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# Review of Enforcement in Environmental Regulation

## Report of Conclusions

October 2006

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## 1. INTRODUCTION

1.1 The Government's Review of Enforcement in Environmental Regulation was launched by Ministers in September 2005<sup>1</sup>. The Review covers England and Wales. It draws on discussions between regulators, the judiciary, the legal profession, environmental and business groups which culminated in a Conference on Access to Justice in Environmental Matters organised by Defra in November 2004.

1.2 The aim of the Review was **to develop an effective and flexible system of environmental enforcement which more closely involved the community**. The Review used the available evidence to identify obstacles to more effective enforcement and to develop and suggest possible solutions. These were considered within a culture of Better Regulation which rightly places heavy emphasis on guidance, advice and trying to prevent harm.

1.3 This report sets out the Review's approach and conclusions. It aims to develop a strategic view about improving environmental enforcement. Not all of the ideas and possible solutions outlined in this report would be appropriate for every regulatory regime.

1.4 The Review received invaluable advice from a Project Board. Its members included representatives from government departments, the Environment Agency, the Small Business Service, the Small Business Council, the Environmental Law Foundation, the Royal Society for the Protection of Birds, the Confederation of British Industry, and the Local Government Association and later LACoRS (Local Authorities Co-ordinators of Regulatory Services). However the report's conclusions do not necessarily reflect the views of all Board participants or their organisations, or indeed of the other organisations and individuals who have so helpfully participated in the Review, or of researchers on whose reports the Review has drawn.

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<sup>1</sup> speech by the then Minister of State for the Environment, September 2005 (<http://www.defra.gov.uk/corporate/ministers/speeches/em050908.htm>)

## 2. EXECUTIVE SUMMARY

2.1 The Review of Enforcement in Environmental Regulation has developed evidence-based ideas for improving the effectiveness of environmental enforcement, as one part of wider regulation.

2.2 The Review looked across environment regulation, giving the opportunity to move towards a more coherent approach across the various regulatory areas. It has necessarily been fairly high level. The project ran in two stages: 1) gathering evidence and defining obstacles to more effective enforcement; 2) identifying possible solutions. It examined enforcement processes in the context of the wider regulatory system and as part of a better regulation culture.

2.3 The Review found evidence of the following obstacles to effective enforcement:

- The current design of environmental enforcement is not based on a full understanding of the varying attitudes and motivations of operators<sup>2</sup>;
- sentencing in environmental cases does not generally achieve all of the key purposes of enforcement – criminal sanctions are therefore inadequate;
- inadequate sanctions are undermining the impact of regulation;
- many regulators do not have explicit environmental enforcement policies;
- regulators do not have all the right sanctions to match the varying seriousness of non-compliance, or to recognise the differing operator behaviour which leads to it – proportionality in enforcement is too weak;
- the available data on enforcement cannot tell us what is being achieved.

2.4 The Review report outlines these obstacles and seeks to address them through various possible solutions under five broad themes:

1. defining the purposes of enforcement
2. developing a transparent basis for sentencing
3. reinforcing proportionality and creating stronger incentives to comply with the law
4. ensuring a consistent approach to enforcement
5. involving the community in support of more effective enforcement

2.5 The Review suggests a number of possible solutions which evidence suggests should overcome the obstacles identified. These possible solutions would form a package of mutually supporting measures designed to promote key enforcement outcomes – **improved operator behaviour** and the need for the **polluter to pay** for putting right environmental damage. The principal ideas for change are:

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<sup>2</sup> meaning any organisation or individual subject to the requirements of environmental legislation.

- The purposes of enforcement should be explicit, so people can understand the goals of the system and effectiveness can be judged;
- There needs to be a more transparent framework for sentencing, structured so that everyone can understand the purposes of enforcement and see that they are being achieved;
- Consideration should be given in each environmental regulatory regime to introducing civil variable administrative penalties, as the first step towards a more proportionate enforcement system;
- Where such administrative penalties are introduced, it should be regulator policy to bring strict liability cases to criminal court only where the alleged offender has shown serious negligence, intent, or caused very serious risk or damage. Other significant breaches would attract variable administrative penalties. This would reinforce incentives to be part of a responsible majority;
- New general powers should be given to regulators to issue “stop notices” to prevent or stop serious environmental harm quickly;
- There should be public registers of criminal sentences, variable administrative penalties, and stop and remediation notices covering all areas of environmental regulation. They should be available on the internet for transparency and to reinforce incentives for operators to comply;
- Evidence should be gathered on the most effective mechanisms for involving communities in (i) assisting the detection and reporting of environmental offending; (ii) helping to assess what restitution to communities may be appropriate following an environmental incident.

2.6 The conclusions of this report represent early policy ideas, which the Review considers, flow from the evidence gathered. Further work would be needed to fully assess the value of these ideas in particular regulatory areas. Costs and benefits would need to be analysed, consulting interested people and organisations, including business and regulators. The means by which the ideas could be established in practice would need to be considered, and priorities would need to be set.

2.7 Figures 2.1 and 2.2 set out how the full range of possible solutions address the obstacles which have been identified. Section 7 gives a brief overview of how this package of ideas would fit together in achieving the purposes of enforcement, and in day-to-day enforcement practice.

## Summary of obstacles to effective environmental enforcement and possible solutions

### OBSTACLES

- 1. The design of environmental enforcement is not based on a full understanding of the varying attitudes and motivations of operators.**

*Possible solutions:* 2.1 & 2.2, 3.4 – 3.7, 4.3, and 5.1 (i) overleaf

- 2. Sentencing in environmental cases does not generally achieve all the key purposes of enforcement, which themselves have not been defined – criminal sanctions are therefore inadequate.**

*Possible solutions:* 1.1, 2.1 & 2.2 and 5.1 (ii)

- 3. Inadequate sanctions are undermining the impact of regulation**

*Possible solutions:* 2.1 & 2.2

- 4. Many regulators do not have explicit environmental enforcement policies, to the detriment of transparency, and making it difficult to assess consistency of approach – this may undermine confidence in the enforcement system.**

*Possible solutions:* 4.1

- 5. Proportionality in enforcement is too weak - regulators do not have all the right sanctions to match the varying seriousness of non-compliance, or to recognise the differing operator behaviour which leads to it.**

*Possible solutions:* 3.1 – 3.3

- 6. The available data on enforcement cannot tell us what is being achieved:** The available enforcement data and performance monitoring are not adequate in themselves to allow the efficiency or effectiveness of enforcement activity or sanctions to be comprehensively assessed – it is hard to assess what works and what does not.

*Possible solutions:* 2.2, 4.2 and 4.3

Figure 2.1: key obstacles to effective environmental enforcement identified by the Review

## POSSIBLE SOLUTIONS

### 1. Defining the purposes of enforcement

1.1 The purposes of enforcement should be specifically defined

### 2. Developing a transparent basis for sentencing

2.1 Fines should be structured to explicitly achieve the purposes of enforcement

2.2 Future data collection should reveal how well the purposes of enforcement were achieved

### 3. Reinforcing proportionality and creating stronger incentives to comply

#### More proportionate enforcement – having the right tools for regulators

3.1 Variable administrative penalties should be progressively introduced, subject to separate consideration in each environmental regulatory regime

3.2 a new general power should be given to environmental regulators to issue a “stop notice” in any circumstances when there is serious risk of damage to the environment or actual harm is taking place

3.3 “Stop notices”, and other “remediation” notices should be available for use instead of or in combination with other enforcement measures.

#### Creating effective incentives to comply

3.4 Research should be conducted in particular regulatory areas to establish what motivates operators to comply or not to comply.

3.5 Regulation should continue to rely on strict liability offences, but regulators should normally prosecute only when there is evidence of serious culpability, or especially serious risk or damage has been created. For significant breaches not entailing culpability of this kind variable administrative penalties should be available.

3.6 Where courts impose a penalty for serious culpability, regulators should be able to seek adverse publicity orders and director disqualifications

3.7 Variable administrative penalties should be civil not criminal, in order to distance their operation as far as possible from the criminal justice system – this would increase proportionality in enforcement and create new incentives for operators to be seen to be among a responsible majority.

### 4. Ensuring a consistent approach

4.1 Regulators should ensure enforcement policies explicitly deal with environmental regulation so as to provide a more transparent framework for operation

4.2 Information gathered about penalties should explicitly cover the elements devoted to remediation, removal of economic gains or cost saving, restitution to communities and, for criminal action, moral blame

4.3 There should be public registers of criminal sentences, administrative penalties, and stop and improvement notices covering all areas of environmental regulation. These would be available on the internet, and it should be possible to search the registers by offence, operator name, and nature of breach.

### 5. Involving the community

5.1 Evidence should be gathered on the most effective mechanisms for involving communities in (i) assisting the detection and reporting of environmental offending; (ii) helping to assess what restitution to communities may be appropriate following an environmental incident.

Figure 2.2: summary of the ideas from the Review

### 3. THE ENFORCEMENT SYSTEM – SOME DEFINITIONS

3.1 The Review has considered enforcement as one system within the wider regulatory framework of primary and secondary legislation, economic incentives, permitting, formal guidance, advice and encouragement, and enforcement.

3.2 Waite (2005)<sup>3</sup> presents environmental regulation as a system in which overall effectiveness depends on the impact of and interaction between “onion layers”, from environmental imperatives at the core, through environmental principles, to regulator and operator and others’ behaviour. Enforcement is shown as an element of the outer layers. For the system to work, all elements in it need to be performing their functions effectively. Several authors have represented the graduated use of more and less punitive enforcement tools in the form of a pyramid.<sup>4</sup>

3.3 For the purposes of the Review, we describe the enforcement system in Figure 3.1:

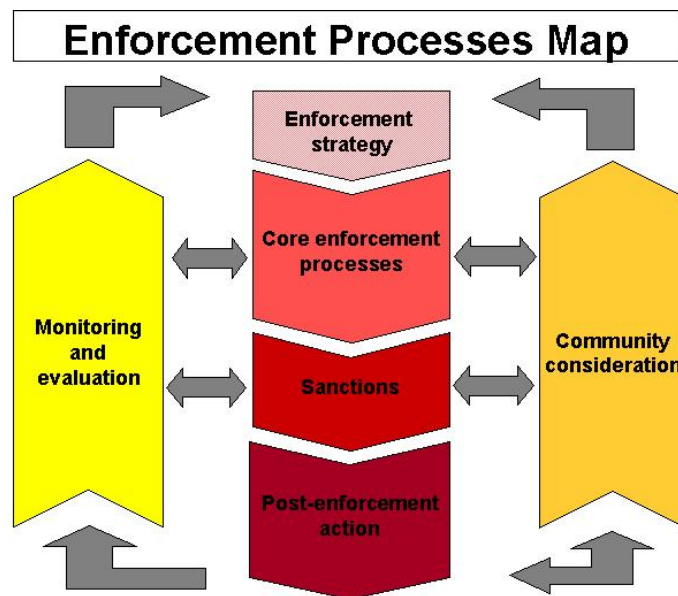


Figure 3.1: one possible map of enforcement processes

A more complex “map” of the enforcement system is at Annex A.

#### **What is enforcement?**

3.4 Enforcement is about ensuring compliance with the law. In a regulatory arena it generally involves:

<sup>3</sup> Waite, A, “*The Quest for Environmental Law Equilibrium*”, pp. 34-62 Environmental Law Review no. 7 (2005)

<sup>4</sup> first proposed by Ayres and Braithwaite “*Responsive Regulation: Transcending the Deregulation Debate*” OUP 1992

- direct dealings between the regulator and those with statutory responsibilities (“the operator”);
- an investigation sufficient to establish the nature and extent of non-compliance;
- a range of measures intended to prevent and correct non-compliance with environmental requirements;
- ensuring that operators take short-term or long-term corrective action.

3.5 Enforcement does not include the setting of requirements, which is carried out through legislation, land-use planning, and permitting. Enforcement can occur only when requirements have been established. The Review has not looked at requirement setting.

3.6 The purposes of enforcement are discussed in Section 5 below.

3.7 Penalties are just one form of enforcement measure. Enforcement actions may be administrative or criminal and may include advice, warnings, enforcement notices, fixed penalty notices, formal cautions, criminal prosecution, fines or imprisonment, or modification or revocation of licences.

3.8 Enforcement interventions may be expensive to the regulator, so regulatory systems should be designed to facilitate maximum compliance with minimum enforcement effort. Indeed, increasing attention has been paid to creating regulatory systems which make it easier to comply, which are more effective in preventing harm, and which thus reduce the need for enforcement. The Review therefore looked at how to improve the effectiveness of enforcement by supporting this approach rather than relying solely on penalties to address non-compliance.

### **Principles of enforcement**

3.9 The Review has borne in mind the following principles of good enforcement:

**Proportionality** in applying the law and securing compliance, *which means relating enforcement actions to the risks or any actual harm;*

**Targeting** of enforcement action, *which means making sure that regulatory effort is directed primarily towards those whose activities risk or give rise to serious environmental damage;*

**Consistency** of approach, *which does not mean uniformity but rather taking a similar approach in similar circumstances to achieve similar ends;*

**Transparency** about how the regulator operates and what may be expected of the regulator;

**Accountability** for the regulator’s actions

These principles are important for fairness and effectiveness.

### **Other definitions**

3.10 Other key definitions are:

**Compliance:** meeting the requirements of environmental law, whether set out in Acts of Parliament, or in regulations;

**Operator:** any organisation or individual subject to the requirements of environmental legislation;

**“Polluter pays” principle:** environmental and social costs should fall on those who impose them;

**Prevention principle:** operators should ensure that significant environmental risks are identified and controlled to the extent the law requires;

**Regulation and regulated:** used in their widest sense as applying to any activity or person subject to environmental law. The terms are **not** used in the limited sense sometimes encountered of referring only to those operators who are regulated under permits.

**Regulator:** used here to refer to any public authority that regulates or just enforces environmental requirements – so covering police forces, who enforce in relation to wildlife crime, as well as Environment Agency and local authorities, who have wider regulatory responsibilities;

**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.

Other terms are defined in footnotes where they first appear.

## 4. REVIEW SCOPE AND APPROACH

### Review scope

4.1 The Review was defined by its aim, to develop a more effective and flexible system of environmental enforcement which more closely involved the community, and by the enforcement processes in England and Wales which it examined:

- the range of enforcement measures and court sanctions available to assist in securing compliance or remedying damage to the environment;
- the way these measures are currently used;
- the way in which these measures interact in practical enforcement;
- the means by which the wider community, including business, can assist the enforcement process;
- means by which the views of the community are taken into account in the way enforcement or court decisions are made.

4.2 In practice, the scope of the Review was also defined by the early selection of five particular regulatory areas in which to concentrate evidence gathering:

- Pollution Prevention and Control (PPC);
- illegal waste disposal (including fly-tipping);
- water quality;
- noise nuisance; and
- wildlife and habitats.

4.3 These study areas were chosen to cover a range of regulatory approaches and to build on important work already going on in these areas. Among the things that the Review did not consider were the setting of requirements, the allocation of resources to enforcement action, or other issues reaching beyond the definition of 'enforcement' given above. The Review made the working assumption that there was a lot of evidence available if it could be tracked down and analysed. Any new work would thus be informed by a thorough survey of present knowledge.

4.4 The Review drew on past Defra funded reports which informed the *Conference on Access to Justice in Environmental Matters* in November 2004<sup>5</sup>. The Review also had to search much more widely for enforcement data and research which would uncover the working of the enforcement system. The evidence discussed below includes independent research conducted in the UK and abroad, surveys by government and non-government bodies, and research and enforcement data from regulators.

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<sup>5</sup> these reports, and a note of the Conference discussions are available at: <http://defraweb/environment/enforcement/justice.htm>

4.5 Looking specifically at community involvement may assist with continuous improvement in those measures by which the UK complies with the Aarhus Convention (*UN Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*). However, the scope of the review was different from that of the Convention. Nor did the Review consider more than one small aspect of “environmental justice”. We have taken this to mean the ultimate purpose of nearly everything Defra and environmental regulators pursue under the umbrella of the Government’s sustainable development strategy *Securing the Future*<sup>6</sup>.

### **Assumptions about enforcement strategy**

4.6 The Review assumes that the regulators’ strategies are risk based, with a continuing element of routine inspection, as endorsed by the Hampton Report. Assessments of risk need to take account of both the nature of operators’ activities and how well they are managed, which is in turn partly dependent on how well informed and well-intentioned operators are<sup>7</sup>. The Review also recognises that environmental regulators’ enforcement strategies give more weight to encouraging and negotiating compliance than to policing and deterrence<sup>8</sup>. Enforcement thus has a role to play in efforts to raise operators’ awareness of the need to control environmental risk, although other regulatory measures are likely to be more cost effective in awareness raising.

### **Cabinet Office Penalties Review**

4.7 The Cabinet Office Better Regulation Executive’s current Review of regulators’ penalty regimes (the “Penalties Review”) has been considering options for the reform of sanctions regimes across nearly all non-financial regulation. This followed the Hampton Report’s recommendation that a review be set up to ensure that regulators have access to a flexible, more effective enforcement toolkit consistent with risk-based regulation.<sup>9</sup>

4.8 The Review of Enforcement in Environmental Regulation has provided evidence and ideas in the environmental context with relevance for the Penalties Review. However, this report has also looked at the wider enforcement system, in which sanctions are only one important element.

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<sup>6</sup> see <http://www.sustainable-development.gov.uk/publications/uk-strategy/index.htm>

<sup>7</sup> various sources cited by Professor R Baldwin in advice to Defra: see generally R. Kagan and J. Scholz (1984), ‘The “Criminology of the Corporation” and Regulatory Enforcement Strategies’ in K. Hawkins and J.M. Thomas (eds) (1984), *Enforcing Regulation* (Boston, Mass: Kluwer-Nijhoff); R. Baldwin (1995), *Rules and Government* (Oxford: OUP); D. McBarnet and C. Whelan (1991), ‘The Elusive Spirit of the Law’ 54 *Modern Law Review* 848.

<sup>8</sup> Reiss, A, “Selecting Strategies of Social Control over Organisational Life” in Hawkins, K and Thomas, J (eds), “Enforcing Regulation” (Boston, 1984) cited in Baldwin, R and Cave, M *Understanding Regulation* (Oxford, 1999, Chapter 8

<sup>9</sup> for further information on the Hampton Report, see [http://www.hm-treasury.gov.uk/budget/budget\\_05/other\\_documents/bud\\_bud05\\_hampton.cfm](http://www.hm-treasury.gov.uk/budget/budget_05/other_documents/bud_bud05_hampton.cfm); for more details on the Better Regulation Executive Penalties Review, see [www.cabinet-office.gov.uk/regulation/penalties](http://www.cabinet-office.gov.uk/regulation/penalties)

## **Staged approach**

4.9 The approach to developing enforcement in the past has sometimes been characterised by the view that regulators need to have the widest possible array of enforcement measures and sanctions from which to choose depending on the circumstances of a case. However, simply extending the range of enforcement tools is no guarantee that the resulting system will be more effective. The Review has looked for an evidence-based rationale for designing a more effective enforcement system in which a set of key measures is selected because, working together, they are most likely to improve compliance. This does not prevent having a wider array of measures available provided the way in which each one adds to effectiveness overall is understood. However, greater complexity means that transparency and consistency will be harder to achieve.

4.10 The Review was in two stages: (1) open-minded evidence gathering to define important obstacles to more effective environmental enforcement; (2) identifying possible solutions and how to bring the greatest improvements.

4.11 The Review team worked with the advice of a Project Board, which included the Environment Agency, local government representatives, business and environmental groups. We sought a wider dialogue at key stages to help inform our conclusions. This dialogue was often swift as the Review represents the early stages of policy development – any formal consultation would follow Ministerial consideration of the ideas generated in this report. Further work would also be needed to develop evidence on the potential regulatory impact, including costs and benefits of possible options for change.

4.12 This paper gives an overview of the evidence which has been gathered, and important obstacles to effective enforcement which the Review suggests need to be addressed. It then goes on to consider possible solutions and areas for further work.

## **5. THE FIRST STAGE: IDENTIFYING OBSTACLES TO EFFECTIVE ENVIRONMENTAL ENFORCEMENT**

5.1 This Review set out with an open mind to gather evidence to define important obstacles to effective environmental enforcement. This section of the report sets out in brief the obstacles which have been identified and outlines the evidence that led to them. A more detailed survey and analysis of the evidence (including all key references) is in **Annexes B and C**.

**a) The design of environmental enforcement is not based on a full understanding of the varying attitudes and motivations of operators:**

5.2 Regulatory and enforcement approaches have not generally considered what is most likely to bring about change in behaviour. Creating fully effective incentives to comply depends on understanding the varying attitudes and motivations of operators.<sup>10</sup>

5.3 Research suggests that enforcement is one important driver of regulatory compliance. Crucially, it also suggests that the levers which are most effective for changing behaviour vary depending on employer attitude, and that employer attitudes in turn vary depending on sector and size. So the enforcement toolkit should be designed with regard to attitudes in a particular sector or particular players in a sector. At its simplest, for example, there will need to be a distinction in the approach taken to working with generally responsible business on the one hand and curbing the activities of career criminals on another. But the evidence shows that the spectrum of attitudes and behaviours is far more complex.

5.4 Research such as that commissioned by Defra's Waste Management Unit on the causes of and solutions to fly tipping is an example of good practice. This kind of work offers a basis for deciding what combination of enforcement and other measures will be most effective in any sector. It may also offer an objective basis for deciding how resources should be allocated to each element of regulation including enforcement, although this question of balance is beyond the scope of the Review.

5.5 The evidence also shows that awareness of what is required is an important precursor for compliance, and that the level of awareness among operators is often poor. Decisions on the balance between enforcement and other regulatory measures will need to take this into account as well.

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<sup>10</sup> for evidence see Annex B, pp 1-7

**b) Sentencing in environmental cases does not generally achieve all of the key purposes of enforcement, which themselves have not been defined – criminal sanctions are therefore inadequate.<sup>11</sup>**

5.6 Many people and organisations with an interest in environmental regulation have considered that criminal fines are too low. However, the available data on enforcement and sentencing is not in itself adequate to test this perception. This is partly because the bald facts about a fine more often than not conceal mitigating factors such as ability to pay and discounts for early guilty pleas (at present up to a 30% maximum). These factors often have substantial effects on the fine that is imposed.

5.7 This absence of hard data has tended to lead to a circular discussion about the adequacy of fines. The courts have often been criticised for not taking environmental offences seriously and prosecutors in turn have tended to be criticised for not presenting cases effectively.

5.8 We can only consider whether fines or other criminal penalties are sufficient by reference to the purposes of enforcement and the working of the wider regulatory system. We suggest here, on the basis of looking at a sample of cases (first hand where possible) that sanctions are “too low” because they generally fail to achieve certain key purposes, in particular remediation of damage, restitution to affected communities and removing cost savings or economic gain from non-compliance.

5.9 On the other hand, our sample of cases (**Annex D**) shows courts taking care when considering questions of seriousness, culpability and ability to pay. We argue that the criminal courts are effective in ascribing moral blame in environmental cases, but the lack of a framework of purposes hinders transparent and fully effective sentencing. This strongly suggests that a new approach is needed.

**c) Inadequate sanctions are undermining the impact of regulation<sup>12</sup>**

5.10 The wide use of strict liability in environmental law should ensure that regulation has a high impact on operators.<sup>13</sup> However some commentators have suggested that its existence reduces the likelihood of strong deterrence in environmental cases, for example because it leads to “trivialisation” of offences. The Review set out to consider what part the liabilities play in the effectiveness of environmental enforcement.

5.11 In considering the arguments for or against the use of strict liability two questions need to be answered: (1) does it have a beneficial effect on enforcement efficiency? (2) does its existence prompt preventive operator behaviour, reducing negative environmental impact?

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<sup>11</sup> for evidence see Annex B, pp 8-18

<sup>12</sup> see Annex B, pp 19-23

<sup>13</sup> the Review 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”.

5.12 Prosecutors' general experience of the criminal justice system suggests that strict liability supports enforcement efficiency in a number of ways:

- lowering the cost of regulator investigation, intrusion on business, prosecution and defence effort, and reducing trial length
- minimising the possibility of defendants exploiting doubt about any alleged culpability and slowing down the resolution of incidents.

5.13 It is often argued from first principles that exposure to enforcement for causing an environmental incident regardless of culpability should strongly encourage compliant behaviour by operators. The Review found some evidence that this was so, but also considered whether the incentive could be undermined:

- by the existence of defences;
- if firms are sheltered from full financial liability because of limited assets;
- by inadequate penalties which might undermine the deterrent effect of conviction.

5.14 On the face of it, the existence of defences to strict liability, such as “due diligence”, could be argued to promote compliance by highlighting a need for operators to have policies and procedures. On the other hand, due diligence defences could promote paper systems while still allowing a culture to exist in which compliance is given a low priority. Research would be needed to explore this question.

5.15 The Review concludes that sheltering from financial liability could be a significant factor, but there is limited evidence to evaluate its true effect – again, further research would be necessary. However, we believe the evidence does point to the effectiveness of strict liability in the enforcement system being undermined by sanctions which fall well short of achieving the purposes of enforcement (discussed under 2 above).

**d) Many regulators do not have explicit environmental enforcement policies**, to the detriment of transparency, and making it difficult to assess consistency of approach – this may undermine confidence in the enforcement system<sup>14</sup>

5.16 An examination of enforcement policies across environmental regulators indicates that they do not always specifically cover environmental enforcement. Using a generic policy covering a number of regulatory areas does not allow businesses or citizens to assess consistency of approach in environmental regulation – more transparency is needed.

5.17 There is some evidence that more explicit policies lead to greater enforcer activity in areas they highlight. The Review was not tasked to look at

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<sup>14</sup> see Annex B, pp 24-28

enforcer priorities, but evidence of this kind demonstrates that sufficiently clear and specific enforcement policies are a necessary part of an effective enforcement system.

**e) Proportionality in enforcement is too weak:** regulators do not have all the right sanctions to match the varying seriousness of non-compliance, or to recognise the differing operator behaviour which leads to it <sup>15</sup>

5.18 As outlined above, it is worth distinguishing between operators according to their attitudes to regulation and what motivates them to comply or not to comply. The present range of enforcement measures is not sufficiently graduated in force or effect to allow this. The Review set out to explore the scope for using variable administrative penalties to provide for a more proportionate and discriminating approach. This is discussed in Section 5 of the report.

5.19 The environmental enforcement system in some areas lacks enough mechanisms beyond advice or a formal warning, to bring environmentally damaging behaviour to a halt immediately.

5.20 This is partly because under environmental law, “stop” notice powers are not always available. Where such notices are available for general use in other regulatory areas, the evidence shows that they are heavily used by regulators and respected by operators.

5.21 Environmental enforcement activity is increasingly being targeted on (i) operators who are not subject to permitting, where risks are least likely to be effectively managed and breaches are most likely to be committed; (ii) operators who act illegally by flouting permitting requirements. The lack of generally available stop notice powers is a major gap in the capacity of the enforcement system to take proportionate and targeted action.

**f) The available data on enforcement cannot tell us what is being achieved:**

5.22 The available enforcement data and performance monitoring are not adequate in themselves to allow the efficiency or effectiveness of enforcement activity or sanctions to be comprehensively assessed.<sup>16</sup> The performance indicators in use do not enable us to explain how enforcement outputs support regulatory outcomes.

5.23 Discontinuities in the available data also make it difficult to get an overall picture of the way enforcement works. The lack of any link between data on incidents and data on enforcement action and penalties is a particular problem.

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<sup>15</sup> see Annex B, pp 26-28, and Annex C

<sup>16</sup> see Annex B, pp 29-30

5.24 The existing data is insufficient to support discussion about whether enforcement action is consistent or penalties are adequate. Data on average fines provide no useful information about the adequacy or likely effect of current financial penalties as they do not reveal key aspects of sentencing, in particular seriousness and ability to pay. Nor is there data to show whether specific purposes of enforcement are being met. Improved data would assist in finding ways in which enforcement could be improved in the future.

## **6. THE SECOND STAGE: POSSIBLE SOLUTIONS TO THE OBSTACLES**

6.1 The Review set out to produce ideas for improving the efficiency, proportionality and effectiveness of environmental enforcement.

6.2 The evidence reviewed on whether there are obstacles to effective enforcement is in many cases partial (**Annex B**). But it is sufficient to identify the six important obstacles set out in the previous section. This section of the report seeks to address these obstacles under the following broad themes:

1. Defining the purposes of enforcement
2. Developing a transparent basis for sentencing
3. Reinforcing proportionality and creating stronger incentives to comply
4. Ensuring a consistent approach
5. Involving the community

6.3 It needs to be recognised that enforcement can be fully effective only in concert with other regulatory measures. In this section, the ideas from the Review are expressed as “possible solutions”, all of which would need further exploration with stakeholders, including consideration of costs and benefits where appropriate. The summaries of obstacles and possible solutions on pages 5 and 6 show how some possible solutions would help to address more than one kind of problem.

### **Theme 1 – defining the purposes of enforcement**

6.1.1 There needs to be an agreed statement of the purposes of enforcement before we can consider how to make it more effective. The sufficiency of fines and other criminal penalties can only be considered by reference to the purposes of enforcement and the working of the wider regulatory system.

6.1.2 In line with fundamental principles of environmental regulation – prevention and “polluter pays” principles – the Review suggests that the key purposes of enforcement are to:

- prevent continuing environmental risk or harm;
- secure improvements leading to compliance;
- ensure environmental damage is put right;
- remove cost savings or economic gain from non-compliance;
- make restitution to adversely affected communities;
- publicly condemn moral wrongdoing.

... and overall to:

- promote future compliance (or deter non-compliance) with environmental requirements;

... and, throughout:

- protect the environment

6.1.3 We take damage to the environment to include pollution, but also for example damage to biodiversity or obstruction of flood plains by illegal waste disposal.

**Possible solution 1.1:  
the ‘purposes of enforcement’ should be explicitly defined**

## **Theme 2 A transparent basis for sentencing**

6.2.1 As outlined in Section 5, there is evidence that criminal sanctions do not fully meet the suggested purposes of environmental enforcement or the overall purpose of protecting the environment. The current guidance to the courts does not identify these purposes in a structured way.

6.2.2 The case studies considered by the Review in **Annex D** pointed to the following conclusions about whether the purposes suggested above were generally being met:

<b>Enforcement purpose</b>	<b>Do criminal penalties generally achieve purpose?</b>
Putting right environmental damage	No
Remove cost savings or economic gain from non-compliance	No
Make restitution to adversely affected communities	No
Publicly condemn moral wrong-doing	Yes

Table 6.1: adequacy of penalties against purposes of enforcement

6.2.3 Table 6.1 above illustrates why penalties are often perceived as inadequate, though there are areas in which the courts now can and do ensure environmental damage is put right. An example is ordering restoration of habitat following a conviction for damage to a Site of Special Scientific Interest – a summary of cases is in **Annex D**. In some cases, regulators can separately use powers to order remedial action, as under the Water Resources Act 1991. But, there is a need for more coherence between enforcement purposes, sanctions and powers.

6.2.4 The Court of Appeal has decided against a tariff for environmental (or health and safety at work) fines, mainly on the basis that cases vary a great

deal. It would indeed be difficult to establish conventional guidelines on fines for the many different categories of environment offence. However, sentencing guidelines could be established which set a basis for calculating fines in relation to each of the purposes of environmental enforcement set out under Theme 1 above. Sums could specifically cover the:

- **full cost of putting right any environmental damage** – which the court could order to be paid for, and preferably carried out or organised by operators considered responsible to do so. Where this was not the case, other arrangements would need to be devised, ranging from close monitoring of the operator’s remediation to the regulator directing the use of this element of the fine.
- **full cost of making restitution to adversely affected communities** – this could cover, for example, damage to community facilities, loss of amenity more generally, and nuisance experienced by local residents. Arguably more complex matters such as potential human health impacts, and any individual or corporate claims for economic loss should remain a matter for civil litigation. The relationship with civil litigation would certainly have to be examined.
- **full amount of any cost savings or economic gain from non-compliance** - including, if appropriate, an element to reflect returns from any large sums that should have been spent, for example on purchasing permits or packaging recovery notes. This element would be designed to level the playing field for competing businesses that are complying with the law.

plus

- **a fine (or other sanction) proportionate to any serious culpability** – depending on the desired scope of criminal prosecution in environmental cases this could range from ordinary negligence to gross negligence (repetition would increase seriousness); and include intentional non-compliance (for example abuse of licences, misrepresentation to secure waste exemptions, mis-description of waste, deliberate failure to purchase permits or packaging recovery notes); or recklessness.

The above amounts would need to be recorded. As now, regulator costs in bringing a case would be considered separately.

**6.2.5 The overall penalty could combine financial and alternative measures**, such as Community Penalties or other sanctions – this is discussed further below under “ability to pay”. Non-financial elements could include offenders putting right environmental damage using their own resources where that is feasible, or contributing in specific ways to projects of community benefit.

6.2.6 Courts and regulators would need powers to ensure that offenders paid sums required and co-operated with any non-financial sanctions which formed part of the sentence.

6.2.7 In economic terms, the role of the “culpability element” of a fine would be to punish and deter any tendency to flout requirements or deliberately run environmental risk for gain. Deterrence only comes into play when the offender or others may be tempted to consciously disregard the law.

6.2.8 Except as regards punishing culpability we suggest that the term “punishment” is not useful here<sup>17</sup>. The main aim of a new sentencing framework would be to achieve important regulatory purposes by including items such as remediation costs and removing cost savings or economic gain from non-compliance, to create incentives for improved operator behaviour.

6.2.9 The explicit attention to community restitution would require some form of engagement with the affected community. This is discussed under Theme 5 below.

6.2.10 This kind of approach to sentencing would seem to be broadly in keeping with the purposes of criminal sentencing as set out in the Criminal Justice Act 2003 section 142, section 164 (2), and section 143 (2)<sup>18</sup>. However, if it was decided to introduce the sentencing ideas set out above, further consideration would be needed as to whether legislation would be required.

6.2.11 The new sentencing approach would also recognise that environmental regulatory offences can be, and need to be, addressed routinely in terms of the cost of practical remedies. This is in keeping with the “polluter pays” principle.

6.2.12 It is clear that the remediation and restitution elements of a fine would be devoted to those specified purposes. Any consideration as to whether other elements of a fine could contribute directly or indirectly to funding regulation, whether for enforcement or other activities, was beyond the scope of this Review. However, it is appropriate to note here that any such consideration would need to take account of the implications for operator

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<sup>17</sup> “Principled Regulation: Federal Civil and Administrative Penalties in Australia”, Australian Law Reform Commission, Report 95, tabled before Federal Parliament 19 March 2003, page 104, paragraph 3.7: “Punishment is the imposition of a form of loss or disadvantage to the extent that it is not directed at protection or compensation. There are two aspects to the purpose of punishment: retribution for the wrong done (which need not be categorised as criminal) and, in the case of criminal penalties, the social stigma attached”.

<sup>18</sup> quoted in WRc report for Defra, “*The Effectiveness of Enforcement of Environmental Legislation*” (2006): section 142 Purposes of sentencing (1) Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing- (a) the punishment of offenders, (b) the reduction of crime (including its reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences.

attitudes to regulation. It would be particularly important that operator confidence in the enforcement system should not be undermined.

6.2.13 In summary, environmental sentencing needs to achieve the following:

<b>outcome</b>	<b>environmental protection</b>			
<b>outputs</b>	<b>Remediation</b>		<b>Deterrence</b>	
<b>objectives</b>	put right environmental damage	make restitution to affected communities	negate economic gains	assign moral blame and overcome tendency to calculate gain from non-compliance

Table 6.2: what environmental sentencing needs to achieve

6.2.14 This approach would pick up themes which are already widely expressed in court judgments and in criticisms of sentencing, but would make the issues and the response explicit – sentences would be, and be seen to be, fit for purpose.

### **Ability to pay**

6.2.15 It is a long established principle of criminal sentencing that those responsible for similar offences should suffer equivalent punishment irrespective of the offender’s means – a fine should have similar effect on a rich as on a poor offender. In *R v F Howe & Son (Engineers) Ltd*, the Court of Appeal noted that “any fine should reflect not only the gravity of the offence but also the means of the offender, and this applies just as much to corporate offenders as to any other”. However, the Court of Appeal also stated that if no representations were made as to ability to pay, the court would take it that the defendant could pay any fine imposed.

6.2.16 Under the ideas set out above, the overall fine would therefore, if necessary, be reduced according to ability to pay, and readiness with a guilty plea as now. Ideally, if ability to pay were limited this would be stated by the courts, amounts moderated and any ‘discount’ recorded. We suggest that factors such as turnover or profitability should be seen as bearing only on ability to pay – seriousness should be the primary concern in sentencing environmental offences.

6.2.17 Where the overall fine was limited by ability to pay, the available sum of money could be used to cover the enforcement purposes in the order of priority as listed above, remediation costs first.

6.2.18 The courts would continue to make judgements about the financial pressure that a corporate offender should bear in the light of the offence set against the benefits its activities bring to society. In extreme circumstances

the courts have already stated that there may be cases where offences are so serious that the defendant ought not to be in business.<sup>19</sup>

6.2.19 The courts should be invited to take a wider view of a company's ability to pay. This could be done on a similar basis to the US approach of using computer modelling.<sup>20</sup> This kind of approach could also help to improve consistency in sentencing.

6.2.20 It would be important that individual offenders could not escape liability simply by lack of funds. Consideration of cases under the proposed sentencing scheme would be likely to point to ways in which an operator could make at least some practical recompense to society through sanctions such as Community Penalties, which are rarely used at present in environmental cases. For the offence of illegal waste disposal (Environmental Protection Act 1990, section 33) the courts already have available a range of additional non-financial sanctions, including: anti-social behaviour orders; remediation orders for under 16s; curfew orders; removal of driving licence if a vehicle was used in the offence; or forfeiture of vehicle.

### **Assessing the need for remediation, restitution, or removal of economic gain**

6.2.21 The framework discussed above would help to bring greater objectivity to assessing the level of fines.

6.2.22 In some cases, in some areas of environmental regulation, it may be relatively easy to determine cost savings or economic gain based on, for example, packaging recovery notes not purchased, or a licence not paid for. That is not to say that assessing the amounts which should be paid is generally simple, but use of computer modelling to help determine ability to pay, economic gain and clean-up costs in the United States shows that steps in that direction could be taken. How to assess harm or gain will also have to be addressed in transposing the Environmental Liability Directive.

6.2.23 There would inevitably be a range of possible figures to be considered in some cases, sometimes based on disputed facts. Court procedures already provide for the resolution of these kinds of contested issue. Although the large majority of environmental prosecutions result in a guilty plea, this is often not before significant effort has been spent in a Newton hearing, agreeing or litigating the basis of the plea, that is, how it is claimed the offence was committed or the extent of harm which resulted<sup>21</sup>.

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<sup>19</sup> R v F Howe & Son (Engineers) Ltd [1992] 2 All ER 249

<sup>20</sup> US system, cited in Woods and Macrory, "Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach" (2003).

<sup>21</sup> A Newton hearing occurs when a defendant has pleaded guilty to the offence, but on the basis of a different version of the facts from that of the prosecution. If the prosecution and the defence are unable to agree the facts of the offence, the court may hold a Newton hearing to resolve the dispute and ascertain the correct basis for sentence. (Reference from HSE Enforcement Guide.)

6.2.24 Apportioning responsibility for remediation and restitution among a number of defendants would be an added, but not wholly new complication.

6.2.25 This essentially practical approach will not do away completely with difficult questions in some cases about “valuation” of environmental harm, but it would provide a starting point. It would also provide a framework for a pragmatic approach in very difficult cases.

6.2.26 In the light of R v Friskies Petcare Ltd, the Courts might expect the prosecution and defence to seek to agree the assessments beforehand, as well as the facts and aggravating and mitigating circumstances<sup>22</sup>. Then, ultimately, the courts would decide. This approach does not impose a rigid tariff but offers instead a more systematic framework for more effective and consistent sentencing decisions.

6.2.27 The above approach is wholly consistent with the classical justification for regulation as a means to compensate for market failure, and with traditional deterrence theory with its emphasis on internalising costs otherwise passed off to society. The polluter would be seen to pay, including making restitution to affected communities as appropriate.

6.2.28 This approach would provide a framework for decision-making; for communication within the criminal justice system and with communities; and for information gathering. It would also offer a basis for training regulators, magistrates and the judiciary where this is considered necessary – such training has often been suggested as vital to adequate sentencing, but what the training should specifically address has tended not to be discussed.

6.2.29 The Sentencing Guidelines Council is understood to be planning to consider environmental and regulatory sentencing (concerning the general principle of how to assess penalties against businesses) in the course of its 2006/07 programme of work.

**Possible solution 2.1:**

**that fines should be structured to explicitly achieve the purposes of enforcement.** Sentencing guidelines, regulator presentation in court, and information gathered and presented publicly by regulators should all explicitly relate enforcement decisions and resulting sanctions to generally agreed purposes of enforcement.

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<sup>22</sup> In R v Friskies Petcare UK Ltd, Court of Appeal Criminal Division, 10 March 2000, Case no 99/5226/WC (2000) CAR (s) 401 the Court of Appeal strongly recommended that whenever the regulator prosecutes, it should set out in writing: the case summary; and any aggravating features in schedule form that the regulator says exist in the present case. All of the relevant aggravating features should be set out from the outset. If a defendant pleads guilty on the basis set out in a Friskies schedule, then other aggravating features cannot be referred to at a later sentencing hearing. (Reference from HSE Enforcement Guide.)

## Monitoring enforcement

6.2.30 Monitoring enforcement and assessment of its impact should be an important part of the environmental enforcement system.

6.2.31 Recent consideration given to the enforcement tools used across the whole sweep of Defra regulation concluded that more work was needed to assess the effectiveness of enforcement policy and measures.

6.2.32 If gathering data and monitoring is to be useful it needs to be geared to finding out whether the purposes of enforcement are being achieved. This depends in turn on those purposes being stated and explicitly reflected in sanctions as suggested above. If information is gathered under these headings, all parties could be satisfied that penalties are broadly achieving the purposes of enforcement with proportionality and broad consistency. Following the establishment of a transparent scheme for sentencing, a useful first step in gathering and presenting information could be achieved by setting up public registers of sanctions.

6.2.33 The enforcement data also needs to allow a connection to be made between records of incidents and resulting enforcement and sanctions, which cannot be done from publicly available data at present. There would also be a need to ensure that data on fines was related to cases and not separate charges - it is the overall penalty in a case which is important.

6.2.34 Ideally these links would be a feature of regulators' operational management information systems. This may only be practicable when designing a new IT system. As such opportunities tend not to come up frequently, it would be important to consider including these changes in future specifications.

### **Possible solution 2.2:**

#### **future data collection should reveal how the purposes of enforcement were achieved**

- 1) information gathered about penalties should explicitly cover remediation, removal of gains, restitution to communities, and moral blame
- 2) the information gathered will need to tell the story from incident to enforcement result
- 3) regulators should specify the above pattern of information gathering and monitoring, related to enforcement purposes, when specifying any new operational management information system

6.2.35 The framework of enforcement purposes also focuses attention on what performance indicators should be set for enforcement activity. For

example, it may be helpful to monitor *the total amount*, or better *the proportion, of remedial costs met by offenders*.

6.2.36 Regulators could then consider setting a goal to increase the proportion by x% over a specified period, subject to a realistic assessment of what was achievable. Research would be needed to establish a baseline. The costs of any initial survey and subsequent monitoring would be weighed against the benefits of better informing future debate about penalties and impact, and future consideration of policy change.

6.2.37 The research commissioned by Defra Waste Management Unit on employer attitudes, and certain other reports, also suggests that evidence of behaviour change could be another valuable intermediate measure of enforcement impact. Baseline surveys would be needed, which are suggested above in any event as a necessary basis for decisions on enforcement approach.

6.2.38 The Environment Agency already sets out various enforcement outcome, output and process measures in its Corporate Plan and Annual Report. Current measures, particularly a focus on reducing incidents, help to present a picture of the effectiveness of environmental enforcement, but might be supplemented as follows:

<b>Regulatory outcomes</b>	
Performance indicators on eg water quality, air quality etc	
<b>Enforcement outcomes</b>	<b>Other regulatory process outcomes</b>
– reduction in incident numbers (or better, rates)	existing performance indicators
<b>New</b> – more positive operator attitudes	
<b>Enforcement outputs</b>	
<b>New</b> – proportion of remedial costs borne by offenders	
– operator compliance with specified requirements	

<p><b>Enforcement processes</b></p> <p><b>Consistency</b></p> <ul style="list-style-type: none"> <li>- rates of issue of enforcement notices or prosecution per 1,000 operators, by region, by sector</li> </ul> <p><b>Proportionality</b></p> <ul style="list-style-type: none"> <li>- % of enforcement notices and % of administrative penalties successfully imposed, ie not subject to successful complaint or successful statutory appeal.</li> <li>- % successful prosecution cases</li> </ul>	<p>-----</p> <p><b>Resources inputs</b></p> <p>existing performance indicators</p>
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Table 6.3: enforcement performance indicators

6.2.39 Further work would be needed with economists and regulators to test the value of the proposed new indicators, and how the necessary information could best be obtained.

6.2.40 Where enforcement is the responsibility of more than one regulator, it is important that information is gathered on a common basis so that data and monitoring assists collaboration and evaluation of impact generally. Flycapture is a good example of information gathering across regulators, in this case the Environment Agency and local authorities.<sup>23</sup>

### **Theme 3 - Reinforcing proportionality and creating stronger incentives to comply**

#### **More proportionate enforcement measures**

6.3.1 This section identifies ‘gaps’ in the available enforcement measures which appear to undermine proportionate action, and considers how they may be filled. We also consider how enforcement measures could be designed so as to strengthen the incentives to comply with environmental requirements.

6.3.2 Proportionality is one of the most important factors in ensuring fairness, effectiveness, and efficiency in regulatory enforcement decisions. The “public interest test” in regulatory decisions about whether or not to bring a criminal prosecution depends crucially on if it would be proportionate to prosecute<sup>24</sup>. It follows that as the seriousness of the breach increases, more and more stringent enforcement measures should be progressively available.

<sup>23</sup> see <http://www.defra.gov.uk/environment/localenv/flytipping/flycapture.htm> for the Flycapture database.

<sup>24</sup> This contrasts with the Code for Crown Prosecutors’ public interest test, which approximates to a presumption of prosecution for a criminal offence, subject to certain special factors.

6.3.3 The range of enforcement measures currently available under environmental regulation does not fully satisfy this need. Regulators cannot always match the enforcement response to the seriousness of the offence; take account of the attitude of the operator; or take action as quickly as protecting the environment might require.

### ***Administrative penalties***

6.3.4 The Review focused on variable administrative penalties as having the potential to bring about major change in the way the enforcement system works. Variable administrative penalties would involve regulators instead of the courts applying penalties for certain environmental breaches – penalties could be substantial, depending on the circumstances of the case. Such penalties could be financial or involve action by the offender.

6.3.5 We have not considered fixed penalty notices in depth as they are already becoming an established way to deal with minor offences where the threat of a small financial penalty is likely to change behaviour, for example for littering. Even then, understanding underlying behaviour and attitudes will be important to ensure that fixed penalty notices are confined to circumstances in which they are most likely to be effective.

6.3.6 The work of the Review included running six workshops simulating future use of variable administrative penalties. The results are summarised in Annex C, and set out fully in the independent facilitator's report<sup>25</sup>. The workshops showed that such penalties could work in environmental regulation.

6.3.7 The most appropriate areas for initial pilots would be regimes where requirements were relatively straightforward and compliance most easily assessed, like packaging waste. However, the workshops indicated that subject to the necessary procedures, including strong procedural safeguards, good communications, and transparent exercise of regulator discretion, variable administrative penalties could be used more generally.

6.3.8 The workshops showed that business would value flexibility in enforcement, provided that regulator discretion was exercised within a framework of principles and transparent decision-making guidance.

6.3.9 Regulators would decide on the basis of their investigation whether to pursue an administrative penalty as opposed to criminal prosecution, at least in the first instance.

6.3.10 The question of whether or not a criminal prosecution would be more appropriate would need to be based on readily understood factors, for example: evidence of serious culpability; the seriousness of environmental

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<sup>25</sup> *“Report on Administrative Penalties Simulations”*, Henley Centre Headlight Vision (2006) – for Defra

risk; or the likely cost of remediation relative to any maximum administrative fine.

6.3.11 The workshops assumed that the use of administrative penalties should be confined to responsible businesses whose general approach is to try to comply with the law. Any evidence of intent to commit a significant breach, including repeat offending, would suggest criminal proceedings. What the trigger should be for criminal prosecution in environmental cases is discussed on pages 32-38, under the heading “Creating effective incentives to comply”.

6.3.12 Variable administrative penalties would need to achieve the following purposes of enforcement by providing sanctions to:

- secure remediation of damage
- remove economic gain from non-compliance
- make restitution to adversely affected communities

6.3.13 Remedial action required under an administrative penalty could be:

- left to an informal agreement between regulator and operator where the operator has a proven record of corporate social responsibility; or
- made the subject of an enforceable undertaking<sup>26</sup>; or
- enforced under some form of notice where a regulator needed powers to compel action by an unwilling operator.

6.3.14 The courts see serious damage as an aggravating factor. The question of what degree of damage to the environment should trigger a criminal prosecution as opposed to an administrative fine is partly a question of what degree of discretion the regulator should be given to apply penalties. There is an argument for setting the maximum high enough to cover all but exceptionally serious damage.

6.3.15 However, there is also an argument that communities affected by very serious incidents could reasonably expect the facts to be fully aired and responsibility allocated publicly. The criminal courts often do this, though an early guilty plea in a magistrate's court will mean the facts do not get a full airing. In introducing variable administrative penalties, the question of openness would need to be considered - perhaps the degree of public exposure should be proportionate to the seriousness of the environmental impact of the offence.

6.3.16 Finally, in making any reforms to the environmental enforcement system in a particular regulatory area, variable administrative penalties should not be seen as “just another enforcement measure”. If introduced, they have probably the biggest potential of any new development to change the enforcement system, including crucially the role of the criminal justice system.

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<sup>26</sup> that is, a legally binding agreement, enforceable by the regulator, which requires the operator to carry out certain actions, or pay specified sums for particular purposes.

6.3.17 Introducing administrative penalties in suitable areas of regulation appears to offer a very significant opportunity to improve the proportionality and effectiveness of environmental enforcement.

**Possible solution 3.1:  
variable administrative penalties should be progressively introduced, subject to separate consideration in each environmental regulatory regime**

6.3.18 The form variable administrative penalties should take – civil or criminal - is an important consideration, and is discussed below under “Creating effective incentives to comply”.

### ***Enforcement notices***

6.3.19 Enforcement notices have an important part to play in complementing other enforcement action, for example ensuring that risks are controlled or continuing harm is prevented well ahead of any prosecution. Their use can also register a need for change forcefully enough to influence the behaviour of responsible operators, avoiding prosecution in many cases. Notice powers are an essential part of a proportionate enforcement system.

6.3.20 A range of enforcement notice powers does exist, but they are specific to particular regulatory regimes. The Review considered whether sufficient notice powers exist to ensure that activities causing serious harm, or involving a high risk of serious harm, are stopped without delay. We have not looked at notices used for purposes that do not entail direct prevention of serious damage or risk, for example notices which may require an operator to produce waste transfer notes.

6.3.21 At present, there is no general “stop notice” which can be issued by environmental regulators, immediately if necessary, to prevent serious risk of environmental damage. There are exceptions in limited circumstances specified in legislation. For example notices are currently available to require removal of waste or remediation (Environment Protection Act 1990, section 59), but not to stop other destructive activity from continuing. Nor is such a power available to stop activities which are damaging a Site of Special Scientific Interest.

6.3.22 Injunctions may be sought, but inevitably involve delays of at least hours even though damage may be occurring rapidly as a result of a breach of the law. The specificity of such notice powers to particular regimes also adds to the complexity of the enforcement system.

6.3.23 There is a strong argument for a generally available stop notice power to reinforce proportionate regulation. It would help the Environment Agency in particular to shift effort to deal more efficiently and effectively with those least likely to stop when asked - irresponsible operators and those with criminal

intent. Such a stop notice power would also promote a simpler enforcement framework, and send a strong signal to those who may seek to exploit gaps in existing powers. An inspector could ask the police to attend if a recipient was thought likely to be aggressive.

**Possible solution 3.2:**

**a new general power should be given to environmental regulators to issue a “stop notice” in any circumstances when there is serious risk of damage to the environment or actual harm is taking place**, and an inspector has reasonable grounds to believe an offence is being committed - irrespective of whether the activity requires or does not require a permit.

6.3.24 Arguably the definition of serious harm should include circumstances where there is the potential for huge cost to restore land, even if pollution may not result. Large volumes of waste could be dumped on a flood plain for example, but the cost of removal may be beyond the landowner or the regulator. It would be important to be able to stop illegal activity quickly in these circumstances.

6.3.25 A right to a swift appeal would need to be built in. Options include setting up a specialist “independent and impartial” tribunal or using magistrates courts to provide such a tribunal.

6.3.26 It would be important that regulators followed up stop notices promptly, particularly where remedial action by the operator could lead to the notice being suspended. Alternatively the regulator could specify the conditions under which activity could be resumed.

6.3.27 It should be possible to treat failure to comply with a stop notice as a criminal offence – as in other regimes. Failure to comply with notices tends to involve intent and sometimes criminal levels of culpability. Failure to comply also serves to undermine regulation. Imprisonment, fines, and community penalties should therefore be available.

6.3.28 It would also be important that notices generally could continue to be used instead of, or in combination with, other measures such as a variable administrative penalties or prosecution. This should promote flexible and proportionate enforcement. Flexible use of notices would enable more cases to be effectively handled outside the criminal process but would also help regulators to apply pressure for early remedial action in cases of potentially criminal seriousness. Opportunities for greater flexibility and effectiveness would be lost if notices were simply one step in a rigid sequence of enforcement measures.

**Possible solution 3.3:**

**stop notices should be available to be used instead of, or in combination with other enforcement measures, including prosecution or administrative penalties.**

6.3.29 As now, regulators' advice to operators should remain the response to many cases of lesser non-compliance, and an important supporting element in more significant matters subject to notices or more forceful measures.

6.3.30 The evidence pointing to operators' concern to safeguard reputation suggests that public registers of stop notices or notices requiring remediation could usefully increase the impact of enforcement. However, fair use of such registers would require consistent presentation of a better graduated set of enforcement measures so that the significance of notices relative to other measures was clearly understood. Stop notices and remediation notices would record a significant breach, though (on their own) one much less serious than those subject to variable administrative penalties in turn much less serious than a criminal conviction.

### **Creating effective incentives to comply**

6.3.31 Section 5 above notes the importance of research into operator awareness, attitudes, and motivations. Work such as that commissioned by Defra's Waste Management Unit on causes of and solutions to fly tipping is an example of good practice. This kind of research offers a basis for deciding what combination of enforcement and other measures will be most effective in any sector, and how those measures should be organised.

**Possible solution 3.4:**

**research should be conducted in particular regulatory areas to establish what motivates operators to comply or not to comply**

6.3.32 There would need to be criteria to determine whether a case should be subject to criminal prosecution or variable administrative penalties. The threshold for prosecution should be as easy to understand as possible, while allowing necessary discretion to regulators. This allows them to tailor enforcement action to the particular circumstances of a case and to prevent the unscrupulous from calculating whether a certain level of disregard for the law will result in prosecution. The triggers for criminal prosecution should strengthen the incentives for operators to behave as one of a responsible majority.

6.3.33 Punishing and shaming offenders as a means to deterrence is an important and distinctive function of the criminal courts<sup>27</sup>. It has been argued that, irrespective of size of fine, the key punishment in the regulatory sphere is damage to reputation, though intentional criminals will often not be affected by loss of a business reputation.

6.3.34 The sentencing framework suggested above would explicitly separate technical and moral judgements in deciding the level of penalty. For criminal courts to have greatest effect, the reputational penalty from any moral condemnation should be reinforced as far as possible to create stronger deterrence. This could be achieved in a number of ways, more and less radical (see also Table 6.4 below):

**Option 1** replace existing criminal offences with new offences based on serious culpability – deal with other offences of causing uncontrolled risk or actual harm by means of variable administrative penalties

**Option 2** strict liability retained in criminal cases, but only with regard to very serious environmental damage, economic gain, and harm to communities. Separate culpability based offences would be introduced and put on the charge sheet as necessary. Variable administrative penalties would be used in other cases, where there is a significant but lesser environmental risk or harm, and no serious culpability.

**Option 3** retain existing strict liability offences as now, but as a matter of explicit regulator policy bring to court only those cases where the alleged offender has shown serious culpability, or there has been very serious risk or damage to the environment. Deal with other significant offences by means of variable administrative penalties

**Option 4** as Option 3, but only cases of serious culpability to be directed to the criminal courts. Even the most serious risk or damage would be dealt with by administrative system, unless there was sufficient evidence of serious culpability.

6.3.35 Some have argued that strict liability should be removed, as a way to maximise the reputational penalty and criminal deterrence, as in Option 1, and partly in Option 2. At least strict liability offences should be qualified so as to shift them somewhat towards the culpability-based end of the spectrum. As indicated in Section 5, evidence as to the value of strict liability as an approach (**Annex B**) falls under two headings: evidence about enforcement efficiency; and evidence about impact.

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<sup>27</sup> “Principled Regulation: Federal Civil and Administrative Penalties in Australia”, Australian Law Reform Commission, Report 95, tabled before Federal Parliament 19 March 2003, page 104, paragraph 3.6: “The aim of social condemnation, or stigma, traditionally applies to criminal penalties, and remains one important criterion for distinguishing between criminal and non-criminal penalties”

6.3.36 The evidence suggests that absolute or strict liability increases regulatory efficiency and effectiveness. Removing strict liability would therefore be against the public interest, which lies in ready accountability of those who cause environmental risk or damage.

6.3.37 The new sentencing scheme discussed above would overcome the current weakening in the desired impact of strict liability caused by fines which do not achieve the purposes of enforcement. Strict liability would come to provide a strong link in the chain of intervention as was intended. By the same token, strict liability + “polluter pays” fines + a criminal record adds up to a severe penalty overall and it should be used only in the most serious cases. There would need to be an easily understood and fair threshold for prosecution. It would be reasonable for operators to be brought to a criminal court only if seriously culpable, as in options 3 and, most strongly, 4.

6.3.38 Options 3 and 4 would both promote proportionality in enforcement. They would maintain enforcement efficiency while also helping to reinforce the reputational penalty.

**Table 6.4: options for distinguishing between offences suitable for criminal and administrative penalties**

Options	Pros	Cons
<p><b>Option 1</b>                      Replace existing strict liability criminal offences with new ones based on culpability.</p> <p>Deal with all other offences through variable civil administrative penalties under strict liability.</p>	<p>Criminal courts are used to considering culpability; would help to reinforce the view that criminal convictions in environmental cases are a particularly serious matter.</p> <p>Clear distinction between criminal and administrative cases.</p>	<p>Difficult for regulator to investigate culpability to the point of being able to prove beyond reasonable doubt. Operator has control of all material and knows operation best.</p> <p>Increased opportunities for combative defence.</p> <p>Risk of failing to assign responsibility for putting right environmental damage in some of the worst cases.</p> <p>Difficult to identify corporations to charge them with culpability.</p> <p>The Regulator may be encouraged not to prosecute.</p> <p>Huge policy development and legislative task.</p>
<p><b>Option 2</b>                      Strict liability retained in criminal cases only with regard to serious environmental damage, economic gain and harm to communities.</p> <p>Additional new culpability based offences would be introduced and put on the charge sheet as necessary.</p> <p>Use variable administrative penalties and strict liability in other cases, where significant but lesser risk or harm, and no serious culpability.</p>	<p>Responsibility for environmental damage always allocated.</p> <p>Criminal courts used to considering culpability; would help to reinforce the view that criminal convictions in environmental cases are a serious matter – but less reliably than Option (1).</p> <p>Together with increased transparency in sentencing would reduce perception that some environmental criminal offences are less serious simply because they are regulatory.</p>	<p>“Re-criminalisation” coupled with tougher penalties related to enforcement purposes might make courts less inclined to uphold special procedures for regulatory cases (eg reverse onus; limits on interpretation of defences)</p> <p>Does not completely separate culpability and non-culpability cases – mixed signals and less boost to incentives.</p> <p>Excessively complex.</p>

<p><b>Option 3</b> Continue with existing strict liability regimes.</p> <p>As a matter of explicit regulator enforcement <u>policy</u> bring to court only those cases where the alleged offender has shown serious culpability or has created very serious risk or damage.</p> <p>Deal with other significant offences by means of variable administrative penalties, also under strict liability.</p>	<p>Criminal courts are used to considering culpability; would help to reinforce the view that criminal convictions in environmental cases are a serious matter.</p> <p>Responsibility for environmental damage always allocated.</p> <p>Together with increased transparency in sentencing would ensure seriousness of environmental criminal offences not seen as less simply because regulatory.</p> <p>Finding evidence of culpability as an aggravating factor is already a strong element in existing enforcement decision-making.</p> <p>Legislation not needed</p>	<p>“Re-criminalisation” coupled with tougher penalties related to enforcement purposes may make courts less inclined to uphold special procedures for regulatory cases (eg reverse onus; limits on interpretation of defences)</p> <p>Does not completely separate culpability and non-culpability cases.</p> <p>Regulators would have to put additional effort into finding evidence of gross negligence, recklessness or intent where such leads needed to be pursued. Even if prosecution were not appropriate, variable administrative penalties would allow remediation and restitution to be secured and cost savings or economic gain to be negated.</p> <p>Danger that courts hold regulators to explicit enforcement policies and undermine benefits of strict liability (Adaway case).</p>
<p><b>Option 4</b> As Option 3 but <u>only</u> serious culpability cases go to the criminal courts.</p> <p>Without evidence of culpability, even the most serious damage would be dealt with by variable administrative penalties.</p>	<p>Plays to the strength of the criminal courts; would help to reinforce the view that criminal convictions in environmental cases are a serious matter.</p> <p>Strictly separates cases of serious culpability from non-culpability.</p> <p>Moral blame would be allocated for the most serious offences.</p> <p>Responsibility for environmental damage always allocated.</p>	<p>Especially serious risk or damage widely seen as a serious aggravating feature which justifies criminal prosecution.</p> <p>Public may expect an open, adversarial hearing in serious damage cases (though court procedures do not always fully provide for this).</p> <p>Stakeholders would need to accept regulators having extensive discretion to set potentially very high “polluter pays” fines.</p>

6.3.39 Options 3 or 4 would of course reduce regulator discretion to bring criminal proceedings, but this would be part of creating a more effective range of enforcement measures overall. The availability of variable administrative penalties would ensure that even without a criminal conviction, operators could still be held to account for the costs of any necessary remediation or restitution. Economic gain could still be removed. An administrative breach would still be publicly recorded as a significant breach, though less serious than a criminal conviction. Operators who, while acting within the law, were un-cooperative or who adopted combative tactics could still be held to account before a regulatory tribunal.

6.3.40 Looked at from a different perspective, it would be hard to justify, on grounds of transparency, a situation where the decision whether to prosecute or to bring a civil administrative penalty depended on discretion based on a multiplicity of decision-making factors. The proposed scheme makes the threshold for prosecution dependent on two key factors: culpability, and exceptionally serious actual or potential harm. Thought will need to be given as to whether “exceptionally serious” should be the equivalent of the Environment Agency’s “Category 1” incident assessment. Greater simplicity would make it easier to demonstrate consistency, a major and understandable business concern.

6.3.41 As now, a regulator’s decision to prosecute could be challenged, but if the grounds for prosecution are narrowed so are the grounds for challenge.

6.3.42 Where cases went to the criminal courts under options 3 or 4, magistrates’ decisions on whether to hear a case or to send it to the Crown court should arguably depend mainly on degree of culpability. There could be a maximum lower court fine for culpability. On the other hand, either magistrates or Crown court could deal with the more “technical” issues of the cost of remediation, restitution or removal of economic gain, whatever the scale. The decision on whether the lower or higher court should hear a case would then relate to degree of culpability, which would reserve the reputational penalty of a Crown court conviction for those who deserve most moral condemnation. This too would reinforce proportionality in criminal sanctions.

6.3.43 Option 4 raises the question of whether all cases where there was serious environmental risk or damage, but no culpability, should be handled by variable administrative penalty only. The decision on whether such cases should be handled by criminal proceedings or administratively appears to depend on four factors:

1. the venue best able to provide for openness so that facts and responsibility may be publicly aired, i.e. criminal court, or criminal court acting as civil tribunal, or special regulatory tribunal;
2. whether there should be a ceiling to the level of penalty which a regulator could impose administratively;
3. efficiency and ability to deal with technical complexity;

4. the extent to which creating exceptionally serious risk or harm aggravates failings to a criminal seriousness.

6.3.44 Factors (2) and (4) suggest that the idea of regulators dealing with the worst cases of environmental damage under administrative penalties would probably be seen as unacceptable, but that the various options should be aired.

6.3.45 The balance of advantages and disadvantages of the four options points to Option 3 as the approach most worth exploring further in the interests of more effective enforcement. Option 3 is designed primarily to strengthen incentives for operators to be among a responsible majority.

**Possible solution 3.5:**

**a move to option 3 above – basing prosecution on strict liability offences, but normally prosecuting only when there is evidence of serious culpability, or especially serious risk or damage has been created.**

6.3.46 This approach would represent an important change from the current position, which links decisions on prosecution primarily to the seriousness of an incident (Environment Agency Categories 1 – 4), and only secondarily to culpability as an aggravating feature, or public interest factor. Nevertheless, the Environment Agency's Functional Guidelines on enforcement decisions confirm that culpability is already a consideration. The Guidelines set out 11 public interest factors which may influence decisions whether or not to prosecute. Of these "intent", "past history", "attitude" and "foreseeability" all have a direct bearing on questions of culpability. Offender motivation is also referred to under "nature of offence" and "financial implications".

6.3.47 **No change in the scope of criminal prosecution could occur without first introducing a suitable scheme of variable administrative penalties, which would require legislation.** It is recognised that variable administrative penalties may not turn out, on further exploration, to be suitable for all regulatory regimes.

### **Complementary measures**

6.3.48 A wide range of alternative sanctions is often suggested for use in environmental enforcement. This report limits itself to discussing those which, on the evidence obtained, would seem likely to support a more effective enforcement system.

6.3.49 Under Option 3, serious culpability (and secondarily, especially serious risk or damage), would become the defining feature of criminal environmental cases. Certain measures which could complement criminal penalties seem likely to further reinforce incentives to comply.

6.3.50 The proposed new sentencing scheme would mean that the nature of the offence and penalties could be described clearly in public while still respecting the Human Rights Act and European Convention on Human Rights Article 6.

6.3.51 In Canada and Australia, the courts may make **adverse publicity orders** requiring an environmental offender to publicise a conviction, reinforcing social stigma. One option could be to use adverse publicity orders against all offenders in England and Wales convicted in the criminal courts, as their offences would be the most serious. However, it could be argued that the use of adverse publicity orders should be limited further to those criminal cases involving serious culpability. There need be no ambivalence about using adverse publicity orders in such cases. Without moral blame, though, adverse publicity orders may seem disproportionate and oppressive.

6.3.52 Where a serious environmental offence was committed by the serious neglect of a director or with their connivance or consent, the degree of culpability again argues for possible use of an additional sanction. The courts may already be invited to consider **disqualification** in suitable cases. However, the availability of director disqualification is a matter of company law, which is beyond the scope of this Review.

**Possible solution 3.6:**

**where the criminal courts impose a penalty following serious culpability, the regulator should:**

- be able to seek an adverse publicity order;
- seek director disqualification, where it is available under company law, when the offence is due to the director's consent or connivance, or results from their neglect

6.3.53 The evidence also suggests that **publicly accessible registers** naming those who have committed significant breaches will increase the reputational penalty on operators, and thence the incentives to comply. Ideally these registers would be on the internet, and could also be linked to websites with examples of operators who have demonstrated good environmental practice. In the case of determined offenders unconcerned about reputation such registers may at least have the benefit of warning members of the public about their activities.

6.3.54 The more clearly graduated response to breaches of varying seriousness which is outlined above would be designed to ensure that an operator's appearance in the register of variable administrative penalties was judged as much less serious than appearance in the register of prosecutions. Regulators would need to take account of the Rehabilitation of Offenders Act 1974, and the Data Protection Act 1998 in deciding what information could be presented publicly, and for how long. (See possible solutions 4.2 and 4.3 below.)

6.3.55 The Health and Safety Executive has some years experience of running separate web-based public registers of criminal convictions and of enforcement notices. This is part of the Health and Safety Commission's wider regulatory strategy. The legitimacy of the approach has not been seriously challenged by business. There is anecdotal evidence that insurers, and companies assessing potential contractors do use the registers.

6.3.56 For registers to be fully effective, it should be possible to search them by offence, operator name, nature of breach, region and time period for example. Ideally, the public registers should cover both Environment Agency and local authority cases for ease of public access; to promote a common pattern of information provision; to better inform policy making; and to facilitate Environment Agency or local authority checks on relevant cases when considering prosecution. Good quality information would call for input by appropriately trained front-line staff.

6.3.57 Web-based registers could include a publicly accessible level of information consistent with human rights and other statutory requirements, and a level of information which would be accessible only to regulators (and perhaps the police) for operational purposes. Again, this is a feature of the Health and Safety Executive's central registers of notices and prosecutions.

6.3.58 The registers would have the linked objectives of informing public debate and increasing incentives to comply. Both objectives rely on ready public availability of information. The Police National Computer system is sometimes suggested as a means to record environmental offences, but while this might assist regulators operationally, it would not be a substitute for publicly accessible web based registers.

### **Variable administrative sanctions – criminal or civil?**

6.3.59 If introducing variable administrative penalties, a decision would need to be made whether to make them subject to a possible criminal prosecution if negotiation breaks down, or to create a civil route with recourse to a civil tribunal. Table 6.5 below considers three options. The option chosen would seem to greatly affect how far a new variable administrative penalty system would increase incentives to comply.

6.3.60 In some cases, variable administrative fines would be much higher than at present, particularly when it was appropriate to apply fines for remediation, and restitution, and cost savings or economic gain.

6.3.61 The work on simulating administrative penalty use set out in the Henley report indicated that, overall, participants strongly favoured the procedural safeguards built into the criminal system. It was not possible for the workshops to consider in detail the respective merits of oversight by the criminal courts or by an independent specialist tribunal, but they certainly showed that any administrative penalties system, civil or criminal, would need to be transparent, fair, and subject to rigorous independent scrutiny.

Options	Advantages	Disadvantages
<p><b>Option 1</b> Regulator has recourse to criminal prosecution if penalty negotiations with operator break down, or if operator refuses administrative penalty.</p>	<ul style="list-style-type: none"> <li>- Makes most use of existing resources.</li> <li>- Where offender accepts the penalty, potentially faster and cheaper than current criminal route.</li> <li>- Retains protections of existing criminal procedure.</li> <li>- Offers route for those genuinely trying to comply to repair environmental damage.</li> </ul>	<ul style="list-style-type: none"> <li>- Perhaps likely to be used to a limited extent – uncertainties over outcome may encourage continued reliance on criminal proceedings.</li> <li>- May be incentives for some (perhaps small) operators to accept an inappropriate administrative fine rather than demand a hearing.</li> <li>- No clear distinction between administrative and criminal proceedings – the relationship is ill defined.</li> <li>- Regulator would always have to be prepared to bring a criminal prosecution, so the use of administrative penalties is limited to those offences already prosecuted under criminal law.</li> <li>- Regulator might be tempted to resort to “bluff” to make wider use of administrative penalty system.</li> </ul>
<p><b>Option 2</b> Wholly civil route – <u>magistrates</u> act as a civil appeal body, or hear civil case if regulator’s administrative penalty decision is rejected.</p>	<ul style="list-style-type: none"> <li>- Use of existing forum.</li> <li>- Makes some distinction between those cases suitable for criminal prosecution and those where administrative penalty is appropriate.</li> <li>- Where offender accepts the penalty, potentially faster and cheaper.</li> <li>- Offers route for those genuinely trying to comply to make good environmental damage.</li> <li>- Could insure against civil administrative fines if service available.</li> <li>- “Beyond reasonable doubt” can be retained</li> </ul>	<ul style="list-style-type: none"> <li>- Would require special arrangements within magistrates system.</li> <li>- Less clarity in distinction between civil and criminal systems.</li> <li>- Fails to send clear message about relative seriousness of criminal and administrative cases.</li> </ul>
<p><b>Option 3</b> Wholly civil route - <u>specialist regulatory tribunal</u> acts as a civil appeal body, or hears civil case if regulator’s administrative penalty decision is rejected.</p>	<ul style="list-style-type: none"> <li>- An unmistakably civil administrative penalty regime with clear separation between the criminal and administrative spheres.</li> <li>- Where offender accepts the penalty, potentially faster and cheaper than current criminal route.</li> <li>- Offers route for those genuinely trying to comply to repair environmental damage.</li> <li>- Would help contrast the seriousness of cases that do go to the criminal courts with those dealt with by administrative tribunal.</li> <li>- Arguably offers greatest opportunity to expand range of incentives to address differing motivations.</li> <li>- Reputational benefits to responsible business – much greater reputational penalties for serious offenders.</li> <li>- Could insure against civil administrative fines if service available.</li> <li>- “Beyond reasonable doubt” can be retained</li> </ul>	<ul style="list-style-type: none"> <li>- Requires new tribunal arrangements – costs and benefits would have to be weighed carefully (unit costs would be lower if a tribunal had a wide regulatory and not just environmental remit).</li> <li>- Higher risk – with a whole new system and basis for sanctioning.</li> </ul>

Table 6.5: criminal or civil administrative sanction options

6.3.62 As indicated in the table above, there may be important benefits for operators in moves towards a wholly civil system under Option 3:

- operators subject to administrative fines would be able to make clear they were not morally culpable;
- responsible operators should be able to negotiate with the regulator some positive publicity for remedial work or restitution undertaken;
- under a wholly civil system, the possibility of administrative fines could be insured against if such a service was available – introducing a civil admin penalty system might encourage the insurance industry to develop suitable, ideally risk-based products;
- under a separate civil system, there would be the opportunity to follow simplified fast-track procedures when both regulator and operator agree.

6.3.63 These factors would reinforce still further a distinction between environmental crime, and the kind of non-compliance which a responsible business is keen to put right. The objective of the system should be to have the largest proportion of operators working responsibly in partnership with regulators.

6.3.64 Having regulators decide on the basis of investigation whether to use criminal prosecution or a fully civil administrative penalty would effectively allow for decriminalisation where there was lack of culpability. But it would avoid the risk that full decriminalisation of certain offences would allow less responsible operators to calculate the ‘benefits’ of non-compliance.

6.3.65 A civil approach would need to include strong incentives to comply with administrative penalties. We suggest a time limit for appeals, after which the decision would be deemed accepted and enforceable.

6.3.66 A decision by a tribunal on the validity and final form of an administrative penalty should be readily enforceable. In civil matters, civil debt recovery would be the normal means. However, it could be argued that failure to comply with a civil regulatory penalty should be treated differently – such a failure, like failure to comply with an enforcement notice, serves to undermine regulation. This is very much against the public interest. Furthermore, if as is suggested administrative penalties are for responsible companies, non-cooperation to that degree should arguably place the operator back in the criminal sphere. The position is not the same as in civil litigation between private individuals or companies.

6.3.67 Proportionate protections for alleged offenders would be needed under a civil administrative procedure just as much as under a criminal model. One important question concerns the standard of proof to be adopted when applying civil variable administrative penalties.

6.3.68 Legal advisers indicate that *beyond reasonable doubt* is simply a benchmark for weighing evidence – there appears to be no reason why it should not be used in a civil context, in the same way as criminal courts rely on “balance of probabilities” where there is “reverse onus” on the defendant; or civil courts may require a higher standard of proof in serious matters. *Beyond reasonable doubt* would give extra assurance of fairness and transparency. We also understand from discussion with Environment Agency that using “balance of probabilities” would not in reality lead to cost savings in investigation. It could also be argued that the combination of strict liability + balance of probabilities would give enforcers too great an advantage.

**Possible solution 3.7:**

**to distance the operation of administrative penalties from the criminal justice system as far as possible, as this would increase the impact of the system of sanctions overall**, that is option 3, a wholly civil system. However, the evidential standard of “beyond reasonable doubt” should be retained under a civil administrative penalty system.

6.3.69 In developing a suitable approach to the use of variable administrative penalties, a number of important questions would need to be answered:

- whether there was evidence that variable administrative penalties would be more effective in the particular regulatory area;
- how to ensure procedural fairness (including the question of the burden of proof) proportionate to the possible adverse consequences for the accused;
- how sufficient openness could be built into tribunal procedures to secure public confidence;
- how the unit cost of cases handled by a tribunal would compare to that for other mechanisms – including consideration of fine collection and enforcement;
- how tribunals should be administered, for example: how many tribunals should there be? What should be their regulatory scope? What expertise would be required from those who sit on them?

6.3.70 As regards costs, much would depend on whether or not a Regulatory Tribunal could be set up to cover a variety of regulatory areas and not just environmental cases. The Cabinet Office BRE Penalties Review is considering this.

## **Theme 4 - Consistency of approach**

6.4.1 Select Committee reports on the Environment Agency, and Government and Agency responses to those reports, refer to stakeholder concern about regulatory consistency, including in enforcement, and they record continuing attention to and progress on the issue.

6.4.2 We recognise that a good deal of variation exists between the circumstances of particular cases, or between the kinds of operator prevalent in different sectors, and to some extent between regions. With average fines, too many factors are concealed in the figures to reveal much. Notably, questions of seriousness are mixed with ability to pay and discount for early guilty pleas.

6.4.3 Considering prosecution, there has been sufficient evidence of significant regional variation in the incidence of prosecution to at least raise reasonable questions about consistency<sup>28</sup>. Even a perceived lack of consistency serves to undermine the credibility of regulators. The Environment Agency has been addressing this through its Functional Guidelines and other means.

6.4.4 There are good arguments for regulators and the courts exercising discretion to distinguish between minor negligence and worse cases. Discretion, within the bounds set by effective policies and decision-making processes, offers more flexibility and better tailoring of decisions to cases than rigid rule-based decision-making. However, this relies heavily on considerable transparency, which in turn demands adequate publicly available information about policy and procedure to allow broad level consistency to be judged.

6.4.5 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. Unfortunately, this is not available, as discussed on page 16 above. Relating sanctions (both criminal and administrative) explicitly to the purposes of enforcement, and of gathering data accordingly, is intended partly to help monitor consistency at the broad level.

6.4.6 Regulators' policies need to refer explicitly to their approach to enforcing environmental requirements. This does not prevent regulators, including local authorities, from setting and resetting priorities or reviewing their enforcement approach to reflect new evidence of what works in local circumstances. We merely suggest it is important that the approach is set out in sufficient detail for businesses and citizens to know what it is. Policies need to be drafted so as to ensure a reasonable level of accountability as well as allowing reasonable discretion.

**Possible solution 4.1:**  
**regulators should build on current enforcement policies to ensure that they set out their approach to environmental enforcement, and provide a basis for monitoring consistency of approach at the broad level.**

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<sup>28</sup> p 81-82 *The Environmental Justice Project Report* (2004)

**Possible solution 4.2:**

**criminal and variable administrative penalties should be publicly recorded on the internet, each entry breaking the penalty down so it is clear which enforcement purposes are being addressed**

**Possible solution 4.3:**

**there should be a web-based public register of the issue of stop and remediation notices, which together with registers of administrative penalties and criminal prosecutions, would encourage better compliance with the law to safeguard reputation.**

6.4.7 Complaint mechanisms should be robust enough to allow operators to fairly challenge decisions perceived as inconsistent. Operators and third parties currently 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; or in particular criminal cases. The evidence on the use of these, and their respective benefits and limitations are considered under Theme 5 below, "Involving the community".

## **Theme 5 - Involving the community**

6.5.1 We consider in this section what role communities could play in increasing the effectiveness of enforcement, by assisting detection of environmental crime; and by being involved in the assessment of whether restitution should follow environmental incidents which have harmed community interests.

### **Detection**

6.5.2 We note that the likelihood of detection coupled with the anticipated level of penalty is considered to determine the deterrent effect<sup>29</sup>. Detection of environmental offending depends heavily on reports from members of the public. We argue above that deterrence from penalties is currently inadequate in that not all the key purposes of environmental enforcement are routinely being achieved.

6.5.3 Measures to encourage communities to report non-compliance could increase levels of detection. And, if more active involvement of communities was widely known, it may also increase the risk of detection perceived by

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<sup>29</sup> A. Ogus and C. Abbott "Pollution and Penalties" (2001)

6.5.4 operators. Greater perceived risk of detection coupled with the more effective penalties discussed above would increase deterrence.

6.5.5 Community assistance with detection could involve residents drawing attention to incidents; businesses drawing attention to serious non-compliance elsewhere; and “whistle-blowing”.

6.5.6 While there may be gains to be had from better intelligence and detection through more community involvement, it will be important to avoid undermining the targeting of enforcement resources on the greatest risks.

6.5.7 The enforcement system “map” in Annex A draws attention to feedback from regulator to community. This aspect of the enforcement system may be worth exploring as a possible motivator to community reporting of incidents or non-compliance.

6.5.8 For example, Lewisham Council has won an award for enabling the public and officers to report fly-tips and graffiti to a web site using mobile phone picture messaging<sup>30</sup>. The response and a picture of the cleaned-up site are posted for all to see. Lewisham’s mayor is quoted as saying: “Our innovation paid off. In the first year more than 15,000 enviro-crimes were dealt with, with twice as much graffiti being cleared up than in previous years. ... In most cases [they] are now being cleared up the same day as they are reported, three times quicker than before”. It may be worth exploring whether ease of reporting plus quick feedback could similarly galvanise public support for enforcement.

6.5.9 Local authority experience also suggests that an effective response to community concerns about local environmental degradation places a premium on sound working partnerships with other bodies. Lewisham Borough Council’s efforts<sup>31</sup> to reduce fly tipping involved the Environment Agency helping track down companies who were fly tipping; Milwall FC surveillance equipment being used to gather evidence; and the police impounding vehicles that were causing tipping. Enforcement on housing estates involves tenants, community organisations and housing offices. All those involved are trained and know what evidence is needed for prosecution.

## **Restitution**

6.5.10 It is suggested above that restitution to a community affected by a serious incident should be an important element in deciding the appropriate sanction, whether criminal or administrative. Community involvement would be important in helping to assess the degree of harm which has been experienced. Information could come from a range of possible sources, including intermediaries such as local authority support services and community representatives groups or direct from residents.

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<sup>30</sup> <http://www.lewisham.gov.uk/NewsAndEvents/News/PhoneTechnologyAward.htm>

<sup>31</sup> London Assembly, Report of Environment Committee “*Protecting the City Environment - London’s response to fly tipping, litter, graffiti, fly-posting and abandoned vehicles*” (2004), page 22, London Case Study 1: Enforcement in Lewisham.

6.5.11 If not many people are affected it is possible that restorative justice approaches in the form trialled by the police may be a suitable model<sup>32</sup>. Where those affected are more numerous other, possibly resource intensive, approaches may be needed.

6.5.12 A “rapid review” by the Sustainable Development Research Unit<sup>33</sup> found the poorest and most excluded communities are:

- disproportionately exposed to environmental risk, and disproportionately vulnerable to its effects;
- least able to make use of opportunities to participate in environmental decision-making ... .. [and] ... many will require access to additional resources and support if they are to make effective use of such mechanisms

6.5.13 Seeking a “community view” will not be straightforward as there will be many players, potentially competing views and interests, stronger and weaker though equally important voices, and more and less well-informed opinions. The costs of obtaining a rigorous assessment of community impact based on direct consultation may be disproportionate except in the case of serious incidents.

6.5.14 Possible approaches on which to draw could include:

- **regulator led:** (i) based on restorative justice processes now being established in the criminal justice field; (ii) possible tailor made approaches designed to assess incidents with a large number of victims;
- **court led:** exemplified by the North Liverpool Community Justice Centre. The Centre works with partner agencies to tackle behaviour which damages the quality of life in the area, including noise pollution, graffiti and fly tipping. The Centre regularly researches the views of the community, to ensure it is taking everyone's opinions into consideration.<sup>34</sup>

6.5.15 There may also be lessons to be learned from companies in high hazard industries who need to maintain communication with local communities regarding risks, and when incidents occur.

6.5.16 Next steps could include obtaining evidence as to what principles and good practice would need to be followed in assessing proportionate and useful restitution to a local community following an incident.

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<sup>32</sup> Office for Criminal Justice Reform “*Restorative Justice: Helping to meet local needs – web based guidance*”

<sup>33</sup> “*Environment and Social Justice: Rapid Research and Evidence Review*”, Final report, December 2004

<sup>34</sup> Paper by the Department for Constitutional Affairs “*Doing law differently*” April 2006

6.5.17 Questions would include:

- what should trigger work towards restitution following an incident?
- how to decide what approach was most appropriate and proportionate in the circumstances?
- how to decide who to consult so as to get a “community view”;
- how to assess the nature and extent of harm to the community;
- how in practice to direct funding from a fine to achieve restitution;
- whether rural and urban areas might require different approaches;
- who would finally decide what constituted satisfactory restitution, or mediate a resolution – regulator, court, or some other body?
- what should be the relationship between restitution by this means and compensation which may be available through civil litigation?

**Possible solution 5.1 :**

**Evidence should be sought on the most effective mechanisms for involving communities in (i) assisting the detection of environmental offending; (ii) helping to assess what restitution to communities may be appropriate following environmental harm**

### **Challenging enforcement decisions**

6.5.18 An important aspect of community involvement in enforcement is the ability to challenge regulator enforcement decisions. This may be accomplished by means of:

- regulator complaint procedures
- the Parliamentary Commissioner for Administration (“the Ombudsman”), via Member of Parliament
- judicial review

6.5.19 The Review has looked for data on usage of these routes. The Environment Agency has a documented procedure for dealing with and recording complaints and commendations. In each of the four quarters leading up to December 2005, EA received 400 to 480 complaints and from 260 to 340 commendations, all in various categories<sup>35</sup>. Complaints included those of “failure to act”, but it is not known how many, if any, related to enforcement. However, the complaints procedure is available for that purpose.

6.5.20 The reports of the Ombudsman show that a number of complaints are raised each year about regulators, including EA<sup>36</sup>. Challenges to enforcement

<sup>35</sup> supplied by Environment Agency

<sup>36</sup> [http://www.ombudsman.org.uk/improving\\_services/selected\\_cases/PCA/index.html](http://www.ombudsman.org.uk/improving_services/selected_cases/PCA/index.html)

action tend to fall into two camps: (1) that the regulator failed to take appropriate action against an alleged polluter; and (2) that the regulator took disproportionate or ill-founded action against the complainant.

6.5.21 So this route is available for enforcement issues, and has been used in relation to environmental enforcement. For example, the Environment Agency has been challenged about its enforcement action to address an operator's non-compliance with a waste management licence. Correct procedures had not been followed and the challenge was at least partially upheld<sup>37</sup>. We are also aware of at least one similar health and safety at work enforcement case. The Review also noted a report by the Scottish Public Services Ombudsman, on a complaint, from a business, which examined how an environmental enforcement decision was reached, recorded, and internally reviewed.

6.5.22 There are of course some differences in the nature and scope of Ombudsman and judicial review procedures, as reviewed by WRC<sup>38</sup>. The Ombudsman considers alleged maladministration, judicial review considers reasonableness, but in both cases this involves among other things considering whether the regulator followed its policies and procedures in a timely and thorough manner. A key difference is in the remedy: the Ombudsman's decisions have only persuasive force, though it would be extremely unusual for a public authority not to comply. The courts can require action following judicial review. However, the Ombudsman does not charge, whereas judicial review typically entails a variety of costs.

6.5.23 Some commentators have argued that access to judicial review in public interest cases is hindered by prohibitive costs and financial risks. Questions around the operation of protective cost orders in environmental cases are being considered separately from the Review.

### **A note on powers**

6.5.24 Decisions on which enforcement approach and measures to adopt should be followed by identifying necessary investigative powers for inspectors (eg. entry, evidence gathering, questioning) and sentencing or other powers for the courts.

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<sup>37</sup> example supplied by the office of the Parliamentary Ombudsman

<sup>38</sup> WRC report for Defra, "*The Effectiveness of Enforcement of Environmental Legislation*" (2006)

## 7. OVERVIEW OF POSSIBLE SOLUTIONS

7.1 The ideas set out above would lead to an enforcement system something like that presented in figures 7.1 and 7.2.

7.2 Figure 7.1 tabulates the Review proposals for a reformed approach to environmental enforcement geared to achieving its main purposes:

<b>enforcement outcome</b>	environmental protection					
<b>enforcement outputs</b>	prevent continuing risk or harm	remediation			deterrence	
<b>enforcement purpose</b>	early risk / damage control	put right environmental damage	make restitution to affected communities	negate actual economic gains <i>(level playing field)</i>	<b>plus</b> punish moral culpability	
					address illegal activity motivated by economic gain	address illegal activity without economic motive
<b>nature of response</b>	stop & remediation notices	variable civil administrative penalty			criminal	
<b>liability</b>	Strict				strict – but prosecution only if serious negligence, or recklessness, or intent <i>(or especially serious risk / damage)</i>	
<b>offender motivation</b>	A spectrum of attitudes and behaviour from “aims for compliance” ... to ... “low level negligence”				criminal levels of negligence, or recklessness, or intent <i>(or especially serious risk / damage)</i>	
<b>Information provision</b>	public registers					

Figure 7.1: summary of proposals as related to the purposes of enforcement

7.3 Figure 7.2 shows how in practice enforcement decisions would be based on the two key factors, culpability on the one hand, and actual or potential impact on the other:

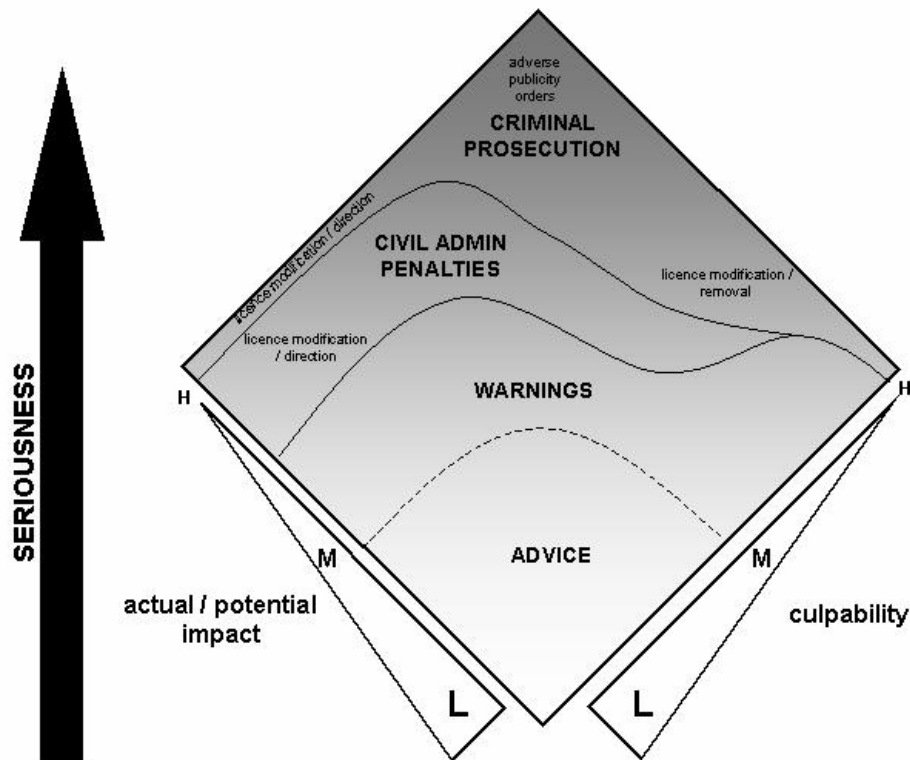


Figure 7.2: the basis for enforcement decisions in practice

7.4 Figure 7.2 shows how decisions on using the major enforcement tools would be expected to turn out in practice. In line with the ideas in this report, the key factors would be a combination of culpability and the seriousness of actual or potential impact. The importance of culpability as a key factor is a major change – at present incident seriousness is the main factor in Environment Agency policy. Please note that Figure 7.2 is not a decision making tool in its own right.

7.5 Figure 7.2 is also designed to illustrate the relatively few high impact incidents and the relatively few highly culpable operators. High impact incidents would be expected to lead to prosecution, even if an operator had made considerable efforts to control a major risk. Progressively less responsible operators should expect prosecution even where the actual or potential impact is less. A few prosecutions may be justified where operators repeatedly flout requirements, even though actual harm or potential risks are low – this is behaviour which wilfully undermines the authority of regulation and ultimately constitutes high culpability.

7.6 In Figure 7.2, the scope for use of civil administrative penalties finally vanishes when operators have shown intent to breach the law, or have flouted the law by repeatedly committing lesser offences. As illustrated, advice and guidance on compliance would continue to play a major part, complemented as appropriate by formal enforcement measures.

7.7 Stop or remediation notices would be available instead of or in combination with any of the measures shown in Figure 7.2.

7.8 There are strong arguments for both Environment Agency and local authorities both having access to all these enforcement tools and to subscribe to the same broad approach to using them. This would avoid loopholes which could enable environmental criminals to exploit differences in powers between the Environment Agency and local authorities, or between local authorities.

## 8. CONCLUSION

8.1 In conclusion, this report offers evidence that the range of ideas discussed above would increase proportionality, transparency, consistency and effectiveness in environmental enforcement. These ideas could promote what the Review sees as key enforcement outcomes – improved compliance behaviour and “polluter pays” – as well as better regulation generally.

8.2 More particularly, criminal convictions would be reserved for demonstrably criminal behaviour, that is, morally culpable behaviour (and for especially serious risk or damage). There would be strong incentives for operators to be seen to be among those responsible operators who are subject to civil administrative penalties when things go wrong despite generally sound risk control measures. Sanctions would be seen serve enforcement and wider regulatory purposes. Data would be available publicly helping to show whether enforcement purposes and broad consistency were being achieved.

8.3 The extent to which ideas like civil variable administrative penalties are suitable may vary between different areas of environmental regulation. Much will depend on the attitudes and behaviour of operators in a sector, locally or nationally - evidence in specific areas may point to legitimate variations in approach. However, the evidence-based ideas in this report could provide a starting point for considering improvements in effectiveness across the whole sweep of environmental regulation.

8.4 The package of ideas set out in this report seeks to offer a more coherent enforcement framework which would:

- show business, especially smaller businesses, and others that tough sanctions are being applied to the worst offences, while the good intentions of a responsible majority are being better recognised;
- be much better in levelling the playing field for business;
- ultimately be more effective by strengthening incentives to comply.

8.5 However, to know whether in practice these benefits would be achieved, regulatory impact assessment would need to be carried out, in consultation with interested people and organisations, including business. Costs and benefits would need to be assessed. The means to establish these ideas in practice would need to be considered. It would also be necessary to assess the likely impact on local authority regulation.

8.6 The conclusions of this report therefore represent early policy ideas that flow from the evidence gathered. These conclusions contribute to work going on within Defra and environmental regulators to improve the effectiveness and the fairness of environmental enforcement as a working part of wider regulation.

## **Contacts for further information**

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