proof of the various matters defined in the directives which they transpose, provided the effectiveness of Community law is not thereby undermined. He further noted that the ECJ has consistently declined invitations to provide a definitive test for 'end of waste', and that it was not the function of the domestic court to fill the gap.

National authorities have a duty to use their expertise and experience to assist both those concerned with treatment and handling of waste, and also the courts (civil or criminal) 'who may well be faced with deciding individual cases without the benefit of any comparable expertise'. The Dutch case *Icopower* is such an example, and Carnwath LJ suggested that Defra and the Environment Agency join forces to provide practical guidance to 'those affected'.

Post-Appeal Court judgment

Following this direction, the Environment Agency and Defra established a technical advisory group (TAG) comprised of government and industry representatives to develop a technical standard and associated sampling/analytical protocols for waste oils that satisfies the criteria set by the Court of Appeal in order to determine the point at which such oils cease to be 'waste'. The suggested scope of the TAG's activities was given in the draft Terms of Reference and the TAG was required to:

- address how the standard will be applied, including its scope and how compliance should be verified
- produce initial proposals within one month of starting and complete its work in three months.

Prior to the first meeting, the Environment Agency issued interim guidance indicating that:

> it would not regard fuel oils that are derived wholly or partly from waste lubricating oils, and that are used as fuel, as waste, if they are processed to meet the specification for Class G oils, excluding the requirements for viscosity, as specified within Table 3 of British Standard BS 2869:2006 (Fuel oils for Agricultural, domestic and industrial engines and boilers – Specification).

This British Standard, albeit in its 1998 version, was an important component of the OSS case in the High Court, and formed the basis of the injunctive relief granted to OSS. However, when the Environment Agency was obliged to extend these provisions to other producers, its enforcement position was based upon CFO® and 'CFO-equivalents' with no direct reference to the BS – the relevance of the equivalence of which it doubted as well as the ability of the producers to meet the specification.

However, the standard was again made the benchmark for the Agency's post-appeal interim arrangements, although after the first meeting of the TAG it had been made more rigorous in terms of test methods for flashpoint and ash content; imposition of a halide limit; parameters within WID relevant to waste oil, including PCBs, chlorine and bromine, zinc, lead, chromium, copper, nickel and vanadium; analytical tests to be performed in a UKAS accredited laboratory or equivalent.

It was agreed that specifications should be developed for two grades (light and heavier recovered oil), and that the standards should relate to both environmental impact and the end-use of the product.

The TAG met on three occasions following which a consultant, ERM, was contracted to provide factual information and a summary of data collated from various members of the TAG and other authoritative sources. The final report was published on the Environment Agency website on 17 March 2008,[46] but on account of the diverging views of the TAG members – both in relation to specific aspects (eg composition data for oils) and to aspects of the approach undertaken by the TAG – it was not possible to meet all the original aims of the work.

The TAG process did not clearly identify the risks to human health and the environment posed by materials present in oils which are subsequently burnt as a fuel, and as such ERM concluded that it was not advisable to draw up a final specification for fully recovered oil.

In order to meet the court's requirement that the 'recovered product will not result in greater harm to human health and the environment than use of virgin product', a detailed comparison of the environmental and human health impacts that arise as a result of the consumption and burning of virgin fuel oils with those of the recovery and burning of waste oil was recommended. Such an assessment would need to consider the use of different fuels in different applications and the full suite of substances which could potentially be found in virgin and waste oils.

Work on quality assurance and test methods was considered to be 'premature' and should only commence when the assessment is underway and nearing completion. The availability of markets for fully recovered oils is unlikely to be a problem, assuming that 'the costs of waste oil

46 ERM, Waste Oil Technical Advisory Group Final Report, Reference 0075320, February 2008.

processing do not result in the final product being uncompetitive'.

Following the publication of the report[47] the Environment Agency engaged an independent consultant to carry out a detailed analysis of the substances of concern with a view to setting compositional and other limits based on its findings. The Agency anticipated that the draft protocol will be finalised by the end of April following which there will be a 12 week consultation period. Once agreed Defra must undertake the notification procedure required under the Technical Standards Directive – another three months – followed by a three month period for industry to implement the requirements of the protocol.

Response of SEPA

In contrast to these lengthy deliberations, on 6 August 2007 the Scottish Environmental Protection Agency, SEPA, issued supplementary guidance to Annex 4 of its document 'Is it Waste?' for determining when waste oil has been fully recovered.[48] This consisted of a three-part assessment: initial description and identification of a suitable non-waste comparator; comparative analysis and conditions of use and environmental emissions.

Progression from one step to the next is only advised where agreement had been reached with SEPA.

The approach adopted is quite different from that of the Environment Agency. It provides an example of the required methodology and is not intended to be definitive. Operators are entitled to make a case to SEPA using a different approach should they wish and decisions must be made on a case-by-case basis. Important components of the procedure are:

- a description of the waste(s) to be considered; the treatment/recovery process undertaken on the waste; the material(s) that the recovered waste is intended to replace and each proposed use of it; and potential differences, if any, in composition between the recovered waste and the non-waste comparator(s) for each proposed use
- evidence to back up all procedures with no greater risk of harm to health or the environment.

Summary and conclusions

The judgment of the Appeal Court was welcomed by many as a positive step towards a more practical approach to waste oils in particular, and possibly waste-derived products in general. However, a number of aspects remain controversial, and it is interesting to speculate how the case would have fared had it been referred to the European Court.

The move from a strict, legal approach based upon ECJ jurisprudence to a technical analysis is an interesting one, but it remains to be seen whether this will provide a more effective and less ambiguous solution. Within this framework, SEPA has favoured a 'bottom-up' case-by-case approach based upon guidelines it issued shortly after the Appeal Court ruling, whereas Defra and the Environment Agency have opted for a 'top down' scheme, set up by committee, subject to public consultation and approved by the Commission. The difficulty in achieving consensus is an obvious drawback of a committee in which a number of different interests are represented, as is the scope for gamesmanship and the complexity of assessing the environmental and health risks of a waste stream.

Whilst the SEPA scheme was put in place relatively quickly , its case-by-case approach could ultimately involve substantially more of the regulator's time. The Agency's projected finish date is close to the finalisation of the Waste Framework Directive in 2008.[49]

'End of waste' is one of the issues that has been hotly debated in relation to the modified WFD, and is the subject of an ongoing European Commission project. However, only non-fuels are being considered – scrap metal, compost and recycled/secondary aggregates – and a proposal from the Czech Republic for a new recital introducing the possibility of lifting the 'waste' status for recovered fuels before incineration was rejected.

Back in the real world, it has been reported that following the Appeal Court judgment some of the waste oil that was being used at Corus' Redcar works has already begun to return to roadstone plants, since quarries are willing to pay double what Corus will pay.[50]

The Oil Recycling Association believes that the long-term effect on the industry will depend on the strength of the environmental standards set by the Agency for heavy metals, chlorine and ash – demanding standards will encourage the re-refining of waste oils to make base oil, but this will not occur if low standards are set. The German company Puralube has announced its intention to build a 70,000-tonne capacity re-refining plant in the United Kingdom, but this would only be competitive if high standards are set.

Burton J noted[51] the 'very considerable financial and practical significance' of the classification of used oil as 'waste', or not, and since before the introduction of the WID in December 2005, companies wishing to influence the debate have adopted a range of strategies to achieve this end. However, the forum at which this has been decided has changed, with legal arguments giving way to technical discussions, although in the long run it could be the parliamentary/public affairs agenda that is decisive.

47 Ibid.

48 'Supplementary Guidance to 'Is it Waste?' Determining when waste oil has been fully recovered' SEPA, Document Number: WML-G-DEF-02, 6 August 2007.

49 Political agreement on the common position was achieved on 28 June 2007. The ENVI Committee considered the rapporteur's report on 26 February and is scheduled to debate the 210 amendments at the end of March. A long time interval has been introduced between the ENVI vote, 3 April, and the vote in plenary, 16–19 June, to limit the possible necessity of the directive going to conciliation. Final adoption is expected under the French Presidency during the second half of 2008.

50 'Legal Ruling Forces Agency to Rethink Controls on Waste Fuels' ENDS Report 391 (August 2007) p 4.

51 Paragraph 1 ref 16.

Case Law

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Headline Issues

- **EC Law** – *Commission v Italy* – waste (excavated material); *Commission v Italy* – waste (food scraps); *Commission v Italy* – waste (production residues); *Commission v Spain* – Birds Directive
- **Planning Law** – *Residents Against Waste Site Ltd v Lancashire CC* – waste site review – standing
- **Waste** – *Neal Soil Suppliers Ltd v Environment Agency* – Section 59 EPA notices; *R (Anti-Waste Ltd) v Environment Agency* – landfill

EC Law

Waste

Commission v Italy (excavated material)
Case C–194/05, ECJ, 18 December 2007

Commission v Italy (food scraps)
Case C–195/05, ECJ, 18 December 2007

Commission v Italy (production residues)
Case C–195/05, ECJ, 18 December 2007

Three separate enforcement actions were brought against Italy in relation to its failure to fulfil its obligations under Directive 75/442/EEC on waste (OJ 1975L 194/39) (as amended), and were considered by the same court on the same day. Each case concerned separate subject matters, although the principles were dealt with in common between them. Broadly, the Commission was unhappy with Italian implementing legislation which made provision for the exemption of each of the subject matters of the cases: excavated materials, intended to be used for re-engineering projects; food scraps, for use as animal feed and pet shelters; and a general category of production residues capable of reuse. After the failure of the pre-litigation procedure in resolving the problem, the cases came before the ECJ for determination.

In the first case, Italian law exempted excavated earth and rock intended for actual use for filling, backfilling, embanking or as aggregates, from the meaning of 'waste', unless the material was contaminated with pollutants at a certain level of concentration. The Commission felt that this did not comply with the requirements of the directive. The material in question is listed in the European Waste Catalogue as intended to be discarded and therefore was covered by the directive's definition of waste. Therefore, the Italian law laid down far too broad an exclusion. Italy stated that EC waste law is subject to certain 'reasonable exclusions', for example certain by-products that the undertaking concerned does not intend to discard as waste. The way a residue is classed as a by-product, rather than waste depended upon the certainty that they would be used without prior processing. This applied in para 26 of the excavation waste case, para 22 of the food scraps case and para 25 of the production residues case.

The ECJ considered, in each case, the application of the directive, and the many interpretations it itself had applied to the subject matter in the many cases to come before it. It noted, again, that the discard concept was central to the operation of the waste regime, and was central to the determination of what constituted waste. The term 'discard' should be interpreted not only in the light of the objectives of the directive, but also of Article 174(2) EC which demand a high level of protection to be afforded to the environment, taking account of, inter alia, the precautionary principle. As a result the term 'discard', and thus the term 'waste' could not be interpreted restrictively. It was true that here was the possibility in certain situations for residues to be classified as by-products rather than waste when the reuse was a certainty, there was no need for reprocessing and the substance formed an essential part of the process of production or use. However, and common to each case the ECJ stated (at paras 38, 41 and 39 respectively) that: 'If such re-use requires long term storage operations which constitute a burden to the holder and are also potentially the cause of precisely the environmental pollution which the directive seeks to reduce, that re-use cannot be described as a certainty and is foreseeable only in the longer term, and accordingly the substance in question must, as a general rule be described as waste'.

All of the circumstances need to be considered, as the directive does not provide any single criterion for determining the question of whether a person intends to discard a substance or not. In each of the cases it was submitted by Italy that the materials in questions were not residues, and were intended for 'certain' reuse and were therefore not waste. In the case of the excavation residue, it was held that the material would be stored, often for a long time; in the case of the food scraps it was determined that the Italian exempting law did however envisage some form of processing; and for the production residues, there was a lack of clarity as to what was covered by the Italian law's exemption.

In all three cases, the ECJ held that there was no justification permitted in the directive for the exemptions put in place by the Italian laws, and thus the Commission's case was upheld in each.

Birds Directive

Commission v Spain
Case C–186/06, ECJ, 18 December 2007

The Commission alleged Spain's failure to fulfil its obligations under Articles 2–4(1) and (4) of Directive 79/409/EEC on the conservation of wild birds (OJ 1979L 103/1) in relation to an irrigation project in Catalonia. Article 2 imposes obligations on Member States in relation to the maintenance of populations of naturally occurring wild birds in the EC at a favourable conservation level, taking account of recreational and economic considerations, or to adapt the populations to that level. Article 3 imposes obligations in relation to the maintenance of habitat, in terms of both area and diversity, for species referred to in Article 1; and obligations to create protected areas, manage habitats and re-establish biotypes. Further obligations in relation to the establishment of special protection measures concerning the habitats of Annex I listed species are imposed by Article 4(1), which requires account to be taken of, inter alia, species vulnerable to extinction or vulnerable to specific changes in habitat for the basis of the establishing of Special Protection Areas (SPAs); and finally, so far as material in this case, Article 4(4) obligates Member States to take appropriate measures to prevent pollution or degradation of SPAs, as well as striving to protect other, non-SPA, areas.

The Commission received a complaint that a proposed irrigation project would affect the only two areas important for the conservation of steppe-land birds in Catalonia, areas which were known as Important Bird Areas (IBAs), and identified in the 1998 IBA directory. The Commission requested some detail about the irrigation project and the extent of SPA classification in the IBAs. Unsatisfied with Spain's response, the Commission's letter of formal notice stated that the directive had been incorrectly applied and that, in the region in question, insufficient SPAs (both in number and size) had been designated. It was further alleged that the project had been authorised despite the fact that it would lead to deterioration or destruction of the habitats of a number of Annex I listed birds. A reasoned opinion followed, and Spain's unsatisfactory response resulted in the action before the ECJ. The Commission stated that the action related to the authorisation of the irrigation project and the detrimental impacts it would have for certain Annex I species, as opposed to the question of the sufficiency of SPA designation.

Spain succeeded in pleading that the Commission's complaints on Articles 2 and 3 were inadmissible, as only the breach of Article 4(1) and 4(4) were included in the letter of formal notice to which Spain submitted its own observations. The ECJ noted that a letter of formal notice and reasoned opinion sent by the Commission to the Member State 'delimit the subject matter of the dispute, so that it cannot thereafter be extended' (para 15), and on that basis declared the Commission's action inadmissible insofar as it related to Articles 2 and 3. On the remaining issue, the Commission argued that the irrigation project would have a negative impact on the relevant bird populations in the IBAs, and the fact that certain areas of the IBAs were not classified as SPAs did not exempt Spain from complying with the requirements of Article 4(4) of the directive. Spain submitted, first, that the Commission had been unable to prove that there would be negative impact; and secondly, that in any event, the protective measures which form part of the project would be sufficient to avoid negative consequences.

The ECJ explained that Article 4(4) required Member States to take appropriate steps to avoid pollution or deterioration of habitat or disturbances to the birds which would be significant in the light of the rest of that article. Previous case law was clear that the duty in Article 4(4) extended to areas outside of the declared SPAs, where those areas should have been so classified. Noting the impact of Article 6(2) of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ (1992)L 206/7) (the Habitats Directive), on Article 4(4) of the directive, the ECJ observed that the directive remained the means by which protection of the areas which were not SPAs, but should be, might be achieved. The court referred to the IBA directory, which it has often declared to be the basis of reference for determining whether a Member State has classified SPAs of a sufficient size and number, in the absence of scientific data to the contrary. It was certainly the case that the area provided a habitat for some Annex I bird species, and the ECJ also referred to the regional government's negative environmental assessment for the area, stating: 'The irrigation project … is seriously harmful, particularly with regard to the habitats of steppe land birds'. This was the case even with account taken of the: 'Preventive, corrective and compensatory measures proposed in the environmental impact assessment' (both para 33).

The court had no difficulty in finding that Spain, by its authorisation of the irrigation project had failed to fulfil its obligations under Article 4 (4) of the directive in that it had not taken appropriate protective measures in an area which should have been classified as an SPA. The ECJ considered, again, the balance in relation to socio-economic arguments relating to the development, reiterating its settled principles that: '[The] finding cannot be called into question by the mere fact that the project … is of considerable importance to the economic and social development of the area which it affects. The Member State's ability to significantly harm areas which ought to have been classified as SPAs … cannot in any event, be justified buy economic and social requirements' (para 37).

Planning Law

Waste site review – standing

Residents Against Waste Site Ltd v Lancashire County Council
[2007] EWHC 2558, QBD, Irwin J, 7 November 2007

The case involved an application for judicial review against a decision of the defendant local authority (LCC) to grant planning permission for the construction of a waste technology plant in Leyland, Lancashire. LCC had applied to itself, in its role as waste disposal authority, as waste planning authority to develop a large waste management facility. The planning process involved a detailed environmental impact assessment involving, inter alia, contamination, water resources, noise and traffic routing to and around the facility. Many representations were made during the consultation process in relation to the traffic aspect, and even though it did not consider it essential, LCC determined that traffic to the site should only use one specific entrance. However, they did not impose any condition on the planning permission and instead created a contractual obligation between itself and the site developer (the interested party). The obligation required the interested party to comply with routing provisions, which would be enforced through the penalties provided for in the contract.

The claimant (RAWS), was a company formed by local objectors to the development, in order to represent their interests. Two challenges were put before the court for determination. One, in relation to the routing of the traffic; and the other in relation to the alleged failure on the part of the LCC to give effect to the required objectives in relation to waste management. Prior to his consideration of the substantive issues, Mr Justice Irwin ruled on two procedural issues relating to RAWS' standing; and whether, as LCC had submitted, the action was out of time.

On the standing issue LCC submitted that RAWS had no standing. RAWS had been formed as a company limited by guarantee only two days before the claim, and thus, according to LCC, could not have been an interested party during the planning process, even though its members could be. It was submitted that RAWS had been incorporated solely as a means to limit liability for costs. Reflecting that public law is: 'About wrongs – that is to say misuses of public power' (para 16), Irwin J, having considered a series of judgments on the issue, and noting that a security for costs agreement had been concluded between the parties, refused LCC's challenge on this point. Similarly, the submission that the application was out of time was also rejected. LCC had argued that it and the interested party had incurred costs in pushing on with the development, and that RAWS should have begun proceedings more promptly than within two days of the deadline for application. It was noted that a prompt application was necessary when large contracts could not reasonably be halted on the basis of tentative indications that proceedings might be issued. Mr Justice Irwin found as a fact that LCC and the interested party did not halt their contracts, even after *actual* (my emphasis) issue of proceedings, and he noted that: 'There is no evidence on which I can find safely that they would in fact have done so had the proceedings have been issued three of four weeks earlier' (para 26).

Turning to the substantive issues, Irwin J dealt, first, with the claim that LCC had failed to address properly the 'relevant objectives' in relation to the disposal or recovery of waste. These objectives originated from Directive 75/442/EEC on waste (OJ 1975L 194/39) (as amended) and are given effect in the UK by Regulation 19 and sched 4 of the Waste Management Licensing Regulations 1994 (SI 1994/1056) (as amended). It was not in dispute that these objectives applied to the LCC in its role as the planning authority, but in assessing the extent to which they applied, Irwin J considered the judgment of Lord Justice Pill in *R (Thornby Farms) v Daventry DC* [2002] EWCA Civ 31. In that case, it was stated that: '[An] objective in my judgment is different from a material consideration' (quoted at para 33), in that it was something to be aimed at, and that: 'Provided the objective is kept in mind, a decision in which the decisive consideration has not been the contribution they make to the achievement of the objective may still be lawful'. The objectives would thus always need to be kept in mind and would be required to be taken into consideration with all of the others, in Irwin J's view, although an explicit reference to them was not always necessary, mere lip-service should be avoided. He stated that: 'An absence of reference to the relevant objectives in an otherwise lawful decision, where the decision maker has in fact paid proper attention to them will not condemn the decision. A challenge on these grounds must not become a semantic game' (para 35). An examination of the series of decisions and documents, including the environmental statement, which had gone before the planning committee brought Irwin J to the conclusion that LCC: 'Fully took into account the relevant objectives' (para 48).

The traffic issue remained. The main problem appeared to be the fact that the contractual agreement reached between the parties as a method of controlling the traffic to and from the site was not sufficiently robust. Mr Justice Irwin noted from the outset that: 'Desirable traffic routeing is not the issue here. The question is one of enforcement' (para 50). The contractual obligations which had been chosen in preference to a planning condition, did not run with the land, and so, would not be effective were another operator to take over the site. LCC had resisted calls for the imposition of a planning condition, and had pointed to Department of Environment Circular 11/95, which provided that planning conditions were not an appropriate means of controlling the right of passage over public highways. A third solution presented itself through the course of the hearing. LCC proposed that they could give a unilateral undertaking in its capacity as an applicant for planning permission pursuant to s 106 of the Town and Country Planning Act 1990. That undertaking would attach to the land and would therefore remain effective should the site change hands. LCC's failure to consider this option at the planning permission stage was a failure on its part, and the use of a s 106 agreement:

'In the context of a highly vexed and difficult application such as this one, that should have been considered essential' (para 57). However, the judicial review was granted on that ground alone, as LCC had already undertaken to put the obligation into operation, no further order was required from the court.

Waste

Section 59 EPA notices

Neal Soil Suppliers Ltd v Environment Agency
[2007] EWHC 2592, QBD, Keene LJ, Gibbs J, 31 October 2007

The case was an appeal by case stated against a decision made by Cardiff Crown Court in proceedings relating to the treatment of waste soil, and raised an interesting point about the relationship between prosecution for waste offences and remedial powers. The appellant had been convicted, along with a third party, of an offence under s 1(a) of the Environmental Protection Act 1990 (EPA). The offence related to the deposit, without a waste management licence, of soil contaminated with Japanese Knotweed (JK) an extremely invasive weed, which is classified as controlled waste. The deposit took place on the appellant's property after the appellant had been contracted to remove soil containing JK from a development site. Despite the fact that the appellant intended to recycle and reuse the soil as part of its wider business, it was convicted, having entered a guilty plea, of the s 33 deposit offence.

Aside from the offences provided for in s 33, the relevant authority, in this case the Environment Agency (the Agency, may serve a notice on the occupier of land, under s 59(1) EPA, requiring the waste to be removed and/or other steps to be taken. Failure to comply within the period set out in the notice without reasonable excuse is an offence by virtue of s 59(5). A notice was served on the appellant requiring the removal of the waste within 28 days, although there was no specified destination for it. According to the case stated, there is no management facility licensed to process JK-contaminated soil, and so it would have had to go to landfill. The appellant appealed to the magistrate's court against the removal requirement, proposing instead that the material be treated on site, and only if that treatment did not eradicate the JK should the soil be removed to a landfill site. The magistrate's court refused the appeal. At the Crown Court it was noted that the Agency had produced a code of practice outlining three options for dealing with such soil if discovered. Two options related to in situ treatment with herbicides, meaning that the soil would not have been discarded and would therefore not be waste. The other option required removal, then treatment where available, or landfill.

The appellant's treatment proposal, it was noted by the Crown Court, was similar to how the soil would have been treated if dealt with at the site it originated from and, importantly, would be no more environmentally damaging to the environment. Despite this view the Crown Court would not modify the s 59 notice by substituting treatment for removal. It reasoned that treatment of waste should be carried out under licence. Policy reasons, as well as the purpose of Directive 75/442/EEC on waste (OJ 1975L 194/47) (as amended) required such an approach, the Crown determined. The appellant was not licensed to treat the waste in question, despite having attempted to be licensed after negotiations with the Agency, and the Crown Court was of the view that it would be wrong to permit a company convicted of a deposit offence to then treat the waste without a licence. This, it was submitted, would not be supportive of the purpose of the directive. The material remained waste and as such the appellant would be allowed to commit a further offence under s 33(1)(b) EPA, relating to the 'treating, keeping or storing' of controlled waste without a licence. The Crown Court forwarded the following question in the case stated: 'Whether the court was correct to base its decision upon the view that, in the light of the waste management legislation and its purpose, the steps proposed to be taken by the appellant with a view to eliminating or reducing the consequences of the deposit of the waste under s 59 would be contrary to the purpose of the legislation and/or would involve the commission of an offence under s 33 (1) (b) of the Act' (quoted at para 12).

The appellant submitted that the Crown Court's approach was legally flawed. Despite the fact that the court had recognised the appellant's proposals to deal with the waste in situ as 'sensible', it had accepted the Agency's view that the lack of a licence to treat it was sufficient reason to refuse modification of the notice. It was submitted for the appellant that the Crown Court was relying on the fact that modifying the notice would condone the s 33(1)(b) offence. Consequently, the rejection of the proposed modification to permit treatment was premised on the appellant's lack of a treatment licence. The flaw, it was submitted, could be seen in the fact that s 59 clearly contemplates 'treatment' under a notice which, without such notice, would amount to an offence.

Further, the policy aspect did not help any further, as it was premised on the basis of having a waste licensing system. Thus, it was submitted, the Crown Court was wrong in its decision that it could not amend the notice for fear of condoning the commission of an offence. The respondent accepted that a court dealing with an appeal under s 59 cannot rule out the 'treatment' option merely because it would contravene s 33(1)(b). It also accepted that no offence is committed in complying with a s 59 notice. However, it was argued that the Crown Court barred the modification of the notice on the grounds of the suitability of the appellant. It was observed that the appellant had brought the waste onto the site under a commercial contract. If the notice was modified, it would be, effectively, short-circuiting the processes put in place in that: 'His breach of the licensing regime would have meant that he was treating waste on his own, unlicensed, site and indeed at a profit' (para 17). This would send out a message that circumnavigating the system could be a profitable approach. It was however conceded by counsel

for the Agency that fines under s 33 may reflect any financial benefit accruing to the defendant, such that: 'Ill-gotten gains … can be removed from him on such a prosecution' (para 18).

Lord Justice Keene identified two principal strands in the Crown Court's reasoning. First was the fact that modification permitting treatment would lead to an offence under s 33(1)(b) because of the fact that treatment would be carried out without the necessary licence to do so. The second strand reflected the policy reasons, including the purposes of the EPA and the directive. He then explained the legal flaw in relation to the first strand of reasoning. He noted that s 33(1)(b) provides for a criminal offence in relation to treatment without a licence, referred to the s 59(1) provisions, and noted that both removal and treatment, or, either removal or treatment could be specified: 'In other words, a s 59 notice may perfectly lawfully allow the waste to remain deposited on the land in question, albeit that the deposit breached s 33 and the notice may simply require some steps short of removal to be taken'. Obviously this would generally necessitate the 'keeping' of waste on land which would otherwise be an offence under s 33(1)(b). Section 59 can also require 'treatment' of the waste and it was noted that the EPA gives a wide meaning to the word 'treat' in s 29(6). As a consequence he stated that s 33(1) should be read subject to the provisions of s 59(1), so that action taken under s 59(1) would not amount to an offence under s 33(1). This point was accepted by counsel for the Agency, and Lord Justice Keene thus determined the approach taken by the Crown Court to have been wrong.

Despite the fact that this finding would be sufficient to allow the appeal and remit the case, Lord Justice Keene took the trouble to address the second strand of the Crown Court's reasoning, relating to policy considerations and the purpose of the directive. In the case of the latter, the recitals provided that the directive aims towards the protection of human health and the environment. So far as the purposes were indicative of a test to apply in a s 59 appeal, he reflected that it did not appear to point strongly in favour of removal or against treatment.

Additionally there were sound reasons in setting up a waste management licensing system. Keene LJ considered that the Crown Court may have been influenced by its desire to prevent the appellant's evasion of the waste licensing system, and that it should not be able to get away with a less expensive solution to landfill. Also in their minds, it was offered, was the potential for others to be others encouraged to a similar approach particularly where there was a possible commercial benefit. The essential point to remember was that these were: 'Essentially considerations of punishment of the offender and deterrence of others' (para 28), and such considerations were inappropriate for the Crown Court in the instant case. Section 59 was not in existence to achieve punishment or deterrence: as stated previously, s 3 fulfilled that function given its extensive range of penalties. Keene LJ differentiated the provisions, stating: 'Section 59 … to my mind is remedial. It is there to deal with a situation which has arisen, and to deal with it in the most appropriate way for the protection of the environment' (para 28).

He concluded the judgment by noting that s 59 is not designed to make good deficiencies in penalties imposed in criminal proceedings. Interestingly, particularly given the many criticisms levelled at the stringency of environmental law sentencing, he encouraged both magistrates' and Crown Courts to reflect any commercial advantage accrued by a person when convicted of a deposit offence when determining the fine level. That apart, s 59 notices involved something different, namely: 'Determining the most appropriate remedial steps in the context of protecting human health and protecting the environment' (para 29). He allowed the appeal and remitted the case back to the Crown Court.

Landfill

R (on the application of Anti-Waste Ltd) v Environment Agency
[2007] EWCA Civ 1377 Court of Appeal, Pill, Sedley and Rimer LJJ, 20 December 2007

The appeal was against a decision of the High Court which had declared, as a matter of law, a landfill permit could be issued to operate a new landfill above an existing, but closed, landfill cell. It was also held that where an installation or part of an installation as a landfill includes a closed cell, which is discharging and will continue to discharge substances listed in the Groundwater Regulations 1998 (SI 1998/2746) (the regulations) a landfill permit could not be granted for that landfill as the permit would in effect be permitting discharges contrary to the regulations. The Environment Agency appealed against the first of the declarations and Anti-Waste Ltd against the second. Lord Justice Pill gave the leading judgment with which his colleagues agreed, although Lord Justice Sedley demonstrated that he was less than impressed with the approach taken by the parties to the case in seeking declarations from the court prior to reaching the end of the statutory appeals process.

On the first issue the Agency argued that the declaration was wrong as it was based on an erroneous interpretation of the term 'stationary technical unit', used to define an installation under the Pollution Prevention and Control (England and Wales) Regulations (SI 2000/1973) (the PPC regulations). It had been held that a new deposit of waste in a defined area that excluded an existing and no-longer used cell was capable of constituting a 'stationary technical unit' (the term is not defined in the PPC regulations). The effect of this was that a landfill permit did not have to apply to the whole of a site, and so could be granted to a separate landfill which overlaid a closed cell. The practical limitations, such as the risk of pollution from an old overlaid cell, due to compression, were considered by Collins J in the High Court, who observed that such technical difficulties did not establish that as a matter of law a landfill permit could not be granted, although practically it would be unlikely. Lord

Justice Pill quoted his reasoning at para 15: '[This] will not be because it does not qualify as a technical unit in its own right but because it cannot meet the requirements necessary to avoid a serious risk of pollution'.

The Agency submitted that the definition of installation as a stationary technical unit where a 'relevant' activity, for these purposes landfill, was undertaken should be considered objectively. Thus, where old and new landfill cells needed to be managed together in an integrated way for environmental purposes, the new and old cells should be regarded as interdependent, so the 'piggybacking' cell could not be classed as a technical unit. The Agency again identified technical issues such as compression, and pollution monitoring as difficulties, and difficulties which were included in the reasoning for the refusal of licences. It was admitted by counsel for the Agency that the Agency's view of the meaning of 'technical unit' was the subject of an appeal to the Secretary of State. However, it was submitted that the term should be construed in the context of the relevant EC law and the regulations, which required a high degree of protection and an integrated approach to be adopted.

Lord Justice Pill agreed with the High Court and counsel for Anti-Waste Ltd on the issue. He determined that: 'Technical and environmental considerations which arise from the presence close to the area subject to the application of the closed unit do not bear upon the definition of technical unit' (para 27). He continued by stating that an application is made for a permit for an 'installation'. That then requires the identification of a stationary technical unit, and that can be achieved: 'By identifying a space in which the scheduled activity can be carried out independently as a functionally self-contained operation' (para 27). This was so despite the potential for it to have an impact on other areas, including previously closed cells. In that regard he stated that the impact: 'Is very relevant to whether a permit should be granted but there is no requirement to demonstrate an absence of such an impact before an application for a permit can be considered' (para 27).

On the second ground of appeal relating to the regulations, it was observed that the appeal turned on the construction of the word 'permit' in the regulation. Authorisation cannot be granted for certain activities to commence if it would permit the discharge of any substance on List 1. Additionally reference was made to Regulation 13, which provides that: 'The application of the measures taken pursuant to these regulations may on no account lead, either directly or indirectly, to pollution of groundwater' (para 33). So far as this related to the type of landfill operation imagined, the Agency submitted that the regulations meant that a person applying for a fresh permit would be required to prevent pollution from the whole landfill. If that were not achieved, there would be 'permission' given to the discharge according to Regulation 4. The result would be that even if it was impossible to prevent an emission that was already occurring, a new permit could not be granted. In this respect it was submitted that a failure to prevent an old discharge would amount to permitting it within the scope of the regulations. The appellant took a different view, submitting that if an existing discharge is not exacerbated by a new development, that new development cannot be permitting the discharge within the meaning of Regulation 4: simply, the discharge would be there regardless and a refusal of a permit would not end the discharge. Lord Justice Pill preferred Anti-Waste's interpretation. He stated that: 'A permit which does not require the ending and preventing of an old discharge does not "permit" that discharge within the meaning of Regulation 4 of the Groundwater Regulations' (para 41). He continues that the regulations contemplate a discharge linked to the activity subject to authorisation, and not one that is 'extraneous in the sense that it is unrelated to the new activity' (para 41). On this basis the appeal was allowed on a very limited ground, in that the second of the High Court's declarations was quashed, although there were no replacement declarations made as there was no real factual basis upon which to base them. Lord Justice Sedley stated at para 47 that: 'Neither the declarations which were made nor any of the expanded versions put, at our invitation, before this court is a proper use of the court's declaratory function. The pursuit of them in advance of the statutory appeal to the Secretary of State is an inappropriate endeavour to anticipate part of that appeal' (para 47).

Strategic Issues – EU

Joanne Sellick *University of Plymouth*

Headline Issues

- EU-wide cap for emissions trading 2008–12
- Commission announces linkage of the EU ETS with Norway, Iceland and Liechtenstein
- International Carbon Action Partnership announced
- Extension of the Natura 2000 network
- IPCC report highlights need for negotiations on global emission cuts
- Oil pollution in the Black Sea
- Directive on flood risk management comes into force
- Commission's annual report on progress towards meeting Kyoto objectives
- EP vote on the Marine Strategy Directive
- EP vote on the Air Quality Directive
- EC and UN to deploy joint expert team to South Korea following oil spill
- EU welcomes agreement to launch negotiations on a global climate regime for post-2012
- Commission proposal to limit CO_2 emissions from cars
- Commission takes steps to cut industrial emissions further
- Commission welcomes Council agreement on aviation, regrets failure on soil

EU-wide cap for emissions trading 2008–12

The Emissions Trading Scheme (ETS) ensures that greenhouse gas emissions from the energy and industry sectors covered are cut, helping the EU and its Member States meet commitments under the Kyoto Protocol.[1]

National Allocation Plans (NAPs) determine each Member State's limit on the total amount of CO_2 that installations covered by the EU ETS can emit, and specify how many CO_2 emission allowances each plant will receive. The Commission is responsible for assessing Member States' proposed NAPs against 12 criteria listed in the ETS Directive.[2] The Commission may accept a plan in part or in full.[3]

The assessment criteria seek, among other things, to ensure that plans are consistent with meeting the EU's and Member States' Kyoto commitments, with actual verified emissions reported in the Commission's annual progress reports, and with technological potential for reducing emissions. Other assessment criteria relate to non-discrimination, EU competition and state aid rules, and technical aspects.

The EU-wide cap for 2008 to 2012 has been fixed at 2.08 billion allowances per year after reducing the number of allowances allocated in the second period by more than 10 per cent.

IP/07/1614, Brussels, 26 October 2007.

Commission announces linkage of the EU ETS with Norway, Iceland and Liechtenstein

As part of the review of the EU ETS,[4] the Commission has been exploring the option of linking it with other credible emissions trading systems in the world. Systems must be mandatory and set absolute limits on emissions, as well as have robust registry systems and stringent monitoring and compliance provisions in place.

The linkage of the EU ETS with Norway, Iceland and Liechtenstein is taking place through the incorporation of the EU ETS Directive[5] into the European Economic Area agreement. The decision of the European Economic Area Joint Committee on incorporation was taken on 26 October 2007. The next step is for national approval procedures to be fulfilled.

IP/07/1617, Brussels, 26 October 2007.

International Carbon Action Partnership announced

A coalition of European countries, US states, Canadian provinces, New Zealand and Norway has announced the formation of the International Carbon Action Partnership[6] to fight global warming. It is hoped that this will provide an international forum in which governments and public authorities adopting mandatory greenhouse gas emissions cap and trade systems will share experiences and best practices on the design of emissions trading schemes.

1 See generally http://ec.europa.eu/environment/climat/emission.htm and http://ec.europa.eu/environment/climat/2nd_phase_ep.htm.
2 Council Directive 2003/87/EC of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and Amending Council Directive 96/61/EC [2003] OJ L275/30 (ETS Directive).
3 For Commission decisions on individual NAPs see IP/06/1650, IP/07/51, IP/07/136, IP/07/247, IP/07/412, IP/07/415, IP/07/459, IP/07/501, IP/07/613, IP/07/667, IP/07/749, IP/07/1131, IP/07/1274, IP/07/1566, IP/07/1612 and IP/07/1614.
4 www.ec.europa.eu/environment/climat/emission/review_en.htm.
5 ETS Directive (n 2).
6 www.ICAPCarbonAction.com.

The ground-breaking international and interregional agreement was signed by US and Canadian members of the Western Climate Initiative, north-eastern US members of the Regional Greenhouse Gas Initiative, and European members including the United Kingdom, Germany, Portugal, France, the Netherlands and the European Commission. New Zealand and Norway have also joined on behalf of their emissions trading programmes.

IP/07/1627, Brussels, 29 October 2007.

Extension of the Natura 2000 network

Natura 2000 is an EU-wide network of nature protection areas intended to ensure the long term survival of Europe's most valuable habitats and endangered species.[7] It is comprised of special areas of conservation (SACs) designated by Member States under the Habitats Directive[8] and special protection areas (SPAs) designated under the Birds Directive.[9]

Given the large natural variation in biodiversity across the EU, the Community is divided into different bio-geographical regions: Atlantic, Continental, Alpine, Mediterranean, Boreal, Macaronesian and Pannonian. The decisions concern the adoption of an initial list of new sites of community importance in the Pannonian region in the Czech Republic, Hungary and Slovakia and the updating of the existing lists in the Atlantic, Boreal and Continental bio-geographical regions. This extends the Natura 2000 network by adding 4255 new sites of Community importance and a total area of some 90,000 square kilometres. The addition of large areas to the offshore marine environment designated as sites of Community importance is also new, with more than 8000 km^2 proposed by Germany.

IP/07/1683, Brussels, 13 November 2007.

IPCC report highlights need for negotiations on global emission cuts

The UN Intergovernmental Panel on Climate Change (IPCC)[10] assesses the scientific, technical and socio-economic information relevant for understanding the risk of man-made climate change. Its reports are based mainly on peer-reviewed and published scientific and technical literature and thus represent the most authoritative global scientific consensus on climate change.

This synthesis report forms the final part of *Climate Change 2007*, the IPCC's Fourth Assessment Report, by summarising the key conclusions. The other three parts were released earlier in 2007 and covered the physical science of climate change,[11] impacts, adaptation and vulnerability[12] and ways to mitigate climate change,[13]

The key findings of the Fourth Assessment Report confirm that climate change is accelerating and is almost certainly caused by emissions of greenhouse gases from human activities; that climate change is already affecting people; that global emissions of greenhouse gases must be reduced drastically and urgently; that these emission reductions can be achieved; and that society must adapt to climate change.

The key elements of EU action in response are:

- a commitment to reduce greenhouse gas emissions to at least 20 per cent below 1990 levels by 2020, that will be strengthened to 30 per cent reduction in the context of a fair global agreement
- a firm target to increase the use of renewable energy to 20 per cent by 2020
- a broad range of measures to improve energy efficiency by 20 per cent by 2020
- further evolution and strengthening of the EU's emissions trading scheme
- an ambitious limit to CO_2 emissions from cars
- a framework for introducing carbon capture and storage (CCS) in power production
- development of an effective adaptation strategy.

IP/07/1716, Brussels, 17 November 2007.

Oil pollution in the Black Sea

The European Commission has responded to a request from Ukraine through its Monitoring and Information Centre (MIC), the office responsible for civil protection and marine pollution actions, for assistance in evaluating the environmental impact of oil pollution in the Kerch Strait.

The MIC has been monitoring the development of events in this maritime region, which connects the Black Sea with the Sea of Azov. Violent storms have dispersed oil pollutants, caused by the sinking of several ships containing oil and sulphur, affecting communities living in the region and the environment. The MIC has also been in contact with Russia.

IP/07/1715, Brussels, 18 November 2007.

Directive on flood risk management comes into force

The new directive[14] on flood risk management came into force on 26 November 2007. The directive requires flood

7 http://ec.europa.eu/environment/nature/index_en.htm.
8 Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L206/7 (the Habitats Directive).
9 Council Directive 79/409/EEC of 2 April 1979 on the Conservation of Wild Birds [1979] OJ L103/1 (the Birds Directive).
10 www.ipcc.ch.
11 IP/07/128.
12 IP/07/491.
13 IP/07/610.
14 Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the Assessment and Management of Flood Risks [2007] OJ L288 (6 November 2007) p 27.

risk management to be negotiated across national borders and contains important commitments to increase transparency and involve citizens. Member States are now obliged to identify river basins and associated coastal areas at risk of flooding and draw up flood risk maps and management plans for these areas.[15]

IP/07/1766, Brussels, 26 November 2007.

Commission's annual report on progress towards meeting Kyoto objectives

The Commission's annual report on progress towards meeting Kyoto objectives concludes that the EU is moving closer to achieving its Kyoto Protocol targets for reducing emissions of greenhouse gases but that additional initiatives need to be adopted and implemented swiftly to ensure success.

Under Kyoto, the EU-15 Member States are committed to reducing their collective greenhouse gas emissions in 2008–2012 to 8 per cent below base year levels. There is no collective target for EU-25 or EU-27 emissions. Most EU-12 Member States have individual commitments to reduce emissions to 6 or 8 per cent below base year levels over the same period. Cyprus and Malta have no target.

The latest projections from Member States indicate that measures already taken, together with the purchase of emission credits from third countries and forestry activities absorbing carbon from the atmosphere, will cut EU-15 emissions in 2010 to 7.4 per cent below levels in the chosen base year (1990 in most cases), which is just short of the 8 per cent reduction target for 2012. According to this report, additional policies and measures under discussion at EU and national levels will allow the target to be reached and may even take the reduction to 11.4 per cent if implemented promptly and fully.

A significant contribution to meeting the EU-15's 8 per cent reduction target will come from the Commission's decision to cut back many NAPs for the second trading period of the EU ETS (see above). Compared with base year levels, these decisions will reduce EU-15 emissions by 3.4 per cent and EU-25 emissions by 2.6 per cent.

Agreed emissions targets for 2020 are 30 per cent below 1990 levels (provided other developed countries agree to make similar efforts, 20 per cent if not). The latest projections show that, if it is to reach these targets, the EU will have to put emissions on a much steeper reduction path after 2012. The Commission intends to propose a number of key measures towards this early in 2008.

IP/07/1774, Brussels, 27 November 2007.

15 EU Strategic Issues (2007) 19 ELM 313 and (2007) 18 WL 69.

European Parliament vote on the Marine Strategy Directive

The European Commission welcomed the European Parliament's second reading vote on the directive to protect the marine environment.[16] The objective of the directive is to achieve good environmental status for the European Union's marine waters. Once in force, it will oblige Member States to ensure that EU marine waters are environmentally healthy by 2020 at the latest.[17]

The directive has been amended to include an obligation on Member States to establish marine protected areas. In addition, those Member States sharing a marine region will have to cooperate to ensure coherent and coordinated marine strategies and make every effort to coordinate their activities with non-EU countries in the same marine region.

IP/07/1894, Brussels, 11 December 2007.

European Parliament vote on the Air Quality Directive

The European Parliament's second reading made amendments to the directive on ambient air quality and cleaner air for Europe, one of the key measures outlined in the 2005 thematic strategy on air pollution adopted by the Commission in September 2005.[18] The agreement sets binding standards for fine particles PM2.5 for the first time.

Member States will be required to reduce exposure levels in urban areas to PM2.5 by an average of 20 per cent by 2020 based on 2010 exposure levels. The final agreement introduces an additional condition which obliges Member States to bring exposure levels below 20 micrograms/m3 by 2015 in these areas. Throughout their territory, Member States will need to respect the PM2.5 limit value set at 25 micrograms/m3. This value must be achieved by 2015 or, where possible, 2010.

The new directive will not change existing air quality standards, but will give Member States greater flexibility in meeting some of these standards in areas where they experience difficulty complying.[19]

Deadlines for complying with the standards can be postponed by up to three years after the directive's entry into force in mid-2011, provided relevant EU legislation

16 Proposal for a Directive of the European Parliament and the Council Establishing a Framework for Community Action in the Field of Marine Environmental Policy (Marine Strategy Directive) COM (2005) 505 (24 October 2005).

17 Europe's marine waters cover about 3 million square kilometres but at present there are only measures offering indirect protection of the marine environment. The Commission proposed a Thematic Strategy on the Marine Environment in October 2005 see COM (2006) 275 Final (7 June 2006) vol I and II; SEC (2006) 689; Press Release IP/05/1335; for a full discussion of the strategy (2006) 17 WL 33; for DG Environment web page on the Marine Strategy see http://ec.europa.eu/environment/water/marine/index_en.htm.

18 IP/05/1170.

19 26 of the 27 EU Member States currently exceed PM10 limits in at least one part of their territory.

(such as industrial pollution prevention and control[20]) is fully implemented, and all appropriate abatement measures are being taken.

IP/07/1895, Brussels, 11 December 2007.

EC and UN to deploy joint expert team to South Korea following oil spill

A team of marine pollution and civil protection assessment experts has been deployed[21] to South Korea following a request made by the country to the European Commission's MIC on 12 December 2007, after an accident on 7 December. The accident occurred when a crane-carrying barge broke free from a tugboat and collided with a single-hulled tanker, piercing it in three places. Oil from the leaking vessel reached beaches the following day.

The joint expert team, led by the United Nations, will be composed of MIC experts, United Nations officials and a representative from the European Maritime Safety Agency. It will provide advice on managing the emergency, removing the remaining oil, limiting its spread, and long-term recovery for the eco-system in the area. South Korea has also requested material assistance and equipment.

IP/07/1932, Brussels, 14 December 2007.

EU welcomes agreement to launch formal negotiations on a global climate regime for post-2012

The European Union has welcomed the agreement reached at the UN climate change conference in Bali to start formal negotiations on developing a regime for the post-2012 period and on a 'Bali Roadmap' that sets out an agenda for these negotiations. The conference set a 2009 deadline for completing the negotiations to allow time for governments to ratify and implement the future climate agreement by the end of 2012, when the Kyoto Protocol's first commitment period ends. The conference also took important decisions on several additional issues of significance to developing countries.

The Bali Roadmap – two negotiating tracks

The conference agreed to launch formal negotiations[22] among the 192 parties to the UN Framework Convention on Climate Change (UNFCCC) on action up to and beyond 2012, replacing the informal dialogue that has taken place over the past two years. The Convention negotiations will involve the United States, party to the UNFCCC but not the Kyoto Protocol.

The decision explicitly acknowledges the findings of the IPCC's recent Fourth Assessment Report (AR4). At the EU's insistence it makes reference to a section of the AR4, which demonstrates that emissions reductions for developed countries in the range of 25–40 per cent below 1990 levels by 2020 are necessary to limit global warming to 2 degrees above pre-industrial levels.

The roadmap envisages that commitments or actions by developed countries could include quantified objectives for limiting and reducing emissions. Developing countries will also take action, but in their case no reference is made to quantified emissions objectives.

In parallel with negotiations under the UNFCCC, the 176 parties to the Kyoto Protocol will continue negotiations on new post-2012 emissions targets for developed countries. The Bali conference agreed an intensive work schedule for these protocol negotiations during 2008 in an attempt to accelerate progress. A review of the protocol at the UN climate conference in December 2008, considered by the EU an important opportunity to strengthen its effectiveness in readiness for the post-2012 period, will help to inform these negotiations.

The negotiations under both tracks – convention and protocol – will be completed at the UN climate change conference to be held at the end of 2009.

Developing countries

The conference also reached decisions on a number of issues of particular importance to developing countries.

- Governance arrangements for the Kyoto Protocol's Adaptation Fund for developing countries were finalised so that it can become operational. The fund will be financed primarily through a levy on the value of emission credits generated by clean energy projects undertaken under the protocol's clean development mechanism and joint implementation instrument.
- Agreement was reached to launch a framework for demonstration activities allowing different approaches to reducing deforestation and forest degradation to be tested over the next two years, in preparation for covering these issues in a post-2012 agreement. The demonstration activities will be supported by the World Bank's Forest Carbon Partnership Facility.
- Agreement was reached paving the way for the elaboration of a strategic programme to scale up investment in the transfer of clean technologies to developing countries.

MEMO/07/588, Bali/Brussels, 15 December 2007.

Commission proposal to limit CO_2 emissions from cars

The European Commission has proposed legislation to reduce the average CO_2 emissions of new passenger cars.[23] This will be a major step and will reduce the average

20 IPPC see MEMO/07/441.
21 The team left for Korea on 14 December 2007.
22 Four negotiating sessions are scheduled in 2008, starting in March or April.
23 See generally http://ec.europa.eu/environment/co2/co2_home.htm.

emissions of CO_2 from new passenger cars in the EU from around 160 grams per kilometre (g/km) to 130g/km in 2012, as part of the EU's integrated approach to achieve an overall 120g/km. This will translate into a 19 per cent reduction of CO_2 emissions which will place the EU among the world leaders in fuel efficient cars. The Commission also believes that the proposal will benefit consumers through fuel savings, improve energy security, and promote eco-innovations and high-quality jobs in the EU.

Safeguarding competitiveness

The proposal aims to safeguard the competitiveness of the EU's automotive sector through provisions which will stimulate the development and deployment of cutting edge automotive technologies. Under the proposed legislation, several manufacturers will be able to form a pool which can act jointly in meeting the specific emissions targets, although they must comply with the rules of competition law.

Independent manufacturers who sell fewer than 10,000 vehicles per year and who cannot or do not wish to join a pool can apply to the Commission for an individual target. Special purpose vehicles such as those designed to accommodate wheelchair access are excluded from the scope of the legislation.

Implementing the strategy on CO_2 emissions from light-duty vehicles

The review of the EU's CO_2 and cars strategy[24] envisages a number of complementary measures to contribute a further emissions cut of 10g/km or equivalent, thus reducing the overall average emissions of the new car fleet sufficiently to meet the EU objective of 120g/km. These complementary measures include efficiency improvements for car components which have the highest impact on fuel consumption, such as tyres and air conditioning systems.

How the legislation will work

The draft legislation defines a limit value curve of CO_2 emissions allowed for new vehicles according to the mass of the vehicle. The curve is set so that a fleet average of 130 grams of CO_2 per kilometre is achieved. Manufacturers must ensure that by 2012 measured fleet average emissions are below the limit value curve, taking all vehicles manufactured and registered in a given year by the manufacturer into account. This means that the improvement in emissions levels of heavier cars must be proportionately greater than in lighter cars. Manufacturers will still be able to make cars with emissions above the limit value curve, provided these are balanced by cars which are below the curve and the fleet average remains at 130 grams. Progress will be monitored each year by the Member States on the basis of new car registration data.

Manufacturers will face an excess emissions premium if their average emission levels are above the limit value curve. This premium will be based on the number of g/km that an average vehicle sold by the manufacturer is above the curve, multiplied by the number of vehicles sold by the manufacturer. A premium of €20 per g/km has been proposed in the first year (2012), rising to €35 in the second year (2013), €60 in the third year (2014) and €95 by 2015. Most manufacturers are expected to meet the target set by the legislation, so significant penalties should be avoided.

The proposal will now be communicated to the Council and the European Parliament as part of the co-decision legislative procedure.

IP/07/1965, Brussels, 19 December 2007.

Commission takes steps to cut industrial emissions further

The European Commission has proposed a new directive on industrial emissions. The Commission believes the proposal will bring significant health and environmental benefits and create a more level playing field across the EU by reducing competition distortions between companies. It will also simplify current legislation by merging seven directives into one, significantly cutting the administrative burden for industry and public authorities.

The main aim of the new directive is to tackle the shortcomings of current legislation on industrial emissions[25] by merging existing legislation into a single new industrial emissions directive. Seven overlapping directives currently cover similar activities, with approximately 52,000 installations falling under the scope of the Integrated Pollution Prevention and Control (IPPC) Directive[26] alone. The new directive will also increase the use of 'best available techniques' (BATs) (an obligation to ensure that industrial operators use the most cost-effective techniques to achieve a high level of environmental protection). Due to the weakness of existing legislation, there has not been the level of application of BATs required by the IPPC Directive across the EU. Compliance and enforcement of current legislation in the different Member States is also inconsistent[27] and the complex legal framework carries unnecessary costs for industry. The Commission believes these issues need to be addressed in order to maintain fairness for industry while providing higher levels of protection for the environment and human health.

24 Results of the Review of the Community Strategy to Reduce CO_2 Emissions from Passenger Cars and Light-commercial Vehicles COM(2007) 19.

25 See generally http://www.europa.eu.int/comm/environment/ippc/index.htm.

26 Council Directive 96/61/EC of 24 September 1996 Concerning Integrated Pollution Prevention and Control [1996] OJ L257/26 (IPPC Directive).

27 The most recent figures on the issuing of permits under the directive suggest that by mid-2006 only about 50 per cent of the 52,000 installations concerned had received a permit. The Commission believes this indicates that Member States have not made sufficient efforts to comply with the directive's deadline of 30 October 2007.

The proposed directive tightens minimum emission limits in certain industrial sectors across the EU – particularly for large combustion plants where, on the whole, progress has been inadequate. It introduces minimum standards for environmental inspections of industrial installations and allows for more effective permit reviews. The proposal also extends the scope of legislation to cover other polluting activities, such as medium sized combustion plants.

The Commission believes that emission reductions achieved at large combustion plants alone are likely to offer net benefits ranging from €7 to 28 billion per year and should reduce premature deaths and years of life lost by 13,000 and 125,000 respectively. Significant health and environmental benefits are also expected in other sectors. The proposed directive will reduce administrative costs for authorities and operators by €105–255 million per year.

However, the proposal is not due to come into effect for several years. In the interim the Commission intends to put forward recommendations and work with Member States to improve the implementation of existing legislation.[28]

IP/07/1985, Brussels, 21 December 2007.

Commission welcomes Council agreement on aviation, regrets failure on soil

Aircraft emissions and the emissions trading scheme

The Council position remains close to the Commission's original proposal of 20 December 2006,[29] with the majority of changes being technical improvements. However, there are also changes of a more political nature, including:

- the one-year introductory phase for intra-EU flights has been dropped. The scheme will now become operational in a single phase, starting in 2012
- emissions will be capped at 100 per cent of the average level for the years 2004–2006
- the level of auctioning has been increased to 10 per cent. Revenue from the auctioned allowances will be used to combat climate change
- an exemption has been introduced for operators with very low traffic levels on routes to, from or within the EU. Under this mechanism many operators from developing countries with only limited air traffic links with the EU will be exempt
- a special reserve of free allowances for new entrants or very fast-growing airlines has been added
- a new mechanism to ensure consistent and robust enforcement throughout the EU has been introduced. As a last resort, Member States could ask for an operator to be banned from operating in the EU if it has persistently failed to comply with the scheme and other enforcement measures have proven ineffective.

The political agreement reached will be formally adopted as a common position in 2008 and will then be sent to the European Parliament for a second reading.

Soil Framework Directive

The Soil Framework Directive[30] is intended to set common principles and objectives at EU level, and would require Member States to adopt a systematic approach to identifying and combating soil degradation. The failure to adopt the directive was largely due to concerns about subsidiarity, with some Member States maintaining that soil was not a matter to be negotiated at European level. Others felt that the cost of the directive would be too high, and the burden of implementation too heavy.

IP/07/1988, Brussels, 20 December 2007.

28 For more information see Questions and Answers on the Commission's proposal and on the current legislation MEMO/07/623.

29 See IP/06/1862 and MEMO/06/506 The European Commission's original proposal to include aviation in the EU ETS can be found at http://ec.europa.eu/environment/climat/aviation_en.htm.

30 COM(2006) 232 final (Brussels 22 September 2006) see Press Release IP/06/1241.

Strategic Issues – England and Wales

Compiled by members of the School of Law, University of the West of England

Headline Issues

- A Review of Consumer Attitudes to Energy: Report for the Sustainable Development Commission
- Engagement and Political Space for Policies on Climate Change
- Defra statistical releases:
  - Air quality indicator for Sustainable Development 2007 (provisional results)
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A Review of Consumer Attitudes to Energy: Report for the Sustainable Development Commission

Sustainable Development Commission Report prepared by Victoria Graham, February 2007

This review aims to contribute advice as to how best Ofgem can provide a greener regulatory framework for the delivery of the UK's energy needs.

Much has been published in the social science literature about the factors which shape consumer behaviour in the energy sector and the review aims to take stock of the findings of recent empirical literature in this field. One danger with this approach is that the material under review quickly becomes outdated. Certainly, the most comprehensive research cited in this review was carried out five years ago by Powergen. Research from this period could not have foreseen the increasing importance of issues such as micro-generation (one of the Commission's favourite topics and rightly so). Another problem is that focusing on *published* research risks distorting the findings of research as a whole, given that much of it is carried out on behalf of energy companies within a framework of strict confidentiality.

Findings

The findings overall are bleak from an environmental point of view. In connection with business consumers, the Powergen study reported that: 'most SMEs seem to pay scant attention to their energy consumption and are unable to think of many, or indeed any, occasions on which a decision has been motivated by the desire to improve efficiency' (para 23).

For domestic consumers, the evidence goes beyond indifference, towards outright suspicion. With regard to energy saving devices in particular, 'people are reluctant to install major measures, such as cavity wall insulation, because they think it is expensive, cowboy ridden and disruptive' (para 22).

Barriers to the take up of green products are reflected in ignorance of the impacts that energy choices have on the environment. For example, a MORI survey referred to in the review revealed that two-thirds of respondents considered that they knew 'little or nothing' about the issue of climate change in relation to their behaviour. The fact that consumers are at best ambivalent towards energy saving devices, even where these can result in economic savings, has left economists puzzled as to consumer rationality (para 61).

Some of the research addressed in this report seeks to draw out the relative priorities of being green and other matters of concern to consumers. A National Consumer Council report of 2005 into the type of information consumers actively seek out found that the greatest demand was in the field of healthy living (75 per cent), followed by pensions and savings (63 per cent). By contrast, only 18 per cent actively sought out information relating to the environment (para 28). Part of the problem may be that respondents are sceptical about the impartiality of the information that is available, although that is not a complete explanation, for there would appear to be no reason why that would not be a barrier in respect of *all* types of information.

By far the most effective mode of engaging the public in environmental concerns is considered to be accurate meter readings. In most countries, energy companies tend to provide bills on the basis of estimates which are derived from past usage. In a Swedish trial, consumers were required to read their meter monthly, and were billed in accordance with the meter reading. This corresponded with a reduction in energy consumption of 8 per cent. A similar study in Canada reported that reductions in energy consumption of 10 per cent could be achieved by electricity prominent metering. With such a simple solution to hand, it is surprising that the metering infrastructure remains so outdated.

Update

As a result of a campaign in June 2007 by the Energy Retailers Association for better metering (from a green consumption standpoint), a £10 million pilot scheme funded by the government commenced in relation to 'smart meters'. Smart meters provide consumers with up to date information regarding energy consumption and also allow for the measurement of energy exported back into the grid where consumers have adopted micro-generation. Scottish and Southern Power, E-on, Scottish Power and EDF Energy are the participating companies in

this pilot scheme, which involves 15,000 homes. Its results are awaited with interest, for reductions in energy consumption of the order of 10 per cent are highly significant in the quest for a lower carbon economy (see Statistics, below).

Richard Stewart

Engagement and Political Space for Policies on Climate Change

Institute for Public Policy Research/Sustainable Development Commission, August 2007

This IPPR/Sustainable Development Commission collaborative report focuses on the function of engagement with regard to creating political space for green policies to flourish. In this context, 'political space' is the time which politicians give to certain issues. This may come in the form of parliamentary debates, televised speeches, or internal political party research (among other examples). 'Engagement' is the means by which the government can connect with stakeholders.

The report asserts that increasing political space on a subject leads to more effective policy. It recognises the need to create more political space for sustainable development policies, focusing on climate change. It begins by identifying why there is limited political space for sustainable development issues in general:

> British politics is dominated by a paradox. On the one hand, a key issue on which the next election will be fought is the environment, and in particular what to do about climate change … But on the other hand, all political parties are finding that bringing forward specific policies to reduce emissions – especially bold policies – is often unpopular (p 4).

The most interesting aspects of this report concern how political space can be used to make environmental policies more (and of course less) attractive. With regard to road pricing, for example, it highlights how certain groups among the public, special interest organisations and the print media have tried to close down political space for debate on policies for sustainable development. What makes this interesting is that there is broad consensus from political parties, business and environmental groups to look at road pricing as a way of ensuring responsible car use. However, the report shows how sectors of the public can use political space to great effect in mobilising opposition.

Nothing illustrates this better than the impact of a small pressure group, the Association of British Drivers, which in 2006 set up an electronic petition on the 10 Downing Street website calling for the Prime Minister to 'scrap the planned vehicle tracking and road pricing'. Through a symbiotic relationship with parts of the media, signatures for this petition grew rapidly. The e-petition dominated the media and by the deadline in February 2007 over 1.8 million people had signed it.

Although this e-petition was run by a small pressure group, its aim was publicised through the media, and put enormous pressure on the government. Overall, the e-petition has not closed down the policy on variable road charging. However, the furore over the e-petition and the hostility in much of the print media are now reference points framing the debate.

Another policy which has had great problems is green taxation. In March 2007, when the government launched the Climate Change Bill, Gordon Brown made a major speech on climate change, and the Conservatives floated the idea of rationing people to one flight a year and replacing air passenger duty with a new tax on flights. This proposal was met with much media protest, and the *Daily Mail* warned that it would be a vote loser policy. Interestingly, Alistair Darling's 'Green Budget' announcement has met with a rather restrained response within the press (eg *The Daily Mail*, 10 March 2008).

How can political space be opened?

One of the ways in which political space can be opened is through deliberative inquiry involving the public. Pensions policy provides the inspiration here. The Pensions Commission, under the leadership of Adair Turner, undertook a two-year assignment gathering evidence through hearings and meetings with major stakeholders. The Pensions Commission then framed the issue in a clear and simple way that came down to a series of unavoidable choices, between pensioner poverty and more savings or more taxes. The evidence of this report was consistently and widely promoted through the media and general public.

Another example is the London congestion charge. There was public acceptance of the problem and yet significant opposition to the charge. Ken Livingstone committed his office to pushing forward the congestion charge in a campaign. Proposals to use a large proportion of the revenues generated would be re-channelled towards improving and extending the bus service. The report clarifies that the main factors in the success of the congestion charge were the openness about the proposals and the Mayor's strong political leadership. That might explain why revisions to the pricing of this scheme have met with such concern, and allegations that the proposed pricing structure imposes an economic burden way out of proportion to the environmental benefits.

The IPPR thus advises that greater use of independent commissions be made with regard to environmental issues, with appropriate stakeholder involvement. Even here, however, it is necessary to adhere to core principles for the process to be successful in opening up political space. Four principles are identified:

- establishing credibility
- target sceptics
- frame choices
- act at scale.

One may ask where existing decision-making processes fall short in this respect. This is not something the report explores, but it is not clear why bodies such as the Royal

Commission on Environmental Pollution could not adapt to this 'political space' agenda. Surely the problem here is not that this Commission is not as such independent. Rather, it is that it does not necessarily involve stakeholders in the deliberative way that has brought success in other fields in the past.

Rachel Kaiser

Defra statistical releases

Air quality indicator for Sustainable Development 2007 (provisional results) (January 2008)

Sustainable Development Indicator No 29 (of 68) concerns 'Emissions of Air Pollutants'. Emissions of $S0_2$, PM10 and oxides of nitrogen have declined substantially since the 1970s. This trend has coincided with an increase in statutory environmental regulation, although it is likely that the improvement in statistics is the result of structural changes in the economy. Whatever the explanation, the most positive feature of this trend is that, with the exception of the dirty period 1982–86 (when there were substantial increases in measured air pollution), air pollution has declined while the economy has grown. This trend continues in the latest statistical release, relating to 2006/2007.

Highlights of the latest statistics include:

- urban background PM10 levels averaged 21 (24 in 2006) micro-grammes per cubic metre
- in urban areas, air pollution was moderate or higher on 26 (41 in 2006) days on average per site
- in urban areas, ozone levels averaged 57 (61 in 2006) micro-grammes per cubic metre.

The reduction in emissions this year is modest. The greatest reductions historically occurred in the early 1990s. Part of the explanation is that improvements in emissions from motor vehicles (the main cause of air pollution) are slow in themselves, and certainly slow to translate into significant improvements in ambient air quality.

Greenhouse gas emissions (January 2008)

Figures published earlier this year suggest that greenhouse gas emissions in 2007 were 16.4 per cent lower than 1990 levels – a fall of 0.5 per cent on 2006 levels. While this is an improvement on the position in 2004/2005 when emissions increased, there are major areas for concern arising from the latest statistics, relating to emissions of carbon dioxide.

CO_2 emissions remained practically stable over the year (0.1 per cent less than 2006). In the energy sector – the focus of so much attention in terms of emissions reductions – emissions rose by 1.3 per cent. Overall improvement in performance in this setting has thus been rescued by relatively large improvements in the performance of the residential sector (4 per cent reduction).

These statistics add considerable urgency to the House of Lords debate on the Climate Change Bill.

Local authority waste statistics

Figures for 2006/2007 were published by Defra in November 2007. These figures were compiled from local authority returns using the WasteDataFlow template. The response rate was 100 per cent.

The headline statistic given in the Defra press release accompanying the publication concerns, as ever, municipal waste recycling and composting rates (the more environmentally important waste prevention rates are of lower profile, and trends here are proportionately less visible). Recycling rates increased to 31 per cent (27 per cent in 2005/2006). This is a considerable way off the recycling target for 2010 of 40 per cent contained in the government's *Revised Waste Strategy 2007* (Cm 7086).

As is inevitable with a decentralised waste management system, local variations are quite dramatic. You are most likely to recycle in the East Midlands council of North Kesteven (55.45 per cent of municipal waste is recycled there). You are least likely to recycle in the Kent council of Swale (15.76 per cent).

While recycling has a high political profile, waste prevention – arguably the best practicable environmental option – receives less attention. This is reflected in the fact that there are no targets for national targets for prevention (ie in terms of reducing waste production).

Here, as elsewhere, how much waste you generate various according to your locality. Indeed, one striking message from the latest statistics is that it is clear that being strong on recycling does not mean that the bigger problem of waste production is being tackled. Recycling enthusiasts North Kesteven council can take no comfort from the fact that waste production grew last year by 3 per cent, to 480kg per head. In this respect the council comes off worse than the least enthusiastic recyclers in Swale! Swalites produced 463 kg ph, up 'just' 0.3 per cent on the previous year. North Kesteven certainly performs better than the most wasteful council, Cumbria (594 kg ph). Even here, however, it should be noted that Cumbria is at least heading in the right direction in reducing its waste by 6 per cent on the previous year.

The greenest council in terms of waste prevention is Hynburn Borough Council. At 302kg per head, this Lancashire council with a modest population of 80,000 produces half the waste of its Cumbrian counterpart. As a result of the distorting emphasis that the waste strategy places on recycling, Hynburn's relative excellence is submerged below its distinctly average recycling rate of 33 per cent.

Joan Ruddock (Climate Change and Waste Minister) struck the right note in her cautious welcome of the statistics:

> These statistics show that many householders and local authorities have got the 'reduce, reuse and recycle' philosophy and are doing a great job … But some authorities are not doing anywhere near enough.

Ben Pontin

Strategic Issues – Scotland

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Headline Issues

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- Planning
  - Draft NPF2
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Climate change

Consultation for a Draft Climate Change (Scotland) Bill

The Scottish Government has released a set of consultation documents for the proposed Scottish Climate Change Bill (SCCB), which it hopes to introduce to the Parliament by the end of 2008. As readers will know, the UK Climate Change Bill sets a target of reducing emissions by 60 per cent by 2050; the Scottish Government seeks to go beyond that with a target of 80 per cent. The principal consultation document sets out the background, including our capacity for forest cover and the 60GW of renewables generating capacity that exists in Scotland, which in turn is 75 per cent of the UK total. On the downside is our carbon-rich soil, which makes it more difficult to reduce emissions from land-based activities.

There is some discussion of various approaches, for example, whether targets should be set for CO_2 only, or for a 'basket' of greenhouse gases. Research is underway on possible measures, to be published in spring 2008. The government would like, as well as the target figure, to use multi-year emissions budgets and a trajectory for year-on-year emissions cuts (at around 3 per cent per year). It is also consulting on whether banking and borrowing against those targets should be permitted, and whether there should be a power to vary the statutory targets by secondary regulation; the potential need for this is clear but one must wonder if it could be seen to be an admission that 80 per cent is an unrealistic target.

There are a number of devolution issues to be considered; broadly, the regulation of energy supply is a reserved matter as are appropriate taxation instruments, which are a powerful tool in this area. For example, the UK bill empowers programmes of actions and directions by the Secretary of State to apply in England; these same powers will be used in Wales and Northern Ireland but the Scottish bill should have equivalent powers for use here. The UK bill establishes a Climate Change Committee which will report to both Parliaments, and the Secretary of State will respond after consultation with the Scottish Government; there is a consultation question as to whether the Scottish Government should take advice from that Committee (which they are minded to do in the meantime), set up a Scottish equivalent, or look for an existing Scottish body to perform that function. In addition, of course, the EU ETS scheme sits above national matters and operates by setting UK targets, whilst the problem of including international aviation and shipping emissions remains difficult to solve, even at global level.

The consultation proposes several reporting mechanisms, and asks for views on how the process should be monitored. It ends with some discussion of the role for individuals, the use of building standards not just for new build but potentially for retrofit, and for the public sector employers in Scotland. The consultation ends on 23 April 2008.

Scottish Government 2008 *Climate Change Consultation on Proposals for a Scottish Climate Change Bill* available at http://www.scotland.gov.uk/Publications/2008/01/28100005/0.

Accompanying documents

Two other documents run in parallel with the bill consultation. One is the draft Regulatory Impact Assessment (RIA) and the other is part of the Strategic Environmental Assessment (SEA). Both of these are extensive documents in their own right, and will not be surveyed here, but readers may wish to note their existence. The SEA is in fact 'only' the non-technical summary of the environmental report, running to some 250 pages as it stands with links to the full documentation. As one would expect, it contains a significant amount of data on the baseline situation, the strategic options, their likely effects and possible mitigation measures. Bearing in mind that '[t]his SEA considers options within the *consultation proposals* for the SCCB, and is not intended to represent an SEA of the Bill itself' (p1 original emphasis) we can see both the complexity and the extent of the SEA process when it extends not to policy, but to the legislative process itself.

The RIA likewise addresses options under the proposed bill. It assesses government policies and the rationale for the proposed measures, the consultation measures taken and the benefits and costs. As large businesses and industries may be subject to regulation anyway, it is likely that at least some of the costs may fall disproportionately on SMEs.

Halcrow 2008 *Strategic Environmental Assessment of the Scottish Climate Change Bill Consultation Proposals: Non Technical Summary* available at http://www.scotland.gov.uk/Publications/2008/02/08142328/0.

Scottish Government 2008 *Proposals for a Scottish Climate Change Bill: Partial Regulatory Impact Assessment* available at http://www.scotland.gov.uk/Publications/2008/01/28100110/0.

Planning

Planning matters are advancing on several fronts, with the continued roll-out of secondary legislation and the development of the second National Planning Framework (NPF). This section will review some of the key events of recent months.

The Draft National Planning Framework

The government has released a consultative draft of the second National Planning Framework (NPF2) and a series of related documents. The NPF2 will of course be subject to parliamentary approval under the Planning (Scotland) Act 2006 and will set the framework for consent for national developments. The draft NPF2 gives a good overview of the spatial situation and demography. It establishes the context to future needs for energy, transport, waste and communications and is stated to be outward looking, considering Scotland's place in Europe and the global community. It identifies drivers for change, including the economy and sustainable development, which seems to equate mainly with climate change, as well as 'people and households' (on population and social trends), and regeneration – which in turn might be thought to be just as relevant to sustainable development as climate change.

Nine specific projects are identified as 'national developments':

- a replacement Forth crossing
- Edinburgh airport enhancement
- Glasgow airport enhancement
- Grangemouth freight hub
- Rosyth international container terminal
- Scapa Flow international container transhipment facility
- Grid reinforcements for renewable energy development
- The Glasgow strategic drainage scheme
- 2014 Commonwealth Games facilities.

Each of these identified projects has a 'statement of need' in the Annexes. In addition, there are commitments and potential commitments throughout the paper, such as electrification of the Edinburgh-Glasgow rail line. The document is being used as a vehicle to seek views on a sub-sea super-grid, to take electricity from Scotland and Norway direct to continental markets. There is surprisingly little on waste, with cross-references to other planning instruments at local level, so presumably all such foreseeable facilities will be major rather than national developments. However, flood management is included, along with water infrastructure.

This is a readable document, with various events occurring in the near future to assist with public participation. It is open for comment until 15 April 2008; we will wait and see if 'the public' responds to the challenge.

Scottish Government 2008 *National Planning Framework for Scotland – Discussion Draft* available at http://www.scotland.gov.uk/Publications/2008/01/07093039/0.

Strategic Assessment of NPF2

There is of course an accompanying SEA – or at least the non-technical summary of the environmental report – but this is pleasantly short, which reflects the non-technical nature of the high-level NPF itself. It identifies an interesting set of environmental trends and challenges including biodiversity loss, changes to household structures, flooding, urban derelict land as well as climate change. It then looks at potential impacts of the policy on a set of environmental variables.

Again, this is a straightforward document, but it contains plenty of useful and useable information which would seem to be easily comprehensible to community groups and special interest groups as well as that rare creature – the interested member of the general public. Hopefully, there will be responses to this and the draft NPF as a package. In addition, for those wanting technical detail, the full environmental report is also available, with considerably more substance.

Scottish Government 2008 *National Planning Framework 2 SEA Environmental Report: Non Technical Summary* available at http://www.scotland.gov.uk/Publications/2008/01/07141815/0.

Scottish Government 2008 *National Planning Framework 2 SEA Environmental Report* available at http://www.scotland.gov.uk/Publications/2008/01/10160608/0.

Also produced in this 'package' of the NPF process is a separate document setting out an appraisal of high-level strategic alternatives to the NPF. It sets out alternatives within each of the four themes of the NPF – 'economy, sustainability, communities and connectivity' – but within accepted parameters (eg that the NPF will not conflict with established policies or commitments). This column will not analyse these documents, but merely point them out to the reader, if she or he should be so inclined.

Scottish Government 2008 *National Planning Framework 2 SEA Annex to the Environmental Report: Assessment of Strategic Alternatives* available at http://www.scotland.gov.uk/Publications/2008/01/10160643/0.

Planning Regulations

The Scottish Government has issued a series of consultations and draft regulations under the Planning (Scotland) Act 2006 (the Act). Some of these are recent; others were released at the end of last year. They include a lengthy paper on the new regime for development management, another on planning appeals including local review, and shorter papers with draft regulations on

examinations of development plans and on the planning hierarchy. We will begin with the last-named.

The Planning hierarchy

The Act provides for national, major and local developments, and as we know, one key objective is to reduce the amount of time spent on local developments, in order to expedite major applications. As discussed above and in previous issues, ((2007)19 ELM 316) the category of 'national development' will be provided for in the NPF, and approved by the Parliament, and we now know the nine developments (or in some cases, groups of related developments) which will be managed in this way. This paper sets out the definition of 'major developments' by setting threshold criteria. Everything that is not national or major development will therefore be 'local', and the government has generally resisted the temptation to have opt-outs and exceptions to the thresholds, so there should be a degree of clarity. Key criteria include developments within schedule 1 (but not schedule 2) of the EIA Regulations 1999/1: 100 units of housing (or two hectares); business or industrial developments of 20,000m^2 (or four hectares); renewable energy projects of 20MW; waste facilities of 25,000 tonnes per annum (or wet sludge capacity of 50 tonnes per day); transport infrastructure of 8km (and all motorway service stations); and any development of 10,000m^2 (or two hectares).

These developments will then be subject to all the additional requirements foreseen in the Act and detailed in various papers described below, and the time period for determination will now be four months. This consultation closed on 21 March 2008.

Development Plan Examinations

Readers will recall ((2007)19 ELM 316–17)that draft regulations have been issued relating to the new development planning processes, and these are now supplemented by proposals for their examination in public. It is expected that this will increase the scrutiny given to strategic plans, but at the same time the proposals are in line with another key general objective which is to reduce the time that these processes take, and thereby assist with ensuring that development plans exist and are up-to-date. We will see the same thinking feeding into the regulations on appeals (below).

Both local and strategic plans will be examined where there are outstanding representations, or otherwise where the ministers so require; strategic plans will also be examined where the authorities within the city region cannot agree on aspects of the plan. There is no longer any presumption of a hearing, and it is hoped that many examinations will be a review of written material, which should be extant; eg the unresolved objections, the authority's summary of the same, and the authority's reasons for not taking them into account. Alternatively, especially for strategic plans, a 'round table' discussion might be appropriate.

At present there is no intention to specify in regulation the matters to which 'the appointed person' may refer, but we expect guidance may cover this; the appointed person will have power to ask for additional information including from other parties (such as statutory consultees or other public agencies). There will be neither right nor expectation for parties or objectors being able to submit additional material or make further oral representations; the process will be 'front loaded'. We would then see the need for everyone – developers and authorities and also public and community groups to be very forward-looking. The opportunities currently existing in many parts of the system to supplement submitted arguments at a later stage are being removed. This consultation closed 4 April 2008.

Development management

The substantive paper in this group is the general consultation on development management, and this review will cover the main points only; doubtless those involved at the sharp end will already be immersed in the detail.

It covers pre-application consultation with the community (another main focus of the whole reform package) which will be required for national and major developments; those subject to EIA, and those falling within schedule 1 of the draft Development Management Regulations (DMR). For the most part the latter include developments above certain thresholds and not within the development plan, but also all developments on greenbelt land or open space. Developers may request a decision (within 21 days) as to whether such consultation will be required. A minimum process is also set out. Where a proposal is significantly contrary to the development plan, or requires EIA, a pre-determination hearing by the whole council is proposed. This may allay fears current amongst community groups and others that in some authorities, decisions on applications of significance are being taken by a small committee with no reference to a wider body.

The DMR also sets out arrangements for 'processing agreements' whereby timescales may be agreed between the developer and the Planning Authority. As noted above the time period for major developments is increased to four months. Ideally these agreements will be made before the application is submitted, or otherwise within 28 days.

There is discussion of the principles behind the new approach to planning permission, replacing as it does outline planning permission. There will be no 'reserved matters' but simply matters on which there are conditions outstanding. There is discussion of where additional information might be specified (eg flood risk or other impact assessments) – the draft regulations are 'widely drawn', bearing in mind the wish to avoid delays in the process once begun. There will of course be guidance, and there is discussion here of the need for applications in principle to contain more detail than is necessarily the case at present.

The consultation also addresses design and access statements, neighbour notification and publicity, statutory consultees and bad neighbour developments. Neighbour notification is of course moving to the PA, whilst the statutory consultee arrangements are currently unchanged from the General Permitted Development Order (GPDO). However, the government is still considering possible

alterations here so readers with strong views might wish to make them known at this point. There are some alterations to the list of 'bad neighbour' developments, and the government also wonders if there are any suggestions for a different nomenclature – a fun idea and doubtless readers could think of several; the government is hoping for a term less pejorative. This consultation closed 2 April 2008.

Appeals

The lawyers amongst us, and not only the lawyers, will be keen to see what is proposed for appeals and especially the new provision for local review of delegated decisions on local developments. The appeals system is also meant to be 'front loaded', ie with less opportunity for new evidence, leading to a quicker process overall. Here there are three sets of draft regulations, on schemes of delegation, local review and appeals 'proper'. In future, applications will not be variable once an appeal is lodged and only exceptionally will new evidence be considered. Decision-makers will have the power to decide that they do not need either further information or to hear the parties. Timescales for bringing (all) appeals are reduced from six months to three.

Section 17 of the 2006 Act (new section 439(a) of the 1997 Act) empowers these provisions and allows the Ministers to prescribe the scheme. Other schemes of delegation are unaffected and not subject to local review. The regulations on schemes of delegation set out those developments which should still be determined by members rather than by officers. These include where there are unresolved objections from statutory consultees, where EIA is required, where there are significant departures from the development plan, where there is a 'substantial body of objections' or where the PA or a member has a personal interest. Views are of course requested on all of these but the list is what was expected and in keeping with the wider reform programme; concerns over these proposals relate to the underlying concept not the detail. Ministers must approve these schemes.

The regulations on appeals, as noted, restrict the evidence that may be relied upon and there is a specific consultation query as to whether the regulations should permit or prevent any further evidence from third parties. The reporters will continue to hear most appeals and there is discussion on procedure for inquiries, to reduce their length and complexity. Again, 'round table' discussions may be an appropriate mechanism in some cases, but the decision as to the form will be made by the Ministers.

The provisions for local review may be the most contentious issue here, and certainly on principle, where there may be concerns about a lack of scrutiny and even issues of natural justice. The suggestion is that a panel of three to five members of the council will hear these appeals, drawn from a wider group to avoid conflicts of interest (although such applications should surely not be subject to the scheme of delegation). Interested parties will be notified but not invited to comment further; again there is a specific consultation query as to further evidence from third parties, but the government view seems clear enough. For the parties, there is no right to be heard, and it is expected that many reviews will be determined by written scrutiny. The government hopes that the process will be non-adversarial, but given the neighbourhood nature of many small-household developments this is perhaps optimistic. Further appeal by an 'aggrieved applicant' lies to the Court of Session within six weeks, and there is also provision for the service of a purchase notice. With no provision for aggrieved third parties, their only recourse will be judicial review; therefore the scope for instances of local bad feeling may be quite broad.

Overall, however, it is to be hoped that the new rules will prevent some of the delays (especially from the opportunities that currently exist to make multiple applications and present new evidence at appeal) and also rationalise the workloads between the many small applications, usually uncontentious, and the bigger projects properly deserving of fuller consideration. This consultation is open until 9 May 2008.

Scottish Government 2007 *Draft Regulations on the Planning Hierarchy: Consultation Paper*

Scottish Government 2007 *Draft Regulations on Development Plan Examinations: Consultation Paper*

Scottish Government 2008 *Development Management: Consultation Paper*

Scottish Government 2008 *Modernising Planning Appeals: Consultation Paper*

All available at http://www.scotland.gov.uk/Topics/Planning/Modernising.

Industry Soundings

David Pocklington *British Cement Association*[1]

Certainties and uncertainties – Commission proposals for modification of the EU Emissions Trading Directive

The date for publication had been delayed, the unfinished document leaked in December, further leaks emerged in January and everyone had written their press releases in advance of the official launch. So did the publication of the European Commission's proposals for the modification of the EU Emission Trading Directive therefore contain any surprises, or was this irrelevant to the commentators who were intent solely on selective quotations that reinforced their pre-conceived views?

The official launch of the package of measures on 23 January 2008 was an example of the Commission at its worst. At the London briefing in the EU offices, a Commission official began his introduction by indicating his intention to dispense with the normal pre-meeting health and safety briefing – clearly considered as an Anglo Saxon peculiarity of no real importance. Enormous piles of the various briefing notes were available, all printed single-sided, but no copies of the proposed Directive were provided.

The proposed directive did appear on the Commission's website for a short time on the day of the launch but it was shortly withdrawn when someone spotted that this was a 'track changes' version. Whilst most of us have at some time circulated a sensitive Word document containing all our prior thoughts, the website had a pdf version, so even if readers wished to remove the comments, they could not. It was several days before anyone could access the final version and make an authoritative assessment of its implications. Consequently stories in the media were based upon the briefing notes without the ability to check specific aspects of detail.

Some have suggested that industry has been dealt with lightly since the proposals could have been far worse. However there is no doubt that the 40 per cent of European industry falling within the directive's ambit will be considering the future of their sector within the EU. The French building and civil engineering group Lafarge announced that it had suspended cement plant projects in Europe to a total value of one billion Euros until there was more certainty on the implications of the proposed directive.[2]

In the UK context, the placing of an additional burden of 21 per cent reductions on the cement industry, an industry that has already saved 29 per cent, does not stack up, either equitably or scientifically, with the non-traded sector which, with its 10 per cent total reduction through non-mandatory measures, appears to have got off almost scot free.

In its present form the proposed directive contains a number of critical areas that are open to interpretation and will not provide any certainty as to how certain sectors will be treated until just before the directive's implementation. Although ministers and officials pay lip service to industry's vital need for certainty, this has not been borne out in this recent offering.

In terms of the bigger picture, the real importance of the directive will be the extent to which, with other equivalent schemes, it leads to the establishment of a global scheme for achieving realistic reduction in the emissions of greenhouse gases. However, there is no certainty as to which countries will sign up to an agreement post-Kyoto nor to what levels of greenhouse gas reduction will be agreed by those who do sign up.

The proposal contains provisions that will increase the Community's overall target from 20 per cent to 30 per cent 'provided that other developed countries commit themselves to comparable emission reductions and economically more advanced developing countries contribute adequately according to their responsibilities and respective capabilities'.[3] However, there are concerns that the Community's target will be increased on the basis of lesser commitments, leaving EU industry at a competitive disadvantage.

Word from Brussels is that the French Presidency has set its sights on completing the EU ETS within its term of office and the Institutions are responding to this difficult challenge. In addition, there has been recognition that certain of the timescales within the proposed modifications, whilst reflecting the possible development of a revised Kyoto Protocol, would give industry insufficient certainty with respect to investments necessary to meet the requirements post-2012.

In particular, sources suggested that it now seems likely that the identification of sectors that are exposed to a significant risk of carbon leakage under a new Article 10a[4] will be made in 2008 rather than by 30 June 2010.

1 The views expressed in this article are those of the author, and do not necessarily reflect those of the British Cement Association or its member companies.

2 'Proposition de Bruxelles sur CO_2: Lafarge suspend 1 md d'euros de projets', Paris, 14 fév 2008 (AFP).

3 Recital (3) and art 28 of the proposed Directive.

4 Transitional Community-wide rules for harmonised free allocation.

Whilst this has been generally welcomed, the downside is that the Commission is demanding detailed complex financial data from sectors earmarked for potential inclusion.

Child labour

Readers familiar with the Special Waste Regulations 1980[5] will recall the criterion for classification of a substance as special waste that stated: 'a single dose of not more than 5 cubic centimetres would be likely to cause death or serious damage to tissue if ingested by a child of 20kg body weight'. Likewise, the use of children to assess the impact of airborne pollution was considered by the US Environmental Protection Agency (EPA), although this was intended to be a practical study rather than a theoretical assessment. The EPA instituted the CHEERS (Children's Environmental Exposure Research Study) programme to 'fill critical gaps in understanding how children may be exposed to pesticides and chemicals', and, had it not been stopped, would have comprised a two year programme in which infants under the age of three were exposed to a range of pesticides and other chemicals.[6]

The testing of 'child-proof packaging' is another area that demands participative research and recent EU proposals do not disappoint. Industry is currently considering the implications of a proposal for a Regulation to implement the Globally Harmonised System for Classification and Labelling (GHS) in the EU.[7] [8]

Included in the scheme are provisions relating to child-proof packaging, and in this context non-reclosable child resistant packaging must: 'resist the efforts of 85 per cent of 200 children (42–51 months) to unlock the package for 5 minutes using any means they choose (including their teeth but without tools or implements, unless supplied with the package by the manufacturer) and, after a demonstration on how to open the package, must resist the efforts of 80 per cent of the children, who failed to open the package for a further 5 minutes. Where tools are required to open the package and these are not supplied by the manufacturer, there shall be no demonstration and the test is limited to the first 5 minutes'.

Amidst the scoffing one should not forget that in the UK, health and safety principles are regularly applied to prevent children becoming involved in hazardous activities. On Shrove Tuesday, the choristers of Ripon Cathedral did not participate in the 600-year-old pancake race on account of the risk assessments demanded by the insurers and the cost of policing the event.[9] Anyone who has tried to run whilst wearing a cassock, let alone when tossing a pancake and racing over cobbled streets, will attest to the inherent dangers of this activity. However, this does not appear to have been a problem during the previous 599 years[10] – perhaps this is why Europeans are sceptical of the UK approach to health and safety?

Creative remedies

Objectors to phone masts generally rely upon the potential health effects of mobile phone transmission as the basis for their legal challenges to placement and use of equipment that comprise the cellular network necessary to ensure good signals are available throughout the country. However, the proposed location of a mast on a church tower provided objectors with the opportunity to challenge the permission to do so on the grounds of potentially pornographic material that might be transmitted.

The case of *In re St Peter and St Paul, Chingford*[11] was heard before the Arches Court of Canterbury – an ecclesiastical court of the Church of England[12] – which was asked to hear an appeal against the refusal by the Chancellor[13] of a faculty for the installation of a mobile phone base station and antennae in the tower of St Peter and St Paul, Chingford. The refusal was on the grounds that some of the material to be transmitted was not consistent with the use of the church as a place of Christian worship, and that it was not part of the work or mission of the Church to facilitate the transmission of pornography whether from the internet or privately created, whether lawful or unlawful.

In granting the appeal, the Dean noted that in faculty applications it was the role of chancellors to carry out a balancing exercise in order to exercise their discretion in a fair way. Whilst its was necessary to adopt a cautious approach in permitting, it was important not to lose sight of the great benefits that had flowed from the introduction of new technology, and to keep a sense of balance 'when assessing the risk from evildoers'.

In carrying out the balancing exercise the court stated that it was necessary to differentiate between the impact on children and that on adults, the former being the major consideration. Following *In re Emmanuel Church, Bentley*[14]

5 Special Waste Regulations 1980, SI 1980/1709, as amended by SI 1988/1790.
6 'Consultation Round Up', ELM 17 (2005) 3 151.
7 The aim is for a globally harmonised system for classification and labelling of dangerous substances and mixtures (preparations) and for hazard communication for workers, consumers and in transport which includes labelling and SDS. The EU GHS regulation will replace the existing classification and labelling scheme.
8 The proposal is now under discussion in the Parliament and it is intended that the GHS enters into force at the same time as the classification and labelling requirements under REACH by 1 December 2010.
9 'Pancake race is tossed aside after 600 years by health and safety rules' *The Times* (5 February 2008).
10 Strictly, not 599, for although the race dates back 600 years, it was only revived in 1998.
11 'Balancing mobile phone risks against benefits' *The Times* (8 October 2007).
12 The court takes its name from the arches within the church of St Mary-le-Bow, (*Sancta Maria de arcubus*), which was formerly the Archbishop's principal peculiar in London, and one of the locations at which the court sat. Presided over by the Dean of the Arches it has both appellate and original jurisdiction. Although strictly its jurisdiction is restricted to the 13 peculiar parishes of the Archbishop in London, since the office of Dean of the Arches is joined with that of Principal Official, the court receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province.
13 George F Pulman QC, Chancellor of the ecclesiastical court.
14 *In re Emmanuel Church, Bentley*, [2006] Fam 39.

it was important to acknowledge that it was not possible to eradicate every element of risk to children before introducing some new feature into modern life. However, the steps that had been taken were a reasonable and welcome public response to countering the risk to children.

The court noted that the availability of unsuitable content to under-18s was restricted through the use of web crawlers and filtering techniques, and legislation was in place making it an offence to communicate grossly offensive or indecent, obscene or menacing information. Furthermore, a key strategy in dealing with misuse of modern technology was the education of children as to its proper use.

In relation to adults, there was a risk that some of those benefiting from the resultant improved transmission might use it to access pornography, but this was not unlawful under criminal law. To bar something which would be of benefit to the public generally because there was a risk that some would be able to access privately material which many Christians and others deplored, was considered an unbalanced approach.

The court held that a more balanced approach would be for Christians to work in conjunction with others at improving standards of sexual morality in society generally.

Weasel words and meagre minutes

Freedom of information provisions extend to the most sensitive of exchanges with senior officials, and cognisant of this, both government and industry moderate their communications to limit unwanted exposure – emails and letters are written on the assumption that they might be accessed by a third party, and the use of generalities and weasel words results in the resulting documents often requires detailed knowledge of the context in order to understand what is being discussed. Likewise, telephone conversations provide a means of exchanging information and opinions in a form that is not readily accessible to others.

In addition to such subterfuge, it is a general rule that the more senior the official, the more problematic is the task of obtaining information. However, a recent ruling of the Information Commissioner, Richard Thomas, made inroads into the workings of No 10 and caused a shift in the rules of the game.[15]

About three years ago, a request was made for the minutes of a 1999 meeting between the Prime Minister and representatives of Wal-Mart. Following what is described as the 'aggressive and dogged intervention' of the Information Commissioner; a ruling was given in late January. There are three important components to this ruling:

– the Commissioner rejected Downing Street's claim that the meeting amounted to 'formulation of policy' and was therefore exempt
– he found 'no evidence that the meeting involved anything other than the exchange of views' and so could not prejudice 'free and frank advice' to ministers
– civil servants/ special advisers who were present at the meeting should be named since they were 'relatively senior officials, and could therefore expect to have their role in decision-making put under public scrutiny'. It was however, acknowledged that the names of more junior personnel may still be withheld.

Although the Commissioner's ruling does not affect the categories covered within the Act, it does give useful guidance on their interpretation.

'Government to ban kissing in fields'

Headlines in the media should always be read with caution, as they are often written for their impact on the reader rather than for factual accuracy. It is quite common for proposals in a consultation document to be presented as the established position; fragments of legislative provisions taken out of context; or the interpretation of a piece of legislation by a local authority or lower court is presented as established law with general application.

Recent reports on the use of the Disability Discrimination Act 1995 in relation to the demise of stiles and 'kissing gates' have elements of all the above. Stiles and kissing gates have been highlighted as obstructions for people with mobility problems or visual impairment and there have been calls for stiles to be banned and kissing gates replaced by larger ones that allow wheelchair access.[16]

Suffolk County Council and other local authorities have expressed the view that installing them along footpaths and rights of way is a breach of s 19 of the Disability Discrimination Act 1995. These interpretations have been presented by the media as the imminent demise of these characteristic features of the countryside.

The name 'kissing gate' may have been derived from a traditional game in which passage through the gate was made dependent upon the presentation of a kiss to the person who had just passed through. More prosaically, it could refer to the action of the gate that merely 'kisses' (ie touches) the fixed parts on each side, rather than being securely latched.

'Kissing gates' and stiles have widespread use as a means of preventing livestock from moving between fields while permitting walkers to do so, and in addition to the issues of access, other interested parties have expressed their concerns: parish councils question the aesthetics of the alternatives and the possible loss of long-established stiles over fences, walls and hedgerows; farmers question the expense of new gates on little used access points; and the government has an agenda for encouraging more people to visit the countryside and learn about farms and food production.

15 Sam Coates, 'Freedom of Information: an important victory against Downing Street', Red Box – Times on Line, 26 January 2008.

16 V Elliott 'Farms kiss goodbye to stiles and gates to allow wheelchair access', *The Times* (30 November 2007).

It was left to the Ramblers' Association to put the matter into perspective through its measured response to the news item in which it expressed its support for the right of disabled people to access the general network of footpaths and trails (where the terrain allows), and the protection of legitimate rights of landowners, while avoiding the creeping urbanisation of the countryside.[17]

The Association's website[18] identifies the conditions under which stiles may be erected on a public right of way[19] and highlights the role of the highways authorities and their statutory obligation to maintain the footpath network in both rural and urban areas to a standard capable of meeting the level of use to be expected.

An important component of these conditions is a revised British Standard for Gaps Gates and Stiles BS5709:2006, which relates to: 'pedestrian gates, bridle gates, kissing gates, dog gates (dog traps or latches) horse stiles, Kent carriage gaps, wide (swing leg-over) and narrow (step over) pedestrian stiles. It does not explicitly cover stiles with moving parts nor vee stiles or ladder stiles, though these and other structures had been considered for inclusion during the writing of the standard'. Recently a farmer was ordered by a court to replace a kissing gate he had installed at the cost of £2000 on the grounds that it did not comply with this standard.[20]

In addition to s 19 of the Disability Discrimination Act 1995 which is of most relevance which applies when a public body provides a new footpath, public or concessionary, ss 60–62 of the Countryside and Rights of Way Act 2000 place a duty on highway authorities to produce a rights of way improvement plan. This inter alia requires highway authorities to assess the accessibility for disabled, blind, or partially sighted people or others with mobility problems. Both of these measures rely upon the minimum standards set in BS5709:2006.

Section 69 of the Countryside and Rights of Way Act 2000[21] will give new powers to a highways authority to enter into an agreement with the owner, lessee or occupier of land. These agreements will allow a landowner to agree to carry out work for replacing or improving a stile that will result in it being safer or more convenient for persons with mobility problems, and the highway authority will be able to agree to pay the whole or part of the cost.

17 K Roberts 'Rights of Way' *The Times* (1 December 2007).

18 http://www.ramblers.org.uk/footpaths/research/advicenote7.html.

19 (i) A right of way may be dedicated to the public subject to the right of the landowner to place a stile or gate across it; (ii) A highway authority may authorise the erection of a stile or gate by a landowner, lessee or occupier to prevent the ingress or egress of animals on land which is used, or being brought into use, for agricultural or forestry purposes (including the breeding or keeping of horses) under s 147 of the Highways Act 1980; (iii) A highway authority may provide and maintain a stile to safeguard persons using a footpath under s 66(3) of the Highways Act 1980.

20 R Zeria 'Farmer's kissing gate is too small, says council' *[Halifax] Evening Courier* 19 November 2007 at http://www.halifaxcourier.co.uk/news/Farmer39s-kissing-gate-is-too.3502134.jp.

21 Which inserts s 147ZA into the Highways Act 1980.

'Small titles and orders for Mayors and Recorders . . .' [22]

It's the time of year once again when government departments ask for nominations for the New Year Honours in 2009. This year, the process for submitting nominations has changed since in the past 'the number of nominations which have been put forward has far exceeded the number likely to be successful'. So instead of giving the full citation for the potential honour, only the name and job title of the nominee have been asked for at the preliminary stage.

This is supposed to minimise the wasted effort in producing citations that are subsequently rejected. The basic details are supposed to provide the department with an overview of nominations and help to reduce the number of nominations that are put forward with little chance of success. When the exercise is officially commissioned in April, the department will be able to identify for which nominees full citations are required.

There is a certain logic in this approach since, in the past, citations written by civil servants were often so bland and non-committal that it made the task of prioritising them almost impossible without a further round of enquiries seeking supplementary information. However, the suggested procedure does imply that the initial selection for honours is made on the basis of who one is and what one is supposed to do, rather than what one has done to justify consideration.

For those external to the selection process, it is difficult to glean what factors are really important, but examination of the guidelines to the writing of citations gives an interesting insight as to some of how the civil service views itself, and others. Readers may make draw their own conclusions from the following random examples:

- the palace does not recognise professional titles such as Dr and Professor
- whilst post nominals may include: JP, QC, DL, FRS, FRSE and existing honours, academic qualifications should not be included
- 'he' and 'she' should be used instead of the nominee's name '*as this will save space*' but the full name of the department should be used and not 'we' or 'the department'
- length of service in grade – for state servants only. Insert figure in full years, rounding up or down as appropriate.
- the term 'aka' should only be used if the candidate has a household stage name – eg 'Sting'.
- information on support for nomination – ceremonial secretariat cases only. It is necessary to insert the name of primary supporters, eg A Baker (work colleague). Supported by MP (Beaconsfield), Chief Rabbi, David Beckham and others. Use titles rather than names (unless well known).

22 W S Gilbert *The Gondoliers*, Act II.