

# Environmental law

[Environment](#), [Ecology](#)



AN INTRODUCTION TO ENVIRONMENTAL LAW James Maurici, Landmark

Chambers Introduction 1. This talk will look at: i. What is environmental law?

ii. The sources of environmental law iii. Some key concepts in environmental

law: the precautionary principle, the polluter pays, public participation and

access to environmental justice iv. An introduction to the main areas of

environmental law: a. air quality b. climate change c. contaminated land d.

noise e. environmental permitting f. waste g. water h. nature conservation i.

nuisance j. environmental impact assessment k. strategic environmental

assessment l. REACH v. Some recent important environmental cases. 2.

Further reading: the best introduction to the subject is the excellent Bell &

McGillivray, *Environmental Law* (OUP, 7th ed. , 2008). What is environmental

law? 3. There is no agreement on what environmental law is. This is a source

of endless (academic) debate. 4. What is the “ environment”? Some legal

definitions ... i. S. (2) of the Environmental Protection Act 1990 (“ the EPA

1990”) “ The “ environment” consists of all, or any, of the following media,

namely, the air, water and land; and the medium of air includes the air

within buildings and the air within other natural or man-made structures

above or below ground. ” ii. Environmental Management Standard ISO 14001

“ ... air, water, land, natural resources, flora, fauna, humans and their

interrelationship ...”; iii. See also Annex I to the Aarhus Convention, of which

more later ... 1 5. A “ new” subject, underdeveloped? see “ Maturity and

methodology: starting a debate about environmental law scholarship” Fisher,

Lange, Scotford and Carlarne, *J. Env. L.* (2009) 21(2), 213-250. Fundamental

questions about environmental law: i. Christopher Stone, “ Should Trees

Have Standing? : Towards Legal Rights for Natural Objects” (1972) *Southern*

California LR 450-501; ii. Wild Law? The term "wild law" was first coined by Cormac Cullinan, a lawyer based in Cape Town, South Africa (Wild Law: A Manifesto for Earth Justice, Green Books, Totnes, Devon, 2003): see <http://www.ukela.org/rte.asp?d=5> and "On thin ice - Could 'wild laws' protecting all the Earth's community - including animals, plants, rivers and ecosystems - save our natural world?", by Boyle and Elcoate (The Guardian, 8 November 2006) – the idea is "Fish, trees, fresh water, or any elements of the environment, ... having legal rights" which can be vindicated by local communities (<http://www.guardian.co.uk/environment/2006/nov/08/ethicalliving>. society). Environmental law has many aspects: i. Private law: tort – especially nuisance (public and private), and also property law; ii. Public law – state regulation: a. Setting standards: water quality, air quality; b. requiring authorisation of activities – town planning, environmental permitting; c. Prescribing procedures to be carried out – EIA, SEA; - nature d. Identifying land or species that must be protected conservation, Sites of Special Scientific Interest ("SSSIs"), the Green Belt, AONBs etc; e. Banning activities – fly tipping; f. Creating civil liability - contaminated land regime (see below); the Environmental Liability Directive 2004/35 implemented by the Environmental Damage (Prevention and Remediation) Regulations 2009 (<http://www.defra.gov.uk/environment/policy/liability/>) etc. iii. Criminal law: environmental crime: a. Numerous offences in many Acts; b. Environment Agency (formerly National Rivers Authority) v Empress Car Co [1999] 2 A. C. 22: unknown person opened the unblockable tap of a diesel tank kept by Empress in a yard which drained directly into a river, with the result that the contents of the tank

overflowed and drained into the river's waters. Empress's conviction for causing poisonous, noxious or polluting matter to enter controlled waters contrary to the Water Resources Act 1991 s. 85(1) on a prosecution brought by the NRA upheld by HL; 6. 7. 2 c. See the Environment Agency's prosecution guide: <http://www.environmentagency.gov.uk/business/444217/444661/112913/?version=1> = \_e d. A new approach: The Regulatory Enforcement and Sanctions Act 2008 ("RESA 2008") – main provisions brought into force 1 October 2008. The Act gives Government the power to give regulators, including local authorities, the Environment Agency, Natural England, English Heritage, the Countryside Council for Wales and others range of new enforcement powers (called "civil sanctions"). The Act was a response to a review by Richard Macrory<sup>1</sup> that criticised the heavy reliance of most areas of regulation on criminal sanctions.

The civil sanctions introduced are intended to provide regulators with an alternative to prosecutions and formal cautions. The intention is that the new sanctions will create a more proportionate regulatory framework, and reduce the administrative burden for regulators and businesses alike. 1. The civil sanctions created by RESA 2008 include: a. fixed monetary penalties in respect of relevant offences (ss. 39-41); b. discretionary requirements which may include variable monetary penalties, compliance requirements, and restoration requirements (ss. 42-45); c. stop notices, which prohibit a regulated person from carrying on a particular activity (ss. 46-49); d. enforcement undertakings, whereby regulated persons avoid the effects of other civil sanctions by undertaking to take certain actions (s. 50). 2. The actual schemes for these civil sanctions are to be made by the relevant

government departments in respect of the matters falling within their respective competences. RESA 2008 simply provides the statutory basis for such enforcement mechanisms. In the environmental context, the Environment Agency and Natural England are the first to be given powers under RESA.

The Environmental Civil Sanctions (England) Order 2010 and the Environmental Sanctions (Misc. Amendments) (England) Regulations 2010 have now been laid before Parliament. The Welsh Assembly Government is drawing up co-ordinated secondary legislation in Wales to extend civil sanctioning powers to the Environment Agency in Wales. 3. The Environment Agency press release on 3 February 2010 says “ The Environment Agency will be consulting business from 15 February 2010 to help shape how the new powers will be implemented”. The Orders provide further detail on the level of the penalties to be provided for: 1

R Macrory “ Regulatory Justice: Making Sanctions Effective” Cabinet Office November 2006 3 4. 5. 6. 7. a. In relation to fixed monetary penalties, the level of penalty is set at between ? 100 - ? 300 (Para. 3, Sch. 1); b. In relation to variable monetary penalties, no maximum level is set by the RESA 2008, save that where the offence is triable only summarily, the penalty must not exceed the maximum amount for that fine (Para. 4, Sch. 2). An example case in the DEFRA consultation proposes a variable monetary penalty of ? 38, 500 for a water pollution incident as a result of poor site maintenance.

The Environmental Civil Sanctions (England) Order 2010 though sets a maximum limit of ? 250, 000. RESA 2008 provides that the regulator may only impose a monetary penalty in respect of a relevant offence where it is “  
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satisfied beyond reasonable doubt” that the subject of the penalty has committed the relevant offence (s 39(2); s. 42(2)). Both fixed and discretionary monetary penalties are to be imposed by the service of a “notice of intent” to impose a penalty, which affords the subject of the penalty an opportunity to make representations to the regulator.

If the person fails to convince the regulator that the penalty should not be issued (or perhaps that the amount of the penalty should be reduced), the regulator will then issue a final notice requiring the payment of a penalty. Where a fixed or variable monetary penalty is imposed on a person, or when a notice of intent is served, criminal proceedings cannot be taken in respect of that person (ss 41, 44). As such, the monetary penalty is intended to replace the criminal offence. Stop notices are notices issued by a regulator with the intention of prohibiting a person from carrying on a certain activity until the steps specified in the notice have been taken. They can be imposed where the regulator reasonably believes that an activity (presently occurring or likely to occur) is causing, or presents a significant risk of causing, serious harm to human health, the environment, and the financial interests of consumers, and the regulator reasonably believes that the activity as carried on involves or is likely to involve the commission of a relevant offence (s 46(4)). Persons receiving a final notice, or a stop notice, have a right of appeal.

That right of appeal must allow the subject of the penalty to challenge the decision on (at least) the following bases - see RESA 2008: a. That the decision to impose the penalty was based on an error of fact; b. That the decision was wrong in law; 4 c. That the decision was unreasonable (and in

the case of variable penalties, that the amount of the penalty was unreasonable); d. In relation to stop notices only, that the person has not committed the offence and would not have committed the offence if the stop notice was not served. 8.

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

An appeal from the First-tier Tribunal is to the Upper Tribunal on a point of law only. 9. Article 6 issues: see *Rethinking regulatory sanctions: Regulatory Enforcement and Sanctions Act 2008 - an exchange of letters* E. L. M. 2009, 21(4), 183-18. iv. EC law: generally said 80% of environmental law in UK derives from EU – see below. v. International law: see further below, increasingly important. 8. Planning law: is planning law part of environmental law? Yes, undoubtedly. But beyond this talk to consider: see Moore *A Practical Approach to Planning Law* (10th ed, OUP).

Who are the regulators? i. Central Government: Defra, DCLG, DECC but also DfT, BERR; ii. Local Government: historical role in public health protection. Now: Town & Country Planning, EPA 1990 (statutory nuisance); noise; also air quality and management and contaminated land (for non-special sites).

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Also a regulator under Environmental Permitting Regulations 2007 (soon to be 2010, “ the EPR”) for certain installations; iii. The Environment Agency: an executive non-departmental government body, principal environmental regulator in England & Wales.

Responsible for: environmental permitting, water resources, flooding and coast management, waste, emissions trading. 13, 000 employees. In Scotland SEPA; iv. Natural England: merger of English Nature and Countryside Agency responsible for nature conservation, species and habitat protection, National Parks, Countryside and Rights of Way Act. CCW similar role in Wales. In Scotland Scottish National Heritage; v. Others: Maritime and Coastguard Agency; Drinking Water Inspectorate; Nuclear Installations Inspectorate. 5 9. The sources of environmental law (1) International Environmental Law 10.

Important – direct influence on domestic law, but also on EC law and through that domestic law. 11. Some examples: the 1979 Geneva Convention on Long-Range Transboundary Pollution, the Kyoto Protocol, and the Aarhus Convention (see below). 12. Illustrate importance of International Law by reference to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“ the Aarhus Convention”). The Aarhus Convention entered into force in October 2001. It was ratified by the UK in February 2005, and by the EU in the same month.

As of 8 September 2009, there were 43 Parties to the Convention. 13. Article 1: In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or  
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her health and well being, each Party shall guarantee the rights of access to information, public participation in decision making, and access to justice in environmental matters in accordance with the provisions of this Convention.

14. The Convention contains three broad themes or 'pillars': i. access to environmental information (Articles 4 -5); ii. public participation in environmental decision-making (Articles 6 -8); and iii. access to justice in environmental matters (Article 9). 15. Former United Nations Secretary-General Kofi Annan said " Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities.

As such it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations" (emphasis added). 16. It has had, and continues to have a profound impact on the development of EC and UK environmental law. 17. Access to environmental information: i. the Environmental Information Regulations 2004 (SI 2004/3391) (" the EIR"); ii. implements Directive 2003/4/EC on public access to environmental information (" EI Directive"). The EI Directive repealed the earlier Directive 90/313/EEC and was intended to give effect to the Aarhus Convention. 6 18.

The EIR apply to " environmental information", which is defined in regulation 2 in the following way: "" environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on- (a) the state of the elements

of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a); (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements; (d) reports on the implementation of environmental legislation; e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c)” 19. As is clear from the EIR, that definition replicates that in the EI Directive, which in turn is in similar terms to the definition of environmental information in the Aarhus Convention. The ECJ has treated “environmental information” as having a broad meaning under Directive 90/313/EEC.

In Case C-321/96 Mecklenburg v Kreis Pinneberg – Der Landrat [1998] ECR I-3809, the ECJ found the wording of the definition (albeit different from that in

the present version of the EI Directive) to create a broad concept of what can constitute environmental information. 20. A broad interpretation of the meaning of environmental information is also advocated by the Information Commissioner's Office ("ICO"), see [http://www.ico.gov.uk/what\\_we\\_cover/environmental\\_information\\_regulation/guidance.aspx](http://www.ico.gov.uk/what_we_cover/environmental_information_regulation/guidance.aspx). Requests falling under the EIR must be dealt with under those regulations and not as an FOIA request. NB the procedures and exemptions are different. 21.

The Supreme Court in *Office of Communications v Information Commissioner* [2010] UKSC 3 referred to ECJ the following question: "Under Council Directive 2003/4/EC, where a public authority holds environmental information, disclosure of which would have some adverse effects on the separate interests served by more than one exception (in casu, the interests of public security served by article 4(2)(b) and those of intellectual property rights served by article 4(2)(e)), but it would not do so, in the case of either exception viewed separately, to any extent sufficient to outweigh the public interest in disclosure, does the Directive require a further exercise involving the cumulation of the separate interests served by the two exceptions and their weighing together against the public interest in disclosure?". The information requested relates to the precise location of mobile phone base stations in the United Kingdom. 7 22. For other cases touching on the EIR: see *Veolia ES Nottinghamshire Ltd v Nottinghamshire CC* [2010] Env. L. R. 2 and the BARD case discussed in the Annex below. 23. Public participation in environmental decision-making: In *R(Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] Env. L. R. 29 (a challenge to the consultation

process in relation to new build nuclear) Sullivan J said: “ 49. Whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive. The United Kingdom Government is a signatory to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).

The Preamble records the parties to the Convention: “ Recognizing that adequate protection of the environment is essential to human wellbeing and the enjoyment of basic human rights, including the right to life itself, Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations, Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights, Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment, ...” 50

Article 7 deals with “ Public Participation concerning Plans, Programmes and Policies relating to the Environment”. The final sentence says: “ To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment. ” 51 Given the importance of the decision under challenge—whether new nuclear build should now be supported—it is difficult to see how a promise of anything less than “ the fullest public consultation” would have been consistent with the Government's obligations under the Aarhus Convention ...”. 24.

See also what Lord Hoffmann said on public participation in the context of EIA in Berkeley (see below). 25. Access to justice in environmental matters: Article 9 requires that members of the public have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of environmental decision-making. Article 9(4) requires that the procedures for rights of access to justice in environmental matters shall “ provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely, and not prohibitively expensive”.

In recent times the key issue in England & Wales has been the “ not prohibitively expensive” requirement: see below. 8 26. What is the status of the Aarhus Convention? i. It is an international convention, and the parties to the convention have established a Compliance Committee that can investigate alleged instances of non-compliance. There are currently three complaints relating to the UK in which decisions are awaited: a. ACCC/C/2008/27: this is a complaint brought by the Cultra Residents’

Association, County Down. The Association was one of five who were applicants in judicial review proceedings brought in the High Court in Northern Ireland.

The judicial review proceedings related to the expansion of City Airport in Belfast. The proceedings were dismissed as being premature (*Kinnegar Residents' Action Group & Ors, Re Judicial Review* [2007] NIQB 90 (7 November 2007)). The Department's costs were awarded against the applicants in the sum of ? 39, 454. The Association alleged that the award of costs violated its rights under Article 9 of the Aarhus Convention. b. ACCC/C/2008/23: this arises out of the *Morgan v Hinton Organics* case considered below. A summary of that case records the complaint as being that the communicants "rights under article 9, paragraph 4, of the Convention were violated when they were ordered to pay costs amounting to approximately ? 5, 000, which, in the opinion of the communicants, is prohibitively expensive. The costs order was issued following a discharge of an interim injunction obtained by them earlier in private nuisance proceedings for an injunction to prohibit offensive odours arising from Hinton Organics (Wessex) Ltd operating a waste composting site. The communicants allege that the issuing of the costs order by the Court, in circumstances where one month before it had agreed and made an order that there was a serious issue to be tried and that the Claimants should enjoy interim injunctive relief, amounts to non-compliance with article 9, paragraph 4, of the Convention". c.

A third communication concerning the UK has been brought Mr. James Thornton, the CEO of ClientEarth. The complaint there is that the "law and

jurisprudence of the [UK] fail to comply with the requirements of article 9, paragraphs 2 to 5, in particular in connection with restriction on review of substantive legality in the course of judicial review, limitations on possibility for individuals and NGOs to challenge act or omissions of private persons which contradict environmental law, prohibitive nature of costs related to access to justice and uncertain and overly restrictive nature of rules related to time limits within which an action for judicial review can be brought”. ii.

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

As a result its institutions can take enforcement action against Member States for non-compliance. Indeed the provisions of Article 9 of the Aarhus Convention concerning access to justice have been inserted into two key EC environmental directives. Article 10A of the 1985 EC Directive on Environmental Impact Assessment (“EIA”) provides that Member States must ensure that members of the public have access to a review procedure before a court of law or other independent body to challenge the substantive or procedural decisions, acts or omissions subject to the public participation

provisions of the Directive, and that “ any such procedure shall be fair, equitable, timely, and not prohibitively expensive”.

Directive 96/61/EC on Integrated Pollution Prevention and Control (“ IPPC”), which provides for a consent system for a wide range of industrial activities, is similarly amended with a new Article 15a, which also provides that procedures for legal challenges must be fair, equitable, timely, and not prohibitively expensive. Also: a. The requirements of Article 9 have been recently considered by the ECJ: Case C-427/07 Commission v Ireland 17 July 2009; b. It is well known that in 2006 CAJE (Capacity Global, Friends of the Earth, the Royal Society for the Protection of Birds and WWF) complained to the EC Commission about UK non-compliance with Aarhus in particular as regards the “ not prohibitively expensive” obligation. A Letter of Formal Notice was sent to the UK in December 2007.

It is understood that the Commission is currently considering whether to issue the UK with a Reasoned Opinion. It is said in *Morgan v Hinton Organics* that the Commission decision was awaiting the Sullivan Report ([www.wwf.org.uk/filelibrary/pdf/justice\\_report\\_08.pdf](http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf), see below) This arose in the context of infraction proceedings against the Republic of Ireland. In the proceedings it was alleged, inter alia, that Ireland had failed to transpose requirements in Article 10a of the EIA Directive and Article 15a of the IPPC Directive by ensuring that procedures for access to justice in respect of decisions made under those Directives were not prohibitively expensive.

The Commission complained that “ there is no applicable ceiling as regards the amount that an unsuccessful applicant will have to pay, as there is no legal provision which refers to the fact that the procedure will not be

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prohibitively expensive”. The ECJ concluded that: “ 92. As regards the fourth argument concerning the costs of proceedings, it is clear ... that the procedures established in the context of those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement. 3 Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts. 94 That mere practice which cannot, by definition, be certain, in the light of the requirements laid down by the settled case-law of the Court, ... cannot be regarded as valid implementation of the obligations arising from [the EIA and IPPC Directives]” 2 10 and the UK’s response to it. This is because the UK Government had indicated it would respond to the Sullivan Report. It then did not do so.

The first public response to the Sullivan Report came in the form of the submissions of the UK to the Aarhus Compliance Committee in the Cultra Residents Association communication and related communications (see above). Some of the correspondence between the Commission and the UK is recorded in the judgment in *Morgan* (see below) as is correspondence between the Aarhus compliance authorities and the UK. 27. The influence of Aarhus in the English Courts: there have been numerous cases in England & Wales that have made reference to the Aarhus Convention in the costs context. The most common context in which this consideration has arisen is

in respect of applications for a protective costs order or PCO – about which much more below. 28. The first time that Aarhus was mentioned by the Courts of England & Wales was in *R. Burkett) v Hammersmith and Fulham LBC (Costs)* [2004] EWCA [2005] C. P. Rep. 113. Since then Aarhus been at the forefront of the liberalisation of the PCO case-law. The restrictive approach evident in the (non-environmental cases) of *R (Corner House Research) v. Secretary of State for Trade and Industry* [2005] 1 WLR 2600 and *R (Goodson) v Bedfordshire & Luton Coroner* [2006] C. P. Rep. 6 has been relaxed and Aarhus has been at the forefront of this: The Court of Appeal in an addendum to their judgment having referred to the requirement in the Aarhus Convention that judicial procedures in environmental law “ not be prohibitively expensive” said: “ 75.

A recent study of the environmental justice system (“ Environmental Justice: a report by the Environmental Justice Project”, sponsored by the Environmental Law Foundation and others) recorded the concern of many respondents that the current costs regime “ precludes compliance with the Aarhus Convention”. It also reported, in the context of public civil law, the view of practitioners that the very limited profit yielded by environmental cases has led to little interest in the subject by lawyers “ save for a few concerned and interested individuals”. It made a number of recommendations, including changes to the costs rules, and the formation of a new environmental court or tribunal. 76. .... f the figures revealed by this case were in any sense typical of the costs reasonably incurred in litigating such cases up to the highest level, very serious questions would be raised as to the possibility of ever living up to the Aarhus ideals within our present

legal system. ... 77. Equally disturbing, perhaps, is the fact that this large expenditure on Mrs Burkett's behalf has not, as far as we know, yielded any practical benefit to her or her neighbours. ... 80. We would strongly welcome a broader study of this difficult issue, with the support of the relevant government departments, the professions and the Legal Services Commission. However, it is important that such a study should be conducted in the real world, and should look at the issue not only from the point of view of the lawyers involved, but also taking account of the likely practical benefits to their clients and the public.

It may be thought desirable to include in such a study certain issues that relate to a quite different contemporary concern (which did not arise on the present appeal), namely that an unprotected claimant in such a case, if unsuccessful in a public interest challenge, may have to pay very heavy legal costs to the successful defendant, and that this may be a potent factor in deterring litigation directed towards protecting the environment from harm. " 3 11 i. R (England) v LB of Tower Hamlets [2006] EWCA Civ 1742 – restrictive approach to “no private interest” not applicable in environmental context, Carnwath LJ refers to Aarhus; ii. May 2008 the report of the Working Group on Access to Environmental Justice Ensuring access to environmental justice in England and Wales chaired by Sullivan J. – Aarhus central to this report and report itself since driven the case-law; iii.

R (Compton) v Wiltshire Primary Care Trust; [2008] CP Rep 36 – a nonenvironmental case but Court of Appeal in relaxing requirements refers to Aarhus and the Sullivan Report; iv. Further consideration in R (Buglife) v Thurrock Thames Gateway Development Corporation [2009] C. P. Rep. 8 –

environmental case further considering criteria for grant of a PCO; v. Morgan v Hinton Organics (Wessex) Ltd – see above, further relaxation and citation of Aarhus; vi. Aarhus features prominently in Jackson Report – recommendation for judicial review generally and environmental cases for qualified one way costs shifting. (2) EC law 29. Hugely important – all environmental lawyers must be EC lawyers. 30. The TEU: i.

Article 4: the environment an area of shared competence: EC and Member States; ii. Article 11(ex Article 6 TEC): “ Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development”; iii. Article 114(3) (ex Article 95 TEC): “ The Commission, in its proposals envisaged in paragraph 1 concerning ... environmental protection ... will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective”; iv.

Article 191 – 193 (ex Articles 174 – 176 TEC) “ Article 191 (ex Article 174 TEC) Union policy on the environment shall contribute to pursuit of the following objectives: — preserving, protecting and improving the quality of the environment, — protecting human health, — prudent and rational utilisation of natural resources, — promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. 2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle

and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. ... 3.

In preparing its policy on the environment, the Union shall take account of: — available scientific and technical data, — environmental conditions in the various regions of the Union, 12 — the potential benefits and costs of action or lack of action, — the economic and social development of the Union as a whole and the balanced development of its regions. ... Article 192 (ex Article 175 TEC) 1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191. 2.

By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, shall adopt: (a) provisions primarily of a fiscal nature; (b) measures affecting: — town and country planning, — quantitative management of water resources or affecting, directly or indirectly, the availability of those resources, — land use, with the exception of waste management; (c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the Economic and Social

Committee and the Committee of the Regions, may make the ordinary legislative procedure applicable to the matters referred to in the first subparagraph. 3. General action programmes setting out priority objectives to be attained shall be adopted by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

The measures necessary for the implementation of these programmes shall be adopted under the terms of paragraph 1 or 2, as the case may be. 4. Without prejudice to certain measures adopted by the Union, the Member States shall finance and implement the environment policy. 5. Without prejudice to the principle that the polluter should pay, if a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, such measure shall lay down appropriate provisions in the form of: — temporary derogations, and/or — financial support from the Cohesion Fund set up pursuant to Article 177.

Article 193 (ex Article 176 TEC) The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission. " 31. Numerous Directives (as well as Regulations and Decisions) on environmental law will look at a number below but some examples: i. The Environmental Liability Directive 2004/25; ii. The Environmental Impact Assessment Directive; iii. The Waste Framework Directive; iv. Directive 2000/60 establishing a framework for EC action in the field of water policy.

32. Decisions of the ECJ: hugely important - purposive approach to interpretation especially visible in environmental context. A classic example is in relation to EIA 13

Directive " ... the Court has frequently pointed out that the scope of Directive 85/337 is wide and its purpose very broad". 33. Why EC law so important? Directly effective, and supreme! 34. And there is a further matter - Francovich liability and Kobler ... In *Cooper v Attorney General* [2008] 3 C. M. L. R. 45 Plender J. dismissed the first claim brought in the UK for damages, pursuant to the ECJ's decision in *Case C-224/01 Kobler v Republik Osterreich* [2003] ECR I-10239. In that case the ECJ held that a Member State may be answerable in damages for failures by its courts of final instance to give effect to EC law, where the failure amounts to a sufficiently serious breach of EC law.

The case arises out of what are alleged to have been sufficiently serious/manifest errors of EC law by the Court of Appeal when dismissing judicial review proceedings commenced by Stephen Cooper and the other then trustees of the CPRE London Branch in October 1999 in respect of the Westfields development: see *R. v London Borough of Hammersmith and Fulham* [2000] 2 C. M. L. R. 1021; [2000] Env. L. R. 549 and [2000] Env. L. R. 532. In dismissing the claim for judicial review the Court of Appeal's reasoning was in part based on: (i) a finding that EIA could not be required at the reserved matters stage of the planning permission procedure; and (ii) that the EIA Directive did not require the Council to revoke a permission if it was granted in breach of the EIA Directive.

Both findings have in effect been subsequently been overruled by the ECJ: see *R (Wells) v Secretary of State for Transport, Local Government and the Regions*, [2004] ECR I-723 on 7 January 2004; *Case C-508/03 Commission v UK* (Article 226 (as was) EC proceedings involving, inter alia, Westfields shopping centre); *C-590/03 Barker and the House of Lords decision in Barker* [2007] 1 AC 470. 35. As well as dismissing the judicial review in 2000 the Court of Appeal awarded against the trustees of the CPRE two sets of costs. The Kobler damages claimed were the recovery of those costs. Plender J. concluded that the case fell “ far below the standard required to constitute a manifest infringement of the applicable law so as to give rise to a claim for damages”.

He said: “[a]ny contention that a court adjudicating at last instance can be said to have made a manifest error of Community law when its judgment is, in some respect, inconsistent with a later judgment of the ECJ is as misconceived as it is inconsistent with the judgment in *Kobler*. Community law is a system in the process of constant development. This is recognized in the many judgments of the ECJ that refer to “ the subsequent development of Community law applicable to this domain” (see most recently *Case C 375/05, Erhard Geuting v Direktor der Landwirtschaftskammer Nordrhein-Westfalen fur den Bereich Landwirtschaft*, 4th October 2007, § 18. ) This being the case, inconsistencies between national decisions and subsequent judgments of the Court of Justice can be expected to arise.

Claims based on the *Kobler* case are to be reserved for exceptional cases, involving errors that are manifest; and in assessing whether this is the case, account must be taken of the specific characteristics of the judicial function,



which entails the application of judgment to the interpretation of provisions capable of bearing more than one meaning. " 36. The Court of Appeal decision awaited, other Kobler damages claims - all in environmental cases pending ... 14 (3) Domestic law 37. Primary legislation: the ever growing nature of environmental law: i. 2008: the Climate Change Act 2008; Energy Act 2008, Planning and Energy Act 2008, the Planning Act 2008; Regulatory Enforcement and Sanctions Act 2008; ii. 2009: Green Energy (Definition and Promotion) Act 2009; Marine and Coastal Access Act 2009; iii. 2010: Climate Change (Sectoral Targets) Bill; the Consumer Emissions (Climate Change) Bill; the Development on Flood Plains (Environment Agency Powers) Bill; the Energy Bill; the Environmental Protection (FlyTipping Reporting) Bill; Flood and Water Management Bill. 38. Most EC Directives transposed via secondary legislation via EC Act: Westlaw suggests that 596 statutory instruments concerned with the environment have been made since 1 January 2008! 39. Guidance, policies etc: " soft law" - voluminous in environmental law. 40. Case-law: environmental law occupies Courts from Magistrates Courts to the House of Lords: i. Recent environmental cases before the House of Lords include: R. (Edwards) v Environment Agency (No. 2) [2008] 1 W. L. R. 1587 and Wasa International Insurance Co Ltd v Lexington Insurance Co [2009] 3 W. L. R. 575.

And again to illustrate how broad is environmental law: the first was a judicial review challenge to the grant of a pollution prevention control permit to allow the burn shredded and chipped tyres as a partial substitute fuel in cement kilns in Rugby and the second was about the construction and choice of law for a reinsurance contract concerned with environmental damage

clean up. ii. Magistrates Court decisions in environmental cases can end up before the ECJ: see Case C-252/05 R. (Thames Water Utilities Ltd) v Bromley Magistrates' Court [2007] 1 W. L. R. 1945 (on the meaning of waste). 41. There have over the years been calls for the setting up of a specialist environmental court, see: H Woolf: 'Are the Judiciary Environmentally Myopic?' (1992) 4 Journal of Env Law 1; Professor Malcolm Grant's Environmental Court Project: Final Report (2000, DETR) and R Macrory & M Woods Modernising Environmental Justice – Regulation and the Role of the Environmental Tribunal (UCL London, 2003). (4) the interface with human rights 42. The European Convention on Human Rights does not have any explicit environmental rights but there is a growing body of case-law – Article 8, (also Articles 2 and 3): i. Lopez Ostra v Spain 20 EHRR 277 ii. Guerra and others v Italy 26 EHRR 357; 15 iii. S v France 65 DR 250; iv. Hatton v United Kingdom (2003) 37 E. H. R. R. 28. Some key concepts in Environmental law 43. We have looked at some key concepts already: public participation; access to environmental information and access to environmental justice. 44.

There are two other key concepts both of which we have seen mentioned directly in the text of the TEU: (i) the polluter pays principle; and (ii) the precautionary principle. (1) the polluter pays principle 45. In environmental law this is the principle that the party responsible for producing pollution should also be responsible for paying the damage done as a result of that pollution to the national environment. 46. International Law i. Possible regional 'customary international law' as a result of strong support by both EC countries and countries of OECD. ii. OECD early documents on 'polluter

pays': a. Environment and Economics: Guiding Principle concerning international economic aspects of environmental policies (1972) b.

The implementation of the Polluter Pays Principle (1974) c. Recommendation of the Council concerning the Application of the Polluter-Pays Principle to Accidental Pollution (1989) iii. Rio Declaration on Environment and Development 1992: Set out in Principle 16 (Rio Declaration was document produced at 1992 UN Conference ' the Earth Summit' of 27 principles intended to guide future sustainable development around the world. Some regard the principles as ' third generation rights'). 47. Applications in countries around the world i. Eco-taxes e. g. US: ' Gas-Guzzler tax' where cars with increased pollution pay more. ii. ' US Superfund' law requires polluters to pay for cleanup of hazardous waste sites. iii.

Extended polluterresponsibility- First described by the Swedish government in 1975 and applied by economies where the cost of pollution is internalised into the cost of the product to shift responsibility of dealing with pollution from governments to those responsible. See also OECD document ' Extended Polluter Responsibility' (2006). 48. EC Law: i. Article 191 TEU (ex Article 174 TEC): " 2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the 16 ii. iii. iv. v. precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Sixth Community Environment Action Programme - which covers the period until July 2012 sets out the Polluter Pays Principle. Decision No. 1600/2002 of the European Parliament and of the Council, 2002

O. J. (L242) 1. EC Directive 2004/35/EC - Environmental Liability Directive – Embodiment of polluter pays principle and provides that the one responsible for the pollution should pay for the damage caused to the environment. Council Recommendation (75/436/Euratom, ECSC, EEC and the attached Communication): As a result of Article 174, the Commission set out the ‘Polluter Pays’ principle as well as a number of exceptions to the Polluter Pays Principle, which are also provided for under Article 175(5) of the Treaty.

Commissions’ Technical Paper 1 on the new programming period 2000-2006: Application of the Polluter Pays Principle, differentiating the rates of community assistance for funds – Incorporates the polluter pays principle to community assistance for structural funds and ISPA infrastructure operations. 49. Domestic Law - Contaminated Land Regime (see below) – exemplifies it. Contained in Part 2A of the EPA 1990. Contained in Circular 01/2006, Annex 1, para. 37: “ Under the provisions concerning liabilities, responsibility for paying for remediation will, where feasible, follow the ‘polluter pays’ principle”. Principle referred to in a number of domestic authorities including recently: Corby Group Litigation v Corby DC [2009] EWHC 1944 (TCC) and R. (Thames Water Utilities Ltd) v Bromley Magistrates' Court [2009] Env. L. R. 13. (2) the precautionary principle 50.

The Preventative principle: Prevention of environmental harm should be the ultimate goal when taking decisions, actions or omissions with potentially adverse environmental impacts. And an important corollary of this is the precautionary principle: A precautionary approach should be taken whenever there is uncertainty as to whether environmental harm will arise, even if the remedy involves a substantial cost. 51. International law i. Rio Declaration on

Environment and Development 1992: a. Set out in principle 15. b. In addition, Principle 2 effecting the Preventative principle: States have...the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction. ii.

Article 2 of the Framework Convention on Climate Change 1992: “ The ultimate objective is to achieve the stabilization of a greenhouse gas emissions in the atmosphere to a level that would prevent dangerous anthropogenic interference with the climate system”. 17 iii. International cases: Trail Smelter Arbitration (US v Canada) 3 RIAA (1941): No state had the right to permit the use of its territory in a way that would cause injury by fumes to the territory, people, or property of another. In this case that Canada should prevent pollution entering the US. iv. Ad hoc expert group established by UNESCO to study the ‘ precautionary principle’ and its application. 52. EC Law: i. Article 191 TEU (ex Article 174 TEC): “ 2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union.

It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. ” ii. European Commission Communication on Precautionary Principle, endorsed by Heads of Government at a General Affairs Council at Nice in December 2000 (COM 2000 1) establishes essence of precautionary Principe and how it should be applied: “ Where there are threats of serious or irreversible damage, lack of

full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. iii.

Sixth Community Environment Action Programme - which covers the period until July 2012 sets out the Precautionary Principle. Decision No. 1600/2002 of the European Parliament and of the Council, 2002 O. J. (L242) 1 iv. Cases, examples: a. Joined Cases T-74/00, 76/00, 83/00, 84/00, 85/00, 132/00, 137/00 & 141/00, *Artegoda GmbH v Commission* [2002] E. C. R. II-4945, at para. 184: Precautionary principle general principle of EC Law. b. *UK v Commission* [1998] Case C-180/96: ECJ held EC institutions could take protective measures without having to wait until the reality and seriousness of those risks became fully apparent (in this case Commission had issued decision on emergency measures to protect against BSE which UK was seeking to annul). c.

*Pfizer Animal Health SA v Council of the European Union* [2002] T13-99: CFI affirmed that under the precautionary principle, EC institutions are entitled in the interests of human health to adopt; on the basis of currently incomplete scientific knowledge protective measures and that they have a broad discretion in this respect. v. Application in European directives relating to environment. Examples: a. Directive 2008/ 101/EC on greenhouse gas emissions trading scheme, Recital (19) specifically refers to precautionary principle. b. Directive on Hazardous waste particularly refers to precautionary principle. 53. Domestic Law: i. *R v Secretary of State for Trade and Industry ex p Dudderidge* [1995] (The Times 26 October 1995): Challenge brought that Secretary of State should issue regulations restricting electromagnetic fields from electric cables being laid as part of

national grid under precautionary principle and Article 130r [now Art. 191] of EC Treaty. Court of Appeal held that precautionary principle had no distinct legal effect in the UK and Article 130r of EC Treaty did not impose such an obligation on the Secretary of State. ii. R (AMVAC Chemical UK Ltd) v The Secretary of State Environment, Food, & Rural Affairs and others [2001] EWHC Admin 1011: Court considered precautionary principle in detail. Crane J state precautionary principle requires that where threats of serious or irreversible damage, lack of scientific certainty should not be posed as reasoning for postponing cost-effective measures to prevent environmental degradation.

Referred to UK Sustainable Development Strategy 1999 referring to precautionary principle, EC communication, Caragena Protocol on Biosafety 2000, Article 174(2) EU Treaty (Community policy on the environment.... shall be based on the precautionary principle and on the principles that preventative action should be taken'). iii. Now recognised in domestic law: UK Interdepartmental Liaison Group on Risk Assessment (HSE) published paper on 'The Precautionary Principle: Policy and Application' iv. Application seen in domestic law: Incorporation in PPS25 (2001), development and flood risk where preventative principle is seen to be of particular importance. v. Included in White Paper 2007 on sustainable development. vi.

UK 'Sustainable development Strategy' Chapter 4 specifically refers to the precautionary principle (available on defra website). vii. Included in defra 'Guidelines on Environmental Risk Assessment and Management' (1. 6: 'Risk Management and the precautionary principle'). An introduction to the main areas of environmental law 54. This can be no more than the briefest of

introductions: (1) Air Quality 55. Human activities across the spectrum produce pollutants that affect the quality of the air around us, ranging from the everyday of driving to complicated industrial processes producing highly toxic fumes. Regulatory measures are put forward as a response to try and regulate the production of air pollutants that are produced.

Initially there was a more reactive approach of addressing specific problems as they arose. Recently, with increasing concerns about air quality and climate change there is a more proactive and integrated approach to regulating the emission of pollutants. 56. Sources of Air Quality Law: i. International Law: Air pollution is not confined to boundaries – pollution caused by one country affects the air quality of another's. International law has therefore long been concerned with pollution of the atmosphere. International treaties concluded tend to be framework treaties setting out broad principles which can then be implemented with more detail into domestic laws. Sources include: 19 a.

The 1979 Geneva Convention on Long-Range Transboundary Air Pollution – Imposes obligations to endeavour to limit air pollution using the 'best available technology' feasible. Followed by protocols on the reduction of specific pollutants. b. The 1985 Vienna Convention for the Protection of the Ozone layer – Takes Action against activities that were likely to modify the ozone layer. Followed by the Montreal Protocol setting concrete targets and the 1999 Gothenburg Protocol aiming setting emissions ceilings for particularly acidic and ground-level ozone emissions, namely SO<sub>2</sub>, NO<sub>x</sub>, VOCs and ammonia. c. The 1992 Framework Convention on Climate Change – Starts with the position of 'common but differentiated responsibility'



imposing lesser burdens on developing countries in order to allow sustainable development.

Stabilize greenhouse gas emissions at a level that would not interfere with the climate system of food production. Provides for national inventories of emissions, integration of climate change issues. d. The Kyoto Protocol – Sets binding reduction targets for parties signed up to it (listed in Annex I). Adopted in 1997 and entered into force in 2005. Sets out specific reduction targets for different countries in relation to six gases: CO<sub>2</sub>, NO<sub>x</sub>, HFC's, PFCs, methane, ground-level ozone. ii. EC Law: a. Ambient Air Quality Directive (2008/50/EC) – Aimed at defining principles of a common strategy to assess and define objectives for ambient air quality.

Identified 13 ambient air pollutants for which various forms of specific controls were to be introduced under daughter directives. Controls mainly to take the form of limit values, target values, and alert thresholds. Implemented by Air Quality Standard Regulations 2007. Regime originated with Air Quality Framework Directive (96/62/EC). 2008 Directive consolidates existing legislation apart from 4th Daughter Directive, and must be implemented by 11 June 2001. b. Daughter directives: 1. 1st Daughter Directive, 1999/30/EC: Set limit values for SO<sub>2</sub>, NO<sub>2</sub>, NO<sub>x</sub>, PM and lead; 2. 2nd Daughter Directive, 2000/69/EC: Set limit values for benzene and CO<sub>2</sub> 3. 3rd Daughter Directive, 2002/3/EC: Set objectives and thresholds for concentrations of ozone. 4. th Daughter Directive, 2004/107/EC: Set target values for concentrations of arsenic, cadmium, nickel and benzo(a)pyrene. 5. Integrated Pollution Prevention and Control Directive (IPPC) (96/61/EC) – Creates a regime for controlling polluting releases from certain industrial

activities to air, water and land. Implemented by UK EPR 2007 (see below)

20 6. National Emissions Ceilings Directives (Directive 2001/81/EC) - Effects the Gothenburg Protocol by setting ceilings for each MS for emissions of Ammonia, SO<sub>2</sub>, NO<sub>x</sub> and VOCs which must have been met by 2010. Implemented by The National Emissions Ceilings Regulations 2002. UK must report emissions of four NECD Pollutants annually, DEFRA produces yearly emission data. 7.

Large Combustion Plant Directive (2001/80/EC) - Controls emissions of SO<sub>2</sub>, NO<sub>x</sub> and dust from large combustion plants with aim of reducing acidification by providing emission limit values for such pollutants. 8. Solvent Emissions Directive (1999/13/EC) - Limits emissions of VOCs in environment by requiring permits for such emissions in specified activities and installations. Amended by Paints Directive. Effected by EP Regulations, Schedule 14. 9. Petrol Vapour Recovery Directive - Aimed at controlling emissions from motor vehicles. Stage II PVR now proposed for controlling emissions when motor vehicles refuelling. 10. Paints Directive (2004/42/EC) - Limitation of emissions of VOC's in certain paints.

Further objective of reducing VOC emissions by setting limits for VOC use. Implemented in UK by Volatile Organic Compounds in Paints, Varnishes and Vehicle Refinishing Production Regulations 2005. 11. Sulphur Control of Liquid Fuels Directive (1999/32/EC), objective to reduce emissions of SO<sub>2</sub> resulting from combustion of heavy fuel oil and gas oil by limiting sulphur content in these oils. Implemented by Sulphur Content of Liquid Fuels (England and Wales) Regulations 2007. 12. Waste Incineration Device (WID) (2000/76/EC) - Applies to most activities that involve burning waste,

including burning waste to fuels. Regulates standards and methodologies for incineration of waste. 13.

The European Pollutants Release and Transfer Register. Commission Decision 2000/479/EC - Provides for a European register of air emissions, allows direct comparison of air emissions across all member states. Member states have to produce a three yearly report on emissions to air and water at industrial installations if certain threshold values exceeded which are then recorded and maintained on the register. c. Domestic Law 1. Environment Permitting Regulations 2007 (see below) - Brings series of environmental controls together, including PPC and waste management licensing by requiring that an environmental permit must be granted for operation of a 'regulated facility'.

Permit requires regulators to exercise permit-related functions to deliver obligations with various 21 directives include large combustion plant directive, solvent emissions directive, waste incineration directive and petrol vapour recover directive. 2. Useful Guidance: DEFRA: Environmental Permitting General Guidance Manual on Policy and Procedures for A2 and B Installations; 3. National Air Quality Strategy: a. UK Air Quality Strategy: Strategy published by the Secretary of State containing policies with respect to assessment or management of quality of air. Required by s. 80(1) of Environment Act 1995. Sets specific objectives for different air pollutants. b.

Local Air Quality Management: Environment Act 1995 imposes duty on LA's to conduct reviews of present and future air quality within area, formulating 'air quality management area' (AQMA) where objectives not being met and formulating action plans if necessary. c. In addition: Advice in PS23 on <https://assignbuster.com/environmental-law-research-paper-samples/>

relationship between determination of planning applications and pollution control (paras 8 to 10 and Annex 1). EIA requires inter alia air quality assessment. (2) Climate Change 57. This is of course big news: i. The Kyoto Protocol - Sets binding carbon reduction commitments for states. ii. The EU ETS Scheme - Directive 2009/29/EC (replacing Directive 2003/87/EC) implemented in UK by Greenhouse Gas Emissions Trading Scheme Regulations 2005: a.

On 1 January 2005 the EU ETS came into force. It is the largest multicountry, multi-sector greenhouse gas emission trading scheme worldwide. In total approximately 11, 500 installations are presently covered by the EU ETS and it accounts for nearly 45% of total CO<sub>2</sub> emissions, and about 30% of all greenhouse gases in the EU (see EU Action against Climate Change: EU Emissions Trading - An Open Scheme Promoting Global Innovation, CEC, Brussels). b. The EU ETS is the key policy introduced by the EU to help reduce the EU's greenhouse gas emissions. The importance of the EU ETS is further emphasised by the recitals to Directive 2003/87 (see recitals (1) and (2)).

Article 1 of Directive 2003/87/EC states: " This Directive establishes a scheme for greenhouse gas emission allowance trading within the Community (hereinafter referred to as the " Community scheme") in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner. " The importance of the EU ETS has further been confirmed by the Court in Case T-178/05 UK v Commission; Case T-374/04 Germany v Commission and Case T-387/04 EnBW: see especially in Case T- 22 374/04 Germany v Commission paragraphs 1 -5. In his opinion in

Case C-127/07 Arcelor Advocate-General Maduron referred to the EU ETS as being “ one of the cornerstones of Community environmental protection policy”. c.

Under the Kyoto Protocol the EU is required to make an 8% reduction in emissions compared to 1990 by the first Kyoto Protocol commitment period (2008 – 2012)<sup>4</sup>. d. Recital (10) to Council Decision 2002/358/EC concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the UNFCCC and the