

ANNEX B – REVIEW OF EVIDENCE

1. Introduction

1.1 This annex considers the available research, surveys and data which help to explain how environmental enforcement is working and where there are obstacles to effectiveness. It suggests where change may be needed.

1.2 This annex draws on a supporting review of research and enforcement data carried out by WRc Plc as well as other material.

1.3 This is not intended to be a comprehensive study of the evidence on environmental enforcement, but it sets out what the Review team sees as key pieces of evidence. For clarity, the main documents, authors and sources of evidence are underlined in the text below. Full references are included in the footnotes.

2. What motivates compliance, or non-compliance?

2.1 Waite (2005)¹ presents enforcement as one element of a wider regulatory system. Separate pieces of research funded by the Health and Safety Executive (HSE) and by Defra (discussed below) show how in practice effective enforcement is only one of a variety of elements required for fully effective regulation.

Attitudes and behaviours

2.2 Wright et al (2005)² shows that employer attitudes to health and safety at work vary depending on sector and size. Some sectors are notably less inclined to see health and safety as important. The levers seen as most effective in changing behaviour also vary depending on expressed attitudes to health and safety. For example, organisations who do not believe health and safety is important or who report they are inhibited by cost tend to recommend more enforcement, among other levers. However, Wright et al do not consider enforcement in isolation. Key factors motivating health and safety improvements were confirmed as: business case, especially risk to reputation; enforcement; and the moral dimension. These factors were found to be intertwined.

2.3 Fear of enforcement, coupled with fear of damage to reputation, is an important motivator. HSE commented that “86% [of employers] agreed or strongly agreed that damage to reputation could cause them to lose business, with 82% feeling that they must comply with health and safety regulations to protect their reputation”³.

¹ Waite, A. “The quest for environmental law equilibrium”, Environmental Law Review, 7 (2005) 34 - 62

² Wright, M., Antonelli, A., Doyle, J.N., Bendig, M, and Genna, R “An evidence based evaluation of how best to secure compliance with health and safety law”(2005) - HSE research report 334 [<http://www.hse.gov.uk/research/rrhtm/rr334.htm>]

³ HSE press release 4/3/05 [<http://www.hse.gov.uk/press/2005/e05033.htm>]

2.4 The research argued that the impact on reputation is to increase internalised costs, through damage or potential damage to brand value. This depends on the brand being exposed, which is not always the case, as company names are not always associated with their brands. It also depends on reputation being valued, which is not evident in all types of operator. However, any impact of enforcement on reputation may thus help to internalise costs.

2.5 Wright et al quote their earlier work⁴ as finding a large body of research in the UK indicating that organisations are prompted to manage health and safety to avoid reputational damage from incidents.

2.6 They cite other work⁵ in support of their contention that publicity is important to maximise effect on reputation and thence internalisation of costs. It is suggested that reputational risk is growing, and organisations are increasingly motivated to manage their reputations and image. A link between risk and organisational action is dependent on awareness of a view from society at large, or more narrowly customers, or at least organisational perceptions of such views. Proportionate and timely negative publicity can have a role to play in enforcement effectiveness.

2.7 HSE has a web site register of convictions (from 1 April 1999 onwards) and one for enforcement notices. Evidence available to HSE indicates a low level of public awareness of the convictions register but even so, there is anecdotal evidence which points to use by insurers assessing risk, and by companies checking on the record of potential suppliers⁶. This suggests that when organisations are considering commercial transactions, there is a potential for a record of non-compliance to adversely affect reputation and profit.

2.8 When the Veterinary Medicines Service confiscates and destroys illegal medicines, this is publicised. Such action has prompted questions from offenders' customers (eg supermarkets) asking if an offender is in a farm assurance scheme.

2.9 Wright et al cite evidence⁷ of a range of pressures on companies, including those from insurers, customers and suppliers. This includes customer reinforced pressure regarding environmental legislation together with a need to create or maintain competitive advantage.

⁴ Wright, M., Marsden, S, and Antonelli, A. "Building an evidence base for Health and Safety Commission Strategy to 2010 and beyond: A literature review of the interventions to improve health and safety compliance", HSE research report (2004)

⁵ Yeung, K. "Is the use of informal adverse publicity a legitimate regulatory compliance technique?" 200[?]; and OECD publication "Reducing the risk of policy failure: Challenges for regulatory compliance" (2001)

⁶ personal communication

⁷ Vickers et al "Cultural Influences of Health and Safety Attitudes and Behaviour in Small Businesses" (2003) HSE CRR 150/2003

2.10 Turning to an area where reputation is less likely to be a motivating factor, Defra Waste Management Unit commissioned the Jill Dando Institute⁸ to research motivations behind fly-tipping and means to overcome it. This work adopted the perspective of research into criminal offending by setting out to describe the “opportunity structure” which currently tends to encourage fly-tipping.

2.11 The Jill Dando Institute point out that in general crime control work, it is well recognised that there are two types of offender:

- Opportunistic offenders – there are a lot of them, but they are generally less motivated to break the law, and more easily deterred;
- Persistent and prolific offenders – not many, but they account for a great deal of crime, are highly motivated and therefore less easily deterred.

2.12 The Jill Dando Institute study suggests that the same two types of fly-tipper exist. 39% of fly-tipping offenders had only been convicted once, while 6% of offenders accounted for 22% of all offences. The one-off offenders seem to be generally more petty and opportunistic, having convictions for other offences. The prolific fly-tippers appear to be specialists.

2.13 The Institute points out that this calls for two kinds of response, fitted to each group of offenders. Measures that make it harder or less rewarding to fly-tip are more likely to deter the opportunists. Enforcement resources need to be focused on the more committed group.

2.14 The study emphasises the need for strategic thinking, as opposed to enforcement dominated thinking. Incentives and drivers point to a need for local authorities to:

- coordinate services and strategy within and between authorities;
- have better intelligence;
- develop a knowledge base of what works;
- be able to identify higher level problems and pass them upwards for action.

2.15 There are also recommendations for improvement in the regulatory system. Enforcement is a necessary complement to these measures, but the study shows the possibilities for greatly strengthening the incentives to compliance in the regulatory system. If this does not reduce the level of enforcement needed, it at least offers the hope that it can be much better targeted.

2.16 Both reports indicate that a mix of interventions is necessary for effective regulation, of which enforcement can be only one part. The research suggests that the enforcement toolkit as a whole (and wider regulatory

⁸ Webb, B., Marshall, B., Czarnomski, S. and Tilley, N. (Jill Dando Institute) “Fly-tipping: Causes, Incentives and Solutions” (2006) – for Defra Waste Management Unit

approach), and specific tools (eg admin penalties) need to be designed with regard to attitudes in a particular sector or particular players in a sector. This may need different approaches in order to create different incentives for small and large firms, and for those with different motivations (out-and-out criminals at the extreme).

2.17 Assessing London's response to fly tipping, litter, graffiti, fly posting and abandoned vehicles, the London Assembly Environment Committee reported⁹ that "in order to reduce the impact of these issues, there needs to be a co-ordinated response to address the motivation and causes of the issues as well as tackle the symptoms. Desired behaviour must be made easy and attractive. Undesired behaviour must be made less acceptable and more difficult, including through effective enforcement". "Swift and co-ordinated action is needed to tackle the increase of fly tipping and the involvement of organised crime". The Committee based their assessment on evidence from local authority councillors, officers, community organisations, other public agencies, businesses and others, and drew on evidence of good practice.

2.18 WRc Plc cite a study conducted for Defra by the University of Wolverhampton¹⁰ which examined the level of organisation in wildlife crime and also examined the motivational factors for offenders through a survey of the agencies involved in wildlife crime. They found that, with the exception of habitat damage, all offences were considered to be planned in advance, many organised, sometimes involving the use of violence and, in some cases, a hierarchical network of offenders. Organisation sometimes involved good intelligence networks. When looking at motivational factors, financial gain was considered to be the main motivating factor for many offences. Entertainment and a feeling of power was felt to be the main motivation for offences involving cruelty to animals and the killing, harming or taking wild birds.

2.19 A core set of tools needs to be selected to create the right incentives to improve behaviour for the particular regulatory area – it would be important not to focus on adding enforcement tools piecemeal.

2.20 In the environmental context, the spectrum of attitudes and behaviours among operators includes at simplest an important distinction between generally responsible business on the one hand and the activities of career criminals on another. But the evidence above shows that the spectrum of attitudes and behaviours is likely to be far more complex. This is also indicated by judges' sentencing remarks:

- in a serious pollution case, involving a large company: "So far as the co-operation or lack of it with the Environment Agency is concerned, on the face of it the defendant's attitude appears cavalier, verging on irresponsible, [but] I accept that in this instance it was probably misguided rather than deliberately obstructing". ... "I accept that the defendants

⁹ London Assembly, Report of Environment Committee "Protecting the City Environment - London's response to fly tipping, litter, graffiti, fly-posting and abandoned vehicles" (2004)

¹⁰ Roberts *et al* "Wildlife Crime in the UK" (2001) – for Defra

have now begun to co-operate with [Environment Agency] but that really would have been expected before”.

- in a serious local pollution case involving a large company: “All these offences [at another site] pre-dated the incident in the present case and should have sounded alarm bells in the appellant’s senior management. One might have expected a proper review of risk management to have led to the imposition of a sufficient fail-safe system in the present case”.

Awareness – a pre-requisite for compliance

2.21 Wright et al point to awareness and understanding of requirements as a necessary precursor to compliance. They refer, in particular, to the need for operators to have a valid and accurate understanding of risk, of the costs and practicality of risk management, and of the internal benefits of compliance.

2.22 This follows logically from a model of compliance behaviour which is based on economic rationalisation, in which self-motivated compliance stems from high internalisation of the costs of non-compliance coupled with high knowledge or perception of risks.

2.23 The introduction in Wright et al refers to work indicating ways in which economic rationality can be limited:

- pursuit of profit opportunities is a stronger motivation than cost minimisation;
- benefits of compliance are unevenly spread in an organisation, so “local” management experience only costs;
- excessively short term focus; and,
- lack of information where it really counts.

However, economic rationalisation seems to provide a useful theoretical starting point provided these limitations are recognised.

2.24 As regards lack of information where it really counts, a number of surveys, submissions to the House of Commons Environmental Audit Committee, and research reviewed by WRc¹¹ finds variously that:

- Small and Medium-sized Enterprises (SMEs) are responsible for 80% of pollution incidents in England and Wales;
- 41% of SMEs believed clearer information would encourage compliance;
- only 14% of SMEs could name any environmental legislation, though 64% could recognise at least one piece when presented with a list;
- “environmental legislation is not top of [Federation of Small Businesses members’] list”.

¹¹ WRc Plc “The Effectiveness of Enforcement of Environmental Legislation” (2006) – for Defra

2.25 The Environment Agency's 2003 NetRegs survey¹² of Small and Medium Sized Enterprises showed that 76% had not heard of the waste duty of care for example. This finding is supported by other reports.

2.26 A recent survey commissioned by the Institute of Directors (IoD)¹³ among a structured sample of its members found that only 29% of respondents knew "a great deal" or "quite a bit" about environmental rules. IoD suggested that given 70% of its members are involved in the services sector, it might be unreasonable to expect them to demonstrate a strong grasp of rules related to, for example, waste management or air quality. However, IoD noted that the members involved in sectors such as construction, mining, or transport or manufacturing are heavily exposed to these issues, so their relatively low levels of awareness should be a significant cause for concern. The IoD survey showed that 59% of members in manufacturing knew "not much" or less; for construction, mining or transport, the corresponding figure was 52%.

2.27 WRc concludes there is huge scope for working with SMEs to achieve a higher level of compliance. It cites research indicating that:

- generic approaches to encouraging compliance may not be successful as the small business population is highly heterogeneous;
- the level of response to advice and information provided by HSE varied between sizes of organisation, cultural influences and industry sectors;
- evaluations of advisory and information campaigns carried out by HSE (for example publicity campaigns, guidance and provision of advice) indicate this work is effective in improving compliance.

2.28 From a practical point of view, the more general and the greater the awareness and understanding the more self-motivated compliance there is, and the more targeted enforcement can be.

Impact of enforcement

2.29 We have found little research which shows what impact enforcement has on attitudes and compliance behaviour.

2.30 Wright et al¹⁴ found that enforcement is a significant driver for health and safety at work. The study also found "scope for increasing the general deterrence effect of enforcement by increasing the level of publicity awarded [enforcement] actions", as discussed above.

¹² NetRegs SME-nvironment Survey 2003, Environment Agency. See also "UK SMEs and their response to environmental issues", Small Business Research Centre Monograph, Revell, A, and Blackburn, R (SBRC 03-04), Kingston University, July 2004. [<http://business.kingston.ac.uk/sbrc.php?item=monographs>]

¹³ Institute of Directors "The Business of the Environment: Policy and Opportunities ... a survey of IOD members", February 2006 [www.iod.co.uk]

¹⁴ Wright et al (2005)

2.31 In the field of market-based instruments, Stavins¹⁵ says that sulphur dioxide allowance trading in the US has brought home the importance of monitoring and enforcement provisions. On the enforcement side, the underpinning Act's stiff penalties have provided sufficient incentive for the very high degree of compliance that has been achieved.

Need for change?

- awareness and understanding are a necessary precursor to compliance, and thence to support more targeted enforcement;
- awareness of requirements seems to need raising considerably (though this is beyond the scope of the Review);
- policy-makers and regulators should take account of research which shows that: (i) it is necessary to understand operators' attitudes to environmental regulation, and what factors drive compliance or non-compliance; (ii) it is possible and valuable to "segment" the regulated community, in much the same way as professional marketing seeks to do, to ensure that the most effective "levers" are adopted; (iii) different approaches may be needed in order to create different incentives for small and large firms, and for those with different motivations (out-and-out criminals at the extreme).
- Fear of damage to reputation is an important motivator to compliance – more needs to be done to ensure that this mechanism for enforcement impact is maximised, proportionate to the breach.
- More needs to be done to assess the contribution of enforcement to the impact of environmental regulation.

¹⁵ Stavins, R.N. "What can we learn from the Grand Policy Experiment? Lessons from SO₂ allowance trading" (summer 1998) *Journal of Economic Perspectives*, Vol 12 (3)

3. Criminal sanctions

3.1 Criminal prosecution is the central characteristic of the current system of environmental enforcement so it is a good place to start.

3.2 Commentators have given much attention to the adequacy of criminal sanctions. This means in the vast majority of cases fines – the criminal courts have used other sanctions rarely.

3.3 It has been widely said that the courts have been imposing criminal penalties which are too low; on the other hand it has often been said by magistrates that sentences can only reflect the case presented to them, and prosecution cases could often be better presented; and the view is often expressed by business that prosecutor and court decisions are inconsistent and thus unfair. We look at the evidence around each of these in turn.

Adequacy of fines

3.4 An important finding of a Defra funded report on trends in environmental sentencing¹⁶ was that data was hard to come by and gaps existed in what was available. However, the report did not consider in any depth how this problem should be overcome. We return to this later.

3.5 The report also suggested that average fines were too low, though this conclusion is undermined by the limited data. For example, the data was based on separate charges, in which all information about the overall fine in particular cases is lost – the total fine could be much higher in a case where the offender was convicted and fined on more than one charge. It has also been pointed out¹⁷ that the available data does not allow the key sentencing factors of seriousness and ability to pay, both in turn many-faceted questions, to be unravelled.

3.6 Fines may be too low, but this conclusion cannot be supported by the available data. Kimblin (2005) suggests what data would be helpful: effect of prosecution; fines; prosecution and legal costs on defendants; relationship between this and deterrence; and what the appropriate penalty should be. This does not seem systematic enough, but it is clear that the available data does not tell the story one way or another.

3.7 It is interesting to note that fines for breaches of the packaging waste regulations are substantially higher than for other waste offences. This tends to undermine arguments that strict liability¹⁸, or in this case absolute liability,

¹⁶ C Dupont and P Zakour “Trends in environmental sentencing in England and Wales” - for Defra

¹⁷ R Kimblin “Penalties in regulatory crime” (2005) 17 ELM

¹⁸ “Strict liability”: where to establish that an operator has committed an offence the only thing that needs to be proved is the act or omission (there is no need to prove any intention or recklessness on the part of the operator), subject to a defence that (for example) the operator took all reasonable precautions and exercised due diligence. “Absolute liability”: as strict liability, but without a defence.

in itself undermines fine levels through “trivialisation”, discussed in Section 3, “Liabilities in Legislation”.

3.8 In a recent case, an operator should have paid for the recycling and recovery of about 970 tonnes of packaging waste handled by the company over a six year period. The company should have registered with the Environment Agency as a producer of packaging and should have purchased the necessary Packaging Waste Recovery Notes. This was not done because of misunderstandings within the company, which was estimated to have saved about £22,000 as a result. The Agency acknowledged that the company fully accepted and supported the principle of recovery and recycling. Magistrates fined the company a total of £25,000 and ordered it to pay £2,176 costs.

3.9 Ideally it would be possible to compare overall levels of fine with evidence in a particular sector (eg waste disposal) on the level of economic gain, and costs of environmental damage and clean-up. But, WRc¹⁹ has found this is not generally available, even at the macro level. However, the growing level of illegal waste disposal alone²⁰ indicates these gains and costs may be substantial. Ineed, the costs of removing fly-tipped waste recorded in the Flycapture database may be understated.

3.10 Alternatively, it could be argued that the level of average fines is too low by orders of magnitude, but that would need to be supported by analysis of what level of fine would be sufficient to achieve the desired purpose. As Kimblin points out this has been lacking.

3.11 There have been several increases in maximum lower court fines in various pieces of environmental legislation, for example to £50,000 for fly-tipping offences (Clean Neighbourhoods and Environment Act 2005). These have given magistrates more headroom to deal with serious offences involving economic gain and environmental damage. Often, such increases have also been presented as providing an indication to the courts that environmental cases are potentially serious. [However, there is no evidence that past hikes in the maximum lower court fine have led to any marked change in the general level of environmental fines²¹].

3.12 Under health and safety at work legislation, there was a marked percentage increase in the average lower court fine in 1993/1994. The maximum fine for most offences had gone up to £5,000 and for certain offences (for example failure to comply with enforcement notices) to £20,000. The overall average fine for health and safety offences (per separate offence) doubled, though from a very low level²².

¹⁹ WRc Plc “The Effectiveness of Enforcement of Environmental Legislation” (2006)

²⁰ Environment Agency reported a 40% increase in incidents of illegal dumping that it dealt with between 2001 and 2003. Local authorities also report increases in fly-tipping they have dealt with – across England and Wales they dealt with more than 70,000 fly-tipping incidents every month. [source Defra WMU draft consultation document] The Jill Dando Institute (2006) estimates 1 million fly-tips each year.

²¹ WRc report (2006)

²² HSE Offences and Penalties report (2003/04)

Purposes of enforcement

3.13 We can only consider whether fines or other criminal penalties are sufficient by reference to the purposes of enforcement, and working of wider regulatory system.

3.14 Based on a variety of commentaries, the purposes of environmental enforcement could be said to be:

- Prevent continuing harm
- Secure remediation of damage
- Remove economic gain from non-compliance
- Make restitution to communities adversely affected
- Publicly condemn moral wrong-doing
- Promote future compliance
- Protect the environment

Not all will be relevant in every case. Stopping continuing harm is not likely to be a purpose of sentencing, as it should have been done earlier if possible.

3.15 As the enforcement data is insufficient in itself to reach conclusions about whether fines are achieving their purpose, the Review has set out to obtain information on a number of particular cases and to consider whether sentencing had achieved enforcement purposes (**Annex D**).

3.16 The Review has concluded that the purposes of enforcement are generally not met (see analysis in main report), arguably apart from publicly condemning and punishing moral failings.

3.17 Will the total penalty in such cases promote compliance? As sentencing stands, the fine does not seem to have been a strong deterrent in itself, unless the attitude of the offender is strongly susceptible to the reputational penalty it entails.

Economic gain and clean-up

3.18 Cases are often quoted where offenders have been left with economic gain or costs avoided well beyond the level of fine imposed²³. WRc points to examples quoted by the Hampton Report²⁴:

²³ EA submission to House of Commons Environment Select Committee, quoted in WRc (2006)

- a man fined £30,000 having been paid £60,000 to dump toxic waste illegally. The waste cost the local authority £167,000 to incinerate. (Just as importantly this kind of case may illustrate the inadequacy of financial sanctions alone);
- a waste company fined £25,000 for having failed to register for a waste disposal licence, thus saving £250,000 in cost;
- A company in the land management sector fined £830 for illegally dumping several thousand tonnes of spoil and garden waste over a ten year period.

3.19 A report by the National Audit Office Wales²⁵ gives the example of a private site owner who had been disposing of waste who was fined (along with others) a total of about £800, but was estimated to have avoided costs of £400,000.

3.20 WRc also cites a comparison made by Naturewatch between fines imposed on developers convicted of habitat destruction offences (£250-£7,600) and the direct costs incurred by a responsible developer to protect great crested newts during a development (about £45,000).

3.21 However, WRc could find little reliable data on the cost of cleaning up damage caused by prosecuted offences.

3.22 It is important to note that the courts have until recently had little opportunity to ensure that remediation or restitution occurred. The Clean Neighbourhoods and Environment Act introduced a power for the courts to order those who have illegally disposed of waste to reimburse the Environment Agency for the cost of cleanup. This came into force in October 2005, and we have to wait until offences since then come to court to see what use the courts will make of it. However, this power will only make illegal operators pay for clean-ups already done by the regulator.

3.23 SSSI legislation does provide for the courts to take account of any economic gain made as a result of an offence. Legislation on wildlife offences does not, which makes it difficult for sentences to properly address cases where pursuit of gain has resulted in destruction of wildlife, as in some cases against developers.

3.24 The Proceeds of Crime Act 2002 also made provision for gains to be removed, but has not yet been successfully used in an environmental case. Lifestyle criminals are usually very good at hiding their gains and putting assets beyond reach. The Environment Agency is in discussion with the Serious Organised Crime Agency about a number of cases.

²⁴ "Reducing administrative burdens: effective inspection and enforcement", Sir Phillip Hampton - Cabinet Office, see http://www.hm-treasury.gov.uk/budget/budget_05/other_documents/bud_bud05_hampton.cfm

²⁵ National Audit Office Wales "Environment Agency Wales: Regulation of Waste Management", for the Auditor General for Wales (2004)

3.25 The Environment Agency indicates that in reality, in most cases, illegally dumped waste will not be cleared up unless:

- the landowner does so (and it will often be beyond their resources)
- the waste presents significant human health risks, or risks other serious environmental damage, in which case the Agency may need to act.

3.26 The present sentencing framework, in legislation or in guidance, makes no comprehensive provision for attacking gains from non-compliance or for remediating damage. This needs to be addressed if the polluter is to pay. Any solution needs to apply widely so as to avoid creating loopholes which criminals can exploit.

Level of deterrence

3.27 Ogus and Abbott²⁶ consider the extent to which criminal penalties create an incentive to compliance by reference to traditional deterrence theory. They find that level of deterrence depends on likelihood of detection coupled with scale of anticipated penalty.

3.28 Prosecution is reserved for the most serious cases, in line with proportionality. But the general level of penalties is arguably too low to achieve important purposes, as set out above. Ogus and Abbott argue that the current sanctions regime would only have an impact if one assumes an implausible degree of misapprehension on the part of possible offenders of likely penalties for non-compliance, or of being caught.

3.29 Ogus and Abbott point to evidence that a degree of bluff may be used by regulators to compensate for inadequate overall deterrence, for example by pointing to strict liability or high conviction rates, though this would not be in line with Better Regulation principles. This appears to be an example of how, as Waite suggests, weaknesses in one aspect of the system may be compensated for in other ways. However,, the system is not working as it should..

Ability to Pay

3.30 Taking account in sentencing of ability to pay, following consideration of seriousness, is an important part of ensuring fairness: equal punishment irrespective of means.

3.31 Importantly, the Court of Appeal has said that if a defendant makes no representations as to ability to pay the court will assume they can pay any fine imposed. An onus is placed on the defendant to show that their means are limited.

²⁶ A. Ogus and C. Abbott "Pollution and penalties" paper presented to Symposium on Law and Economics of Environmental Policy, UCL (September 2001).

3.32 The Court of Appeal has indicated that courts should be prepared to put a company out of business in extreme cases²⁷.

3.32 The opportunities for stripping the proceeds of crime from “lifestyle criminals or repeat offenders have been mentioned above.

3.33 In so far as we have evidence from the sample of cases examined, the courts appear to take ability to pay into account. The examples in **Annex D** show this happening.

3.34 Fairness in recognising ability to pay is applied to companies just as to individuals. However, as Kimblin points out, there are several factors which determine a company’s “wealth”, including: turnover, gross profit, net profit, fixed assets, liquid assets, liabilities, cash flow and ability to borrow. Regulators make use of experts to draw out ability to pay in some cases when it is contested and issues are complicated.

3.35 It has been argued that for sentences to do their job, fines need to be related to turnover or profitability. However, it seems more useful to see these factors as aspects of the complicated question of a company’s ability to pay. It can be argued that the main factors in sentencing environmental offences should be connected with seriousness – actual or potential harm, and culpability.

Presentation of cases

3.36 Magistrates can only consider a case based on the evidence presented, and magistrates will often have no opportunity to consider prosecution or defence summaries until the hearing itself or just before. It has sometimes been suggested that cases are not well presented, but we are not aware of any firm current evidence to that effect.

3.37 So-called Friskies²⁸ schedules are intended to ensure that all the relevant factors relating to seriousness, and aggravating and mitigating factors are set out for the court beforehand, and if possible agreed by prosecution and defence. Their use might be taken as an indication that the important factors have been set out for the courts’ attention.

3.38 Environment Agency policy is to use Friskies schedules in the most serious cases – Environment Agency’s chief prosecutor estimates that they are used in half of their cases.

3.39 English Nature have begun to use Friskies schedules in prosecutions for damage to Sites of Special Scientific Interest (SSSIs).

²⁷ R v F. Howe and Son (Engineers) Ltd (1999)

²⁸ R v Friskies Petcare Ltd (2000)

Sentencing guidance and consideration by the courts

3.40 It has been argued by Kimblin that the broad factors that need to be taken into account in sentencing have already been identified by the Court of Appeal (also reflected in the Magistrates Association's own guidance), and that there is a broad framework for deciding the most serious cases.

3.41 In *R v Milford Haven Port Authority* [2000] Env LR 632, the Court of Appeal declined to issue specific environmental guidelines as had been proposed by the Sentencing Advisory Panel. Instead, it drew attention to existing relevant judgments, such as *R v F. Howe & Son (Engineers) Ltd*²⁹. More specifically, the Court of Appeal has set itself against any sentencing tariff on the basis that cases are so variable.

3.42 WRc argue that as sentencing practice stands the courts are obliged to "fit any penalty within the framework of previously imposed fines". The effect of this has been seen in a number of cases in which a more substantial fine than usual has been considerably reduced on appeal. WRc suggest this approach promotes consistency but does not accord with judicial acknowledgements that levels of fines for environmental offences are too low. Arguably the existing general level of fines tends to be preserved.

3.43 WRc concludes that:

"In [*R v Anglian Water Services Ltd* [2003] EWCA 2243] the Court was invited to endorse a 'tariff' for penalties based upon the common incident classification system adopted by the Environment Agency This ... was rejected ... [as] each case must be considered in the light of its own facts However, the Court was shown the Magistrates Association circular, *Fining of Companies for Environmental and Health and Safety Offences* (Magistrates Association 2001) and observed that "it provides helpful advice which we endorse" noting, in particular, the advice that "Magistrates should accustom themselves . . . to imposing far greater financial penalties than have generally been imposed in the past". The difficulty remains, however, that any magistrate or crown court judge who was minded to act upon that statement, by imposing a significantly greater penalty than those previously imposed for relevantly similar offences, might find the sentence being the subject of an appeal grounded on the 'consistency' issue noted above".

3.44 The Magistrates Association sentencing guidelines include an annex on environmental and health and safety cases. This guidance was first issued in 2001, and elaborated in 2002 and 2003. However, there is no evidence of any marked change in level of environmental fines following these developments.

²⁹ reviewed in WRc 2006

3.45 A magistrate will typically encounter an environmental case rarely³⁰. Dupont and Zakour cite anecdotal evidence from prosecutors that magistrates who had training in the issues, understand cases better and therefore have a sounder and more consistent approach. The same study also notes (page 30) that “a large majority of ... people ... consider magistrates understand the evidence”.

3.46 The report “Environmental Justice”³¹ quotes the Chartered Institute of Environmental Health (CIEH) as finding that the courts generally, and perhaps the magistrates courts in particular, have an “inevitably lay view of environmental issues, which reflects the communities they serve. That is not inappropriate even if it is not always scientifically correct and it is not to imply that they do not care about the environment and damage to it”. The CIEH recognises, says the report, this may place a small additional burden on witnesses and advocates.

3.47 The sample of cases at Annex D tends to show magistrates making appropriate decisions as regards ascribing blame, assessing seriousness within the bounds of past cases, and tailoring fines to ability pay. But, as already indicated, other purposes of enforcement are arguably not being achieved.

3.48 If, as suggested above, existing cases identify the broad sentencing issues, and prosecutors are raising the issues, and the courts are considering those issues, then those who argue for more information and training, or more specific sentencing guidelines for magistrates or others must say what more needs to be provided. If the debate is to move forward, a fresh perspective is needed as a basis for communication, information gathering, training and debate.

Consistency in fines

3.49 The proportionality principle creates a high threshold for regulatory as opposed to general criminal prosecutions. The evidence of high conviction rates (95% in the case Environment Agency) and rarity of unconditional discharges shows that regulators generally bring prosecutions which are seen by the courts as having been properly brought. We are not aware of any evidence which shows that regulatory prosecutions are generally other than proportionate. Low fines could not be explained in that simple way.

3.50 There is variation in average environmental fines across regions which could be taken to suggest inconsistency in sentencing practice³². However, important variables of ability to pay and up to 30% discount for an early guilty plea make such assertions difficult to sustain from the available enforcement

³⁰ C Dupont and P Zakour “Trends in environmental sentencing in England and Wales” , and other sources

³¹ Environmental Law Foundation, Leigh Day & Co, WWF “Environmental Justice” (2004)

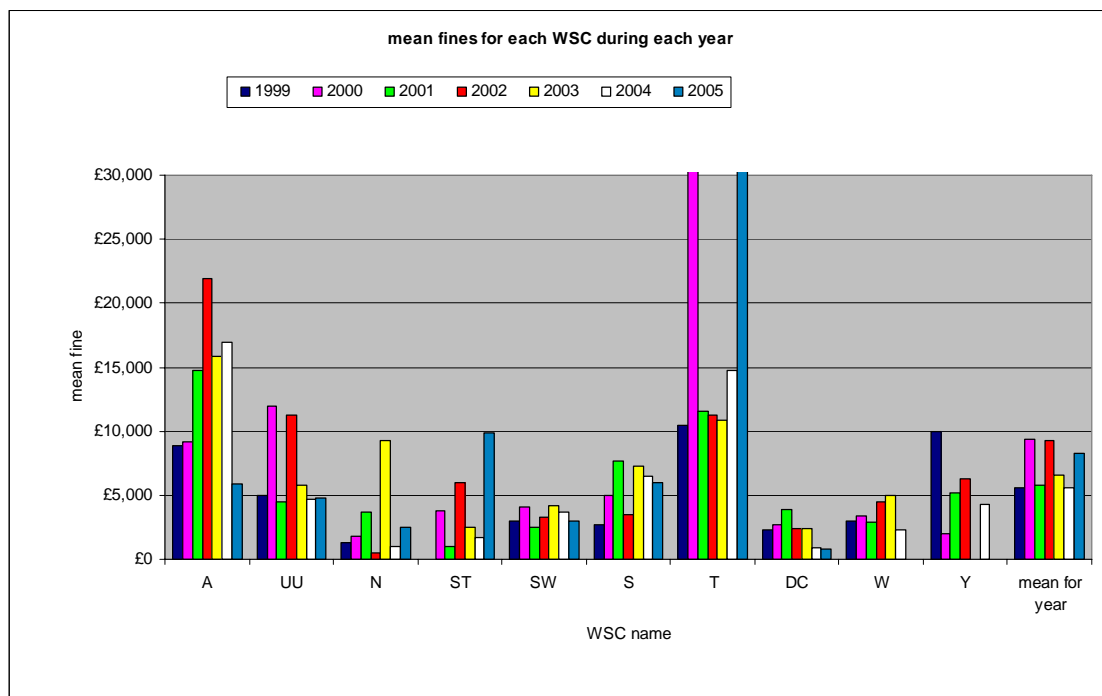
³² Better Regulation Executive “Regulatory Justice: Sanctioning in a post-Hampton world”, consultation document (May 2006) Figure 2.1, *Regional average fines (Environment Agency)*.

data, especially when public interest questions and other variables are also taken into account.

3.51 WRc³³ has pointed to what approximates to a broad geographical split in England and Wales between a lower general level of fines in West and North on the one hand, and a higher general level in South and East. This may suggest that economic factors are significant in sentencing, for example in considering the impact of sentences on employment opportunities. However, this would be a research question in itself.

3.52 It is interesting to compare fines against water companies, as they all relate to operators who are large private undertakings and unlikely to have made representations about ability to pay, an important variable. On the other hand early guilty pleas are seen in many but not all cases, leading to a discount in fine of up to 30%. The data below has been helpfully provided by a water industry contact:

Table 1 – Chart illustrating the mean fine in each year for the main Water Services Companies.



The chart appears to show significant variation between years (though note small numbers of cases) and more importantly perhaps between regions.

³³ WRc report

Table 2 - Summary details of pollution events which resulted in different sizes of fine.

	trial date	summary details	Fines
1	22/11/01	Bathing water failure due to design of inlet works at STW	3 fines totalling £30,000
	02/09/04	Shellfishery closed for 2 weeks following burst sewer	£7,500
	13/02/03	Blue Flag beach contaminated with sewage due to incorrect valve setting at STW	£1,500
2	18/06/04	4 th pollution in 3 years due to blocked / burst sewer	£18,000
	27/06/03	5 th pollution in 19 months due to sewer failure	£7,500
3	07/10/04	Blocked sewer led to 250 fish killed	2 fines totalling £32,905
	26/09/03	Blocked sewer led to 200 fish killed	2 fines totalling £8,000
4	15/10/04	PS failure led to 4000 fish killed	£15,000
	28/08/03	PS failure led to 3000 fish killed	2 fines totalling £6,000

3.53 Tables 1 and 2 raise questions about consistency in sentencing. However, despite the relative similarity of operator and breach there are still several factors which could be involved in leading to variation in fine. Early or late guilty plea is mentioned above. The courts view of seriousness may also be heavily influenced by local factors such as proximity of housing, or impacts on uncommon species for example.

3.54 The data does not allow much to be said confidently about consistency or lack of it. This is serious, as even a perceived lack of consistency in sanctions serves to undermine the credibility of enforcement.

3.55 Operators and others do need sufficient information to indicate whether cases have been treated consistently in decisions whether or not to prosecute and in sentencing. In this respect, information is needed which indicates both the circumstances of different cases and the connected enforcement outcomes, which is not available in existing enforcement data. However, there will in practice be severe limits to the level of detail which could be provided in overall information on cases.

3.56 Operators and third parties have access to a range of complaint and appeal mechanisms to challenge alleged inconsistency by regulators: regulators' internal complaint procedures; the Parliamentary Ombudsman; judicial review; and through the criminal trial or by appeal against sentence in particular criminal cases.

Length of cases

3.57 The Environment Agency finds that on average the time between incident and trial is 7 months. Typically, 5 months of this is investigation and 2 months readying the prosecution. In a few cases, the period is longer – up to 2 years.

Need for change?

- The view that fines are generally too low, or inconsistent cannot be supported by the available enforcement data in itself;
- The available data does not allow members of the wider community, including businesses, to reach a view on whether prosecutions and sanctions are broadly consistent;
- As sentencing stands, fines do not seem generally to have been a strong deterrent in themselves, unless the attitude of the offender is strongly susceptible to the reputational penalty a fine entails.
- The main factors in sentencing environmental offences should be connected with seriousness - actual or potential harm, and culpability. Turnover or profitability are most usefully seen as aspects of the complicated question of a company's ability to pay.
- The sample of cases in Annex D tends to show the courts (1) making appropriate decisions as regards ascribing blame, and assessing seriousness, within the bounds of past cases and a fairly limited range of possible fines; and (2) tailoring fines to ability pay. But offenders are generally left with gains from non-compliance, damage is not generally put right, and restitution to affected communities is not secured. The polluter doesn't pay, or when the polluter pays in the sense of being punished the fine does not go to putting right the harm. Fines are therefore too low in specific respects.
- The factors which should be taken into account in sentencing decisions are not presented in a simple, clear framework by policy-makers, regulators, or in sentencing guidance. Sentences cannot be related to the purposes of enforcement, so nobody can tell whether a sanction was adequate. Complaints therefore persist.
- The present sentencing framework, in legislation or case law, makes no comprehensive and systematic provision for attacking gains from non-compliance, or for putting environmental damage right, or for restitution;
- Overall, the lack of evidence about adequacy of criminal sentencing is strong evidence for a more explicit approach, in guidance and decision-making, and in recording information about both.

4. Liabilities in legislation

4.1 Strict liability is used widely in environmental law. WRc defines strict liability as referring to:

“those criminal offences where the defendant has been shown to have committed the wrongful act, but there is no need for any intention, recklessness or negligence to be established to secure a conviction”.

4.2 Waite (2005) usefully describes a spectrum of liabilities from absolute (no defence), to strict (various defences, eg. due diligence), to fault based (requiring negligence or worse to be proved), to no liability. The Review adopts these definitions.

4.3 In different areas of environmental legislation, we find a range of liabilities from absolute to fault based. The nature of the defences in strict liability also vary. Appendix 1 gives examples.

4.4 In the UK, Australia and Canada³⁴ “the removal of the common law requirement for a mental element in “public welfare” legislation has been justified on the basis of protecting the community by enforcing a high standard of care. Without strict liability, this standard of care has the potential to be undermined by the difficulty for the prosecution in proving a guilty mind in these types of cases.

4.5 Some legal commentators³⁵, arguing mainly from first principles, suggest that on the balance of arguments strict liability reduces the likelihood of strong deterrence in environmental cases which are brought before the criminal justice system. It is argued that strict liability “trivialises” environmental offences and leads to weaker penalties. It should be noted that these discussions tend to be confined to impact within the criminal justice system.

4.6 If arguing that strict liability is in the public interest, it is important to show the means by which it supports the public interest. The balance between pros and cons seems to hinge on the extent to which in practice strict liability can be argued to support the principles of prevention and “polluter pays” which underpin environmental law.

4.7 We do not believe that strict liability should be seen as a principle in itself. It is a possible means to an end, to be tested against available evidence as to whether it is the best formulation to secure compliance, compared to other options. On the other hand it would be wrong to change to some other form of liability without evidence that change would be for the better. What evidence is there on the impact of strict liability, for good or ill in

³⁴ “Principled Regulation: Federal Civil and Administrative Penalties in Australia”, Australian Law Reform Commission, Report 95, tabled before Federal Parliament 19 March 2003, page 146, paragraph 4.33

³⁵ eg. WRc commentary on strict liability (2006)

terms of the effect of enforcement and regulation on environmental protection?

4.8 The courts themselves have strongly endorsed reasoning that strict liability is essential for public policy purposes³⁶. In particular, without strict liability there would be serious pollution incidents for which nobody would be held to account if conviction always depended on proving fault on the part of the operator.

4.9 Arguments for or against using strict liability will rest heavily on showing either the chain of intervention by which strict liability supports prevention and “polluter pays”, or the effect of strict liability on enforcement efficiency.

4.10 **Efficiency** first. Based on regulators’ general experience of the criminal justice system, increased costs may be expected from any move to a fault based system. These would stem from more intrusive regulator investigation, and corresponding costs to business; increased prosecution and defence effort; and lengthier trials.

4.11 Many defendants can be expected to make every effort to exploit doubt under a fault based regime. This would be all the easier given that the operator best understands their own organisation and systems, and indeed controls the information relating to it. Prosecutors³⁷ indicate that large companies sometimes use these opportunities to the full. This would risk lengthening further the criminal justice process. There is a strong public interest in allocating responsibility for incidents as quickly as possible to encourage clean-up - this argues for strict liability.

Many general criminal offences also involve strict liability, eg causing death through dangerous driving. Rather than strict liability itself leading to trivialisation, perhaps any perception that environmental offences are less serious stems more from being in the special category of “regulatory offences”.

4.12 The Court of Appeal itself has said that magistrates must accustom themselves to imposing much heavier fines in appropriate circumstances³⁸. On the other hand, the courts also see regulatory crime as a special category, which permits legislators to shift procedural checks and balances in the prosecutor’s favour in the interests of public policy³⁹. This has allowed strict liability and reverse onus. (Whether stiffer, and more truly criminal penalties such as availability of longer terms of imprisonment would raise questions about the level of defendant protections remains to be seen).

4.13 So, operators might seek to portray regulatory incidents as “accidental” and convictions as ‘technical’. There is some evidence that defence lawyers pursue arguments of this kind in mitigation, intending to “trivialise” the strict

³⁶ R v Milford Haven Port Authority [2000] 2Cr App R(S) 423, p432

³⁷ personal communication – EA prosecutor

³⁸ R v F. Howe and Son (Engineers) Ltd (1999)

³⁹ Davies v Health and Safety Executive [2002] EWCA Crim 2949

liability offence at issue. De Prez cites examples, but offers no evidence as to whether courts have been swayed by such tactics, indeed pointing to a trend towards case law stiffening the demands of strict liability⁴⁰.

4.14 Overall, the evidence for such a “trivialisation” effect is not strong. Indeed, any “trivialisation” may be diminishing as society increasingly expects the courts to get tougher. The CBI for example, in a recent report on environmental regulation, says “Business wants to see firms which flout regulations for their own gain dealt with by the full force of the law”⁴¹. The Hampton report argues similarly. NGOs see deliberate flouting of environmental law as especially serious.

4.15 Examination of prosecutor decisions indicates that most environmental prosecutions are in fact brought in cases where there is evidence of significant negligence or intent to break the law, or alternatively serious environmental risk or damage. Indeed, any serious negligence, or recklessness or wilful intent is an important factor in sentencing. In practice it could be argued that strict liability, plus exercise of regulator discretion in this way amounts to a fault based system anyway. This seems to have long been a feature of strict liability regimes more generally, such as the Factories Act 1961 (largely superseded after 1974) considered by W. Carson in 1970⁴².

4.16 The position appears to be that only the most serious cases are brought to the criminal courts. However, the perception of regulatory offences as a separate category would seem likely to impact on views about seriousness. This appears to support an argument for distinguishing regulatory offences where fault is a central feature, as well as a more structured approach to sentencing.

4.17 As regards the **intervention chain**, suggestions that strict liability supports the preventive principle seems to depend on the extent to which it helps to prompt preventive behaviour.

4.18 Waite cites land contamination regulation as a field in which operators appear to act as a result of strict liability in ways which support the aims of regulation. For example, it appears that those buying land routinely do “due diligence” as regards land contamination.

4.19 We have not been able to uncover any evaluation of the use of strict as opposed to fault based liability in the UK. However, in the USA, Alberini and Austin⁴³ found that strict liability reduces the frequency and severity of pollution releases, but its effects vary with firm size.

⁴⁰ De Prez, P, “Excuses, excuses: The Ritual Trivialisation of Environmental Prosecutions”, *Journal of Environmental Law*, Vol 12, No 1 (2000)

⁴¹ CBI brief “Feeling the Benefit: Getting Environmental Regulation Right” (2006)

⁴² Carson, W. “Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation” *Modern Law Review*, Vol 33 (1970)

⁴³ Alberini, A and Austin, D “Accidents waiting to happen: liability policy and toxic pollution releases”, *The Review of Economics and Statistics*, Nov 2002, Vol 84 No. 4 729-741

4.20 Alberini and Austin used as a large-scale natural experiment the variation in liability under State provisions for cleaning up contaminated sites not serious enough to be covered by the Federal “Superfund” cleanup scheme. States with strict liability had introduced it at various times – others had kept fault-based liability. Caution is needed in extrapolating from US to UK, but this research tends to support the contention that strict liability is more effective than fault-based liability in promoting environmental protection.

4.21 However, the desired impact of strict liability could be weakened or modified in a number of ways:

- inadequate penalties undermining the deterrent effect of likely conviction;
- possible effect of defences, or the absence of defences;
- the sheltering from full liability of firms with limited assets.

Effect of defences

4.22 Absolute liabilities seem to depend particularly heavily for effect on detection, or expectation of likely detection, and expectation of deterrent penalties. The absence of any defence, such as due diligence or taking reasonable steps, seems to allow no other mechanism to stimulate preventive behaviour. Workshops on administrative penalties developed to support this Review (see **Annex C**) suggested that additional incentives to comply should be built into administrative fines⁴⁴.

4.23 It is sometimes suggested that absolute offences, intended to provide strong deterrence, could be undermined by the much higher chance of conviction (if the offence is detected), prompting the calculation that “as well be hung for a sheep as a lamb”. We are not aware of any evidence to that effect.

4.24 Do defences under strict liability such as “due diligence” encourage precaution, or do they promote evasion or token paper systems? Anecdotal evidence of the latter negative effect is sometimes offered, but we have been unable to find any research one way or the other. The attitude or culture of the operator would seem to be a crucial factor. This reinforces the need to understand what motivates compliance or non-compliance in the sector being considered for regulation.

Inadequate fines

4.25 Traditional deterrence theory suggests that a mechanism such as strict liability which reinforces the likelihood of a penalty will increase enforcement effectiveness if the expected penalty is substantial.⁴⁵

⁴⁴ Henley Centre Headlight Vision “Report on administrative penalties simulations” (2006) - for Defra

⁴⁵ Ogus and Abbott, discussed above

4.26 We concluded above that the overall fine in environmental cases often fails to fully support the purposes of enforcement – fines are generally inadequate in that sense, allowing advantage to non-compliance. Based on the deliberations of the courts in a sample of cases, we consider this has more to do with the lack of a sufficiently structured approach to sentencing in environmental cases, and lack of court powers, rather than any tendency for the courts not to take environmental cases seriously. Nevertheless, the desired impact of strict liability appears to be weakened at present.

Sheltering from liability

4.27 In the USA, researchers Aberini and Austin⁴⁶ found that small firms may have specialised in more risky production processes, partially sheltered from strict liability by limited assets. This suggests another potential factor which could undermine the impact of strict liability.

Need for change?

- Based on general experience of the criminal justice system, increased costs may be expected from any move to a fault based system;
- There are strong arguments for strict liability on regulatory efficiency grounds, provided use of criminal prosecution is then transparent and proportionate.
- There is some evidence from research in the USA, that strict liability has the effect of reducing serious pollution incidents;
- Evidence for strict liability “trivialising” environmental offences in court is not strong. Any lessening of perceived seriousness may come more from regulatory offences being seen as a separate category. This reinforces an argument for distinguishing regulatory offences where serious culpability is a central feature.
- Strict liability is designed to support key environmental regulation principles of prevention and polluter pays, but its impact tends to be undermined by fines which do not fully achieve enforcement purposes;
- There is a need to gather evidence about the impact on preventive behaviour of defences in strict liability.
- Operators with limited assets may be partially sheltered from strict liability – this suggests a need for (i) rigorous examination of wider sources of a corporate offender’s wealth if it claims limited means; (ii) sanctions which could require compensatory community service in some form if the polluter cannot afford to pay.
- In using the criminal justice system, more effort is needed to present clearly the purposes, expected working and desired outputs of strict liability in support of important public policy aims.

⁴⁶ Alberini, A and Austin, D “Accidents waiting to happen: liability policy and toxic pollution releases” *The Review of Economics and Statistics*, Nov 2002, Vol 84 No. 4 729-741

5. Enforcement policies

5.1 There is a distinction to be made between consistency of approach, as set out in policies and procedure, and consistency in enforcement action (considered in the next section).

5.2 There are good arguments for regulators and the courts exercising discretion so as to distinguish between minor negligence and worse cases. Discretion, within the bounds set by effective policies and decision-making processes can be argued to offer more flexibility and better means to tailor decisions to cases than rigid rule-based decision-making. However, this argument for discretion relies heavily on considerable transparency, which in turn demands adequate publicly available information to reveal the regulator's approach and whether broad level consistency is being achieved.

5.3 EA sets out a broad enforcement policy, and adds a detailed supplementary statement on the normal anticipated response to different kinds of incident: the Functional Guidelines, which are subject to the operation of public interest factors set out in its overriding policy.

5.4 The Local Authority Pollution Prevention and Control (LA PPC) annual statistical report 2004/05 indicated that 94% of LAs had general enforcement policies and 42% of authorities have an enforcement policy specifically for LAPPC or LAPC. WRc surveyed 47 local authorities (about 10%) covering a wide range of Office of National Statistics Area Classifications – 27 were found to have environmental enforcement policies.

5.5 This suggests that local authority enforcement policies are often not explicit about the authority's environmental enforcement approach or priorities⁴⁷. There do not appear generally to be other more specific, and still easily publicly available documents from local authorities covering these matters.

5.6 It is recognised that each local authority has a range of regulatory functions. This may encourage generalised enforcement policies. Local authority enforcement policies typically accord with the broad terms of the Cabinet Office Enforcement Concordat.

5.7 WRc quote BeEnvironmental (2004) as finding that 70% of local authorities surveyed had an enforcement policy in place but that very few had formal systems in place for implementation and monitoring of policies.

5.8 Police authority and police force strategies and plans concentrate on major crime fighting and confidence building priorities. Roberts et al (2001) carried out a scan of force policing plans and found that out of 52 plans none mentioned wildlife crime. Similarly when 55 police websites were scanned wildlife crime was mentioned on only 13. This was considered to illustrate a low priority that was given to wildlife crime at the time.

⁴⁷ Local Pollution Control Statistical Survey 2004/05, on Defra web site; WRc (2006).

5.9 A brief Google search in 2005 for “wildlife crime police” brought up at least 25 police force websites with some information on wildlife crime, ranging from full strategies to press releases concerning successful cases⁴⁸, suggesting a somewhat higher profile now for wildlife crime, but also that it is not systematically considered by all police forces.

5.10 A further quick sample of force and police authority web sites in ten police force areas in 2006 indicated a highly variable approach to referring to this area of policy, from quite extensive strategies to apparently minimal information⁴⁹.

5.11 Surveys cited by WRc indicate a variable pattern of approach, organisation and resourcing in different police forces’ responses to wildlife crime.

5.12 It is important to note steps forward in the police service approach to wildlife crime. This includes the recently established free standing National Wildlife Crime Intelligence Unit to gather and assess intelligence, and to provide operational support to police forces in difficult cases. This unit is supported by the Home Office, the Association of Chief Police Officers, and Defra.

Need for change?

- An explicit statement of environmental enforcement policy aids transparency, and allows business and citizens to monitor consistency of approach.
- A balance needs to be struck between detail in policy statements and necessary discretion, for example local authorities need the flexibility to set local priorities and pursue approaches which are found to work in local circumstances.
- Without overstating the effort which police forces can reasonably devote to wildlife crime, it would be helpful to inform the public, and potential offenders, through force policies and web sites how forces organise to deal with wildlife crime and what kind of response can be expected.

⁴⁸ Naturewatch 2005 - includes Scotland

⁴⁹ WRc report (2006)

6. Consistency in enforcement action

Prosecution

6.1 Data for 1999 – 2002 indicate significant variation in Environment Agency prosecutions, by Region, as a percentage of enforcement actions⁵⁰.

6.2 Select Committee reports on Environment Agency, and the Government and Agency responses, refer to stakeholder concern about regulatory consistency, including in enforcement, and record continuing attention to and progress in the issue⁵¹. The EA's Functional Guidelines, expanding in detail on its Enforcement and Prosecution Policy, is designed to promote consistency across England and Wales.

6.3 Various sources mention cases which offer anecdotal evidence of inconsistency⁵². However, the available data only scratch the surface of the issue.

6.4 It would be more informative to be able to compare rates of issue of enforcement notices, and of prosecution by region eg number of prosecutions per 1000 inspections or 100,000 businesses in a particular sector. We have not been able to obtain this kind of data.

6.5 Dupont and Zakkour (2003) summarise the results of a questionnaire to LAs in chapter 5. There were 73 replies. Of these, 51 (70%) did not prosecute any fly-tipping case between 1998 and 2003. Of the 19 who did prosecute, 8 were satisfied with the outcome, 8 were dissatisfied.

Warnings, and enforcement notices – availability and use

6.6 The Hampton Report recommends that warning letters are a desirable first step for regulators to take in non-serious cases. WRc reviewed EA and LA use of warning letters, and found that EA use engagement with the operator and warning letters to deal with 70% of regulatory breaches. 81% of LAs who do not actively prosecute for fly-tipping use warning letters as an alternative to achieve compliance, and these authorities generally consider them effective in securing compliance.

6.7 WRc surveyed the enforcement powers available under environmental legislation. This reveals a patchwork of varying enforcement notice powers for specific purposes. Notices of this kind, subject to proper appeal arrangements are an important feature of proportionate and responsive regulation in other regulatory fields.

⁵⁰ Environmental Justice Project "Environmental Justice" (2004) Appendix 5, Figure 2.23

⁵¹ for example the Environmental Audit Committee's inquiry on Corporate Environmental Crime (2005) and the Environment, Food and Rural Affairs Committee report on the Environment Agency (2006).

⁵² eg. CBI report (2006), IoD report (2006)

6.8 There is some evidence from health and safety at work regulation of a correlation between an employer having received an improvement or prohibition notice and the employer perceiving room for improvement⁵³.

6.9 There is no general power for regulators to issue a notice stopping activities which risk serious environmental damage, short of applying to the civil courts for an injunction. In particular, there is no such power available in relation to illegal waste disposal a major source of cost to the authorities and private landowners, and sometimes a source of pollution and risk to human health – on the other hand notices which require removal and remediation are available for illegal depositing of waste.

6.10 There appears to be a gap here in powers to support EA in its aim to devote 80% of its inspection and enforcement effort to those least responsible operators and illegal operators who are responsible for most damage.

6.11 Nor is there any preventive power to directly stop activities damaging an SSSI, only the regulatory regime of notice and consent.

6.12 The discussion paper from the Cabinet Office Better Regulation Executive Penalties Review⁵⁴ compared the annual number of statutory enforcement notices served by various regulators, including the following:

Table 3: use of enforcement notices – annual numbers

	Improvement notices	Prohibition Notices	“Statutory notices” (a)
HSE	6,798	4,537	
LA EH (b) – health and safety	3,937	1,043	
LA EH - pollution control			4,766
LA EH - noise			11,989
LA EH – food law	4,524	190	
EA			737

Notes:

(a) incorporates all the different types of notices where the statistics do not break them down

(b) LA Environmental Health

Figures are for financial year 2003-04, other than food standards (for 2001) and Environment Agency (for 2004)

Figures are for GB, except EA, which is for England and Wales only

6.13 The figures indicate that enforcement notices are far more widely used by local authorities for environmental enforcement than by Environment Agency.

⁵³ Wright et al 2005, Appendix E, 12.3 and Table 65.

⁵⁴ Better Regulation Executive “Regulatory Justice: Sanctioning in a post-Hampton World” discussion paper (2005), table 1.1, sourced from relevant enforcement agencies.

6.14 In health and safety at work regulation, the Health and Safety Executive issued 8,445 Prohibition Notices and Improvement Notices in 2004/05. Appeals to Employment Tribunals against HSE Prohibition Notices and Improvement Notices are normally in the region of less than 1% of the total number of notices

6.15 Notices are generally respected. Under the Water Resources act 1991, WRc review evidence that out of 515 enforcement notices issued by EA, 26 successful prosecutions were brought for failure to comply with a notice – a compliance rate of 95%. HSE estimate, on the basis of rough data, that well over 90% of Prohibition Notices and Improvement Notices are complied with.

Need for change?

- The available enforcement data suggests a degree of inconsistency in environmental enforcement, but the data fails to shed light on the nature and extent of any inconsistency;
- There appears to be a complex pattern in the availability of enforcement notices, and an important gap in relation to the availability of stop notices - there is a case for a simpler general framework of notice powers to support a more graduated response to non-compliance.

7. Enforcement data and performance measurement

7.1 WRC has extensively investigated the available enforcement data, and has identified a number of specific inadequacies which are set out in its report.

7.2 Discontinuities in the available data make it difficult to discern the overall picture of the way environmental enforcement works. The lack of any link between data on incidents and data on enforcement actions or outputs is a particular problem. This hinders consideration of how far proportionality and consistency are being achieved.

7.3 This is compounded by a total absence of data to show whether the specific purposes of enforcement are being achieved, for example the extent to which remediation costs are being met by offenders, or economic gains from non-compliance are being removed.

7.4 Some environmental crime is recorded on the Police National Computer but recording is understood to be partial. Home Office crime statistics were of limited value for the Review's purposes because the records are on the basis of the offence which has led to the most serious penalty. Furthermore, there is no indication of the specific kind of offence unless it has been prosecuted under specific regulations, as opposed to the Environmental Protection Act for example.

7.5 The Police are understood to give priority to those activities which must be recorded. The priority given to wildlife crime is thus dictated by the classification of most as "non-arrestable" or "mere offences", and as such non-recordable.⁵⁵ It is important to note the decision to record wildlife crime specifically through the new National Standard for Incident Recording.

7.6 What may be put in the public domain after a case has been decided will always be limited by Human Rights Act considerations (especially article 6 ECHR), Data Protection Act 1998, and the Rehabilitation of Offenders Act 1974.

7.7 Current performance indicators used by regulators do not provide an overall picture of what impact enforcement may be having. There appears to be no comprehensive suite of process, output, and outcome measures. The lack of such data is compounded by a near absence of evaluation of enforcement, even as part of wider evaluation of regulation.

Need for change?

- There is a need to overcome grossly inadequate data on conduct of enforcement – this includes linking data on incidents through to data on enforcement outputs
- Agreed purposes of enforcement are needed - to provide a framework for collecting data which would enable consistency, proportionality and

⁵⁵ Environmental Audit Committee report quoted by WRC

impact to be discerned – the effect in sentencing of ability to pay should also be described.

- Attention needs to be given to establishing a set of performance indicators for enforcement which will help to reveal its impact as part of wider regulatory effort. These would not be easy to set up but would be essential to monitor the effects of any proposed change to the enforcement system, and to properly inform future debate.

APPENDIX 1

Liabilities in environmental and other Defra regulation

Policy area	Legislative requirement	Nature of liability			Duty to enforce?
		Absolute - no defence	Strict - limitation on liability, or defence	Fault-based - indicate basis (eg need to prove negligence, intent ...)	
Packaging waste	Producer Responsibility Obligations (Packaging waste) Regulations 2005	<u>Yes</u>			
Noise	statutory nuisance under Environmental Protection Act 1990, Part III, s79(1)		<p>Recipient of an abatement notice may appeal – in certain circumstances. It is a defence to show that best practicable means were used to prevent, or to counteract the effects of, the nuisance. ‘Best practicable means’ is defined in case law.</p> <p>Offence to fail to comply with an abatement notice “without reasonable excuse”.</p>		Yes.
Water	Water resources Act 1991 (WRA) – offences under sections 85(1) – (5)		<p>Under s85(1)-(5) WRA it is a criminal offence if a person “causes or knowingly permits” various water polluting offences.</p> <p>There are some statutory defences to the offences under section 85 WRA, in sections 87 (resulting from acts or failures of others; could not reasonably have prevented discharge; and a further defence for person responsible for a discharge to the sewage works which the undertaker was bound to accept); section 88 provides a defence in respect of discharges which are made in accordance with the conditions of a discharge consent issued under the WRA; and 89 a defence in relation to discharge, or entry into waters made in emergency; and all reasonably practicable steps taken to minimise - fuller text in</p>		

			further background below.		
Waste	Environmental Protection Act 1990		<p>Section 33(1)(a)-(c): ... a person shall not—</p> <p>(a) deposit controlled waste, or knowingly cause or knowingly permit controlled waste to be deposited ... unless [authorised by] a waste management licence ... is in force and the deposit ... [accords] ... with the licence;</p> <p>(b) treat, keep or dispose of controlled waste, or knowingly cause or knowingly permit controlled waste to be treated, kept or disposed of except under a waste management licence;</p> <p>(c) treat, keep or dispose of controlled waste in a manner likely to cause pollution of the environment or harm to human health.</p> <p>Defence in section 33(7) – “due diligence” and “emergency”</p> <p>Section 34 ... duty of any person who imports, produces, carries, keeps, treats or disposes of controlled waste or, as a broker, has control of such waste, to take all such measures applicable to him in that capacity as are reasonable in the circumstances— (a) to prevent any contravention by any other [person]</p> <p>No defences corresponding with the defences in relation to section 33 EPA, but the measures taken by a person under section 34 need only be those that are reasonable in the circumstances. Accurate text in further background below.</p>		

Habitats	Wildlife and Countryside Act 1981, as amended ⁵⁶ . Offences under section 28P (1-3), 5A, 6, 6A, 8 and 31 (5)			See below for the detail of offences. All offences considered to be fault based, with provisions for reasonable excuse (which is not exhaustively defined in the legislation), and some (28P(6) and (6A)) requiring that action be expressly intentional or reckless. Convictions required.	Yes. Duty to maintain status of EC protected habitats and species. Duty to further the conservation and enhancement of SSSIs, where reasonably practicable.

⁵⁶ By the Countryside and Rights of Way Act 2000 and the Natural Environment and Rural Communities Act 2006

Further background

Water Resources Act – defences to section 85

Section 87 -

“(2) A sewerage undertaker shall not be guilty of an offence under section 85 above by reason only of the fact that a discharge from a sewer or works vested in the undertaker contravenes conditions of a consent relating to the discharge if—

- (a) the contravention is attributable to a discharge which another person caused or permitted to be made into the sewer or works;
- (b) the undertaker either was not bound to receive the discharge into the sewer or works or was bound to receive it there subject to conditions which were not observed; and
- (c) the undertaker could not reasonably have been expected to prevent the discharge into the sewer or works.

(3) A person shall not be guilty of an offence under section 85 above in respect of a discharge which he caused or permitted to be made into a sewer or works vested in a sewerage undertaker if the undertaker was bound to receive the discharge there either unconditionally or subject to conditions which were observed.”

Section 88 –

A person shall not be guilty of an offence under section 85 in respect of the entry of any matter into any waters or any discharge if the entry occurs or the discharge is made under and in accordance with a discharge consent.

Section 89 -

“(1) A person shall not be guilty of an offence under section 85 above in respect of the entry of any matter into any waters or any discharge if—

- (a) the entry is caused or permitted, or the discharge is made, in an emergency in order to avoid danger to life or health;
- (b) that person takes all such steps as are reasonably practicable in the circumstances for minimising the extent of the entry or discharge and of its polluting effects; and
- (c) particulars of the entry or discharge are furnished to the Agency as soon as reasonably practicable after the entry occurs.”

Environment Protection Act 1990

Section 33(1)(a)-(c) EPA 1990

“(1) Subject to subsection (2) and (3) below and, in relation to Scotland, to section 54 below, a person shall not—

- (a) deposit controlled waste, or knowingly cause or knowingly permit controlled waste to be deposited in or on any land unless a waste management licence authorising the deposit is in force and the deposit is in accordance with the licence;

(b) treat, keep or dispose of controlled waste, or knowingly cause or knowingly permit controlled waste to be treated, kept or disposed of—

(i) in or on any land, or

(ii) by means of any mobile plant,

except under and in accordance with a waste management licence;

(c) treat, keep or dispose of controlled waste in a manner likely to cause pollution of the environment or harm to human health.”

Statutory Defences

The main statutory defences, the scope of which has been determined by case law, for an offence under s33(1) EPA are in section 33(7):

“(7) It shall be a defence for a person charged with an offence under this section to prove—

(a) that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence; or

(c) that the acts alleged to constitute the contravention were done in an emergency in order to avoid danger to human health in a case where—

(i) he took all such steps as were reasonably practicable in the circumstances for minimising pollution of the environment and harm to human health; and

(ii) particulars of the acts were furnished to the waste regulation authority as soon as reasonably practicable after they were done.”

Section 34 – Duty of Care

“(1) Subject to subsection (2) below, it shall be the duty of any person who imports, produces, carries, keeps, treats or disposes of controlled waste or, as a broker, has control of such waste, to take all such measures applicable to him in that capacity **as are reasonable in the circumstances**—

(a) to prevent any contravention by any other person of section 33 above;

(aa) to prevent any contravention by any other person of regulation 9 of the Pollution Prevention and Control (England and Wales) Regulations 2000 or of a condition of a permit granted under regulation 10 of those Regulations;

(b) to prevent the escape of the waste from his control or that of any other person; and

(c) on the transfer of the waste, to secure—

(i) that the transfer is only to an authorised person or to a person for authorised transport purposes; and

(ii) that there is transferred such a written description of the waste as will enable other persons to avoid a contravention of that section or any condition of a permit granted under regulation 10 of those Regulations and to comply with the duty under this subsection as respects the escape of waste.”

Note that although there are not defences corresponding with the defences for an offence under section 33 EPA, the measures taken by a person under this section need only be those that are reasonable in the circumstances.

Habitats

28P(1) Offence for an owner or occupier of a SSSI to carry out, cause or permit to be carried out, any operation notified to them as likely to damage the special interest features, unless they have notified and received consent from English Nature, the operation is carried out in accordance with a management agreement, or in accordance with a management scheme or notice. Defence of reasonable excuse provided for. **Nature of liability- fault based.**

28P(2) Offence for a section 28G authority to carry out an operation, acting in the exercise of their functions, which damages the special interest features of a site without complying with section 28H(1 and 4a) (giving notice to English Nature, and where it does not assent in response to the notice, advise English Nature how their advice has been taken into account and the date on which the operations will begin). Defence of reasonable excuse provided for. **Nature of liability- fault based.**

28P(3) Offence for a section 28G authority having complied with s28H(1 and 4a) to carry out the operation but fail to comply with the requirement to carry out the operation in a way which causes as little damage as is reasonably practicable and to restore the site as far as is practicable if damage does occur. Defence of reasonable excuse provided for. **Nature of liability- fault based.**

28P(5A) Offence for a section 28G authority, in the exercise of their functions, to permit the carrying out of an operation which damages the special interest features of a site without first complying with s28I (2) and where relevant (4) and (6). (giving notice to English Nature, waiting before for the advice before deciding whether to permit, and giving further notice if they do not follow EN's advice). Defence of reasonable excuse provided for. **Nature of liability- fault based.**

28P(6) Offence for any person to intentionally or recklessly destroy, damage or disturb special interest features, knowing the land affected was within a SSSI. **Nature of liability- fault based.**

28P(6A) Offence for any person to intentionally or recklessly destroy, damage or disturb special interest features. **Nature of liability- fault based.**

28P(8) Offence for an owner or occupier of a SSSI to fail to comply with a management notice. Defence of reasonable excuse provided for. Notices, which require specified work to be carried out, may be appealed against and cannot be enforced against until any appeal is determined. Notices may only be served where NCC of the opinion that an o/o not giving effect to a management scheme, special interest features are being inadequately conserved or restored, and they are satisfied they are unable to conclude on reasonable terms, a management agreement. **Nature of liability- Fault based.**

31(5) Offence for any person against whom a restoration order has been made by the Courts on conviction for an offence under s28P(1,2,3,6 or 6A), to fail to comply with it. Defence of reasonable excuse provided for. **Nature of liability- fault based.**

BIBLIOGRAPHY

- Adebowale, M.
"Using the Law: Barriers and Opportunities for Environmental Justice"
Capacity Global (2003)
- Alberini, A. and Austin, D.
"Accidents waiting to happen: liability policy and toxic pollution releases", *The Review of Economics and Statistics*, Nov 2002, Vol 84
No. 4 729-741
- Australian Law Reform Commission
"Principled Regulation: Federal Civil and Administrative Penalties in Australia", Report 95, tabled before Federal Parliament 19 March 2003
- Ayres, I. and Braithwaite, J.
"Responsive Regulation: Transcending the Deregulation Debate" OUP
1992
- Baldwin, R. and Cave, M.
"Understanding Regulation" OUP, 1999, chapter 8
- Better Regulation Executive
"Regulatory Justice: Sanctioning in a post-Hampton world",
consultation document, May 2006
- Brook Lyndhurst
"Environmental Exclusion Review" for Neighbourhoods Renewal Unit /
Department for Communities and Local Government
- Brown, R. and Rankin, M.
"Persuasion, Penalties and Prosecution: Administrative v. Criminal Sanctions" from *"Securing Compliance"*, Friedland, M.
- Carson, W.
"Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation" (1970) *Modern Law Review*, Vol 33
- Department for Environment, Food and Rural Affairs
Local Pollution Control Statistical Survey 2004/05
- Department for Environment, Food and Rural Affairs
"Securing the Future: UK Government Sustainable Development Strategy" (2005)
- Department for Constitutional Affairs
"Doing Law Differently" (2006)

- De Prez, P.
"Excuses, excuses: The Ritual Trivialisation of Environmental Prosecutions", Journal of Environmental Law, Vol 12, No 1 (2000)
- Dupont, C. and Zakour, P.
"Trends in environmental sentencing in England and Wales" (2003) for Defra ("ERM study")
- Environment Agency
"NetRegs SME-nvironment Survey" (2003-6)
- Environmental Law Foundation, Leigh Day & Co, WWF
"The Environmental Justice Project Report" (2004)
- Hawkins, K.
"Environment and Enforcement" OUP (1984)
- Henley Centre Headlight Vision
"Report on Administrative Penalties Simulations" (2006) – for Defra
- Institute of Directors
"The Business of the Environment: Policy and Opportunities ... a survey of IOD members" (2006)
- Jill Dando Institute
"Fly-tipping: Causes, Incentives and Solutions" (2006) – for Defra Waste Management Unit
- Kimblin, R.
"Penalties in Regulatory Crime" (2005) 17 Environmental Law and Management
- London Assembly, Report of Environment Committee
"Protecting the City Environment - London's response to fly tipping, litter, graffiti, fly-posting and abandoned vehicles" (2004)
- Macrory, R. with Woods, M.
"Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal" University College London (2003)
- National Audit Office Wales
"Environment Agency Wales: Regulation of Waste Management" (2004)
- Organisation for Economic Co-operation and Development
"Reducing the risk of policy failure: Challenges for regulatory compliance" (2001)

- Office for Criminal Justice Reform
"Restorative Justice: Helping to meet local needs – web based guidance"
- Ogus, A. and Abbott, C.
"Pollution and Penalties" a paper presented at the Symposium on Law and Economics of Environmental Policy, University College London (2001)
- Revell, A. and Blackburn, R.
"SMEs and their response to environmental issues in the UK" (2004) Small Business Research Centre Monograph, Kingston University
- Roberts, M., Cook, D., Jones, P. and Lowther, J.
"Wildlife Crime in the UK: Towards a National Crime Unit" Report for Defra and the Partnership for Action against Wildlife Crime (PAW), University of Wolverhampton, (October 2001)
- Stavins, R.N.
"What can we learn from the Grand Policy Experiment? Lessons from SO₂ allowance trading" (1998) Journal of Economic Perspectives, Vol 12 (3)
- Sustainable Development Research Network
"Environment and Social Justice: Rapid Research and Evidence Review" (2004)
- Vickers et al
"Cultural Influences of Health and Safety Attitudes and Behaviour in Small Businesses" (2003) HSE CRR 150/2003
- Waite, A.
"The Quest for Environmental Law Equilibrium" (2005) Environmental Law Review no. 7
- Woods, M. and Macrory, R.
"Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach" (2003)
- WRc report for Defra
"The Effectiveness of Enforcement of Environmental Legislation" (2006)
- Wright, M., Antonelli, A., Doyle, J.N., Bendig, M., and Genna, R.
"An evidence based evaluation of how best to secure compliance with health and safety law" (2005) HSE research report 334

Wright, M., Marsden, S., and Antonelli, A.

“Building an evidence base for Health and Safety Commission Strategy to 2010 and beyond: A literature review of the interventions to improve health and safety compliance” (2004) HSE research report

Yeung, K.

“Securing Compliance” (2005)