



**Le juge administratif
et
le droit communautaire
de l'environnement**

**National administrative courts
And
Community
Environmental law**

Grande-Bretagne-Great-Britain

**Réponse au
questionnaire
Answer to
The questionnaire**

SEMINAR FOR COUNCILS OF STATE AND SUPREME ADMINISTRATIVE JURISDICTIONS

28 JANUARY 2008, BRUSSELS

RESPONSE OF ENGLAND AND WALES TO THE QUESTIONNAIRE

1. Information and public participation in environmental issues

Secondary Community law makes provision for procedures to inform the public of environmental data and for citizen participation in the development of projects that are likely to impact the environment.

The two main texts in force are Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC; and Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment as later amended.

Other international texts, such as the Aarhus Convention of 25 June 1998 or Article 8 of the European Convention for the protection of Human Rights and Fundamental Freedoms also apply and the European Court of Human Rights ruled, on the basis of these texts, that member states had an obligation to provide information on environmental matters.

A - Application of regulations

Has the respective application scope of these texts, and the Community directives in particular, led to disputes? How has national case law clarified the

concepts contained in these texts considering, in particular, the case law of the Court of Justice of the European Communities?

For example, has the establishment of the party to be consulted, as provided for under Directive 85/337 and referred to as the "public concerned", ever been the subject of litigation? If so, how did your court settle the matter? Do you feel that the explanations provided on this matter by Directive 2003/35/EC, which modified the previous directive, such as the concepts of the public "likely to be affected" by a project or "having an interest in" a procedure to authorise a given project, clarify the scope of the text?

There has been considerable litigation on the circumstances in which an environmental impact statement is or may be required when planning applications are considered, the most important recent judgment being that of the House of Lords in *R (Barker) v Bromley London Borough Council* [2006] UKHL 52, [2007] 1 AC 470, in which it was held that the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 failed fully and properly to implement Directive 85/337, because they did not permit assessment of environmental impact after outline planning permission had been given when detailed planning permission was sought. However, there has been no case law on the requirements of Article 6.2 and 6.3 of Directive 85/337, presumably because domestic law on the provision of information to persons affected by planning applications is adequate. The Freedom of Information Act 2000 confers rights on citizens to obtain information generally from public authorities; the Environmental Information Regulations 2004 transpose and implement Directive 2003/4; and there is a wide range of public environment registers containing relevant information (e.g., on waste management, details of waste management licences, including enforcement and conditions, on contaminated land details of notices identifying land as contaminated, of statutory remediation notices that have been served and appeals).

It is considered that Directive 2003/35/EC has clarified and improved the previous text. No case law has resulted from the improved definitions.

B - Judge control techniques

How much control does the administrative judge exercise over the administration's compliance with its obligations to inform citizens and facilitate public participation? In other words, how much discretion does it allow the administration in this regard? And what sanctions are issued when the judge observes that one of the obligations not been met?

The consultations provided for under Directive 85/337/EEC may take place during long and complex procedures before official permits are issued. Does failure to comply with obligations systematically lead to the simple annulment of the permit? Or does case law show that annulment is reserved for cases where the irregularities observed are substantial? Is it possible to make the entire or part of the procedure compliant?

The grant of remedial orders by the Administrative Court is discretionary. The Court would not make an order quashing an administrative decision if the failure to comply with the obligations in question could not conceivably have affected the outcome. If, however, there is a real prospect of compliance with the obligation affecting the decision, a quashing order will be granted unless there is some other substantial reason why no order should be made (as where delay on the part of the Claimant has led to a significant expense or change of position on the part of the public authority or a person affected by the decision).

If the decision of the administration is itself judgmental, or results from an exercise of discretion on the part of the administration, the Court will not quash the decision unless an error of law was made by the decision-maker, or he misunderstood the facts, or he made a decision that no reasonable and competent decision-maker correctly applying the law could have made.

The Court cannot in general amend a decision made by the administration; it can, however, make an order compelling the administration to comply with its legal obligations.

C - Open question

In addition to the two previous questions, has your court issued other decisions on waste law or polluting installations law that should be noted? If yes, please summarise these decisions in a few lines.

R (OSS Group Ltd) v Environment Agency [2007] EWCA Civ 611: the Court of Appeal sought to interpret and to apply the judgment of the European Court of Justice in *ARCO Chemie Nederland v Minister Van Volkshuisvesting* 2000/C 273/09 on the concept of waste and the issue when substances cease to be waste. The Court of Appeal decided that “a search for logical coherence in the Luxembourg case-law is probably doomed to failure”. It held that waste lubricating oil ceased to be waste when it was converted into marketable fuel oil, principally because as marketable fuel oil it was not more hazardous or noxious than fuel oil that was not derived from waste. A different conclusion was reached in *Castle Cement v Environment Agency* [2001] Env LR 46, where the fuel derived from waste products remained hazardous and noxious: it was held that that fuel remained hazardous waste.

2. Pollution law (example of polluting installations)

Secondary Community law on waste and polluting installations represents an attempt to reconcile economic growth with environmental protection.

The two main texts in force in this regard are framework Directive 2006/12/EC of the European Parliament and the Council of 5 April 2006 on waste (which replaces Directive 75/442/EEC) and Directive 96/61/EC of the Council of 24 September 1996 concerning integrated pollution prevention and control.

A - Application of regulations

How are responsibilities distributed under your national legislation in connection with the restoration of polluted sites? Does the selection of the party responsible (operators of sites or holders of waste) raise problems? Moreover, is it possible, in certain cases, to question the responsibilities of the public authorities in charge of applying the regulation in the event that they have not sufficiently exercised their powers to monitor and control industrial manufacturers?

Directive 96/61, for example, makes provision for the satisfactory rehabilitation of an operating site once operating activities have been completed. Problems can arise when the relevant public authority intends to exercise its supervision and control powers to end pollution that emerges after operating activities have ended. For example, can these powers be exercised immediately? Against which party: the former operator, the current owner? Can the responsibility of the relevant authority be applied due to a shortcoming in the exercise of its prerogatives?

The attached table (taken from *Bell and McGillivray Environmental Law 6th edition*) sets out the principal statutory powers to control current (i.e. non-historical) contamination and to secure remediation.

Local authorities are under a statutory duty to inspect their areas from time to time for the purpose of identifying contaminated land and defined “special sites” (e.g., land affecting certain controlled waters by reason of its contamination): section 78B of the Environmental Protection Act 1990. The local authority must notify its finding to the Environment Agency, the owner of the land, the person appearing to be the occupier and any other person who appears to be responsible for remediation, and is under a duty to require remediation by serving a statutory remediation notice on the appropriate person (section 78E of the EPA). In an appropriate case, a

remediation notice may be served immediately. There are certain exceptions to the duty to serve a remediation notice (section 78YB), and the enforcing authority itself has power to carry out remediation works (section 78N). A person served with a remediation notice may appeal to the Secretary of State, who may appoint an inspector to conduct a hearing of the appeal on his behalf. The Secretary of State may quash the notice, if he is satisfied that it has a material defect, or confirm it, with or without modification.

The Administrative Court may make an order compelling an enforcement authority to serve an appropriate remediation notice and to enforce the notice.

B - Judge control techniques

What is the scope of the powers of a judge ruling on a dispute concerning the application of one or other of these regulations? Are there procedural regulations or rules of evidence before the judge or procedures for establishing specific facts connected with these matters, given, in particular, their specific technical nature?

When asked, for example, to rule on the decision taken by the relevant authority on the request for prior authorisation provided for under Directive 96/61, is the judge only permitted to annul the decision? Or may the judge also amend the decision or impose other measures?

What rules for the transfer and taking of evidence does the judge apply to settle the dispute? Can the judge request special investigation measures (e.g. expert opinions or amici curiae)?

On an appeal against a remediation notice, the appellant may challenge (principally) whether the land is contaminated, whether the appellant is liable to remedy the contamination, whether the requirements imposed by the notice are reasonable, and whether the enforcing authority has complied with statutory guidance. Where an

appeal has been determined by the Secretary of State, the Court would interfere with his decision only on traditional judicial review grounds. While it is possible that expert evidence would be required, and the Court has power to receive such evidence, since the available grounds of challenge are principally error of law or a perverse or unfounded finding of fact, this would not usually be necessary. The Court does not itself instruct an expert witness: it is for the parties to present relevant expert or technical evidence.

C - Open question

In addition to the two previous questions, has your court issued other decisions on waste law or polluting installations law that should be noted? If yes, please summarise these decisions in a few lines.

See above.

Overlapping power	Powers available to deal with contamination	Relevant statutory positions	Who is responsible for clean up	Can a remediation notice be served?	Is contamination a criminal offence?	Other comments
Integrated Pollution Preservation and Control (IPPC)	Remedy contamination or harm caused by a breach of an IPPC condition (or in some cases integrated Pollution Control authorisations)	Pollution Prevention and Control Regulations 2000 reg. 26 EPA, s.27	The holder of the permit or authorisation	No (s. 78YB (1))	Yes, where contamination is caused by a breach of a condition of a permit or the implied BATNEEC condition	A requirement to carry out an investigation into the site conditions to provide a benchmark which can be used to assess clean up requirements when the installation is closed. Additional powers are available to vary, and enforce against conditions of permits, see reg 23-26 PPC Regs 2000
Waste Management Licensing	Enforce against breaches of conditions found in a waste management licence	EPA, ss.35-38	The holder of the waste management licence in question	No (s.78YB2))	Yes, where waste is deposited, treated or kept in the absence of or not in accordance with a waste management licence, see s. 33, EPA	The licence has to be current even if the waste disposal activities have ceased. Additional powers/duties to supervise and vary conditions of a waste management licence
Unlawfully deposited waste	Require the removal of illegally deposited waste or to remove waste and remedy harm caused	EPA, s.59	The occupier of the land on which waste is unlawfully deposited	No (s. 78YB (3))	Yes, as the waste will have been deposited without a waste management licence, see s.33 EPA	Arguably this only applies to waste deposited after 1 April 1994 (i.e. the implementation of the waste management licensing regime). The decision in <i>Van de Walle</i> suggests that inadvertent deposits of material (e.g. from leaking pipes) is waste and should therefore be cleaned up under this power
Water Pollution	Powers to serve a works notice prevent or clean up contamination where there is or is likely to be pollution of controlled waters	WRA s.161-161D	Any person who caused or knowingly permitted the pollution of the controlled waters	Yes	Yes, as it will be causing or knowingly permitting polluting matter to enter controlled waters, see s.85 WRA	The powers to serve a works notice and a remediation notice are concurrent. Additional powers available to enforce against breaches of and vary existing discharge consents
Statutory	Power to abate a	EPA, ss. 80-	Any person	Yes	No, only where	Where land is in a 'contaminated state'

Nuisances	statutory nuisance as defined	81	responsible for the nuisance		abatement notice is not complied with within the time limit specified, see s. 80(4) EPA	it is excluded from the definition of a statutory nuisance and thus an abatements notice cannot be served
Town and Country Planning	Power to impose planning conditions to clean up contamination prior to carrying out development. Also a breach of notice	TCPA ss. 71(9), 187A	The person responsible for the breach	Yes	Yes, where there has been a breach of a planning condition (e.g., in relation to places of storage). Breach of condition is a criminal offence, see s.187A, TCPA 1990	The use of conditions to address contamination and role of the planning system in helping to clean up contaminated sites is dealt with in Circular 2/2000 and PPS 23
Amenity Notices	Power to require steps to be taken to remedy the condition of land which adversely affects the amenity of their area by serving an appropriate notice on the owner or occupier of the land	Town and Country Planning Act 1990 S.215	Owner/ Occupier of the land	Yes	No, only where the amenity notice is not complied with, see s. 215 TCP	Tends to be used in respect of visual disamenity