Commentary on England and Wales' First-tier Tribunal (Environment)

Introduction

In 2010, the First-tier Tribunal (Environment)[1] was established as part England and Wales' new Tribunal System.[2] The First-tier Tribunal (Environment) hears appeals against civil sanctions made by regulators. The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009[3] govern the procedural aspects of the Environmental Tribunal. The Regulatory Enforcement and Sanctions Act 2008[4] consists of enabling powers to introduce these civil sanctions. These civil sanctions are introduced under the following Statutory Instruments[5]:

- The Environmental Civil Sanctions (England) Order 2010
- The Environmental Sanctions (Misc. Amendments) (England) Regulations 2010)
- The Environmental Civil Sanctions (Wales) Order 2010
- The Environmental Civil Sanctions (Miscellaneous Amendments) (Wales) Regulations 2010
- The Ecodesign for Energy-Using Products (Amendment) (Civil Sanctions) Regulations 2010
- The Ecodesign for Energy-Using Products Regulations 2007

The language pertaining to civil sanctions reads, "If you or your business breaches environmental legislation, the Environment Agency or Natural England (the Regulators) can issue any of the following civil sanctions or undertakings"[6]:

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[1]Tribunals, Environment, http://www.tribunals.gov.uk/environment/ (last visited May 16 2011)
[2] Professor Richard Macrory, Honorable Q.C., CBE, *Consistency and Effectiveness-Strengthening the New Environment* Tribunal 8 (Center for Law and the Environment University College London 2011)
[3] The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, http://www.legislation.gov.uk/uksi/2009/1976/contents/made (last visited May 16 2011)
[4] Regulatory Enforcement and Sanctions Act 2008 Chapter 13, http://www.legislation.gov.uk/ukpga/2008/13/pdfs/ukpga_20080013_en.pdf (last visited May 16 2011)
[5] Tribunals, Environment, http://www.tribunals.gov.uk/Environment/ (last visited May 16 2011)
[6] *Who can appeal to the First-Tier Tribunal,* Appeal against a civil sanction imposed by the Environment Agency or Natural England, http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1086376539&r.l1=1079068363&r.l2=1086048470&r.l3=1086375938&r.s=sc&type=RESOURCES (last visited May 16 2011)

- Stop Notice - a written notice requiring you immediately to cease activity which is causing serious harm or a significant risk of serious harm to human health, the environment or the financial interests of consumers
- Compliance Notice - a written notice ordering you to take specific steps to ensure the offence does not continue or happen again
- Restoration Notice - a written notice requiring you to rectify the problem and restore the position to what it was before the offence
- Fixed Money Penalty - a low-level penalty for a minor offence (usually £300 for a business or £100 for an individual)
- Variable Money Penalty - a proportionate penalty where the regulator believes prosecution would not be beneficial
- Non-Compliance Penalty - a financial penalty that may be imposed for failing to comply with a compliance notice, restoration notice or third party undertaking
- Enforcement Cost Recovery Notice - the mechanism used by the regulators to recover costs incurred in issuing a fixed monetary penalty or enforcement undertaking
- a Regulator's decision not to issue a Completion Certificate for complying with a Stop Notice or enforcement undertaking

You can appeal against a decision of the Regulators where they have refused to issue certificates of completion - in relation to a Stop Notice issued to you, or in relation to enforcement undertakings you have given.

On the other hand, you cannot appeal a notice of intent, although you do have the right to make written representations to the issuing regulator about the proposal to impose the sanction.

Access to Courts/Standing to Sue

The first issue this commentary will address is whether or not this legislation will enhance access to the courts (and justice).The first clause of Principle 10 of the Rio Declaration is that: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level."[7]

With respect to standing, since this is one of the newest courts that is being reviewed and analyzed, not as much information exists as does for the other environmental courts and tribunals in this study. Generally, rights of public participation were developed within the planning system well before environmental regulation incorporated equivalent rights.[8] Over the last thirty years, the United Kingdom courts have generally adopted a liberal approach towards standing to bring forth a case for judicial review.[9] In that sense, the current practice meets the Aarhus

[7] Principle 10 of the Rio Declaration states the following: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided", Rio Declaration on Environment and Development, http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163 (last visited May 16, 2011)

[8] Richard Macrory, *Environmental Courts and Tribunals in England and Wales- A Tentative Dawn,* JOURNAL OF COURT INNOVATION 62 (2010) , http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)

[9] The basic requirement is that the claimant must have "sufficient standing" but both local and national environmental groups have passed this test, as have individual citizens with no property interest as cited in Richard Macrory, *Environmental Courts and Tribunals in England and Wales- A Tentative Dawn*, JOURNAL OF COURT INNOVATION 71 (2010) , http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)

Convention requirements[10] concerning the right of access of the public and non-governmental bodies[11].

Scientific Knowledge

The next inquiry addresses the question of whether the Rules of Procedure for Environmental Cases facilitates the application of environmental science to the decision-making process.

There are six legally qualified Tribunal judges of the First-tier (Environment) Tribunal, including, Professor John Angel, Christopher Hughes OBE, Alison McKenna, Beverly Primhak, Vivien Rose, and Nicholas Warren. The non-legal members of the tribunal are David Billing, Malcolm Clarke, Pieter D Waal, Richard Enderby, Henry Fitzhugh, Gareth Jones, Narendra Makanji, Brian McCaughey, Christopher Perret, David Ritchie and Andrew Whetnall. [12]

The non-legal members possess a range of science-based qualifications. Examples of their qualifications include, but are not limited to:

- David Billing's training as a research chemist;
- Richard Enerby's experience as the former head of waste disposal authority and his pioneering work on recycling projects, waste to energy schemes, and grounds management;
- Henry Fitzhugh's background in aeronautics, astronautics and aerodynamics; and

[10] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on June 25th 1988, http://www.unece.org/env/pp/documents/cep43e.pdf (last visited May 16 2011)

[11] Richard Macrory, *Environmental Courts and Tribunals in England and Wales- A Tentative Dawn,* JOURNAL OF COURT INNOVATION 71 (2010) , http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)

[12] Tribunals Environment, http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/environment/index.htm (last visited May 16 2011)

- Christopher Perrett's background as a geologist.[13]

Effectiveness

The next factor that must be evaluated is the extent to which the legal process protects nature and improves the environment, as opposed to simply determining that one party prevails over the other. The fourth clause of Principle 10 of the Rio Declaration states that, "Effective access to judicial and administrative proceedings, including redress and remedy shall be provided".

Since the Environmental Tribunal of England and Wales was just formed in 2010, and still has not heard its first appeal, it is difficult to determine the long-term benefits/impacts of the existence of an environmental tribunal. Richard Macrory, Professor of Environmental Law and Director of the Center for Law and the Environment at the University College of London, analyzes the Environmental Tribunal based on the limited information currently available. Macrory writes,

> Paradoxically, the two main drivers for change providing the opportunity for establishing the environmental tribunal were not environmental factors. Rather, the new tribunal system was established as a result of a general recognition that the existing tribunal system could be run more efficiently and with greater flexibility. The new civil sanctions and rights of appeal to a tribunal are derived from a review of regulatory sanctions cutting across all areas of business regulation[14]

Macrory provides an interesting perspective to the tribunal. From his perspective, it does not look as though the court is too concerned with long-term environmental effectiveness. Once

[13] Tribunal Judges and Tribunal members, http://webarchive.nationalarchives.gov.uk/20110206074954/http://www.tribunals.gov.uk/Environment/Documents/TribJdgs_NonLegalMmbrs_Environment.pdf (last visited May 16 2011)

[14] Richard Macrory, *Environmental Courts and Tribunals in England and Wales- A Tentative Dawn*, Journal of Court Innovation 77 (2010), http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)

remedies are awarded in the decisions that have yet to be adopted, we will really be able to determine the extent of "effectiveness."

Procedural Elements

Procedural issues with respect to the environmental courts and tribunals can be evaluated in a variety of ways. This analysis includes general accessibility, the costs in creating environmental tribunals, the efficiency or lack thereof when multiple states in one country have to create environmental tribunals, the existence of an appellate system, the issue of transparency, the existence of online electronic filing systems to make access to the courts logistically easier, and global transparency as a whole. The first procedural aspect this commentary will discuss is the issue of appeals. Initially, in 2004, environmental groups rejected the proposal of an environmental appeals tribunal. The reasons for this are articulated below in the "Traditional Measures" section of this paper. The second clause of the Rio Declaration is that "at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous activities in their communities and the opportunity to participate in the decision-making process".

According to the information found on the website of the First-tier Tribunal (Environment), a panel composed of the Tribunal judge and up to two other members, all appointed by the Lord Chancellor hear appeals at venues across England and Wales. Either party involved in a hearing can appeal against a decision of the First-tier Tribunal (Environment) through the Upper Tribunal (Administrative Appeals Chamber). To appeal to the Upper Tribunal, you should first obtain permission from the First-tier Tribunal by applying within 28 days of receiving its written decision-or its amended decision following a review-stating your reasons for appeal.

The procedure by which someone can appeal is spelled out on the website of Business Link- the government's online resource for business.

> When the First-tier Tribunal receives your appeal application, it can review its earlier decision based on your reasons for appeal. If a further decision is made by the First-tier Tribunal, it will inform both parties as soon as possible. The First-Tier Tribunal can issue a further decision based on reasons such as: 1) an important document was not received by you, the regulator or the First-Tier Tribunal in time, 2) you or the environmental regulator's representative was not at the hearing, 3) a mistake was made in the procedure. If you are given permission to appeal under the Upper Tribunal, you must provide a notice of appeal to the Upper Tribunal within one month. If you are refused permission to appeal to the Upper Tribunal, you can apply directly to them by mail or call them on the phone for permission to appeal. In addition, one can download an application form for permission to appeal to the Upper Tribunal from the First-tier Tribunal website. One can only appeal against a decision of the First-tier Tribunal on the grounds that it made an error on a point of law when making that decision. You cannot appeal against any of the following decisions of the First-tier Tribunal: 1) To review an earlier decision, 2) refusal to review an earlier decision, 3) to take no action or particular action after reviewing an earlier decision, 4) to set aside an earlier decision, 5) to set aside an earlier decision on review- even after an appeal has begun and 6) to refer or not to refer a matter to the Upper Tribunal.[15]

Access To Information

The concept of access to information is that whereby the public is given access to information that is being decided by a particular court or jurisdiction. The third clause of Principle 10 of the Rio Declaration is that "States shall facilitate and encourage public awareness and participation by making information widely available." The objective of the Aarhus Convention is that in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-

[15] Appealing against a civil sanction imposed by the Environment Agency or Natural England, http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1086377061&type=RESOURCES (last visited May 16 2011)

making, and access to justice in environmental matters in accordance with the provisions of this Constitution.[16]

The oral hearings of the First-tier Tribunal (Environment) are open to the public. If an individual is interested in attending a hearing, the website dedicated to the First-tier Tribunal (Environment) indicates that the interested individual should refer to the current case section of the website for further information, or contact the First-tier Tribunal (Environment) administrative offices.[17]

Traditional measures

The next inquiry is how this legislation/tribunal/court addresses traditional concerns expressed by courts that litigation is costly and wastes time. Article 9(4) of the Aarhus Convention requires that the procedures be "fair, equitable, timely, and not prohibitively expensive."

Environmental judicial review claims have followed Britain's standard "cost in the cause" principle: the losing party must pay the winning party's legal costs. An ordinary individual who is neither poor enough to be entitled to legal aid nor rich enough not to be concerned by litigation costs, is likely to be deterred from taking action, as would a non-governmental organization with limited resources.[18]

[16] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on June 25th 1988, http://www.unece.org/env/pp/documents/cep43e.pdf (last visited May 16 2011)
[17] Tribunals, Environment, http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/environment/index.htm (last visited May 16 2011)
[18] Richard Macrory, Environmental Courts and Tribunals in England and Wales- A Tentative Dawn, Journal of Court Innovation 71-72 (2010), http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)

One of the major reasons why some of the environmental groups rejected the proposal of an environmental appeals tribunal in 2004 was that the proposal failed to explicitly address concerns of the costs of litigation, especially during judicial review. A new environmental division of the High Court was considered by many to be a preferred solution to these problems.

Since 2004, there has been a great deal of movement on this issue, including the publication of the Sullivan Report on Access to Environmental Justice,[19] the Jackson Review on Civil Litigation,[20] the Sullivan follow-up report,[21] an enforcement action by the European Commission against the United Kingdom for excessive costs followed by a Reasoned Opinion issued in 2010,[22] condemnation of the existing British system by the Aarhus Compliance Committee,[23] and judicial intervention, including a revisit to the existing limitations on Protective Cost Orders, as well as the more recent referral by the Supreme Court to the European Court of Justice regarding the meaning of the requirement, in EU environmental legislation and the Aarhus Convention, that costs must not be prohibitively expensive. Given all of these developments, Professor Richard Macrory does not think that strengthening the regulatory

[19] Report of the Working Group on Access to Environmental Justice (2008) *Ensuring Access to Environmental Justice in England and Wales* (the Sullivan Report) as cited in Professor Richard Macrory, Honorable Q.C., CBE, *Consistency and Effectiveness-Strengthening the New Environment Tribunal* 8 (Center for Law and the Environment University College London 2011)

[20] *Review of Civil Litigation Costs: Final Report (2009)* (The Jackson Report) as cited in Professor Richard Macrory, Honorable Q.C., CBE, *Consistency and Effectiveness-Strengthening the New Environment* Tribunal 8 (Center for Law and the Environment University College London 2011)

[21] *Ensuring Access to environmental justice in England and Wales: Update Report (2010)* as cited in Professor Richard Macrory, Honorable Q.C., CBE, *Consistency and Effectiveness-Strengthening the New Environment Tribunal* 8 (Center for Law and the Environment University College London 2011)

[22] European Commission (2010) Environment: Commission warns UK about unfair cost of challenging decisions Press Release 18 March 2010 as cited in Professor Richard Macrory, Honorable Q.C., CBE, *Consistency and Effectiveness-Strengthening the New Environment Tribunal* 8 (Center for Law and the Environment University College London 2011)

[23] Findings and Recommendations of the Aarhus Compliance Committee with regard to Communication ACCC/C/2008/33 24 September 2010 as cited in Professor Richard Macrory, Honorable Q.C., CBE, *Consistency and Effectiveness-Strengthening the New Environment Tribunal* 8 (Center for Law and the Environment University College London 2011)

appeals jurisdiction of the new Environmental Tribunal will be seen as a divisionary threat to the challenge of dealing generally with cost issues in environmental litigation.

History

A final factor one must consider when analyzing acts that create environmental tribunals is the rationale, which led to the creation of the environmental tribunal.

Environmental courts and tribunals have been discussed and analyzed in the United Kingdom for over thirty years. Traditionally, there have not been any specialized environmental courts or tribunals in England and Wales. Prosecutions for environmental offenses were handled in the criminal courts with no specialized judges. Private civil actions for damages, or other civil remedies arising out of environmental issues, were heard in ordinary civil courts. Public law cases, where the legality of a decision of a government body, such as the Environment Agency, is challenged by industry or by non-governmental organizations, are heard at first instance in the Administrative Court, a division of the High Court, by High Court judges assigned to that division.[24]

Decisions concerning which judges will hear environmental matters have been ad hoc and unsystematic. There is some informal specialization with some individual judges frequently hearing environmental cases, and developing a detailed knowledge of this area of law. The first public call for some kind of environment court was in a report by Sir Robert Carnwath in 1989, who was then a leading planning barrister and is now a judge in the Court of Appeal and the senior judge of the new Tribunal Service.

[24] Richard Macrory, *Environmental Courts and Tribunals in England and Wales- A Tentative Dawn,* Journal of Court Innovation 61-62 (2010), http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf (last visited May 18 2011)