NFLA English Forum Special Seminar on AWE Aldermaston
Reading 20th June 11.50 to 1.15, Council Chamber, Reading Civic Centre.

Jamie Woolley, NFLA Legal Adviser – legal issues affecting the base,

1. Planning Permission

The Government does *not* need to obtain planning permission before allowing a site it owns to be used or developed in a particular way[1]. Removal of Crown Exemption was announced in March 1994 by the Conservative Government and has been promised by the Labour Government but no action has been taken.

2. DoE Circular 18/84 Crown Land and Crown Development Part IV

This commits the Government to consult planning authorities before proceeding with a development that would otherwise require planning permission. The MoD do this by sending in a "Notice of Proposed Development" ("NPD") which the authority then treats broadly speaking like an ordinary planning application. The authority has no power to refuse consent. "In any case where strong objections are received …the …authority must decide whether… they should be supported…" (para 21) If the authority does object, the MoD must notify the Office of the Deputy Prime Minister (Planning) which seeks to resolve the dispute and can set up a non-statutory inquiry. Local planning authorities invite public comment on the NPD.

Paragraph 25 makes it clear that the precise procedures will depend on the circumstances of the case (some will be dealt with by written representations, others through a non-statutory public inquiry). Those arrangements have been (i) promoted by the Secretary of State for the Environment as providing, and (ii) accepted by the Court as providing, the same protections to objectors for Human Rights Act purposes as does the statutory planning system.[2]. See paragraph….below regarding further implications of the Act.

The effect of this Circular and the extra-statutory commitments mentioned below in practice give rise to a "legitimate expectation" that the

[1] The ordinary requirements of the 1990 Act (i.e. for planning permission) do not bind the crown: see, for example, MAFF -v- Jenkins [1963] 2 QB 317

[2] Hillingdon -v- SSE 30th July 1999 (unreported)

commitments made will be kept to. A failure on the part of the Secretary of State to follow that approach would be an unlawful failure to give effect to that legitimate expectation and could be challenged by way of a judicial review.[3]

3.MoD extra-statutory commitment

In July 2000 Geoff Hoon MP, Secretary of State for Defence, issued a policy statement committing the MoD to various things. Importantly it commits the MoD to following the planning system as closely as possible :-

> 'Where the Ministry has been granted specific exemptions, disapplications or derogations from legislation, international treaties or protocols, Departmental standards and arrangements are to be introduced which will be, so far as is reasonably practicable, at least as good as those required by the legislation. I will only invoke any powers given to me to disapply legislation on the grounds of national security when such action is absolutely essential for the maintenance of operational capability.'

A copy of the full statement is attached to this paper for information.[4] Annual Defence Environment and Safety Reports are published which track progress in compliance with the statement.[5] The 2000 2001 Defence Environment and Safety Report recognised "the increased emphasis being placed on the rights of individuals and NGOs to participate in matters of public administration". In answer to an inquiry based on this recognition, I have a written reply from the MoD which accepts that consultation is implicit in environmental assessment: see further below.

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[3] see e.g. R -v- North and East Devon Health Authority ex parte Coughlan [2000] 3 All ER 850

[4] I have inquiries with the MoDn hand regarding (a) relevant statements of policy, (b) standards or (c) regulations that refer to either the undertaking of environmental policy appraisals or environmental impact assessments; (d) any note of (i) the direction and/or (ii) objectives set by the Defence Environment and Safety Board in these regards; (e) any relevant general safety and environmental policy promulgated by (i) the Defence Safety, Health, Environment and Fire Board or (ii) any other functional safety board relevant to my inquiry; (f) arrangements in place such as (i) audit or (ii) external authorisation to provide assurance that requirements in respect of environmental policy appraisal and environmental impact assessment are being met.

[5] I have inquiries with the MoD arising out of these reports asking
(a) if there is an agreed methodology, resources and expertise available for the purpose of SEA and EIA at working level; (b)if the MoD has formulated a written policy to respond to the increased emphasis being placed on the rights of individuals and NGOs to participate in matters of public administration in general and SEA and EIA in particular; (c) whether any Best Practice guidance notes been produced to explain when and how SEA and/or EIA should be undertaken; (d) whether the MOD hasestablished its department-wide Environmental Committee and (e) if it has introduced a common written approach to SEA, Sustainability Appraisal and Environmental Impact Assessment for the MOD.

4. Relevant considerations in considering a planning application
A planning authority will only take account of "material considerations". These are not defined but have been defined over time by court decisions: they include e.g. what the development plan says, environmental impact (e.g effects of radiation), habitat protection, alternative sites, planning policies, visual amenities, public concerns about safety e.g if the proposed development would introduce or increase a risk of danger, etc. "Public opposition per se is not a material consideration, even though it may be a powerful background consideration in a democratically based planning system." [6]

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5. Environmental Impact Assessment: project: current position
Since 1988 EU Directive 85/337 has required that

- the relevant UK regulator must ensure that the environmental impacts of certain physical projects are assessed;
- that such projects must be made subject to a formal consent which cannot be granted without the prior assessment; and
- the public must be allowed to comment on the developers' environmental statement.

Commonly (but not always) the regulator is the planning authority and the relevant consent is planning permission. The physical projects are by and large industrial or infrastructure projects.

However the Directive specifically excludes " projects serving national defence purposes": Article 1(4).

6. Environmental Assessment: project: position from 2004
A new European Directive[7] ("the participation directive") was agreed by the European Council on 4th March 2003. It will come into force in mid 2004. Amongst other things, it will replace the absolute exemption in the current

[6] Planning Encyclopaedia 2-3262 to 3288, esp 2-3282 to 3284

[7] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC: http://europa.eu.int/eur-ex/en/dat/2003/l_156/l_15620030625en00170024.pdf

article 1.4 for projects serving national defence purposes. That Article will instead read

"4. Member States may decide, on a case-by-case basis if so provided under national law, not to apply this Directive to projects serving national defence purposes, if they deem that such application would have an adverse effect on these purposes."

Commenting on this the Environmental Data Services Bulletin stated

> "The new legislation…removes the sweeping exclusion of defence projects from the scope of the EIA Directive. Instead, Member States will now have to decide on a case by case basis whether to exclude such projects from EIA, and justify this on the grounds that EIA would have an "adverse effect" on national defence purposes."

Accordingly a defence project would require environmental assessment and prior public consultation if

(a) it falls within a category of project referred to in the Directive; and
(b) no UK law provides the potential to exempt as envisaged by the Directive; or UK law provides this potential to exempt and
(c) the law requires consideration of the potential to exempt on a case by case basis (i.e. addressing the specific project rather than a blanket exemption)
(d) the UK Government "deem(s) that (applying the Directive) to the particular case would have an adverse effect on (national) defence purposes.

Note that the list of projects referred to in the Directive does not, unsurprisingly, include a "nuclear weapons factory". The European Court of Justice and the House of Lords have signalled the vital importance of environmental assessment and the critical importance of the issue of "significant effect on the environment" as the driving defining concept in disputes over the application of the Directive. It would also seem irrational for the Directive to allow for the inclusion of defence projects if none of the projects listed were capable of falling within the required definition of any one project.

It would be over-optimistic to think that the UK Government could not surmount these legal hurdles to exclude a defence project if it wished.[8] However see 8 below.

7. Environmental Assessment: project: Article 6.1.(b) of the Aarhus Convention

The Aarhus Convention[9] has been agreed by both the EU and its member states. It appears to extend the list of projects requiring environmental assessment beyond those lists in relevant EU Directives. Article 6.1.(b) states that a Convention state must

> "in accordance with its national law, *also* apply the provisions of this article to decisions on proposed activities *not listed … which may have a significant effect on the environment*. To this end, Parties shall determine whether such a proposed activity is subject to these provisions."

This has not been provided for by the EU and it remains to be seen what approach the UK will take to this.

8. Environmental Assessment: project: MoD extra-statutory commitments

DETR Circular 02/99 on EIA, para 157 says "... the MOD will, in appropriate circumstances and subject to considerations affecting national security, provide Environmental Statements in respect of major defence projects."

In July 2000 Geoff Hoon MP, Secretary of State for Defence, as indicated above, issued a policy statement committing the MoD to various things

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[8] It must be borne in mind that the courts are very reluctant to review defence decisions: Chandler v DPP and the recent.CND application for judicial review regarding the Iraq war

[9] In June 1998, the European Community, together with the fifteen Member States, signed the UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The Convention entered into force in October 2001. The Convention obliged the EU to align its legislation with the requirements of the Convention. This has required

- a new directive on access to information in environmental matters
- a new directive on public participation in the drawing up of plans and programmes relating to the environment and amending Directives 85/337/EEC and 96/61/EC which has prompted this note;
- a proposal for a directive on access to justice in environmental matters.

Note the Convention *also* applies to the EU's own institutions, so a legislative instrument is also necessary to ensure access to information, participation in decision-making and access to justice in environmental matters applies to the European Community bodies themselves.

including to ‘carry out … environmental impact assessments of all new projects and training activities….'

As noted above, the policy statement commits the MoD to following the environmental assessment process as closely as possible –

> 'Where the Ministry has been granted specific exemptions, disapplications or derogations from legislation, international treaties or protocols, Departmental standards and arrangements are to be introduced which will be, so far as is reasonably practicable, at least as good as those required by the legislation. I will only invoke any powers given to me to disapply legislation on the grounds of national security when such action is absolutely essential for the maintenance of operational capability.'

The MoD’s Estate Strategy 'In Trust and on Trust: the strategy for the Defence Estate' (2000) which came out of the Strategic Defence Review also has commitments to undertake Environmental Appraisal of new or renewed military activity/construction.

In compliance with this policy the MoD published an environmental statement for comment regarding the proposed dismantling of HMS Renown.[10]

9. How are EIAs applied to existing, but developing sites?
If a site was given planning permission before 1988, then no EA has been necessary. However where a project described in the list which was in existence or consented to (before or since 1988) is subsequently "modified" and the modification creates significant environmental impacts then an EA is necessary.

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10. Environmental assessment: plans and programmes
Directive 2001/42/EC of 27 June 2001"on the assessment of the effects of certain plans and programmes on the environment" is known as the “strategic environmental assessment” or SEA Directive. It will apply to plans and programmes whose formal preparation begins after 21 July 2004,

[10] CofN/NNRP/506/5/6 Environmental Impact Assessment NAVAL NUCLEAR REGULATORY PANEL ENVIRONMENTAL IMPACT ASSESSMENT OF THE PROPOSED DISMANTLING OF HMS RENOWN ISSUE 1 10 AUGUST 2001

but also to those which are already in preparation by that date but have not been adopted or submitted to a legislative procedure by 21 July 2006. The plans and programmes covered are those which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Directive 85/337/EEC on Environmental Assessment or which are likely to have effects on areas protected by the Habitat Directive 92/43/EEC and whose effects require assessment under that Directive.

The SEA Directive provides that
"The following plans and programmes are not subject to this Directive: plans and programmes the sole purpose of which is to serve national defence or civil emergency" (Article 3.8)

11. Environmental assessment: plans and programmes: extension
Article 2 of the "participation" Directive extends environmental assessement to a range of plans and programmes not covered by Directive 2001/42, e.g. waste and air quality.
Article 2.4 provides that "This Article shall not apply to plans and programmes designed for the sole purpose of serving national defence or taken (sic) in case of civil emergencies"

12.Environmental assessment: plans and programmes: MoD Extra-statutory commitment
Again, the July 2000 policy statement commits the MoD to

> 'carry out environmental policy appraisals of all new or revised policies and equipment acquisition programmes and environmental impact assessments of all new projects and training activities….'

Again it contains the statement –

> 'Where the Ministry has been granted specific exemptions, disapplications or derogations from legislation, international treaties or protocols, Departmental standards and arrangements are to be introduced which will be, so far as is reasonably practicable, at least as good as those required by the legislation. I will only invoke any powers given to me to disapply legislation on the grounds of national security when such action is absolutely essential for the maintenance of operational capability.'

Again the MoD's Estate Strategy 'In Trust and on Trust: the strategy for the Defence Estate' (2000) contains commitments to undertake Environmental Appraisal of new or renewed military activity/construction.

An example of the MoD's commitment is contained in its "Strategic Environmental Appraisal of the Strategic Defence Review (SDR)" upon which it consulted.[11]

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13. Integrated pollution prevention and control consent ("IPPC")
Directive 96/61 requires concerns integrated pollution prevention and control and requires permits for operating installations in the energy, metal, mineral, chemical, waste sectors and certain other activities. It provides certain minimal public participation rights. It has no exclusion for defence purposes.

14. *Integrated pollution prevention and control consent ("IPPC"): the participation directive*
The participation Directive aligns EU legisation with the Community's obligations under the Aarhus Convention. Annex I of the Convention mentions 22 activities which largely correspond to a combination of
(a) the projects in Directive 85/337 which require environmental assessment (see paragraphs above) *but also*
(b) those activities in Annex I to Directive 96/61/EC on integrated pollution prevention and control (IPPC) which require permits.

15 Integrated pollution prevention and control consent ("IPPC"): the Aarhus Convention
Article 6 1.(b) of the Aarhus Convention provides that Convention states
"(c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes."
This therefore includes by implication military projects that would otherwise be expected to require an IPPC permit unless specifically excluded.

[11] Obtainable from e.g. Ministerial Correspondence Unit, Room 222, Old War Office, Whitehall London SW1A 2EU

16. Integrated pollution prevention and control consent ("IPPC"): MoD extra-statutory commitment.

The commitments noted above apply equally here.

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17 The Human Rights Act and a public inquiry[12]

Section 6(1) of the Human Rights Act 1998 requires public authorities to act compatibly with "Convention rights". This applies to the Secretary of State for Defence and his Ministerial colleagues responsible for land planning, health and safety and environmental protection.

The relevant right here is Article 6 of the European Convention on Human Rights which, so far as is relevant, states:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …"

The first issue is whether a decision to allow the extension of Aldermaston or new development at that site to proceed would determine civil rights. Local authorities in general and those authorities particularly affected do not in genral obtain rights under the Convention. However there is a strong case for saying that such a decision would determine the civil rights of neighbours of the site if any project at Aldermaston would be likely to have environmental and property price impacts.[13]

On this view neighbours could rely on section 6(1) of the 1998 Act to argue that the Secretary of State would act unlawfully if he did not provide an Article 6 compliant procedure for deciding whether or not to permit the project.

The House of Lords considered the implications of Article 6 ECHR for "call in" applications and appeals in the planning (and other land development) regimes in 2001.[14] It had been argued that the requirement of independence was missing as the Secrfetary of State's dual role as both policy-maker and

[12] The analysis that follows draws on an opinion provided to the National Council for National Parks regarding Menwith Hill by David Wolfe
[13] Ortenberg -v- Austria (1994) 19 EHRR 524.
[14] Alconbury [2001] UKHL 23,9th May 2001.

decider-on-the-individual-case was at odds with the Convention. However the court held that the Secretary of State was entitled to determine such matters; indeed, that it was appropriate for matters of policy and planning judgment embraced within such cases to be determined by the Secretary of State. However, critically for present purposes, in each of those cases, a public inquiry had been held, or would be held, under the auspices of a planning inspector who would determine factual disputes and made recommendations on policy and discretion matters. Whether or not that inspector would be sufficiently "independent" in dealing with issues arising from government policy, he or she would be, so the House of Lords held, sufficiently independent for dealing with factual contentions.[15]

The effect of this for any future project at Aldermaston seems clear: the Secretary of State would not be able to permit the development at Aldermaston, unless factual disputes (which are inevitable) had first been considered and determined by an inspector following a public inquiry. That process of inquiry with an independent inspector therefore appears to be a legal prerequisite to a lawful decision by the Secretary of State, particularly where (as at Aldermaston) the applicant for development is another government minister/department, or the land is owned by such a person/department.

On the basis of these arguments Counsel advised the Council for National Parks that there were strong arguments for saying that the Fylingdales project in the North Yorkshire National Park must, at the very least, be subject to the NoPD and the subsequent process (written representatons or a public inquiry). He considered that a judicial review challenge made by a neighbour materially affected (as above) in relation to the Secretary of State's failure to subject the project to at least those processes would have a good prospect of success. This arguments appears equally applicable to Aldermaston.

[15] Lord Hoffman at paras 108-110, 122 and 128; also Lord Clyde at para 157; also Lord Hutton at para 189

Appendix

FRAMEWORK FOR THE MANAGEMENT OF HEALTH, SAFETY AND ENVIRONMENTAL RISKS

THE MANAGEMENT OF SAFETY AND ENVIRONMENTAL PROTECTION IN THE MINISTRY OF DEFENCE - A Policy Statement by the Secretary of State for Defence

Responsibility for all safety and environmental matters within the Ministry including health and safety at work, equipment and materiel safety, environmental protection and fire safety is vested in me by virtue of my appointment as Secretary of State for Defence. This Policy Statement, which is to be observed throughout the Ministry, reflects the importance which I attach to protecting the environment and to the health, safety and welfare of all members of HM Forces, civilian employees of the Ministry and other persons who may be affected by the Ministry's activities.

It is my policy that, within the United Kingdom, the Ministry will:

comply with the requirements of the Health and Safety at Work etc. Act 1974 (HSWA) or the Health and Safety at Work (Northern Ireland) Order 1978 as applicable and with subordinate legislation and other relevant statutory provisions; comply with the Environmental Protection Act 1990, the Environment Act 1995 and other relevant statutory provisions and any additional requirements arising from international treaties and protocols to which the UK is a signatory; comply with the Fire Precautions Act 1971 and all other applicable fire safety regulations; comply with the Government's strategy for sustainable development; maintain a corporate Environmental Management System based on ISO 14001; maintain fire safety management plans and fire risk assessments; carry out environmental policy appraisals of all new or revised policies and equipment acquisition programmes and environmental impact assessments of all new projects and training activities; maintain accident prevention plans and emergency procedures on all sites presenting a risk of a major accident to individuals or the environment.

Overseas, the Ministry will apply UK standards where reasonably practicable and in addition comply with relevant host nations' standards.

Where the Ministry has been granted specific exemptions, disapplications or derogations from legislation, international treaties or protocols, Departmental standards and

arrangements are to be introduced which will be, so far as is reasonably practicable, at least as good as those required by the legislation. I will only invoke any powers given to me to disapply legislation on the grounds of national security when such action is absolutely essential for the maintenance of operational capability. Where there is no relevant legislation, internal standards will aim to optimise the balance between risks and the benefit to the Ministry and employees.

I require the Parliamentary Under Secretary of State to act as the Department's Green Minister and to chair the Defence Environment and Safety Board which will provide direction, set objectives, monitor, review and report on performance. The members of the Board will include senior representatives from each Service, the Centre, the Permanent Joint Headquarters (UK), the Defence Procurement Agency, the Defence Logistics Organisation, the Defence Evaluation and Research Agency. Surgeon General and, to ensure coherence with the Defence Estates Strategy, the Chief Executive of Defence Estates will be members in their own right. The Defence Environment and Safety Board will be supported by relevant functional safety boards which will develop policy, set standards, measure performance and define the extent to which independent scrutiny and regulation is to be applied in their area of interest. To ensure that an integrated approach to safety and environmental management is applied throughout the Ministry, the individuals chairing these functional safety boards will also be members of the Defence Environment and Safety Board. Additionally, the Second Permanent Under Secretary of State will be a member of the Defence Environment and Safety Board and will be responsible for establishing Departmental policy, standards and, where appropriate, regulations. This responsibility will be delegated, personally and in writing, to the post-holder chairing the relevant functional safety board.

Safety and environmental protection are line management responsibilities. I delegate the task of discharging my personal responsibilities in their management areas to the Vice Chief of the Defence Staff, the Chief of Defence Procurement, the Chief of Defence Logistics, the Chiefs of the Naval, General and Air Staffs, the Chief of Joint Operations and to the Chief Executives of Defence Trading Fund Agencies. I expect them to delegate further as necessary and on a personal basis to Commanders, Directors and Chief Executives of Defence Agencies (who should also delegate as appropriate through the line management chain) the task of applying my policy in their areas. I further expect them to ensure that managers at every level receive appropriate training and have at their disposal adequate resources to discharge their health and safety at work, environmental protection and fire safety responsibilities.

Managers must ensure that adequately detailed statements laying out the organisation and arrangements for discharging their duties with respect to this Policy Statement are in place. They must also have in place procedures for monitoring the effectiveness of these arrangements. Taken together with my Policy Statement, these statements will meet the legal requirement for a health and safety policy statement to be in place in each management area. In both Service and civilian areas the relevant statement is to be brought to the attention of all employees and others to whom it applies.

I expect managers to foster by positive leadership a culture which encourages employees to take responsibility for achieving my safety objectives and to act, as far as possible, in compliance with best environmental practice. All members of the Ministry are required to take reasonable care of their own health, safety and welfare; that of others who may be affected by their acts or omissions at work; and of the environment. This includes reporting through the management chain, any work situation giving rise to serious or immediate danger to individuals or the environment or of any shortcoming in arrangements that may create danger.

In the acquisition of materiel and equipment of all kinds, safety and environmental management is to begin at the requirement definition stage and is to be carried forward through service to disposal. All aspects of maintenance and operation (including military service) are to be taken into account and particular care is to be taken in assessing risks and environmental impacts where there is no appropriate statute or equivalent civil practice.

The Second Permanent Under Secretary of State will appoint a Chief Environment and Safety Officer (MOD) who will;

monitor and review the application of arrangements under this Policy Statement within all areas of the Ministry; advise the US of S on health (in conjunction with the staff of the Surgeon General) and safety, environmental protection and fire safety matters; report annually to the Defence Environment and Safety Board on performance and the results of audits of compliance with this Policy Statement. sponsor the publication of detailed health and safety at work, environmental protection and fire safety policy, standards and guidance in Joint Services Publications; report directly to me any evidence of significant failure in any part of the Ministry to discharge my responsibilities.

This Policy Statement will be reviewed depending on changes in legislation and within the Ministry, as should the local statements detailing organisations and arrangements.

7 July 2000

[1] Section 61, Environment Act, 1995