

US NAVAL SHIPS

REVIEW OF REGULATORY STRUCTURE

APRIL 2004

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PART I

1: INTRODUCTION AND TERMS OF REFERENCE

1. Following the incident in 2003 in which 4 redundant US Naval Ships were transferred from the James River in Virginia to Hartlepool without, it later became apparent the necessary authorisations for them to be dismantled there the Environment Agency and Defra agreed to conduct separate reviews to identify the lessons to be learned from this incident. The reviews would inform each other and the findings would be shared.

2. The Agency's review would identify lessons to be learned, with the benefit of hindsight, both to benefit its own processes and identify broader policy and regulatory issues that should be addressed in the Defra study. Defra's study would on the same basis review the policy issues. Both reviews would address lessons for working relationships between the Agency and Defra. I have been asked to carry out the Defra review.

3. In doing so I have been asked to consider:

- how the problems arose;
- the inter relationship between Waste Regulation (including the trans-frontier shipment), Land Use Planning and Habitat Regulations;
- what practical problems arise for regulating bodies, and those subject to regulations, by the way in which they interact at present;
- the adequacy of internal and external, statutory and non-statutory guidance on these complex areas and the possible need for further or amended guidance and
- any other issues which I regard as relevant.

I have not being asked to address the performance or conduct of individuals.

4. I need to add a few words on what this means for the scope of what follows. It is specific to ships, classified as waste for recovery, which may contain hazardous waste in their construction and which the UK has agreed, under various international

agreements may, if properly authorised, be handled in the UK. I have not looked at the importation of waste for disposal as this was not the intention with the US ships.

5. The international agreements, including those reached in the OECD provide that the recovery process should take place in conformity with national laws and regulations relating to environmental protection, public order, public safety or health protection. For those engaging in this trade, and those who regulate it, the procedures that have to be followed to meet international commitments must be married with national requirements, particularly in respect to land use planning, the protection of habitats and the management of waste. Any attempt to learn from the recent experience with the US naval ships must therefore look at all the major regulatory regimes that apply. The movement of waste internationally and ships in particular is however a very small part of the waste material that has to be handled domestically in the UK. In consequence where I have made proposals for change I have sought to limit any wider implications, so that the changes apply only to the handling of ships.

6. I am very grateful to all those whom I consulted in the course of this review and the time they devoted to my enquiries. A full list is at Annex F.

JOHN BALLARD

30 April 2004

2: SUMMARY

1. What are the broader policy and regulatory lessons to be learned from the incident in 2003, in which 4 redundant US naval ships were transferred from the James River in Virginia to Hartlepool without the necessary valid authorisations?

POLICY OBJECTIVES

2. The decision to send the US ships to Hartlepool was the result of a commercial negotiation between MARAD and Able, conducted in a free market, but one severely constrained by a series of international agreements between governments covering the movement of waste, including hazardous waste, for disposal and recovery. These are the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the OECD decision C(92)39 in March 1992, revised in May 2001 (C(2001)107) and the Waste Shipments Regulation EEC No 259/93. For the UK they are backed by the Transfrontier Shipment of Waste regulations 1994 and the UK Management Plan for Exports and Imports of Waste 1996.

3. However these agreements were not framed primarily with ships in mind. They do not ensure that OECD ships are scrapped in an environmentally responsible manner. Nor do they encourage ship-owners world wide to act responsibly. They need to recognise the ease with which ship-owners can evade the present controls and the economic incentives they have to do so. The purpose and/or destination of a ship can be changed in mid voyage. It can be re-flagged if necessary. Ships scrapped in the Far East can produce a much better price because labour costs are lower and the market for recycled materials is much stronger.

4. Questions that should to be addressed include:

- When does a ship become waste? How can the objectives of the Basel Convention and other agreements best be reconciled with the wish of ship-owners to trade commercially until the ship is discarded for recovery?
- The criteria or indicators that should be used to determine the point at which a ship becomes waste, and in particular the intention to dispose of the ship.
- If a ship becomes waste in a Basel Party State and then proceeds to another State or States who has the responsibility or obligation to ensure compliance with appropriate conventions etc?
- If a ship becomes waste on the high seas which jurisdiction applies?
- Does a 90 day limit on the time for recovery allow the most environmentally beneficial methods of recovery to be employed?
- How to apply the rules on the return of waste to a partially dismantled and therefore un-seaworthy ship?
- Need for consistency between OECD Decision C(92)39 Final and the Waste Shipment Regulation if movements between OECD countries are to be allowed or encouraged.

5. An effective policy requires the cooperation of states where at least the majority of ships are registered. Signatories to the Basel Convention do not constitute such a majority. Members of the International Maritime Organisation (IMO) do. The IMO, the Basel Convention and the International Labour Organisation (ILO) have

agreed to set up a joint working party ‘to consider the respective work programmes of the ILO, IMO and the Conference of Parties to the Basel Convention on the issue of ship scrapping in order to avoid duplication of work and overlapping of responsibilities and competencies between the three organisations and identify further needs.’ This is a step which the UK Government should encourage by pressing within that group for a programme of action that recognises that ships come within the Basel Convention, acknowledges the legitimate concerns of ship owners who wish to exercise their rights under UNCLOS until the vessel is being sent for scrap and draws from ship-owners a recognition that flag and port states, as well as importing states, have a responsibility for delivering recovery in an environmentally sound manner.

6. The OECD 1992 decision permits the movement of ships within the OECD for recovery. The Waste Shipments Regulation implements that decision within the EU. Negotiations are currently underway within Europe on how to amend that Regulation in the light of the revised OECD decision in 2001. If those negotiations do not recognise the particular characteristics of ships they will have a limited impact on ship-owners current behaviour. Revision should reflect the outcome of the joint Basel/IMO/ILO working party. If this is not practical provision should be made for some supplementary Regulation for ships.

7. An international agreement to which all relevant states were signatories would encourage the creation of high quality facilities where the combination of costs and market for recycled materials was most advantageous. But this is likely to take some years to achieve. Meanwhile the UK is committed to scrapping ships for recovery within the OECD, but with limited means of delivery. A report for the European Commission from DNV/Appledore in 2001 and a subsequent report in 2003 for the Danish Environmental Protection Agency suggested that there were no existing high quality facilities in Europe that could compete with Asia and China. At the same time the number of vessels coming forward from Europe was expected to rise to between 107 and 247 a year. The possibility that the UK could help to fill this gap would be increased if:

- the policy and regulatory framework acknowledged that ship-owners may receive less for ships scrapped in Europe than in the Far East;
- there was a firm Government statement of support for the development of a ship recovery capability in the UK;
- there was a willingness on the part of potential operators to invest in a facility that minimised labour costs and made the maximum use of technology and
- Government were to require all vessels within its control, notably those owned by the MoD, to be scrapped in the UK (subject to remaining in compliance with our international and EU obligations). Yards with a potential capacity will only make the necessary investment if there is a prospect of a remunerative work stream.

AUTHORISATION OF INTERNATIONAL MOVEMENTS

8. The US ships could not be dismantled on the timescale originally envisaged because the necessary authorisations were not in place. The Environment Agency (EA), when it issued its consent to the import of the US ships, believed that those authorisations for which they were responsible were, or would be in place by the time the ships arrived in the UK. They were not. There was no valid Waste Management

Licence. There were also inconsistencies in appraisal. The Agency modification (later withdrawn), of an existing waste management licence, was framed on the assumption that the ships would be dismantled in dry dock, but did not stipulate it as a condition. The associated 'screening' for the purposes of the Habitats Directive only considered dry dock working. These inconsistencies proved critical later.

9. Neither were the necessary authorisations issued by others in place. There was no appropriate planning consent for a bund or dock gate or FEPA licence. In the case of planning the asserted belief of the applicant that he had the necessary planning permission was not checked or queried until 14 August 2003 when Hartlepool Borough Council (HBC) informed the EA that there might be some debate about the current validity of the permission. By this time the ships had become controversial. On 7 October HBC stated publicly that their view now was that there was no valid permission for ship dismantling - a view upheld in the High Court.

10. The EA does not regard it as part of its function to ensure that all necessary authorisations are in place; that responsibility rests with the applicant. It checked its own authorisations but did not seek confirmation from other regulators that they were satisfied that their consents were in place and valid. Putting a general responsibility upon the EA to check that all authorisations were in place, in respect to all routine shipments of waste, would be a substantial administrative burden that is unlikely to be justified by the benefits. Some further process is required however in respect to ships. Such movements will always be comparatively few in number and dismantling ships for recovery is always likely to need facilities that require a wider range of authorisations, because recovery will be at the land/sea interface.

11. One option would be to set up a formal checking process led by the EA. It is doubtful whether this would be sufficient in itself and it could raise difficult issues of responsibility between regulators. The value of responses to any formal request from the Agency will only be as good as the questions asked. Consultation by the Agency with Hartlepool Borough Council on the proposed modification of the existing waste management licence did not reveal the shortcomings that existed in the planning consent. The wording in that consultation could have been more effective, but it is still doubtful if it would have been enough. The key objective with novel and high profile cases such as ships is to ensure that issues are seen in the round; that all relevant regulators share their perspectives and information.

12. A better course would be to convene a joint review by all relevant regulators of what is required before any formal notification of a proposed movement is made. This would help to expose any inconsistency in assumptions between regulators and thus help to ensure that all required authorisations were in place. This probably means giving the EA a lead role (as the competent authority for transfrontier shipments) in instigating a coordinated approach between all relevant regulators. This should be done at the pre-notification stage. The trans-frontier movement of wastes for recovery is subject to a strict timetable for each part of the process. The EA has only 30 days in which it may object to a proposed shipment. This is unlikely to be long enough for regulators to address any deficiencies in the authorisation process. Once given consent cannot be revoked. The applicant needs to be kept closely in touch with this process.

13. If this joint review exposed gaps and the notifier nevertheless pressed ahead with notification the EA as the ‘competent authority’ for transfrontier shipments could withhold consent to the TFS. This would be in conformity with Article 7(4) of the Waste Shipments Regulation which states that one of the grounds upon which ‘the competent authorities of destination and dispatch may raise reasoned objections to the planned consent [is]: -if it is not in accordance with national laws and regulations relating to environmental protection, public order, public safety or health protection’

14. For imports from outside the EU the OECD Decision in 1992 is relevant. It does not specify the grounds for objection, but leaves the discretion of the importing state unfettered. In such circumstances there should be no difficulty in withholding consent if necessary.

15. Some of the difficulties that arose with the US contract may be attributable, in part, to the differences in the control regimes within which the US and the EU work. Where ships are being imported from a non-EU state it is critical to get the authorisation process right and be clear how any inconsistencies with EU requirements are to be covered. Getting any notifier to take back waste is likely to be more difficult where different international control regimes apply. This reinforces the case for a wider review of the authorisations that may be relevant at the pre-notification stage.

16. When doubts arose as to whether the necessary authorisation would be in place to enable the dismantling project to be carried out as originally envisaged the EA e-mailed MARAD on 3 October to suggest that they ‘may wish to consider the timing of the departure of the vessels to the UK’. On 4 November the Agency informed the US Environmental Protection Agency that in its view ‘the arrival of the ships...will result in a breach of international rules and Community law...and that the only appropriate action is that the waste (ships) be returned to the USA until all outstanding issues...have been resolved. The EA intended that they be read as firm requests to halt the sail and then to take back the vessels. The US did not so interpret them. Such letters need to be clear in language and in purpose.

APPROVAL OF UK WASTE RECOVERY FACILITIES FOR SHIPS

17. A Government statement of its policy on recycling ships in the UK would provide a valuable backdrop against which individual regulators could consider specific proposals. In its absence it is more difficult for regulators to fully respond to the concerns of local communities. The wider context is missing. A statement would be particularly valuable for planning as an input to the forthcoming replacement of PPG 10 by a Planning Policy Statement. In practice only a relatively few authorities are likely to have sites suitable for ship dismantling, but those regions and authorities with such sites might be encouraged to recognise that in their Regional Strategies and development frameworks, for example as a successor industry to shipbuilding and offshore structures fabrication.

18. In respect to almost all authorisations it is for individual regulators to take a view. For planning there is a choice. The usual course is for an application to be considered by the local planning authority. Only if issues of more than local importance are involved will the government consider calling in a planning

application for decision by the First Secretary of State. There is no indication at present that the Government propose to call in the forthcoming application from Able UK. The arrangements being put in place between Hartlepool Borough Council, the EA and other regulators for that application, the waste management licence and associated consents, are intended to ensure that all relevant information is gathered and presented in a coordinated way. This process should be monitored carefully as a record of the capacity of the institutions involved to handle what some see as contentious issues.

19. The drafting of the original waste management licence for the Able UK site subsequently added to the difficulties encountered when the EA sought to modify it. The Agency's work to introduce a standard format and approach is welcome. The proposed introduction of a standard application form for a modification this autumn will be a further step forward.

ALIGNING AUTHORISATION PROCESSES

20. The information needed by the local community to take an overall view of the consequences of dismantling the US ships at Hartlepool was not available before consent was given by the Agency to the import of the ships. Able UK believed it had the necessary planning permissions and the Environment Agency believed that no new waste management licence was required. There was therefore no formal process for consulting the public through which information could be set out systematically.

21. Public understanding will be greater where all relevant information is available at the same time or in a coordinated way. This may however have costs to the developer that need to be justified. Defra with ODPM is reviewing the relationship between the procedures for securing planning approval and those for a waste management licence/IPPC equivalent as part of a review to bring in a new regulatory regime to ultimately replace waste management licensing. At present no application for a waste management licence can be granted until the requisite planning permission has been obtained. The planning community favours parallel tracking so that all relevant information is before the local community at the same time. The business community is more divided. While some see the merit of parallel tracking at least in some circumstances, others want to be able to choose whether to seek a waste management licence or planning permission first.

22. It is for others to determine the relevant balance of advantage for the generality of applications, but the experience with the US ships strongly suggests that where assessments under the Habitats and EIA Directives are required there should be a presumption that any application for a waste management licence and a planning consent will be considered in parallel, with close co-operation between the local planning authority, the Environment Agency and English Nature on the information required for each process. Where possible this should include the joint commissioning of an impact assessment for the purposes of the Habitats and EIA Directives. The ODPM and Defra should issue guidance to this effect. The scope in individual cases to bring in other regulators (Defra (Marine Consents Unit), Crown Estates, HSE and the Maritime Coastguard Agency) should be mapped out collectively in the pre-notification meeting convened by the EA. That meeting should also consider the

arrangements for consulting the public on all the authorisations being considered collectively.

23. This is the course being followed by HBC, English Nature and the EA in respect to the forthcoming application from Able UK for planning permission and a waste management licence. All three regulators have liaised on the information each require so that Able UK can commission a coherent package of material that will meet their purposes - and also that of other relevant regulators. Regular progress meetings between the regulators to assess the information being put to them and the holding of joint surgeries with the local community should make a complex task easier for Able UK, improve the coherence of information available to the local community and enable each regulator to act in a more informed way. It should if possible also incorporate the assessments carried out for the application for a FEPA licence made in August 2003 and still on-going. This process should be properly recorded so that it can, if appropriate, be used as an example of best practice.

24. There are a number of marine consent regimes, including FEPA. The Government is currently considering whether their administration could be merged. . If applications for all relevant permissions can be made at the same time it should be easier for the regulator(s) to make connections. It will easier for those affected to get a coherent picture upon which they can comment. There should be greater scope for producing one set of material on the impact on the environment and sensitive habitats.

EA/DEFRA RESPONSIBILITIES

25. The EA is the competent authority for the consideration of trans-frontier shipments. The criteria on which the Agency acts are laid out in international agreements and the UK Management Plan for the Import and Export of waste. The Department has a responsibility for ensuring that the requirements placed on the Agency allow for as little ambiguity as possible. That done it is for the Agency to consider individual cases, with senior management and the Board being responsible for ensuring that due process is in place. Ministers and the Department have no direct role in decisions on such cases. But they can and should expect to be kept informed where Government policy on the handling of waste recovery may become the subject of debate, or where the resources needed by the EA to deliver a workable solution are beyond those possessed by the Agency.

26. The Department and the Agency had an email from the US State Department on 5 April 2003, informing them of MARAD's approach to Able UK. This was followed by a conference call between the Agency and US Environmental Protection Agency to clarify the role of the Agency and the procedures to be followed. The EA and Defra officials had regular informal contact through to the receipt of notification and the issuing of written consent to the transfrontier shipment on 22 July. Ministers were brought into the picture by a submission from Defra officials on 28 July.

27. There was a recognition within the Agency that this application was novel; and that in consequence the Department should be kept informed of progress. But the level at which contact was maintained reduced the opportunity to consider the potential political resonances that might arise. It was not seen within the Agency as

having the potential it had to attract attention. This was an application to move waste to a site that had, or would have all the authorisations it needed from the Agency and which also appeared to have an appropriate planning consent. In consequence it was not raised at any of the regular bilaterals between the Agency Chairman or the Chief Executive and the Minister. It is perhaps not surprising that the subsequent note put forward by Defra officials in July was low key and for information only. This underestimated the potential political significance. The Department and the EA should have had a contingent communication strategy in place before consent for the shipment was given.

28. If such a strategy had been in place it may have encouraged the Agency to keep before it the option of calling on Government for help over the summer, without compromising the Agency's role as regulator. Help could have been sought when the EA asked MARAD to delay the sailing of the ships, without prejudice to the Agency's role as regulator. It should certainly have encouraged a better flow of information to Ministers in early October on the emerging concerns about the modification of the waste management licence (and therefore the need to review the UK attitude to the movement of the US ships). By the time the Department's help was sought at the end of October all 4 ships were well into the Atlantic, and US positions consequently entrenched, with weather and insurance considerations being a real constraint on options.

GUIDANCE

29. Guidance is needed for three reasons. Those engaged in the business of ship recycling/dismantling/scraping need to know what authorisations are required and how they should set about securing them. The communities that may be affected by them or other interested parties will want to know what is proposed, how they will be consulted and how they can contribute to the decision making process. And the staff of the regulators involved need to be clear what they are required to do.

30. I will confine my recommendations on internal guidance to two recommendations. The agency needs to review the arrangements they have for identifying cases that are novel and/or potentially contentious or high profile. There are arrangements in place within the Agency for front line staff to enlist the help of senior management and central services such as lawyers. However the US ships were seen by the transfrontier shipment team as routine in terms of the wastes involved and these arrangements were not triggered until the ships became an issue in the media. Accordingly both at national level and in the local area team processing was handled according to standard procedures. This did not encourage the wider perspective which was needed.

31. For cases that are identified as novel or potentially contentious or high profile the Agency should take a stronger interest in the other regulatory regimes that may be involved; and take this forward by convening a joint meeting with other regulators.

32. Moving ships for recovery and putting in place facilities for recovery work is a specialist business in which it is reasonable to assume that those involved will want to seek specialist advice. Professional advisors should know what is required. Nevertheless Government ought to consider pulling together in one place a route map

to the different authorisations that may be required with hyper links to the websites of the regulators concerned for detailed guidance. Each of the regulators' websites should in turn have hyper links to the others. Such a route map would also help those who want to comment upon proposals. For them accessibility and clarity of language is particularly important. Present guidance is very variable.

33. Clear guidance on the Trans-Frontier shipments and a copy of the Waste Shipments Regulation are readily accessible on the EA website. For waste management the Agency provide summary advice only. The inquirer must then contact the local EA office who will discuss and comment upon the applicant's proposals. They will not specify in advance what an applicants handling strategy for a waste consignment should be. A succinct account of the Habitats regulations is included on the English Nature website. The EA website contains a comprehensive account of how the regulations are applied to Agency permissions.

34. Up-to-date planning guidance is more difficult to determine as there is a need for early reviews of the framework within which planning decisions sit. Waste Strategy 2000 sets out national policy on waste management, and is a significant influence on the implementation of PPG10 *Planning and Waste Management*, not least through developments in the courts on for example BPEO. Proposals by ODPM to consult on the successor to PPG10 later this year are welcome, but for the new PPS to be effective there needs to be a clear enunciation of that the Government expects the planning system to deliver on waste, including the recycling of ships classified as waste. PPS10 can be expected to articulate general principles on the provision of national or sub-regional facilities, and these could be relevant to the provision of a waste recovery facility for ships. Planning policy is not however the right place to set out government policy on whether there is a need in the first place, and on the network of facilities it thinks would be required to satisfy that need.

3: CONCLUSIONS

POLICY OBJECTIVES

1. International agreements on the movement of ships as waste should recognise the particular characteristics of ships if regulation is to be effective. Existing regulation is easily evaded.
2. An effective international agreement means enlisting the support of the countries where the great majority of ships are registered. The International Maritime Organisation has a critical role to play. The joint work being set in hand by the IMO, International Labour Organisation and the Basel Secretariat is to be strongly encouraged. The current negotiations within the EU on the revision of the Waste Shipments Regulation (EEC No. 259/93) should allow for the outcome of this work.
3. The UK has agreed that OECD ships classified as waste should only be recycled in OECD countries. Suitable facilities do not yet exist in Europe. The UK needs to consider whether it wishes to actively encourage the provision of a high class recovery provision in the UK: and if it does so whether that encouragement should include a commitment that ships owned by the public sector (principally the MOD) should be recycled in the UK (subject to remaining in compliance with our international and EU obligations). An early public statement of the Government's position would help to clarify how present international commitments on the movement of ships classified as waste are to be delivered.

AUTHORISING INTERNATIONAL MOVEMENTS

4. Where the Environment Agency becomes aware of a proposal to recycle ships classified as waste in the UK that is likely to result in a notification under the Basel Convention (and associated agreements) it should take the lead in convening a meeting of all the regulators that it considers may have an interest. This will help to expose any inconsistency in assumptions between regulators and help ensure all necessary authorisations are in place. This should take place before notification occurs. The applicant needs to be kept closely in touch with this process.
5. If the joint review by regulators exposed gaps and the notifier nevertheless pressed ahead the EA, as the competent authority for transfrontier shipments, should withhold its consent.
6. There are significant differences in the detail of how transfrontier shipments of waste are regulated in the US and in the EU. Where waste is being imported to the EU it is important to get the authorisation process right. This reinforces the case for a wider review of the authorisations that may be relevant at the pre-notification stage.
7. Where difficulties arise which require the EA to delay or halt the import of ships communication should be clear in language and purpose.

APPROVING UK WASTE RECOVERY FOR SHIPS

8. An early statement by Government of its policy for recycling ships would provide a valuable backdrop against which regional and local plans can be developed and individual regulators can consider specific proposals.
9. If the forthcoming application by Able UK is left with Hartlepool Borough Council for decision the process should be monitored carefully as a record of the capacity of the institutions involved to handle an issue with national implications.
10. Regions and local authorities that have sites that may be suitable for ship dismantling and recovery should be encouraged to recognise their potential in their Regional Strategies and development frameworks.
11. The EA should as far as possible use standard formats for waste management licences and in applications for any subsequent modification.

ALIGNING AUTHORISATION PROCESSES

12. Where the provision of a ship recycling facility requires assessments under the Habitats and/or Environmental Impact Directives there should be a presumption that any application for a waste management licence (or modification of an existing licence) and a planning consent will be considered in parallel.
13. Where the Environment Agency has taken the lead in convening a pre-notification meeting of relevant regulators, regulators collectively should also consider the scope for aligning processes for the other authorisations required in addition to the planning consent and a waste management licence. This should include an assessment of the procedures/processes to be followed for public consultation in respect to all the authorisations concerned.
14. Merging the administration of some or all of the existing consent regimes for developments that impact on the seabed and marine environment should help developers and those who wish to comment on proposals.

EA/DEFRA RESPONSIBILITIES

15. Responsibility for considering individual cases rests firmly with the agency. But Ministers can and should expect to be kept informed where Government policy on the handling of waste for recovery may become the subject of debate or the resources needed by the Agency to deliver a workable solution are beyond those possessed by the Agency. The novel nature of this proposal was not recognised in the initial handling arrangements within the Agency and this may have conditioned the way in which Ministers were kept in touch, which was too low key and too late. This continued with insufficient sharing of information with Ministers in October with the consequence that the options available when Ministerial help was enlisted were severely curtailed.

GUIDANCE

16. The Agency need to review the arrangements they have for identifying cases that are novel and/or potentially contentious or high profile.

17. For such cases the Agency should take a stronger interest in the other regulatory regimes that may be involved and take this forward by convening a joint meeting with other regulators. Senior management also need to be kept more fully informed.

18. Handling ships for recovery is a specialised business where it is reasonable to assume that professional advice will be sought. Nevertheless a complex web of consents may be needed and there would be value in Government pulling together in one place a route map to the different authorisations that may be required with hyper links to the websites of individual regulators for more detailed advice. Accessibility and clarity of language is important. Present guidance is variable.

PART II

4: REGULATION OF TRANSFRONTIER MOVEMENT OF WASTE AND PROVISION OF RECOVERY FACILITIES

1. The recycling of ships requires a range of authorisations. Some arise from international agreements, some from Directives negotiated in Europe and others from UK requirements. A list of the legislation/regulatory regimes I have been able to identify is at Annex B. I concentrate here on those which were principally involved in the US ships case and where there may be lessons to be learnt from this experience.

TRANSFRONTIER MOVEMENTS

2. The control of transboundary movement of hazardous waste is governed at the international level by the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal. The Convention entered into force in May 1992 and was ratified by the UK on 7 February 1994.

3. Central to the operation of the Convention is a prior written notification procedure for any proposed trans-boundary movement of hazardous waste between Parties to the Convention. No movement is allowed without the agreement of the importing country. Other significant requirements concern the duty to return waste in certain circumstances, the definition of illegal traffic and provisions dealing with such traffic, international cooperation and development of bilateral, multilateral or regional agreements for the transboundary movement of hazardous waste. A subsequent amendment, ratified by the UK in October 1997, prohibits the export of hazardous waste from OECD countries to non-OECD countries.

4. As permitted by Article 11 of the Convention of the Basel Convention, the UK (along with the European Community) has entered into a multilateral agreement (Decision C(92)39/FINAL) concerning transfrontier movements of waste under the auspices of the OECD. This gives more detail than the Convention on the procedures to be followed and firms up some of the times within which action must be taken. The Decision was revised and adopted by OECD states in 2001 but is not binding upon them until the necessary domestic measures are introduced.

5. The USA and the UK have transposed the 1992 OECD Decision into domestic law. For the UK this was done through the Waste Shipment Directive (Council Regulation 259/93). The revised OECD Decision will be transposed into Community law through a revision of the Waste Shipments Regulation, on which negotiations are currently in train.

6. The current Regulation provides detailed rules for the transboundary movements of waste. The central aspect of these rules is a notification procedure where the person intending to ship waste for disposal or recovery is required to notify the Competent Authority of destination prior to shipment of the waste. Such a notification is required to be copied to the Competent Authorities of dispatch and

transit. The Competent Authority of destination may raise reasoned objections to the shipment on certain grounds.

7. The Waste Shipment Regulation is supplemented in the UK by the Transfrontier Shipment of Waste Regulations 1994 which designate the Environment Agency (EA) as the Competent Authority for England and Wales and provide further detailed rules for the transmission of notification and the provision of financial guarantees; and the UK Management Plan for Exports and Imports of Waste,

8. The controls on the import of asbestos are exercised through another European directive 87/217/EEC. The HSE as competent authority may grant (as it did for the US ships) exemption from the general prohibition on importation on the grounds that the asbestos is for disposal and not for recycling.

9. The exporter of waste is required, as part of their notification procedure, to set out the arrangements for the routing of the consignment and for insurance against damage to third parties. Transit authorities have 30 days in which to object and 20 days in which to lay down conditions in respect to transport within their jurisdiction. Rights of passage are enshrined in the UN Convention on the Law of the Sea (UNCLOS). The UK's powers are confined to those set out in the Merchant Shipping Act 1995 as amended by the Marine Safety Act 2003. These provide that in certain circumstances the Secretary of State for Transport may give Directions to the owner or whoever is navigating the ship if an issue of safety or risk of pollution has arisen or is likely to arise. The power in respect to safety cannot be exercised in respect to non-UK ships that are exercising their right of innocent passage or right of transit passage through straits used for international navigation.

OTHER AUTHORISATIONS

10. The other principal requirements in the case of the US ships were a waste management licence, compliance with the Environmental Impact and Habitats Directives and planning consent.

11. The final destination of waste consigned for recovery is a waste management facility licensed under the Waste Management Licensing Regulations 1994. This fulfils many of the UK's obligations arising from European legislation on waste and in particular the Waste Framework Directive. A waste management licence authorises the treatment, keeping or disposal (including recovery) of any specified description of controlled waste. It may be granted on such terms and conditions as appear appropriate. Once made the conditions may be varied, but not the terms. In determining a new application the EA is required to consult the local planning authority. Because planning permission is a prerequisite to the grant of a waste management licence public consultation on the licence may be an unnecessary duplication. But where the planning permission is old or where there are particular issues or complaints pertinent to the determination of the licence application the Agency should consider the need for public consultation.

12. The planning system has three elements

- National guidance from the Secretary of State (which includes guidance on planning and waste management and also pollution control)
- Plans produced by regional and local authorities that indicate how prospective development should be handled (Plan led system)
- Individual applications for development/land use, which are determined by local authorities or by the Secretary of State on appeal or because they are called in for his decision.

13. Applications that are in conformity with local authority plans are likely to be approved unless there are 'material considerations' that suggest otherwise.

14. The main aim of the environmental impact assessment is to ensure that the authority giving the primary development consent for a particular project makes its decision in the knowledge of any significant effect on the environment. Under the Habitats Directive an appropriate assessment must be made of the implications for a European site (a SPA classified in accordance with the Wild Birds Directive, or a SAC designated in accordance with the habitats Directive) of any plan or project which either alone or in combination with other plans or projects would be likely to have a significant effect upon it or if a European protected species will be affected beyond those sites. Similar provisions exist in respect of nationally protected sites, SSSIs, in accordance with provisions set out in the Wildlife and Countryside Act 1981 (as amended by s28 of the Countryside and Rights of Way Act 2000). All European sites are underpinned as a SSSI. These requirements affect the handling of planning applications and applications for a waste management licence.

5: HOW THE PROBLEM AROSE

1. The US MARAD considered that they could not scrap all the ships for which they had responsibility in the time required by US statute without using some capacity outside the US. Able UK were approached indirectly through a MARAD agent based in Hamburg. They expressed interest in undertaking the work.
2. Able UK approached the Environment Agency (EA) in February 2003 about the scope of their existing waste management licence and made a parallel approach to Hartlepool Borough Council (HBC) about their existing planning permission to dismantle marine structures. In neither case were they told that there were any significant difficulties. They did not ask whether they had permission to construct lock gates to the existing dock because they believed that the consent given by the Teeside UDC, the then planning authority, was still valid.
3. The EA did not consider that the task of recovering the ships was different in kind from the work already undertaken by Able UK on marine structures. Neither did they consider that the waste that was likely to arise would be different in kind from that for which Able UK already had a licence to dispose. The proposal to bring in ships for recovery was unusual, but in terms of the material concerned they judged that it was likely to have the same characteristics as materials already handled by Able UK.
4. The EA took steps to ensure that its assessment of the TFS application was compatible with the scope and status of the existing waste management licence; but it did not consider that it was part of its responsibilities to check that any other authorisations that might be needed were in place. That responsibility rested with the applicant.
5. When the EA and the HBC did begin to talk to each other in August and doubts began to emerge as to whether all permissions were in place this was after the EA had given its consent to the transfrontier shipment on 22 July.
6. The trigger for the two regulators to contact each other was the application from Able UK on 30 July for a modification to the existing WML. At a meeting of regulators organised by the EA on 20 August HBC give their preliminary view that the permission for the dock gates had lapsed. (Able UK submitted a new planning application for a cofferdam on the same date-only to withdraw it on 17 September). Nevertheless the EA on 30 September issued a modification to the WML which was based on the assumption that Able UK would recover the ships by dry dock working, but which did not specify it as a requirement. This made it invalid, because no environmental assessment was made of any other method of working. The EA warned MARAD on 3 October about a possible difficulty with planning permission, informed them that FoE had challenged their modification of the waste management licence and asked them to consider delaying the departure of the ships.
7. Meanwhile Able UK had applied to Defra on 13 August for a FEPA licence to undertake construction works at sea (followed by an application for consent to dredge and deposit dredged material on 13 October). HBC had firmed up their position on

the dock gates and said publicly on 7 October that the planning permission for the bund/dock gates was invalid.

8. The EA issued an emergency modification of Able UK's waste management licence on 12 November to allow 2 US ships to dock, followed by the other two ships on 27-28 November. (It also prevented dismantling.)

9. The Court hearing on 8 December confirmed that the modification of the waste management licence was invalid. A subsequent hearing on 16 December concluded that Able UK's planning permission for dismantling marine structures did not include ships.

10. The result is that there are 4 ships in dock in Hartlepool for recovery but without the planning approval, WML or FEPA licences needed for work to begin. The EA have no powers to withdraw a consent to a transfrontier movement of the ships once it has been given. The Waste Shipments Regulation provides that if the work cannot be completed within 90 days the waste should be returned or disposed of in an alternative and environmentally sound manner. The US is not of course subject to this Regulation. Leaving this important point to one side there is also the practical impossibility of returning ships across the Atlantic under tow in winter.

6: UK POLICY OBJECTIVES

INTERNATIONAL COMMITMENTS

1. The UK is signatory to a number of international agreements that govern the movement of ships for recovery. These are the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal agreed in 1989, the OECD decisions C(92)39 in March 1992 and C(2001)107 in May 2001 and the Waste Shipments Regulation EEC NO259/93. These are supported the UK Management Plan for Exports and Imports of Waste 1996.
2. A common principle derived from the Basel Convention is that recovery should be undertaken in an environmentally sound manner and only by those equipped to do so. An important amendment to the Basel Convention, agreed in September 1995 by members of the OECD, the EU and Lichtenstein, said that they would not export waste for recovery to other countries after 31 December 1997. The OECD, EEC agreements and the UK Management Plan add detail on how the objectives of the Basel Convention are to be achieved.
3. In practice these agreements have not yet had any discernible effect on where ships go for recovery. A review commissioned by the Danish Environmental Protection Agency in 2003 showed that of the 187 European ships scrapped in 2001 only 47 were scrapped in the OECD (of which 14 were in Spain and 16 in Turkey). Key factors that favoured Asia were:
 - Much lower labour costs.
 - Much stronger market for recycled steel and therefore prices significantly higher.
 - A difference in culture towards the reuse of equipment (identified by Det Norske Veritas and Appledore International in a study for the European Commission), with a much greater willingness to recycle equipment.In consequence ship owners get an income from sending ships to Asia, whereas they may have to pay to have a ship recycled in Europe. This generates a strong economic incentive to scrap outside Europe.

Average scrap metal prices 1994-2002.

Source: database maintained by London ship broking company (Clarksons) on about 3,800 ships sent for scrap.

Break up location	Average of sales price US\$/Ldt
Bangladesh	160
India	157
Vietnam	156
Pakistan	147
Indian sub-cont	144
China	134
Turkey	83
Spain	56
Mexico	52

4. There are also strong incentives for ship-owners to seek to keep themselves outside the requirements of the Basel Convention in the period before scrapping. The Waste Shipments Regulation defines 'waste' as 'any substance or object...which the holder discards or intends or is required to discard'. Thus if a ship owner discards or intends or is required to discard a ship it would appear to be classified as waste. Yet the decision to discard might be taken some time before disposal is due to take place. In such circumstances the ship owner would be expected to comply with the notification procedures etc that apply to the export of any hazardous waste. At the same time he would want to continue to operate commercially. Yet the ship, if it has proper certification under IMO Conventions, remains a ship with the rights of passage etc that go with it.

5. If European ship-owners are obliged to classify their ships as waste while they are still operating commercially and/or are required to scrap in Europe/OECD countries rather than in Asia they are likely to incur costs not borne by their competitors. In such circumstances they will have a strong incentive to evade these requirements. One simple way of doing so is to re-flag. If environmentally sound recovery is to be achieved it requires the cooperation and support of states where the great majority of ships are registered. This is not found to a sufficient degree among those who have ratified the Basel Convention. It is found among the membership of the International Maritime Organisation (IMO).

6. The IMO, the Basel Convention and the International Labour Organisation (ILO) have agreed to set up a joint working party 'to consider the respective work programmes of the ILO, IMO and the Conference of Parties to the Basel Convention on the issue of ship scrapping in order to avoid duplication of work and overlapping of responsibilities and competencies between the three organisations and identify further needs.' This is a step forward which the UK Government should encourage by pressing within that group for a programme of action that recognises that ships come within the Basel Convention, acknowledges the legitimate concerns of ship owners who wish to exercise their rights under UNCLOS until the vessel is being sent for scrap and draws from ship-owners a recognition that flag and port states, as well as importing states, have a responsibility for delivering recovery in an environmentally sound manner.

7. Particular issues that need to be addressed in securing an effective policy on recovery are

- When does a ship become waste? How to reconcile the objectives of the Basel Convention etc with the wish of ship-owners to trade commercially until the ship is discarded for recovery.
- The criteria or indicators that should be used to determine the point at which a ship becomes waste, and in particular the intention to dispose of the ship.
- If a ship becomes waste in a Basel Party State and then proceeds to another State or States who has responsibility or obligation to ensure compliance with appropriate conventions etc?
- If a ship becomes waste on the high seas which jurisdiction applies?

8. The current negotiations on the revision of the Waste Shipments Regulation need to either await the outcome of the joint work by the Basel Convention, IMO and

ILO or allow for the results of that work to be incorporated subsequently. Otherwise the effect will be to drive EU ship-owners to evasion, which is relatively easy to do through re-flagging. This would negate the benefits that the Basel Convention and other agreements are intended to secure. (Also at risk are the wider benefits for safety, environmental performance and crew welfare that come from ships registered in the EU.) Meanwhile the revision of the Waste Shipments Regulation should review the time limits set for the recovery and return of waste in the event of default as they apply to ships classified as waste. The bar on safety grounds on returning the US ships to the USA during the winter of 2003-04 illustrates the difficulties that can arise at present.

EUROPEAN CAPACITY

9. The DNV/Appeldore review for the European Commission sought to estimate the likely demand for recovery facilities in Europe and to identify likely locations. In looking at demand it considered four categories of vessel-offshore structures, merchant, inland water and naval vessels. Its main conclusions were:

- There will be an increase in the number and tonnage of vessels requiring scrapping in the period 2001-2015.
- The dominant component would be from the merchant fleet, in which the predicted average annual volumes coming from Europe were
 - 107-247 ships
 - 4.3-11.1 million dwt
 - 0.86-1.48 million tonnes steel.
- Many aspects of current principles and methods in use in India, Bangladesh, Pakistan and China were non-compliant with EU health, safety and environmental legislation and objectives.
- It was not practicable to upgrade existing facilities outside Europe to achieve compliance. Neither was pre-cleaning in Europe/OECD prior to scrapping elsewhere economically or technically viable.
- However technological and economic feasibility of ship scrapping in Europe rests upon the ability to apply efficient non-labour intensive steel processing methods in a high volume scenario. Europe should opt for a single high volume, fast turnaround facility including a dock large enough to take vessels up to 400,000dwt
- The end of life value of vessels was heavily dependent upon costs of separation and dismantling. Break even costs were in the region of \$10-15/hr. Employment costs in Eastern Europe and FSU countries ranged between \$1-5/hr c.f. \$15-30/hr in Western Europe.
- Economic viability was likely to be greatest in the lower cost economies of Eastern Europe and the FSU. The adoption of novel applications of steel cutting technology and the assumptions regarding labour requirements inevitably meant that this could only be considered a broad-brush indication.

10. If this analysis is accepted-and it does come with suitable health warnings from the authors-there remains the challenge of finding a suitable site. The DNV/Appeldore study was only able to identify one existing yard, in Gdynia in Poland that met their specification and this was already part of a highly active shipbuilding facility. The other yards identified in Romania and the Ukraine would only be able to take vessels up to about 200,000dwt. There remained the possibility of

developing a Greenfield site, but this was not an easy process as recent efforts to establish a project in Australia had shown.

11. Against this background what should be the UK Government's approach? How far should it go, if any way at all, to encourage the development of a facility in the UK? It is encouraging that notwithstanding their general conclusions the DNV/Appeldore study records that 'the most promising current activities associated to the development of ship scrapping as an industry may be illustrated by emerging initiatives [which include] ..three offshore facilities...located in the UK and Norway. These are interesting because they have a different cost/income structure to the traditional ship scrap yards'. And we do know from the US Naval ships experience that there is a least one segment of the market where UK yards are competitive and judged to be capable of working to the high standards required.

12. There is nevertheless a choice. The Government can leave it to the market to come forward with a facility as and when they judge it commercially feasible to do so. This may take some time and will be influenced by the rigour with which the objectives of the Basel Convention are pursued by governments collectively. Alternatively Government could provide an initial throughput upon which other business could be pursued by requiring all publicly owned vessels to be recovered within the UK, or if this was not compatible with EU legislation, within the EU. The principal source would be naval vessels of which there are five waiting to be scrapped at present or likely to become available in the next two years. (This opportunity may be time limited if the MOD is successful in changing its policy to one of selling on its ships while they still have an operational future.) If this could be pursued as a general policy by EU members this might generate around six significant vessels a year (DNV/Appeldore estimate). Such a policy would be in line with the proximity principle which is at the centre of the Governments policy on waste.

7: AUTHORISATION OF INTERNATIONAL MOVEMENTS

THE RULES

1. The US is a party to the OECD March 1992 Decision C(92)39) and has reflected this in its domestic legislation. The UK is also a party to this Decision but has joined with other EU members to give substance to the OECD Decision through The Waste Shipments Regulation (EEC) No 259/93 as well as its own Transfrontier Shipment Regulations 1994.
2. The OECD Decision and the EEC Regulation cover the same ground. There are some important differences in the detail, for example in the time allowed for dismantling and who is responsible for the ships if the work cannot be completed as originally envisaged. (More information is in the note at Annex D). These differences need not be critical provided each party involved in a transfrontier movement from the US (or any other non-EU member of the OECD) to the UK is aware that they exist and there is agreement on how they are to be covered. In particular there needs to be clarity on key issues:
 - The range of authorisations required
 - Who are the contracting parties
 - How long is to be allowed for recovery of the ships and
 - Who is responsible for the return of the ships/finding an alternative location for recovery to take place if the work cannot be completed as agreed.
3. Common to both regimes is a process of notification by the exporting country and a period of 30 days in which the importing country can object to the proposed shipment. Consent once given cannot be revoked.
4. The exporter of waste is required, as part of their notification procedure, to set out the arrangements for the routing of the consignment. In certain circumstances the Secretary of State for Transport may give Directions to the owner or whoever is navigating the ship if an issue of safety or risk of pollution has arisen or is likely to arise. The power in respect to safety cannot be exercised in respect to non-UK ships that are exercising their right of innocent passage or right of transit passage through straits used for international navigation.

WHAT HAPPENED

Pre-notification

5. A fuller chronology is at Annex A. In the early part of 2003 there was an approach from MARAD to Able UK through a Hamburg based intermediary who had been charged by MARAD with investigating the capacity of European yards to compete for contracts to dismantle and recover waste from the US Naval ships anchored in the James River in Virginia.

6. Able UK subsequently asked Hartlepool to confirm that their existing planning permission to dismantle marine structures covered ships. They did. Able UK also asked the Environment Agency (EA) whether their existing waste management licence (WML) covered the dismantling of ships. The Agency saw no difficulty in relation to the nature of the wastes that would arise. A ‘technical’ modification to the licence would be needed to cover the higher volumes that would arise. The Agency warned Able UK of the need to contact the HSE about compliance with Asbestos (Prohibitions) Regulations 1992.

7. The US sought advice in April from the UK Government on Able UK’s record and the processes to be followed for a transfrontier shipment. The Agency gave advice and also information on Able UK’s (good) performance as recorded in site inspection reports. The US Coastguard (and as an additional safeguard, the UK Maritime and Coastguard Agency (MCA)) inspected the ships in the James River and confirmed that they were seaworthy. The US submitted a notification form on 26 June.

Post notification

8. The Agency believed at this stage that it was dealing with a notification that was unexceptional in the issues it raised. There had been prior discussions with the US competent authority. Able UK believed they had planning permission to dismantle ships, a position which was endorsed by the planning authority. The Agency believed that the WML was adequate subject to a ‘technical’ modification. The Agency’s transfrontier shipment (TFS) and WML teams liaised and the TFS team subsequently agreed that the application could be approved subject to the receipt of a financial guarantee. The EA gave its written consent on 22 July. MARAD’s financial guarantee was received on 28 July. The potential public and political profile of this action was however underestimated –see Chapter 10.

9. This apparently stable position quickly unravelled. Contact between the EA and the planning authority in mid August revealed doubts about the validity of an assumed (on the part of Able UK) permission to construct dock gates. In late September FoE suggested and the EA agreed that the Habitats Directive assessment required for the WML modification should be ‘in combination’ i.e. one which takes into account the likely effect of the proposed activity in combination with the impacts of other permissions granted or proposed for activities in the vicinity of the site. The need for a FEPA licence was also confirmed. EA issued a WML modification on 30 September, only to withdraw it on 30 October as invalid. On 7 October Hartlepool BC, having sought Counsel’s opinion, published a statement that the planning permission for the bund/dock gate was also invalid. The status of the WML and planning permission were confirmed by court cases heard in December.

10. In summary the US ships could not be dismantled on the timescale originally envisaged because the necessary authorisations were not in place. The EA when it issued its consent to the TFS believed that those authorisations for which they were responsible were in place or would be in place by the time the ships arrived in the UK. They were not. There was no valid Waste Management Licence. There were also inconsistencies in appraisal. The EA modification (later withdrawn), of an existing waste management licence, was framed on the assumption that the ships would be dismantled in dry dock, but did not make it a requirement, while the associated

‘screening’ for the purposes of the Habitats Directive only considered dry dock working: inconsistencies which proved critical later. Neither were the necessary authorisations issued by others in place. There was no planning consent to construct a bund or dock gate. The existing planning consent did not extend to dismantling ships. There was no FEPA licence.

11. Two conclusions can be drawn. The EA should not issue a TFS consent until all its own authorisations are in place. Its role with regard to other authorisations also needs to be reconsidered.

12. The EA issued its written consent to the TFS on 22 July, before it received an application on 31 July to modify the existing WML. The modification was issued on 30 September and the first two ships set sail on 6 October. FoE wrote to the EA on 3 October contending that the modification was unlawful. EA lawyers subsequently agreed. It may not be appropriate for EA staff to consult their legal colleagues when they are making a routine modification to an existing WML. But this was not routine in two respects. It was a modification to the terms of the licence. It was also connected with a project—the importation of ships—that had the potential to be contentious. This links back to how the initial application was classified within the Agency. There is no guarantee that if written consent had been withheld that the outcome would have been different, but if the application to import the ships had been classified at the start as novel and therefore meriting the attention of EA legal and senior staff throughout the odds would have been shortened considerably.

13. The EA does not regard it as part of its function to ensure that all necessary authorisations are in place; that responsibility rests with the applicant. Accordingly it checked its own authorisations but did not seek confirmation from other regulators that they are satisfied that their consents were in place and valid. While such a step may be unnecessary for routine shipments of waste something more is needed where a movement involves a ship. Dismantling ships for recovery is always likely to need facilities that require a wider range of authorisations, because recovery will be at the land/sea interface.

14. One option would be to make the Agency formally responsible for checking that all appropriate consents were in place. I come down against this because it would be bureaucratic and raise difficult issues of responsibility between regulators without offering much prospect of success. The value of responses to any formal request from the Agency will only be as good as the questions asked. The key objective with novel and high profile cases such as ships is to ensure that issues are seen in the round; that all relevant regulators share a consistent perspective and information.

15. A better course would be to convene a joint review by all relevant regulators of what is required before any formal notification of a proposed movement is made. This would help to expose any inconsistency in assumptions between regulators and thus help to ensure that all required authorisations were in place. This probably means giving the EA a lead role (as the competent authority) in ensuring a coordinated approach between all relevant regulators. This should be at the pre-notification stage. The trans-frontier movement of wastes for recovery is subject to strict timetables for each part of the process. The EA has only 30 days in which it may object to a proposed shipment. This is unlikely to be long enough for regulators to address any

deficiencies in the authorisation process. Potential participants include the local planning authority, Defra as responsible for FEPA, English Nature, the HSE, the port authority and the Crown Estate as well as the Environment Agency. The applicant needs to be kept closely in touch with this process.

16. If this joint review exposed gaps and the notifier nevertheless pressed ahead with notification the EA, as the ‘competent authority’, could withhold consent to the TFS. This would be in conformity with Article 7(4) of the Waste Shipment Regulations which states that one of the grounds upon which ‘the competent authorities of destination and dispatch may raise reasoned objections to the planned consent [is]:-if it is not in accordance with national laws and regulations relating to environmental protection, public order, public safety or health protection’.

LANGUAGE

17. The US and the UK are sometimes said to be separated by a common language. In this case there were certainly different interpretations placed by the US on two attempts by the Environment Agency to first delay and then halt the sailings of the US naval ships.

18. When doubts arose as to whether the necessary authorisation would be in place to enable the dismantling project to be carried out as originally envisaged the EA e-mailed MARAD on 3 October to suggest that they ‘may wish to consider the timing of the departure of the vessels to the UK’. On 4 November the Agency informed the US Environmental Protection Agency that in its view ‘the arrival of the ships...will result in a breach of international rules and Community law...and that the only appropriate action is that the waste (ships) be returned to the USA until all outstanding issues...have been resolved (EA’s letter of 4 November 2003 to US Environmental Protection Agency at Annex E.) The EA intended that they be read as firm requests to halt the sail and then to take back the vessels. The US did not so interpret the letters. Such letters need to be clear in language and in purpose if they are to be acted upon.

8: APPROVAL OF UK WASTE RECOVERY FACILITIES FOR SHIPS

1. Any proposal to develop a recovery facility for ships in the UK would need to be developed in conformity to the regulatory regime of England, Scotland, Wales or Northern Ireland as appropriate. I deal here only with the regime that applies in England.
2. The initiative rests with the individual developer. They may be helped if what is sought is in conformity with national, regional or local plans.

NATIONAL PLANS

3. The Government has published its policy on the transfrontier shipment of waste in the UK Management Plan for Exports and Imports of Waste. This reflects its commitments under the Basel Convention, OECD Decision C(92)39 Final and Council Regulation (EEC) No 259/93. It has also set out its vision for managing waste and resources better in Waste Strategy 2000. The strategy stresses the importance of recycling. There are no specific commitments or objectives in respect to ship recycling. Their absence is not however a great surprise. It is a specialised business and one that has not been associated with the UK for several decades.
4. A Government statement now on how the UK proposed to deliver its international commitments in respect to the transfrontier shipment of ships as waste and such waste generated within the UK would fill this gap. It would provide the broader context within which individual regulators could then consider individual proposals. If Europe is to provide facilities for the recycling of its own ships and the UK wishes to compete appropriate provision needs to be made in regional strategies and the waste plans and in the land use plans of individual authorities.

LOCAL PLANS

5. Waste planning authorities (County Councils, Unitary District Councils London Boroughs and the National Parks) are responsible for drawing up land use planning policies in respect to waste and incorporating them in a range of statutory documents that together comprise development plans for their areas. In shire counties the function is limited to waste (possibly in combination with a parallel requirement on minerals). In all other areas, including that of Hartlepool Borough Council, waste policies will form part of comprehensive plans for all forms of development. (The detailed arrangements for plan making are about to be changed in the Planning and Compulsory Purchase Bill, subject to concluding its passage through Parliament, but the substance of the requirements to prepare policies and give them spatial expression in plans does not change.)
6. At regional level, the present process, -of incorporating non-statutory regional waste strategies within non-statutory Regional Planning Guidance- is similarly to be replaced by statutory Regional Spatial Planning Strategies prepared by the planning teams of the Regional Assemblies (whether elected or not). A Regional Technical advisory Body (RTAB), made up of a network of waste related stakeholders will

assemble data, give technical advice on waste issues and recommend policies for inclusion in the Regional Spatial Strategy. These plan-making mechanisms at regional and local authority level are intended to enable local needs to be identified and also to provide a means of identifying requirements that go beyond the capacity of individual waste authorities to assess when local plans are reviewed. For the management of a number of waste streams a cross-boundary approach is essential.

HANDLING INDIVIDUAL PROPOSALS

7. There will probably be two elements, which may or may not be carried out on the same site. These are the recovery process and the disposal of any residual waste. Each will require planning permission and a waste management licence. And each authorisation will need to take account of the potential impact on the environment and habitats of European significance (The EIA and Habitats Directives). The full list of regulatory regimes involved is at Annex B.

8. If there are a number of competing sites there might be a case for the planning applications concerned being called in by the Secretary of State for a national decision. There has only been one firm proposal so far, by Able UK in Hartlepool. A formal application has yet to be made, but the local authority and other regulators have been in discussion with Able UK on a number of aspects, including the scope of the assessments needed for the EIA and Habitats Directives. If the subsequent application is left to the local authority to determine this will have the advantage that its officers are already familiar with the area and should be in a position to continue to liaise closely with local staff of the Environment Agency and other regulators on the associated application for a waste management licence and the EIA and Habitats assessments required.

9. The benefits of local decision making and local knowledge are however diminished if local communities who may be affected by the proposal do not consider that they are being presented with a coherent picture of what is involved. This did not happen with the US ships last summer. This was partly because there was not perceived to be a need for any authorisation that would have required public consultation. (TFS shipments are not normally subject to consultation because they are by law only going to facilities licensed to work upon them and to dispose of residual waste.) Described elsewhere is the role I recommend that the Environment Agency should take to help ensure that all necessary authorisations are in place for the transfrontier movement of ships before the notification process begins under the Waste Shipments Regulation (Chapter 7 paragraph 15). Assuming that is done there will then be a firm basis upon which the regulators involved can jointly map out what information is required and how the public can best be informed and consulted.

10. The difficulties that arose with the modification to the existing WML for Able UK were due in part to lack of clarity when the licence was drawn up originally about what should be included under the terms of the licence and what should be a condition. The recent moves by the EA to adopt a common format for licences and their proposal to introduce a standard application form for those seeking a subsequent modification are welcome.

9: ALIGNING AUTHORISATION PROCESSES

1. The information needed by the local community to take an overall view of the consequences of dismantling the US ships at Hartlepool was not available before consent was given by the Agency to the import of the ships. Able UK believed it had the necessary planning permissions and the Environment Agency believed that no new waste management licence was required. There was therefore no formal process for consulting the public through which information could be set out systematically. The procedures governing any proposal to develop a ship recovery facility in the UK should seek to ensure that the communities affected are informed in a coordinated way.

2. Some authorisations that would be required are given by Government Departments. Others are given by the Environment Agency and the Health and Safety Executive, set up by Government but responsible to their own Board/Commission. Local accountability is most direct in respect to planning decisions where responsibility rests primarily with local authorities, although Government does retain some significant powers to intervene on individual proposals. In each case who is the decision making body reflects the nature of the task and the balance to be struck between local and national concerns. To standardise national processes just to accommodate the needs of proposals for a ship recovery process is not likely to be productive. There are two possible exceptions.

3. Defra, ODPM, DTI, and DfT have recently examined the scope for bringing together the current marine consenting regimes under the Coast Protection Act, Food and Environment Protection Act (FEPA), Transport and Works Act, Harbour Authority Consent, Electricity and Telecommunications Acts, Petroleum Act, Planning Permission and the Government View. These are all relevant to developments which impact on the seabed and the marine environment. The review was not aimed specifically as those wishing to develop a ship recovery facility but if pursued it would be of benefit, replacing 9 separate application processes by one. Although the difficulties are not to be underestimated it must be more feasible to combine processes that are all within the direct control of Government Departments than where they are not.

4. Government is considering how to take forward the conclusions of that report. The interim decision to merge the administration of the Coast Protection Act with the Marine Consents Unit who administer the FEPA licence system is a welcome first step. If applications for all relevant permissions can be made at the same time it is easier for the regulator(s) to make connections. It is easier for those affected to get a coherent picture upon which they can comment. There is greater scope for producing one set of material on the impact on the environment and sensitive habitats.

5. The second possible exception concerns the two processes that are likely to be at the heart of any development for ship recovery-the planning system and the waste management regime. At present no waste management licence should be issued before an appropriate planning consent is in place. On receipt of an application for a licence the Agency writes to the local planning authority for information as to the

planning status of the site. It should review the terms in which it does so. The Environment Agency when it wrote to the local planning authority HBC about a proposed modification of an existing waste management licence in August 2003 said 'I would be grateful if you would advise me about the current planning status of the facility'. This did not encourage HBC to consider whether the modification had any implications for the existing planning consent. It would have been better if it had gone on to say- 'Please confirm that the use of the site in accordance with the proposed modification would remain within the terms of the existing planning consent for this site'.

6. This however will not be enough. Where there is a proposal concerning ships which requires planning approval and a waste management licence, both processes should be carried forward in parallel. EIA and Habitat assessments can be commissioned jointly ensuring that consistent assumptions are made-a failing in the US ships case previously – and a complete picture can be given to the public. The end of the process, the timing of decisions, will still need to respect the constraints imposed by existing planning legislation which prohibits the granting of a waste management licence before planning permission is given. This should not be a barrier given that the decisions are taken by two separate bodies-the local authority and the Environment Agency. Making one body responsible for both decisions in respect to ships is not practicable as the spread of expertise between existing bodies reflects their respective wider responsibilities for land use planning and environmental protection. (There is also a constitutional point in that it would not seem practicable on this context to consider removing planning powers from elected authorities.) Neither is it necessary if they share information and engage in a joint process-as is being done with the applications currently being prepared by Able UK.

7. Where the Environment Agency has taken the lead in convening a meeting of the regulators likely to be involved in assessing proposals for ship recovery, regulators collectively should also consider the scope for aligning processes for the other authorisations required in addition to planning consent and a waste management licence. This would open up the possibility of a single Habitats/EIA assessment that could be used by all the regulators concerned and a more coordinated approach to consultation with the public, including a common understanding of the method and timing of the release of information. The relevant Government Office should also be given the option of attending. Defra rely upon them-and English Nature-to ensure the requirements of the Habitats Directive are known to competent authorities. Their general knowledge of the region may also be relevant.

10: RESPONSIBILITIES OF DEFRA AND ENVIRONMENT AGENCY

RESPECTIVE RESPONSIBILITIES

1. The Department for Environment Food and Rural Affairs is responsible, within Government, for the development of policy on the protection of the environment and is accountable to Parliament for the implementation and delivery of those policies. It is also held responsible by the European Commission for the delivery of agreements reached within the EU on the environment.
2. The Environment Agency is a Non Departmental Public Body (NDPB) whose Board is appointed by the Secretary of State for Environment, Food and Rural Affairs. It is directly responsible for a wide range of regulatory regimes which are intended to deliver the Government's policies for environmental protection. The Board are responsible for the actions and performance of the Agency.
3. The policy areas most relevant here are those concerning the management of waste in the UK and the transfrontier shipment of wastes. The Government published its Waste Strategy, its vision for managing waste and resources better, in 2000. Central to the strategy is the greater recovery and recycling of materials. In March 2003 Defra produced a Consultation paper on Waste Management Licensing giving guidance on the licensing and supervision of waste recovery and disposal facilities. These facilities include (as a very small part of the whole) the processing and disposal of imported waste.
4. The policy on the import and recovery of waste is the subject of a series of international agreements negotiated by the Department. These are the Basel Convention, the OECD decision C(92)39 revised in May 2001 (C(2001)107 and the EU Waste Shipments Regulation EEC No259/93 backed in the UK by the Transfrontier Shipment of Waste Regulations 1994.
5. The Environment Agency is responsible, for approving applications for a waste management licence (WML) or the modification of an existing licence. It is also responsible as the designated competent authority, for evaluating and if appropriate approving applications to move waste in or out of the country for disposal or recovery in England and Wales
6. The Department draws upon the expertise of the Agency in the development of policy. The Agency, as an independent regulator is wholly responsible for the decisions it takes on individual applications. This separation of function is central to the relationship between Defra and the Agency. However this does not mean that the Agency should not be able to call upon the expertise of the Department and Ministers in the delivery of their responsibilities. In turn Ministers expect to be informed when there is a possibility that the handling of an individual case may make the Government's policy on the handling of hazardous waste the subject of debate.

APPLICATION TO US SHIPS

7. The Agency was aware in February 2003, from queries that were raised by Able UK, that there was a possibility that ships might be dismantled at Able UK's facility in Hartlepool. By April it was known that they might originate in the US. At that time Defra and the Agency were approached by the US State Department for advice on Able UK's record and the processes to be followed for a transfrontier shipment. The Agency responded in May and June, keeping the Department informed. This led MARAD to conclude that a contract to dismantle the ships in the UK should be pursued and an initial notification of a proposed shipment was made by the US Environmental Protection Agency on 5 June. This was succeeded by a modified notification on 26 June.

8. This was assessed by the EA and written consent was given on 22 July. Departmental officials were kept informed and they put a note to Ministers for information on 25 July. Neither the Defra note nor the more detailed briefing note provided by the Agency gave any indication that any necessary authorisations would not be in place when consent was given, in particular that the existing WML would need to be modified. On the contrary the Agency note said 'A transfrontier shipment notification to a particular facility would only be consented to if the site held a waste management licence that covered the waste in question.' This was misleading given that the Agency had given written permission 4 days earlier in advance of an application from Able UK to modify the existing licence.

9. The tone set up to this point was one that did not encourage the belief that Ministers should be brought more fully into the picture. The political element was underplayed. A progress report was put to Ministers on 15 August referring to possible difficulties with the planning permission for a dock gate/bund but again only for information. The Agency continued work on the modification of the WML and issued it on 30 September, but were sufficiently concerned by then about the status of the planning permission for the bund/dock gate to email MARAD to suggest that the ships should be kept in the US until matters were resolved. But the approach was at too low a level and possibly to the wrong body to be effective. Ministers were not informed of this development.

10. The FoE wrote on 3 October challenging the validity of the modification. Hartlepool Borough Council made an announcement on 7 October that planning permission for a dry dock gate/ bund had lapsed. The EA made a statement on the same day that the HBC announcement did not, in their view, affect the WML modification that had been made. They did think it prudent however at that stage to seek Counsels opinion on the validity of the modification. Meanwhile the first 2 ships set sail on 6 October and the second pair on 17 October.

11. The EA received advice from Counsel on 22 October that the waste management licence was invalid. Ministers were informed on 24 October and briefed more extensively by EA and Defra officials on 27 October. The US was asked by the Agency on 4 November to turn back the four ships.

12. By the time the Department and Ministers were informed at the end of October of the difficulties with the licence modification and their help sought to turn

back the ships US positions were entrenched and Defra Ministers were limited in the arguments they could deploy to persuade their US counterparts. There were concerns about the safety of the ships on a return voyage in sea conditions that were likely to deteriorate as winter set in. There were also problems about insurance. The intervention of Ministers did however enable agreement to be reached that the four ships would return to the US the following Spring, unless environmentally suitable and legally acceptable methods had by then been identified.

13. Looking through the papers produced and meetings held over the period between 22 October when the EA had legal advice that the WML modification was flawed and the issuing of statements by Defra on 6 November on the first two ships and on 15 November on ships 3 and 4 it is clear that there was a mutual understanding between the Department and the Agency of their respective roles and a common understanding how by working together using their respective networks as regulator and government they could best handle what was by then a difficult and complex situation.

14. The Agency could however have been quicker in enlisting departmental and Ministerial help in approaching the US authorities. The option of earlier action at a political level to seek a delay in the departure of the ships from the US does not appear to have been considered. Ministers subsequently were reacting to an unfolding agenda. There had been no discussion in the regular bilaterals held that the Agency's Chairman and Chief Executive each had regular meetings with Defra Ministers This reflected the way in which the case had been handled within the Agency rather than any shortcomings in the bilaterals. The attention given by the media led to the involvement of Director level staff during August, but it was only at the end of that month that warnings began to circulate at a senior level that there could be problems. FoE's letter of 3 October and the HBC 7 October statement led to greater involvement of senior staff.

15. The relationship between Defra and the EA is basically sound. There was a misjudgement in the Agency when the US made their first approach as to the potential political impact of importing the ships. And this affected the handling strategy pursued until August. Departmental officials relied perhaps too heavily on that judgement. By the time that Ministers were briefed at the end of July the Agency had already issued its written consent. It had all the appearance of a task accomplished. There would have been value however at that point in the Department and the Agency putting in place an agreed communications plan on a contingent basis. If such a strategy had been in place it would have raised the profile of the case within the Agency and may have encouraged them to call on the Department for help earlier, without compromising the Agency's role as regulator.

11: GUIDANCE

1. Guidance is needed for three reasons. Those engaged in the business of ship recycling/dismantling/scraping need to know what authorisations are required and how they should set about securing them. The communities that may be affected by them or other interested parties will want to know what is proposed, how they will be consulted and how they can contribute to the decision making process. And the staff of the regulators involved need to be clear what they are required to do.
2. Each regulatory regime generates its own guidance. To review it all in detail would be a lengthy task. Instead I have looked at the guidance available on the principal regimes concerned with ship recovery to seek to establish some general principles.
3. There is considerable guidance available, some of it of high quality and great practicability. For advice on the transfrontier shipment of waste the EA publish a clear comprehensive guide, which is also available on their website together with a copy of the Waste Shipments Regulation.
4. There is also a very full explanation (which is also used by staff internally) on the same website of how the Agency apply the Habitats Directive to their own permissions. This runs to many hundreds of pages. For those who want a more easily digestible account of what this Directive requires this is available on the English Nature website. Considerable background information is also available on the website of the Joint Nature Conservation Council. (JNCC members are English Nature, Scottish Natural Heritage and the Countryside Council for Wales). The Defra website lists relevant legislation and gives useful links to the JNCC website.
5. Waste Strategy 2000 sets out national policy on waste management. This and a Waste Management Licensing guidance document published in 2003 are available from Defra. They are also on the Department's website. Both are accessible to practitioner and commentator alike. The EA website contains a short description of the Agency's role and a copy of the Waste Management Licensing Regulations 1994. Further advice is by enquiry to the Agency's local office. Those interested in a FEPA licence will find guidance notes on the Defra website but will need to know that they are looking for forms MCU 3 and 5: there is no prior explanation of the purpose of the FEPA regime.
6. There is a comprehensive set off planning guidance, which includes guidance notes on planning and waste management (PPG10) and planning and pollution control (PPG23). PPG 10 also includes an explanation of the respective roles of the planning and waste management licensing processes. These are available in published form and on the ODPM website. The same guidance serves all three purposes identified above. Its usefulness is however always tempered by the date of the last revision. For PPG10 and 23 this was 1996 and 1994 respectively. Waste Strategy 2000 is a significant influence on the implementation of PPG10 *Planning and Waste Management*, not least through developments in the courts on for example BPEO. Proposals by ODPM to consult on the successor to PPG10 later this year are therefore welcome. But for the new Planning Policy Statement to be effective there needs to be a clear enunciation of

that the Government expects the planning system to deliver on waste. PPS10 can be expected to articulate general principles on the provision of national or sub-regional facilities, and these could be relevant to the provision of a waste recovery facility for ships. Planning policy is not however the right place to set out government policy on whether there is a need in the first place, and on the network of facilities it thinks would be required to satisfy that need.

7. Each sector has its own set of guidance. There is some variation in its quality and its accessibility. As each part comes up for review it is important that the three potential purposes for which it is needed are remembered. What is needed for internal guidance is not always suitable for the non-expert member of the public.

INTERNAL GUIDANCE

8. I will limit my recommendations on internal guidance to two. The Agency needs to review the arrangements they have for identifying cases that are novel and/or potentially contentious or high profile. There are arrangements in place within the Agency for front line staff to enlist the help of senior management and central services such as lawyers. However the US ships were seen by the transfrontier shipment team as routine in terms of the wastes involved. Accordingly both at national level and in the local area team processing was handled according to standard procedures. This did not encourage the wider perspective which was needed.

9. For cases that are identified as novel or potentially contentious or high profile the Agency should take a stronger interest in the other regulatory regimes that may be involved; and take this forward by convening a joint meeting with other regulators.

EXTERNAL GUIDANCE

10. Moving ships for recovery and putting in place facilities for recovery work is a specialist business in which it is reasonable to assume that those involved will want to seek specialist advice. Professional advisors should know what is required. Nevertheless Government ought to consider pulling together in one place a route map to the different authorisations that may be required, with hyper links to the websites of the regulators concerned for detailed guidance. Each of the regulators' websites should in turn have hyper links to the others (such as has been developed between Defra and the JNCC and between members of the JNCC). A route map would also help those who want to comment upon proposals. For them accessibility and clarity of language is particularly important. Present guidance is very variable.

11. The Environment Agency in their review have recommended that Defra, English Nature and the Agency should clarify the need for and nature of 'in combination' assessments under the Habitats Regulations and that this should be reflected in the procedures adopted by the regulators. The difficulties encountered with the assessments carried out for the modification of Able UK's existing waste management licence do not appear to be unique and some further work in this area, particularly on the nature and scope of assessments would be welcome, with the results incorporated into regulators procedures.