

**POLLUTION CONTROL AND THE RULE OF LAW**

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PhD THESIS

UNIVERSITY OF SHEFFIELD  
DEPARTMENT OF LAW  
JANUARY 1995

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### **SUMMARY**

The thesis is an attempt to apply the rule of law to pollution control, the aim being to discover whether one form of environmental regulation can be regarded as more constitutionally legitimate than another. The thesis begins with a detailed discussion of the rule of law. In the first chapter, I suggest that the rule of law cannot simply be 'intuitively realised', but rather that the values associated with it must be accounted for through theoretical analysis. Immanent critique is rejected as a theoretical technique in favour of Dworkin's 'constructive interpretation'. The latter approach yields the rule of law values of equity, accountability, efficiency, certainty and effectiveness. Future chapters involve the application of these values to specific modes of pollution control. In chapter two, the 'command-and-control' regulatory systems operated by HMIP, the NRA, local authorities (air pollution control and waste regulation) and water and sewerage companies are analysed in terms of rule of law values - except for accountability which is discussed separately and in much greater depth in chapters 3 to 6. In these four chapters, I begin by examining general accountability mechanisms before exploring accountability for specific decisions such as the setting of ambient standards, the setting of emission/process standards and finally, monitoring and enforcement. Having discussed command-and-control approaches to pollution control, chapter 7 proceeds to examine market mechanisms of environmental regulation in terms of the rule of law values. The values are first applied to pollution taxes and tradeable permits at an abstract level; they are then applied to the existing cost-recovery charging schemes operated by the various regulatory bodies. Finally, in chapter eight I attempt to apply the rule of law values to 'market approaches' to pollution control such as environmental management and audit, green consumerism and investment, government-industry contracts and civil liability. The conclusion of the thesis then assesses the success or otherwise of the practical application of the rule of law that has been attempted in previous chapters. It considers whether one can use the rule of law as a benchmark of legitimacy to conclude that one form of pollution control is more constitutionally legitimate than another.

# CONTENTS

<i>Introduction</i>	1
<b>1 - Pollution Control and the Rule of Law</b>	<b>5</b>
1.1 Constitutional Economics	
1.2 Is the Rule of Law Part of the Constitution?	
1.3 What is the Content of the Rule of Law?	
1.3.1 Immanent Critique	
1.3.1.1 Matching Claims With Reality	
1.3.1.2 Connecting the Values with the Rule of Law	
1.3.2 Constructive Interpretation	
1.3.2.1 The Pre-Interpretive Stage - Dicey and the Rule of Law	
1.3.2.2 The Interpretive Stage	
1.3.2.3 The Post-Interpretive Stage	
1.4 Aren't the Rule of Law and its Principles Just Arbitrary and a Matter of Subjective Preference?	
1.5 How Does the Rule of Law Operate?	
<b>2 - Regulation I - Command-and-Control</b>	<b>34</b>
2.1 NRA Regulation	
2.1.1 Accountability	
2.1.2 Efficiency	
2.1.3 Equity	
2.1.3.1 Equity in Setting Standards	
2.1.3.2 Equity in Enforcement	
2.1.4 Certainty	
2.2 Integrated Pollution Control by HMIP	
2.2.1 Accountability	
2.2.2 Efficiency	
2.2.3 Equity	
2.2.4 Certainty	
2.3 Local Authority Air Pollution Control (APC)	
2.4 Trade Effluent Control	
2.4.1 Accountability	
2.4.2 Efficiency	
2.4.3 Equity	
2.4.4 Certainty	
2.5 Waste Management Licensing	

<b>3 - 6 - The Accountability of Environmental Agencies - An Introduction</b>	<b>61</b>
<b>3 - The Accountability of Environmental Agencies</b>	<b>64</b>
<b>I General Accountability</b>	
3.1 Passive Mechanisms and Intermittent Mechanisms	
3.2 Indirect, Day-to-Day, Active Mechanisms	
3.3 Direct, Day-to-Day, Active Mechanisms	
<b>4 - The Accountability of Environmental Agencies</b>	<b>72</b>
<b>II Accountability for Setting Ambient Standards</b>	
4.1 Ex Ante Accountability	
4.1.1 Critical Loads	
4.1.2 The Precautionary Principle	
4.1.3 Cost-Benefit Analysis	
4.1.3.1 Methodological Flaws	
4.1.3.2 Political Objections	
4.1.3.3 Ethical Objections	
4.1.3.4 Defences of CBA	
4.1.4 Setting Ambient Standards Discursively	
4.1.5 Air Quality	
4.1.6 Water Quality	
4.1.7 Conclusion	
4.2 Ex Post Accountability	
4.2.1 Judicial Review and SWQOs	
4.2.1.1 Breach of Duty and Community Law	
4.2.2 Judicial Review, AQSs and Acid Rain Policy	
<b>5 - The Accountability of Environmental Agencies</b>	<b>106</b>
<b>III Accountability for Setting Emission/Process Standards and Other Operational Duties</b>	
5.1 Ex Ante Accountability	
5.1.1 Consultation	
5.1 Ex Post Accountability	
5.2.1 Ombudsmen	
5.2.2 The Citizen's Charter	
5.2.3 Call-In Powers	
5.2.4 Appeals	
5.2.5 Tort	



- 5.2.6 Judicial Review
  - 5.2.6.1 Alternative Remedies
  - 5.2.6.2 Standing
    - 5.2.6.2.1 Current National Law on Standing
    - 5.2.6.2.2 Standing and Community Law
  - 5.2.6.3 Grounds of Review
  - 5.2.6.4 Judicial Review of the NRA
  - 5.2.6.5 Judicial Review of HMIP and Local Authorities (APC)
    - 5.2.6.5.1 A 'Hands-Off' Stance by the Courts
    - 5.2.6.5.2 An Interventionist Stance by the Courts
  - 5.2.6.6 Judicial Review of Waste Regulation Authorities
  - 5.2.6.7 Judicial Review of Water and Sewerage Companies

**6 - The Accountability of Environmental Agencies** **162**  
**IV Accountability for Enforcing Emission/Process Standards**

- 6.1 Tort
- 6.2 Private Prosecutions
- 6.3 Judicial Review of Enforcement Decisions
  - 6.3.1 The Story so Far
  - 6.3.2 Ex p. Mead
    - 6.3.2.1 Fairness
  - 6.3.3 Ex p. C
  - 6.3.4 The Position Now
  - 6.3.5 Applying the Case-Law to Environmental Agencies
    - 6.3.5.1 Do the Bodies Have Prosecution Policies and are they Open?
    - 6.3.5.2 Are the Provisions Sufficiently Detailed to be of Use to Individuals in Review Proceedings?
    - 6.3.5.3 Should Bodies Adopt a Policy of Selective Prosecution?
    - 6.3.5.4 Should Bodies Adopt Prosecution Policies?
    - 6.3.5.5 Should Policies Be Open and Should One Be Able to Rely on Them in Review Proceedings?
- 6.4 Judicial Review of Monitoring Decisions
- 6.5 Conclusion

**7 - Regulation II - Market Mechanisms** **183**

- 7.1 Pure Market Mechanisms
  - 7.1.1 Efficiency
  - 7.1.2 Equity
  - 7.1.3 Accountability
    - 7.1.3.1 Pollution Taxes
    - 7.1.3.2 Tradeable Permits

- 7.1.4 Effectiveness
  - 7.1.4.1 Pollution Taxes - Monitoring and Enforcement
  - 7.1.4.2 Tradeable Permits - Monitoring and Enforcement
- 7.1.5 Certainty
- 7.2 Present Charging Arrangements
  - 7.2.1 The NRA Charging Scheme
  - 7.2.2 The HMIP Charging Scheme
  - 7.2.3 The APC Charging Scheme
  - 7.2.4 Charges for Discharges to Sewers
  - 7.2.5 Waste Charging

## **8 - Market Control of Corporate Pollution**

**207**

- 8.1 Corporate Responsibility
  - 8.1.1 Environmental Management and Auditing and Voluntary Action
    - 8.1.1.1 Effectiveness
    - 8.1.1.2 Efficiency
    - 8.1.1.3 Equity
    - 8.1.1.4 Accountability
  - 8.1.2 Government-Industry Bargaining
- 8.2 Corporate Accountability
  - 8.2.1 Green Consumerism and Eco-Labelling
    - 8.2.1.1 Effectiveness
    - 8.2.1.2 Equity
    - 8.2.1.3 Efficiency
    - 8.2.1.4 Accountability and Certainty
  - 8.2.2 Green Investment
    - 8.2.2.2 Effectiveness
  - 8.2.3 Direct Action and Boycotts
  - 8.2.4 Tort
    - 8.2.4.1 Efficiency
    - 8.2.4.2 Effectiveness
    - 8.2.4.3 Equity
  - 8.2.5 Coaseian Bargaining
    - 8.2.5.1 Equity
    - 8.2.5.2 Efficiency
    - 8.2.5.3 Effectiveness
  - 8.2.6 Regulation

## ***Conclusion***

**240**

## ABBREVIATIONS

ACBE	Advisory Committee on Business and the Environment
APC	air pollution control
BAT	best available technology
BATEA	best available technology economically available
BATNEEC	best available techniques not entailing excessive cost
BOD	biochemical oxygen demand
BPCTCA	best practicable control technology currently available
BPEO	best practicable environmental option
BPM	best practicable means
BSI	British Standards Institution
CBA	cost-benefit analysis
COD	chemical oxygen demand
COPA 1974	Control of Pollution Act 1974
CPS	Crown Prosecution Service
CVM	contingent valuation methodology
DOE	Department of the Environment
EC	European Community
EIRIS	Ethical Investment Research and Information Service
EMAS	Eco-Management and Audit Scheme
EPA	Environmental Protection Agency
EPA 1990	Environmental Protection Act 1990
EVABAT	economically viable application of best available technology
FWPCA	Federal Water Pollution Control Act
HMIP	Her Majesty's Inspectorate of Pollution
IPC	integrated pollution control
LCA	life-cycle analysis
LCP	large combustion plant
MAC	marginal abatement cost
MAC	maximum admissible concentration
NRA	National Rivers Authority
PCC	Professional Complaints Committee
PP	precautionary principle
PPP	polluter pays principle
RCEP	Royal Commission on Environmental Pollution
RPB	River Purification Board
RSPB	Royal Society for the Protection of Birds
SAG	sector application guide
SWQO	statutory water quality objective
WIA 1991	Water Industry Act 1991
WRA	waste regulation authority
WRA 1991	Water Resources Act 1991
WTP	willingness to pay
WWF	World Wide Fund for Nature

## INTRODUCTION

This thesis is an attempt to apply the rule of law (which, as I hope to show, is part of our unwritten constitution), to the various mechanisms of pollution control. If it fills any 'gaps' in the academic literature, they are: first, the lack of any recent theoretical, public law analysis in environmental law in the UK. The last significant public law studies, centred around administrative discretion, were carried out in the early 1980s under the auspices of the Oxford Centre for Socio-Legal Studies.<sup>1</sup> It is perhaps a sign of the times that most theoretical work on environmental policy and certainly most funded research, appears to be performed by environmental economists. The second gap is the absence of any attempts to apply the rule of law at anything other than an abstract level.<sup>2</sup> Although theory is necessarily abstract, it seems to me that it is only useful if it can be applied in real world settings. If, as has been claimed, theory is like a map, it would appear important to find some terrain on which to use the map.<sup>3</sup>

Up until recently, administrative command-and-control<sup>4</sup> regulation was the favoured method for making firms control their pollution. It is still extremely important, but it seems likely that regulation will increasingly give way to the market as a means of control. A note on terminology is needed at this point. I will be using the term 'market approaches' to refer to non-regulatory means of pollution control which are dependent on market processes and signals for their operation.<sup>5</sup> These should not be confused with 'market mechanisms' - which I will be using to describe pollution taxes and tradeable permits. Market approaches rely on the market in contradistinction to regulation; market mechanisms on the other hand are a form of regulation which mimics the market and provides many of the benefits (and

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<sup>1</sup>Eg. Hawkins, *Environment and Enforcement*; Richardson et al., *Policing Pollution*.

<sup>2</sup>Eg. Harden & Lewis, *The Noble Lie*.

<sup>3</sup>Alternatively, one might claim that different theories are like differently scaled maps, so that an 'abstract' theory is the equivalent of a road atlas of Britain while one like mine is a small scale Ordnance Survey variety.

<sup>4</sup>'Command-and-control' is a rather authoritarian sounding term and is only used for want of an alternative. Its use certainly should not be taken to express any prejudice against this form of regulation. Indeed, it is likely to remain the bedrock of our system of pollution control for some time to come.

<sup>5</sup>Market approaches are wider than 'voluntary' approaches, because, as we shall see, there are market-based accountability mechanisms that pressurise companies into action; and action which results from such pressure is not strictly voluntary.

disadvantages) associated with actual markets.<sup>6</sup> If as seems likely, we are going to see an increase in the use of both forms of market techniques in the near future,<sup>7</sup> I believe that it is important to try to chart the constitutionality of such a shift. Will such techniques be constitutionally illegitimate? Or, on the other hand, might they prove more legitimate than traditional command-and-control forms? The aim will be to see whether the rule of law can act as a benchmark of constitutional legitimacy to help us to answer these questions.

Finally, one or two comments need to be made on the scope and structure of the thesis. First, while the thesis as a whole is an attempt to apply the rule of law to pollution control mechanisms, it can be read on a number of different levels. Thus, one could for example read the majority of the thesis without the constitutional framework. The rule of law, I suggest, is made up of the values of efficiency, equity, certainty, effectiveness and accountability. Without the rule of law, the thesis becomes simply an application of administrative values to the various types of pollution control mechanism - there is no constitutional underpinning of those values. Alternatively, since a substantial part of the thesis involves the consideration of just one of the rule of law values - accountability - anyone interested in that alone need only read the beginning of chapter 2 and then chapters 3-6. Secondly, the backbone of the main body of the thesis, the blueprint for its structure, is formed by command-and-control *regulation*<sup>8</sup> and more specifically by the twin functions of standard-setting (in relation to both ambient standards and emission/process standards)<sup>9</sup>

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<sup>6</sup>The title of the thesis was originally going to be 'Environmental Regulation and the Rule of Law' rather than 'Pollution Control and the Rule of Law'. The difficulty with this title was that - unless 'regulation' is defined extremely broadly - it did not encompass the non-regulatory market approaches to pollution control.

<sup>7</sup>In the future we are likely to see policy makers setting the goals they desire and then leaving it to industry to sort out amongst themselves how to meet these goals. And just as we are likely to see an increased emphasis on market approaches rather than regulation, we are also likely to see an increasing shift in the *form* of regulation which remains - from command-and-control to market mechanisms.

<sup>8</sup>Regulation has been defined by Kagan as "the control of economic activity by means of direct legal orders" He states that "Regulation in this sense occurs when businessmen are legally prohibited from practising a trade without a license or from constructing buildings or processing milk except in accordance with governmentally prescribed health and safety standards. Typically the detailed specification, enforcement and application of these rules is entrusted to specialised regulatory agencies, established to concentrate on control of a particular industry or trade or a particular business practice." (R.A. Kagan, *Regulatory Justice*, quoted in Baldwin, *Regulating the Airlines*, p.3).

<sup>9</sup>These terms will be examined more closely later in the thesis. Nevertheless, a comment needs to be made at this point about ambient standards (standards which apply to the receiving environment and which typically lay down concentrations of particular substances which must not be exceeded in that medium). Because regulation is the backbone of the thesis, I will be considering only the setting of ambient standards which are an integral part of the regulatory process. This means that I will not, for example, be examining the common law of nuisance: while on one view, the reasonableness standard associated with the law of nuisance could be regarded as an ambient standard (see eg. Ball & Bell, *Environmental Law*, p.81), it is not one set by a regulatory body at which other standards (eg. emission standards) are aimed.

and enforcement under such a system. Although regulation and regulatory schemes often go beyond these two functions, they are the crucial elements which form the basis for comparison with other mechanisms of pollution control.

The environmental law content and structure is also worthy of some comment. One of the biggest problems an environmental lawyer faces is that of setting out the subject in a coherent shape. Lawyers who come from a common law tradition are generally adept at the process of categorisation; however, environmental law tests these skills to the limit. How does one arrange the subject for the purposes of study? Does one categorise according to the medium (ie. land, air and water), the regulator (ie. the National Rivers Authority, Her Majesty's Inspectorate of Pollution, Waste Regulation Authorities etc.), the pollution source (eg. 'point source' or 'diffuse' source), the type of industry (eg. landfill, manufacturing industry, agriculture), or the means of pollution control (the market, command-and-control regulation etc.)? As with cases in the common law, there are many different ways of categorising and hence many potential overlaps. Although the environmental law content and shape of my thesis is obviously determined by my argument, the thesis is manifestly 'about' some things and not others. It is for example about *pollution* control rather than the broader notion of environmental protection or corporate environmental performance - both of which would probably also encompass matters such as conservation and landscaping. While these are of considerable importance, the focus of my thesis is pollution. Nevertheless, despite the fact that pollution control is the central environmental thread, the difficulty with categories mentioned above means that different chapters will not always square-up in terms of subject matter. For example, I consider waste regulation when looking at command-and-control and market mechanisms of regulation, but the chapter on market approaches concerns pollution from manufacturing industry.<sup>10</sup> Although this particular example of dissonance is unintentional and the inevitable result of the historical development of these subject areas, there are occasions where I purposefully stray beyond the strict thread of my argument to examine categories in more detail. Thus, if the thesis has a shifting sands feel to it, this is at times the result of examining a whole category where a watertight logical structure would have required examination of only some components of that category. In chapter 5 for example, I examine accountability for operational decisions which are not related to standard-setting as such - whereas the logic of chapters 5 and 6 would suggest concentrating only on standard-setting and enforcement. Finally, whereas,

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<sup>10</sup>Landfill is an industry, but - in relation to market approaches - while it is possible to consider landfill sites when looking at civil liability, there is nothing manufactured to which, say, an eco-label might attach.

for the sake of interest, I thus refer to things which are perhaps not strictly relevant to my argument, it is also true to say that the things I do cover are often not confined to the context in which I discuss them. Eco-auditing, for example, may deal with traffic noise generated by a plant and perhaps also landscaping or wildlife provision. Green investment may also be broader in scope than just pollution control. However, I am only interested in them as tools for controlling pollution to air, land or water. The reader will no doubt find many other examples.

To sum up, the thesis is selective: on an environmental level, it is a study of pollution caused by waste from production of products by corporations. The following should therefore be borne in mind: environmental law and policy is not solely concerned with pollution (but also with conservation, planning etc.); pollution is not caused just by manufacturing industry (but by agriculture, extractive industries, sewage works, surface run-off, incineration plants, landfill sites and contaminated land, water extraction etc.); corporate pollution associated with production does not arise solely from waste (but also from raw material spillages); and corporations give rise to pollution not just from production (but also from the use and disposal of the products they create).

The text aims to have kept up to date with the secondary literature until around September 1994. The law is stated as in December 1994. The Environment Bill is obviously likely to have some impact on the content of the thesis. Unfortunately, it arrived too late for its implications to be fully discussed, and in any event, given that it has not yet been debated, such discussion would have been premature. Nevertheless, where possible, I have highlighted points where the Bill may be expected to produce changes, although I would not claim to have covered all of the possibilities.

The approximate number of words (including footnotes) is 110,000.

## CHAPTER 1

# Pollution Control and the Rule of Law

This thesis is an attempt to assess the constitutional legitimacy of the English and Welsh system of pollution control using the rule of law as a benchmark of legitimacy.<sup>1</sup> The principles or values which I associate with the rule of law include those of certainty, efficiency, effectiveness, equity and accountability. The thesis is therefore an empirical constitutional case-study: having outlined the framework of constitutional values, the task will be to examine pollution control in terms of these values.

The thesis can be regarded as an exercise in the field of constitutional economics in that it applies the constitutional principles of the rule of law to an area of the economy - pollution control.<sup>2</sup> The range of values considered distinguishes my stance from that taken by welfare economics, which necessarily places the value of efficiency before all others.<sup>3</sup> This chapter begins with a brief discussion of constitutional economics. The remainder of the chapter examines the concept of the rule of law in detail; if the rule of law is to form the centre-piece of the argument, its foundations will require close

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<sup>1</sup>As will become clear, we are concerned with the legitimacy of the means of pollution control - ie. pollution control programmes, rather than the legitimacy of pollution control agencies themselves (although the two are obviously related). On the latter, see for example, Baldwin and McCrudden, *Regulation and Public Law* - who state on p.33: "When there is talk of this or that agency being legitimate or illegitimate, in the sense that certain values are satisfied or left unsatisfied by agency action, reference appears to be being made to one or more of five key criteria: Is it supported by legislative authority? Is it otherwise accountable? Does it carry out its tasks with due process? Is the body expert? Is it efficient? These five criteria constitute the limited vocabulary of the language of legitimacy." See further Baldwin, 'Accounting for Discretion' (1990) 10 *OJLS* 422 - where he states that one can assess good government by reference to core values of legal mandate, fairness, accountability, expertise, efficiency, effectiveness and certainty. See also Jones, 'Administrative Law, Regulation and Legitimacy' (1989) 16(4) *Jo of Law & Soc* 410.

<sup>2</sup>The rule of law has been applied to pollution regulation before, but in the limited context of using rules to limit discretion - see Richardson et al., *Policing Pollution*, pp.22-3. When it comes to equity, they see this as an independent principle of justice rather than one which stems from the rule of law - see p.98, although *cf.* p.47.

<sup>3</sup>Most modern environmental economics (eg. that practised by David Pearce et al.) is a form of welfare economics. Instead of analysing situations in terms of Pareto optimality or superiority, where efficiency alone is the guiding norm, constitutional economics looks to the constitutionality of particular practices. Note that this is not saying that economists - particularly environmental economists - consider only efficiency when comparing different policy instruments. When comparing command-and-control approaches to environmental regulation with market mechanisms for example, while environmental economists usually accord efficiency the most attention, issues of equity, effectiveness and continuous incentives to innovate are invariably discussed. However, efficiency is necessarily their prime concern because it is the foundation of welfare economics. Because I am considering a wider range of values, my approach could also be classed as an exercise in Institutional Economics - see further Duxbury, 'Is There a Dissenting Tradition in Law and Economics?' (1991) 54 *MLR* 300, esp. at 304.



scrutiny. The emphasis on foundations is fundamental: as I hope to demonstrate, the rule of law and its associated values cannot be 'intuitively realised';<sup>4</sup> they must be accounted for by theoretical analysis. It is my belief that recent attempts to ground the rule of law theoretically have yielded a narrow set of values because they are rooted in *gesellschaft*<sup>5</sup> notions. By utilising Dworkinian 'constructive interpretation',<sup>6</sup> I hope to escape the confines of a *gesellschaft* model of the rule of law and hence arrive at a fuller set of constitutional values, appropriate for the modern regulatory state.

## 1.1 CONSTITUTIONAL ECONOMICS

The inventor of this term and its principal modern exponent is Buchanan. The term 'constitutional economics' covers two different strategies. On the one hand, it may mean applying economic principles to the study of constitutions.<sup>7</sup> On the other, it may involve the application of constitutional principles to areas of the economy. Hayek and Buchanan are both proponents of the latter, since they both advocate constitutional restraints on, in particular, taxation.<sup>8</sup> My study will likewise involve the application of constitutional principles to an area of the economy: not taxation, but pollution control. As Buchanan and Hayek are two of the key figures in 'New Right' thought, it is perhaps not surprising that many consider the search for the constitution "as a set of principles of legitimate government" to be a reactionary enterprise.<sup>9</sup> However, it is surprising that those who recognise that written constitutions are double-edged swords - of use to both Right and Left - do not regard unwritten constitutions in the same light. I hope to dispel the notion that constitutional economics is necessarily a 'Right-wing' activity.

Of course, that is not to say that Hayek and Buchanan adopt the same approach. Buchanan is highly critical of Hayek's 'evolutionism' - his insistence that the spontaneous order of the common law is best - because such an anti-constructivist

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<sup>4</sup>See Lewis, 'Public Law and Legal Theory' in Twining (ed.), *Legal Theory and the Common Law*, 99 at p.101, and Harden & Lewis, *The Noble Lie*, pp.12 and 20 (hereafter, *Noble Lie*).

<sup>5</sup>For the meaning of the term and the distinction between *gesellschaft* and *gemeinschaft* forms of law, see Kamenka & Tay, 'Beyond Bourgeois Individualism - The Contemporary Crisis in Law and Legal Ideology' in Kamenka & Neale (eds.), *Feudalism, Capitalism And Beyond*. The *gesellschaft* form of legal authority is one associated with individual rights-bearers in exchange-based societies.

<sup>6</sup>Dworkin, *Law's Empire*.

<sup>7</sup>See eg. Vaughn, 'Constitutional Economics: Themes and Reflections', in Mackenzie (ed.), *Constitutional Economics*, 239 at p.241.

<sup>8</sup>See eg. Buchanan, *The Power To Tax*, and Hayek, *The Constitution of Liberty*. Although Buchanan, particularly in his early work, also applies economic concepts to constitutional matters.

<sup>9</sup>A point noted by Harden, 'The Constitution and its Discontents' (1991) 21(4) *Br Jo of Pol Science* 489 at p.491; Harden and Lewis in *The Noble Lie* are also engaged in 'constitutional economics', but I do not mention them in the same breath as Hayek and Buchanan because they would probably not describe themselves as part of that school.

stance implies that reform and improvement are not possible.<sup>10</sup> Furthermore, Buchanan does not share Hayek's views on equality before the law and its implications for taxation. He notes that taxes do and may legitimately vary between people, and that existing norms rule out only 'totally arbitrary discrimination' - for example taxing Catholics more heavily than Protestants. However, although he is not against uniform taxation *per se*,<sup>11</sup> Buchanan is doubtful whether proportional taxation, as advocated by Hayek, is a necessary requirement of equality before the law:

"How is uniformity or equality to be defined for tax purposes? Should 'equality before the law' in taxation require equal payments by all persons in the polity? Or should such equality be interpreted to require that all persons in the jurisdiction confront equal rates of tax, hence allowing for proportional but not regressive or progressive tax structures? Hayek's argument to the effect that a proportional tax structure would meet the requirement for generality whereas a progressive rate structure would not do so seems to be dangerously arbitrary."<sup>12</sup>

So, where Hayek's primary concern is distributional - ensuring that taxation is in accordance with his version of the rule of law - Buchanan is more concerned with restraining the total amount of taxation. Again, while Buchanan is not explicitly against uniform taxation, he does not believe that Hayek's uniformity requirement would necessarily achieve a reduction in the overall level of taxation.<sup>13</sup> Buchanan's concern then, is to develop constitutional mechanisms which will prevent governments from the inevitable temptation to raise taxes. He does give examples, such as limiting the frequency with which taxes can be altered, but he does not lay down one single correct method; all he is suggesting is that fiscal limits are required.<sup>14</sup>

The above discussion of taxation is naturally of no great consequence here *per se*. The rationale for its introduction is merely to point out that the same sorts of issues will arise in applying constitutional analysis to pollution control. The general approach, rather than the substance of the argument, is significant. However, on closer inspection, it will be revealed that neither Buchanan nor Hayek are arguing from *the* actual constitution.<sup>15</sup>

<sup>10</sup>See *Freedom in Constitutional Contract*, pp. 30-38 and 293; on p.38, Buchanan states that Hayek "has relatively little to say about criteria for evaluating legislation, which does not emerge from the invisible hand process."

<sup>11</sup>*Ibid.*, p.196.

<sup>12</sup>*Ibid.*, p.157.

<sup>13</sup>*Ibid.*, pp.195-6.

<sup>14</sup>*Power To Tax*, pp.190-1 and 204.

<sup>15</sup>Daintith has levelled a similar accusation against *The Noble Lie* by Harden and Lewis; he claims that "their baseline for criticism is not the constitution itself but what it ought to be" (Daintith, 'Political Programmes and The Content of the Constitution' in Finnie, Himsforth and Walker (eds.), *Edinburgh Essays In Public Law*, 44 at p.50). Ironically, Brazier has levelled a similar accusation against Daintith - See Brazier, 'The Non-Legal Constitution: Thoughts On Convention, Practice And Principle' 43(3) *NILQ* 262 at p.280 and p.281 n.13 (hereafter Brazier).

Buchanan does state that he is not relying on the existing US constitution in arguing for limits on taxation.<sup>16</sup> He also states that the desire for constitutional restraints is a political matter: 'social democrats' will, he claims, want government regulation to be unconstrained by constitutions, whereas libertarians (US) or liberals (Europe) will want governments to be constitutionally restricted.<sup>17</sup> This further supports the fact that he is not describing *the* constitution, or even interpreting it; he is merely expressing a hope that people will agree to change it in the way he desires. Hayek, likewise, does not regard the rule of law as part of the British constitution. It is perhaps not surprising that many people believe that Hayek is describing *the* constitution,<sup>18</sup> because he only distinguishes the rule of law from the constitution in one place (CL 206).<sup>19</sup>

Thus, my general approach also differs from that of Buchanan and Hayek in that I am describing *the* constitution. Critics will no doubt respond to this in some of the following ways. They may assert that the rule of law is not truly part of the constitution. They may claim that its content is vague and arbitrary; that it can mean whatever you want it to mean; that it is all a matter of subjective political preferences. They may also question how the rule of law is to operate in practice, denying that there are principles which can strike out government action as unconstitutional. The rest of the chapter attempts to anticipate some of these possible responses.

## 1.2 IS THE RULE OF LAW PART OF THE CONSTITUTION?

As I have said, my approach differs from that of Buchanan and Hayek in that I am describing *the* constitution. Our unwritten<sup>20</sup> constitution is usually described in terms of the rule of law, parliamentary sovereignty and constitutional conventions.<sup>21</sup> The question is whether the rule of law is really part of the constitution, "Or is its proper place not in the realm of constitutional legality but in the rhetoric of liberal-democratic values?"<sup>22</sup> I think that if most commentators asked themselves, 'is the rule of law part of the constitution?' the answer would be 'yes'. I would not disagree if people argued that

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<sup>16</sup>*Freedom in Constitutional Contract*, p.39 and pp.293-8.

<sup>17</sup>See *Liberty, Market and State*, p.256.

<sup>18</sup>See Kukathas, *Hayek and Modern Liberalism*, pp.155 and 159.

<sup>19</sup>However, he does state that the rule of law could be translated into constitutional principles - *The Constitution of Liberty*, pp.205-6. Because I will be referring so often to it, references will be left in the text and abbreviated to CL.

<sup>20</sup>As opposed to that part of our constitution which is written - as Dicey noted, many of our individual 'constitutional' rights are not contained in a written constitutional code, but are written down in disparate judicial decisions and items of legislation.

<sup>21</sup>The question of whether conventions should be further sub-divided into conventions proper, usages, practices etc. will not be dealt with here - on this see eg. Brazier, note 15 *ante*.

<sup>22</sup>Jowell, 'The Rule of Law Today', in Jowell & Oliver (eds.), *The Changing Constitution*, 3 at p.4.

it *ought* not to be regarded as such. The point is that it *is* typically regarded as constitutional in nature.

A caveat is needed at this point. I will suggest that for the British, the content of the rule of law can only realistically be found in Dicey, but that the principles he outlines need to be updated in the light of modern purposes. I am therefore stating, in effect, that the principles Dicey outlines represent the rule of law for us and are therefore part of the constitution, but that they nevertheless require interpretation. This process of interpretation yields a different set of principles. Naturally, I am not maintaining that my new principles *are* the constitution. Nor am I merely saying that they *should* be part of the constitution.<sup>23</sup> My new principles are an interpretation of the constitution, and an interpretation lies somewhere between the actual and the merely desirable.

### 1.3 WHAT IS THE CONTENT OF THE RULE OF LAW?

This is by far the most difficult question to answer and it is one which deserves a full exposition. Assuming that there is such a thing as the rule of law, and having concluded that it is part of the constitution, it may seem easy to say that the rule of law consists of the values or principles of certainty, accountability, efficiency, effectiveness and equity. However, to pick such values out of the air without any explanation of their provenance would be to adopt an 'intuitive realist' approach, as it ignores the essential presuppositions which underlie such an assertion.<sup>24</sup> The task of the constitutional student is therefore to use a theoretical approach which will make these presuppositions apparent. The following sections will explore some of the approaches which one might adopt.

#### 1.3.1 Immanent Critique

The theoretical approach adopted by Harden and Lewis in *The Noble Lie* is that of 'immanent critique' which, quoting Horkheimer, they describe as "the confrontation of 'the existent, in its historical context, with the claim of its conceptual principles, in order

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<sup>23</sup>Brazier finds it remarkable not that Harden can claim that there ought to be fundamental principles of the constitution (which limit the legislative power of Parliament), but that he claims these already exist.

<sup>24</sup>See Lewis, note 4 *ante*.

to criticise the relation between the two and thus transcend them'.<sup>25</sup> Translating this to their particular project, they state that:

"Our contention is that there are immanent expectations of a system of open and accountable government which run deep in the British people and that the rhetoric and claims made for our system of government foster such expectations. Yet these expectations square ill with the contemporary constitutional and political scene."<sup>26</sup>

There would appear to be two issues involved here. First, there is the matter of matching the constitutional claims made by those in power with political reality; secondly, there is the problem of relating these claims to the concept of the rule of law. Whilst the second of these issues will concern us for the greater part of this section, it is worth considering the first issue for a moment.

### *1.3.1.1 Matching Claims With Reality*

My whole thesis is a form of critique: the reality is that the rule of law is not applied in the realm of environmental policy making. *The Noble Lie*, likewise, is keen to show that the idea that we are a society subject to the rule of law is a 'noble lie'. However, that is very different to saying that the reality does not match the claims made by the state.

Matching claims with reality is potentially immanent critique's greatest problem, although this is just one way in which immanent critique is presented and other versions need not share this weakness. In this version, then, the first thing to note is that the critic's interpretation of the claim may not match that offered by the state.<sup>27</sup> So, for example in the debate on liberty, it is no use opposing claim to reality if my interpretation includes negative and positive liberty, whereas the state's includes only the former.<sup>28</sup> Then there is the problem of context. Just because, for example, democracy is a claim made for the system, it does not follow that workplace democracy is also a claim. It is therefore misleading to speak of claims made for the system, unless of course precise claims have been made and are not being met. Benhabib makes a similar point when she shows that although Marx (particularly in his early work such as 'On the Jewish Question') advocates critique rather than utopian thinking, his 'socialization of the universal' in fact appears to be a 'radical negation'. In other words, Marx's project

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<sup>25</sup>*Noble Lie*, p.10.

<sup>26</sup>*Ibid.*, pp.11-12.

<sup>27</sup>A problem alluded to in *The Noble Lie* at p.188.

<sup>28</sup>For the distinction between the two, see Berlin, *Four Essays on Liberty*, and Gray, *The Moral Foundations of Market Institutions*.

involves not the 'fulfillment' of a potential immanent in actuality, but rather a 'transfiguration' or 'transcendence' of actuality.<sup>29</sup>

Another version of immanent critique might say that one should use the language of the present system, rather than relying on utopian vocabulary. Insofar as language as a whole is concerned, this must again be mistaken, because utopian visions necessarily rely on the language of the current system, and the 'other' can only adequately be defined in contrast with the existent. What it must mean - and I believe that this is the only possible avenue for immanent critique - is that rather than describe a grand vision of the 'good' society, the task of the social theorist should be to highlight failings in the current system; the theorist employs the specific, existing language of the system (liberty, democracy, equality, accountability etc.) and suggests that such values (or rather his interpretation of them) are not being met. The idea that such values are actually claims made by the system, for the area under examination, may be used as a useful rhetorical device - but one should be aware that it is not as straightforward as that.

Harden and Lewis are confronted with a similar problem in respect of accountability and openness, in that these values cannot be separated from particular contexts without affecting other policy goals such as effectiveness and efficiency.<sup>30</sup> That is not to say that one cannot argue for an increase in accountability and openness generally (while accepting that precise details will be dependent on context) - but rather that accountability and openness are not exhaustive of constitutional policy-making principles. This would almost certainly be the reply of the state to an argument that such values were 'claims' of the system.

### *1.3.1.2 Connecting the Values With the Rule of Law*

The second problem for Harden and Lewis is that of linking the values of accountability and openness with the rule of law. Although Loughlin's review of *The Noble Lie* is occasionally wide of the mark,<sup>31</sup> his point that immanent critique would appear to

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<sup>29</sup>Benhabib, 'Modernity and the Aporias of Critical Theory' (1981) 49 *Telos* 39, citing K. Marx, 'On the Jewish Question'.

<sup>30</sup>See eg. Jones, note 1 *ante* at p.412; see also the review article of *The Noble Lie* by Loughlin, 'Tinkering With The Constitution' (1988) 51 *MLR* 531 at p.543.

<sup>31</sup>See Harden & Lewis, 'The Noble Lie: A Rejoinder' (1988) 52 *MLR* 812.

require an historical treatment of the concept of the rule of law is surely a valid one.<sup>32</sup> As we saw earlier, Harden and Lewis state the following:

"It is our contention that there are immanent expectations of a system of open and accountable government which run deep in the British people and that the rhetoric and claims made for our system of government foster such expectations."<sup>33</sup>

Openness and accountability are not intuitively realised. They are theoretically accounted for by tying them to immanent expectations held by the general public. However, that does not account for the link made between these two values and the rule of law. As it stands in their analysis, this link seems to have been 'intuited' - where only an historical examination of the rule of law could provide a grounding for such a link. Even if they have grounded their link - and there is some evidence that they derive these values from Dicey - there remain severe limitations to such an approach. Harden and Lewis state:

"The urgent task for constitutional lawyers then becomes to reconstitute the rule of law in terms of its institutional expressions, retaining commitment to the underlying principles which espouse non-arbitrariness, the containment of unaccountable discretion and the perhaps newer commitment to a decision-making process which is rational."<sup>34</sup>

The references to the control of discretion and non-arbitrariness can certainly be traced back to Dicey, although it is not clear where the claim for rational decision-making procedures originates. Nevertheless, despite this evidence that they derive their principles from Dicey, the choice of immanent critique as a theoretical tool creates

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<sup>32</sup>Loughlin, *op. cit.*, p.536-7. It will be obvious to anyone who has read the Loughlin review, that my work incorporates and builds on a number of his criticisms and suggestions - for example his references to Benhabib. One point which I would not agree with however, is his claim that immanent critique is employed by the British Idealists and that there are similarities between *The Noble Lie* and work within this tradition - Loughlin p.534. A reading of Hobhouse would suggest that rather than comparing the actual with the ideal, with a view to changing the actual - as with immanent critique - the idealists perceived the actual as ideal - Hobhouse, *The Metaphysical Theory Of The State*, pp.11-23. This does not seem to be the approach taken in *The Noble Lie*. Another point of disagreement concerns Loughlin's claim that immanent critique requires a tracing of the origins of Dicey's formulation of the rule of law. It may be true that Dicey stems from Coke - and if one was studying Dicey alone it would be advisable to trace this lineage - but the fact is that Dicey is widely regarded as *the* exponent of the classical conception of the rule of law. A genealogical line of inquiry may be useful if it bolsters one's argument, but Loughlin's excursion into history seems to offer little support for the argument of *The Noble Lie*.

<sup>33</sup>*Noble Lie*, p.11.

<sup>34</sup>*Ibid.*, p.72.

problems for them. The claims of the constitution are, as they recognise, premised on a *gesellschaft* model of law:

"The rule of law as an atomistic, *gesellschaft* system, whatever its achievements and whatever its residual role in the modern state, has been substantially overtaken by events. The virtues and principles for which it has stood retain their transcendent significance but require transformation to deal with the problems of policy planning in the modern state".<sup>35</sup>

The only principles which one is able to locate in the classic example of a *gesellschaft*-based constitutional model - Dicey's - concern discretion and equality before the law. The dilemma is that immanent critique requires them to use these principles derived from *gesellschaft* forms, even though they then apply these principles within the novel context of the public sphere.<sup>36</sup> It is novel, because when one thinks of constitutional rights, one normally thinks of the constitutional rights of individuals. However, in *The Noble Lie*, Harden and Lewis' aim was not to argue for individual constitutional rights in the vein of Charter 88 and recent calls for a Bill of Rights, but for a "reconstitutionalization of the processes of public policy-making."<sup>37</sup> In other words, while not wanting to detract from the importance of individual rights against the state, their vision of the rule of law has more to do with the collective conditions of public life and with "the institutional conditions for furthering rational public choices."<sup>38</sup> This is a key point, and my project shares this approach.

Their difficulty is that the old *gesellschaft* forms do not work in this new public context. To say, as they do, that "rule of law values need to be freed from *gesellschaft* associations"<sup>39</sup> is misleading, because the principles which they claim have 'transcendent' status have their origin in such forms. The difficulty of using immanent critique in this context is thus that in comparing constitutional claims against institutional reality, one must rely on current constitutional claims which derive from outdated, *gesellschaft*-based accounts such as Dicey's.

### 1.3.2 Constructive Interpretation

Harden has recently recast<sup>40</sup> his theoretical enterprise as a form of Dworkinian 'constructive interpretation'.<sup>41</sup> It is my belief that by developing this approach, one can

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<sup>35</sup>*Ibid.*, p.299.

<sup>36</sup>*Ibid.*, pp.288 and 302.

<sup>37</sup>*Ibid.*, p.189; see further pp.13, 55 and 299.

<sup>38</sup>*Ibid.*, pp.55, 72 and 288.

<sup>39</sup>*Ibid.*, p.309.

<sup>40</sup>Although there were signs of such an approach in *The Noble Lie* - see p.188.



formulate an adequate conception of the rule of law while avoiding some of the pitfalls associated with immanent critique (such as its seemingly inescapable connection with *gesellschaft* forms). In *Law's Empire*, Dworkin first describes constructive interpretation of the social practice of courtesy. It is worth quoting him at length here:

"Everyone develops a complex "interpretive" attitude towards the rule of courtesy, an attitude that has at least two components. The first is the assumption that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle - in short, that it has some point - that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of courtesy ... are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point."<sup>42</sup>

Dworkin later proceeds to describe constructive interpretation as it applies to law. Legal interpretation, he believes, can usefully be divided into three stages - pre-interpretive, interpretive and finally a post-interpretive or reforming stage. At the pre-interpretive stage, the rules or standards which make up the practice are identified; the interpreter then arrives at a justification for the practice in the interpretive stage; the final stage then consists of adjusting what the practice 'really' requires to fit the justification given at the interpretive stage.<sup>43</sup> Of course, people do not actually go about the process of interpretation in this structured, deliberate fashion.<sup>44</sup> However, Dworkin's aim is not to give a psychological insight into interpretation, but rather to provide a philosophical account which might help to resolve controversies surrounding particular social practices.<sup>45</sup>

The social 'practice' we are concerned with here is the unwritten British constitution and, more specifically, the rule of law. I hope to show that constructive interpretation offers a solution to some of the problems I have outlined in relation to immanent critique. *Pace* Harden,<sup>46</sup> I believe that constructive interpretation is qualitatively different to immanent critique. Immanent critique yields a narrow set of values because it works from *gesellschaft* notions. Dworkinian 'constructive interpretation', by introducing the idea of 'purpose' at the interpretive stage, escapes the confines of a *gesellschaft* model of the rule of law and thus arrives at a fuller set of constitutional values. These values are, unlike the *gesellschaft* ones, of use in the novel, public context of the regulatory state.

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<sup>41</sup>See Harden, 'The Constitution and Its Discontents', note 9 *ante*.

<sup>42</sup>*Law's Empire*, p.47.

<sup>43</sup>*Ibid.*, pp.65-6.

<sup>44</sup>*Ibid.*, p.66.

<sup>45</sup>*Ibid.*, p.67.

<sup>46</sup>Harden, note 9 *ante*, p.497.

### 1.3.2.1 *The Pre-Interpretive Stage - Dicey and the Rule of Law*

At the pre-interpretive stage, the rules or standards which make up the practice are identified. Thus, if one is looking at the principles contained within the rule of law, one must, I will be suggesting, look at their historical usage by Dicey. There is nowhere else where one can 'discover' the principles associated with the rule of law. I explain below why I think this is the case, before moving on to discuss the work of Dicey.

It is worth bearing in mind here the distinction Grant draws between using the constitution in a descriptive sense and using it in a normative sense. Grant states that while central-local government relations can be identified as constitutional in the descriptive sense (what Harden terms the "map of public power"), one cannot describe a change made in these relations as unconstitutional in the normative sense, because "there is very little consensus as to what criteria apply in the normative sense of the word" (what Harden refers to as "principles of legitimate government").<sup>47</sup> Going back to Dicey, some have argued that Dicey intended *The Law of The Constitution* to be descriptive rather than prescriptive: in drawing on the analytical, positivist method of Austin, the need to separate fact from value would have been as much of a concern for Dicey in his study of the constitution as it was for jurists involved in their analysis of case-law.<sup>48</sup> Others, such as Loughlin, have argued that Dicey can equally be seen as a conservative normativist - in other words, he wanted to imbue the rule of law with prescriptive force in order to control what he saw as the socialist advances of state power.<sup>49</sup> I would be inclined to agree with both views. Dicey's account of sovereignty and the rule of law was descriptive of existing practices - he applied an empiricist, analytical method to abstract constitutional principles from historical and political material.<sup>50</sup> However, although he probably wished his account of sovereignty to remain descriptive, one might argue that he intended the rule of law to have prescriptive force.

Today, we can look for the rule of law in two ways. First, we can do as Dicey did and look 'out there' at existing practices in the social world. Whether we would be able to locate the appropriate target without theory to provide us with a map, let alone sum up the existing practices in today's complex society as succinctly as Dicey, has to be doubted. In any event, we would simply, as Grant says, be describing the constitutional

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<sup>47</sup>Grant, 'Central-Local Relations: The Balance of Power', in Jowell and Oliver (eds.), *The Changing Constitution*, 247 at pp.253-5; Harden, op. cit..

<sup>48</sup>McEldowney, 'Dicey in Historical Perspective - A Review Essay', in McAuslan & McEldowney (eds.), *Law, Legitimacy and the Constitution*, 39 at p.57.

<sup>49</sup>Loughlin, *Political Theory and Public Law*.

<sup>50</sup>McEldowney, op. cit., pp.55-6.

terrain as we saw it. Jumping from the descriptive to the prescriptive would be another matter. The second, and I believe the only way to 'find' the rule of law, is to treat Dicey as one's source material. In other words, rather than looking at the 'original' social data in an empirical analysis, one looks at Dicey as the classic secondary source. Thus, Dicey *is* the rule of law. Loughlin refers to him as the codifier of the British Constitution.<sup>51</sup> McEldowney notes that "Lawyers are tempted, when brought up in the common law tradition, to read Dicey as if his book were a constitutional statute and offered interpretations as binding as once were House of Lords decisions."<sup>52</sup> They may have been wrong to do this, but in my view, Dicey's account has become so firmly ingrained that it does now represent our written 'arc of the covenant'.<sup>53</sup> And whether Dicey intended the rule of law to be descriptive or prescriptive, generations of the 'interpretive community' have come to regard it in a prescriptive light.

The rule of law is thus part of our unwritten constitution, along with parliamentary sovereignty and conventions. While the latter two were and continue to be at least partially descriptive of our constitutional fabric, the former continues as part of the triptych because no one has been prepared to excise it or to renew its content to provide it with contemporary relevance. Renewing simply its descriptive content is, I would argue, no longer an option; in any event, it has now been irremediably infused with prescriptive character. Our task then, is to interpret the rule of law in the light of modern purposes to provide it with a new and vital prescriptive force.

In the interpretive stage, we must therefore look to Dicey. The rule of law for Dicey is characterised by three conceptions or principles. Unlike with Hayek, these principles are said to constitute part of the British constitutional heritage and are not simply political ideals.<sup>54</sup>

1) *Nulla poena sine lege*: nobody should be punishable except for a distinct breach of the law established by the courts. This means that government should operate through clear, fixed rules -the rule of law excludes the exercise of wide, arbitrary or discretionary power by governments. The latter point has often been taken as an authority for saying that all discretionary power is bad (a mistake which Hayek is close to making) - whereas it seems likely that Dicey had in mind only the state's position on personal liberties. This is Wade's conclusion,<sup>55</sup> and it is supported both by the language which Dicey uses (he

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<sup>51</sup>Loughlin, *op. cit.*, pp.140, 146 and 153.

<sup>52</sup>McEldowney, *op. cit.*, p.41.

<sup>53</sup>A phrase used by, among others, Lewis, in 'Public Law and Legal Theory', note 4 *ante*, and Brazier, *op. cit.*.

<sup>54</sup>See Jennings, *The Law And The Constitution*, p.54.

<sup>55</sup>In his introduction to Dicey's *Introduction To The Study Of The Law Of The Constitution*, p.cxxvi.

talks of powers of 'arrest', 'imprisonment' and 'expulsion') and by the examples he provides (including Voltaire's imprisonment in the Bastille).

2) Equality before the law: everybody, whether private citizens or public officials, should be subject to the same law, enforced by the ordinary courts. Dicey had in mind here the difference between the British system and the French system of 'droit administratif', where officials were subject to a separate 'official' law. Since Dicey, equality before the law has been seen as a cornerstone of the rule of law but has been interpreted in many different ways - Hayek for example was quite against Dicey's conception, because it forestalled the growth of administrative law (CL 203-4).

3) Constitutional rights are shaped by judicial decisions: individual rights are to be located in various judicial decisions rather than in a separate code or written constitution.

It needs stating that the above principles, which for Dicey constitute the rule of law, are sufficiently broad and malleable to be interpreted to fit most of the ideals of both private and public law. This is certainly true of (1) and (2) above. Some people have read the principle in (1) not as *nulla poena sine lege*, but as a broader principle of legal certainty. This has enabled people to claim that the system of precedent in common law upholds the rule of law because it enshrines the principle of legal certainty. Others have, for example, said that the principle of legal certainty should act as an effective bar on administrative discretion. Both of these are quite far removed from the thrust of Dicey's conception of the rule of law. The point about malleability is perhaps more acute in relation to (2): while it is clear that Dicey was using equality before the law in the sense of all citizens coming before the same courts, people since have tended to regard equality before the law in its many other possible senses as a core feature of the rule of law.

### 1.3.2.2 *The Interpretive Stage*

Having identified Dicey as the *locus classicus* of the rule of law, and having described the principles which he believed made up the rule of law, we now need to go about interpreting them within a coherent theoretical framework, rather than - as evinced in the previous paragraph - in the unconnected, *ad hoc* fashion performed by commentators down the ages. I will be discussing Hayek's view of the rule of law in some depth, because his is one of the few developed, systematic attempts to interpret the rule of law using (implicitly) Dicey as the starting point.

*Hayek and the Rule of Law.* As we have already noted, the rule of law for Hayek, is "not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal" (CL 205-6). In other words, Hayek does not equate the rule of law with the constitution. However, in a sense, Hayek is in fact engaged in a similar enterprise of constructive interpretation, in that he implicitly takes Dicey as his pre-interpretive starting point, and then interprets the rule of law in the light of the purpose he ascribes to it of protecting individual liberty. The rule of law values he establishes at the post-interpretive stage (re-assessing the original Diceyan values in the light of the ascribed purpose) include those of generality, abstractness, certainty and equality before the law. Given that such an interpretive process could, in my account, provide a theoretically sound basis for describing these principles as constitutional, it is incumbent on me to say why I think Hayek's approach does not work. Otherwise, I should arguably be using his version of the rule of law as the framework for my empirical constitutional study of pollution control.<sup>56</sup>

There are numerous problems with Hayek's approach. The first is that the values he has arrived at for the rule of law cannot be applied in the way he wishes: while Harden and Lewis are concerned only with developing a new public constitutional discourse, Hayek wants to reach a unified set of principles that are applicable to both public law (*thesis*)<sup>57</sup> and private law (*nomos*).<sup>58</sup> He begins with private law (which he likes), considers what is peculiar and of value to private law, and then examines public law (which he does not like) to see if it matches up. Some of it *must* match up because Hayek wants to allow some state action beyond a libertarian 'nightwatchman' role. Perhaps not surprisingly, he has problems in applying what are essentially private law values to public law.

However, as we shall see, even where some of the values can be meaningfully applied to both private and public law, Hayek either fails to apply them to public law or applies them in a limited and questionable manner. Next, not only are some of his private law values hard to apply to public law, but the full range of values necessary for a proper assessment of public law is missing. In other words, Hayek faces much the same problem as Harden and Lewis had in deriving a publicly-oriented rule of law from *gesellschaft* origins. The root of much of this is that Hayek sees the rule of law as having but one purpose - the protection of individual liberty. If he was prepared to see

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<sup>56</sup>Of course, one might say the same of Harden and Lewis in *The Noble Lie*, but I hope I have already demonstrated that their their approach is unsuitable.

<sup>57</sup>*Law, Legislation and Liberty* (hereafter LLL) book I, pp 124-5 - ie. rules of organisation designed to achieve particular ends.

<sup>58</sup>LLL I, pp.126-7 - ie. rules of just conduct. All common law will be *nomos* (Hayek classes criminal law as private law - LLL I, p.132). Although statute law will normally be *thesis*, it may be codification of rules of just conduct and therefore *nomos*.

it as serving a wider range of purposes, I would suggest that some of the above problems would disappear. We will now take a closer look at Hayek's theory and application of the rule of law to see how some of his problems arise.

According to Hayek, the state requires coercive powers to prevent greater coercion by individuals on each other (CL 21, 144). But Hayek is not a Nozickian libertarian who would only allow a 'nightwatchman' state (CL 231 and LLL III 41). He would allow the coercive powers of taxation to provide services which the free market cannot ensure. What he will not allow is coercive action by the state beyond taxation for the pursuit of what he terms 'pure service' activities and beyond preventing coercion by private persons (CL 144, 222). According to Hayek, the rule of law "provides the criterion which enables us to distinguish between those measures which are and those which are not compatible with a free system," between pure service activities and coercive measures of government (CL 222). The rule of law thus provides the criteria which enable one to determine whether or not a measure is coercive. If state action is incompatible with the rule of law, it must be rejected - no matter how effective it may be in securing a particular end. If it is compatible with the rule of law and is, therefore, a pure service activity, one must proceed to ask whether it is desirable in the sense of weighing its benefits against its costs (CL 222, 224-5).<sup>59</sup> Many measures, although not inimical to freedom, will be rejected as undesirable in this latter sense.

If the rule of law is to enable us to tell whether state action is coercive or fulfilling a legitimate service, it will be important for us to examine Hayek's conception in more detail. For Hayek, the rule of law requires first that laws be general and abstract; second that they be known and certain, and third that there should be equality before the law (CL 208-210). The Diceyan provenance is obvious.

In order to be general and abstract, laws should be "essentially long-term measures, referring to yet unknown cases and containing no references to particular persons, places, or objects" (CL 208, 149-154). However, as Hayek himself notes, "The degree of this generality or abstractness ranges continuously from the order that tells a man to do a particular thing here and now to the instruction that, in such and such conditions, whatever he does will have to satisfy certain requirements" (CL 149). If, as this suggests, generality and abstraction lie on a continuum, it means that they cannot be used in a pass/fail manner to disqualify certain public law state actions as contrary to the rule of law. The only role which these values can play is that of an ideal type (something

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<sup>59</sup>However, this does not mean measuring benefits in the manner done by welfare economists, such as via contingent valuation methodology (CVM) - see LLL III, p.201, n.35.

at which Hayek hints in CL pp.149-50); they cannot be used as a normative guide in the way that Hayek requires of the rule of law. A feature of private law does not translate into criteria for judging the legitimacy of public law.

That laws be known and certain should not imply that all laws should be statutory and known by all - the common law yields certainty if, as Hayek does, one follows the Dworkinian line that there is always a right answer; and while ordinary citizens do not know the law, it is knowable via lawyers who are able to attempt to predict judicial decisions in non-hard cases (CL 208, 212). Of interest is the fact that Hayek only considers certainty and knowledge in relation to the common law; while it is possible to apply the notions to public, regulatory law, Hayek does not attempt to do so.

In relation to equality before the law, Hayek recognises that the law cannot always treat everyone the same (he gives the example that only women can be raped - CL 154) - and that some sort of classification is therefore inevitable. While he admits that "no entirely satisfactory criterion has been found that would always tell us what kind of classification is compatible with equality before the law," he denies the principle is meaningless (CL 209). He effectively dismisses the precept of 'treat like cases alike', stating: "To say, as has so often been said, that the law must not make irrelevant distinctions or that it must not discriminate between persons for reasons which have no connection with the purpose of the law is little more than evading the issue" (CL 209). His solution is rather that both those inside and outside the classified group should acknowledge the legitimacy of the distinction (CL 154, 209-10). Contrary to Hayek's opinion, I believe that equality before the law can mean little other than 'treat like cases alike' - particularly in public law. His solution raises questions as to whether the agreement does actually have to take place: if it does, this would produce enormous informational and organisational problems; if it does not, then the idea of agreement is merely a convenient fiction for a decision taken by a policy maker. Not surprisingly, Hayek does not attempt to apply his test for this aspect of the rule of law to any practical setting.

The final aspect of Hayek's account of the rule of law which needs to be considered is discretion. Admittedly, discretion is not mentioned as one of the numbered requirements of the rule of law (CL 208-210), but it is arguably the chapter as a whole (ie. CL 205-219) which spells out his interpretation of the rule of law and discretion is a key part of that chapter. However, on examining that and other chapters, one finds that Hayek fails to identify precisely how discretion fits in with the rule of law, and that his account of discretion is at times contradictory or naive. He contradicts himself, because at one point he states that "The problem of discretionary powers as it directly affects the

rule of law is not a problem of the limitation of the powers of particular agents of government but of the limitation of the powers of the government as a whole" (CL 213). On page 213 of CL, for example, he states that the rule of law excludes any state discretionary powers which encroach on the private sphere of the citizen. In other words, he seems to be suggesting that the rule of law is concerned with the question of whether state action is regarded as legitimate in the first place, rather than the exercise of discretion by agents carrying out that state action. However, on pages 211 and 217, he then states that some powers over persons and property (eg. compulsory purchase of land) are permissible - as long as they are subject to judicial review. This comment on the need for agency discretion to be subject to various controls including judicial review is echoed in a number of other places. There is therefore a dual contradiction. First, he claims that the rule of law excludes any discretionary powers which interfere with the private sphere of the citizen, but then comes up with an obvious exception such as compulsory purchase. And secondly, he claims that the rule of law is not concerned with agency-level discretion, but then states that the rule of law requires such discretion to be subject to control.

In fact, for someone who initially claims that the rule of law is not concerned with the limitation of the discretionary powers of administrative agencies, Hayek suggests a surprisingly wide range of controls. Indeed, some of the controls he suggests prefigure the work on discretion of K.C. Davis<sup>60</sup> and others. Reconstructing Hayek's argument slightly, agency discretionary authority can be made compatible with the rule of law in three ways:

1) By 'confining' discretion through clear rules

"Even the delegation of (this) power to some non-elective authority need not be contrary to the rule of law, so long as such authority is bound to announce these rules prior to their application and then can be made to adhere to them."<sup>61</sup>

2) By 'structuring' discretion through agency policy guidelines

"Though the variety of circumstances in which the authorities may have to act cannot be foreseen, the manner in which they will have to act, once a certain situation has arisen, can be made predictable to a high degree."<sup>62</sup>

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<sup>60</sup>Davis, *Discretionary Justice*.

<sup>61</sup>CL 211 and see also 225 and 226; on 'confining' discretion, see Davis, *op. cit.*, p.55.

<sup>62</sup>CL 225; on 'structuring' discretion, see Davis, pp.97-8.



### 3) By 'checking' discretion via judicial review

"In acting under the rule of law the administrative agencies will often have to exercise discretion as the judge exercises discretion in interpreting the law. This, however, is a discretionary power which can and must be controlled by the possibility of a review of the substance of the decision by an independent court."<sup>63</sup>

Where the grant of wide discretionary powers is necessary, because, for example, "the law cannot always name the particular measures which the authorities may adopt in a particular situation" (CL 225) - Hayek introduces an idea similar to Nonet and Selznick's concept of purpose.<sup>64</sup> Just as Nonet and Selznick believed that purpose provided both a means of criticising current practices and a way of controlling administrative discretion, so Hayek believed that law could "be so framed as to enable any impartial court to decide whether the measures adopted were necessary to achieve the general effect aimed at by the law" (CL 225). In other words, discretion is only effectively controlled if the courts have the power not just to decide whether an action was *intra vires* or *ultra vires*, but also "whether the substance of the administrative decision was such as the law demanded" (CL 214)

Hayek's naivety regarding discretion is revealed in his account (quoting Ernst Freund)<sup>65</sup> of British factory legislation, which he believes is "by no means conspicuous for the use of discretionary power" (CL 225). This is certainly not what Carson found, in his classic study of enforcement discretion under such legislation.<sup>66</sup> Hayek seems to conflate the relative generality of enabling legislation with the discretionary power of standard-setting and enforcement under that legislation.

I mentioned at the beginning of this section on discretion that not only was Hayek's account of discretion at times contradictory or naive, but also that he fails to state how it fits in with the rule of law. The problem is essentially the same as the one he faced in relation to generality and abstraction, in that discretion cannot be used in the pass/fail manner which his use of the rule of law requires. One cannot simply find an instance of discretion and state that it is contrary to the rule of law and thus coercive and illegitimate. In any case, discretion is pervasive and necessary in many areas of state activity which Hayek does not wish to decry as coercive.

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<sup>63</sup>CL 213 and see also 211, 214 and 225; on 'checking' discretion, see Davis, p.142.

<sup>64</sup>Nonet & Selznick, *Law and Society in Transition: Toward Responsive Law*, p.77. For a critique, see Galligan, *Discretionary Powers*, pp.100-106.

<sup>65</sup>Freund, *Administrative Powers Over Persons and Property*, p.98.

<sup>66</sup>Carson, 'Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation' (1970) 33 *MLR* 396.

Having briefly outlined Hayek's version of the rule of law, the next task is to see how he applies it to distinguish between coercive state actions, which are inimical to individual liberty, and pure service activities, which are not. Unfortunately, this is something that Hayek fails to do in any systematic way - not surprisingly given many of my previous observations. He declares that progressive taxation is in breach of the rule of law because it is unequal - ie. it fails the 'equality before the law' hurdle. Progressive taxation is thus coercive and illegitimate. However, he is then prepared simply to concede that factory and pollution<sup>67</sup> legislation is general and therefore in accordance with the rule of law. Such legislation is thus a pure service activity and can be regarded as a legitimate state action if it is expedient (ie. its benefits outweigh its costs). My point is that, even if one ever could, one can no longer assume that social regulation is in accordance with the rule of law. Carson's study of factory legislation has, *pace* Hayek and Ernst Freund whom Hayek cites, made it clear that the system is heavily reliant on discretion - at the enforcement level if not in the statutory provisions themselves. Recent work on environmental regulation has reached similar conclusions.<sup>68</sup> Does the mere possibility of judicial review of such discretion bring such regulatory programmes back in line with the rule of law? And what of certainty and equality before the law? If standards or regulations are changed frequently or discretion is the order of the day, does this not have implications for legal certainty and thus for the rule of law? If firms are subject to different requirements as a result of discretion or otherwise, does this offend against the principles of equality before the law? These are all questions which Hayek leaves unanswered.

To conclude, Hayek's account of the rule of law runs into a number of difficulties. The root of many of these is his narrow conception of the purpose of the rule of law, which he sees as being the protection of individual liberty. The values which this purpose yields are essentially private law values.<sup>69</sup> Not only are they insufficient for a proper assessment of public law, but some of them are also difficult to apply to public law. Even where some of the limited range of values can meaningfully be applied to both private and public law, Hayek either fails to apply them to public law or applies them in a limited or questionable manner. Far from applying the rule of law values in a systematic way to particular state activities, one is left with the impression that Hayek begins with the conclusion of whether state action is justified and then works backwards

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<sup>67</sup>CL, p.492, n.6.

<sup>68</sup>See eg. Hawkins, *Environment and Enforcement*; Richardson et al., *Policing Pollution*, and Hutter, *The Reasonable Arm of the Law*.

<sup>69</sup>Other than the issue of discretion, but then this is not contained within his core definition and it is not clear exactly what he would have us do with it.

to find a 'rule of law' peg on which to hang it; this backwards search is usually rather cursory.

As I have stated, I would argue that the root of many of Hayek's difficulties is the fact that he sees the rule of law as having but one purpose - the protection of individual liberty. If he was prepared to see it as serving a wider range of purposes, I would suggest that some of the above difficulties would disappear. I said earlier that the idea of purpose is a crucial part of the interpretive stage of Dworkin's constructive interpretation. As Dworkin notes:

"A participant interpreting a social practice ... proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify."<sup>70</sup>

For Hayek, the purpose of the rule of law is the protection of individual liberty to form a private sphere where people can create their own life-plan and pursue their own projects.<sup>71</sup> It is perhaps no wonder then that he formulates the rule of law primarily in terms of private law values of generality, abstraction, certainty and equality. However, as an interpreter of the rule of law, I would suggest that the rule of law in fact serves a number of different purposes. On the one hand, the individualist side of the rule of law will remain and its purpose may continue to be the protection of individual liberty. But on the other hand, there is what might be called a regulatory side to the rule of law. This side of the rule of law, I would suggest, serves two purposes: first, it fulfils the role of upholding democracy and democratic goals (which is contrary to Hayek's view that the democratic control of government has nothing to do with the rule of law - CL 211); and secondly, it provides the guarantees of an effective economy.<sup>72</sup> One might ask how I derive these purposes. The answer would be that they come from my interpretation of equity and discretion - which can be found in Dicey's classical conception of the rule of law - and why these are important in the public sphere. I interpret equity as 'treat like cases alike' and, for firms subject to regulation, this will be important for reasons of competition. Discretion is a concern in the public sphere because of its potential to undermine democratic decision-making.<sup>73</sup> If the protection of democracy and an effective economy are the purposes of the rule of law, one is then led to consider what principles might be required by such purposes - hence the principles of accountability,

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<sup>70</sup>*Law's Empire*, p.52.

<sup>71</sup>Hayek, *The Road To Serfdom*, p.54. Dicey shared a similar view of the purpose of the rule of law - see Dicey, *Introduction To The Study Of The Law Of The Constitution*, pp.196-7. One might question the extent to which the constitutional safeguards described by either Dicey or Hayek are sufficient to protect the rights of individuals against the State, but that does not concern us here.

<sup>72</sup>Hayek was concerned with this - see LLL III, pp.46 and 65.

<sup>73</sup>Discretion may also have an impact on equity.

efficiency, effectiveness and certainty which I discuss below in the post-interpretive stage.

### *1.3.2.3 The Post-Interpretive Stage*

Having reconsidered the purpose of the rule of law away from the protection of individual liberty (although, as we have seen, the private strand of the rule of law will not cease to exist), towards regulation, democracy and the playing field of the economy, one must then come to Dworkin's third stage of interpretation - the post-interpretive or reforming stage. This involves reconsidering the principles in the light of the new purposes, and those I would select (see Fig. 1 below) include certainty, efficiency and equity on the corporate/economy side, and accountability and effectiveness on the democracy side. Companies need a certain and stable framework within which to operate; a competitive economy requires a level playing field where all companies are treated equally and none are allowed, through inequity, to enjoy undue competitive advantage; a competitive economy also requires efficiency in the sense that regulatory costs are kept as low as possible. As for the democratic case, the regulatory state is concerned with the achievement of goals. It is important that these goals should be the subject of a democratic decision-making process, whether by Parliament or through the participation of interest groups in a surrogate democratic process. Accountability ensures that decisions remain rooted in the democratic process by preventing decision-makers from charting their own private courses. It is also important that these democratically decided goals are, as far as possible, effectively met. There is, in that sense, a link between accountability and effectiveness, because an increase in the former will often lead to an increase in the latter.<sup>74</sup> There is also obviously some overlap between the corporate/economy values and the liberal individualist approach, because corporations are 'actors' in the market in the same way as individuals are 'actors' of their own lives. Certainty and equity are common to both.

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<sup>74</sup>But it is important to distinguish here between agency ineffectiveness (goals not met because of eg. the discretionary behaviour of field officers) and programme ineffectiveness (where the programme is ineffective on paper to begin with - eg. with market mechanisms). Accountability will only lead to increased effectiveness in the former case.

Figure 1
Equity
Efficiency
Effectiveness
Certainty
Accountability

Having exposed the essentials of the values which go to form the rule of law, we now need to expand them. Starting with **equity**, *pace* Hayek, in the context of the rule of law, equity can only mean 'treat like cases alike'. However, this precept is not as straightforward as it might at first sight appear.<sup>75</sup> It can usefully be divided into three parts. First, one needs to decide when cases are 'alike' in the sense of being 'like cases';<sup>76</sup> secondly, one needs to decide what the 'treatment' is to be;<sup>77</sup> and finally one must give these cases the same treatment ('alike'). Commentators normally refer to the third as 'formal' or 'procedural' justice and distinguish this from the issues of 'substantive' justice involved in the first two.<sup>78</sup> Alternatively, the third is referred to as the 'concept' of justice and the other two 'conceptions' of justice.<sup>79</sup>

An example may help to demonstrate some of the above distinctions. If a black man commits a crime and is imprisoned for three years and a white man later commits the same crime and is sentenced to the same period, formal justice is achieved because they are treated alike. However, there is a separate issue of the substantive fairness of the cases - if they have both been 'treated' to imprisonment for three years for a parking offence, then the result is arguably substantively unfair. Substantive fairness is also involved in assessing what constitutes a like case. If, for example, the black man was sentenced to five years and the white man three, then *ceteris paribus*, this is unfair because, unless one seeks to justify racism, like cases have not been treated alike.

<sup>75</sup>See further Galligan, *Discretionary Powers*, pp.152-161 and the footnotes contained therein.

<sup>76</sup>In *The Concept of Law*, Hart speaks of justice that: "There is therefore a certain complexity in the structure of the idea of justice. We may say that it consists of two parts: a universal or constant feature, summarized in the precept 'Treat like cases alike' and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different" (p.156).

<sup>77</sup>See Lyons, *Ethics and the Rule of Law*. As Lyons states, we need to go further than deciding when cases are alike or different, because "It also makes a difference how we treat the cases that fall into the classes we establish; for example whether we reward good samaritans and punish rapists, or the contrary. A conception of justice requires not only a way of classifying cases but also guidelines for their respective treatment" (pp.78-9).

<sup>78</sup>See eg. MacCormick, *Legal Reasoning and Legal Theory*, p.73.

<sup>79</sup>*Ibid.*

The need for justice is most apparent in judicial decisions; the principle of formal justice is, for example, enshrined in the system of judicial precedent. Dworkin has suggested that while justice is of crucial importance in this arena, it is not a requirement of legislative policy-making.<sup>80</sup> While this is true, in that it is obvious that, for example, a government decision to close Rosyth dockyard does not have to be accompanied by a decision to close Devonport dockyard - in other words that broad legislative decisions do not need to follow the principle of justice or equity in this sense - the same cannot be said of decisions within a system of regulation. These do need to adhere to the principles of justice. Wherever there is a process involving sequential decision-making on the basis of rules, then formal justice is required.

Granted that the rule of law requires formal justice, does it require a particular substantive version of justice? Since the value of equity has been derived from the need to support competition, it may be that equalising total control costs should be seen as the *ideal* for equity. After all, this would produce the most level playing field. However, equalising total control costs will seldom be a realistic prospect for informational reasons and in any event, it conflicts with the goal of efficiency which requires the equalisation of marginal and not total costs. What this means is that while the equalisation of total control costs might be regarded as the *ideal* where equity is concerned, the rule of law will not rule out other substantive versions; these may be *less* equitable than the ideal, but so long as they can be justified by reference to some other appropriate regulatory goal (eg. efficiency), they will still be equitable. Perhaps what this demonstrates above all, is that the issue of equity is far from clear-cut. There are, rather, degrees of equity; but the nearer to the ideal of an even distribution of regulatory costs, the more equitable a programme may be considered to be. Finally, beyond substantive principles, there remains the question of their practical realisation; as we shall see in future chapters, formal inequity may arise despite perfectly acceptable substantive equity criteria, if an appropriate framework (eg. a policy) is not in place to ensure that these are applied in practice.

One last point which needs to be made on the subject of equity is that our derivation of equity from equality before the law and the need for competition means that the rule of law concerns only equity between firms. Needless to say, there are other important equity considerations such as the distribution of costs between rich and poor and the allocation of pollution costs between polluter and polluted. Pollution taxes such as a carbon tax for example, are considered regressive and hence inequitable because the poor spend a higher proportion of their income on fuel. If such taxes are to be

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<sup>80</sup>Dworkin, *Taking Rights Seriously*, p.88.

introduced, alterations to other taxes and social security may be needed to ensure an equitable result. The allocation of costs between polluter and polluted is the concern of the 'polluter pays principle' (PPP). This is a very broad equitable principle which requires the polluter to bear the burden of pollution control rather than letting it fall on ordinary members of the public. The current cost-recovery charging schemes operated by our pollution control bodies could, for example, be said to reflect the PPP. Rather than all regulatory costs being met by the taxpayer via government grants to these bodies, the levying of charges now ensures that polluters pay for the costs of direct regulation. While these two important equity considerations will not be assessed as part of the rule of law, I will be addressing them indirectly where they arise - usually in the form of a footnote.

Like equity, the value of **efficiency** may at first sight appear straightforward, but it too requires interpretation. By efficiency, I mean the 'least-cost' solution, rather than one based on Pareto efficiency, which would require the appropriate level of ambient quality to be determined by cost benefit analysis (CBA).<sup>81</sup> Strictly speaking, one perhaps ought to use the term 'cost-effectiveness' rather than efficiency. At the moment, ambient quality levels are not decided on the basis of CBA, and efficiency therefore entails designing a regulatory strategy to achieve these given ambient targets at least cost. Of course, in principle, efficiency in the context of the rule of law could mean Pareto efficiency, but it must again be stressed that it is a matter of interpretation; it is my belief that Pareto efficiency is an unrealisable chimera and that CBA - on which it is predicated - has damaging implications for other rule of law values such as accountability.

**Effectiveness** presupposes the achievement of a goal of some type. It does not make sense to examine effectiveness without addressing the question 'effective at what?' The answer is 'effectiveness at achieving a given target or goal.' Thus, I take effectiveness to mean the ability to achieve a goal or target which has been set. In this context, the goal being considered is an ambient environmental one and the aim is to see the extent to which different instruments of environmental protection are effective at reaching that goal. However, one might equally consider other goals such as the ability of different policy tools to create in firms continuous incentives to innovate, or even the non-rule of law equity principles mentioned earlier. In this way, effectiveness has the capacity to act as a broad, residual value which could tackle the accusation that the rule of law values

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<sup>81</sup> A Pareto optimal state is one from which it is impossible to make one person better off without making someone else worse off. If benefits outweigh costs, there is a Pareto improvement if those who gain from the increased benefits actually compensate the losers. In practice this tends not to happen and thus the Pareto principle was modified by Kaldor and Hicks so that those who gain are potentially able to compensate the losers. Most textbooks on Welfare Economics deal with this issue.

fail to capture the range of factors which need to be considered in any assessment of environmental policy-design.

**Certainty** is quite straightforward. The use of discretion can create uncertainty, as can rule-based change. Certainty requires the avoidance of excessive use of discretion and excessive regulatory change.

**Accountability** can be either *ex ante* or *ex post*. *Ex ante* accountability - often referred to as 'participation' - ensures that the public and others have some input into regulatory decision-making; *ex post* accountability enables them to hold decision-makers to account after the event for the practical exercise of their discretion. One important point to note is that while accountability will often involve the receiving and/or the giving of an account, the concept is much broader than this and incorporates notions such as a threat which may be carried out, and even that someone else will do the job instead. The latter two will often be intertwined. The ability to bring a private prosecution, for example does not involve an agency giving or receiving an account, but it is an *ex post* accountability mechanism - enabling one to hold an agency to account for their enforcement decisions - because there is that sense of a threat of being seen to do the agency's job for it.

We have seen then, that Hayek's and Dicey's approaches to the rule of law were premised on liberal individualism. However, just because the assumptions behind their principles have been laid to one side and new purposes mooted does not mean that the principles they espoused are no longer valid. Indeed, I would suggest that the reason why their principles maintain their currency today is because they are implicitly applicable to both private and public realms. The point is that their application to the public realm has remained undeveloped. My aim therefore, has been to continue the systematic development of rule of law values to the public sphere attempted by Hayek and then by Harden and Lewis. I hope that I have been able to demonstrate that immanent critique necessarily involves using only existing principles - which are premised on a liberal individualist purpose - and applying these to the sphere of public policy-making. Only by changing theoretical tack and adopting constructive interpretation can one redefine the purpose of the rule of law and arrive at a fuller set of constitutional principles which can help shape policy design.

Of course, such a list will not be exhaustive of all the principles and factors which should be included in policy-making (unless the principle of effectiveness is used as a residual, catch-all category). Some may doubt the utility of having some constitutional policy-



making principles and some non-constitutional principles. Why not simply devise a list of sound principles rather than dress some up in constitutional apparel? The answer to this is that a dual approach is required by a search for our constitution. I am not arguing that my approach is more useful than a unitary set of policy-making principles (although I would also say that I can see no harm in having two separate sets of principles) - instead, I am arguing that my approach makes the best sense of the rule of law in today's society.

#### **1.4 AREN'T THE RULE OF LAW AND ITS PRINCIPLES JUST ARBITRARY AND A MATTER OF SUBJECTIVE PREFERENCE?**

While such an accusation would not be a problem for Hayek, because he sees his analysis as explicitly political, it is not an accusation I can easily ignore. If I was adopting a typical positivist, 'intuitive realist' approach, then it might be true to say that the rule of law means whatever you want it to mean<sup>82</sup> and that the values I describe are simply naked political preferences.<sup>83</sup> However, there are two reasons why this is not true of my approach. First, the rule of law is something which requires interpretation and as Dworkin makes clear, interpretation is not simply a matter of preferences. While constructive interpretation can rightly be seen as an exercise in political theory, like Hercules (Dworkin's ideal-typical judge),<sup>84</sup> the interpreter of our constitution cannot be accused of merely imposing his or her own political preferences. The rule of law principles are not merely picked from the air: if they are to be brought into play, their 'fit' within constitutional discourse must be asserted. This we have done by locating them within the Diceyan heritage. Secondly, as we shall see below, with at least one of the possible ways in which the rule of law might be operationalised, it acts in a procedural manner - aiming to shape political action rather than specifying specific, substantive political outcomes.

#### **1.5 HOW DOES THE RULE OF LAW OPERATE?**

If we have decided that the rule of law is part of the constitution and has a prescriptive quality, the question arises as to how it is to operate and be enforced. The distinction between the existence of the rule of law as part of our constitution and its practical

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<sup>82</sup>See Ewing, 'Trade Unions and the Constitution: The Impact of the New Conservatives', in Graham and Prosser (eds.), *Waiving The Rules*, 135 at p.146. Ewing describes the rule of law as "pregnant with ambiguity, which means whatever its authors would like;" see also Jennings, note 49 *ante*, p.60.

<sup>83</sup>See eg. Jennings, note 54 *ante*, p.60; see also Griffith, 'The Political Constitution' (1979) 42 *MLR* 1 at p.15, and Harden, note 9 *ante*, p.492.

<sup>84</sup>See Dworkin, *Law's Empire*.

operation and enforcement is an important one. Some commentators seem to suggest that because principles are not enforced, the British constitution lacks a normative component.<sup>85</sup> In contrast, I believe that the rule of law contains such normative principles, but that it is not effectively operationalised or enforced. I offer some ways in which this might be done, because it seems to me that this is necessary for it to be seen as part of constitutional practice. Otherwise, it will continue to be true that the "idea of the constitution is more important than the constitution itself,"<sup>86</sup> with the rule of law apt "not to be an analysis of the practice of government."<sup>87</sup>

It is my belief that the rule of law consists of certain fundamental principles which, while they do not override parliamentary sovereignty,<sup>88</sup> should aim to structure the exercise of power. I would not disagree with Brazier's insistence that there *are* no existing fundamental constitutional principles which *do* restrain government power, but that there *should* be some<sup>89</sup> - so long as the 'are' and the 'do' are read together. I would disagree with a statement that said that there *are* no existing fundamental constitutional principles *tout court*. In other words, I would disagree if Brazier were to suggest that there is no such thing as the rule of law, or that it does not consist of fundamental principles, or that it is not part of our unwritten constitution.

Given that there are existing fundamental normative constitutional principles - albeit ones which require interpretation, just as case-law requires interpretation - how are they to be applied? There are various ways in which the rule of law might be *used or operationalised* (as opposed to *enforced*, which will be considered below). First, and most stringent, one might take each principle separately and if a system of pollution control failed any one of the principles, it would be judged to be in breach of the rule of law. This is very much Hayek's approach. Secondly, one might compare a pollution control system with each of the values in turn and then assess, across the whole range of values, whether that system was in accordance with the rule of law. Thirdly, one might

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<sup>85</sup>Brazier, *op. cit.*.

<sup>86</sup>Loughlin, note 49 *ante*.

<sup>86</sup>Jennings, note 54 *ante*, p.60.

<sup>88</sup>*Cf.* Harden. I disagree with Harden's view that the rule of law is one of the constitutional principles which limit legislative authority. Brazier quite rightly, it seems to me, asks for evidence of Harden's proposition and states that the claim that there are fundamental constitutional principles, higher up the hierarchy than conventions, which limit the legislative authority of Parliament itself and which cannot be altered by judicial decision or by Act of Parliament, is somewhat controversial.

<sup>89</sup>Brazier, *op. cit.*. On pp.283-4, he states that fundamental principles might be drawn up and that these may be able to give "more effective expression" to "aspects of what we know as the rule of law." Brazier does not say whether he considers the rule of law to be part of the constitution, and if so, what he thinks it consists of; he refers to it as a 'doctrine' which is vague and elastic (p.284) and 'notoriously ambiguous' (p.273). However, the logical consequence of his criticisms of Harden would be for Brazier to deny that the rule of law is part of the constitution.

use the values to assess whether one system could be said to be more in accordance with the rule of law than an alternative system. Finally, and this is the least stringent possible usage, one might merely require that those designing a system of pollution control had checked the system against each of the values. On this account, the rule of law would take the form of a policy-design framework and a system of pollution control would therefore be in accordance with the rule of law if it had been passed through that framework.

I begin with two theses:

1) The first is that the rule of law can be used in either the first or the second of the above ways. In other words, that the legitimacy of pollution control instruments can be assessed using the rule of law values;

2) The second thesis, which is to an extent dependent on the first, is that market approaches to pollution control and market mechanisms<sup>90</sup> of environmental regulation represent a more constitutionally legitimate system of pollution control than command-and-control regulation. This second thesis presupposes that the rule of law can be used in the third of the above ways.<sup>91</sup>

It will be left to the conclusion to see whether these theses and any of their presuppositions can be proved. If they cannot, we may be left with the final possible application of the rule of law - the policy-design framework.<sup>92</sup>

The next issue to address is that of the enforcement of these various uses of the rule of law. There are two possibilities here. First, they might be enforced by the courts, so that for example in the first usage, if a policy failed to fulfil one of the rule of law values, it would be struck out as unconstitutional by the courts; or in the final usage, the policy would be struck out if the policy-makers had not performed the appropriate procedural task of passing the policy through the framework. Alternatively, the rule of law, in any

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<sup>90</sup>The distinction between market approaches and market mechanisms will be made clearer in chapters 7-8. For the moment, it is sufficient to point out that market approaches are non-regulatory approaches to pollution control which make use of the market (such as environmental management and auditing, green consumerism and green investment) as opposed to market mechanisms such as pollution taxes or charges and tradeable pollution permits, which are a form of regulation.

<sup>91</sup>While I do not include it as a thesis, if the rule of law can be used in the third way listed in the text, then one might also compare the different command-and-control regimes (HMIP, NRA etc.) to see whether one could be regarded as more constitutionally legitimate than another.

<sup>92</sup>We will only be left with this if not only the first thesis, but the second thesis *and* its presupposition are also disproved. If only the second thesis was disproved, the possibility would remain that one could compare command-and-control regimes under the third application, as in note 91 *ante*.

of the above usages, could be enforced as a living, practised principle of institutional morality.<sup>93</sup> In other words, it would be up to policy-makers themselves to police compliance with the rule of law<sup>94</sup> - whether that involved ruling out a policy if not in accordance with a rule of law value, preferring one policy to another if it could be said to be more in accordance with the relevant principles, or simply making sure that all policies are weighed-up across the range of rule of law values.

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<sup>93</sup>The rule of law has been variously described as "a principle of institutional morality" (Jowell, note 22 *ante*, at p.19), and by Dicey as a "code of constitutional morality" (a quote in Brazier, *op. cit.* - no page number is given and I have not been able to locate the quote in Dicey) and "the predominance of the legal spirit" (Dicey, *op. cit.*, p.195).

<sup>94</sup>See Harden, note 9 *ante*, at p.502.

## CHAPTER 2

# Regulation I - Command-and-Control

The aim of the chapters which follow is to see how the rule of law might be applied to command-and-control regulation, market approaches to pollution control and market mechanisms of regulation and whether the latter two might be said to be more in accordance with the rule of law than the former. In other words, can market approaches and regulatory market mechanisms be described as more constitutionally legitimate than our traditional regulatory approach?

In order to test whether market approaches and market mechanisms are somehow more in accordance with constitutional principles, one must consider the extent to which the present command-and-control regulatory system accords with these principles. In this chapter, I will therefore be examining the varying types of command-and-control regulation that exist in Britain under the various regulators with responsibilities for pollution control, to see how they compare in terms of rule of law values of equity, accountability, certainty, and efficiency. However, while I will be examining the value of accountability in great depth, that examination will take place not in this chapter but in the four that follow. Furthermore, I will not - as I will be doing in relation to the other values - be exploring the rule of law value of *effectiveness* for each individual regulator in turn. I will explain the reasons for this after a brief outline of the various regulatory systems operated by the different regulators.

Until the new Environment Agency is introduced by the current Environment Bill (which is likely to be some time in 1996), responsibility for pollution control is divided between five separate bodies: the National Rivers Authority (NRA) which is in charge of water; Her Majesty's Inspectorate of Pollution (HMIP) - which, under integrated pollution control (IPC), controls emissions to all environmental media from the most harmful 'prescribed' processes; local authorities, who are responsible, *inter alia*, for local authority air pollution control (APC); waste regulation authorities (WRAs are a specific division within local authorities), whose key role, for present purposes, is waste management licensing which includes regulating the final disposal of waste to land; and

finally, water and sewerage companies, which are responsible for the regulation of trade effluent discharges to sewer.<sup>1</sup>

It would take a long time to outline all of the powers and duties of the above bodies under the various pieces of legislation. Instead, set out below, is an outline of a selection of those powers and duties which will be of relevance to the discussion in the chapters that follow. Those wanting more detail should consult the relevant section of an environmental law textbook.

NRA	<p>The NRA is an independent agency originally established under the Water Act 1989. It has a wide range of responsibilities in relation to water, including primary responsibility for water pollution control. The regulatory system can be split into two functions. First, there is the setting of water quality objectives. Next, consents (which are licences to discharge trade or sewage effluent) are granted to firms. The setting of these consents is guided by the need to ensure that the relevant water quality objectives are met. The NRA is, by s.84 Water Resources Act (WRA) 1991, under a duty to ensure that <i>statutory</i> water quality objectives are, so far as practicable, achieved at all times. As yet, only a limited number of water quality objectives are on a statutory footing. Discharging without a consent or in breach of consent are criminal offences under the WRA 1991.</p>
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<sup>1</sup>Once the environment agency is introduced, the NRA, HMIP and WRAs will be merged into one independent body; trade effluent control and local authority air pollution control will remain where they are (see The Environment Bill).

HMIP	<p>HMIP, part of the Department of the Environment, was established in 1987. It has a range of responsibilities, the most significant for present purposes being the operation of integrated pollution control (IPC) under Part I of the Environmental Protection Act (EPA) 1990. As the word 'integrated' suggests, under integrated pollution control, HMIP are responsible for emissions from processes prescribed for central control<sup>2</sup> across <i>all</i> environmental media - air, land and water. As with all the other regulatory systems, IPC operates as a prior licensing system. Here, the licences are called 'authorisations'. Under s.7 EPA 1990, HMIP are under a duty to ensure that all authorisations for prescribed processes contain specific conditions requiring the use of BATNEEC (best available techniques not entailing excessive cost) to prevent the emission of prescribed substances<sup>3</sup> or, where that is not practicable by such means, to reduce the emission of prescribed substances to a minimum, and to render harmless the emission of any prescribed or other substances which are released. In addition to BATNEEC, and again reflecting the integrated nature of their task, HMIP must ensure that the best practicable environmental option (BPEO) is being used. In other words, where there are emissions to more than one environmental medium, HMIP must make sure that the balance between the various media is optimal - so that, for example, emissions to air should not be reduced if that would simply shift the problem to an unacceptable extent to water. Under s 7, authorisations must also comply with: EC Directives and international law; any statutory quality standards or objectives, and any national plan issued by the Secretary of State under s 3 EPA 1990.</p>
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<sup>2</sup>These are set out in The Environmental Protection (Prescribed Processes and Substances) Regulations 1991 (SI 1991 No.472) as amended.

<sup>3</sup>*Ibid.*

<p>Local Authority APC</p>	<p>The environmental health departments of local authorities are responsible for the control of air pollution under the Clean Air Act 1993 (the control of visible material such as grit, dust, steam and fumes), for local authority air pollution control (APC or LAAPC) under Part I of the EPA 1990 and for the control of statutory nuisances under Part III of the EPA 1990.</p> <p>I will be focusing on APC under the EPA 1990.<sup>4</sup> The controls here are contained in the same part of the EPA 1990 (Part I) as those for HMIP - the word 'enforcing authority' refers to both HMIP and local authorities. The APC system will apply to all processes prescribed for local control.<sup>5</sup> Because the IPC and APC systems are covered by the same sections of the EPA, such processes will similarly require authorisations which reflect BATNEEC etc., though not BPEO (since APC covers emissions to only one medium - air).</p>
<p>WRAs</p>	<p>In England, the waste regulation authority (WRA) in non-metropolitan areas is the county council. In Wales it is the district council - as it is for English metropolitan areas, with the exception of: London, where it is the borough council; areas where a joint body has been established (Greater London, Merseyside and Greater Manchester), and areas where the Secretary of State has used his power under s.31 EPA 1990 to establish a regional authority (eg. South Yorkshire). The WRA is responsible both for waste management licensing and for the duty of care under Part II of the EPA 1990. The waste management licensing system requires a licence to be held for the deposit, storage, treatment and disposal of waste. <i>Doing any of these things to waste without a licence is a criminal offence.</i> The duty of care mainly involves administrative steps which must be taken when waste is transferred. I will be focusing on waste management licensing, and - for the sake of clarity and because it is perhaps the most visible problem - on the final deposit of waste to landfill.</p>

<sup>4</sup>I will not be covering industrial smoke controls and statutory nuisance because they are primarily reactive means of control (with certain exceptions). To that extent, they are very different from APC and the other systems I am examining, which are all licensing systems.

<sup>5</sup>See note 2 *ante*.



Sewerage Undertakers	The privatised water and sewerage companies are responsible, <i>inter alia</i> , for regulating the discharge of trade effluent to sewers, conceding control to HMIP for those discharges which are subject to IPC. One therefore has the slightly curious arrangement that a private company is responsible for public regulation. As with the NRA, regulation is based on a consent system, the consents here being called trade effluent consents. The various powers are contained in the Water Industry Act (WIA) 1991.
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I stated above that I will not be exploring the rule of law value of *effectiveness* for each individual regulator in turn, as I will be doing in relation to the other values. Having briefly outlined the various regulatory systems, I can now explain the reason for this. The best measure of the effectiveness of the various command-and-control regimes is probably to see whether ambient quality has improved or declined. A decline in ambient quality would suggest ineffectiveness. On this basis, one might conclude that command-and-control regulation of waste storage, treatment and disposal has been ineffective, because ground and water contamination from landfill and other sites is quite common. A number of the problems stemmed from weaknesses in the original legislation,<sup>6</sup> many of which have been addressed in the EPA 1990 which replaced it.<sup>7</sup> Whether the new waste management regime under Part II of the EPA 1990<sup>8</sup> proves to be equally ineffective remains to be seen.

However, the use of the state of environmental quality as a measure of effectiveness will not always be straightforward. Regulatory responsibilities often overlap a particular environmental medium, which makes it difficult to comment on the effectiveness of each of the regulators in isolation. For example, both the NRA and HMIP are responsible for river pollution. If river quality has declined, one cannot easily conclude which of the two systems of regulation is ineffective.<sup>9</sup> There is a similar overlap between the NRA and the regulation of trade effluent to sewer: sewage works are still often in breach of their consents, which may seem to indicate that the NRA is ineffective in enforcement, but the blame could equally be laid on the regulation of firms' discharges to sewer. Much the same is true of air pollution: responsibility is divided between HMIP and local

<sup>6</sup>The Control of Pollution Act (COPA) 1974.

<sup>7</sup>As will be seen when I come on to them, market mechanisms are generally ineffective in theory and practice, whilst command-and-control regulation is effective in theory, but can be ineffective in practice, as it was here. The crucial difference is that one can seek to solve some of the practical effectiveness failures of command-and-control (eg. here by new legislation in the form of the EPA 1990), whereas a theoretical flaw is more difficult to address.

<sup>8</sup>Which came into force on 1 May 1994.

<sup>9</sup>Although one might conclude that our combined system of command-and-control water pollution regulation is ineffective.

authorities, and it is difficult to conclude, from any decline in air quality, which of the respective systems is ineffective.<sup>10</sup>

Furthermore, having said that the best measure of the effectiveness of the various command-and-control regimes is to see whether ambient quality has improved or declined, that will not always be a sure guide. For example, using that measure (and leaving aside for the moment HMIP's responsibility for water pollution), the NRA's system of regulation might be seen as ineffective because recent years have seen a decline in overall river quality.<sup>11</sup> However, some of the reasons for this decline cannot be blamed on the NRA - drought has, for example, been the cause of some quality problems.<sup>12</sup> In other words, the blame for a decline in environmental quality cannot always be laid at the door of ineffective command-and-control regulation. In addition, it is arguably misleading to consider a particular medium as a whole rather than examining specific types of pollution within that medium. For example, command-and-control air pollution regulation has been very effective at tackling some of the problems it set out to solve such as visible pollution in the form of smogs; its ineffectiveness lies in tackling invisible air pollution which has caused new problems, such as respiratory difficulties in humans, acid rain and global warming. Similarly with water pollution - the current command-and-control system is arguably quite effective at tackling point-source pollution (ie. factories etc ); its ineffectiveness lies in dealing with pollution from diffuse sources such as farms, which are one of the biggest causes of poor water quality.<sup>13</sup> It is also potentially misleading to look at overall quality shifts - with water quality for example, while the 1990 survey revealed an overall decline, this masks the fact that in some areas there were significant improvements while others showed a marked decline. Is command-and-control within the improvement areas ineffective?

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<sup>10</sup>*Ibid.*, except replace 'water' with 'air'.

<sup>11</sup>See eg. NRA, 'The Quality of Rivers, Canals and Estuaries in England and Wales: Report of the 1990 Survey', 1991. There is however, some doubt as to whether there has been a decline in overall quality - the appearance of a decline may be due to changes in survey methods over the period. For a good account of the effectiveness of US water pollution controls, see Yeager, *The Limits of Law*, pp.243-246.

<sup>12</sup>See the NRA report, *op. cit.*, pp.12 and 45-6.

<sup>13</sup>See further Ball & Bell, *Environmental Law*, p.357.

## 2.1 NRA REGULATION

### 2.1.1 Accountability

Discretion exists in setting standards, and in the monitoring and enforcement of these standards. The numerous ways in which the NRA may be held accountable for the exercise of these discretions will be examined in chapters 3 - 6.

### 2.1.2 Efficiency

By efficiency here, I mean the 'least-cost' solution, rather than one based on Pareto efficiency, which would require the NRA to set emission standards to achieve a level of ambient quality determined by cost benefit analysis (CBA). Strictly speaking, one ought to use the term 'cost-effectiveness' rather than efficiency. At the moment, ambient quality levels are not decided on the basis of CBA, and efficiency therefore entails designing a regulatory strategy to achieve these given ambient targets at least cost. This section will examine the extent to which NRA regulation does keep overall costs down to a minimum.

To allocate standards efficiently, an agency must take into account both location<sup>14</sup> and marginal abatement costs (MACs)<sup>15</sup>. With the former, if for example a river is able to assimilate a substantial amount of waste, it obviously makes sense to consider this when setting a consent. A consent which is stricter than necessary to achieve water quality will not be the least-cost solution. As the Royal Commission noted in their sixteenth report

"If a unit of effluent has no known effect on wildlife when discharged into a fast-flowing river but does significant damage when discharged into a sluggish river, then reductions in effluent at the latter are more 'cost-effective', all other things being equal, than reductions in the former."<sup>1</sup>

As for marginal cost, if the agency wishes, say, to reduce emissions by 15% and there are two industries, A and B, it will seldom be efficient to make both plants cut back by

<sup>14</sup>See eg Ackerman et al., *The Uncertain Search for Environmental Quality*, pp 236-7. and Kolstad 'Uniformity versus Differentiation in Regulating Externalities' (1987) 14 *Jo of Env Economics and Management* 386

<sup>15</sup>The cost to a firm of reducing its discharge by one more unit of pollution. A good explanation of marginality for the non-economist is given in Kerry Turner et al., *Environmental Economics - An Elementary Introduction*, pp 66-72 and in Tietenberg, *Environmental and Natural Resource Economic*, pp 21-26. To see the importance of marginal analysis in relation to pollution control costs, see Tietenberg, pp 314-5

<sup>16</sup>Royal Commission on Environmental Pollution, 16th Report, 'Freshwater Quality', Cm 1966, 1992, para 86

15%. This is because MACs differ between firms, so that if, for example A's control costs are five times that of B's, the lower cost solution will obviously be to make B cut back more than A.<sup>17</sup> The least-cost solution will be the point where the marginal abatement costs of the two plants are equalised.<sup>18</sup>

The NRA does vary standards according to location, although they would probably seek to justify this on scientific rather than efficiency grounds.<sup>19</sup> In other words, they would say that they differentiate because different rivers have different uses and different assimilative capacities; they would not say that they do so because to ignore location would not achieve the least cost arrangement. By taking location into account, the new agency is very much continuing with the traditional 'British approach' to standard-setting. This involves setting individualised consents, taking local geographical factors into account - and lies in contrast to the 'European' system of setting uniform emission standards irrespective of location. The argument goes that Britain has plenty of fast flowing rivers and is surrounded by sea, whereas on the Continent rivers often flow through a number of different countries. While they require uniform standards for reasons of inter-country fairness, we are not so constrained.

On the other hand, it appears that the other limb of efficiency in this context - differing MACs - is not systematically considered by the NRA. Indeed, the informational cost to the NRA of doing so would be enormous.<sup>2</sup> Costs may however be considered on an *ad hoc* basis in individual consent negotiations.<sup>21</sup> While such an approach is likely to be too unsystematic to ensure the lowest cost arrangement, it should lead to a more efficient system than if costs were not considered at all. Whether it does so will depend on the *way* in which costs are taken into account when consents are set. If the NRA consider abatement costs to be a factor only if imposing certain conditions might result in a discharger 'going bust', there is a danger that efficiency may actually be undermined. There are two possible reasons for this. First, it may effectively support inefficient

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<sup>17</sup>This example is based on the one given in Baumol & Oates, *The Theory of Environmental Policy*, p.164; on pp.165-8 they provide formal mathematical proof of these efficiency arguments. For the non-economist, a clear explanation of the efficiency advantages of market mechanisms is provided by Tietenberg, note 15 *ante*, at pp 314-20.

<sup>18</sup>See Tietenberg, *op. cit.*, p 315

<sup>19</sup>See Brittan, *The Impact of Water Pollution Control on Industry: A Case Study of Fifty Dischargers*, p.20. It should be borne in mind that all of the books on pollution control in the Oxford socio-legal studies series were written before privatisation of the water industry in 1989. Nevertheless, with water pollution control, one can probably safely assume that the NRA continue to adopt a similar *general* approach to that described in the books in relation to the old regional water authorities (though perhaps with a more structured approach in terms of discretion).

<sup>20</sup>In a US context, see Koch & Leone, 'The Clean Water Act: Unexpected Impacts On Industry' (1979) 3 *Harv Env LR* 84 at pp 108-9.

<sup>21</sup>*Ibid.*

companies. Secondly, a firm which has hit hard times may be the least-cost abater and thus, by not loading a greater proportion of the controls on it, the least-cost result will be missed. The NRA should be encouraged to publish guidance on how and what costs should be taken into account in setting consents.

It should also be noted that abatement costs can be considered at the enforcement stage as well as during standard setting<sup>22</sup> (in fact the two are quite similar in that non-enforcement effectively sets a new consent)<sup>23</sup>. While such an approach is similarly likely to be too unsystematic to ensure the lowest cost solution, it may lead to a more efficient system than one in which costs are not considered at all. Again, whether it does so will depend on what type of costs are taken into account by field officers. One might of course argue that allocative efficiency should only be considered at the initial standard-setting stage and that any relevant costs which ought to be considered will be available for consideration then. The only costs which are likely to be taken into account at the enforcement stage are those which may not have been apparent at that earlier stage - eg. the threat of bankruptcy - and are ones which ought to be ignored.

Finally, if, as has been suggested in the US, agencies tend to concentrate their enforcement efforts on large firms, allowing small firms to continue with their non-compliance,<sup>24</sup> this may be efficient to the extent that large firms enjoy economies of scale which are likely to make them lower cost abaters than small firms. If, on the other hand the converse is true and agencies concentrate their fire on small firms, then regulation is likely to be inefficient.<sup>25</sup>

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<sup>22</sup>See Richardson & Ogus, 'The Regulatory Approach To Environmental Control' (1979) 2 *Urban Law & Policy* 337 - their research into trade effluent control showed that for large companies, cost would often play a part in negotiations at the consent setting stage, while for small companies with less bargaining power, cost might be a factor in enforcement decisions.

<sup>23</sup>For an example, see Brittan, note 19 *ante*, at p.17; Brittan also notes that differential enforcement can be efficient if it takes into account differences in abatement costs (p.67).

<sup>24</sup>See Breyer, *Regulation and Its Reform*, pp.277 and 280.

<sup>25</sup>Yeager, note 11 *ante*, at pp.45-6, 292, 311.

### 2.1.3 Equity

#### 2.1.3.1 Equity In Setting Standards<sup>26</sup>

Equity in relation to consents is obviously important from a competition point of view in that if a firm has a more stringent consent than a direct competitor, it may be placed at a competitive disadvantage. As standards are gradually tightened to cope either with growth or increasing public expectations in relation to water quality, the issue of competition can only become more pronounced, because pollution control costs are likely to represent an increasingly large proportion of a firm's total costs. One reason for this is that control costs tend to rise exponentially, so that while it might for example cost a firm £20,000 to reduce emissions by 90%, cutting them by an extra 5% may cost the same amount again.

Ideally, from a competition point of view, equity would involve the equalisation of total control costs across all firms. This would be the ultimate level playing field. Of course, for informational reasons, this ideal cannot be realised, but it is worth mentioning because it highlights the fact that the more evenly costs are spread out, the more equitable an arrangement will be. This is an important point to bear in mind in what follows because many a differentiation can be justified and hence be regarded as equitable; however, some arrangements (ie. those which spread the costs out more evenly) will be more equitable than others.

In the old water authorities,<sup>27</sup> field officers were keenly aware of equity among industrial sectors:

"Field men, however, are constantly reminded that industrialists and farmers work on a principle of equity: they can readily discover the standards which their competitors must observe and may complain if they are being handicapped. But the agencies prefer to avoid complaints wherever possible, and this encourages an administrative inclination for equity of treatment, even though 'scientific' judgement may dictate otherwise. Negotiating about standards, especially when there is some disparity between *apparently*

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<sup>26</sup>See generally Kolstad, note 14 *ante*; McGarity, 'Media Quality, Technology, and Cost-Benefit Balancing Strategies For Health and Environmental Regulation' (1983) 46 *Law and Contemporary Problems* 159 at pp.219-220; Leone & Jackson, 'The Political Economy of Federal Regulatory Activity: The Case of Water Pollution Controls' in Fromm (ed.), *Studies in Public Regulation*, 231 at p.264; and Koch & Leone, note 20 *ante*, at pp.104-5.

<sup>27</sup>The regulators of water pollution before privatisation. As was said in note 19 above, one assumes that the NRA continue with a similar approach, though further empirical research would be needed to confirm this.

similar dischargers, though an infrequent event, can be one of the field man's trickiest tasks."<sup>28</sup>

The word 'apparently' in the above quote is of course crucial. A firm may look as though it ought to have the same standard as a competitor, but a field officer will often be able to point to a differentiating factor. In other words, if equity means 'treat like cases alike', the most important thing will be to decide when firms are 'alike' in the sense of being 'like cases'. Setting a firm a different consent to that set for another will not be inequitable if a field officer can point to a distinguishing feature which means they are not like cases. This distinguishing feature must be justifiable; there will typically be two possible justificatory norms here - science and economics.

In setting discharge consents, the NRA differentiates on the basis of the type of discharger, the control costs facing a firm and location. Differentiating on the basis of the type of firm is obviously justifiable using either science or economics. In technical terms, emissions must be expected to differ according to the particular process involved; a large chemical plant cannot realistically be expected to have the same emissions as a small engineering plant. Equally, giving all firms the same standard when marginal pollution control costs may vary widely between different types of process, will not be efficient. Differentiating on the basis of location can similarly be justified scientifically (eg. different rivers have different assimilative capacities) or by reference to efficiency (it is not efficient to grant the same standards to similar firms emitting to rivers with different assimilative capacities) - although the old water authorities would normally use the scientific justification. Hawkins quotes a field officer as follows:

"if people perhaps in the same industry are situated in different places in the estuary, y'know, if one was to point the finger at the other and say "But you allow him to discharge such and such and you only let us do this", then we should be able to turn round and say, "Ah yes, but you're discharging in a different place and the river quality in this different place needs different treatment."... I think you can only treat them similarly if all other things are equal, if they're discharging into the same sort of watercourse in the same sort of position."<sup>29</sup>

Having seen that the NRA approach is equitable in principle because the grounds on which it differentiates between firms are justifiable, one must then proceed to determine whether it is equitable in practice. This is where the equity difficulties lie for the NRA. In relation to costs, not only are they considered on an ad hoc basis, but there are also no guidelines on what type of costs should be taken into account. Thus while granting

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<sup>28</sup>Hawkins, *Environment and Enforcement*, p.26 - emphasis added.

<sup>29</sup>*Ibid.*; see also p.31.

apparently similar firms different standards because they face different control costs is equitable in principle because it can be justified on efficiency grounds, there will be a lack of equity in practice because a lack of guidelines means that field officers may be proceeding on the basis of different, unjustifiable substantive conceptions of justice; in addition, the ad hoc nature of their considerations is likely to result in inconsistency and hence an absence of formal justice. The assessment here must be whether the anticipated efficiency gains outweigh this inequity which is bound to arise in practice.

In relation to the type of industry and location there are other problems which stem from the fact that the NRA starts with river quality and works backwards, setting consents with this target in mind. They do not start with industrial categories as HMIP does with its guidance notes. For this reason, while the NRA, like the former water authorities, may be conscious of equity considerations, there must be an element of chance as to whether equity is actually achieved in practice. It does not take long to see why this must be so. Similar firms in similar locations within one NRA region may well be given similar consents. But a similar firm in a similar location in a second NRA region will not necessarily be given a similar consent to that in the first region. In fact, all other things being equal, while similar firms within regions may be given similar standards, similar standards may not apply to similar firms between regions. In other words, while equity may exist *within* regions, there may be inequity *between* regions, both in relation to similar firms and in relation to similar locations.

It is submitted that the NRA are unlikely to achieve national consistency of treatment without moving, at least in part, from setting standards solely on the basis of the receiving waters, towards the HMIP approach of setting standards on the basis of industrial categories. This does not mean that the NRA would no longer be able to individualise consents to take account of location or costs. What it means is that there would at least be a uniform starting point, from which local agencies could diverge in order to take local factors into account.

A final mention should be made of the Kinnersley report. The NRA is implementing a number of the recommendations made in the report by developing a national consent processing system to replace the existing regional systems.<sup>30</sup> While this system will ensure national consistency of treatment in the way applications are processed, the point to make is that it will not achieve equity in the sense described above of a similar starting point. The form of consents will now be much more uniform, but the substantive

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<sup>30</sup>See NRA, 'Discharge Consent and Compliance: The NRA's Approach to Control of Discharges to Water', March 1994, para. 6.2.



conditions contained in those consents will still derive from the particular catchment in which the discharge is made. In other words, while two similar firms in similar locations but in different NRA regions may now both be subject to, for example, percentile limits, the new system will not ensure that they have similar substantive emission standards.

#### 2.1.3.2 *Equity In Enforcement*

Equity in relation to enforcement will be considered as part of chapter 6 in the section on judicial review.<sup>31</sup> The issue of enforcement has potentially serious implications for competition, because some firms could end up facing prosecution and fines more regularly than others.<sup>32</sup> Perhaps more importantly, the non-enforcement of a consent is effectively the setting of a less stringent consent - a consent which may be lower than one held by a competitor.<sup>33</sup> Essentially, as we shall see in chapter 6, if a policy of selective prosecution operates, equity will suffer unless there is also a policy for selecting prosecution. Ideally equity requires that this policy be published and be useable in judicial review proceedings. These points on equity in relation to enforcement will obviously also be true for all other agencies, so I will not be repeating them when I consider those agencies below.

#### 2.1.4 **Certainty**

To be able to plan their business and investment strategies effectively, companies need a certain, stable framework within which to operate. Uncertainty can arise in two principal ways. First, unstructured discretionary action (in either standard-setting or enforcement) on the part of regulators is an obvious source of uncertainty.<sup>34</sup> And secondly, the formal ability to change consents may create uncertainty and instability. With the former, uncertainty arises because it is difficult to tell in advance what form discretionary action might take. With the latter, if consents are changeable in a short space of time, a company will face considerable difficulties in planning investment.

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<sup>31</sup>This is purely for the sake of convenience and exposition. It may be wondered what a discussion of equity is doing in amongst a section on the judicial review of prosecution discretion in a chapter on accountability for enforcement decisions. The answer is that the issues of equity and accountability in this area, as in others, are very closely connected (as anyone who has read K.C. Davis will know) and it saves having to go over the case-law twice.

<sup>32</sup>See EC 5th Environmental Action Programme, 'Towards Sustainability: A European Community programme of policy and action in relation to the environment and sustainable development', OJ 1993, C138/5 at p.81.

<sup>33</sup>See Brittan, note 19 *ante*, at pp.27 and 68. On p.68, she gives an example of the metalwork finishing industry, where different consents *and* differential enforcement meant that firms in a lax area had won orders from those in a strict area (a 20% difference in prices is mentioned).

<sup>34</sup>Besides uncertainty, discretion also gives rise to problems of accountability, effectiveness and equity and may be a contributor to efficiency or inefficiency - ie. many of the values are closely connected and altering one (eg. accountability) is likely to have a knock-on effect on the others.

The solution to the problem of uncertainty caused by discretionary action may be to confine or structure the discretion via rules or policy guidance so that companies are, to a large extent, able to predict the way in which the discretion will be exercised. Whether discretion can or should be effectively channelled in this manner will obviously depend on the particular regulatory context. We have already seen that there may be equity grounds for channelling NRA consent-setting discretion via national policy guidelines. As we shall see in chapter 6, the same may be true of their enforcement discretion. The value of certainty would also be served by the introduction of such guidelines.

The solution to the uncertainty created by altering consents is to lay down time limits within which consents cannot be changed, except in definable emergencies and perhaps on payment of compensation to the affected company. In fact, this type of strategy is adopted by the Water Resources Act 1991, schedule 10. A consent will normally contain a period before which the consent cannot be changed without the permission of the discharger. This period will usually be two years, but cannot be less than this.<sup>35</sup> However, the Secretary of State can direct an alteration within the period if it is necessary to give effect to an EC or international obligation or for the protection of human health, flora or fauna, or in consequence of representations or objections made to him. If such a direction is made within the allotted period on human or ecosystem health grounds (and only these), then the NRA will be obliged to pay compensation to the discharger, unless the direction is the result of something which could not reasonably have been foreseen at the time.

## 2.2 INTEGRATED POLLUTION CONTROL BY HMIP

### 2.2.1 Accountability

In many ways, HMIP's discretion is similar to the NRA's in that they too follow the process of setting standards and then enforcing those standards. Nevertheless, there is a difference in the structure of decision-making at the standard-setting stage, in that HMIP inspectors make their decisions within the framework of centralised guidance contained in the Chief Inspector's guidance notes.<sup>36</sup> Under the NRA scheme, there is no such centralised guidance.<sup>37</sup> This inevitably means that HMIP inspectors have less discretion

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<sup>35</sup>The Environment Bill looks set to change this period to 4 years.

<sup>36</sup>See DOE, 'Integrated Pollution Control: A Practical Guide', 1993, paras. 7.1, 7.16 and 7.18.

<sup>37</sup>Except in relation to the form of consents - see note 30 *ante* and accompanying text.

in setting standards than NRA staff, because their discretion has been structured by central policy. This suggests a greater level of accountability in the HMIP system.<sup>38</sup> This structuring of discretion by centralised guidance also has a bearing on equity - as we saw earlier where I advocated a similar approach for the NRA.

Of course, the degree of accountability and equity achieved in practice will depend on precisely how inspectors use the Chief Inspector's guidance notes. If, as has been suggested,<sup>39</sup> many inspectors simply apply the guidance notes as written, with no process of individualisation, then accountability and equity may be regarded as maximised (which may or may not be a good thing, because as we shall see below, this may mean that other values such as efficiency are compromised). If on the other hand, as the DOE guide to IPC<sup>40</sup> presupposes, inspectors merely use the notes as a starting point and do take individual factors into account in applying BATNEEC in the particular case, then a lesser degree of accountability and equity is likely to be achieved. If the information in the DOE guide is to be taken at its word, then this latter approach is the one that ought to be adopted.<sup>41</sup>

Again, the other ways in which HMIP may be made accountable for the exercise of their discretion will be considered in chapters 3 - 6.

### 2.2.2 Efficiency<sup>42</sup>

The first point to make here is that the degree to which efficiency is attained will again depend on how inspectors use the Chief Inspector's guidance notes. If inspectors use the notes simply as a starting point and do take individual environmental and economic factors into account in applying BATNEEC to each case, then at least a degree of efficiency is likely to be achieved. However, if inspectors simply apply the guidance

<sup>38</sup>Albeit accountability in a rather limited sense of the word. The accountability is of an internal kind - there is no question of an account being given to someone outside in this particular instance.

<sup>39</sup>See Harris, 'Integrated Pollution Control in Practice' [1992] *JPEL* 611 at p.617. Although Harris observes that, as the guidance notes age, inspectors are less likely to apply them wholesale.

<sup>40</sup>See note 36 *ante*.

<sup>41</sup>NB. in particular para. 7.13.

<sup>42</sup>The efficiency of BATNEEC is also considered by Pearce and Brisson, 'BATNEEC: The Economics of Technology-based Environmental Standards, With a UK Case Illustration' (1993) 9(4) *Oxford Review of Economic Policy* 24. However, they concentrate not on whether HMIP might be achieving the least-cost solution in applying BATNEEC, but rather whether BATNEEC represents a Pareto optimal level of emissions - ie. a level premised on CBA where the difference between benefits (reduced environmental damage) and costs (pollution control costs) is maximised. They conclude that "unless BATNEEC is deliberately chosen on the basis of cost-benefit analysis, it is only by chance that it will produce emission levels corresponding to the optimum" (pp.29-30). However, this approach obviously requires acceptance of the principles of CBA, which were called into question in chapter 1. Least-cost efficiency on the other hand, does not require acceptance of CBA because the ambient target is still set 'politically' - it is simply a matter of trying to achieve this target at least cost.

notes to the letter, with no process of individualisation, an efficient system will only result to the extent that marginal costs to particular industries have been considered by the Chief Inspector in drawing-up the guidance notes. Again, one assumes that the material in the DOE guide on the application of BATNEEC is not a dead-letter and that BATNEEC is applied in the way it suggests.

Beginning with the locational limb of efficiency - to what extent do HMIP take the local environmental situation into account? Does BATNEEC mean only that the costs of BAT must be weighed against environmental protection in some general, abstract sense,<sup>43</sup> or does the imposition of BAT entail an excessive cost if it is not required for the purposes of meeting ambient quality objectives?<sup>44</sup> Only if the latter is the case can IPC be said to be truly cost-effective in the locational sense. As we will see in chapters 4 and 5, it seems fair to say that this is an issue which has not been fully resolved. In principle, dangerous substances should be subject to BAT, unless costs are excessive in a general sense, because the precautionary principle suggests that environmental quality standards for these substances should be read as a minimum. Non-dangerous substances should not be subject to BAT, but should be tied to local quality objectives. If BAT is imposed in relation to these substances, the system will not be least-cost because more is being spent than is necessary to achieve ambient targets.

As for efficiency in the sense of taking into consideration differing marginal abatement costs (MACs), the DOE guide sets out how inspectors will be expected to take costs into account in applying BATNEEC. For both new and existing processes BAT is unlikely to be imposed if costs to a class of industry are considered excessive "in relation to the nature of the industry"<sup>45</sup> For existing processes, it is further stated that the imposition of BAT must be weighed against the desirability of avoiding excessive costs for the plant concerned having regard to the economic circumstances of the industrial sector of which it is part.<sup>46</sup> Within industries, inspectors would appear to be entitled to take into account variable factors such as configuration, size and other individual characteristics of the process<sup>47</sup> for both existing and new processes, for existing

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<sup>43</sup>As implied perhaps by the DOE guide's statements that BAT need not be imposed where the costs of BAT would be excessive in relation to "the environmental protection to be achieved" (para 7.7) that for existing processes, the "environmental situation" should be considered (paras 7.11 - 7.11), and, for new processes, that "the cost of the best available techniques must be weighed against the environmental damage from the process" (para 7.8)

<sup>44</sup>As implied by the guide's statement that "local environmental factors" should be taken into account (para 7.1)

<sup>45</sup>DOE guide, *op cit*, para 7.7

<sup>46</sup>*Ibid*, para 7.10, see also para 7.11

<sup>47</sup>*Ibid*, para 7.1

processes, they may also consider "the plant's technical characteristics, its rate of utilisation and length of its remaining life."<sup>48</sup>

There are various possible interpretations of "the nature of the industry" and, for existing plants "the desirability of not entailing excessive cost for the plant concerned, having regard to the economic situation of undertakings belonging to the category in question." First, they may be referring to the financial health of a plant or industry. While we are explicitly told that this should not be a consideration for new processes,<sup>49</sup> it is not mentioned in relation to existing processes, which means it might be taken into account for them. If the financial health of a company or industry is taken into account in relation to existing processes, the least-cost solution may not be achieved. There are two possible reasons for this. First, it may effectively support inefficient companies. Secondly, a firm which has hit hard times may be the least-cost abater and thus, by not loading a greater proportion of the controls on it, the least-cost result will be missed.<sup>50</sup> Next, it could for example mean that inspectors should have regard to the potential effect on the industry's position in world markets; with a carbon tax for example, it is likely that sectors such as the steel industry will either be fully or partially exempted because of the effect a unilateral tax would have on their ability to compete internationally. The introduction of expensive technology, under IPC could easily have the same impact. This approach is likely to aid the cause of efficiency: if unilateral action causes trade to be lost, the least-cost solution will not have been reached.

Finally, the above terms could refer to the average MACs of one industry compared with the burden on others. Arguably, it is only if this latter interpretation was adopted that the HMIP approach could be described as truly efficient. *Across* industries, it is most unlikely that HMIP adopt the MAC approach; much more likely is that costs in a general sense will be compared with the costs to other industries in an unsystematic, *ad hoc* manner. To adopt a systematic calculation would present HMIP with considerable informational difficulties - albeit fewer than if MACs for each and every firm were to be calculated and compared. Again however, whilst an *ad hoc* comparison will not lead to the least-cost solution, it will arguably lead to a more efficient, lower-cost result than if

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<sup>48</sup>*Ibid.*, para. 7.11.

<sup>49</sup>*Ibid.*, para. 7.8.

<sup>50</sup>*Cf.* Richardson et al., *Policing Pollution*. In relation to the best practicable means (BPM) test used by the old Alkali Inspectorate in the control of air pollution, they comment that: "The reference to 'what is not practicable or beyond his means' implies that restraining a polluter when the abatement cost is beyond his means can never be appropriate. This ignores the fact that it may be socially efficient to internalise an externality if the damage costs exceed the abatement costs, even where the result is the closing down of the polluter's enterprise" (p.46). However, it should be noted that they are using efficiency in the Paretian sense, not in the least-cost sense and that their 'damage costs' would be worked out via CBA.

costs were not considered at all. As for costs to firms *within* particular industrial categories, these will probably be considered on an even more *ad hoc* basis - they are likely to be considered by inspectors case-by-case without attempting to relate them to costs faced by other firms. However, again, while perfect efficiency will not be achieved, a degree of efficiency is obviously attained by taking into account factors such as scale, plant configuration and plant-age. It is factors such as these which are the cause of differing compliance costs among firms in the same industrial category. If uniform standards were applied in a blanket fashion to all firms in the same category, one would be far from a least-cost solution.

### 2.2.3 Equity

Much of what was said about equity in relation to the NRA will apply here.<sup>51</sup> Like the NRA, HMIP similarly differentiates between firms on the basis of costs, location and industry category. In order to demonstrate that setting firms different standards is not inequitable, one needs to point to a particular conception of justice which can be justified. HMIP can justify differentiation on the basis of industry category, location and control costs in the ways outlined in relation to the NRA. The efficiency justification for setting firms facing different control costs different standards can, for example help to dismiss allegations that IPC is inequitable in applying BATNEEC differently in relation to old and new plants. New sources are generally made to adhere to stricter standards sooner than old plants. This is regarded by some as an unfair barrier against new entrants, and as undesirable because it allows old and dirty technology to continue polluting.<sup>52</sup> While there is an element of truth in these claims, it would hardly be cost-effective to make old plants which may be nearing the end of their life clean-up immediately; even if they are not nearing the end of their life, the control costs to an existing plant are likely to be much greater than those of a new plant because the former will either need to make expensive process alterations or install expensive add-on equipment, while the latter can incorporate pollution control relatively cheaply in the initial design process. In other words, efficiency here provides a legitimate grounds for differentiation.

However, there is an obvious and crucial difference between HMIP and the NRA in relation to the practical realisation of equity, in that with HMIP, centralised guidance in

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<sup>51</sup>NB. the distinction made there between equity in standard-setting and equity in enforcement. The latter will be dealt with as part of chapter 6.

<sup>52</sup>In a US context, see eg. Ackerman & Stewart, 'Reforming Environmental Law: The Democratic Case for Market Incentives' (1988) 13 *Col Jo of Env Law* 171 at p.173. Of course, one could turn it around to say that if new and old plants are treated alike it will be unfair because the old ones were there first - see eg. Richardson et al., *op. cit.*, p.105.

the form of the Chief Inspector's guidance notes ensures a starting point of equity for firms in the same industrial sector. Deviations from this baseline can then be made on the basis of relevant considerations such as differing costs and geographical conditions. In other words, with HMIP, all firms within an industrial sector begin with the same presumptive standards as set out in the Chief Inspector's guidance notes and differentiation proceeds from that equal starting point. This is in contrast to the NRA approach where the starting point is the receiving water and there is no concept of an equal baseline. The guide on IPC issued by the DOE states the following:

"The inspector determining the case must decide what is BATNEEC in relation to each application, and translate that decision into conditions to be included in the authorisation. There must, however, be broad consistency in these decisions, especially between processes of the same kind. It is important for process operators and the public that BATNEEC is determined and applied in a transparent, rational and consistent way. In part this will be achieved by the application of the general guidance in the paragraphs above. A further important ingredient will be the guidance notes on each class of process which the Chief Inspector will issue to his inspectors."<sup>53</sup>

The 'general guidance in the paragraphs above' in the quote relates to the meaning of BATNEEC supplied in the DOE guide. It is perhaps more likely that inspectors will rely on similar information in the internal inspectors' manual. Thus, while the Chief Inspector's guidance notes will assist uniformity by giving an indication of what should constitute BATNEEC for each process,<sup>54</sup> the manual will do so by ensuring that local inspectors are following the same steps in applying BATNEEC in each individual case.<sup>55</sup>

However, while the Chief Inspector's guidance notes ensure a baseline of equity from which individualisation can take place in accordance with the guidance set out in the DOE guide and the IPC manual, it might be argued that the guidance on the application of BATNEEC contained in the latter guides is insufficiently precise to ensure any great level of consistency. The guidance as to costs and location for example is so vague and open to such broad interpretation that it is unlikely to produce much consistency between HMIP regions. Within regions, management structures and possibly more detailed guidelines are likely to produce consistency of treatment.

Furthermore, while the Chief Inspector's guidance notes may ensure a measure of equity within industrial sectors, there may be concerns about equity between different

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<sup>53</sup>DOE guide, *op. cit.*, para. 7.13.

<sup>54</sup>*Ibid.*, para. 7.1.

<sup>55</sup>While the NRA lack an equivalent of the Chief Inspector's guidance notes, their national consent processing guidance mentioned in note 30 *ante*, is perhaps the equivalent of the DOE guide or the IPC inspector's manual.

industries. Imposing BATNEEC may be considered inequitable if some industries have historically put much more effort into pollution control than others. A very clean industry may feel unfairly treated if it is made to become even cleaner while a historically dirty industry is only beginning on the BAT path which the clean industry started on years earlier.<sup>56</sup> An example of this can be found in the slightly different context of the national plan for the reduction of acid gas emissions under section 3 EPA 1990. The oil refinery industry and 'other industry' categories were unhappy with the fact that they had been given a much larger burden under the plan than the electricity generating industry, given that they had already done a great deal to reduce their emissions as against the poor efforts of the power generators.<sup>57</sup> It is difficult to see a way around this problem,<sup>58</sup> and as we shall see in chapter 7, it is one from which a tax or tradeable permit system may also suffer.

#### 2.2.4 Certainty

As we saw in relation to the NRA, the prime sources of uncertainty are discretion in the setting and enforcement of standards and the legal ability to alter these standards. With the setting of authorisations by HMIP, industry is provided with a degree of certainty by the IPC guidance notes. As Ball and Bell comment:

"The notes are supposed to provide a coherent context in which decisions can be made in relation to conditions to be imposed upon authorisations. Thus, all parties to an authorisation will know of the ground rules. The introduction of an element of certainty into the system increases both public accountability and also procedural fairness."<sup>59</sup>

With the enforcement of authorisations, certainty may be increased by the provision of an enforcement policy. Again, this issue will be explored more fully in chapter 6 on accountability for enforcement decisions.

As regards the variation of authorisations, HMIP is empowered to vary an authorisation under section 10 and Part II of Schedule 1 of the EPA 1990. Unlike the NRA and sewerage undertakers, HMIP has the power to vary the conditions in an authorisation at any time - indeed, it is under a duty to do so if it considers that the authorisation no longer reflects BATNEEC within section 7. This duty is reinforced by section 4(9), which places a duty on the Chief Inspector to keep abreast of developments in pollution

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<sup>56</sup>See Ackerman et al., note 14 *ante*, at p.248.

<sup>57</sup>See (1990) 1(3) *Utilities Law Rev* 120.

<sup>58</sup>Other than perhaps to allocate each industry a presumptive base-line - what Baumol and Oates call a "hypothetical 'raw waste load' " (see Baumol and Oates, *Economics, Environmental Policy and the Quality of Life*, p.236).

<sup>59</sup>Ball & Bell, *Environmental Law*, p.277.



abatement techniques. In any event, authorisations must be reviewed by HMIP at least every four years. These provisions obviously have the capacity to inflict considerable uncertainty on industry, making it very difficult for them to plan ahead. Whether such uncertainty arises will very much depend on how the powers are used in practice. If HMIP do enforce BATNEEC in the manner of a permanent revolution, then uncertainty will abound. If, on the other hand, they tend only to review authorisations every four years, industry will be provided with a much more certain and stable framework in which to operate.

### **2.3 LOCAL AUTHORITY AIR POLLUTION CONTROL (APC)**

This system is very similar to the IPC regime and is therefore likely to be similar in terms of efficiency, certainty and equity to HMIP. The significant points of difference lie in relation to accountability.<sup>60</sup> To begin with, whereas HMIP is a part of the DOE and political accountability will therefore be to Parliament via the minister, APC is subject to local accountability. The next point to make is that the accountability achieved via centralised guidance will probably be even stronger here than in the case of HMIP. Local authority officers, like HMIP inspectors, make their decisions within the framework of centralised guidance, but because the former generally have less expertise than the latter, they are more likely to apply the guidance notes to the letter. HMIP inspectors, in contrast, may be expected to use their expertise to individualise authorisations - using the guidance notes as a starting point rather than applying them in a blanket fashion.<sup>61</sup> Again, further aspects of accountability will be explored in more depth in chapters 3 - 6.

### **2.4 TRADE EFFLUENT CONTROL<sup>62</sup>**

#### **2.4.1 Accountability**

Water companies follow a similar line of decision-making to all the other pollution control agencies. They set trade-effluent consent standards and then have to go about

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<sup>60</sup>And *quaere*, effectiveness - see the beginning of this chapter.

<sup>61</sup>Although, as we saw in note 39 above, there is some doubt as to whether HMIP inspectors do actually individualise authorisations as opposed to applying the guidance wholesale.

<sup>62</sup>This is now shared between HMIP (for dangerous, 'red-list' substances) and sewerage undertakers (for all other discharges). In relation to HMIP control of such discharges, the section on HMIP will obviously apply.

enforcing those standards. Richardson et al. report the fact that within the old regional water authorities which they studied:<sup>63</sup>

"Most divisions, whatever the precise details of their policy towards consent conditions, had produced some form of guidelines or rules to govern their application. The process of consent setting was in fact the main exception to the general absence of formal internal rules ... Typically, in the well-established divisions, a set of *quality* conditions (or limits as they were usually called) existed for most categories of discharge. The officers had merely to determine the category, metal-plater or food-processor for example, and fill in the appropriate limits."<sup>64</sup>

However, while this will produce some accountability within divisions by structuring the officers' discretion, it does not produce accountability and consistency on a national scale, as achieved by centralised guidance of the type used by HMIP. Richardson et al. also note that, in contrast to standard-setting, formal predetermined guidelines were seldom used in relation to enforcement decisions. Again, accountability mechanisms will be examined in more detail in the chapters which follow, with enforcement covered in chapter 6.

#### 2.4.2 Efficiency

Richardson et al. comment that, in setting trade effluent standards, most water authority divisions tended to be guided by locational efficiency (although they would see it in technical rather than economic terms)<sup>65</sup>, but not by the marginal abatement costs facing dischargers. Location here obviously cannot refer *directly* to the assimilative capacity of the environment because discharges are made to the enclosed environment of the sewer. What it refers to therefore is the assimilative capacity of the sewage treatment works: the ability of the sewage works to cope with the trade effluent discharge without damage to itself and without breaching its own consent limits, thereby causing damage to the receiving watercourse.<sup>66</sup> To a great extent, water authority policy depended on the type of effluent under consideration. If the effluent was one which sewage works are designed to treat and a sewage works was able to cope with a considerable amount of waste, then few limits would be placed on dischargers;<sup>67</sup> imposing stringent limits in

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<sup>63</sup>As in note 19 above, one should be aware of the possibility that the Oxford socio-legal study by Richardson et al. (op. cit.) may no longer reflect existing practice post-privatisation. Indeed, given the change from a public sector to a commercial culture, one might expect there to be some difference in approach between the old water authorities described in the Richardson study and the new private companies.

<sup>64</sup>Richardson et al., op. cit., pp.95-6.

<sup>65</sup>*Ibid.*, p.99.

<sup>66</sup>Hence the 'directly' above.

<sup>67</sup>Richardson et al., op. cit., pp.99-100. As they note, sewage works are designed to treat the chemical oxygen demand (COD) and suspended solid content of the effluent.

such circumstances would be inefficient because they would be unnecessarily strict for the purposes of operating a safe, working waste disposal system. If, on the other hand, the effluent contained toxic substances such as heavy metals, sewage works are not designed to treat these and thus imposing stringent controls could not be said to be inefficient. One could not say, as in the previous example, that the sewage works could cope with more, because they are mostly not designed to cope with them at all.

As for abatement costs, while these were generally not considered by the divisions studied by Richardson et al.,<sup>68</sup> there were circumstances in which they were. For example, in relation to dangerous substances, those discharging very small volumes would often be given similar limits to those emitting larger amounts since the abatement costs per litre were lower for small volumes because manual treatment was possible.<sup>69</sup> However, as Richardson et al. argue, if it is the case that large volumes (of dangerous substances) typically issue from large firms, then the most efficient allocation is likely to be to impose stricter standards on the larger volume discharger because large firms are usually the lower cost abaters.<sup>70</sup> Finally, officers would typically set stricter consents for new dischargers than for existing ones if the sewage works was near capacity. Existing firms might have their consents tightened slightly, but the greater burden was borne by the new arrival. This is one of the few occasions when the officers did justify their action by reference to efficiency, arguing that new arrivals will usually be able to control emissions at much less cost than existing firms who may have to install expensive bolt-on equipment or make expensive process modifications.<sup>71</sup>

### 2.4.3 Equity<sup>72</sup>

Richardson et al. comment that among the old water authorities, there was a clear preference for similar limits for similar dischargers:

"If ten traders wish to discharge copper to a single works which is capable of receiving 1kg a day, it will be immaterial to the maintenance of overall effluent quality whether the available capacity is divided equally between the ten or given entirely to one. For the purposes of rendering the limits acceptable to industry, however, the first alternative would be deemed clearly preferable. The officers understood the

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<sup>68</sup>*Ibid.*, pp.103-4.

<sup>69</sup>While this is efficient in the marginal cost sense, it may not, as Richardson et al. argue, be efficient in the locational or damage cost sense. It assumes that damage costs of dangerous substances are less with a lower volume; this is not true (pp.101-103) and hence a policy that was efficient in both senses would set a *stricter* limit on the small volume discharger in this example.

<sup>70</sup>Richardson et al., *op. cit.*, pp.54 and 103.

<sup>71</sup>*Ibid.*, p.104.

<sup>72</sup>Many of the points made in relation to the NRA and equity will be relevant here. NB. the distinction made there between equity in standard-setting and equity in enforcement. The latter will be dealt with as part of chapter 6.

Confederation of British Industry to favour similar limits for similar traders wherever possible and they also believed that industry in general disliked the idea of differentiated limits for firms operating within the same industry because of the alleged opportunities it gave for unfair competition. In broad terms, therefore, most divisions felt constrained by the emphasis on acceptability to adopt a policy of uniformity and to impose similar quality limits for similar traders within their various catchments except insofar as they could justify to the traders deviation from such a policy. 'Similar traders' in this context connoted those who discharged effluents of a similar composition."<sup>73</sup>

Of course there was no uniformity of consent conditions *nationally*. The question which must be addressed is whether this lack of uniformity is justifiable and the answer here is clearly 'yes' - different sewage works have different capacities and trade effluent consent conditions need to vary to reflect this fact. This justification can be seen in either technical or economic terms. Claims that this is anti-competitive would probably be met with the response that a trader is free to choose his location and trade effluent conditions should be a factor in that choice.<sup>74</sup>

While the above quote, read alone, might appear to suggest that uniformity was the norm *within* catchments, in fact it very much depended on the type of substance being discharged.<sup>75</sup> First, particularly in relation to COD, firms were often allowed to discharge as much as they liked as long as the sewage works could cope.<sup>76</sup> While this means that the limits were not uniform, or more accurately, that there often were no limits, it does not mean that there was a lack of equity - far from it, as each discharger was equally free to discharge as much as they wished. Next, those discharging exceptionally high concentrations or volumes of normal, treatable effluent were often given stricter standards than others. As Richardson et al. note, this would only be justifiable if such a discharge by itself posed a threat to the capacity of the sewage works.<sup>77</sup> If there was no danger, such a policy would arguably be inequitable because no good justification would be available for differentiation. Uniform *quality* standards were the norm for the discharge of dangerous substances. However, some divisions did individualise consents by varying quality standards according to the volume of toxic substances discharged, so that exceptionally large volumes might attract a stricter quality limit and small volumes a lower quality limit than the norm.<sup>78</sup> Again, this different treatment may still be equitable if a good enough justification can be given. Locational efficiency cannot provide such justification because "the discharge of untreatable metals

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<sup>73</sup>Richardson et al., op. cit., pp.97-8.

<sup>74</sup>*Ibid.*, p.99.

<sup>75</sup>Hence the final sentence of the quote: " 'Similar traders' in this context connoted those who discharged effluents of a similar composition."

<sup>76</sup>Richardson et al., op. cit., p.100.

<sup>77</sup>*Ibid.*, p.101.

<sup>78</sup>*Ibid.*, pp.100-101.

above a certain concentration could be said to impose the same damage costs per litre whatever the volume of the discharge."<sup>79</sup> However, differentiation of toxic substances limits according to volume might be justifiable on efficiency grounds if the *abatement* costs are lower for the high-volume discharger.<sup>80</sup> If, as Richardson et al. state, large volumes typically issue from large firms and large firms are typically lower cost abaters,<sup>81</sup> then differentiated limits will be equitable because dissimilar treatment can be justified on efficiency grounds.

It is not just the volume and nature of the substance which might lead to a non-uniform approach. As we noted earlier, new traders tended to be given different consents to established traders. This non-uniformity will not however be inequitable because, as we have seen, it can be justified on efficiency grounds.

The next task is to determine whether equity was actually realised in practice. The answer is that it probably was, because as we saw above when looking briefly at accountability, most divisions - whatever the substance of their approach towards setting consent conditions - had produced some type of policy or guidelines to structure the process. As Richardson et al. state:

"Typically, in the well-established divisions, a set of *quality* conditions (or limits as they were usually called) existed for most categories of discharge. The officers had merely to determine the category, metal-plater or food-processor for example, and fill in the appropriate limits."<sup>82</sup>

The limits set out in the policy would therefore act as an equitable starting point and individualisation on the grounds listed above might then take place (ie. depending on the capacity of the sewage works, the volume and nature of the substances discharged, and whether the discharger was a newcomer). This has much in common with the HMIP approach and contrasts with that of the NRA, where, even within regions, consent-setting proceeds from the starting point of the receiving water rather than industrial categories. Here, the capacity of the sewage works is obviously similarly the starting point, but that is then divided up into notional limits for particular sectors.

#### 2.4.4 Certainty

The amount of discretion in the setting and enforcement of trade-effluent consents is arguably greater and less structured than in any other area, which is perhaps to be

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<sup>79</sup>*Ibid.*, p.101.

<sup>80</sup>*Ibid.*.

<sup>81</sup>*Ibid.*, p.103.

<sup>82</sup>*Ibid.*, pp.95-6.

expected given the age of the regulatory system in this area<sup>83</sup> and the quasi-private nature of trade effluent disposal to sewer. As we saw earlier in the section on accountability, policy guidance in relation to the setting of consents did exist within divisions of the old water authorities, but not nationally. Guidance on enforcement was not supplied in most divisions, which means that firms would be uncertain as to how enforcement discretion would be exercised.

As for the alteration of trade effluent consents, by section 124 Water Industry Act 1991, a sewerage undertaker must give the discharger two months notice before making an alteration. Similar to the NRA, an alteration will only be allowed without the consent of the discharger if it is two years since the initial grant of the consent or the previous alteration. Under section 125, it is possible for an alteration to be made within this two year period, but this will oblige the undertaker to pay compensation to the discharger unless the variation was the result of circumstances which were not foreseeable when the consent was granted or last varied. This 'hands-off' period and the obligation to pay compensation for exceptional circumstances which might have been foreseen, provide dischargers with a stable and certain framework within which to make decisions on investment in pollution control.

## 2.5 WASTE MANAGEMENT LICENSING

As I stated at the beginning of this chapter, I will be focusing here on the final disposal of waste to landfill sites, although waste management licensing under Part II of the EPA 1990 obviously covers much more than this. I will be examining how waste regulation authorities (WRAs) can be held accountable for their standard-setting and enforcement decisions in chapters 4-6. There may be concerns about equity of treatment if some WRAs are imposing different site-licensing conditions to others on similar sites. Lack of consistency has been a problem in the past. As the Government's 1990 White Paper, 'This Common Inheritance' stated, "the standards of waste regulation vary considerably."<sup>84</sup> Proposed remedies were twofold. First, there was to be statutory guidance: just as HMIP seeks to avoid the problem of inequity by way of the DOE guide, the manual for inspectors and the various guidance notes, so WRAs will be led

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<sup>83</sup>The Water Industry Act 1991 is only a consolidating Act - in practice, the system dates from the Public Health (Drainage of Trade Premises) Act 1937, with subsequent amendments.

<sup>84</sup>Cm 1200, p.195.

towards consistency by the Waste Management Papers issued by the DOE.<sup>85</sup> Waste Management Paper No.4, 'Licensing of Waste Facilities' is perhaps the most important of these as it sets out guidance on matters such as the criteria to be considered in granting a licence and the conditions to be attached to licences which are granted. The second remedy involved the creation of regional groupings of WRAs with regular liaison aimed at bringing about greater consistency in planning, licensing and enforcement.<sup>86</sup> In relation to certainty, the above measures designed to create greater equity will also have an impact on discretion, which can be one cause of uncertainty. The other main source of uncertainty we have been mentioning is the ability to change licences. Section 37 EPA 1990 gives WRAs a much broader power to modify licence conditions than exists for some other agencies we have looked at. This is probably due to the relatively unstable and uncertain nature of landfill sites. Although there are, for example, no time limits within which changes cannot be made and no provisions for compensation, there is however a restriction in that WRAs cannot make changes which are likely to require unreasonable expense on the part of the licence holder.<sup>87</sup> This is likely to provide most site operators with the stability they require.

As for efficiency, while the marginal cost aspect cannot really be applied in this context, the locational aspect may be relevant. If, as it is argued, the geology of many parts of the UK make the co-disposal<sup>88</sup> of wastes possible, then it would arguably be inefficient to require suitable sites to refuse commercial and industrial waste. If they were made to do so, this would arguably be inefficient because it would be imposing control stricter than necessary to maintain environmental quality.<sup>89</sup>

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<sup>85</sup>*Ibid.*, p.194. Note s.35(8) EPA 1990, which requires WRAs to "have regard to any guidance issued to them by the Secretary of State with respect to the discharge of their functions in relation to licences." Quære the degree to which the words 'have regard to' make such guidance binding.

<sup>86</sup>*Ibid.*, p.195. The creation of the Environment Agency should lead to even greater consistency.

<sup>87</sup>s.37(1)(a).

<sup>88</sup>The mixture of industrial and commercial solid and liquid wastes with biodegradable municipal waste, the idea being that the two will react to form a harmless end-product. Needless to say this approach is controversial. For a view in favour, see DOE, 'UK Landfill Practice: Co-Disposal - Using Nature's Techniques to Treat Difficult Waste', 1993.

<sup>89</sup>The forthcoming EC Landfill Directive appears to ban new co-disposal sites while allowing existing ones to continue - see 233 ENDS Report (1994) 34.

## CHAPTERS 3 - 6

# **The Accountability of Environmental Agencies An Introduction**

This brief introductory section provides background information which is necessary for an understanding of the structure of chapters 3 - 6 which follow.

To begin with, it will be useful to set out the various types of standard which are found in environmental law. Emission standards prescribe 'end of pipe' limits which must not be exceeded. Process standards lay down the type of technology, factory lay-out, manning requirements, chimney heights etc.. BATNEEC is perhaps the best example of a process standard, although the DOE guide on IPC emphasises that BATNEEC will often be expressed as a performance standard. Performance standards are effectively a hybrid of emission and process standards: the best process is set out, but rather than constrain firms' choice and flexibility by imposing that process on them, it is simply required that they meet the emission standard which that process yields.<sup>1</sup> Emission and process standards should be distinguished from ambient standards such as air quality standards (AQSs) and statutory water quality objectives (SWQOs).<sup>2</sup> Like emission standards, ambient standards will often lay down concentrations of particular chemicals which must not be exceeded. However, rather than applying these at the end of a plant's pipe or chimney, ambient standards dictate that such concentrations should not be exceeded in the receiving environment. An ambient quality objective may be truly environmental (eg. a river which can support fish; a forest undamaged by acid rain), or it may be health-based (eg. air quality which does not harm health). Environmental quality objective can be used in terms of a present quality standard which must be achieved, or it may be used in terms of a future target - in which case there will be a date by when the objective must be achieved. An ambient quality standard is a maximum concentration of one or more substances in a particular medium which must not be exceeded if the environmental quality objective is to be attained.

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<sup>1</sup>DOE, 'Integrated Pollution Control: A Practical Guide', 1993, para. 7.12.

<sup>2</sup>AQSs and SWQOs will be discussed in detail in the chapters which follow.



There are three principal ways of approaching pollution control. First, one can concentrate on the means of controlling pollution without tying them directly to the end of environmental quality. For example, emission or process standards can be set for each plant.<sup>3</sup> The disadvantage of this approach is that it cannot guarantee a given level of environmental quality: every plant may be keeping to its emission standard, but together, they may be causing considerable pollution. Secondly, one can attempt to tie the means directly to the ambient ends sought. In theory, this involves first deciding upon the desired ambient environmental quality, and then organising such things as emission standards to try to attain this ambient goal. The third approach is a hybrid of the first two and involves setting both an ambient quality standard and setting process/emission - specifically BATNEEC - standards. This hybrid approach avoids the problem with the first approach that a given level of environmental quality cannot be guaranteed. It also avoids a potential problem with the second approach, which is that one may wish to reduce emissions below the level necessary to achieve the given level of environmental quality. This is achieved by imposing the ambient environmental quality standard as a minimum and requiring firms to use BATNEEC to go beyond this. It is, for example, arguably the best approach for controlling dangerous substances in water. With dangerous substances, it means that a minimum level of environmental quality is guaranteed and, because one cannot be sure whether this is a safe level, that firms must aim to achieve below this by employing BATNEEC.

Historically, our regulatory system of air pollution control has tended to follow the first approach and our regulatory system of water pollution control the second.<sup>4</sup> However, while water authorities did use quality objectives as an aid to setting individual standards, these objectives were relatively flexible and were administrative rather than legal in form. Recently, we have seen a shift in both air and water pollution regulation towards the use of formalised, legal quality standards.<sup>5</sup> From now on, individual emission standards are likely to be firmly linked to these legal ambient quality standards,<sup>6</sup> not least because of the increased possibility of legal challenges, which I will be discussing in chapter 4. While much of our system of pollution regulation is therefore now based on the second approach,

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<sup>3</sup>These emission or process standards may be of an 'ordinary' type or they may reflect eg. BATNEEC (best available techniques not entailing excessive cost).

<sup>4</sup>See Macrory, 'Environmental Law: Shifting Discretions and the New Formalism', in Lomas (ed.), *Frontiers of Environmental Law*, 8 at pp.9-10, and Richardson et al., *Policing Pollution*, pp.52-3.

<sup>5</sup>These will be addressed in detail in the next chapter.

<sup>6</sup>Recent Government thinking on air pollution control confirms this - see DOE, 'Improving Air Quality', 1994.

pollution control under part I of the EPA 1990 adopts the third approach above. Even though the EPA regime reflects the third approach, the link between the two parts of the hybrid is far from certain; for the most part, the regulatory authorities have failed to set out the precise relationship between BATNEEC and environmental quality objectives.

Bearing in mind these general approaches to pollution control, the functions of environmental regulatory agencies can be split into three: first, the setting of ambient standards; second, the setting of process/emission standards and third, the enforcement of those standards so that the ambient targets are achieved. In looking at the accountability of environmental agencies, I will largely be following this framework. In chapter 4 I will be examining how agencies are held accountable for their ambient standard-setting decisions; chapter 5 will explore accountability for process/emission standard-setting decisions; and chapter 6 will be concerned with accountability for enforcement decisions. However, in the next chapter, chapter 3, I will first be examining general accountability mechanisms which cannot be tied to any of these particular agency functions.

## CHAPTER 3

# The Accountability of Environmental Agencies

## I General Accountability

Accountability connotes external pressure of some kind, and may be either *ex ante* or *ex post*. *Ex ante* accountability involves agencies receiving an account. If this is not required by law, this is arguably an example of responsibility rather than accountability. *Ex ante* accountability is normally considered in the literature under the heading 'participation', and I will be using the two terms interchangeably. *Ex post* accountability may mean one of two things: firstly, there is the narrow sense of being obliged to render an account; next there is a wider meaning, involving a threat (eg. of bringing a private prosecution) which may be carried out if the agency's actions are found to have fallen short of a desired goal.

In the chapters which follow, I will primarily be concerned with how agencies may be made accountable to industry and individuals or environmental organisations<sup>1</sup> on a direct,<sup>2</sup> day-to-day and active basis. This is in contrast with more selective, intermittent accountability mechanisms such as Select Committees and passive mechanisms such as registers - which are considered briefly in section 3.1 below. It is also in contrast with 'indirect' mechanisms, which cannot be directly controlled by pressure groups or industry; these are considered in section 3.2. One could of course, compartmentalise the various mechanisms in a different way - comparing for example mechanisms which, by-and-large, ensure accountability for policy (eg. Select Committees and ministerial responsibility), with those which ensure legal accountability (eg. judicial review), and those which secure financial accountability (eg. the National Audit Office). Thus, Lord Diplock has commented judicially:

"It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is

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<sup>1</sup>To avoid repetition, I will be using environmental group to include individuals or vice-versa. Where there is some difference in the position of the two, I will point this out.

<sup>2</sup>Ie. an accountability mechanism which can be used directly by such groups - as opposed to an indirect mechanism which can only be directed by someone else.

the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."<sup>3</sup>

However, for the purposes of this study, the mechanisms I will be spending most time examining are the ones which enable pressure groups and industry to hold agencies to account. Most of these are 'legal' in that they are provided for in legislation, but not all involve the courts, so legal accountability in the sense used by Lord Diplock is not an entirely appropriate classification for my purposes.

### 3.1 PASSIVE MECHANISMS AND INTERMITTENT MECHANISMS

The NRA and HMIP are held accountable to Parliament for financial management by the National Audit Office and the Parliamentary Accounts Committee.<sup>4</sup> These are intermittent examinations. Other intermittent accountability mechanisms include the Select Committees and the issuing of annual reports. Select Committees which consider environmental matters include the House of Commons Select Committee on the Environment and the environment sub-committee of the House of Lords Select Committee on the European Communities - although the latter sub-committee has been disbanded.<sup>5</sup> The NRA, HMIP and WRAs all issue annual reports: the NRA is under a duty to arrange for the laying of such reports before each House of Parliament and to ensure that they are published in a manner considered appropriate by the Secretary of State;<sup>6</sup> under section 67 EPA 1990, WRAs are also under a duty to publish annual reports; HMIP is not placed under a duty to publish a report - presumably because it is felt that as a division within the DOE, it is sufficiently accountable. The same cannot be said of local authority air pollution departments, which are also free from such a duty. If HMIP or a local authority does issue a report, this should arguably be regarded as a form of responsibility rather than accountability, as it is not specifically required by law. One should also mention sewerage undertakers, who, as public companies, are required to issue annual reports as a matter of company law. However,

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<sup>3</sup>*R v IRC, ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

<sup>4</sup>See eg. 'Financial Management and Control in the National Rivers Authority', 23rd Report, Committee of Public Accounts, HC 216, Session 1991-2; and NAO, 'Control and Monitoring of Pollution: Review of the Pollution Inspectorate', 1991.

<sup>5</sup>215 ENDS Report (1992) 26. Only the sub-committee has been disbanded; the HOL Select Committee on the European Communities remains in existence and is still able to examine European environmental proposals.

<sup>6</sup>s.187 Water Resources Act 1991; for details of the NRA's 1991/2 annual report, see 211 ENDS Report (1992) 6.

these reports are issued for the benefit of shareholders, not the environmentally concerned public, and the amount of environmental information is limited.<sup>7</sup>

One of the most significant instruments for accountability is the 'register'. All of the pollution control bodies are required to keep registers which are open to the public, with details of applications, consents/licences/authorisations, monitoring data, infringements etc.. Of course, precisely what is required varies according to the agency - and the respective Acts and corresponding regulations should be consulted for the details.<sup>8</sup> The real exception is the water and sewerage companies. Under section 196 Water Industry Act 1991, they are required to maintain registers of trade effluent consents that are open to the public. They are not, however, required to provide details of any monitoring information. Indeed, it is a criminal offence under section 206 WIA 1991 for an employee of a sewerage undertaker to disclose a firm's sampling information. Friends of the Earth launched a significant campaign on the secrecy of discharges to sewers in 1992.<sup>9</sup> However, the Environmental Information Regulations 1992<sup>10</sup>, which are designed to implement EC Directive 90/313 on Freedom of Access to Information on the Environment, may be of use here. Despite being private companies, after the *Griffin* case, the water services companies probably are covered by the regulations.<sup>11</sup> However, there remains some doubt as to whether information on sewers amounts to 'environmental' information as such.

Finally, it is to be hoped that the ability of companies to apply to have certain information excluded from any of the above registers on the grounds of commercial confidentiality<sup>12</sup> will not succeed as a cloak to exclude public scrutiny: if such exemptions become commonplace, the accountability potential of the registers will be severely curtailed. It should also be noted that, like annual reports, registers are, in themselves, 'passive' accountability mechanisms. However, they are a crucial tool in active mechanisms such as private prosecutions and judicial review. As we shall see, material entered on the registers should make these actions more straightforward.

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<sup>7</sup>See eg. 209 ENDS Report (1992) 4.

<sup>8</sup>Eg. s.20 EPA 1990 and SI 1991 No. 507; s.64 EPA and the Waste Management Licensing Regulations, SI 1994 No. 1056, and circular 11/94; s.190 WRA 1991 and SI 1989 No. 1160.

<sup>9</sup>See 'The Secret Polluters' (1992) 16 *Earth Matters* 10; see further 210 ENDS Report (1992) 4.

<sup>10</sup>SI 1992 No. 3240.

<sup>11</sup>*Griffin and Others v South West Water Services*, 236 ENDS Report (1994) 38-9.

<sup>12</sup>See eg. s.22 EPA 1990.

### 3.2 INDIRECT, DAY-TO-DAY, ACTIVE MECHANISMS

HMIP, the NRA, and perhaps to a lesser degree, sewerage undertakers, are all politically accountable for their decisions to Parliament via the minister (and Select Committees, considered above). WRAs and environmental health officers responsible for APC are locally accountable for their decisions to the elected members on the council. Both are good examples of indirect (for the most part), ongoing, active accountability mechanisms.

I begin with the doctrine of ministerial responsibility which is in theory central to the accountability of the former three bodies. The traditional treatment of the doctrine tends to conflate the supervisory element, with the reactive, accountability part.<sup>13</sup> And yet one does not necessarily entail the other, since managerial supervision can exist without answerability to Parliament and vice-versa. The Scott Inquiry into the 'arms to Iraq' affair and recent controversy over prison management have revealed the weakness if not the fiction of the supervisory element of ministerial responsibility. The reactive part of ministerial responsibility may be direct or indirect. The engine of ministerial responsibility may be set in gear voluntarily (eg. with a statement to the House), or in reply to a parliamentary question prompted by the MP's own interest. In other words, neither of these need be in response to 'outside' requests, and ministerial responsibility is indirect. If on the other hand, ministerial responsibility is set in motion by outside pressure, it takes on something of a 'direct' flavour. For example, industry or pressure groups can write direct to ministers, or to their MPs (or, in the case of eg. Friends of the Earth, encourage their members to do so) who may then write to the minister or table a question in the House. The minister may then provide information or give reasons for the course of action taken (what Colin Turpin has termed 'explanatory' accountability) and may also undertake to remedy any "errors or defects of policy or administration, whether by compensating individuals, reversing or modifying policies or decisions, disciplining civil servants, or altering departmental procedures" (which he calls 'amendatory' accountability).<sup>14</sup>

In practice, the limitations of parliamentary questions (the lack of a requirement to reply to such questions, the often cursory and obfuscatory nature of replies and the lack of effective sanctions other than political embarrassment), the yielding of Parliament to parties (a party with a majority is unlikely to have its policies censured by Parliament), and the extreme

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<sup>13</sup>See Day and Klein, *Accountabilities: Five Public Services*, p.33.

<sup>14</sup>Turpin, 'Ministerial Responsibility: Myth or Reality', in Jowell & Oliver (eds.), *The Changing Constitution*, 53 at p.57.

rarity of ministerial resignations - mean that reactive ministerial responsibility is, like its supervisory cousin, an extremely attenuated form of accountability.<sup>15</sup> The final point to note is that the strength of both elements of ministerial responsibility is likely to be further eroded by the existence of quangos or non-departmental public bodies (NDPBs) as they are now often called.<sup>16</sup> Whereas HMIP is a division within the DOE, the NRA is a quango and sewerage undertakers are privatised companies. With quangos and *a fortiori* with private companies exercising public regulatory functions, the supervisory element of ministerial responsibility is necessarily diminished because they are intended to be independent bodies operating at arms'-length of government. As a rule the quango is responsible for operational matters and the minister and the government department remain responsible for policy. However the lines between the two are seldom clear-cut, which means that the reactive element of ministerial responsibility may also be weakened because a minister will often be able, with some justification, to claim that a matter is operational rather than one of policy.

What then of the machinery of political accountability at local level which will apply in respect of local authority APC and waste regulation? The important point to note here is that local government accountability is very different to that of central government. In central government, civil servants are accountable to ministers who are in turn accountable to Parliament. In local government, council officers are accountable - not to individual council members who are in turn accountable to the remaining members - but to all the elected council members as a corporate body. And the members of this corporate body are actually involved in government - unlike central government where the minister is part of a government which is separate from Parliament. The corollary of this is that while in central government, government accounts to Parliament, in local government, since government and parliament are effectively one, council members account thereafter to the local population - by providing access to information, through council meetings, and ultimately, in elections.

The accountability of council officers to members is predominantly indirect in that officers' policy decisions and operational actions will be routinely supervised by members of the council. Nevertheless, it may become more direct if an individual complains to the council and the council then addresses this complaint to the relevant officers. It may also become more direct if an individual is present at the meeting of the council or the relevant

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<sup>15</sup>See further Harden & Lewis, *The Noble Lie*, and Marshall (ed.), *Ministerial Responsibility*.

<sup>16</sup>Quasi autonomous non-governmental organisations.

committee (as they are entitled) and addresses the complaint to the officers for himself. The accountability of the council members to the local populace may similarly be indirect or direct. Most accounting for what they do will be routine, unprompted and of an indirect nature in council meetings. If direct questions are asked in these meetings then accountability becomes direct.

Default powers are another good example of an indirect, ongoing, active accountability mechanism. They are indirect in that industry or environmental groups cannot direct the complaint themselves. They are ongoing and active in that the Secretary of State can step in at any time, although their use is likely to be extremely rare. The Secretary of State obviously does not require default powers in relation to HMIP because it is part of the DOE. With the other pollution regulators, which are independent of central government, he does require such powers. Under section 4 and section 72 EPA 1990, the Secretary of State may take over from local authority air pollution departments or waste regulation authorities if he is not satisfied with their performance. If sewerage undertakers are not fulfilling their statutory functions, the Director General of Water Services or the Secretary of State possess wide powers ranging from enforcement orders to special administration orders. The latter enable the Secretary of State or the Director General (with the Secretary of State's permission) to apply to the High Court for a direction that the affairs of the company shall be managed by someone else.<sup>17</sup> There are no default powers as such in respect of the NRA, but section 5 WRA 1991 gives the Secretary of State wide powers to give directions to the authority.

Finally, in relation to EC matters, the ability of the Commission to bring proceedings against a Member State under Article 169 of the Treaty for breaches of Community law provides another form of indirect, ongoing, active accountability mechanism.

### **3.3 DIRECT, DAY-TO-DAY, ACTIVE MECHANISMS**

Mechanisms which can be relied upon directly by industry or environmental groups (in varying degrees) as and when necessary, include consultation, call-in powers, appeals, judicial review, private prosecutions, civil actions, the ombudsmen and finally, such channels as may exist under the Citizen's Charter initiative. Returning to my earlier definition of accountability, it is interesting to see how some of these mechanisms fit in.

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<sup>17</sup>Water Industry Act 1991 ss.18-24.



What one finds, is a considerable overlap. For example, consultation comes squarely within one sense of the word accountability in that it involves the agency receiving an account. Appeals on the other hand involve the final sense, of a threat - the threat here being the possibility of an appeal (with all the time and cost which that entails) if a company is unhappy with the original decision; then, if the threat is carried out, appeals also involve the agency receiving an account (ie. a form of *ex post* accountability shades into *ex ante* accountability) and giving reasons for its decision in the appeal itself. Judicial Review is another example of a threat: the threat of a judicial review action if companies or pressure groups are unhappy with their decisions holds agencies to account. Again, if the threat is realised, accounts will be given and received, and accountability shades into participation. The same is true of possible negligence actions against the agency itself: the threat of liability may keep the agency on its toes, and if an action is actually brought, accounts will be given and received during the process of litigation.<sup>18</sup>

Private prosecutions and civil actions against polluting companies involve only the final sense of accountability - a threat which may be carried out if the agency's actions are felt to have fallen short. Even then, the threat is not that obvious. Whereas appeals or judicial review actions can be seen as threats because they pose some inconvenience to an agency, the threat posed by a civil action against a polluter, or by a private prosecution, is less obvious because they have less of an impact on the agency itself. However, private prosecutions may pose a threat because of the public embarrassment that such actions produce: if someone brings a private prosecution, the implication is that the agency has failed, and that the person or group bringing the prosecution are putting things right. If considerable publicity surrounds such a prosecution, the 'implication' will be specifically stated and emphasised - as it was in the prosecution of Albright & Wilson by Greenpeace.<sup>19</sup> Civil actions against polluters, on the other hand, ought not to reflect badly on the agency, because such private rights can be enforced despite the existence of, for example, an agency prosecution. Nevertheless, whether the public always fully appreciate the difference between criminal and civil actions is open to question, and in any event, someone bringing a civil action could also publicise that they were doing so because of agency inaction.<sup>20</sup>

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<sup>18</sup>NB. there is some doubt as to whether the various environmental agencies would be held liable in negligence in respect of their pollution control functions. This subject will be addressed in ch. 5.

<sup>19</sup>See (1991) 5(3) *LMELR* 170; the first private prosecution brought for water pollution was *Wales v Thames Water Authority* (1987) 1(3) *Environmental Law* 3.

<sup>20</sup>For a recent civil action which attracted considerable media attention, see *Cook v. South West Water*, 207 *ENDS Report* (1992) 39. The case was reported in the *Daily Telegraph* of 16 April 1992. One of the reasons for the media interest was that the poet Ted Hughes was present with the plaintiff in court.

In the following three chapters, I will be concerned with direct, day-to-day, active mechanisms which have just been discussed briefly in section 3.3. In chapter 4, I begin by looking at mechanisms for ensuring accountability for setting ambient standards. Chapter 5 then goes on to consider accountability for standard-setting and other operational duties,<sup>21</sup> before I move on to examine accountability for enforcement decisions in chapter 6.

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<sup>21</sup>For the most part, I will be examining standard-setting decisions; however, particularly when looking at waste regulation authorities, I will also be looking at accountability for other operational duties. This terminology is used simply for expositional purposes - enforcement could obviously also be classed as an operational duty.

## CHAPTER 4

# The Accountability of Environmental Agencies

## II Accountability for Setting Ambient Standards

### 4.1 EX ANTE ACCOUNTABILITY

The approach I am taking in this part of the chapter is rather unusual and requires some prior explanation. The approach which would probably be expected would be for me approach *ex ante* accountability by discussing the various laws which enable people to participate in the setting of ambient standards - ie. advertising and consultation requirements, opportunities to attend inquiries and such like. However, while I do intend to discuss these issues, they will be located within an alternative structure. The central focus of the section will be on various types of decision-making frameworks; it will set out a number of ideal-typical methods of deciding upon the appropriate ambient standard. The reason for doing this is that these methods themselves have very differing implications for accountability which deserve to be explored.

Thus, in looking at *ex ante* accountability for the setting of ambient standards, I will first be considering various model or ideal-typical methods of deciding upon ambient quality. These will include setting ambient quality using the precautionary principle; setting it at a critical loads level; setting it using cost-benefit analysis and, finally, deciding it 'discursively'.<sup>1</sup> The first two might be labelled as the approaches of science, the third that of economics and the fourth, of politics. I explore the implications which each has for accountability. I then examine how two different types of environmental quality are set in practice - air quality and water quality. As yet, there are no ambient quality standards for land (ie. level of soil quality to which contaminated land ought to be cleaned up). My conclusion is that degrees of all three models are present in the way in which standards are actually decided. The extent to which each is present will have an important bearing on accountability. In discussing the 'politics' or discursive model, I necessarily cover the types of *ex ante* accountability mechanism I mentioned earlier - ie. consultation, rights at inquiries etc..

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<sup>1</sup>A similar discussion occurs in Ramchandani and Gourlay, 'Alternative Approaches to Setting Effluent Quality Standards' (1992) 11 *IEM* 10 and in Kerry Turner et al., *Environmental Economics: An Elementary Introduction*, ch.14. However, they do not make the distinction between ambient standards and effluent (ie. emission) standards; cf. also McGarity, 'Media-Quality, Technology, And Cost-Benefit Balancing Strategies For Health And Environmental Regulation' (1983) 46 *Law and Contemporary Problems* 159.

A brief caveat is necessary here. It will be obvious to some that the four model approaches set out above are not exactly replacements because they come from different points of the decision-making framework: CBA is a tool used by decision-makers; a discursive approach is not concerned with tools but with who makes the decision; and the precautionary principle and 'critical loads' approaches represent, as we shall see, the outcomes of a decision. Nevertheless, I believe there is considerable value in considering them as alternatives, because they can be seen as models of existing, real-world positions: the precautionary principle combined with critical loads is essentially a fairly strong environmentalist approach; CBA represents the favoured approach of mainstream environmental economists, and discursive decision-making is the approach of critical theorists and civic republicans.

#### 4.1.1 Critical Loads

The critical loads approach<sup>2</sup> seeks to avoid ecological damage:

"The environment can accept a certain level of effluent discharge without adverse biological effects. This is the assimilative capacity of the environment. The concentration at which damage begins to occur is the Critical Load concentration."<sup>3</sup>

A critical loads or assimilative capacity approach allows for some human-environment interaction, but aims for no significant biological damage. This approach recognises that any human activity is likely to have some impact on biological life, however small this impact might be. It also recognises that ecosystems are generally in flux, so that is not a matter of finding the natural level, but rather a level of ecosystem functioning judged by humans to be healthy.<sup>4</sup> However, implementing a critical loads approach across the board would almost certainly come at considerable cost. Paying that price should be a choice made within a transparent and democratic framework. It should not be imposed without democratic debate by authoritarian ecological mandarins.<sup>5</sup> For those with a concern for the environment, there is a temptation to see a scientific 'is' in the shape of critical loads, and to transpose this into a policy 'ought'. The apparent legitimacy of science can too easily become a replacement for democratic legitimacy.<sup>6</sup> An ambient

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<sup>2</sup>An approach endorsed by the Government in relation to the control of acid rain - see 'This Common Inheritance - Britain's Environmental Strategy', Cm 1200, 1990, p.144 and 'This Common Inheritance: The Second Year Report, Cm 2068, 1992, pp.99-101.

<sup>3</sup>Ramchandani and Gourlay, *op. cit.*, at p.11.

<sup>4</sup>See Editorial (1993) 25 *JEM* 1.

<sup>5</sup>On ecological mandarins, see Ophuls, *Ecology and the Politics of Scarcity: A Prologue to a Political Theory of the Steady State*.

<sup>6</sup>For a practical illustration, see Smith & Elliott, 'Hazardous Waste and Technological Risk: The Limits of Science in Decision-Making' (1992) 2(1) *European Env* 1. Greens might be accused of

standard based on critical loads is a result; it should not be confused with the process of arriving at a result, which is where, one might argue, our attention ought to be focused.

#### 4.1.2 The Precautionary Principle

The precautionary principle<sup>7</sup> suggests that, where there is uncertainty as to whether damage will occur, but if it does occur it will be great, then it makes sense to take steps now to prevent the pollution which would cause that damage. Perhaps the most obvious application of the principle lies in relation to global warming: scientists are uncertain about whether increasing CO<sub>2</sub> emissions lead to global warming, but should warming occur, damage will be considerable; it therefore makes sense to proceed as though the causal connection has been established and thus attempt to limit CO<sub>2</sub> emissions as far as possible.<sup>8</sup>

Another application can be found with dangerous substances in water. The critical load approach presumes that we can establish a level of the substance below which damage will not occur. This is not possible for all substances. With dangerous substances - ie. those which are toxic, persistent or bio-accumulative, we cannot say with certainty what is the level of a substance below which long-term damage will not occur. The precautionary principle states that where we know that a substance is harmful due to its toxicity, persistence or bio-accumulative nature and where there is uncertainty about the long-term effects of these substances at even very low levels, the best approach is to attempt to reduce them as far as possible. With many dangerous substances such as mercury, we know that they are toxic, persistent and bio-accumulative, but we do not know what a safe ambient level of these substances might be. In other words, we do not know what the critical load is - we do not know what is critical in relation to low dose exposure over time. Applying the precautionary principle would mean reducing discharges of these substances to the lowest level possible. The ultimate aim of the principle would therefore be zero discharges and hence zero ambient concentrations above trace levels.<sup>9</sup> As we shall see, if levels of dangerous substances were decided

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inconsistency in their approach to science: on the one hand they present scientific ecological limits as an uncontroversial basis for policy; on the other hand, they see modern science as the cause of our ills and wish to emphasise that science is not value-neutral, but rather has numerous moral and social implications - see Redclift, 'Sustainable Development: Needs, Values, Rights' (1993) 2(1) *Env Values* 3 at pp.3-4.

<sup>7</sup>A principle apparently endorsed by the Government - see 'This Common Inheritance', note 2 *ante*, p.11.

<sup>8</sup>'As far as possible' is obviously significant: one could take very drastic action to cut CO<sub>2</sub> emissions (eg. banning all fossil-fuel power generation) but this would be to great a cost given the risk (or rather uncertainty) which faces us. Thus, it can be seen that the precautionary principle requires some form of cost-benefit balancing.

<sup>9</sup>See Gee et al., *Beyond Rhetoric: An Economic Framework for Environmental Policy Development in the 1990's*. They state that the precautionary principle (PP) demands ambient standards of 'no

using CBA or discursively, it is by no means certain that a target ambient standard of zero would be chosen.

#### 4.1.3 Cost-Benefit Analysis

Under cost-benefit analysis (CBA), the appropriate level of ambient environmental quality would be where the benefits of control outweighed the costs by the greatest margin. In a 'pure' model, this would be the level 'chosen'.<sup>10</sup> However, in the real world, the level suggested by CBA would be just one input into a political decision made by agency personnel. In other words, the decision-maker is not bound to choose the CBA answer. I hope to demonstrate that CBA is flawed on either account.

Costs are relatively easy to quantify because they stem from the cost of technology which has an actual market price.<sup>11</sup> Some benefits can be quantified via actual market prices in the same way as control costs: reduced river pollution, for example, may produce more revenue from the sale of fishing licences; a reduction in air pollution may lead to tangible savings in healthcare expenditure or building maintenance. The problem comes in trying to assess the other benefits which are not associated with real market transactions. The technique on which economists usually rely to capture these other benefits is 'contingent valuation methodology' (CVM). This generally involves asking people how much they would be willing to pay (WTP) (or alternatively, how much they would need to be compensated) for, say, a reduction in pollution levels. When CBA is criticised below, it should be borne in mind that criticism is being directed only at CBA which makes use of CVM. I do not deny the need carefully to weigh the costs of environmental improvement. In fact, one could quite easily replace the term CBA with CVM more or less throughout. I have not done so because most of the literature similarly treats CBA as coterminous with CVM.

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pollution' which can be translated into emission standards of zero emissions (p.8). However, their approach seems to reflect what one might call a strong PP stance - ie. one that does not take the costs into account; for what one might call a weak PP approach, see the Government's stance in the White Paper (note 2 *ante*), which places considerable emphasis on the balancing of costs and benefits.

<sup>10</sup>See Ramchandani & Gurlay, note 1 *ante*.

<sup>11</sup>Although the process is far from straightforward - see McGarity, note 1 *ante*, at pp.181-3.

CBA has been criticised on ethical, political and methodological grounds.<sup>12</sup> Pearce has identified three types of objection to economic valuation:

- a) "that the exercise of seeking measures of individuals' willingness to pay for environmental quality is itself somehow flawed;
- b) "that the fate of environments should not be determined by human wants at all; and
- c) "that human wants matter, but are not the only source of value. For example, there exists something called 'intrinsic' value, value 'in' things rather than 'of' things."<sup>13</sup>

Proposition (c) is an ethical objection. However, as Pearce notes, it is not a valid objection to economic valuation because economists are not claiming that there are no other values. Contingent valuation deals with economic - ie. preference-based values; it does not deal with, but neither does it rule out, other values such as intrinsic ones. Nevertheless, as Pearce points out, while economic and intrinsic values may co-exist, "(p)ractical issues do of course arise, since someone still has to say what these intrinsic values are and how they trade-off against other values."<sup>14</sup> I would therefore agree with Pearce that some of the ethical arguments against CBA often miss the point of what CBA is trying to achieve and ignore the need to balance human interests with the environment.

Proposition (b) is an ethical objection against anthropocentrism, which Pearce counters with the political observation that it "is clearly untenable if there is to be any semblance of democracy."<sup>15</sup> This is quite true, but as we shall see one might just as easily make the same political observation about CBA. It too has worrying implications for democracy.

Proposition (a) is a methodological objection. Here, Pearce admits that "there are indeed technical problems in validating the measures obtained - i.e. in determining whether they are true values or not", but states that "Proposition (a) is not the dominant reason behind the objections to valuation."<sup>16</sup> This is not true - methodological objections are as much at the centre of the debate surrounding CBA as any other class of objection.

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<sup>12</sup>Young, book review of *Valuing the Earth: Six Case Studies*, (1992) 1(2) *Env Politics* 307.

<sup>13</sup>Pearce, 'Green Economics' (1992) 1(1) *Env Values* 3 at p.7.

<sup>14</sup>*Ibid.*

<sup>15</sup>*Ibid.*

<sup>16</sup>*Ibid.*

Pearce's typology provides a useful entry to the debate. I now intend to discuss some of the methodological objections (which Pearce claims are secondary), the political objections (which Pearce fails to mention) and ethical objections (other than the economic/intrinsic value debate which I think Pearce is correct to dismiss). In the discussion, one should bear in mind the distinction I made at the beginning of this section between a 'pure' model and the real world of decision-making. It should be apparent that the political objections to CBA are premised on a real world scenario.

I will begin by examining what I regard as the flaws in CBA; I will then move on to consider some of the defenses made for CBA and whether these stand up to scrutiny. The critique is by no means exhaustive - other people would no doubt choose to highlight other problems or apparent advantages.

#### *4.1.3.1 Methodological Flaws*

One of the major problems with CVM is peoples' unfamiliarity with the resource being valued and the practice of putting a price on it. People are used to paying for products like toothpaste and they know from experience how much they are willing to pay for it; the same cannot be said of clean rivers, or clean air. Another problem is that while people are asked how much they would be WTP, they will not actually have to pay up. This means they are free to think up 'wild' prices, unconstrained by their actual income and without thinking about how this extravagant expenditure might deprive them of other goods.<sup>17</sup>

Looking at the matter more systemically, there is a similarity between the problems of CBA and those of economic planning as practised in the former Soviet Union. The Austrian critique of planning can be applied just as forcefully to CBA. Hayek, for example, attacked welfare economics (of which CBA is a part) for its utilitarian foundations,<sup>18</sup> and accused utilitarianism of the same naive constructivism as economic planning.<sup>19</sup> Mulberg is one author who has recently examined CBA from an Austrian angle.<sup>20</sup> However, Mulberg does not argue that CBA is flawed because, like planning, it suffers inherent calculational and epistemological problems. He argues that "(i)t is only through trade that values become known"<sup>21</sup> and that if CBA can be used to derive

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<sup>17</sup>See generally, Note, "Ask a Silly Question ...": Contingent Valuation of Natural Resource Damages' (1992) 105(8) *Harv LR* 1981.

<sup>18</sup>See *Law, Legislation and Liberty*, volume III, p.201, n.35. Bentham is undoubtedly the grandfather of CBA - maximizing utilities is the aim of both CBA and utilitarianism.

<sup>19</sup>See Kukathas, *Hayek and Modern Liberalism*, pp.8, 12 and 62-5.

<sup>20</sup>In his article 'Who Rules the Market? Green Versus Ecosocialist Economic Programmes: a Response to Eckersley' [1992] *Pol Studies* 334.

<sup>21</sup>*Ibid.*, p.338.



values for the environment without the 'goods' being traded, there is no reason why all goods cannot be valued in this way. In other words, the market is unnecessary and the whole economy can be planned. If Mulberg is saying that the logic of CBA leads to planning, I would agree with him. However, he also seems to be saying that the whole economy should be planned.<sup>22</sup> Here I disagree. The important point to remember is that there is a continuum between the market and planning - there is no such thing as a 'free' market and there are various shades of planning. Where we place ourselves on this continuum should be decided pragmatically on the basis of what works - not on the basis of dogma and ideology. Pollution regulation is a mild form of planning, but it can help to achieve the collective goals we desire; the total planning of consumer goods, on the other hand, has been seen not to work. Mulberg makes the mistake of assuming that environmental standards or taxes are set to achieve an efficient level of environmental quality (ie. one where the benefits outweigh the costs), whereas in fact, the level of environmental quality is usually decided politically and economics is relegated to working out which of the means (taxes, standards etc.) is most cost-effective. If CBA were used to set taxes at a Pareto efficient level, Mulberg would have a point about double standards. As it is, there is no hypocrisy in maintaining pollution regulation in a predominantly market economy.

#### 4.1.3.2 *Political Objections*

There are various possible political objections to CBA. Before listing these, one needs to be clear about different models of agency legitimacy. Without such an understanding, the political objections to CBA are easily confused - with different discourses talking past each other. Broadly speaking, there are four different models of administrative legitimacy.<sup>23</sup> These are of course ideal types which simplify matters to make the picture clearer - in reality legitimacy is conferred by a mixture of the processes described.<sup>24</sup> First, there is the legislative model, or what Stewart calls 'transmission-based justice'.<sup>25</sup> In this model, the agency secures legitimacy by way of its connection to the democratic legitimacy of the legislature. It simply does what the legislature tells it to do. Second, there is the New Deal inspired 'expertise' model, where agency decision-making is seen as a technical rather than a political task. Here, the legitimacy of agency decisions rests upon the legitimacy of science or professional technique, not democracy.<sup>26</sup> Next, there is the accountability model. This model recognises that the transmission belt is far from

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<sup>22</sup>*Ibid.*, pp.335-6; *cf.* p.340 where he claims the market is necessary.

<sup>23</sup>See Jones, 'Administrative Law, Regulation, and Legitimacy' (1989) 16(4) *Jo. of Law & Soc* 410 at p.412 *et seq.*

<sup>24</sup>*Ibid.*

<sup>25</sup>See Stewart, 'The Reformation of American Administrative Law' (1975) 88 *Harv LR* 1669 at p.1675.

<sup>26</sup>*Ibid.*, p.1678.

perfect, but seeks to keep the holes in the belt to a minimum by requiring accountability to the courts (via judicial review, to ensure the agency does not step outside its democratic mandate) and to Parliament (via reports, select committee scrutiny etc.). The final model is the discursive model. In this model, legitimacy is secured not by maintaining a connection between the agency and the legislature, but by creating a 'surrogate political process'.<sup>27</sup> If a representative cross-section of society participates in making agency decisions, legitimacy is no longer derived solely from the representative democracy of parliament, but also from the bottom-up via participatory democracy.

The model of agency legitimacy which can most easily be seen at work in Britain is undoubtedly the accountability model. The legislative transmission belt exists to some extent, but cannot easily account for the broad delegation of discretion in much statutory language. The professional expertise model still counts for something but has largely been discredited because of its undemocratic, authoritarian implications. The discursive model is only partly descriptive of British practice - we have some consultation, but decisions are far from being negotiated in a roundtable discussion by all interested parties.

Under the accountability model, CBA raises problems. While there is some truth in Helm's statement that CBA provides "a check on the exercise of regulatory discretion,"<sup>28</sup> the question he does not address is whether the check itself raises greater accountability problems than the discretion. If environmental benefits are outlined in word form, the accountable decision maker will be the one who weighs these benefits with the associated costs. If, on the other hand, environmental factors are included in numerical form, as economic values, the most important decisions are taken by the unaccountable analyst - it is the analyst who decides on the appropriate methodology and this determines the numbers that form the input into the decision that is eventually reached. Thus, while the ultimate decision is taken by somebody who is accountable, not by the analyst and while the CBA may only be one of a number of inputs into the decision making process, CBA is presumably an important input and the issue will to a certain extent have been pre-determined by the change in the form of the data from descriptive complexity to numerical simplicity. The discredited 'expertise' model - the expert now being the analyst rather than the administrator - is in danger of replacing the accountability model. In reply, one might state that these problems can be overcome by

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<sup>27</sup>*Ibid.*, p.1670.

<sup>28</sup>Helm, 'The Assessment: Reforming Environmental Regulation in the UK' (1993) 9(4) *Oxford Review of Economic Policy* 1 at p.8. Helm correctly identifies that regulatory discretion is constrained still further by extension of the role of market mechanisms as policy instruments (*ibid.*). This is one of the key points of my thesis, to be developed in future chapters.

making the decision-maker fully aware of the assumptions and limitations of the methodology.<sup>29</sup> On this account, no information is hidden from the accountable decision-maker, no effective power to decide is transferred. However, it must be said that this represents an extremely optimistic view. First, there is surely a danger that explanation will not occur. Secondly, one might question the extent to which an economist can fully explain the intricacies of supply and demand curves, differential calculus equations and specialist language to a generalist decision-maker with limited time.<sup>30</sup> The numerical result of the CBA is likely to shine out as a beacon of light in the darkness of economic jargon.

The concern above is that delegated decisions should be taken by accountable decision-makers, not by unaccountable experts. The analyst's response to this concern is that if the decision-maker understands the limitations of CBA, he remains in control. Even if one is convinced by this response, there is still the issue of the process of *ex post* accountability.<sup>31</sup> To hold someone accountable, one must understand the basis for their decisions.<sup>32</sup> Agencies are accountable to the courts, to parliament (who are in turn accountable to the public via the ballot box). Agency decisions based on CBA are not easily comprehensible by generalist courts, politicians or the public and thus CBA also threatens this form of accountability.<sup>33</sup> The task of explaining the assumptions and limitations of CBA to this wider audience will be harder to overcome.

In reply to the above criticisms relating to accountability, one might then say that CBA is still democratic because it counts the 'dollar' votes of consumers in real or simulated markets. In other words, there is another kind of 'surrogate political process' at work here.<sup>34</sup> Thus, the effective delegation of some power to the analyst, and the difficulty of the courts, the legislature and the public reviewing decisions the bases of which they do not understand, does not threaten accountability because the analyst is merely channelling more accountability from below in the form of citizen participation in contingent valuation questionnaires. The accountability model is seemingly replaced by the discursive model. There are two points to be made here. First, the market is not democratic because some people are better off than others - it is not 'one person, one

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<sup>29</sup>See Rodgers, Jr., 'Benefits, Costs, And Risks: Oversight Of Health And Environmental Decisionmaking' (1980) 4 *Harv Env LR* 191 at p.198.

<sup>30</sup>See Bennett, 'Cost-Benefit Analysis, the Market, and Political Legitimacy' (1988) 23 *Univ of San Fran LR* 23 at p.63.

<sup>31</sup>See Green, 'The Risk-Benefit Calculus In Safety Determinations' (1975) 43 *Geo Wash LR* 791 at p.806.

<sup>32</sup>*Ibid.*

<sup>33</sup>*Ibid.*

<sup>34</sup>See text accompanying note 27, *ante*.

vote'. Second, participation ought to mean having a voice to state your case, not merely a voice to name your price.

Related to the second point above, a common criticism of CBA is that it merely aggregates unquestioned, existing preferences whereas politics should be about reaching a conclusion based on debate amongst the citizenry.<sup>35</sup> However, it should be noted that this criticism is not premised on the accountability model of agency legitimacy, but rather on the discursive, civic republican model.<sup>36</sup> Our present regulatory arrangement is no more truly discursive in its design than CBA.

#### 4.1.3.3 *Ethical Objections*

One might add that it is not just results which concern environmentalists, but also the procedure used in reaching them. The medium is the message: approaching the environment in money terms may encourage the very attitudes which caused its destruction in the first place. Prices do not elicit reverence - the environment becomes just another thing that can be bought and sold. Tribe puts it far more eloquently:

"What the environmentalist may not perceive is that, by couching his claim in terms of human self-interest - by articulating environmental goals wholly in terms of human needs and preferences - he may be helping to legitimate a system of discourse which so structures human thought and feeling as to erode, over the long run, the very sense of obligation which provided the initial impetus for his own protective efforts."<sup>37</sup>

On the other hand, it has also been claimed that putting a price on the environment may help by horrifying us into action.<sup>38</sup> Being asked to quote a price for some aspect of the environment may cause some people to become aware of the environment for the first time - and discomfort at naming a price may spur them into action on its behalf.

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<sup>35</sup>Reich, 'Public Administration and Public Deliberation: An Interpretive Essay' (1985) 94 *Yale LJ* 1617 at p.1637; Sagoff, *The Economy of The Earth*, pp.10-11; Sunstein, 'Interest Groups In American Public Law' (1985) 38 *Stanf LR* 29 at p.32.

<sup>36</sup>Whereas the second point in the previous paragraph in the text is premised on our present system: our present system does provide for some voice - but this tends to be sequential consultation rather than a debate involving all concerned citizens sitting around the same table.

<sup>37</sup>Tribe, 'Ways Not to Think About Plastic Trees: New Foundations for Environmental Law' (1974) 83 *Yale LJ* 1315 at p.1330.

<sup>38</sup>Rose, 'Environmental Faust Succumbs To Temptations Of Economic Mephistopheles, Or, Value by Any Other Name Is Preference' (1989) 87 *Mich LR* 1631.

#### 4.1.3.4 Defences of CBA

- 1) It can only produce better results than those so far.

An argument often used by proponents of CBA, is that it can only be better for the environment than what has gone before.<sup>39</sup> Would the road through Twyford Down, for example, have gone ahead if a full CBA had been carried out? In other words, using economic valuation is better than leaving the environment unpriced. However, there is the issue of what in fact 'went before': it may be true to say that conventional CBA is better than a report which does not consider environmental benefits at all, or which lists them separately - for example in an environmental impact assessment; but, that is not to say that it is better than a report which fully integrates non-numeric environmental benefits into the report.

Then, as Jacobs suggests, the results of CBA may be favourable to the environmentalists' cause, but on the other hand, they may not. One cannot be sure that it will only produce better results than those so far:

"Critics of monetary valuation tell environmentalists to beware. These methods may generate some useful results ... but they can equally easily 'undervalue' what conservationists regard as important environmental assets. Thus, for example, survey respondents may not realise a particular habitat's ecological significance, and so place a low monetary value on it ... In these cases environmentalists might wish to override the results of the CBA. But if they have accepted the results of similar exercises elsewhere when it suited them, critics warn, they will find themselves (as it were) without a leg to stand on."<sup>40</sup>

- 2) With CBA, the environment will not be overlooked.

Here, one might accuse environmental economists of a sleight of hand. On the one hand they state that environmental benefits should be included in the analysis in numerical form to avoid being overlooked. Campen quotes a congressional committee:

"Whenever some quantification is done - no matter how speculative or limited - the number tends to get into the public domain and the qualifications tend to be forgotten ... The number is the thing."<sup>41</sup>

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<sup>39</sup>See eg. Pearce, 'Toward the Sustainable Economy: Environment and Economics' (1991) 172 *The Royal Bank of Scotland Review* 3 at p.6.

<sup>40</sup>Jacobs, *The Green Economy*, pp.206-7.

<sup>41</sup>Campen, *Benefit, Cost, And Beyond: The Political Economy of Benefit-Cost Analysis*, p.68.

Then, on the other hand, they claim that CBA is merely one input into the decision-making process and that other values will play a part.<sup>42</sup> This is having one's cake and eating it: if environmental values need to be included in numerical form to avoid being forgotten, then surely CBA will dominate the other non-numerical inputs? Either CBA and its numbers take centre stage or they do not.

### 3) The inability of opponents of CBA to offer an alternative<sup>43</sup>

This supposes that CBA is in place. One could quite easily turn the tables and put another method in place. If one then said "come up with an alternative," this would presumably mean an unflawed alternative - which would, on our account, rule out CBA. To say that there is no alternative here simply means that proponents of CBA believe CBA is good and any decision-making framework without CBA is bad. Furthermore, one might simply state that there is an alternative to CBA - factual complexity. This complexity should be addressed, not hidden away behind a superficial screen of numbers.<sup>44</sup>

To conclude, CBA which makes use of contingent valuation has worrying implications for accountability. CVM is a misconceived enterprise which can only lead to inaccurate results. Nevertheless, some basic form of cost-benefit balancing will be necessary, because environmental improvement is not costless. People must be democratically free to reject that cost if they consider it too great. Decision-makers also need to establish where money can be spent most effectively, which can only be done by weighing the costs with the benefits in different areas. However, it seems to me that weighing costs with benefits can and ought to be a relatively simple matter. One might for example compare the cost of having a swimmable river with the cost of having one in which fish flourished and decide that the cost of the former outweighed the benefits. Why go to the added expense of an army of analysts, when this frames the issue in a manner which everyone can understand?

#### 4.1.4 Setting Ambient Standards Discursively

This particular approach builds on two traditions which have much in common - European critical theory (particularly Habermas and his concept of the 'ideal-speech

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<sup>42</sup>Pearce, *Economic Values and the Natural World*, p.35.

<sup>43</sup>See eg. *ibid.*, the preface, n.38.

<sup>44</sup>This should not be seen as a contradiction to what was said earlier about the ability to understand decisions made on the basis of CBA: factual complexity is easier for generalists to understand; the simplicity of CBA is only in the result - understanding how the result was reached is by no means simple.

situation'),<sup>45</sup> and US civic republicanism.<sup>46</sup> It involves setting ambient standards on the basis of a public consensus reached via undistorted discussion. Legitimacy here is a participatory democratic legitimacy rather than the legitimacy of science (critical loads/precautionary principle). Legitimacy is conferred via community consensus; CBA on the other hand does not involve discussion and consensus by the community - it merely aggregates existing preferences without testing these through the process of rational debate. The legitimacy of decisions reached via CBA is therefore open to question.<sup>47</sup>

There are problems with setting ambient standards on the basis of civic republican deliberation and consensus.<sup>48</sup> The first is that, from an environmentalist's point of view, the consensus reached may be a 'bad' one. In other words, the danger with democracy is that the environmentalist's goal of a clean environment may be compromised:

"Is it not conceivable that the individuals involved in discursive designs would reflectively and competently choose to downgrade environmental concerns in comparison with (say) economic prosperity or social integration?"<sup>49</sup>

Reviews of Sagoff's book, *The Economy of the Earth* have noted that author's tendency to denigrate working class tastes as against those of the middle classes.<sup>50</sup> They have also noted that while he supports the idea of deciding environmental goals discursively, "he repeatedly characterizes deliberation in terms that reveal a systematic disdain for the

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<sup>45</sup>See eg. Held, *Introduction to Critical Theory - Horkheimer to Habermas*; see Forester (ed.), *Critical Theory and Public Life*, for some practical applications of some of Habermas' ideas; on Habermas' relevance to public law, see Prosser, 'Towards a Critical Public Law' (1982) 9(1) *Jo of Law & Soc* 1; for discussion of critical theory, Habermas and ecology, see Dryzek, *Rational Ecology*, ch.15, and Eckersley, *Environmentalism and Political Theory: Toward an Ecocentric Approach*, ch.5.

<sup>46</sup>See Seidenfeld, 'A Civic Republican Justification for the Bureaucratic State' (1992) 105 *Harv LR* 1511; Sunstein, 'Beyond the Republican Revival' (1988) 97 *Yale LJ* 1539 and Michelman, 'Law's Republic' (1988) 97 *Yale LJ* 1493.

<sup>47</sup>Seidenfeld, *op. cit.*, p.1637.

<sup>48</sup>Both Seidenfeld and Sunstein (*op. cit.*) make it clear that civic republican deliberation to achieve consensus is not the same as negotiation (see Seidenfeld p.1529, n.89; Sunstein, p.1549). Perhaps the best known advocate of negotiation of environmental standards is P. Harter (see 'Negotiating Regulations: A Cure for Malaise' (1982) 71 *Georgetown LJ* 1). Seidenfeld and Sunstein state that negotiation assumes a trade-off between competing private interests so that a compromise can be reached. Civic republicanism differs from negotiation in that it "involves an ongoing attempt at persuasion that has the potential to alter how all participants view the contested subjects of debate." In other words, the process aims at acceptance rather than compromise. However, Seidenfeld concedes that it will often not be possible to achieve consensus through deliberation, and that in these circumstances, compromise will be necessary. Thus, a discursive or civic republican approach would seem to require deliberation and consensus wherever possible, and negotiation and compromise where not.

<sup>49</sup>Dryzek, 'Ecology and Discursive Democracy: Beyond Liberal Capitalism and the Administrative State' (1992) 3(2) *Capitalism, Nature, Socialism* 18 at p.38.

<sup>50</sup>See eg. San Juan, book review of *The Economy of The Earth*, (1991) 15 *Harv Env LR* 307 at p.308.

uneducated or lower classes: 'a pack of yahoos.'<sup>51</sup> Yet while he is forced by his commitment to democracy to allow the 'yahoos' to enter the discussion, he blithely assumes that they will not win.<sup>52</sup>

While the possibility of downgrading cannot be ruled out (and it is by no means obvious that this would be instigated by the working class rather than the non-environmentalist, materialistic middle classes), Dryzek claims that this is unlikely if there is a sufficiently wide number of interests present and if communication is truly undistorted by ideology and strategic behaviour.<sup>53</sup> He also cites Paehlke, who believes that the experience of democratic participation so far has been on the side of environmental improvement rather than downgrading.<sup>54</sup>

Another difficulty with setting ambient standards discursively comes in deciding who should attend.<sup>55</sup> At a local level, there is some evidence that public deliberation can be made to work<sup>56</sup> and because of the small numbers involved, there is no need to limit attendance. However, while there may be no need to limit attendance, there are many other issues which need to be addressed such as how representative the participants are of the local population, how to ensure that discussion is even-handed, how to ensure non-middle class involvement, and what counts as consensus (majority vote or unanimity?).<sup>57</sup> If environmental groups are to attend such fora, there are potentially further problems of which they select to attend (assuming there are too many for them to attend them all), whether they should be granted funding to do so and again, their representativeness.<sup>58</sup> In practice, environmental groups such as FOE have volunteer groups at local level which may mean that such problems are less acute.

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<sup>51</sup>*Ibid.*

<sup>52</sup>*Ibid.*

<sup>53</sup>Dryzek, note 49 *ante*, p.39.

<sup>54</sup>*Ibid.*, at p.27, citing Paehlke, 'Democracy, Bureaucracy, and Environmentalism' (1988) 10 *Env Ethics* 305.

<sup>55</sup>Wald, 'Negotiation of Environmental Disputes: A New Role for the Courts?' (1985) 10 *Col Jo of Env Law* 1 at p.20. It is details like this that many of the more theoretical writings on critical theory and civic republicanism fail to address. As with proponents of market mechanisms, there is a tendency to call for something which sounds very attractive at a level of abstraction but which runs into problems when it comes to moving from theoretical abstraction to practical application (see Mashaw, 'Imagining The Past, Remembering The Future' (1991) *Duke LJ* 711 at pp.726-728).

<sup>56</sup>See eg. Reich, note 35 *ante*.

<sup>57</sup>*Ibid.*, pp.20 and 24. Similar issues arise in relation to corporatism - see eg. Craig, *Administrative Law*, pp.18-21. Negotiation is effectively corporatism on a smaller scale. On corporatism and public law, see further, Birkinshaw et al., *Government By Moonlight*.

<sup>58</sup>See Stewart, 'Regulation, Innovation, And Administrative Law: A Conceptual Framework' (1981) 69 *Cal LR* 1256 at pp.1346-7. The discussion of negotiation should be read with care as it is firmly located within a US context, where it is considered as an antidote to the paralysis that judicial review has imposed upon the US system of environmental law. As yet, we do not face the same problems, but negotiation can obviously be seen as a good in itself rather than simply as a cure for regulatory 'disease'.



Of course, not all ambient standards can be set locally because many pollutants have regional and transnational effects. Here, the above problems are compounded.<sup>59</sup> Where ambient standards have to be set at a national, European, or international level, problems of selection are likely to arise because of the large numbers who might wish to be involved.<sup>60</sup>

One final criticism which has been made is that negotiated decisions fail to reflect the 'public interest' because the public interest cannot legitimately be decided by private agreement between interest groups who are not necessarily representative of the general public.<sup>61</sup> However, this is to state a conclusion without questioning the pre-suppositions which inform that conclusion. The presupposition here is perhaps that the public interest is best reached by experts. However, if one is not convinced by the expertise model of the public interest, then it is not clear what choice one is left with other than to have the public interest decided by potentially non-representative interest groups. The 'public interest' is not a value-free term and whichever values inform it will be far from uncontroversial.

The final point to make is that this form of decision-making is extremely unlikely to be introduced, because it takes power away from the existing decision-makers such as the agencies and the Secretary of State.<sup>62</sup>

#### 4.1.5 Air Quality

Air quality standards (AQSs) are set in Brussels on health-based grounds - a human rather than ecological equivalent of critical loads. The judgment is that, below particular levels, humans will not suffer damage. There are health protection ambient standards for levels of sulphur dioxide, nitrogen dioxide, lead and suspended particulates.<sup>63</sup> Health

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I am considering negotiation in this latter manner, but some of the problems identified by Stewart and others in the former context are obviously germane to my discussion.

<sup>59</sup>See Dryzeck, note 49 *ante*; on p.37, he describes the question of unrestricted participation at this level as 'more problematical' than at the local level, 'though not intractable'. Unfortunately, he gives no indication of how to solve these problems.

<sup>60</sup>At a national or European level, it is tempting to think that the necessary discussion on ambient standards could be taken by national parliaments and the European Parliament respectively. After all, both of these are democratic arenas. However, this cannot be the case, because while there are inevitably fewer ambient standards to be set at these levels than at the local level, parliaments simply do not have the time to examine fine details.

<sup>61</sup>Funk, 'When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest - EPA's Woodstove Standards' (1987) 18 *Environmental Law* 55 at pp.95-6.

<sup>62</sup>Stewart, note 58 *ante*, at p.1346.

<sup>63</sup>EC Directives 80/779, 85/203, 82/884.

and vegetation standards now also exist in respect of ground level ozone, but these are guide values rather than mandatory standards.<sup>64</sup>

What of our system of air pollution control designed to reduce acid rain? While the aim of the Large Combustion Plants Directive 88/609 was to reduce the damage caused by acid rain, the structure of the programme was such that emissions were not *directly* linked to critical loads under the Directive. All member states were (and still are) required to reduce their emissions of sulphur dioxide (sox) by 60% by 2003 and nitrous oxides (nox) by 30% by 1998, beginning from a 1980 baseline. *The Economist* noted the Directive's ability to over-regulate - citing the example of Spain, which had to cut emissions by the same amount as other countries - despite the fact that it produces little sulphur which falls into neighbouring countries.<sup>65</sup> The recently signed UNECE protocol is a partial improvement in that it sets individual national targets linked to the contribution a country's sox emissions make to exceedances of critical loads. However, as ENDS notes, the protocol will not bring sulphur deposition below critical loads because this was considered to be too expensive; instead, a 60% 'gap closure' will be the goal.<sup>66</sup> The UK's individual target is a 50% reduction in SO<sub>2</sub> emissions by 2000, 70% by 2005 and 80% by 2010. A protocol on nox emissions is expected to follow. However, in setting national reduction targets for acid pollutants, the protocol is still not sufficiently focused. Just as the EC Directive tended to under or over-regulate between nations, so the protocol may still under or over-regulate within the national targets.

By and large then, there is no concept in our system of air pollution control of tying emissions directly to ecological critical loads. This is true of AQSs because these are designed to protect not ecosystems, but human health. There are two senses in which the statement is true of acid rain policy. First, while policy on acid rain has *aimed* at critical loads (ie. reducing acid deposition to non-damaging levels) in a general sense, it has either failed to secure this aim or this aim is held as a longterm one and the interim aim is something less than critical loads. The former (and possibly the latter) could be said of the LCP Directive, the latter of the recently agreed UNECE protocol. Secondly, not only has the aim of critical loads failed or is absent, but also neither of these policies are structured in such a way that emissions are tied *directly* to critical loads. The national targets set in the LCP Directive are quite unrelated to the effect of a country's emissions on critical loads of acid deposition; the new UNECE protocol does link a

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<sup>64</sup>Directive 92/72. The Directive has been implemented in the UK via SI 1994 No. 440. See 213 ENDS Report (1992) 34; 230 ENDS Report (1994) 38. A *lack* of ozone in the upper atmosphere is thought to contribute to global warming and an increase in skin cancers; the *presence* of ozone at ground level causes respiratory problems.

<sup>65</sup>*The Economist*, 4 September 1993, p.18.

<sup>66</sup>See 233 ENDS Report (1994) 41 at pp.41-42.

country's targets to that country's impact on critical loads, but it still sets *national* emission targets. For a programme to achieve critical loads, or certainly to achieve them at a cost effective level, arguably requires plant emissions *within* countries to be tied to critical loads.

If EC acid rain policy is not directly linked to critical loads, perhaps our UK policy does so? The protocol, like the Directive, is likely to be implemented via the national plan<sup>67</sup> and BATNEEC within IPC.<sup>68</sup> The national plan certainly does not tie emissions directly to critical loads. A national plan which reflects even the new protocol targets would still be a blunt instrument, leading to possible exceedances of critical loads at local level. The Orimulsion controversy at National Power's power station in Pembroke provides a good example. National Power admitted that burning the fuel would spread acid rain over Wales, but argued that it was reducing emissions at other plants in Britain to meet the overall reductions required by the national plan drawn up to meet the Large Combustion Plant's Directive.<sup>69</sup>

With BATNEEC, there is potential for tying plant emissions directly to critical load levels, but it is safe to say that there has been little but confusion about the link between emissions and critical loads. Again, BATNEEC has the potential to under-regulate or over-regulate. It can under-regulate because all firms may be applying BATNEEC, but critical loads could still be exceeded. BATNEEC is no guarantee of environmental quality. However, the EPA 1990 does not simply require BATNEEC - section 7(2)(a) requires that BATNEEC be used to 'render harmless' any substances which are released, and the concept of harm could be linked with critical loads. This points towards how BATNEEC can also over-regulate: imposing BATNEEC may not be necessary if there is no harm being caused. While HMIP appear to be aware of these issues, they have done little to clarify the uncertainty surrounding them. In 1993, the ENDS Report reported an HMIP consultation paper on BATNEEC and environmental harm, which suggested that there might be an attempt to "provide a mechanism to relate long-range environmental damage, such as acid deposition and low-level ozone formation, to emission controls on the numerous point sources."<sup>70</sup> However, according to ENDS, this idea was scrapped because HMIP felt it would be too difficult to disentangle the effects of numerous distant point sources.<sup>71</sup>

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<sup>67</sup>DOE, 'The United Kingdom's Programme and National Plan for Reducing Emissions of Sulphur Dioxide and Oxides of Nitrogen from Existing Large Combustion Plants', December 1990.

<sup>68</sup>EPA 1990, s.7.

<sup>69</sup>See chapter 5 for further details.

<sup>70</sup>222 ENDS Report (1993) 16 at p.17.

<sup>71</sup>231 ENDS Report (1994) 38 at p.39.

As for public participation - with AQSs, lobbying by national interest groups almost certainly occurs,<sup>72</sup> but there are no official mechanisms of public consultation, let alone a public discursive decision-making process. If AQSs are to continue to be set at an EC level, an effort must be made to create consultation procedures.<sup>73</sup> Ideally, AQSs should be decided upon on the basis of consensus in a discursive forum, but this may be difficult because of the difficulty of selecting from the large number of potential participants at this level. On the other hand, one might argue that AQSs should not be set at the EC level and that the principle of 'subsidiarity' should apply. Under this approach, those elements of AQSs which do not have transboundary effects would be decided upon at a local level. If this was the case, a discursive model would be more feasible, because selection would be less of a problem. However, while subsidiarity may be a viable option for matters such as bathing and drinking water, with air quality it would run into problems of competition within the internal market: local communities might choose lower standards to protect their local industry or to attract others. However, it would presumably be possible to decide at a local level whether a stricter standard was desirable - imposing stricter standards than in Directives is, in limited circumstances, allowed under Community law.<sup>74</sup>

There is likewise no public participation in deciding upon the ambient quality to be aimed for in terms of acid rain. Because of the transboundary implications of acid rain, local decision-making is inappropriate. Local communities might choose poor quality, but the effects would be felt by others. However, having ambient quality decided upon at a national or European level rather than a local level has implications for *ex ante* accountability. If, as is the case, acid rain policy must be set at national and EC levels, there should (on the democratic model) be scope for some public consultation on what standard of environmental quality is appropriate and how quickly it is to be achieved. A 'rapid' critical loads approach may be thought appropriate by some but too stringent by many.

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<sup>72</sup>For a discussion of the participation (or rather lack of formalised consultation) of environmental organisations at EC level, see Kramer, *Focus on European Environmental Law*, ch. 5 and pp.22-3; for a practical example of interest group lobbying, see Porter & Butt Philip, 'The Role of Interest Groups in EU Environmental Policy Formulation: A Case Study of the Draft Packaging Directive' (1993) 3(6) *European Env* 16. There are also signs in recent Community policy that the EU is beginning to allow environmental groups some say in policy appraisal, if not formulation - see eg. the 5th Environmental Action Programme, 'Towards Sustainability: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development', OJ C138 17.5.1993, at pp.29 and 81; Article 6 of Council Regulation 880/92 on a Community Eco-Label Award Scheme; and a Council Meeting of 4th May 1993 on 'Industrial Competitiveness and Environmental Protection', Bull.EC 5-1993, pp.98-100 at p.99.

<sup>73</sup>Macrory, 'Environmental Law: Shifting Discretions and the New Formalism' in Lomas (ed.), *Frontiers of Environmental Law*, pp.20-21.

<sup>74</sup>See Arts. 130T, 100A(4) and 36 of the Treaty, and the 'Danish Bottles' case (*Commission v Denmark* [1989] 54 CMLR 619). For details on these, see Ball & Bell, *Environmental Law*, pp.62-4.

Regarding CBA, if the US example is anything to go by, it seems likely that AQSs are set without reference to costs. In other words, they are 'cost-oblivious'.<sup>75</sup> To quote Rodgers:

"This decision reflects the value judgment that, at least where some health hazards are concerned, the public has a right to a minimum level of protection regardless of what a cost-benefit analysis suggests."<sup>76</sup>

Empirical research is needed on the extent to which decisions on the ambient goals to aim for in relation to acid rain have been subject to a technical CBA. The impression one gets is that an 'intuitive' CBA may have been performed.<sup>77</sup> With the recent UNECE protocol on sulphur emissions for example, it was decided that reaching critical loads within the timeframe set by the agreement would be too expensive.<sup>78</sup>

#### 4.1.6 Water Quality

Section 82 WRA 1991 empowers the Secretary of State to establish a system of classifying water quality. This is done by way of regulations. Three sets of regulations which have been issued reflect the requirements of relevant EC Directives on water quality - SI's 1989/1148, 1989/2286 and 1991/1597. Other classification regulations will eventually incorporate a set of Use Classes, with appropriate standards for each particular use. So far, regulations have been issued in respect of only one use class - fisheries ecosystem - in the shape of the Surface Waters (River Ecosystem) (Classification) Regulations 1994.<sup>79</sup> The regulations establish chemical standards for a

<sup>75</sup>See Rodgers, note 29 *ante*, at pp.201-2. There are however signs that CBA may soon be applied to air quality - one of the research projects reported in the DOE's Environmental Protection Group Research Newsletter 1994-95 (April 1994) relates to the 'valuation of air quality effects' (B7, p.21).

<sup>76</sup>Rogers, *op. cit.*, p.202.

<sup>77</sup>Kerry-Turner et al., note 1 *ante*, state that "The data to compare costs and benefits do exist, but no rigorous exercise making the comparison has yet been done." (p.302). However, there are indications that the EU is moving in the direction of considering the costs and benefits of their proposals - see eg. the 5th Environmental Action Programme, note 72 *ante*, at pp.70-71, which states that "although the value of many environmental assets is difficult to measure in monetary terms and, in the case of particularly important or rare elements should not be priced in any event, valuations, pricing and accounting mechanisms have a pivotal role to play in the achievement of sustainable development" (p.70) and proceeds to advocate the "development of meaningful cost/benefit analysis methodologies and guidelines in respect of policy measures and actions which impinge on the environment and the natural resource stock." These thoughts are echoed in more recent Community policy documents such as 'Industrial Competitiveness and the Protection of the Environment', the subject of a Commission Communication, a Council Resolution and a Council Meeting - see Bull.EC 11-1992, p.35; OJ 1992, C331/5; and Bull.EC 5-1993, pp.98-100 respectively. The Commission communication is reported in and commented on by Barnes, 'Industrial Competitiveness and the Environment: The Need for EU Policy Integration' (1993) 3(6) *European Env* 11.

<sup>78</sup>See text at note 66, *ante*.

<sup>79</sup>SI 1994 No. 1057; see further 231 ENDS Report (1994) 36.

range of classes from FE6 (fish unlikely to be present) to FE1 (high class salmonid and cyprinid). Future proposed Use Classes may include agricultural abstractions, industrial abstractions, special ecosystem and watersports.

These regulations then form the basis of statutory water quality objectives (SWQOs).<sup>80</sup> Under section 83 WRA 1991, the Secretary of State serves a legal notice on the NRA specifying, for particular stretches of water:

- a) one or more of the classifications prescribed under section 82;
- b) the date by which compliance should be achieved.

SWQOs based on two of the above three EC-based classification regulations (1989/2286 and 1991/1597) have already been set. This was done under section 146 of the Water Act 1989 in order to avoid the consultation requirements in section 105 (now section 83 WRA 1991).<sup>81</sup> Following the procedures would have been pointless, as these SWQOs were required by EC law and consultation would only have delayed implementation. SWQOs for SI 1989 No.1148 are expected to follow soon. It should also be noted that these initial SWQOs were to be achieved when set; there was no future date as in (b) above. As regards use classes, although the Surface Waters (River Ecosystem) (Classification) Regulations 1994 were brought into force on 10 May 1994, it will be some time before SWQOs are actually set on the basis of these regulations. Unlike with the four EC-based regulations above, target dates will of course be a key feature of such use classes-based SWQOs. Thus, for example, a date might be set for turning a river suitable for sustainable cyprinid fishery (FE4) into one suitable for a sustainable salmonid fishery (FE2).

Do SWQOs reflect the precautionary principle or critical loads? Beginning with the dangerous substances element of SWQOs, these reflect a precautionary approach, although their form might suggest a critical loads approach. SWQOs for dangerous substances take the form of concentrations of the substances in ambient water which must not be exceeded. This might suggest that the SWQO concentration is the critical load level, below which damage to the environment will not occur. However, this is manifestly not the case. SWQOs represent an interim target. They do not represent a safe level of such substances in water. One has to look not at the SWQO in isolation but

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<sup>80</sup>See NRA, 'Proposals For Statutory Water Quality Objectives', December 1991; NRA, 'Recommendations For a Scheme of Water Quality Classification For Setting Statutory Water Quality Objectives', October 1992; DOE, 'River Quality, The Government's Proposals: A Consultation Paper', December 1992.

<sup>81</sup>And see eg. reg. 4 of SI 1989 No. 2286.

at the Dangerous Substances in Water Directive 76/464 as a whole to see that the policy espouses a precautionary approach.

The dangerous substances element of SWQOs, as with AQSs, must be met in all areas. With the other, non-dangerous substances elements of SWQOs, when they are eventually implemented, there is some choice as to whether they will apply to a stretch of water. What this means is that SWQOs need not be set at a critical loads level. First, of course, one has to decide what a critical load level is. Is it where there is no significant damage to fish?<sup>82</sup> Why only fish? Or is it, as the RCEP states, “water quality suitable for the survival of salmonid fish and other water biota.”<sup>83</sup> The latter approach is surely the more appropriate, because one would expect a critical loads standard to support a much broader range of biological life than fish alone. Even if one decides it is the level required to support high-class fisheries, the SWQO system does not require this to be met in all areas. The quality standards for fisheries only need to be met if the river has been designated as such, and not all rivers are designated. Thus, SWQOs will not necessarily be set at critical loads level - whatever this is decided to be. Some rivers will already be achieving this level, but many will not.

What then of public participation? The EC standards components of statutory water quality objectives (SWQOs), as with AQSs, are set in Brussels and are not open to public consultation. There will however be some consultation on the application of many of these EC standards to local water courses and on the non-EC components of SWQOs. Under section 83(4)(a) WRA 1991, the Secretary of State must give notice setting out his proposal and specify a period of not less than three months within which representations and objections to the proposed SWQO can be made. Section 83(5) specifies that this ‘notice’ must be publicised “in such manner as the Secretary of State considers appropriate for bringing it to the attention of persons likely to be affected by it,” which allows him considerable discretion. However, the Secretary of State is able to and has bypassed these consultation requirements in relation to dangerous substances. Under section 84(3)(b), the Secretary of State must then consider any objections he receives to the advertised proposal. In order to decide on the appropriate SWQO, the Secretary of State can if he wishes hold a local inquiry under section 213(2)(a) WRA 1991. Having selected the SWQO, it must be placed on the register.<sup>84</sup>

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<sup>82</sup>See Ramchandani and Gourlay, note 1 *ante*; admittedly, they give this only as an example.

<sup>83</sup>The Royal Commission on Environmental Pollution, 16th Report, ‘Freshwater Quality’, 1992, para. 6.46.

<sup>84</sup>WRA 1991, s.190(1)(a).

The point to make about the consultation procedures above is that they are sequential rather than discursive: each individual or group puts forward its views to the NRA or the Secretary of State - they do not sit around a table together for discussion. If the Secretary of State chooses to hold a local inquiry there will more of a discursive forum, but such a procedure is still a long way from truly discursive decision-making: while they could conceivably take the form of deliberative roundtable discussions, the Secretary of State will be the one who makes the final decision; in a deliberative system, the group's decision would be final. Thus, while the above arrangements are a marked improvement on the previous system where water quality objectives were set on an informal, non-statutory basis without any formal public consultation, one might argue that the local nature of these decisions would make them suitable for trial runs in fully discursive decision-making. If this was done, the danger of local communities democratically deciding to downgrade could be avoided by including a requirement in the legislation, similar to that placed upon the Secretary of State in section 83 WRA 1991, that SWQOs can only be set to maintain or improve water quality.<sup>85</sup> In other words, the US approach of 'non-deterioration' would apply.

Finally, in relation to CBA, historically the authorities have not directly addressed the costs of achieving the ambient standards set by them.<sup>86</sup> For the future, consultation papers have stressed the need to balance costs with benefits in the setting of SWQOs.<sup>87</sup> The extent to which CVM will play a part in such CBAs is uncertain,<sup>88</sup> although the NRA's recent R&D effort into economic valuation of environmental effects suggests its use is not far away.<sup>89</sup> There appears to have been little NRA research into the implications that CBA has for consultation procedures in relation to SWQOs: if the

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<sup>85</sup>Although it should be noted in passing that the current requirement on the Secretary of State to set SWQOs to maintain or improve water quality is rather vague. It is argued in *Current Law Statutes Annotated* (1991(3) p.57/84) that the wording would not prevent the Secretary of State from downgrading if this would improve or maintain water quality elsewhere. The NRA has emphasised that it sees the purpose of the statutory regime as one of maintaining and improving water quality, although it does not tackle the above issue - see the NRA paper, 'Recommendations For A Scheme Of Water Quality Classification For Setting Statutory Water Quality Objectives', note 80 *ante*, para. 3.5.

<sup>86</sup>Note 83 *ante*, para. 8.13.

<sup>87</sup>See eg. paras. 3.18 and 4.7 of 'River Quality, The Government's Proposals: a Consultation Paper', *op. cit.*; para. 7.14 of the first NRA consultation paper, 'Proposals For Statutory Water Quality Objectives', *op. cit.*; and para. 26, p.6 of the DOE consultation paper entitled 'Draft Regulations: The Surface Waters (Fisheries Ecosystem) (Classification) Regulations 1993 - Consultation Paper', 1993.

<sup>88</sup>Para. 7.14 of the first NRA consultation paper is interesting in that it states that the NRA will consider - among other things - "the benefits, and can they in any way be quantified".

<sup>89</sup>See eg. NRA, 'Water: Nature's Precious Resource - An Environmentally Sustainable Water Resources Strategy for England and Wales', March 1994, Appendix 4; see also the DOE's Environmental Protection Group Research Newsletter 1994-95 (April 1994) which lists a research project on the 'development of a valuation manual for river quality' (B3, p.21). This is also mentioned in DOE, 'Environmental Appraisal in Government Departments', June 1994, p.27 where it is described as a general assessment manual for assessing the benefits of improved river quality.



CBA figures are to play a significant role, why bother with public consultation? Perhaps contingent valuation questionnaires are to become the new way in which the public is consulted.<sup>90</sup> The extent to which Brussels relies on CBA in devising water quality standards is unknown. However, a comment by the RCEP in their 16th report on freshwater quality that EC environmental Directives should be subject to some form of CBA, suggests that they do not.<sup>91</sup>

#### 4.1.7 Conclusion

I have examined a number of 'ideal typical' ways of arriving at an ambient environmental quality objective: a precautionary principle and a critical loads approach, setting them via CBA, and setting them discursively. I then looked at how air quality standards, acid rain objectives, and statutory water quality objectives are set in practice - examining the extent to which they approximate these models.

As one would expect, the practice is very different to the models. AQSs are set to protect human health - not to ensure that ecological critical loads are respected; there is no official public consultation procedure, and the extent to which CBA is used is unknown, but they are probably 'cost oblivious'. With the system for controlling acid rain - critical loads may have been the goal of the LCP Directive, but the targets it set were not sufficient to achieve them and the structure of the programme was unlikely to achieve them in any event; with the new UNECE protocol the targets have been set to achieve a level less than critical loads and the structure remains much the same as that in the LCP Directive. Although our national system of control could arguably be structured to achieve critical loads irrespective of the EC approach, there have been no moves to bring this about. Public consultation on the ambient quality aimed at in acid rain policy is non-existent at both national and EC levels. The extent to which CBA has been used in deciding upon the ambient targets is unknown.

The dangerous substances element of SWQOs reflects the precautionary principle. In relation to other components, SWQOs will not necessarily be set at a critical loads level. Ambient quality standards are set in Brussels with no public consultation procedure. There will be limited consultation on the application of many of these standards to local water courses (though not in relation to dangerous substances). It could be argued that the local nature of these decisions would make them particularly appropriate for pilot

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<sup>90</sup>The NRA and the DOE appear to have little time for R&D which is not scientific or economic (performed by mainstream environmental economists); if they spent some of their research budgets on law and political science, they might become more aware of the key political ramifications of a world organised on the basis of CBA.

<sup>91</sup>Note 83 *ante*, para. 8.14.

exercises in discursive decision-making. It seems likely that CBA will play a part and contingent valuation methodology may also be employed. More research is needed on the extent to which Brussels uses CBA in setting water quality standards.

## 4.2 EX POST ACCOUNTABILITY

There are a number of means of holding an agency to account for its ambient standard-setting decisions on an *ex post* basis. One important, *indirect*,<sup>92</sup> *ex post* accountability mechanism where EC matters are involved, is the ability of the Commission to bring Article 169 proceedings against a Member State.<sup>93</sup> A breach of EC-based SWQOs might, for example, attract such proceedings. *Direct, ex post* accountability mechanisms may also be available - for example the Ombudsmen or complaints procedures under the Citizen's Charter initiative. These will be dealt with more fully in chapter 5. Another direct, *ex post* accountability mechanism is an action for judicial review under Order 53 of the Rules of the Supreme Court. Judicial review is used to challenge the legality of administrative action. It is a two stage process: an applicant must first seek leave to bring an action, which he must do within the appropriate time limit and without unnecessary delay;<sup>94</sup> if leave is granted, the applicant may then proceed to a full hearing of the merits. For conceptual purposes, the substantive hearing can be divided into three separate parts: first, the applicant must jump the hurdle of *locus standi* and must surmount other 'threshold' barriers such as *O'Reilly v Mackman*<sup>95</sup> and the alternative remedies rule;<sup>96</sup> secondly, he must be able to establish one of the grounds of review,<sup>97</sup> and thirdly, he must persuade the court, in its discretion, to grant him a remedy. Remedies which can be granted by a court include: the prerogative orders of certiorari (quashes an unlawful decision), prohibitions (prohibits an unlawful action), mandamus

<sup>92</sup>Ie. one which cannot be directly mobilised by third parties. However, it is often indirectly mobilised by third parties since the Commission often takes Art. 169 action having been informed of a breach by citizens from a Member State.

<sup>93</sup>Although this holds the agency to account indirectly through the Member State, since the Commission cannot proceed directly against the agency itself.

<sup>94</sup>See Order 53, rule 4 of the Rules of the Supreme Court and s.31(6) Supreme Court Act 1981. Delay was one of the reasons why the application brought by the RSPB failed in *R v Swale BC, ex p. RSPB* [1991] *JPL* 39 (despite the fact that the applicants were just within the limitation period). However, after the recent ECJ ruling in the *Emmott* case (case C-208/90 *Emmott v Minister for Social Welfare* [1991] 3 CMLR 894) national limitation periods must not prevent one from enforcing one's directly effective Community rights. In other words, where a directly effective Directive was at issue, the approach taken in *Swale* would now be in breach of Community law.

<sup>95</sup>[1982] 3 All ER 1124; ie. is the matter one of private or public law? Only if an issue of public law is involved can the applicant proceed by way of judicial review.

<sup>96</sup>The rule which states that an applicant must normally have exhausted any other appropriate remedies before bringing a review action; this rule will be discussed more fully in chapter 6.

<sup>97</sup>Eg. as set out by Lord Diplock in *CCSU V Minister for Civil Service* [1985] AC 374 (illegality, irrationality and procedural irregularity). However, these are very fluid categories.

(compels the performance of a duty); and the normal remedies of an injunction, declaration or (in limited circumstances) damages. Like the Ombudsmen and the Citizen's Charter, judicial review will be examined in detail in chapter 5. However, there are special features relating to ambient standards which may arise in a review action, which make it appropriate at least to touch on the subject in this chapter. The best approach may be to read the section on standing in chapter 5 before reading what follows, because the discussion below is written on the assumption that the *locus* hurdle has been crossed.

#### 4.2.1 Judicial Review and SWQOs

If a company or an environmental group is unhappy with the SWQO which is eventually set, it may be able to seek judicial review of the decision if it can point to one of the normal grounds such as procedural impropriety (eg. a failure to consult in accordance with the statutory requirements, or breach of natural justice) or illegality (eg. a failure to incorporate relevant EC Directives). Perhaps more interesting, is the question of whether an individual or an environmental group could bring a judicial review action for breach of the duty in section 84 WRA 1991 if SWQOs have been breached.<sup>98</sup>

Section 84(1) WRA 1991 (previously section 105 of the Water Act 1989) states that:

"It shall be the duty of the Secretary of State and of the Authority to exercise the powers conferred on him or it by or under the water pollution provisions of this Act ... in such manner as ensures, so far as it is practicable by the exercise of those powers to do so, that the water quality objectives specified for any waters ... are achieved at all times."

Section 84(2) continues:

"It shall be the duty of the Authority, for the purposes of the carrying out of its functions under the water pollution provisions of this Act - (a) to monitor the extent of pollution in controlled waters ..."

The question that must be asked is: why will the switch to putting SWQOs on a statutory footing and imposing a legal duty to maintain SWQOs, be important for

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<sup>98</sup>Ball & Bell (p.381) state that "a judicial review action could conceivably be brought to ensure the enforcement of the duty;" *Current Law Statutes Annotated* (1991(3) p.57/85) suggest that review may be possible but that a court may hold that a more suitable remedy exists under s.5 WRA 1991 which gives the Secretary of State extensive powers to give directions to the authority (ie. that a review action would fall foul of the 'alternative remedies' rule). I doubt whether they would take this approach (see the text at n.56, p.120 post), but in any event, I would argue that review ought to be available if the Secretary of State has declined to exercise these powers.

judicial review purposes? The first matter which needs to be addressed is the nature of statutory water quality objectives. As we saw in the previous section on *ex ante* accountability, section 82 of the WRA 1991 empowers the Secretary of State to establish a system of classifying water quality which is done by way of regulations. Three sets of classification regulations which have been issued reflect the requirements of relevant EC Directives on water quality. Other classification regulations will eventually incorporate a set of Use Classes, with appropriate standards for each particular use. So far, regulations have been issued in respect of only one use class - fisheries ecosystem - in the shape of the Surface Waters (River Ecosystem) (Classification) Regulations 1994.

These classification regulations then form the basis of SWQOs. Under section 83 WRA 1991, the Secretary of State serves a legal notice on the NRA specifying, for particular stretches of water:

- a) one or more of the classifications prescribed under section 82;
- b) the date by which compliance should be achieved.

The only SWQOs that exist at present reflect the three EC-based classification regulations. As regards use classes, although the Surface Waters (River Ecosystem) (Classification) Regulations 1994 have recently been brought into force, it will be some time before SWQOs are actually set on the basis of these classification regulations.

How then does this differ from the old system? Under the previous system, rivers were classified on a non-statutory basis from Class 1a to Class 4. Each class had an associated range of standards (river quality standards or RQs) for biochemical oxygen demand (BOD), suspended solids, ammonia etc.. Informal water quality objectives, if they existed, might have stated for example, that a stretch of river currently Class 3 should attain Class 2 status by a given year. Because of their non-statutory form, these arrangements were not susceptible to public enforcement. In other words, one could not have gone to court to complain that a river had not achieved its water quality objective by the given date; nor, for example, could one claim that a designated Class 1 river did not meet the standards associated with Class 1: a non-statutory target would be unenforceable; and the fact that a river was no longer Class 1 would simply indicate that it needed reclassifying as Class 2. The *Cutts*<sup>99</sup> case may suggest that to succeed in challenging the exercise of an authority's powers, one would have to demonstrate not simply that the river conditions were unsatisfactory, but that no reasonable authority

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<sup>99</sup>(1990) 4 *Env Law* 8; 4(2) *LMELR* (1990) 132; full transcript on Lexis.

could have permitted their condition.<sup>100</sup> This is arguably an impossible task, because very poor conditions are tolerated in many areas.

In the future however (and indeed at present, bearing in mind that SWQOs have already been set in relation to, for example, dangerous substances<sup>101</sup>), stretches of water will have SWQOs attached to them, consisting of: a use-related class with associated standards (whether national or EC-based), levels of dangerous substances which must not be exceeded and a date by which these must be achieved. Again, it should be recalled that the dangerous substances part of a SWQO will have no date, as the levels are to be achieved immediately. By themselves (leaving aside for the moment the question of the enforcement of EC-based provisions), these arrangements would be no more enforceable than the previous system: if SWQOs were being breached, the courts would probably be inclined to see this as part of the NRA's discretion - a discretion to allow the breach of SWQOs.

It is here that the duty under section 84 WRA 1991 is important, because by spelling out a legislative duty that SWQOs are to be achieved at all times, the assumption must be that this discretion has been narrowed, if not removed. However, if SWQOs are breached, there will still not necessarily be a breach of duty. It will be recalled that the duty is to ensure that SWQOs are achieved at all times, 'so far as it is practicable'. If SWQOs are breached, this may be due to misguided consent setting or poor enforcement, or it may be due to factors beyond the NRA's control (eg. a series of freak accidents). If the breach of the SWQOs is the NRA's fault, then an action for breach of the duty in section 84 should lie because the NRA have clearly not done as much as is practicable. On the other hand, the breach of SWQOs may not be the NRA's fault: if there are a number of freak, one-off discharges which lead to a breach of an SWQO at the end of the year, and the NRA has set consents to leave a large enough 'buffer-zone' to deal with reasonably foreseeable accidents, then they may have done as much as is 'practicable' within section 84; even prosecuting every breach of consent may not have prevented the breach of the SWQO. If the NRA are at fault, a court could grant an order of mandamus, requiring the NRA either to tighten-up the consents to ensure the SWQO was achieved, or to step up enforcement.

The other crucial point to bear in mind is the time-frame within which compliance with SWQOs is to be assessed. It will not simply be a matter of environmental groups being able to declare a breach on the basis of one sample. In relation to the existing SWQOs

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<sup>100</sup>See 4(2) *LMELR* (1990) 132.

<sup>101</sup>Based on SI 1989 No. 2286.

based on the EC Dangerous Substances in Water Directive 76/464, one has to look to Annex I, Directive 86/280 - heading B of which is on "Quality objectives, dates for compliance therewith and procedure for monitoring compliance with them." Paragraph 3 of heading B states that "Unless otherwise specified under heading B in annex II, all the concentrations mentioned as quality objectives refer to the arithmetic mean of the results obtained *over a year*."<sup>102</sup> In relation to future SWQOs, as and when the scheme comes fully into operation, the NRA consultation paper comments on the duty in section 106 (now section 84 WRA 1991) that it "need(s) to be read together and considered against the background of sampling and statistical techniques which are the only practical means of assessing compliance."<sup>103</sup> The consultation paper which accompanied the draft Surface Water (Fisheries Ecosystem) (Classification) Regulations 1993 similarly notes that:

"The Water Resources Act 1991 requires the NRA, and the relevant Secretary of State, to use available pollution control powers to ensure, as far as is thereby practicable, that WQOs, once set for the purpose of maintaining and improving the quality of specific river stretches, are achieved there by the date specified in the Notice setting the WQO. It is therefore important, in establishing a classification and related assessment procedures, to ensure that WQOs can be set realistically, such that they are achievable and that there are clear-cut rules on compliance assessment."<sup>104</sup>

Regulation 3 of the final Surface Waters (River Ecosystem) (Classification) Regulations 1994 states that compliance is to be determined in accordance with the procedures and methods set out in the NRA document entitled 'Water Quality Objectives: Procedures Used by the NRA for the Purpose of the Surface Waters (River Ecosystem) (Classification) Regulations 1994'.<sup>105</sup> The consultation paper which preceded the 1994 Regulations states that :

"Sampling procedures will follow the NRA's laid-down procedures. All sites will be sampled at a minimum frequency of 12 times per year ... Compliance is to be assessed only on the basis of full calendar year sets of data. The minimum period for compliance

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<sup>102</sup>Emphasis added.

<sup>103</sup>NRA, 'Proposals for Statutory Water Quality Objectives', note 80 *ante*, para. 3.10 at p.13.

<sup>104</sup>DOE consultation paper on the draft surface waters regulations, note 87 *ante*, para. 14 at p.3.

<sup>105</sup>Annex B of the draft Surface Water (Fisheries Ecosystem) (Classification) Regulations 1993 consultation paper, contains a draft of this NRA document. The final version is available from the NRA's regional offices. As the consultation paper states, "The manual addresses questions such as sampling frequency and location, data handling etc. A principal goal is to ensure that the system for assessing compliance with WQOs is open and consistent, from one area to another, and over time" (p.4). The statistical basis for assessing compliance with SWQOs was previously discussed in Appendix 4 of the 1992 NRA consultation paper and mentioned in a note at p.27 of the 1992 Government consultation paper - note 80 *ante*.

assessment would be one full calendar year, so the first assessment of compliance would normally be made one year after the WQOs target date."<sup>106</sup>

Thus, it is clear that environmental groups will only be able to rely on long-term sampling data. Although obvious, it is also worth mentioning that they will only be able to rely on official NRA sampling data as recorded on the register. Regulation 3 arguably precludes them from relying on their own data, as they are able to do with private prosecutions brought against firms for breaching their discharge consents.

#### 4.2.1.1 *Breach of Duty and Community Law*

As we have seen, the first round of SWQOs were designed to implement the EC Dangerous Substances in Water Directive 76/464. The question is whether the duty in section 84 WRA 1991, which forms the substance of our national right to waters free of excessive concentrations of dangerous substances, is sufficiently onerous fully to reflect any Community right to such unpolluted waters enforceable in national courts.<sup>107</sup> This question can only be addressed by examining Schiemann J.'s recent decision in *R v Secretary of State for the Environment, ex p. Friends of the Earth*.<sup>108</sup> While the decision specifically relates to drinking water rather than pollution, which is what we are concerned with, it has important ramifications for future pollution-related actions concerning breach of duty.

Andrew Lees and FOE sought judicial review of the Secretary of State's decision to use his powers under section 19(1)(b) Water Industry Act 1991 to allow Thames Water Utilities Ltd. and Anglian Water Services Ltd. to supply drinking water with pesticide levels above the maximum admissible concentrations (MACs) in the Drinking Water Directive 80/778. Under section 18 WIA 1991, the Secretary of State is under a duty to issue an enforcement order if conditions have been breached, unless he accepts an undertaking from the company that they will take the necessary steps to secure compliance. The Secretary of State accepted such an undertaking from Thames Water

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<sup>106</sup>Draft Surface Water (Fisheries Ecosystem) (Classification) Regulations 1993 consultation paper, p.4.

<sup>107</sup>Of course, this assumes first that standing would be granted under our domestic law. On the basis of *Twyford Down* or the *Greenpeace* case decided by Otton J., standing probably would be granted to an individual or a group with a local connection with the watercourse (see ch.5, p.123 et seq.). Secondly, it assumes that there is a Community right to such unpolluted waters enforceable in national courts (as opposed to a Community right enforceable only by the Commission in Art. 169 proceedings). In other words, it assumes that Community law requires there to be access to national courts to enforce the Dangerous Substances Directive. As we shall see in ch. 5 (at p.129 et seq.), this is probably not the case. Given that Community law would appear not to require procedural access to the courts to enforce the Directive, it may seem pointless to discuss the substance of the right. Nevertheless, I include the discussion because if, as I believe will happen, 'citizen actions' are encouraged as a means of enforcing all Directives, the nature of the substantive right will become relevant in the future.

<sup>108</sup>(1994) 5(3) *Water Law* 79, case & comment.

and Anglian Water on 4th October 1991 and hence allowed them to continue to supply water in breach of EC standards. It was this decision to accept the undertaking which was challenged by the applicants.

If the water companies were in breach of the standards, and the Secretary of State had not accepted an undertaking, and had failed to serve an enforcement order, then FOE would have been able to base their action on breach of the duty in section 18. If on the other hand the water companies are in breach of the standards on drinking water quality but the Secretary of State has served an enforcement order or, as here, has accepted an undertaking, there will be no breach of duty in national law. However, the question arises whether one's directly effective Community right to wholesome drinking water requires the substantive ability to bring an action in these circumstances?<sup>109</sup> There are ECJ cases which have ruled that directly effective Community rights must be effectively protected.<sup>110</sup> Most of these cases have related to procedural and remedial rights but it is arguably even more important that the lack of a substantive right in national law should not prevent one from protecting one's Community rights. Does the lack of a duty to maintain standards where an enforcement order has been served or an undertaking accepted effectively deny one from upholding one's Community rights via an action for breach of duty?

The answer to the above question depends on whether the directly effective right to wholesome drinking water enforceable by individuals in national courts is coterminous with the right to wholesome drinking water protected by the ECJ in Article 169 proceedings brought by the Commission against Member States. What then has the ECJ decided is the nature of the duty on Member States when implementing directives? In case C-337/89 *Commission v UK*, the ECJ decided that the obligation to comply with MACs in the Drinking Water Directive 80/778 is strict - excuses other than those provided by the Directive are not permitted. The ECJ declared that a Member State would be in breach of Community law where MACs had been exceeded, despite the Member State's claim that it had taken all practicable steps to secure compliance; non-compliance with MACs would only pass without censure if it came within one of the

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<sup>109</sup>Again, this question assumes both that standing would be granted as a matter of domestic law (which of course, on the basis of the *FOE* decision itself, it would be) and that there is a Community right to enforce the Drinking Water Directive in national courts. As we shall see in chapter 5, p.129 et seq., since the Directive is intended to protect human health, there is such a right. Thus, unlike with the Dangerous Substances Directive, the substance of the right is of current rather than possible future interest.

<sup>110</sup>See cases - C-45/76 *Comet BV v Produktschap voor Siegerwassen* [1976] ECR 2043, C-213/89 *R v Secretary of State for Transport, ex p. Factortame* (1990) ECR 2433, and cases C-6/90 and C-9/90 *Francovich v Italian Republic* [1992] IRLR 84.



derogations laid down in the Directive itself.<sup>111</sup> A similar decision was reached in case C-56/90 *Commission v UK*, where it was held that the obligation in Article 4(1) of the Bathing Water Directive 76/160 was unconditional in nature.<sup>112</sup> If the directly effective right to wholesome drinking water enforceable by individuals in national courts is coterminous with this strict right to wholesome drinking water protected by the ECJ in Article 169 proceedings, then an action for breach of duty should arguably be available in our national courts even where an enforcement order has been served or an undertaking accepted by the Secretary of State. If the two rights are not the same, then no such requirement exists.

In the *FOE* case, Schiemann J. was seemingly of the opinion that the two rights were not the same. However, this conclusion was almost inevitable given the argument used in the applicants' challenge and the accompanying relief they were seeking. The applicants were arguing that the Secretary of State had erred in law in accepting undertakings with the aim of securing compliance as soon as practicable rather than as soon as possible. The remedies sought by the applicants included, *inter alia*, certiorari to quash the Secretary of State's decision to accept the undertakings and not to make any enforcement orders, and mandamus either to compel the Secretary of State to reconsider the making of enforcement orders or to compel the acceptance of stricter undertakings from the water companies.

Schiemann J. agreed that the duty on the Secretary of State was to achieve compliance as soon as possible rather than as soon as practicable, but felt that all that was possible was being done. However, as *Water Law* has commented, it really looks as though the Secretary of State was requiring only what was reasonably practicable, because it would, in theory have been 'possible' to meet the standards much sooner if considerable Government funds had been put in.<sup>113</sup> But even if Schiemann J. had agreed with the applicants that the Secretary of State had erred in law, the question of relief would have been a difficult one. An order of mandamus compelling the Secretary of State to reconsider making an enforcement order would have been rather pointless: even if he did serve an enforcement order, this in itself would not have secured compliance on the part of the water companies. An order of mandamus requiring stricter undertakings so that compliance was truly achieved as soon as possible would, on the other hand, have required the Government to commit large sums of money. If such an order was to be made, it should arguably have been made by the ECJ. Better still, would have been for the Commission itself to accept undertakings from the UK Government under Article 20

<sup>111</sup>Reported in (1993) *JEL* 5(2) 273 see further case and comment (1993) 4 *Water Law* 59 and 61

<sup>112</sup>Reported in (1993) 4 *Water Law* 168

<sup>113</sup>Note 108 *ante*, at pp 80-81

of the Drinking Water Directive, ignoring the fact that the UK was outside the period within which a request under Article 20 must be submitted. Under Article 20, a Member State can, in exceptional cases and for geographically defined population groups, submit a request to the Commission for an extension of the Directive's deadline for compliance. This request has to propose an action programme with an appropriate timetable for the improvement of water quality. From the point of view of enforcement of Community law, it would certainly have made more sense for the Commission to use Article 20 to keep continuous pressure on the water companies indirectly via the UK Government, than to gain a one-off Article 169 success and leave the Government free to apply what it perceives as the correct pressure on the companies.

I stated earlier that Schiemann J. was of the opinion that the right protected by the ECJ in Article 169 proceedings and the directly effective right enforceable by individuals in their national courts were not the same but that this conclusion was almost inevitable given the argument used in the applicants' challenge and the accompanying relief they were seeking. It would arguably have been more fruitful for the applicants to argue that the right they enjoyed was a strict one - ie. that the Secretary of State had a duty to achieve compliance *tout court*, not as soon as possible or as soon as practicable. And then they might have sought a declaration to the effect that the Secretary of State was in breach of his Community obligations. In other words, assuming the Community right enforceable in national courts is of the same order as the right protected in Article 169 proceedings (ie. strict), it ought to be possible for a person to secure a declaration that the Secretary of State has acted unlawfully. Of course, this approach is not without problems of its own. First, while the declaratory nature of the relief avoids the problem of the courts ordering politically controversial action, it would have to be made clear that the issuing of a declaration here is just that - there should be no expectation that the government will take immediate action in response, otherwise there would be little difference between the effect of a declaration and mandamus. Second, the problem remains of when such declarations should be available? Should they, for example, be available when the Commission has already instigated or succeeded in Article 169 proceedings? This was raised, but not fully addressed in the *FOE* case: it was not that Article 169 proceedings had already culminated in a successful judgment against the UK in case C-337/89, because that case related to the *Drinking Water Directive* parameters on nitrates and lead, rather than the subject of the *FOE* case - pesticides; however, the UK currently faces Article 169 proceedings in relation to the standards on pesticides. There is obviously a need to avoid unnecessary duplication. And should declarations be available whenever there is a breach of standards? If they were, a long-term breach such

as in the *FOE* case itself, could attract a judicial review a day. There would therefore be arguments for allowing perhaps only one such action.

We return now to the question of whether the duty in section 84 WRA 1991, which forms the substance of our national right to waters free of excessive concentrations of dangerous substances, is sufficiently onerous fully to reflect the Community right to such unpolluted waters enforceable in national courts (assuming that, at some stage in the future, Community law requires the Directive to be enforceable in national courts). It will be recalled that the duty is to ensure that SWQOs are achieved at all times, 'so far as it is practicable'. If SWQOs relating to dangerous substances are breached, this may be due to misguided consent setting or poor enforcement, or it may be due to factors beyond the NRA's control (eg. a series of freak accidents). If the breach of the SWQOs is the NRA's fault, then an action for breach of the duty in section 84 would lie because the NRA have clearly not done as much as is practicable. If on the other hand, breach of the SWQO is not the NRA's fault (the freak accidents example), section 84 will not have been breached because the NRA will have done all that is practicable. However, if the Community right enforceable by individuals in their national courts is the same as the right protected by the ECJ in Article 169 proceedings, it can be argued that the lack of a substantive right to bring an action for breach of duty where the NRA are not at fault is in breach of Community law because it prevents one from effectively enforcing one's directly effective right. Again, according to *C-337/89 Commission v UK* the Article 169 right is a strict one and hence the duty to maintain EC-based SWQOs is a strict one. On this basis, one can argue that the duty in section 84 ought to be interpreted as a strict one, leaving out the words 'so far as it is practicable'.

#### **4.2.2 Judicial Review, AQSs and Acid Rain Policy**

Beginning briefly with acid rain, if the national plan<sup>114</sup> was not being fulfilled, judicial review might lie against HMIP for breach of the duty in section 7 EPA 1990 to comply with any requirements set out in a national plan made by the Secretary of State. If critical loads were being breached and these exceedances could be traced back to emissions from an IPC process (such as a power station), it may be that judicial review would lie for breach of the section 7 duty to apply BATNEEC to render substances harmless. The latter possibility will be addressed in more detail in the next chapter on accountability for emission/process standard-setting.

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<sup>114</sup>Note 67 *ante*.

As, *mutatis mutandis*, with SWQOs, a review action could conceivably be brought against the Secretary of State<sup>115</sup> for breach of the duty to maintain ground level air quality standards (AQSs).<sup>116</sup> Statutory Instrument 1989 No. 317, which was introduced by the Secretary of State under section 2(2) of the European Communities Act 1972, imposes a duty on the Secretary of State to ensure that levels of sulphur dioxide, suspended particulates, nitrogen dioxide and lead do not rise above EC limits. Regulation 2(1) for example, states that "The Secretary of State shall take any appropriate measures to ensure that the concentrations of sulphur dioxide and suspended particulates in the atmosphere do not exceed the limit values given in Annex I to Council Directive No. 80/779/EEC on air quality limit values and guide values for sulphur dioxide and suspended particulates." Regulations 4 and 6 speak in a similar vein about lead and nitrogen dioxide respectively. AQSs now also exist in respect of ground level ozone,<sup>117</sup> but these are guide values rather than mandatory limits, so there can be no question of breach of duty for failure to meet them.<sup>118</sup>

One significant difference from SWQOs is the nature of the duty. The duty here is strict; it is not qualified by any words such as 'so far as it is practicable'.<sup>119</sup> However, the basis for assessing compliance is similarly annual. In relation to lead in air for example, the AQS will be breached if the mean annual concentration exceeds 2 micrograms of lead per cubic metre.<sup>120</sup> With sulphur dioxide and suspended particulates,<sup>121</sup> and nitrogen dioxide,<sup>122</sup> the reference period for assessing compliance with the limit values is also a year.

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<sup>115</sup>Unlike SWQOs where the Secretary of State shares the duty with the NRA, the duty is on the Secretary of State alone here.

<sup>116</sup>*Cf.* DOE, 'Improving Air Quality', 1994, paras. 3.10-3.12, which does not comment on whether and how AQSs *do* currently have legal force, but comments on the legal force they *ought* to have.

<sup>117</sup>Directive 92/72, implemented in the UK via SI 1994 No. 440.

<sup>118</sup>ENDS suggests that the reason for this is that existing international guidelines are breached too often across the Community and there is no real hope of reducing concentrations until the end of the century (213 ENDS Report (1992) 34). However, it should be noted that the regulations do include a duty to issue public warnings when ozone levels exceed health protection thresholds. If such thresholds were exceeded and no warning given, a declaration for breach of duty should arguably be available.

<sup>119</sup>And hence there is no need to consider the EC arguments which were made in relation to SWQOs.

<sup>120</sup>Reg. 4 of SI 1989 No.317 and Art. 2(2) of Directive 82/884.

<sup>121</sup>Reg. 2 of SI 1989 No.317 and Annex I of Directive 80/779.

<sup>122</sup>Reg. 6 of SI 1989 No.317 and Annex I of Directive 85/203.

## CHAPTER 5

### **The Accountability of Environmental Agencies**

#### **III Accountability for setting Emission/Process Standards and Other Operational Duties**

Having examined accountability for the setting of ambient standards in the previous chapter, this chapter will be concerned with accountability for agency decisions on emission and process standards and other operational duties. It will be recalled that emission standards prescribe 'end of pipe' limits which must not be exceeded, while process standards lay down the type of technology, factory lay-out, manning requirements, chimney heights etc.. 'Operational duties' is a residual category to cover regulatory activities/duties which cannot be classed as standard-setting as such. The duty of local authorities to inspect their area for contaminated land under section 61 EPA 1990 would be one example.<sup>1</sup> This is not a standard-setting decision, but it is an operational decision for which one might wish to hold the local authority to account.

#### **5.1 EX ANTE ACCOUNTABILITY**

The previous chapter on accountability for the setting of ambient standards began by discussing various decision-making models such as cost-benefit analysis, the precautionary principle, critical loads and discursive decision-making. A similar analysis can be applied to the setting of emission/process standards (hereafter 'emission standards'). While I will begin by doing this briefly, it is important to bear in mind that this only makes sense if emission standards are *not* tied to ambient quality objectives, which is an increasingly rare occurrence, at least in the UK. If emission standards are tied to ambient objectives then the crucial decisions are taken at the ambient level and the emission standards are to an extent pre-determined by the ambient target. With this arrangement, it obviously does not make sense to discuss different decision-making models for decisions on emission standards: there is little scope for arguing about the 'right' decision-making approach - the only 'right' one is to set the standards so as to achieve the ambient target.

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<sup>1</sup>Although this section is not actually in force, and indeed now seems likely to be replaced by detailed provisions on contaminated land in the Environment Bill.

Bearing the above in mind, there are three possible approaches to setting emission standards. First, one can decide on the appropriate standard using cost-benefit analysis (CBA).<sup>2</sup> Second, one can set a standard which reflects the best available technology (BAT). This would reflect the precautionary principle, because in applying the best available technology, one is keeping emissions as low as is technically possible. Finally, a standard can be set discursively or via a process of negotiation. Again, all of these are ideal-types which have differing implications for accountability.

I merely point out the above as an interesting comparison with the setting of ambient standards. From here on however, this chapter will take on a very different form to the chapter on ambient standards. One could proceed to examine how, for example the NRA, HMIP and others actually set their emission standards in practice, and whether they apply BAT, CBA or elements of a discursive model. However, as I mentioned above, with the NRA for example, their standard-setting decisions are to an extent pre-determined by the ambient objective. It therefore does not make sense to consider the use of CBA in setting emission standards.<sup>3</sup> The remainder of this section on *ex ante* accountability will therefore be concerned with the ways in which agencies are actually held to account for their standard-setting decisions - ie. advertising and consultation rights. I will not, as in the previous chapter, be examining these obliquely through consideration of the way agencies actually reach their decisions on standards.

### 5.1.1 Consultation

Agencies may consult interested parties before setting emission or process standards. This is an example of *ex ante* accountability in that agencies listen to representations from such parties. For example, both the NRA and HMIP necessarily consult with companies before drawing up consents as part of the application process. However, it should be noted that they do not go out to find the companies - they merely wait for applications to come in. This is one good reason why thousands of firms have failed to apply for local authority APC authorisations.<sup>4</sup> Furthermore, where once consents would have been negotiated with give-and-take on both sides and free technical advice from inspectors, the new emphasis was supposed to be on a much more detached, formal relationship. Under the IPC regime for example, HMIP stated that it would be adopting

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<sup>2</sup>See eg. Pearce and Brisson, 'BATNEEC: The Economics of Technology-based Environmental Standards, With a UK Case Illustration' (1993) 9(4) *Oxford Review of Economic Policy* 24.

<sup>3</sup>Such an analysis might make more sense in relation to HMIP - one could plausibly discuss the extent to which they use BAT (the precautionary approach) as opposed to CBA (NEEC could be interpreted as requiring CBA in the technical sense used by economists) and whether they might adopt a discursive approach. However, even there one is confronted with the relationship of BATNEEC with critical loads which belongs in the chapter on ambient standards.

<sup>4</sup>See eg. 209 ENDS Report (1992) 7.

a much less 'cosy' approach - relying heavily on guidance notes and less on individual 'negotiation' of authorisations.<sup>5</sup> It was developments such as this which led Macrory to see a trend in environmental regulation away from unstated assumptions, non-statutory controls and informal relationships towards "a new era of legal formalism."<sup>6</sup> However, it seems that HMIP has now abandoned this initial "arms' length" approach and the old style of close partnership with industry has been reintroduced.<sup>7</sup>

While firms are necessarily consulted as part of the application process, environmental interests are not consulted as such (which is perhaps not surprising, given the number of consents dealt with nationwide). Instead, most agencies are required to advertise applications and take into account replies, which is the next best thing to direct consultation. Schedule 1 of the EPA 1990 and associated regulations<sup>8</sup> state that the enforcing authorities<sup>9</sup> must advertise applications for authorisations. Furthermore, under Schedule 1, paragraph 2(5) EPA 1990, they must then consider any representations made in response within the period allowed. Of course, without anything resembling the US 'hard look' doctrine, such a provision lacks teeth, because the agency will not be required to show how their conclusion has taken objections into account.<sup>10</sup> In relation to EPA Part I control, arguably more important than the consultation requirements associated with individual applications is the issue of consultation in the drawing-up of the Chief Inspector's guidance notes and the separate APC guidance notes. After all, these guidance notes are crucial to the setting of individual authorisations. It is therefore somewhat surprising to find that there are no formal consultation procedures of any kind attached to them. In addition, the number of guidance notes is obviously less than the number of individual applications; while environmental groups will probably lack the resources to become involved in the setting of thousands of individual authorisations, they are more likely to have the resources to provide input into the relatively smaller number of guidance notes.<sup>11</sup>

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<sup>5</sup>See National Audit Office report, 'Control and Monitoring of Pollution: Review of the Pollution Inspectorate', July 1991; see also *The Times*, 31 July 1990 which reported complaints by the chemical industry about their lack of involvement in the drafting of the new IPC guidance notes - cited by Gibson, 'The Integration of Pollution Control' (1991) 18(1) *Jo of Law & Soc* 18 at p.28.

<sup>6</sup>Macrory, 'Environmental Law: Shifting Discretions and the New Formalism' in Lomas (ed.), *Frontiers Of Environmental Law*, 8 at p.16.

<sup>7</sup>See 223 ENDS Report (1993) 9, and 224 ENDS Report (1993) 7.

<sup>8</sup>The Environmental Protection (Applications, Appeals and Registers) Regulations 1991 (SI 1991 No. 507).

<sup>9</sup>HMIP or local authorities.

<sup>10</sup>On the 'hard look' doctrine, see Harden and Lewis, *The Noble Lie*, pp.272-8.

<sup>11</sup>On a similar issue in a US context, see Yeager, *The Limits of Law*, pp.200-202. Yeager states that US environmental groups have typically been able to participate (albeit infrequently) at the Federal level in water pollution control 'rulemaking' proceedings (ie. setting the regulations), but have been constrained by resources from participating in 'adjudicatory' proceedings (court-like challenges to individual discharge permits) and other permit modification processes.

Advertising and consultation requirements also apply to applications made to the NRA, although the application does not need to be advertised if the NRA considers that the discharger in question will have 'no appreciable effect' on the waters into which the discharge will be made.<sup>12</sup> This obviously affords them considerable discretion, but it is not absolute, because the courts would almost certainly intervene by way of judicial review if a decision was perverse. The NRA must then consider any written representations made to it within 6 weeks of advertising. Applications for trade effluent consents do not need to be publicised. This is probably because sewers are viewed as private property rather than the public 'environment'. Nevertheless, secrecy is unnecessary and can only encourage public suspicion. There are no advertising requirements for waste management licence applications. All that is required is that licence applications are referred to the NRA and the Health and Safety Executive, and that application details are included on the register.<sup>13</sup> However, it should be borne in mind that public consultation for waste disposal is carried out at the planning stage.

## 5.2 EX POST ACCOUNTABILITY

While this chapter will be concerned largely with agency accountability for the setting of emission/process standards, this section on *ex post* accountability will begin by looking at the Ombudsmen and the Citizen's Charter initiative - both of which may also act as accountability mechanisms for the setting of ambient standards (examined in the previous chapter) and enforcement decisions (examined in chapter 6).

### 5.2.1 Ombudsmen<sup>14</sup>

Both the NRA in respect of non-flood defence matters<sup>15</sup> and HMIP as part of the DOE are subject to the jurisdiction of the Parliamentary Commissioner for Administration.

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<sup>12</sup>See WRA 1991, sch. 10, para. 1(4). The phrase is defined in DOE Circular 17/84; while circulars are not binding on the courts, they will, unless a court provides an alternative definition, guide agencies in the exercise of their discretion. It has been suggested that up to 90% of applications may, relying on this provision, have escaped advertising, which obviously reduces the potential for public involvement in standard-setting (see Howarth, 'Water Pollution: Improving the Legal Controls' (1989) 1 *JEL* 33-5 and Ball & Bell, *Environmental Law*, p.22). NB. that the NRA's advertising and consultation requirements look set to be changed under the Environment Bill.

<sup>13</sup>s.36 EPA 1990; see also the Waste Management Licensing Regulations 1994 (SI 1994 No. 1056) and the accompanying DOE circular 11/94.

<sup>14</sup>See further Thompson, *Textbook on Constitutional and Administrative Law*, pp.327-339, and Lewis & Birkinshaw, *When Citizens Complain*.

<sup>15</sup>The Water Act 1989, sch. 1, para.11. Paras. 11 and 12 of this schedule would appear still to be in force - there are no similar provisions in the WRA or WIA 1991.



Local authorities<sup>16</sup> and the NRA in respect of flood defence and land drainage matters,<sup>17</sup> may be investigated by the Local Commissioner for Administration. Water and Sewerage companies, in relation to trade effluent consents, are not subject to the jurisdiction of the Commissioners. Complaints by members of the public in respect of these functions go instead to the Customer Service Committees set up by the Director General of Water Services (OFWAT).

The Commissioners only have the power to deal with a problem if a person has suffered injustice as a result of maladministration; they do not have the power to tackle matters raising issues of legality which are more suited to judicial review. Their remit is thus to discover whether the particular body has acted according to reasonable standards of administrative behaviour, not whether a body has acted unlawfully. Nevertheless, the line between the two is often a thin one and perusal of, for example, the Local Commissioners' annual reports provides evidence of this: one report, for example, reveals that the Commissioner dealt with a complaint about a failure to enforce planning conditions on an owner of a quarry and to collect sufficient evidence for a successful enforcement action;<sup>18</sup> this could easily have been classed as unlawful behaviour to be dealt with via judicial review.

Apart from the fact that they are still not very well known among members of the public, most commentators would accept that the Commissioners provide a valuable, easily accessible avenue for redressing grievances about routine errors of administration.<sup>19</sup> Given the way they have been used in planning matters, they could be of considerable significance in relation to pollution where other avenues of redress are unavailable or expensive. Thus, Thompson reports that:

“Some rejected complaints will concern the merits of a decision. In planning, for example, it is recognised that a large number of complaints about planning permission are made by neighbours who do not think that consent should have been given. The planning appeals system does not provide for appeal against the grant of permission, or for appeal by such third parties, and so a complaint to the (Local Commissioner) is a surrogate appeal. Yet there may well have been some maladministration in the processing of the planning decision. The (Local Commissioners) have repeatedly held that a failure to consult neighbours about planning applications, even where this is not required by legislation, amounts to maladministration and that injustice is the sense of grievance at the loss of opportunity to give one's view.”<sup>20</sup>

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<sup>16</sup>In respect of both air pollution functions and waste regulation functions.

<sup>17</sup>The Water Act 1989, sch. 1, para. 12.

<sup>18</sup>Local Commissioners' annual report 1991-2, 89/B/1560, cited in Thompson, note 14 *ante*, at p.332.

<sup>19</sup>See further Ball & Bell, *Environmental Law*, p.30.

<sup>20</sup>*Op. cit.*, p.336.

As we shall see, much the same is true of appeals from pollution control decisions. There would thus appear to be no reason why - assuming maladministration can be established - the Commissioners should not provide a similar surrogate appeals process from these decisions.

### 5.2.2 The Citizen's Charter<sup>21</sup>

The Citizen's Charter is a ten year Government programme the aim of which is to raise the standard of public services and make them more responsive to the 'consumers' of those services.<sup>22</sup> Different, individual charters exist in each public service area, but broadly speaking, they all seek to set out the standards of service the public can expect and to provide effective complaints mechanisms and redress if these standards are not met. Various charter documents relating to the environment were issued in the period 1991-93. The DOE for example published a citizen's charter guide to the environment entitled 'Green Rights and Responsibilities' in 1991.<sup>23</sup> In 1993, the Central and Local Government Forum issued a model local environment charter<sup>24</sup> and a charter guide to development control was published by the National Planning Forum of the DOE.<sup>25</sup> However this material is far from well known, even amongst environmental lawyers. One reason for this may be that these initial charter documents do little more than point citizens towards existing legislative rights. They do not, as for example with the Patient's Charter, set out standards unique to the charter and provide avenues of redress if these standards are not met. One could say that this is to be expected, given that the relationship between citizens and environmental authorities is typically not the direct consumerist one which prevails in many other charter areas such as the Patient's Charter or the Passenger's Charter. There is of course a direct consumer relationship in relation to drinking water, but a charter there would arguably only duplicate the existing lines of accountability.<sup>26</sup> However, despite this general absence of a corporate-consumer nexus, both HMIP and the NRA have recently published charters which do set out distinct

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<sup>21</sup>See further Barron & Scott, 'The Citizen's Charter Programme' (1992) 55 *MLR* 526, and Drewry, 'Mr Major's Charter: Empowering the Customer' [1993] *Public Law* 248.

<sup>22</sup>See 'The Citizen's Charter', Cm 1599, 1991, and 'The Citizen's Charter Second Report: 1994', Cm 2540, 1994.

<sup>23</sup>DOE, 'Green Rights and Responsibilities: A Citizen's Guide to the Environment', 1991.

<sup>24</sup>DOE, 'Your Council and the Environment: The Model Local Environment Charter', 1993.

<sup>25</sup>DOE, 'A Charter Guide - Development Control', 1993.

<sup>26</sup>Under s.6 Water Act 1989, the Director General of Water Services is obliged to establish and maintain Customer Service Committees to represent the interests of customers and to deal with their complaints. The main functions of the Committees are set out in s.27. Pre-privatisation, these functions would have been performed by the Local Commissioner for Administration. If a complaint is made under s.20 or s.162, the complaint must go to the DG, not the Committees. See also the Water Supply and Sewerage Services (Customer Service Standards) Regulations 1989 (SI 1989 No.1159 as amended by SI 1989 No.1383). The Customer Service Committees are themselves overseen by the DG. See generally (1991) 2(2) *Water Law* 62-3 and (1990) 1(2) *Water Law* 47.

standards and complaints procedures.<sup>27</sup> The HMIP charter for example states that: “Anyone who reports a pollution problem or makes a complaint is kept up to date with the investigation and informed within 15 working days of its outcome.”<sup>28</sup> Other standards set include the answering of telephone enquiries within 15 seconds, a response to complaints within 5 working days, an acknowledgement of comments on applications for authorisations within 5 days, and a letter within 15 days informing those who have made comments of the outcome of the application. The NRA charter is more explicitly consumerist in its language, but sets out similar standards to HMIP. ‘Customers’ are stated to include not only those who pay directly for specific services (eg. abstractors, those with discharge consents, anglers and boaters), but also those who “receive services paid for indirectly through government grants and taxation. This group includes the general public and many representative groups and businesses that form a part of our community. Conservationists, water sports enthusiasts and farmers are just some examples. We also regard government at local, national and European level as our customers.” Customer standards the NRA aims to meet include: the answering of telephone inquiries immediately where possible and written inquiries within 10 days; the answering of telephone calls within 15 seconds; a response to complaints within 5 days; the placing of sample results on the register within 60 days; and the attendance at pollution emergencies<sup>29</sup> within 2 hours of being reported, or 4 hours outside normal office hours. The public is encouraged to report such incidents through the provision of a freephone, emergency hotline which is included in the booklet and which has been widely advertised on, for example, the backs of buses.

### 5.2.3 Call-In Powers

The ability of the Secretary of State to call-in applications, as in planning law, is both an indirect, day-to-day, active accountability mechanism and a weak direct one. It is the former because the Secretary of State can call-in an application of his own accord. It is the latter because third parties can also request a call-in. With NRA consents, under paragraph 3 of Schedule 10 WRA 1991, the NRA must serve notice of the proposal to grant consent on everyone who made representations or objections and must tell them of their ability to request (within 21 days) the Secretary of State to exercise his power to direct the authority to 'transmit' the application for him to determine. The NRA are obliged to wait until the Secretary of State has decided on the request before they issue

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<sup>27</sup>NRA, 'NRA Customer Charter: Our Statement of Service Standards', January 1994; HMIP, 'Pollution Prevention: Our Common Concern - A Code For the 1990's', March 1994.

<sup>28</sup>At p.17.

<sup>29</sup>The main text refers to pollution 'incidents', while the appendix entitled 'Further Information 5' refers to emergencies. The problem is that neither of these are defined: would they turn out to a minor incident within 4 hours outside office hours?

a consent.<sup>30</sup> If the Secretary of State does decide to call in the application, he is then empowered under paragraph 4 to hold a local inquiry or to allow the applicant and the Authority an opportunity of appearing before and being heard by someone appointed by him. There must be a hearing of some kind if the applicant or the Authority request one. Under paragraph 4(6), if the Secretary of State chooses a hearing, he must afford - to anyone who made representations or objections to him - the opportunity of appearing before and being heard by the person appointed to chair the hearing.<sup>31</sup> As we shall see, this is in contrast to appeals, where the Secretary of State is under no such duty. If he chooses an inquiry and these are modelled on public local inquiries in planning law, it is at the discretion of the inspector whether third parties are allowed to appear.

The limitation of this 'transmission' procedure is that it is up to the Secretary of State whether or not he calls in an application. Further details of the procedure are contained in SI 1989 No. 1151. The Secretary of State possesses similar call-in powers in relation to IPC authorisations, under paragraph 3(1) of Schedule 1 EPA 1990. However, unlike the NRA position, there are no provisions for objectors to request such a call-in - although there would appear to be nothing to stop them doing so. In any event, the Secretary of State is only likely to make use of his call-in powers in particularly sensitive or important cases. Where he does make use of this power, he cannot decide the issue himself but must give directions to the enforcing authority.<sup>32</sup>

#### 5.2.4 Appeals

The right to bring an appeal is an obvious means of holding an agency to account for its decisions: if someone is unhappy with a decision, an appeal provides a relatively simple, cheap and effective accountability mechanism. The extent to which agencies are held to account by appeals will depend on a number of factors including who can bring appeals (as we shall see, this accountability mechanism is only directly available for the company affected; third parties have very limited rights in relation to appeals); on what grounds they can appeal (if a decision on a certain matter is not appealable, the agency obviously

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<sup>30</sup>Under the deregulation initiative, the DOE made proposals to change this so that the NRA would simply have to notify an objector that a consent had been issued. The objector would still be able to request a call-in by the Secretary of State, but as ENDS notes, he "might often find himself faced with a decision whether to call-in an application after it has been determined - and it would not be surprising to find him more reluctant to intervene at this late stage." Not surprisingly, ENDS concludes that "whatever the practical outcome of the proposed change, it clearly amounts to a reduction in the explicit scope for public participation in the discharge consent procedure." (226 ENDS Report (1993) 31 at pp.32-3). These proposals have been taken up in the Environment Bill.

<sup>31</sup>The Environment Bill may also affect this right of public participation if the application is called in and an inquiry is held: if a person has already made representations, he may be unable to attend the hearing. Whether this will be the case will depend on the precise content of regulations to be drawn up by the Secretary of State.

<sup>32</sup>EPA 1990, sch. 1, para. 3(5).

cannot be held to account for it by that means); what control and input the appellant and others have in terms of procedure; and finally, the decision the person deciding the appeal is empowered to make.

Thus, if a company is refused a consent/authorisation/licence or is unhappy with conditions imposed and informal negotiations have not yielded any results, it may proceed to seek a formal appeal (which may however, as we shall see, be informally structured). In the case of consents issued by the NRA, the appeals procedure is set out in section 91 WRA 1991 and in regulations.<sup>33</sup> The NRA has received a number of appeals - many sewerage undertakers for example have lodged appeals about a 'fish kill' condition which has been included by the NRA in their discharge consents.<sup>34</sup>

Trade effluent consent appeals lie to the Director General of Water Services (OFWAT) under sections 122 (if a consent is refused, if the discharger is unhappy with the conditions imposed, or if there is a deemed refusal because the undertaker has not made a decision on the notice of application within 2 months) and 126 WIA 1991 (for variations).<sup>35</sup> The appeal is basically a rehearing and the Director General has much the same powers as the undertaker to reject, impose conditions etc.. Dischargers have a further right of appeal on a point of law to the High Court under section 137. This specific right is unique to trade effluent consents.

For IPC authorisations issued by HMIP and for air pollution authorisations issued by local authorities, appeals are covered by sections 15 and 22(5) EPA 1990. The main grounds of appeal are set out in section 15, which states that anyone who has been refused an authorisation or a variation of an authorisation, or whose authorisation has been revoked, or who is aggrieved by conditions attached to an authorisation, or who has been served with a variation, enforcement or prohibition notice, may appeal against the decision to the Secretary of State (except where the decision implements a direction of his). Section 22(5) deals with appeals concerning commercial confidentiality. The Environmental Protection (Applications, Appeals and Registers) Regulations 1991 (SI 1991 No. 507) (as amended) provide the detailed blueprint of the authorisation appeals procedure. IPC appeals have come in thick and fast. The first tranche were on the basis of commercial confidentiality under section 22(5) EPA 1990, but by the end of 1992 appeals against the conditions imposed in authorisations had come in. According to

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<sup>33</sup>The Control of Pollution (Consents for Discharges etc.) (Secretary of State's Functions) Regulations 1989 (SI 1989 No. 1151).

<sup>34</sup>See (1993) 4(2) *Water Law* 57.

<sup>35</sup>See further, OFWAT, 'Trade Effluent Appeals', information note 21; and OFWAT news release 16/93 of 2 June 1993.

ENDS, the complaints included: inconsistent treatment, excessive costs, and the danger of stringent but unclear conditions leading to private prosecutions for any breach, irrespective of HMIP's prosecution policy.<sup>36</sup>

Section 43 of the EPA provides for appeals to the Secretary of State from licensing decisions of WRAs. The grounds of appeal are much broader than under the former COPA 1974 regime. Section 66(5) gives an applicant a right of appeal from a decision that information is not commercially confidential. The Waste Management Licensing Regulations 1994 (SI 1994 No. 1056), issued under section 43(8) and DOE circular 11/94, provide further details of the appeals procedure.

What then of the rights of the public in such appeals? Can parties other than the affected company use the appeals procedures to hold agencies to account for their standard-setting decisions? In planning law, an appeal lies from a decision to refuse planning permission, but not from a decision granting planning permission - which means in practice that developers can appeal, but environmental organisations or local interest groups cannot. The only way the latter can directly challenge the decision is by way of judicial review. However, though third parties are unable to initiate planning appeal proceedings, they do have some rights to make representations, both under the written representations procedure and at hearings.

The position is similar in the field of pollution control: companies can appeal, objecting individuals and pressure groups cannot. Nevertheless, while third parties cannot instigate appeals, they may sometimes have certain rights once an appeal has been launched by a company. These rights enable them to exert some influence. With NRA appeals under section 91 WRA 1991, the appellant or the Authority can request a hearing and if they do so, the Secretary of State must either order a local inquiry or afford the appellant and the Authority an opportunity of appearing before and being heard by a person appointed by him.<sup>37</sup> If the Secretary of State chooses a local inquiry, sections 215 WRA 1991 and 250 Local Government Act 1972 will apply. Assuming that the inquiry is modelled on local planning inquiries, it will be at the discretion of the inspector as to whether third parties can appear.<sup>38</sup> If he chooses a hearing, the regulations mention only the appellant and the Authority. In any event, the Authority is required to serve notice of an appeal against the refusal of a consent on anyone who made representations about the application, stating that further representations may be made to the Secretary of State. When the Secretary of State reaches his decision, he

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<sup>36</sup>213 ENDS Report (1992) 18.

<sup>37</sup>SI 1989 No. 1151, reg. 7(9).

<sup>38</sup>SI 1992 No. 2039, reg. 11.

issues directions to the NRA. Any reports, the contents of the directions and reasons for the decision do not have to be published; all that is required is that the register should contain a statement to the effect that the Secretary of State has issued a direction under paragraph 8(4) of Schedule 12 Water Act 1989 (now section 91(5) WRA 1991).

With appeals from HMIP, under SI 1991 No. 507, a company can elect either a written representations approach or a hearing, but the enforcing authority must consent for the written procedure to apply. With the written procedure, the Secretary of State disposes of the appeal on the basis of written representations, and the relevant enforcing authority must submit any third party representations to him. A useful summary of the written procedure is provided in the recent DOE guide to IPC.<sup>39</sup> If either party, or the Secretary of State chooses a hearing, it is at the discretion of the person hearing the appeal whether this is heard in public. The original DOE guide to IPC stated that "The hearing, or part of the hearing, shall take place in public unless the appeals inspector otherwise orders on the application of either party (normally this would be because he was satisfied that commercial confidentiality would otherwise be prejudicially affected)."<sup>40</sup> If it is to be held wholly or partly in public, the date, time and location of the hearing must be publicised in advance in the local press. Third parties may be allowed to speak at the hearing at the discretion of the appeals inspector, but permission must not be unreasonably withheld. Appeals may be structured informally in the shape of a round table discussion, or may be more formal and court-like; again this is at the discretion of the appeals inspector, but the original DOE guide suggested that a more formal procedure would be appropriate for complex or controversial appeals. The more recent DOE guide states that the "procedure at a hearing is left to the appeal inspector, but he will be concerned to ensure that interested parties who wish to give evidence have a fair opportunity to do so."<sup>41</sup> Obviously, the openness of a hearing, the ability to be heard and the format of the hearing will all have an important bearing on accountability to third party interests. With reference to the hearing's structure, Ball and Bell have commented:

"Presumably, where issues are likely to be of great consequence to members of the public, there needs to be some element of the adversarial approach to ensure that there is adequate accountability. Otherwise, public confidence in an appeals system, which to the untrained eye and ear would appear to be a meeting of highly trained, highly specialised people discussing hypothetical problems around a table, would be seriously undermined."<sup>42</sup>

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<sup>39</sup>DOE, 'Integrated Pollution Control: A Practical Guide', 1993, p.26.

<sup>40</sup>Old guide - DOE, 'Integrated Pollution Control: A Practical Guide', 1990, p.36.

<sup>41</sup>Note 39 *ante*, para. 12.6, p.21.

<sup>42</sup>Ball & Bell, *Environmental Law*, p.284.

One might question whether the untrained public are likely to come to appeals, and if they do, whether they would be any the less confused by an adversarial treatment of the same subject matter. However assuming they mean that specialist groups (such as FOE and Greenpeace) will be better served by an adversarial approach, they are undoubtedly correct. This is because with cross-examination and the ability to call evidence and witnesses, such groups have effective control over information and will not be 'shut out', which might be a danger in round-table discussions. However there is no inherent reason why a round table discussion should be exclusionary and one could no doubt think of safeguards to ensure that it did not occur. In any event, one should also recognise, as Ball and Bell do, that an adversarial approach should be used sparingly. This is because one could argue that the advantages to environmental groups of an adversarial format are offset by disadvantages, particularly delay.

If a written representation procedure is used, the Secretary of State will determine the appeal directly. If there is a hearing of some kind, the appeals inspector will provide the Secretary of State with a report stating his conclusions and recommendations. In making his decision, the Secretary of State must take this report into account, although he is not obliged to follow the inspector's recommendations. Under regulation 14(2)(b) of SI 1991 No. 507, the Secretary of State must furnish a copy of the appeal to anyone who made representations to him or at the hearing, if one was held. Regulation 15(j) then states that the register must contain details of any appeal under section 15 EPA 1990, including "any written notification of the Secretary of State's determination of such an appeal and any report accompanying any such written notification." This provides greater rights to third parties than does the NRA procedure.

With waste management licence appeals, circular 11/94 states that it is expected that appeals will usually follow the written representations procedure unless the appellant or the WRA request a hearing. If a hearing is held, it is up to the person hearing the appeal whether the hearing is held in public or in private. All commercial confidentiality appeals will be held in private unless the appellant requests otherwise (which seems unlikely). If the appeal is held in public, it is at the discretion of the person appointed to conduct the appeal as to whether third parties may be heard. Where there is a hearing, the person hearing the appeal may be given the power to determine the appeal, which is unique to this area; otherwise, the Secretary of State will make the decision taking into account the report sent to him. Subject to the commercial confidentiality provisions of section 66 EPA 1990, the WRA must put a copy of the inspector's report and/or a written copy of the Secretary of State's decision and reasons on the register.



With trade effluent consent appeals, there is no provision at all for public involvement, except that details of the appeal must be placed on the register. This absence of any provision for public participation is a regrettable state of affairs for which there appears to be no logical reason, except perhaps that the public do not have an interest in the closed environment of sewers as they do in the environment proper.

### 5.2.5 Tort

In theory at least, civil actions in tort may be used to hold an environmental agency accountable for its actions. In *Scott-Whitehead v National Coal Board*<sup>43</sup> for example, a farmer sued the regional water authority in negligence for the damage to his crops arising from their failure to warn him of the polluted nature of the water he was abstracting. However, although the action there was successful, recent cases have shown a reluctance to impose liability on public bodies,<sup>44</sup> and therefore one cannot be certain that the NRA or other agencies would now be held liable in similar circumstances.<sup>45</sup> In any event, only firms and not environmental groups, are likely to have suffered damage, which is necessary for an action in negligence.

### 5.2.6 JUDICIAL REVIEW

An aggrieved party may be able to hold the agency to account by way of an action for judicial review under Order 53 of the Rules of the Supreme Court. Judicial review is used to challenge the legality of administrative action. Review is only concerned with the lawfulness of decisions taken; unlike appeal, it is not supposed to be a rehearing of the merits of the case. Use of judicial review in the environmental field has been very limited. The Public Law Project reports the following figures for applications for leave in environmental (non-planning) cases:<sup>46</sup>

1987 - 15

1988 - 11

1989 - 21

1991 (Jan-March) - 3

As Sunkin et al. note, the small number of applications to an extent runs contrary to expectation given the amount of legislative activity and public controversy on environmental matters over these years. Their suggestion is that the low figures may be

<sup>43</sup>(1987) 53 P&CR 263. Noted in Ball & Bell at pp.160 and 395

<sup>44</sup>Eg. *Murphy v Brentwood DC* [1990] 2 All ER 908.

<sup>45</sup>See Ball & Bell, p 395

<sup>46</sup>Sunkin et al., *Judicial Review in Perspective. An Investigation of Trend. in the Use and Operation of the Judicial Review Procedure in England and Wales, 1993*. No figures are given for 1990

due to lack of funding or expert legal advice, or a perception that the process is over-formal and burdensome.<sup>47</sup> Furthermore, the above figures represent only applications for leave; the number of applications which proceed beyond the leave stage to a full substantive hearing is likely to be up to 60% lower.<sup>48</sup> Of course, the number of cases actually reported will be much lower still.

What else might explain the limited use of judicial review in environmental cases?<sup>49</sup> There are a number of reasons why companies may not have not brought review actions. Perhaps the most obvious is that, as we have seen, they will typically have a right of appeal. This is likely to be much cheaper and quicker than a review action, and in any event, as we shall see below, companies may have no other choice than to appeal first. Another reason why we may not have seen many environmental review actions lies in Galanter's well-known observations about 'one-shot' and 'repeat' players. As Stewart states, Galanter's thesis is that one-shot players are more likely to litigate than repeat players.<sup>50</sup> Stewart then claims that in the US environmental context, Galanter is turned on his head, since at the Federal level, industry and environmental groups are repeat players but tend to litigate, while co-operation is more prevalent at a local level, where those involved are one-shot or 'few-shot' players. While this may be true when contrasting standard-setting (federal) with planning matters (local), it does not hold when comparing standard-setting with enforcement. Setting standards is an infrequent affair relative to enforcement, which is more of a continuous activity: with the former, the game may take place every few years when standards are revised; with the latter, the game is repeated more frequently. Indeed, Stewart implicitly recognises this in one of his footnotes, where he states that co-operation is needed more for enforcement - which occurs at state level - than for federal standard-setting.<sup>51</sup> It is this that points to the difference between the US and England and Wales: in the US, standard-setting

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<sup>47</sup>*Ibid.*, p.8.

<sup>48</sup>*Ibid.*, p.54.

<sup>49</sup>According to Stewart ('The Discontents of Legalism: Interest Group Relations in Administrative Regulation' [1985] *Wisconsin LR* 655), an increase in the use of uniform standards (such as BATNEEC) as opposed to individualised standards (eg. NRA consents) ought if anything, to lead to a rise in the number of judicial review actions brought by firms. This is because particularised standards tend to produce a 'divide and rule' situation and each producer is likely to prefer the relatively low transaction costs of co-operation to the high costs of review (pp.670-1). Uniform standards on the other hand supposedly encourage industry solidarity (assuming there is a pre-existing trade-association of some kind - if not, free rider problems may mean that uniform standards make no impact on the incidence of judicial review, because, as with individualised standards, transaction costs for an individual producer are likely to be too great - p.672). However, while this may lead to an increase in judicial review, it is perhaps just as likely to make negotiation more prevalent, since collective action will decrease the already low transaction costs of co-operation as well as those associated with judicial review (p.672).

<sup>50</sup>Stewart, *ibid.*

<sup>51</sup>*Ibid.*, p.671, n.57.

invariably takes place at the federal level, while enforcement is handled by the states; in the UK, both functions are performed by the same authority. The US position may thus be categorised as one of 'few-shots' at the Federal level and repeat players at the state level - with litigation more likely with the former than with the latter. In the UK on the other hand, litigation is less likely in respect of both functions because a company must proceed from a 'few-shot' game to a 'many shots' game with the same opponent.<sup>52</sup>

As I stated in the previous chapter,<sup>53</sup> judicial review is a two stage process: an applicant must first seek leave to bring an action, which he must do within the appropriate time limit and without unnecessary delay; if leave is granted, the applicant may then proceed to a full hearing of the merits. For conceptual purposes, the substantive hearing can be divided into three separate parts: first, the applicant must jump the hurdle of *locus standi* and must surmount other 'threshold' barriers such as *O'Reilly v Mackman*<sup>54</sup> and the alternative remedies rule; secondly, he must be able to establish one of the grounds of review, and thirdly, he must persuade the court, in its discretion, to grant him a remedy.

#### 5.2.6.1 Alternative Remedies<sup>55</sup>

The alternative remedies rule states that an applicant should normally exhaust all other remedies which are equally convenient, beneficial and appropriate before bringing an action for judicial review. If he has not done so, the court may refuse to allow the challenge to proceed. This rule should pose few difficulties for environmental interests. One might seek to argue that default powers provide such applicants with a suitable alternative remedy. However, since default powers are not open to individual citizens, they are not equally convenient, beneficial and appropriate.<sup>56</sup>

Companies challenging the conditions in their own consents or authorisations may, in contrast, come into conflict with the rule on the exhaustion of alternative remedies. As we have seen, companies (but not environmental groups) can appeal against agency standard-setting decisions and so far, they have opted for this route rather than judicial review.<sup>57</sup> The question is whether a company could bring a judicial review action

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<sup>52</sup>Stewart also mentions the possibility of being 'punished' at the enforcement level for bringing a challenge at another level - *ibid.*, pp.662-3.

<sup>53</sup>At p.95.

<sup>54</sup>[1982] 3 All ER 1124.

<sup>55</sup>See generally, Lewis, 'The Exhaustion of Alternative Remedies in Administrative Law' (1992) 51 *CLJ* 138

<sup>56</sup>See Waite, 'Criminal and Administrative Sanctions in English Environmental Law' 1 *LMELR* 38 and 74 at pp.77-8.

<sup>57</sup>See 213 ENDS Report (1992) 18; some industry groups, such as the chipboard industry, have 'contemplated' judicial review of HMIP's sector guidelines - see Mayer, 'New tougher regulations cause shock and confusion in Britain', *The Independent*, 10 September 1991, p.13.

without first going through the appeals procedure. This question has recently been answered in the negative in the *Leigh Environmental* case. Until that case, it was generally assumed that the question of whether a court would require the exhaustion of alternative remedies before allowing a review action, would depend on the category of the complaint and its uniqueness; legal questions, it was thought, would stand a greater chance of leapfrogging the appeals procedure than factual disputes;<sup>58</sup> and the first line of cases concerning the interpretation of a new statutory scheme would normally be allowed to go straight to review.<sup>59</sup> The *Leigh* case, which involved the interpretation of a new statutory scheme - the EPA 1990 - may simply be an exception to this general rule. Leigh Environmental Limited brought a review action against HMIP because it objected to the conditions attached to authorisations on its incineration plants.<sup>60</sup> According to ENDS, at the leave stage, MacPherson J. ruled that HMIP's decision was not amenable to judicial review. The EPA 1990 had provided for appeals to be made to the Secretary of State and the dispute should therefore be pursued via that route.<sup>61</sup> It is unclear from ENDS whether judicial review would then become available once the appeals route had been exhausted, but one assumes that this would be the case.

### 5.2.6.2 Standing

Companies challenging the conditions in their own or other companies'<sup>62</sup> consents or authorisations are unlikely to have a problem in surmounting the hurdle on standing. The position of third parties such as individuals and environmental groups is more complicated. This section will largely be concerned with these third party challenges.

A clutch of recent rulings of the High Court in judicial review actions brought by environmental pressure groups in *R v Inspectorate of Pollution and another, ex p. Greenpeace Ltd*,<sup>63</sup> *R v Secretary of State for the Environment, ex p. Greenpeace Ltd*<sup>64</sup> and *R v Secretary of State for the Environment, ex p. Friends of the Earth*,<sup>65</sup> has once more brought into sharp focus the issue of standing in Order 53 proceedings brought to contest the legality of decisions in the field of environmental law. Why should the law allow one applicant to bring judicial review proceedings and not another? Such a

<sup>58</sup>*R v Birmingham City Council, ex p. Ferrero Ltd.* [1993] 1 All ER 530.

<sup>59</sup>In a different statutory context, see *R v Huntingdon District Council, ex p. Cowan* [1984] 1 All ER 58. See further Lewis, note 55 ante.

<sup>60</sup>See 225 ENDS Report (1993) 12.

<sup>61</sup>226 ENDS Report (1993) 44.

<sup>62</sup>On the basis of *R v AG, ex p. ICI* [1987] 1 CMLR 72. The applicants had standing to review the basis on which petroleum tax was assessed for competitor companies.

<sup>63</sup>[1994] 4 All ER 329; see also 225 ENDS Report (1993) 42.

<sup>64</sup>[1994] 4 All ER 352; see also 230 ENDS Report (1994) 43.

<sup>65</sup>*R v Secretary of State for the Environment, ex p. Friends of the Earth Ltd and Another, The Times*, 4 April 1994; see also 231 ENDS Report (1994) 46.

question goes to the very heart of the type of administrative law we have. Should the need to keep public authorities within their lawful bounds be put centre stage, with the result that the courts assume an activist role in striking down instances of administrative illegality whenever and wherever they are found, regardless of the identity of the challenger - as in the 'citizen action' model of standing?<sup>66</sup> Or, alternatively, should the primary focus of the limited resources of the courts be on identifying and remedying the infringement of individuals' legal rights,<sup>67</sup> leaving the resolution of cases where no such rights have been infringed to Parliament, participatory procedures and, where appropriate, to *ex post* accountability mechanisms like the Parliamentary and Local Commissioners for Administration, and those which exist under the Citizen's Charter initiatives?

Twenty years after it was published, Stewart's article 'The Reformation of American Administrative Law'<sup>68</sup> remains a highly influential discussion of how administrative law should regulate who is allowed to come before the court. Whilst the slightly modified version of Stewart's classification presented below may not be without its problems, it nevertheless remains a useful device because it enables one to identify the range of litigants who come before the courts and the interests they possess. Stewart's scheme divides litigants into:

- |                                  |   |
|----------------------------------|---|
| 1. Sole applicants <sup>69</sup> | - someone representing his/her own interest                               |
| 2. Class applicants              | - someone representing him/herself and others who share the same interest |
| 3. Associational applicants      | - an organisation representing its members' interests                     |
| 4. Surrogate applicants          | - someone/organisation representing the interests of others               |

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<sup>66</sup>See further Jaffe, *Judicial Control of Administrative Action*, ch. 12.

<sup>67</sup>Eg. Vining, *Legal Identity*.

<sup>68</sup>Stewart, 'The Reformation of American Administrative Law' [1975] 88 *Harv LR* 1667 at pp.1734-1747.

<sup>69</sup>Stewart uses the word 'plaintiff'; in an English context, the appropriate word is 'applicant'.

Each of 1 - 4 above will claim to possess an interest or interests in the litigated matter which will fall into one or more of the three categories below:<sup>70</sup>

- A. Material interests - economic and *local*<sup>71</sup> health interests
- B. Ideological interests - including moral and religious principles (eg. the interests of future generations and animals; aesthetic, recreational, cultural and historical concerns)<sup>72</sup>
- C. A general interest in law enforcement

It is my belief that public law should go beyond the protection of legal rights to ensure legality and good standards of administration. For this reason, rights of standing should be drawn as broadly as possible to allow challenges by any class of litigant, upholding any class of interest.<sup>73</sup> The only restriction I would make is that a sole applicant should be denied standing if there is a group which appears better placed to bring an action. Even then, standing should be granted if the group has been approached and is unwilling to become involved. Again, the reason for this restriction is a concern with the protection of legality: if a group is better able in terms of skills and resources to bring a challenge, then it is likely that legality will be more effectively and efficiently protected.

The domestic case-law discussed below reveals a much narrower, restrictive approach to standing. While recent cases have moved towards the view that groups may be better placed to bring actions than individuals, the courts typically grant standing only to those with, in Stewart's framework, material interests.

#### 5.2.6.2.1 Current National Law on Standing

In the 1980s, surrogate<sup>74</sup> and associational<sup>75</sup> applicants were often able to challenge administrative decisions, although it is important to note that these groups were typically seeking to protect economic, material interests. Then came the *Rose Theatre*<sup>76</sup> case, where a company - formed to protect the site of the Rose Theatre - sought judicial review of the Secretary of State's decision not to schedule the site under the Ancient

<sup>66</sup>It should be recognised that the categories of interests will at times overlap.

<sup>71</sup>The local nature of the health interest is stressed because it helps to explain recent English case law. Stewart simply talks of economic and physical well-being.

<sup>72</sup>Again, I differ from Stewart in specifically identifying some of the types of ideological interest.

<sup>73</sup>Although, given that legality and enforcement of the law are the central reasons for wide rights of standing, all interests might be regarded as law enforcement interests.

<sup>74</sup>Eg. *R v Secretary of State for Social Services, ex p. CPAG, The Times*, 8 August 1985.

<sup>75</sup>Eg. *Covent Garden Community Association v Greater London Council* [1981] JPL 183; *R v Stroud District Council, ex p. Goodenough* (1982) 43 P & CR 59 and *R v Hammersmith & Fulham London Borough Councils, ex p. People before Profit* (1983) 45 P & CR 364.

<sup>76</sup>*R v Secretary of State for the Environment, ex p. Rose Theatre Trust Co Ltd* [1990] 1 QB 504.

Monuments and Archaeological Areas Act 1979. Using Stewart's typology, the case involved an associational applicant asserting an ideological interest (cultural/historical). Schiemann J. provided two principal grounds for denying standing in the case. In Stewart's terms, the fact that the company was attempting to uphold an ideological interest rather than a material interest counted against them; and secondly, the fact that they were associational plaintiffs gave them no greater claim to standing than the claim they had as sole plaintiffs. In Schiemann's own terms, he claimed that because the challenger could not show that he had a greater right than any other citizen of the country to have the decision on whether to schedule taken lawfully, he would lack sufficient interest. He then remarked that the company could have no greater right to standing, *qua* company, than the individual members which formed it. Since the individuals lacked standing, it followed that the company lacked standing.

The first of Schiemann J.'s reasons above has been criticised for adopting a narrow approach to standing (namely requiring the infringement of private rights) which allows government illegality to go unpunished.<sup>77</sup> It also sits uncomfortably alongside the judge's remark elsewhere that "a direct financial or legal interest is not required."<sup>78</sup> More importantly, it states as a conclusion that which requires to be justified - viz., *why* it is that absence of a greater right than the general public should deny standing. The unstated assumption which informs the reasoning is surely that a restrictive approach to standing is more appropriate. Schiemann J.'s second ground for denying standing has been criticised by Pitt-Payne who argues (in a pre-figuring of *ex p. Greenpeace*,<sup>79</sup> considered below), that a group should be regarded as having a greater claim to standing than its individual members because the fact that they have come together in a group means that they have a serious interest,<sup>80</sup> and the range of expertise covered by the group is likely to be much wider than that of any one member.<sup>81</sup>

Later cases offered rather more hope to environmental groups than the *Rose Theatre* decision. In *ex p. Beebee*,<sup>82</sup> the British Herpetological Society (an associational applicant) had *locus standi* to challenge a planning permission concerning part of Canford Heath, because it had been closely connected with the site for some time, it had a financial input into the site (ie. an economic, material interest) and it was named on the

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<sup>77</sup>See further Geddes, 'Locus Standi and EEC Environmental Measures' (1992) 4(1) *JEL* 29.

<sup>78</sup>Note 76 *ante*, at p.520.

<sup>79</sup>Note 63 *ante*.

<sup>80</sup>Although of course the reverse may be true - ie. it takes less effort to get involved as part of a group than it does to proceed as an individual.

<sup>81</sup>Pitt-Payne, 'Standing in Judicial Review Proceedings', in Supperstone & Goudie (eds.), *Judicial Review*, 327 at p.339.

<sup>82</sup>*R v Poole Borough Council, ex p. Beebee* [1991] *JPL* 643.

planning permission. The ideological interest of the World Wide Fund For Nature (WWF) (promotion of animal welfare) on the other hand was not a sufficient interest, although in the event, consent was given for it to be joined as an applicant after leave had been granted.

Other cases granted environmental interests standing, seemingly without question - although none of the groups was successful on the merits. So, for example, in *ex p. Roberts*<sup>83</sup> the RSPCA (a surrogate/ideological applicant), a body called Compassion in World Farming (an associational/ideological applicant) and Peter Roberts, the Director of CIWF (a sole/ideological applicant), had standing to challenge the decision of the Minister to grant licences for the export of live sheep to France. This is perhaps one of the few examples where standing has been granted to an exclusively ideological interest (the promotion of animal welfare). In the *Twyford Down* case,<sup>84</sup> two parish councils (associational/ideological<sup>85</sup> interests) and three private individuals (sole/ideological applicants) sought judicial review of the Secretary of State's decision to allow the building of a motorway through Twyford Down, near Winchester.<sup>86</sup> Whether or not the applicants had standing as a matter of national law<sup>87</sup> was not questioned by McCullough J. - standing was assumed to exist.<sup>88</sup> The fact that standing was granted to an ideological interest here can perhaps be explained by the local flavour of that interest.

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<sup>83</sup>*R v MAFF, ex p. Roberts* [1991] 1 CMLR 555.

<sup>84</sup>*Twyford Parish Council v Secretary of State for Transport* (1992) 4(2) JEL 273; the case was actually decided on 26 October 1990.

<sup>85</sup>Aesthetic/recreational.

<sup>86</sup>For details of the protest which the scheme attracted, see 'The Battle of Camelot', *The Guardian*, 15 December 1992.

<sup>87</sup>The same could not be said of standing and Community law: because the applicants had not suffered any substantial prejudice, McCullough J. was inclined to hold that they lacked the requisite standing in relation to environmental Directives. This is a somewhat questionable interpretation of Community law on access to the courts which I consider later in the section. As Macrory notes, a factor (lack of prejudice) which normally relates to the court's discretion to deny a remedy under national law, was treated as McCullough J. as a test for standing in relation to Community law - case note at note 84 *ante*, at p.304, n.18.

<sup>88</sup>As it appears to have been in the unsuccessful challenge of the Oxleas Nine to the East London River Crossing (an application by sole plaintiffs in respect of a local, ideological interest). For details on this case and a discussion of access to environmental justice by individuals, see Grosz, 'When we can't see the wood for the fees', *The Guardian*, 2 March 1993 (and see also (1992) 2(4) LMELR 48). In the event, Oxleas Wood was eventually reprieved by a Government decision to reroute the road. The decision and Grosz's article are significant in that they rest on the premise that environmental groups would not have had *locus standi* to seek review in these roads cases because of the lack of a local connection; it is on this basis that Grosz argues that individuals must not be dissuaded from such actions (as they were in the M 11 case) by the prospect of huge legal fees and a bill for the opponents' costs. Environmental groups are obviously better able to absorb such costs, although there are equally valid arguments for not awarding costs against them either.



A similar unquestioning approach to standing can be seen in *R v Swale BC and Medway Ports Authority ex p. the RSPB*<sup>89</sup> - the RSPB being an associational applicant with an ideological interest in the welfare of birdlife, but with the distinguishing feature that they had a public law legitimate expectation arising from a previous promise of consultation.<sup>90</sup> In *R. v Secretary of State for the Environment, ex p. Friends of the Earth Ltd and Another*,<sup>91</sup> standing was addressed, but only in passing, since it was not contested by the Government. Andrew Lees<sup>92</sup> and FOE were granted standing to challenge the decision of the Secretary of State to accept undertakings from water companies rather than serve enforcement orders.<sup>93</sup> The FOE case may be explained as having allowed standing to an associational applicant (FOE) and a sole applicant (Andrew Lees)<sup>94</sup> both with the same material interest (a local health interest in the quality of drinking water).

A recent case which lends more explicit support to environmental and other pressure groups is the review action brought by Greenpeace (associational applicant) of HMIP's decision to allow testing at the Thorp reprocessing plant without a consultation stage.<sup>95</sup> Otton J. held that standing was primarily a matter of discretion for the courts.<sup>96</sup> In exercising that discretion, it would be appropriate to take into account the nature of the applicant and the extent of the applicant's interest in the issues raised, the remedy they sought to achieve and the nature of the relief sought. Taking these factors into account, he rejected British Nuclear Fuels' (BNFL)<sup>97</sup> argument that Greenpeace should not have legal standing. Greenpeace was described as an entirely responsible and respected body with a genuine concern for the environment, which would therefore have a legitimate interest in the environmental consequences of BNFL's activities at Sellafield. The fact that it had been a consultee during the consultation processes lent further weight to its case. He also considered it significant that 2,500 Greenpeace supporters came from the Cumbria region; it would, he said, be to ignore the blindingly obvious for the court to disregard their concern about the threat to health posed by the plant (ie. a local material interest in health).

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<sup>89</sup>*R v Swale Borough Council and Medway Ports Authority, ex p. the RSPB* [1991] JPL 39.

<sup>90</sup>Ward, 'The Right to an Effective Remedy in European Community Law and Environmental Protection: A Case Study of United Kingdom Judicial Decisions Concerning the Environmental Assessment Directive' (1993) 5(2) *JEL* 221 at pp.232-3.

<sup>91</sup>Note 65 *ante*.

<sup>92</sup>FOE's former campaigns director.

<sup>93</sup>Discussed earlier in ch. 4.

<sup>94</sup>Thames Water Company being the supplier of water to Andrew Lees' North London Home.

<sup>95</sup>Note 63 *ante*.

<sup>96</sup>For a similar approach, see the Canadian case of *Findlay v Minister of Finance* [1986] 2 SCR 607; see also Woolf, 'Judicial Review: A Possible Programme for Reform' [1992] *Public Law* 221.

<sup>97</sup>BNFL appeared as a party interested - the Government did not contest Greenpeace's standing.

However, this insistence upon locally affected persons could prove problematic. Consider, for example, the case of a nuclear power plant in a very remote area of Scotland with few inhabitants, let alone Greenpeace supporters. With nuclear power, the Chernobyl disaster surely demonstrates that health concerns cannot be limited geographically. To take another example, if the challenge related to a plan to build a large construction project in such an area, would it really be valid to deny the concern which many non-inhabitants would feel for the preservation of our wilderness areas? In insisting on a local connection, Otton J.'s judgment is arguably too much of an echo of the aforementioned *Beebee* case. Another troubling aspect of his judgment comes with the reasons he gives for distinguishing the present case from *Rose Theatre*. First, he states that the Rose Theatre Company had been formed for the exclusive purposes of saving the Theatre, whereas, as he has already told us, Greenpeace are an established group. However, it is not clear why the longevity of a group should be conclusive as to the genuineness of the interest. Secondly, he comments that in *Rose Theatre* no individual member could show any personal interest in the outcome (ie. material interest). Again, this leaves unaddressed the question of why a material interest is seen as a prerequisite for standing. *Ex parte Greenpeace* thus appears to be yet another example of the courts hiding behind more or less arbitrary 'legal' requirements whilst avoiding the task of questioning the assumptions which underlie those requirements.

A further reason for allowing standing was Greenpeace's obvious expertise: an individual would find it difficult to bring such an action and would almost certainly mount a less well informed challenge which might waste the court's time; Greenpeace on the other hand, with its experience in environmental matters and its access to scientific and technological expertise was able to mount a carefully selected and focused challenge which could only benefit the court in its duty to secure justice between the parties. The implications of this could be very interesting - suggesting as it does, not only that, *pace* Schiemann J. in *Rose Theatre*, associational (and, *quaere*, surrogate plaintiffs) groups may have a greater right to standing than their individual members, but also that sole plaintiffs should be denied standing where a pressure group is better able to bring the action.<sup>98</sup> Otton J. also commented that the nature of the remedy sought would have a bearing on whether standing would be granted: the fact that the relief sought by Greenpeace was certiorari rather than mandamus went in their favour.<sup>99</sup> Finally, he ordered Greenpeace to pay HMIP's costs throughout, but BNFL's costs in full only up until the hearing and two-thirds of their costs for the hearing itself. This partial denial of BNFL's costs may have been meant to demonstrate that Greenpeace, contrary to

<sup>98</sup>See the argument in the text, at notes 73-74 *ante*.

<sup>99</sup>See further *R v Felixstowe JJ. ex p. Leigh* [1987] QB 582, *R v IRC ex p. National Federation of Self-Employed and Small Businesses* [1982] AC 617.

BNFL's view, did have a valid point to make and were not simply vexatious busybodies. This is something that becomes more noticeable in the case below.

Another promising recent case for environmental groups is the judicial review brought by Greenpeace and Lancashire County Council (associational applicant) of the decision of the Secretaries of State for the Environment and Agriculture to grant the final go-ahead to Thorp.<sup>100</sup> The fact that Greenpeace had a strong interest in bringing the case was reflected in the fact that, despite losing the action, Potts J. did not order them to pay their opponents' costs.<sup>101</sup> Nevertheless, apart from the costs point, the case does not really carry us much further than the previous *Greenpeace* case; because the issues in the cases were more or less the same, one would hardly have expected Potts J. to depart significantly on standing from the reasoning of Otton J..

What then can be concluded from an examination of the cases? It seems that the overriding factor in the grant of standing is the type of interest at stake: on the one hand, courts will normally grant standing to material interests (ie. economic and local health interests); on the other, they will usually deny standing to ideological interests<sup>102</sup> and health interests unless they can point to a local concern with the site/issue<sup>103</sup> or some link with the authorities in connection with that site.<sup>104</sup> In principle, the type of applicant is a less significant factor in the granting of standing, although it seems that a group applicant will be required to demonstrate longevity. The *Greenpeace* (Otton J.) case may also be evidence of a change in this regard - insofar as it appears to favour group over sole applicants.

As an advocate of broad rights of standing, I believe that the above cases demonstrate an unduly restrictive approach which should be abandoned to allow challenges by ideological and non-local health interests - whether by groups (regardless of longevity) or individuals - and regardless of geographical or consultative links. I would not, however, advocate the abolition of the statutory standing requirement *tout court*. There may indeed be good practical reasons, in a broad theory of standing, for denying access to the courts. One such example - which I mentioned near the beginning of this section and which seems to have found favour with the courts - may be where an individual

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<sup>100</sup>Note 64 *ante*.

<sup>101</sup>Although they did have to pay their own costs - estimated to be less than £100,000.

<sup>102</sup>*Ex p. Roberts* being an exception, although it is not strictly an environmental case.

<sup>103</sup>Eg. *Twyford Down* (ideological interest - local concern); *Greenpeace* (Otton J.) (health interest - local members); *FOE* (health interest - local water).

<sup>104</sup>Eg. *ex p. RSPB* (ideological interest - promise of consultation giving rise to legitimate expectation; *Beebee* (BHS - ideological/material interest - named on the planning permission; *Greenpeace* (Otton J.) (ideological/material interest - prior consultee).

seeks review where a pressure group is better placed to bring the action. This may provide grounds for denying standing, at least provisionally, until it can be ascertained whether the group is prepared to take up the action. If it is not, a concern with the correction of illegality dictates that the individual should then be granted standing.

#### 5.2.6.2.2 *Standing and Community law*

Having examined standing in domestic law, one needs to examine what Community law<sup>105</sup> has to say on access (and by implication standing) to national courts to enforce environmental Directives. The doctrine of direct effect in relation to Directives is of crucial importance here. A Directive is said to be directly effective if it creates rights and obligations which can be enforced in national courts.<sup>106</sup> In theory, a Directive could be directly effective 'horizontally' or 'vertically' - its rights and obligations could be enforced in national courts against private individuals or state bodies. However, the ECJ has ruled that Directives are only directly effective vertically against the state or emanations of the state;<sup>107</sup> they do not have direct effects horizontally against other private bodies or individuals.<sup>108</sup> Despite this, it has been argued that the ECJ has introduced horizontal effect<sup>109</sup> through the back door via the doctrine of 'sympathetic interpretation'.<sup>110</sup> However, I will be concentrating on vertical direct effect because the material on sympathetic interpretation has no bearing on the question of standing in judicial review actions brought against public bodies, which is our current concern.<sup>111</sup>

Since Directives are only directly effective vertically, we can now say that a directly effective Directive creates rights and obligations which can be enforced in national courts *against state bodies*. The doctrine of the supremacy of Community law further means that not only can the Directive be enforced in national courts against state bodies,

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<sup>105</sup>In this section, specifically ECJ case-law.

<sup>106</sup>Steiner, *Textbook on EC Law*, p.26.

<sup>107</sup>Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337. What counts as the state or an emanation of the state will therefore be crucial. In case C-188/89 *Foster v British Gas* [1990] 3 All ER 897, the ECJ ruled that a Directive could be enforced against British Gas - at the time a nationalised undertaking. The court stated that: "A body, whatever its legal form, which has been made responsible pursuant to a measure adopted by the state, for providing a public service under the control of the state, and had for that purpose special powers beyond those which resulted from the normal rules applicable in relations between individuals, is included among the bodies against which the provisions of a Directive capable of having direct effect might be relied upon" (para. 20). In the recent case of *Griffin and Others v South West Water Services Ltd*, 236 ENDS Report (1994) 38 - the High Court held, applying *Foster*, that a privatised water company is an emanation of the state under EC law.

<sup>108</sup>Case 152/84 *Marshall v Southampton & South West Hampshire HA* [1986] 2 All ER 584.

<sup>109</sup>Albeit 'indirect' rather than 'direct' horizontal effect, in that the Directive is read indirectly through the interpretation of the domestic legislation and not directly.

<sup>110</sup>Steiner, *op cit.*, p.40.

<sup>111</sup>Although the doctrine of sympathetic interpretation may come into play vertically in the substance of a review action against a public body - see eg. the *FOE* case, note 65 *ante*.

but that these courts must, in applying the Directive, ignore any conflicting provisions of national law. A necessary condition for direct effect is that the provisions of the Directive be sufficiently clear, precise and unconditional.<sup>112</sup> If they are not, the national courts will obviously have trouble enforcing them. However, while the satisfaction of these requirements is *necessary* for a Directive to be directly effective, they are by no means *sufficient*. All of the environmental Directives considered below contain provisions which are sufficiently clear, precise and unconditional and yet I suggest that the ECJ would probably rule that some are not directly effective.<sup>113</sup>

What relevance does the doctrine of direct effect have for standing? The answer is that, in theory at least, narrow national laws on standing may have to give way where an environmental Directive is at issue if the ECJ has ruled that the Directive is directly effective.<sup>114</sup> If the Directive is directly effective, it *must* be enforceable by third parties against the state in their national courts; restrictive laws on standing obviously prevent a Directive from being thus enforceable. In other words, if an applicant finds it difficult to make a case for standing on the basis of domestic law,<sup>115</sup> he may be able to argue that, as in *Factortame*, Community law (on access to national courts) should take priority over national laws (on standing) in order to protect directly effective Community rights contained in the Directive.<sup>116</sup> However, at present, the ECJ's jurisprudence on the issue of access to national courts is not particularly clear. As we shall see, the approach I suggest they might adopt is not much broader than that of our domestic rules on standing, and thus Community law is likely to be of little use to an applicant.

The approach which I suggest the ECJ are likely to take is that only Directives which are intended to protect personal rights<sup>117</sup>, or possibly rights to human health, are directly effective and must be enforceable by citizens in national courts. In other words, where these Directives are concerned, national rules on standing must not present a barrier.

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<sup>112</sup>The requirements for direct effect laid down in eg. case 8/81 *Becker* [1982] ECR 53.

<sup>113</sup>For example, the relevant provisions of the Dangerous Substances in Water Directive 76/464 and the Groundwater Directive 80/68 are clear, precise and unconditional, but may not be directly effective - see Kramer, 'The Implementation of Community Environmental Directives Within Member States: Some Implications of the Direct Effect Doctrine' (1991) 3 *JEL* 39 at pp.42-3.

<sup>114</sup>Geddes, note 77 *ante*, at p.37.

<sup>115</sup>Of course in recent cases brought in the UK courts involving Community environmental Directives (eg. *ex p. FOE, Twford Down*), standing has been granted under domestic law and there was therefore no need to argue that Community law required access to be granted.

<sup>116</sup>Case C-213/89 *R v Secretary of State for Transport, ex p. Factortame* [1990] ECR 2433. The case concerned not standing but the availability of interim relief against the Crown. UK national law which did not allow such relief was overturned in order to protect the directly effective rights contained in the relevant EC laws.

<sup>117</sup>Eg. The Environmental Assessment Directive 85/337 which specifically grants personal rights to the 'public concerned'. The economic interests of companies count as personal or individual rights, as most of the cases considered below in the text make clear.

They are likely to rule that other Directives which are intended only to protect nature are not intended to be enforceable in national courts, and thus national rules on standing which denied access to the courts to enforce these Directives would not be contrary to Community law.<sup>118</sup> While this is likely to be the approach the ECJ would adopt, as with our domestic law on standing, I believe that a broader approach on access to the courts would be preferable so that illegality does not go unchecked (in the EC context this may be expressed as a concern with the effective enforcement of EC law). It is my belief that all citizens should be able to enforce, as against the state, all environmental Directives that are sufficiently clear, precise and unconditional<sup>119</sup> and that national laws on standing should not prevent them from doing so.

The only European Court case specifically to address the issue of access to national courts to enforce Directives is the non-environmental, *Rewe* case.<sup>120</sup> In his opinion, Advocate General<sup>121</sup> Capotorti distinguishes between persons with personal rights under Community law and persons who merely have an interest in the application of the law. Those with personal rights under a Directive can invoke it in national courts; those who have only an interest in the enforcement of that same Directive cannot invoke it.<sup>122</sup> Thus, AG Capotorti emphasises the difference between importers, who have a personal right (economic interest) under the Common Customs Tariff, and traders, who merely have an interest in seeing customs duties enforced because imported goods compete with goods produced at home.<sup>123</sup> If the ECJ were to follow this opinion, the only directly effective environmental Directives would be those which are intended to protect personal rights<sup>124</sup> Those intended to protect human health<sup>125</sup> and those intended only to

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<sup>118</sup>In other words, if a Directive specifically grants personal rights, or you have an economic interest under the Directive, or the Directive is intended to protect human health, standing must not be a barrier. If none of these apply, Community law does not require access to national courts.

<sup>119</sup>If a Directive does not satisfy these requirements (eg. it is unclear and imprecise), it will be difficult for a national court to determine the substance of the right and hence enforce it.

<sup>120</sup>Case 158/80 [1981] ECR 1805.

<sup>121</sup>The opinions given by the Advocate General are not as persuasive as the judgment of the Court, but they nevertheless carry considerable weight.

<sup>122</sup>Note 120 *ante*, para. 6 at p.1850. Capotorti states that "Any other view would entail allowing a kind of *azione popolare* [civil action serving as a test case on a matter affecting public interests] on the basis of directly applicable Community provisions."

<sup>123</sup>Of course, in one sense, the traders have an economic, *material* interest because they will suffer financially. It is however less direct. Also of note is that Capotorti's approach could be used to explain the Court of Appeal's decision in *R v Secretary of State for Employment, ex p. Equal Opportunities Commission* [1993] 1 All ER 1022. The woman who alleged discrimination had a personal right under the relevant Directive, while the EOC were denied standing because they merely had an interest in the enforcement of European law. The EOC were granted standing when the case went on appeal to the House of Lords - [1994] 2 WLR 409; however standing was arguably required here as a matter of national law (s. 53(1) Sex Discrimination Act 1975); on the basis of AG Capotorti's opinion in *Rewe* the EOC would not have been able to argue for standing as a matter of Community law.

<sup>124</sup>See note 117 *ante*.

protect the environment would not be directly effective and thus restrictive national rules on standing could remain in place for them.

The *Rewe* case appears to be the only one directly on the issue of access to national courts to enforce Directives. Nevertheless, one might argue that comments made by Advocates General and by the Court in a number of Article 169 cases brought by the Commission against Germany - while they concern the ability to enforce Directives in national courts through national legislation (or rather the inability to enforce Community rights when a Directive has been implemented via administrative means rather than legislative means) - are illustrative of how the ECJ might approach access to national courts to enforce environmental Directives directly.

Thus, the *ratio*<sup>126</sup> of these Article 169 cases concerns the need to have Directives implemented by proper, legislative means rather than by administrative means such as circulars: only if Directives are implemented into national law in a manner that is sufficiently binding, specific, clear and precise, can rights be created that are enforceable in national courts. In case C-361/88 for example, the Court states in relation to the limit values laid down in Article 2 of Directive 80/779 on air quality, "that whenever the exceeding of the limit values could endanger human health, the persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights." They ruled that Germany was in breach of Community law because it could not be claimed "that individuals are in a position to know with certainty the full extent of their rights in order to rely on them, where appropriate, before the national courts."<sup>127</sup> They would only be able to do this if the Directive had been implemented by legislative means. However, the cases also contain some significant *obiter dicta* on who might enjoy these rights. And while the cases only deal with access to national courts to enforce rights contained in *national legislation* - it is suggested that they provide our best guide as to how the ECJ might approach the issue of the direct effect of environmental *Directives*.

The most restrictive approach can be found in the opinion of Advocate General Jacobs in *Commission v Germany*, case C-58/89.<sup>128</sup> He argues that only those with personal rights under Directives 75/440 and 79/869 on Surface Water for Drinking (ie. water undertakings with economic interests) have a right to enforce them in national courts. Despite the fact that the Directives are stated to be intended for the protection of human

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<sup>125</sup>From a common-sense point of view, this might be classifiable as a personal right. However, none of the cases refer to it as such.

<sup>126</sup>Although, as the ECJ lacks a doctrine of binding precedent, the distinction between the *ratio decidendi* and *obiter dicta* is not of much significance.

<sup>127</sup>*Commission v Germany* [1991] I ECR 2567, para. 16, p.2601.

<sup>128</sup>*Commission v Germany* [1991] I ECR 4983.

health (this intention is stated in the preamble of the Directives), AG Jacobs thinks that it is going too far to suggest that "the national measures must be such as to confer rights on third parties to challenge inadequate compliance or implementation. It is true that the public at large, as well as ecologists and environmental pressure groups, have a general interest in water quality, and indeed in the respect for Community law. It does not however automatically follow that enforceable rights must be made available to them in the national courts."<sup>129</sup> Not only is this the most restrictive approach, it is also different to all of the other pronouncements below in that it deals directly with access to the courts.

In other cases, the issue of access is tackled rather more indirectly. In cases C-361/88 and C-58/89, the ECJ ruled that where an environmental Directive is intended to protect human health, it should be implemented in national law via legislative rather than administrative means so that people are able to find out what their rights are,<sup>130</sup> and - because of the mandatory nature of legislation - so that they can rely on them in national courts. In case C-361/88, the Court states that since the limit values laid down in Article 2 of Directive 80/779 on air quality are imposed "in order to protect human health in particular,"the implication is "that whenever the exceeding of the limit values could endanger human health, the persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights."<sup>131</sup> They held that Germany was in breach of Community law because it could not be claimed "that individuals are in a position to know with certainty the full extent of their rights in order to rely on them, where appropriate, before the national courts or that those whose activities are liable to give rise to nuisances are adequately informed of the extent of their obligations "<sup>132</sup> Similarly, in case C-58/89, the Court held that since Directives 75/440 and 79/869 on Surface Water for Drinking are intended to protect human health, it implies that "whenever non-compliance with the measures required by the directives in question

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<sup>129</sup>*Ibid*, at p 5008. Many will recall that one of the requirements of *Francovich* liability is that the Directive concerned must confer rights on individuals. In relation to *Francovich* liability, AG Jacobs, in a recent case (C-237 90 *Commission v Germany* unreported, but noted by Holder & Elworthy (1994) 31(1) *CML Rev* 123) has stated that the Drinking Water Directive 80/778 does confer rights on individuals other than water undertakers (Holder and Elworthy, p 132) Unless this statement is limited to *Francovich* liability cases, this would of course represent a change of heart by AG Jacobs. However one assumes that AG Jacobs would not extend his comments on rights in liability cases to rights associated with the enforcement of regulation. For analysis of the implications of *Francovich* for environmental law, see Holder and Elworthy, and Somsen & Bovis, 'Enforcement of EC Environmental Law and the Implications of the *Francovich* Judgement' (1992) 3 *Water Law* 84.

<sup>130</sup>Legislation is more easily accessible

<sup>131</sup>*Commission v Germany*, note 127 *ante*, at para. 16, p.2601

<sup>132</sup>*Ibid*, para. 20, p 26 2



might endanger the health of persons, those concerned should be able to rely on mandatory rules in order to enforce their rights."<sup>133</sup>

What of Directives which are not intended to protect human health, such as the Groundwater Directive 80/68 and the Dangerous Substances in Water Directive 76/464? (The preambles in both of these Directives do not state that they are intended to protect human health).<sup>134</sup> The judgment in case C-131/88<sup>135</sup> states that the Groundwater Directive 80/68 must be implemented in a clear and precise manner so that those who enjoy individual rights under the Directive - ie. companies concerned with the substances referred to in the Directive - can ascertain their rights and, where appropriate, rely upon them before national courts.<sup>136</sup> While the judgment is silent on the position of ordinary citizens, the implication of the cases discussed in the previous paragraph is that, since the Groundwater Directive is not intended to protect human health, it would not be necessary for individuals to be in a position to know with certainty the extent of their rights in order to rely on them. However, it is worth noting the opinion of Advocate General Van Gerven in the case. Despite the fact that the Directive is not intended to protect human health, he states that proper implementation is important for third parties as well as those who enjoy personal rights under the Directive: "Clear and precise implementation of the directive's provisions may also be important for third parties (for instance environmental groups or neighbourhood residents) seeking to have the prohibitions and restrictions contained in the directive enforced as against the authorities or other individuals."<sup>137</sup>

The ECJ might choose from a similar range of approaches in deciding on the direct effect of environmental Directives. First, they could rule, following AG Capotorti in *Rewe* and the logic of AG Jacobs in case C-58/89 that only those with a personal interest in a Directive should be entitled to enforce it in national courts irrespective of national laws on standing. Secondly, they could follow the logic of cases C-361/88, C-59/89 and C-58/89 and enable not only those with a personal right, but also - where the Directive is intended to protect human health - ordinary citizens, to enforce their rights in national courts. This, it is submitted, is the approach which the ECJ would probably adopt. However, it will be thought by many that even this slightly broader approach is unduly

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<sup>133</sup>Note 128 *ante*, para. 14, p.5023. It added that a further reason for establishing the limits in a binding form is to enable the operators of surface water sampling points to know exactly what their obligations are.

<sup>134</sup>Despite this, there is a sense in which both Directives are intended to protect human health, albeit indirectly.

<sup>135</sup>*Commission v Germany* [1991] I ECR 825.

<sup>136</sup>*Ibid.*, para. 7 of the judgment, p.867.

<sup>137</sup>*Ibid.*, para. 7 of his opinion, p.850.

restrictive given the recent concern about the enforcement of Community law. The Commission is undoubtedly over-stretched for the purposes of Article 169 proceedings,<sup>138</sup> and the House of Lords Select Committee on the European Communities, among others, has come out in favour of allowing 'citizen actions' as an effective, alternative means of ensuring compliance with Community environmental law.<sup>139</sup> One way of meeting this concern about the enforcement of Community law, would be to follow the logic of AG Van Gerven's approach in case C-131/88 and allow all citizens to enforce, as against the state, all environmental Directives - whether intended to protect human health or not - that are sufficiently clear, precise and unconditional, and to ensure that national laws on standing do not prevent them from doing so.

*The Draft Directive on Access to Environmental Justice.* In fact, access to national courts in environmental cases may soon depend not on domestic or ECJ case-law, but on a Directive on the subject. Under the recent Council draft proposal for a Directive on access to environmental justice<sup>140</sup> environmental groups (but not individuals)<sup>141</sup> would simply look to the Directive on access to justice to provide their justification for standing. The Directive would cover access to justice in all cases, not just those which involve an environmental Directive. And the rights of access are drawn extremely broadly, so that litigants with any class of interest, whether it be economic, health-based, or ideological, would be able to bring actions in their national courts.

Thus, citizen actions - the apotheosis of a liberal, expansive approach to standing - may soon be upon us, not through the common law, but via the statutory reach of the EC. Of course, individuals - and groups if they cannot bring themselves within the terms of the Directive - will need to fall back on national law on standing or ECJ decisions. Even then, the introduction of the Directive may lead to a general revision of our laws on

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<sup>138</sup>On Art. 169 proceedings in respect of environmental Directives and some of the problems associated with the procedure, see Macrory, 'The Enforcement of Community Environmental Laws: Some Critical Issues' (1992) 29 *CML Rev* 347.

<sup>139</sup>HOL Select Committee on the European Communities, 9th Report, 'Implementation and Enforcement of Environmental Legislation', HL 53, session 1991-2, p.45; see also HL debates, 21 January 1993 (reported in 216 *ENDS Report* (1993) 26), and Geddes, note 77 *ante*, at p.39.

<sup>140</sup>Unpublished.

<sup>141</sup>The thinking behind this may be the same as that given for favouring groups over individual applicants in the *Greenpeace* case discussed earlier. While the draft Directive reflects a concern set out in the 5th Environmental Action Programme ('Towards Sustainability: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development', OJ 1993, C138/5) to improve access to justice in environmental law, it differs in that 'Towards Sustainability' stresses the role of individuals and groups. In ch. 9, at p.82, it states that "*Individuals and public interest groups should have practicable access to the courts in order to ensure that their legitimate interests are protected and that prescribed environmental measures are effectively enforced and illegal practices stopped*" (emphasis added).

standing, so that there would be no difference between those who could and those who could not bring themselves within the Directive's terms, and no difference in standing between environmental cases and other cases.

### 5.2.6.3 Grounds of Review

The next matter to be considered is the grounds of review. However, before proceeding, it must be noted that there have been very few reported judicial review cases concerning pollution control.<sup>142</sup> The following section is therefore something of a crystal ball. One of the problems with doing 'anticipatory' law rather than commenting on decided cases is that one lacks a designated framework within which to operate. There are essentially three possible approaches that might be taken here: first, one could write a complete guide to the grounds of judicial review, commenting on how, for example, illegality, irrationality and procedural impropriety<sup>143</sup> may arise in actions reviewing the standard-setting decisions of environmental agencies;<sup>144</sup> secondly, one could comment on the few decided cases there are in the area of environmental law; thirdly, rather than using the grounds of judicial review as one's framework, one could structure the discussion around the statutes. I will largely be adopting the third approach - examining how various provisions of the EPA 1990 and the WRA 1991 may give rise to judicial review,<sup>145</sup> although I will be adopting the second approach where there have been cases on a particular statutory provision. To a great extent, the section is an attempt to react to statements made on judicial review of these provisions that have been made by commentators,<sup>146</sup> and it is this that provides the section's structure. In the context of examining specific provisions, the ground of review will usually be breach of statutory duty, which - if one wishes to bring it within Lord Diplock's categorisation in

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<sup>142</sup>Five significant reported cases to date include: *ex p. FOE* (note 65 ante); *Greenpeace v NRA* (note 145 post); the *Leigh Environmental* case (see the text at notes 60-61 ante); *Cutts v Southern Water Authority* (note 150 post); and *AG's Ref. (No. 2 of 1988)* [1990] JEL 80. The *Leigh* case rather proves the point I make in the text - that crystal ball gazing is difficult here - it would have been hard to foresee the exact ground of the *Leigh* challenge. The same could be said of the *Cutts* case and the *AG's Ref.*

<sup>143</sup>The three grounds set out by Lord Diplock in *CCSU v Minister for Civil Service* [1985] AC 374.

<sup>144</sup>Adopting this approach, one might examine eg. : i) natural justice - if for example an environmental group are involved in an appeal and can point to some sort of bias on the part of the Inspector, they could bring a review action to have the decision quashed (in a planning context see eg. *Simmons v Secretary of State for the Environment* [1985] JPL 253); ii) illegality - if for example HMIP sought to apply BATNEEC to a non-prescribed process, this would clearly be ultra vires and the company concerned would be able to seek review to have the decision quashed. This sort of approach is largely the one taken by Murdie in *Environmental Law and Citizen Action*, at pp.88-93, and by Ball & Bell, *Environmental Law*, pp.25-26.

<sup>145</sup>It is partly for this reason that this whole section is entitled 'Accountability for standard-setting and other operational decisions' - not all of the provisions I examine which may attract review are concerned with standard-setting *per se*.

<sup>146</sup>See eg. Macrory, note 161 post; Purdue, Harris, and Gibson, note 187 post; and Lomas, note 251 post.

the *CCSU*<sup>147</sup> case - would come under illegality. It must be stressed that I am not attempting to provide a definitive or comprehensive account of judicial review of environmental agencies. It is my selection and others would no doubt choose to highlight different issues.

#### 5.2.6.4 Judicial Review of the NRA<sup>148</sup>

There have been two cases involving judicial review of public authority water pollution control functions. One was the case brought by Greenpeace against the NRA over an Albright & Wilson plant.<sup>149</sup> The other was a case brought before the privatisation of the water industry, by a private individual, Mr Cutts, against Southern Water Authority and another.<sup>150</sup>

The *Cutts* case centred around the problems which fish farming poses to our water courses. There are two problems associated with fish farming: first, it involves considerable water abstraction which can lead to low flows which render impassable the natural or artificial channels through which migrating fish gain access to their breeding grounds in upper waters; second, when this abstracted water is returned to the river, it often contains highly polluting excreta and chemicals, and escaped fish. Wild fish are threatened either because the excretal pollution kills off the flora and fauna on which they depend, or because the voracious farmed fish eat most of it, or, more controversially, because the farmed fish breed with the wild fish and destroy the homing instincts which lead the wild fish back to their breeding grounds. Mr Cutts - a riparian owner described by the court as an 'enthusiast', but with little legal knowledge<sup>151</sup> - was concerned about the effect which a rainbow trout fish-farm was having on salmon in his local river. He did not feel that the local water authorities - the bodies responsible for pollution control at that time - were doing enough to combat the problem. He therefore sought judicial review to try to force them into action.

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<sup>147</sup>Note 143, *ante*.

<sup>148</sup>Or, in relation to certain NRA functions, the Secretary of State.

<sup>149</sup>*Greenpeace v NRA*, 200 ENDS Report (1991) 4; 201 ENDS Report (1991) 9; 203 ENDS Report (1991) 5; 206 ENDS Report (1992) 10.

<sup>150</sup>*Cutts v Southern Water Authority* (1990) 4 *Env Law* 8 (CA); (1990) 4(2) *LMELR* 132; full transcript on Lexis.

<sup>151</sup>Mr Cutts was represented by counsel in one of the original applications, but due to some fairly fundamental misunderstandings, counsel was dismissed. He represented himself on appeal. In his judgment, Mustill LJ. referred to the relevant principles of judicial review, commenting that: "They are so well-established that in an ordinary Crown Office case they would be taken for granted. I restate them here partly because they are too often ignored by applicants and their advisers, and partly because it is plain that Mr Cutts has not grasped them and might be inclined on some future occasion to waste his own and the public's time and money on applications which are bound to fail" (Lexis).

In the only particularised version of his original applications, Mr Cutts was seeking an order of mandamus compelling various water authorities to perform their duties under the Salmon and Freshwater Fisheries Acts of 1923 and 1975 in relation to pollution from fish farms. The trial judge dismissed the applications on the grounds that the authorities had not transgressed the law and that Mr Cutts had alternative remedies available to him in the shape of private prosecution of offenders (ie. the fish farmers) and a local inquiry under section 108 Water Resources Act 1963. On appeal, Mr Cutts gave further particulars of the orders he wished the court to make by way of mandamus. Mustill LJ. placed considerable weight on Lord Brightman's judgment in *Pulhofer v Hillingdon*<sup>152</sup>, which adopted a deferential stance in relation to homelessness decisions made by housing authorities. Mustill LJ. stated that review would only lie if the authority had failed to address the question at all, had taken into account irrelevant considerations or failed to take into account relevant considerations, or had acted in a *Wednesbury* unreasonable fashion (ie. making a decision which no other reasonable authority could have made). The judgment was divided into two sections - one section dealt with salmon passes, the other with pollution. On both issues, Mustill LJ. stated that none of the above grounds had been made out. First, the authorities arguably lacked the powers to take the action sought by Mr Cutts. Second, even if the authorities did have the powers and could in theory bring a prosecution (under sections 12 and 13 of the 1975 Act in respect of salmon passes and section 32(1) COPA 1974 in respect of the pollution), the court would not order them to do so because they had not failed to consider the problem, they had not omitted to consider relevant factors and they had not made a decision which could be characterised as absurd. Finally, Mr Cutts had other avenues available to him - both political and in the shape of statutory mechanisms such as a local enquiry under section 120 Water Act 1989. Some of Mustill LJ.'s concluding comments are perhaps of even greater interest, for the evidence they reveal of the court's general stance in this category of review case - a stance which *could* be adopted in future review actions involving pollution control authorities. The stance is decidedly 'hands-off'. He states that the court is not a:

"managerial overseer of the performance of the Authorities of their statutory duties and powers ... the court deploys neither the time nor the technical qualifications and experience to perform any such function, in relation to thousands of persons and bodies who every day are performing tasks on the boundary between public and private life. Much more importantly, however, the court ought not to attempt such an enterprise. The electors have chosen Parliament, and the Queen in Parliament has appointed the public bodies, allocated their tasks, and provided whatever powers and resources it has considered necessary to carry them out. The courts must respect this choice. The individual judge might in the particular case think that legislation, or the policy, or the

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<sup>152</sup>*Pulhofer v Hillingdon LBC* (1986) AC 484 particularly at p.518.

deployment of means could profitably have taken a different form. Or he might suspect that the chosen body could have performed its functions with more skill and energy. Even if he did form these opinions it would not matter, for it is the persons and bodies put in place by Parliament, not the courts, who are there to run the country. Through the developing jurisdiction of judicial review the courts perform an essential service, protecting the citizen from injustice and misuse of powers, but the benefits will be compromised if the court allows itself to be drawn into performing functions which properly belong elsewhere."<sup>153</sup>

Thus, at face value, the *Cutts* case - a Court of Appeal decision and therefore of some precedential weight - is not exactly full of promise for those arguing for judicial review of the decisions and actions of pollution control authorities. Nevertheless, examination of the detail reveals a less gloomy picture. The authorities appear to have lacked the powers to deal with the problems identified by Mr Cutts and the court was unwilling to review the prosecutorial discretion of the authorities. However, in future cases, the NRA and other bodies may have the power to tackle a problem and the courts may be prepared to review decisions not to prosecute (this latter point will be addressed in the next chapter). The 'hands-off' stance which Mustill LJ. appears to advocate cannot be taken as a blueprint for all future cases. Furthermore, *Cutts* is a highly peculiar case. Not only does it involve the review of pre-privatisation pollution control authorities, it also involves extremely complex subject matter which was not presented to the court in the best light.

*Greenpeace v NRA* did not proceed beyond the leave stage. Greenpeace decided not to pursue the leave because there were signs that Albright & Wilson were cleaning up their act and that the NRA had stepped up its monitoring of the plant and were due to tighten the consent. As Sarah Burton, Greenpeace's solicitor, stated in a letter to *Environment Law Brief*, for those reasons, they "took the view that the threat of these proceedings had in fact achieved virtually all that the Court itself could have ordered had we pursued the matter and we did not consider this to be a responsible use of our supporters' money."<sup>154</sup> They had to pay the NRA's costs up to that date, but these were not as great as some parties made out.<sup>155</sup> ENDS therefore overstates matters when it says that Greenpeace were dealt a "bloody nose."<sup>156</sup> The case raises a number of interesting points. First, it is not entirely clear from the reports the precise grounds of review upon which Greenpeace were relying, although they appear to have been breach of the duty in section 106 Water Act 1989 and a failure to monitor properly.<sup>157</sup> Some reports suggest

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<sup>153</sup>Lexis.

<sup>154</sup>(1992) 3(7) *Env Law Brief* 61.

<sup>155</sup>*Ibid.*.

<sup>156</sup>206 ENDS Report (1992) 10.

<sup>157</sup>200 ENDS Report (1991) pp.4-6.

that failure to prosecute was also a ground,<sup>158</sup> which is not surprising given that Greenpeace felt compelled to bring a private prosecution. Whether it formed a part of their case or not, the legal position on judicial review of the discretion to prosecute was perhaps uncertain at the time.<sup>159</sup> The second interesting point about the case is that it illustrates that pressure groups use judicial review for their own purposes (eg. publicity), and not to create precedents and answer questions which academic lawyers would like to see answered (eg. whether they might have successfully reviewed the NRA's decision not to prosecute).<sup>160</sup>

However, it is worth considering whether Greenpeace's challenge on the basis of section 106 might have succeeded. Section 84(1) WRA 1991 (previously section 105 Water Act 1989) states that:

"It shall be the duty of the Secretary of State and of the Authority to exercise the powers conferred on him or it by or under the water pollution provisions of this Act ... in such manner as ensures, so far as it is practicable by the exercise of those powers to do so, that the water quality objectives specified for any waters ... are achieved at all times."

Section 84(2) (previously section 106 Water Act 1989) continues:

"It shall be the duty of the Authority, for the purposes of the carrying out of its functions under the water pollution provisions of this Act - (a) to monitor the extent of pollution in controlled waters ..."

Richard Macrory has suggested that:

"Direct enforcement of the duty by means of judicial review may not prove easy, but individual control decisions such as the setting or revision of discharge consents may prove more susceptible to appeal or legal challenge by both industry and third parties on the grounds that they do not reflect the requirements of the general duty."<sup>161</sup>

I would agree that the advent of ambient statutory water quality objectives (SWQOs) under section 83 Water Resources Act 1991, coupled with the duty imposed on the

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<sup>158</sup>(1991) 3(6) *LMELR* 202.

<sup>159</sup>It is hopefully clearer now that such powers are reviewable - see my article in the *Criminal Law Review* [1993] 739 and chapter 6 here.

<sup>160</sup>See further Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) 55 *MLR* 44 at p.46; see also Harlow and Rawlings, *Pressure Through Law*, for a historical account of the use of judicial review by pressure groups.

<sup>161</sup>Macrory, 'The Privatization and Regulation of the Water Industry' (1990) 53 *MLR* 78 at p.85. The issue of the match between consents and SWQOs is separate from the issue of breach of SWQOs which was dealt with in chapter 4.

NRA and the Secretary of State in section 84, should make it possible for environmental organisations to bring judicial review actions where consent standards are insufficiently strict to ensure that water quality objectives are met.<sup>162</sup> With such challenges, it could be argued that if, based on a recognised modelling system, the consented standards would necessarily lead to a breach of SWQOs on paper (or computer), then the NRA will be in breach of their section 84 duty.<sup>163</sup> A court could then grant an order of mandamus, requiring the NRA to tighten-up the consents to ensure the SWQO was achieved, at least 'on paper'.

Challenges by companies on the basis that their standards are unnecessarily strict in relation to SWQOs, are likely to prove more difficult.<sup>164</sup> To begin with, it would appear perfectly legitimate for the NRA to leave a 'buffer zone' to cope with freak discharges and new entrants. Even if a company was able to establish that the buffer zone was excessive, if there were several other dischargers in the area, the company would have to share out any reduction with these others. Even then, the question is not exactly straightforward. To a great extent, the matter will turn on the type of substances that a company is emitting. Discharges to water from non-prescribed processes are controlled by the NRA, discharges from prescribed processes by HMIP. HMIP will be considered in the next section, because the introduction of BATNEEC complicates matters. The NRA thus has direct control over discharges to water from non-prescribed processes, which might emit any of the following substances:

a) 'red list' substances (the UK 'red list' contains all the substances on the EEC 'black list' (List I) and some 'grey list' (List II) substances from Directive 76/464 - the Dangerous Substances in Water directive).

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<sup>162</sup>*Cf.* the conservation duty on the NRA in s.16 WRA 1991. This would be much more difficult to enforce by way of judicial review than the s.84 duty because it is so general. The s.84 duty, in contrast, requires something very specific - the achievement of SWQOs. Where duties are couched in very general terms and leave considerable discretion to the authorities, the courts will be very reluctant to grant remedies to enforce those duties in judicial review actions - see Wade, *Administrative Law*, pp.614-5; *cf.* Cane. 'Ultra Vires Breach of Statutory Duty' [1981] *Public Law* 11.

<sup>163</sup>Even if the breach of SWQOs was nothing to do with consented emissions, environmental groups could, if any IPC firms discharging to water were present, bring a review action for breach of the duty in s.7(2)(c) EPA 1990 to include conditions in an authorisation which ensure compliance and achievement of any quality objective prescribed by the Secretary of State. The authorities would then, as a result of s.7(2)(c), seemingly be obliged to load the responsibility for meeting SWQOs onto the IPC processes, irrespective of their treatment of non-IPC dischargers and irrespective of the fact that non-consented discharges (eg. diffuse, agricultural run-off) were the main cause of the breach of SWQOs.

<sup>164</sup>Macrory note 161 *ante*. One assumes that this is what Macrory has in mind. It seems unlikely that industry would go to the length of checking whether competitors' emissions were contributing to a breach of SWQOs. Of course, if a company is claiming that its consent is too strict given the SWQO, the ground of review is rather problematic. It could be breach of duty, but that assumes that the s.84 duty can be read negatively - ie. as a duty to tie emissions to SWQOs and nothing else. Alternatively, the ground could be failing to consider a relevant consideration, or improper purpose.



- b) non- red list substances which are however EC list II substances;
- c) non- red list, non- list II substances.

The chances of a company mounting a successful challenge - that its consent conditions are overly stringent for the purposes of meeting the SWQO - should depend on which of the above substances it is emitting.

If the challenge related to one of the 'red list' substances in (a) above, these are mostly toxic, bioaccumulable or persistent and need to be systematically controlled over the long-term - not just for their short-term impact on the environment. Water quality standards for these substances do not ensure a safe level of bioaccumulation or persistence. Nobody can be entirely sure what a 'safe' level of dangerous substances in water is; such substances, even in minute concentrations, may pose a long-term threat. Hence the need for a 'precautionary' approach:

"Setting safe environmental quality standards may be difficult for some substances - we do not yet know enough about the properties of some of the most dangerous substances, and the potential long-term risks they pose to the environment and to man, to set quality standards with complete confidence ... because of uncertainty about the effects of these substances, the precautionary principle would suggest that we should take measures to minimise inputs to the environment from point and diffuse sources so far as is practicable."<sup>165</sup>

This precautionary approach is enshrined in Directive 76/464, which makes it clear that the aim is to minimise the input of List I substances; this aim was emphasised in the DOE circular on the implementation of Directive 76/464:

"Nor should the control of discharges be relaxed simply because the appropriate quality objective is easily met; in applying the EQO approach, competent authorities should always consider the quality standard set to achieve a particular quality objective as a minimum to be achieved, and aim for a quality objective as well within that standard as possible."<sup>166</sup>

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<sup>165</sup>DOE, 'Inputs of Dangerous Substances To Water: Proposals For A Unified System Of Control', July 1988, para. 17, pp.7-8.

<sup>166</sup>DOE Circular 7/89, 'Water And The Environment', p.6.

If it is emitting a substance as in (b) above, its challenge may also fail, because Directive 76/464 and DOE Circular 7/89 make it clear that pollution by list II substances must be reduced. The Circular states:

"Having identified the appropriate quality standard, competent authorities should determine discharge emission standards (ie. consent conditions) for individual discharges so that the receiving water quality is maintained as far below the quality standard as practicable."<sup>167</sup>

If on the other hand, the emission relates to a substance of the type in (c) above, the company should stand more chance of success. However, it would still have to demonstrate that the 'buffer zone' is unreasonably large for the purposes of allowing new entrants and for coping with 'freak' discharges. This will not be an easy task.

#### **5.2.6.5 Judicial Review of HMIP and Local Authorities (APC)<sup>168</sup>**

Some challenges are likely to be centred around the core concept of IPC and APC - BATNEEC. While review may lie against both HMIP (*IPC*) and local authorities (APC), for the sake of convenience, I will be referring only to HMIP. References to HMIP in this section should therefore be taken to include local authorities unless otherwise stated. HMIP are, by section 7 EPA 1990, under a duty to require prescribed processes to use the best available techniques not entailing excessive cost (BATNEEC) to: prevent, reduce, or render harmless the release of any prescribed substances; to render harmless the release of any non-prescribed substances; to comply with any quality objectives (eg. SWQOs or AQSs); and to comply with any requirements specified by the Secretary of State for the purposes of meeting EC or international environmental obligations, or for the purposes of a national plan made under section 3(5).

There are obviously myriad ways in which a review action based around section 7 may arise. If, for example, HMIP attempted to impose BATNEEC on a non-prescribed process, this would clearly be *ultra vires*. However, for the most part I will be concentrating on the core concept of BATNEEC itself.

Before doing so, it is worth mentioning an interesting review possibility raised by subsection (2)(a) of section 7. When looking at judicial review of the NRA earlier, it was suggested that a review action might be available to an environmental group unhappy with a consent granted to a discharger, if it could establish that the consent

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<sup>167</sup>*Ibid.*, p.14.

<sup>168</sup>Both may be subject to review in respect of decisions on air pollution; HMIP also for water pollution where prescribed processes are concerned. In certain circumstances, besides HMIP and local authorities, the Secretary of State may also be subject to review.

would inevitably lead to a breach of the SWQO. In a footnote,<sup>169</sup> it was further noted that even if the breach of the SWQO was nothing to do with consented emissions, environmental groups could, if any IPC firms discharging to water were present, bring a review action against HMIP for breach of the duty in s.7(2)(c) EPA 1990 to include conditions in an authorisation which ensure compliance and achievement of any quality objective prescribed by the Secretary of State. Under s.7(2)(c), the authorities would seemingly be obliged to load the responsibility for meeting SWQOs onto the IPC processes, irrespective of their treatment of non-IPC dischargers and irrespective of the fact that non-consented discharges (eg. diffuse, agricultural run-off) were the main cause of the breach of SWQOs. The same may be true in relation to AQSs and emissions to air. If AQSs have been or seem likely to be breached, environmental groups could arguably bring a review action against the enforcing authorities for breach of the duty in s.7(2)(c) to include such conditions in authorisations such that quality standards or objectives prescribed by the Secretary of State are achieved. As the law stands, industrial processes subject to Part I EPA control must be set authorisations strict enough that AQSs are met. Subsection (2)(c) is not constrained by any limitation such as *NEEC in BATNEEC*. *This may not be fair, as the transport sector is just as, if not more, responsible for any breaches in AQSs,*<sup>170</sup> but unless the law is changed or unless other means are found to address the problem, the enforcing authorities would appear to be under a duty to achieve AQSs in this manner.

Moving on to arguably the core concept of section 7 - *BATNEEC* - companies and pressure groups<sup>171</sup> may seek to argue either that HMIP has erred in law<sup>172</sup> in its interpretation of *BATNEEC*, or that a factual error occurred in determining the authorisation. Or they might claim that although the facts and calculations are correct, and the law correctly stated, HMIP have mis-applied the relevant law to the relevant facts. For example, it might be claimed that while HMIP's cost calculations are accurate and their interpretation of 'NEEC' valid, their assessment that the costs are not excessive is mistaken. This may then indicate that the test or interpretation they are actually using is not the one they claim to be using, in which case a question of law is involved.

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<sup>169</sup>Note 163 *ante*.

<sup>170</sup>See DOE, 'Improving Air Quality', 1994, eg. paras. 4.23 and 5.3.

<sup>171</sup>See further Purdue, 'Integrated Pollution Control in the Environmental Protection Act 1990: A Coming of Age of Environmental Law?' (1991) 54 *MLR* 534. At p.541, Purdue notes that a private prosecution cannot be brought against a company complying with the conditions laid down by HMIP, even if a third party thinks those conditions are in breach of the *BATNEEC* principle. He states that it may, however "be open to a pressure group or other interested party to bring an action for judicial review to have the specific condition quashed or declared invalid."

<sup>172</sup>Bearing in mind the previous paragraph where it can be seen that s.7 imposes a *duty* on HMIP to require *BATNEEC*, the ground of review would arguably be breach of duty. However, the question of whether the duty has been breached can only be answered by considering whether eg. an error of law has occurred.

However, the better view is that of Emery and Smythe, who state that the application of law to facts is a question of fact and degree and ought only to be overturned on *Wednesbury* unreasonable grounds.<sup>173</sup> In fact, the two may not be so very different, because if one is led to believe that a different test to the one stated is being used, the decision under the stated test is also likely to be *Wednesbury* unreasonable in relation to that test.

The law on error of law and the law on mistake of fact<sup>174</sup> is, historically, rather confused.<sup>175</sup> Basically, with both areas there are two extreme approaches and the law has veered between these. Both extremes have a sound constitutional basis. On the one hand, the courts can allow mistakes of law and fact to pass unchallenged and unchallengeable. The constitutional justification for this would be that this is what Parliament impliedly intended.<sup>176</sup> Following *Pepper v Hart*<sup>177</sup>, if a minister, in the course of debates on a Bill, has made it clear that the body concerned is to be the final arbiter of a matter, then this would lend further justification to non-intervention on the basis of the intention of Parliament.<sup>178</sup> On the other hand, the courts can choose vigorously to defend the constitutional principle of the separation of powers. On this view, the executive creates law via Parliament, but the courts are there to interpret it: to allow the executive to be the final arbiter of the meaning of a statutory term would destroy the principle of the separation of powers.

With mistakes of fact, the courts can adopt either an expansive approach to judicial review or a limited approach:

- 1) Under an expansive approach, the courts would adopt the view that decisions based upon mistaken facts are examples of injustice which they should remedy;<sup>179</sup>
- 2) Under a limited approach, the judgment would be that a discretionary power to make decisions includes the power to make decisions based on factual error.<sup>180</sup>

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<sup>173</sup>Emery & Smythe, *Judicial Review*, pp.95-7 and pp.108-127.

<sup>174</sup>Not the same as 'jurisdictional mistake of fact' - see Jones, 'Mistake of Fact in Administrative Law' [1990] *Public Law* 507; there are very few cases involving jurisdictional fact.

<sup>175</sup>However, a reasonable account of jurisdiction is given by Craig, *Administrative Law*, ch. 9.

<sup>176</sup>Although the courts seem to have no qualms about intervening when Parliamentary intention expressly provides for non-intervention in the form of ouster clauses - see eg. *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

<sup>177</sup>[1994] 1 All ER 42.

<sup>178</sup>See further Oliver, '*Pepper v Hart: A Suitable Case for Reference to Hansard?*' [1993] *Public Law* 5 at pp.12-13. Oliver and others (See for example Baker, 'Statutory Interpretation and Parliamentary Intention' (1993) 52 *CLJ* 353) have questioned *Pepper v Hart's* constitutional integrity on the grounds that the intention of one person (the minister) cannot represent the intention of the whole of Parliament.

<sup>179</sup>See Jones, note 174 *ante*, at p.512.

<sup>180</sup>*Ibid.*

In practice, Jones suggests, the courts adopt a mid-path between these two extremes. For example, they might hold that the mistake of fact must be 'material' - in the sense that a different decision would have been made without it;<sup>181</sup> or they might only challenge a mistake of fact if it is *Wednesbury* unreasonable.<sup>182</sup> As Jones notes,<sup>183</sup> the 'material' approach will lead to the courts intervening more frequently, because there may be many material mistakes which are not perverse in the *Wednesbury* sense. The recent case of *R v ITC, ex p. TSW Broadcasting Ltd*<sup>184</sup> contains seemingly conflicting opinions on the matter: Lord Templeman expressed a view similar to that in (2) above - that to interfere would involve the court substituting its views for those of the ITC; Lord Goff, on the other hand, adopted something akin to the 'material' approach. Lord Goff's approach is to be preferred, because to quash a decision founded upon error is not to substitute one's own view, but rather to correct a mistake. In any event, mistake of fact is seldom likely to be an issue in the determination of pollution authorisations. This is because, in cases like the *ITC* case - the only way to resolve the effect of the mistake would have been to take the franchise away from the 'winner' and start the process all over again - which would have involved considerable expense, delay and uncertainty. No such problems arise with discharge authorisations, because correcting the mistake is a relatively simple operation: correcting the error will be less costly for HMIP than defending a judicial review action.

With questions of law, the courts have recently followed the logic of the *Anisminic*<sup>185</sup> case and decided that all errors of law are jurisdictional.<sup>186</sup> In other words, a body cannot misdirect itself as to the law and not then be subject to judicial review. Previously, it was possible to have a non-jurisdictional error of law - errors of law made by a body would not be reviewed as long as those errors were made within their jurisdiction. Now that the courts have decided that all errors of law are reviewable, they are free to intervene with decisions when they wish to do so. However, there will be occasions when they do not wish to intervene with what, on the face of it, is an error of law. Of course, if they think there has been no error, the court will have no problems. If they think there has been an error, there will be two approaches available to them: first, they can decide, as in *ex p. Page*, that it is simply not an area which is amenable to judicial review on the grounds of error of law; second, they can classify the question as

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<sup>181</sup>*Mason v Secretary of State for the Environment and Bromsgrove District Council* [1984] JPL 332 at 333 - see Jones, note 174 *ante*, at p.515.

<sup>182</sup>See Lord Brightman in *Pulhofer v Hillingdon LBC* [1986] AC 484 at p.518 - see Jones, note 174 *ante*, at p.516.

<sup>183</sup>Jones, note 174 *ante*, at p.518.

<sup>184</sup>*The Times*, 7 February 1992 (noted by Jones, 'Judicial Review Of The Independent Television Commission' [1992] *Public Law* 372).

<sup>185</sup>Note 176 *ante*.

<sup>186</sup>See *R v Hull University Visitor, ex p. Page* [1992] 3 WLR 1112 at p.1123.

one of fact and degree rather than one of law. This classification is likely to be made on an *ex post facto* basis - having decided not to intervene, they will label the question as one of fact - rather than on the basis of pre-existing principle. So what will the position be in relation to HMIP and BATNEEC? It is difficult to predict which approach the courts would adopt.<sup>187</sup> On the one hand, our courts have traditionally adopted a non-interventionist stance in relation to regulatory agencies, which would point towards leaving the meaning of BATNEEC for HMIP to decide. They may also feel ill-equipped to tackle the complex ecological and economic questions raised by an interpretation of BATNEEC.<sup>188</sup> On the other hand, the courts may be inclined to intervene to provide companies with some certainty in an area of confusion. HMIP would appear to have done little to lift the burden of this uncertainty; it may well be that the courts would feel duty bound to step in to remedy this. In addition, the shadow of *Pepper v Hart* looms large again at this point because counsel may argue that a conflict between HMIP's interpretation and that put forward by the Minister in Parliament should lead the court to intervene to uphold the will of Parliament. The requirements of *Pepper v Hart* are that the words should be ambiguous or obscure, that the material relied upon must consist of statements made by the Minister or other promoter of the Bill and finally that those statements should be clear.<sup>189</sup> There is no problem with the first requirement here - BATNEEC is certainly obscure. As for the second, one significant discussion of BATNEEC does take place at the committee stage,<sup>190</sup> but most of the talking is done by Bryan Gould rather than David Trippier, the Minister promoting the Environmental Protection Bill. On the final requirement, scrutiny of *Hansard* does not reveal much in this particular case, although the Minister does make it clear that BATNEEC is supposed to be stricter than the old best practicable means

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<sup>187</sup>Most of the articles on IPC assume that BATNEEC will be interpreted by the courts. Gibson states that "Since BATNEEC is embodied in the legal requirements for authorisations, its interpretation should in theory be a matter for the courts" (p.25). Harris states that "It is inevitable, however, that the courts will play a major part in refining the definition(s) of BATNEEC" (p.622). Purdue comments that "It is likely that that the court would only interfere where there was clear evidence that the specific condition did not in fact achieve BATNEEC, or that the authority had erred in law in its interpretation of that term" (p.541). (Gibson, note 5 *ante*; Harris, 'Integrated Pollution Control In Practice' [1992] *JPEL* 611; Purdue, note 171 *ante*).

<sup>188</sup>See eg. *Cutts*, note 150 *ante*. This may indicate a need for a specialist environmental court - see eg. Woolf, 'Are the Judiciary Environmentally Myopic?' (1992) 4 *JEL* 1; Carnwath, 'Environmental Enforcement - The Need for a Specialist Court' [1992] *JPEL* 799, and McAuslan, 'The Role of Courts and Other Judicial Type Bodies in Environmental Management' (1991) 3 *JEL* 195. For a similar argument in the US, see Trubatch, 'Informed Judicial Decision-making; A Suggestion for a Judicial Office for Understanding Science and Technology' (1985) 10 *Col Jo of Env Law* 255.

<sup>189</sup>For the application of *Pepper v Hart* in a different environmental context (conservation - s.28 of the Wildlife and Countryside Act 1981) - see (1993) 4 *Water Law* 88.

<sup>190</sup>HC Standing Committee H, 30 January 1990. In the Lords, it was declared that a draft of the first DOE guide which was referred to as giving the Government's general interpretation of BATNEEC, had been placed in the Library (HL Debates cols. 767-8, 26 April 1990). Whether, following *Pepper v Hart*, this therefore makes the draft of the first DOE guide conclusive as to the interpretation of BATNEEC, is open to question.

(BPM) standard and that standards must be met irrespective of financial difficulties facing a particular firm.<sup>191</sup> The relevance of the latter will become obvious as the discussion proceeds.

#### 5.2.6.5.1 A 'Hands-off' Stance by the Courts

If the courts adopt a 'hands-off' approach, we need to scrutinise closely HMIP's current interpretation of BATNEEC. It will be important to do so because an applicant may be able to demonstrate that the Inspectorate has failed to stick to its own policy. They could then claim either that they had a legitimate expectation that this would be followed,<sup>192</sup> or that the Inspectorate had failed to take account of a relevant consideration. What we will see below, is that HMIP interpretation of the NEEC element of BATNEEC in particular, is confused and rather limited.

HMIP's current interpretation of BATNEEC can be gleaned from two sources.<sup>193</sup> The first is the non-statutory guidance to the 'public' on the meaning of BATNEEC contained in the DOE booklet 'Integrated Pollution Control: A Practical Guide', which has recently been updated (1993). 'Best' is taken to mean the most effective in preventing, minimising, or rendering harmless polluting emissions. However, there may be more than one set of 'best' techniques because various techniques may achieve comparable effectiveness. 'Available' is taken to mean procurable in the sense that a technique is generally accessible. This does not imply that it should be in general use, and techniques from abroad or from a monopoly supplier count as available. 'Techniques' are defined in section 7(10) EPA 1990 and as well as the technology employed in a process, the term refers to the number, qualifications, training and supervision of workers and the design, construction, lay-out and maintenance of the buildings in which the process is carried on. The guide provides a further, slight gloss to this definition.

As for 'not entailing excessive cost' (NEEC), the guide states that its meaning will vary depending on whether it is applied to new processes or existing processes. However, for both new and old processes, BAT need not be imposed where the costs would be

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<sup>191</sup>*Ibid.*, cols. 202, 206 and 214. Thus, if it was clear that HMIP had taken into account a particular firm's financial position, one could use *Pepper v Hart* to argue that the courts should intervene to secure the intention of Parliament.

<sup>192</sup>See eg. *R v Secretary of State for the Home Department ex p. Khan* [1984] 1 WLR 1337.

<sup>193</sup>As Jones (Jones, 'Regulatory Policy and Rule-Making' (1991) 20(2) *Anglo-American LR* 131) and others have stated, in studying regulation, "there appears to be a growing recognition that there is a need to study the law of regulators as well as the law and regulators" (p.131) because "an examination of an agency's own rules and standards can reveal more information about the regulatory process than a reading of the statutory provisions" (p.133).

excessive in relation to the nature of the industry and the level of environmental protection to be achieved.

For new processes, the guide states that it is expected that BAT and BATNEEC will be synonymous, but the cost of BAT must be weighed against the environmental damage caused by the process and "the greater the environmental damage, the greater the costs of BAT that can be required before costs are considered excessive."<sup>194</sup> If BATNEEC is not sufficient to prevent serious harm, an application can be refused. Finally, the concern is with what costs in general are excessive; costs to a particular firm and the effects on its profitability should not be considered. For existing processes, the guidance is much less clear. We are not told much about the relationship between cost and environmental benefit beyond the initial statement in the previous paragraph about both new and old processes. It is worth noting the absence of any reference to profitability of particular firms and the presence of the statement that, in considering whether to impose BATNEEC, account should be taken of "*the desirability of not entailing excessive costs for the plant concerned*, having regard in particular to the economic situation of undertakings belonging to the category in question."<sup>195</sup> An initial consultation paper suggests that it was the government's intention that for existing plants, HMIP could take into account the financial and trading circumstance of the individual plant<sup>196</sup> - as does a National Audit Office report<sup>197</sup> The other significant difference between existing and new processes is that, with the former, their rate of utilization and the length of their remaining life will also be taken into account.

Another, arguably more important source of guidance on HMIP's interpretation of NEEC, is the IPC Manual - an internal (but, at least for some sections, publicly available) HMIP document used by inspectors in determining applications. The manual contains the following on NEEC:

"It is not sufficient to describe excessive costs in absolute terms without reference to the cost of the product. The applicant must be able to demonstrate that the increased cost of the product produced by the best available technique is grossly disproportionate to any environmental benefit likely to accrue from that method of production. The extra cost must represent a significant fraction of the cost of the finished product."<sup>198</sup>

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<sup>194</sup>Para. 7.8.

<sup>195</sup>Para. 7.11, emphasis added.

<sup>196</sup>See DOE, note 165 *ante*, p.15.

<sup>197</sup>NAO, note 5 *ante*, para. 3.10.

<sup>198</sup>HMIP, IPC Manual, 1991, para. 3.2.



The manual states that this should be the approach where an applicant has selected a process that is not the best practicable environmental option (BPEO). In this situation, the applicant must demonstrate, by comparing the cost of the product using his preferred option with the cost using BATNEEC, that BPEO would involve excessive cost. What is not clear, is whether this approach will apply to all applications, or only those where BPEO is at issue.<sup>199</sup> Furthermore, as Pearce and Brisson have noted, the extract is rather ambiguous because it seems to advocate both what I will be referring to later as a 'corporate burden' approach and an 'environmental benefit' approach,<sup>200</sup> without considering how the two interrelate. Also problematic is the statement in the passage that the cost of BAT should make up a 'significant fraction' of the cost of the finished product to be considered excessive: nowhere in the manual are we told what would represent a significant fraction.<sup>201</sup>

The manual provides further guidance on the balance between cost and environmental benefit. It states that in deciding BATNEEC for preventing and minimising the release of prescribed substances, inspectors should take no account of the "absolute value of any local environmental effects of the releases. For new processes the same standards should apply to all like processes whatever their location."<sup>202</sup> However, when it comes to rendering releases harmless, the manual states that local environmental factors will be relevant in deciding what is BATNEEC. For example, it says that "a release of a harmful substance to a large river would require a less stringent standard than a release to a small river because of the dilution available in the large river."<sup>203</sup> I will argue below that this is wrong, at least where dangerous substances are concerned.

#### 5.2.6.5.2 *An Interventionist Stance by the Courts*

If the courts<sup>204</sup> decide to intervene to provide their own interpretation of BATNEEC, one needs to be aware of the possible interpretations they could offer. In relation to the BAT element of BATNEEC, it is suggested that the courts are unlikely to intervene because the current interpretations are relatively uncontroversial. Even if the courts do

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<sup>199</sup>In one sense of course, anything that is not BAT is not the BPEO.

<sup>200</sup>See text at note 206, *post*.

<sup>201</sup>Pearce & Brisson, note 2 *ante*, p.33.

<sup>202</sup>IPC Manual, para. 3.4.2.

<sup>203</sup>*Ibid.*.

<sup>204</sup>And this might include the European Court of Justice: in relation to air pollution, BATNEEC is a term used in Art. 13 of the Air Framework Directive 84/360, though 'T' there refers to 'technology' rather than the wider 'techniques' in our national legislation. If our courts decided to intervene, they might - in a case involving emissions to air covered by the Directive - decide to refer the matter to the ECJ under Art. 177 of the Treaty. Alternatively, the matter could come to the attention of the ECJ if a complaint was made to the Commission and they decided to launch Art. 169 proceedings. See 188 ENDS Report (1990) 3 at p.4.

decide to interpret BAT themselves, the range of possible interpretations has been fairly well explored. The reader should refer back to the previous section for details. In this section then, I will be examining the NEEC element of BATNEEC, which is potentially much more controversial and which has received little in the way of detailed analysis. In looking to the range of possible interpretations of NEEC, it will be instructive to refer to US law, where similar provisions have been interpreted by the courts in judicial review actions.<sup>205</sup>

As regards 'excessive cost' within NEEC, the question is excessive in relation to what? Pearce and Brisson have usefully suggested that there are two different approaches that seem to be taken: first, there is what they call the 'corporate burden' concept, where cost is balanced against the effect on company costs or profits; secondly, there is what they call the 'national burden' concept, where the cost of BAT is compared to the environmental benefit derived.<sup>206</sup> I will be adopting this distinction, only using different terminology: I will be contrasting 'corporate burden' interpretations of BATNEEC with 'environmental benefit' approaches; the term 'national burden' is, I believe, potentially confusing since it could conceivably refer to 'corporate burden' at a national level.

### 1) *Environmental Benefit*

1) Cost could be measured against an absolute environmental benefit. For example: if BAT will reduce emissions by 99% at a cost of £100,000, whereas a lesser technology will reduce emissions by 97% at a cost of £5,000 - BAT may be considered excessive.

2) Cost could be measured against a local environmental benefit. This could comprise two different approaches:

a) In the first, it might be argued that a cost is excessive if it is not required for the purposes of securing an environmental quality objective such as a SWQO, an AQS, or a critical load level of acid deposition in relation to acid rain.

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<sup>205</sup>The fact that US courts have reviewed the meanings of similar provisions in US environmental legislation does not of course mean that our courts will adopt a similarly interventionist stance. Historically, the US has had a much greater distrust of its regulatory agencies, and the courts are effectively regulators in their own right. Not only do we have a more trusting attitude towards our regulators (rightly or wrongly), our judges lack the expertise in economics and science which, certainly as regards the former, US administrative law judges possess. To a certain extent, this no doubt reflects the maturity and prominence of environmental law in the US. It may also be an argument for introducing a specialist environmental court in this country.

<sup>206</sup>Note 2 *ante*, p.32.

If for example the stringency of the standard is not required for the purposes of meeting the SWQO (the SWQO would still be achieved if the company was granted a much less strict authorisation), could a company argue that this does not reflect BATNEEC? It is clear, under sections 7(2)(c) and 28(3)(a) EPA 1990 that a company cannot claim that any measure is excessive if it is necessary for the purposes of securing SWQOs. But that is not our concern here; we are now considering whether something like the converse is true - ie. whether a measure is excessive if it is not required to achieve SWQOs. Section 28(3) goes on to state that the NRA may lay down appropriate conditions which the enforcing authority must include,<sup>207</sup> but that the latter may impose more onerous conditions "if it appears appropriate to do so." This confirms that HMIP can impose BATNEEC conditions under section 7 that are stricter than those required for the purposes of meeting SWQOs.<sup>208</sup> This is certainly the Government's view: in the IPC guide, it states that "HMIP may set additional or tighter conditions over releases to water, if for example higher standards are available under BATNEEC than those required by the NRA to safeguard water quality objectives."<sup>209</sup>

Nevertheless, I would suggest that it may be legitimate to regard a cost as excessive within BATNEEC if it is not required for the purpose of meeting the SWQO - but only if the control cost relates to non-dangerous substances. As we saw earlier when looking at the NRA, the 'red list' substances are mostly toxic, bioaccumulable or persistent and need to be systematically controlled over the long-term - not just for their short-term impact on the environment. SWQOs for these substances do not ensure a safe level of bioaccumulation or persistence. Nobody can be entirely sure what a 'safe' level of dangerous substances in water is; such substances, even in minute concentrations, may pose a long-term threat. Hence the need for the 'precautionary' approach enshrined in Directive 76/464, which makes it clear that the aim is to minimise the input of List I substances.

What however, is the position regarding the emission of non-prescribed (ie. non-red list) substances?<sup>210</sup> Section 7(2)(a)(i) states that BATNEEC must be used to prevent,

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<sup>207</sup>In fact, the NRA *routinely* uses this power where there are emissions to water from a prescribed process.

<sup>208</sup>But although setting a standard stricter than that required to achieve SWQOs will not *automatically* amount to an excessive cost, that is not to say that HMIP can simply impose a higher standard than the NRA *simpliciter*; they can only do so if this would not involve an excessive cost.

<sup>209</sup>DOE guide, para. 13.2.

<sup>210</sup>There are two possible scenarios in which such emissions might occur: first, a prescribed process might not be emitting any prescribed substance to water, only non-prescribed ones (however, it is worth noting that, in that case, it must be emitting a prescribed substance to either air or land, or it will not be subject to HMIP control at all - see reg. 4, The Environmental Protection (Prescribed Processes and Substances) Regulations 1991, SI 1991 No. 472); secondly, a prescribed process might be emitting both prescribed and non-prescribed substances to water.

reduce and render harmless the release of prescribed substances. It is clear from what we have said above that merely achieving the SWQO for a prescribed substance will not achieve harmlessness.<sup>211</sup> Section 7(2)(a)(ii) EPA 1990 requires only that BATNEEC be used to 'render harmless' all non-prescribed substances. The claim would therefore be, that as long as SWQOs are achieved, the BATNEEC requirement is satisfied in this case, because SWQOs for non-prescribed substances *do* represent ambient levels which are harmless to the environment.<sup>212</sup> This means that BATNEEC need not be imposed to reduce these emissions further, or - looking at it the other way around - that conditions should be relaxed because the SWQO is being met easily. To answer this claim, we have to go back to my earlier observations on judicial review of the NRA by industry. As there, the answer here will depend on the type of non-prescribed (ie. non-red-list) substance being emitted: if it is a list II substance, the claim ought in many cases to fail because many of the list II substances are extremely dangerous; if it is a relatively harmless list II substance or a non-list II substance, the grounds for tying 'NEEC' to SWQOs are stronger.

Having considered water pollution, what about air pollution? Might a firm claim that an emission standard was excessive within BATNEEC if it is not necessary for the purposes of achieving the AQS associated with that substance (if indeed, given the limited number of AQSs, one existed)? The answer here is far from straightforward and raises complicated issues about the distribution of control costs between the industrial, domestic and automotive sectors<sup>213</sup> of the economy. As with SWQOs, it will obviously depend on issues such as the size of the buffer zone, and the presence of other industries emitting similar substances. Here the matter is complicated further by the fact that other sectors (such as the automotive sector) might claim an equal entitlement to any regulatory reductions.

Acid rain policy raises further issues concerning the link between BATNEEC and environmental quality objectives. Might, for example, one of the electricity generating companies claim that the cost of installing BAT (eg. flue gas desulphurisation equipment - FGD) is excessive if it is not needed for the purposes of achieving their share of the national plan, or critical loads? The answer to the former ought to be no, and to the latter (critical loads) possibly yes. To see why, we need to explore the background in more detail.

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<sup>211</sup>The subsection does not of course require that all prescribed substances must be rendered harmless if their emission cannot be prevented or reduced. If that were possible, why worry about preventing or reducing? All it can mean is that all attempts *which do not entail excessive costs* should be made to render the release harmless.

<sup>212</sup>ENDS, *Dangerous Substances in Water: A Practical Guide*, p.21.

<sup>213</sup>Ie. emissions from cars, lorries etc..

The Large Combustion Plants Directive requires the UK to achieve a 60% reduction in sulphur dioxide emissions by the year 2003 and a 30% cut in emissions of nitrogen oxides by 1998, beginning from a 1980 baseline.<sup>214</sup> These gases have been identified as the prime causes of acid rain. In order to implement this Directive, the Secretary of State used his power under section 3 EPA 1990 to set a national plan for the progressive reduction of sox and nox (as they are known in the trade).<sup>215</sup> This plan contains emission quotas on sox and nox for the power station, oil refinery and 'other industry' sectors. The amounts in the quota which each sector is entitled to emit will be gradually tightened each year. Within the electricity generating industry, there are sub-quotas for each generator. Across all sectors, there are also quotas for individual plants. The electricity generators (and them alone) are able to make use of a 'bubble' concept. This allows them to exceed an individual plant emission quota as long as this is offset by a decrease in a plant of theirs elsewhere, such that they do not exceed their overall corporate sub-quota. However, since mid-1993 there is not only a plant limit under the national plan, but also an HMIP limit for sox and nox (which has nothing to do with BATNEEC). As ENDS notes, "the result may be perplexing to the uninitiated" because "each power station already has an emission ceiling allocated to it under a national plan."<sup>216</sup> The purpose of these second limits is to provide maxima beyond which trade-offs with other plants cannot occur, with HMIP granting low limits to environmentally sensitive plants and limits up to 50% beyond those in the national plan for plants in non-sensitive areas:

"The difference between the two ceilings is that if one of the generators wants to operate a particular station so intensively that it will exceed its specific emission allocation under the national plan, it is free to do so provided any emission in excess of its annual allocation is offset by lower emissions at other plants if this is necessary to keep the company's overall emissions within its total allocation for the year. In contrast, the ceilings set by HMIP are fixed."<sup>217</sup>

Under section 7 EPA 1990, IPC authorisations must comply with the national plan. Section 7 EPA also requires HMIP to impose BATNEEC in every authorisation. This is

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<sup>214</sup>The recently agreed UNECE protocol will replace the uniform targets set by the Directive in respect of sulphur emissions with individual national targets to reflect acid damage more closely. The UK's target is to reduce SO<sub>2</sub> emissions by 50% by 2000, 70% by 2005 and 80% by 2010. A UNECE agreement on nox emissions will follow shortly. The form of implementation of the protocols within the UK is unlikely to change much from that for the EC Directives described below.

<sup>215</sup>DOE, 'The United Kingdom's Programme and National Plan for Reducing Emissions of Sulphur Dioxide and Oxides of Nitrogen from Existing Large Combustion Plants', December 1990.

<sup>216</sup>219 ENDS Report (1993) 15 at p.16.

<sup>217</sup>*Ibid.*.

similarly a requirement of Community law - Article 13 of the Air Framework Directive 84/360 states that BATNEEC must be used in the control of air pollution.

The above laws were put to the test when both National Power and PowerGen applied to burn Orimulsion (a Venezuelan, bitumen-based fuel with a high sulphur content) at a number of their under-used oil-fired power stations. The questions were whether they should be required to fit FGD equipment and whether the installation should be immediate. In relation to National Power, the answer to the second question was relatively straightforward: if FGD was required, it would have to be fitted immediately because the switch from oil to Orimulsion was a 'substantial change' within section 11 of the EPA 1990, which meant that HMIP were perfectly within their rights to demand that the plant should have FGD installed.<sup>218</sup> For PowerGen's plants at Richborough in Kent and Ince in Cheshire, FGD would not have to be fitted immediately, because they had obtained permission to burn Orimulsion before the EPA 1990 came into force.<sup>219</sup> This meant that there was no 'substantial change' under the Act.

As for the first question, National Power claimed that all that was required was for them to remain within their SO<sub>2</sub> quota under the national plan, which they could do without fitting FGD.<sup>220</sup> To impose BAT (FGD) when not required for the purposes of meeting their quota would, they claimed, be to impose an excessive cost. However, this fails to account for section 7 EPA 1990 which requires BATNEEC to be used to 'render harmless' the release of any prescribed substances (of which, in relation to air, SO<sub>2</sub> is one).<sup>221</sup> The plan and BATNEEC must both be satisfied - they are not alternatives. Thus, with National Power's proposal to burn Orimulsion at its Pembroke plant, there was evidence that the high sulphur dioxide emissions stemming from the high-sulphur fuel would add to the existing breaches of critical loads of acid deposition across much of mid-Wales. In other words, the sulphur emissions from the plant would certainly not be rendered harmless.

Nevertheless, the position might be different if a company could show that one of its plant's emissions were within its company bubble and would not affect the environmental quality objective of critical loads. In these circumstances, it might be appropriate for HMIP to decide that the imposition of BAT (eg. FGD) would be excessive in relation to the environmental quality objective to be achieved. This raises

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<sup>218</sup>See further 201 ENDS Report (1991) 7 at p.8.

<sup>219</sup>*Ibid.*

<sup>220</sup>*Ibid.*

<sup>221</sup>See sch. 4 of the Environmental Protection (Prescribed Processes and Substances)(Amendment) Regulations 1992 (SI 1992 No. 614)

some interesting possibilities in relation to existing authorisations. PowerGen's plants at Richborough and Ince have been granted authorisations to burn Orimulsion and while, as existing plants, they have been given time to do so, they have been ordered to install sulphur abatement equipment by 1998.<sup>222</sup> If, as HMIP seems to believe, Richborough poses little if any threat to critical loads,<sup>223</sup> then PowerGen would surely have grounds for arguing that the cost of installing FGD is excessive within BATNEEC - ie. that the cost of BAT is an excessive cost because it is not necessary for the purposes of achieving its national quota or for achieving the environmental quality objective (albeit a non-legal, informal one) of critical loads. It seems that PowerGen are considering an abatement system based on lime injection which is cheaper than FGD but which may not meet new plant standards.<sup>224</sup> If HMIP try to insist on FGD, they could face a challenge in the courts.

How then does the approach in the HMIP internal manual (discussed in the previous section on a 'hands-off' approach by the courts), square with all of this? It will be recalled that it appears to suggest that if prevention or minimisation of prescribed substances is not possible, then the particular BATNEEC for rendering substances harmless may vary according to local environmental circumstances. In relation to air, where substances such as SO<sub>2</sub> are prescribed, this makes perfect sense and would fit in with the critical loads point made above. In relation to water, as we have seen, this may be sensible where non-dangerous substances are concerned, but it is not recommended as an interpretation of BATNEEC for dangerous substances.

b) The second approach to local environmental quality would insist on measuring the benefit of varying ambient conditions which different technologies might produce; this is what economists generally mean by cost-benefit analysis (CBA).<sup>225</sup> So, for example, if technology X cost £50,000 but produced an ambient environmental quality the value of which was put at £10,000, the cost would outweigh the benefit. In the US case of *Portland Cement Association v Ruckelshaus*<sup>226</sup>, the court rejected the local CBA approach, partly because of the time which such an analysis would take and partly because of "the difficulty, if not impossibility, of quantifying the benefit to ambient air conditions."<sup>227</sup> Attempts have been made to ascertain economically 'efficient' effluent

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<sup>222</sup> ENDS Report (1993) 10.

<sup>223</sup> *Ibid.*.

<sup>224</sup> *Ibid.*.

<sup>225</sup> This is the approach advocated by Pearce and Brisson, note 2 *ante*.

<sup>226</sup> (1975) 486 F.2d 375.

<sup>227</sup> *Ibid.* at p.387; see also *Appalachian Power Co. v Train* (1976) 545 F.2d 1351 at p.1361.

standards.<sup>228</sup> However, it is one thing to compare abatement costs with benefits derived from contingent valuation methods (eg. asking people how much they are prepared to pay for a river with fish as opposed to one without) where only one firm is emitting non-prescribed substances; it is quite another matter to suggest that benefit figures for each firm could be assessed where a number of firms are emitting toxic, persistent and bioaccumulative substances. David Pearce himself admits that while there is an extensive literature on economic valuation of environmental damage, “much of it has not been aimed at the kinds of questions that are relevant to finding a damage per unit of pollutant. Moreover, the extent to which damage estimates, when they are obtained, can be *transferred* to other contexts is not known.”<sup>229</sup>

3) Cost-benefit may involve balancing the cost of BAT with the environmental benefit, but should cost be calculated on an incremental basis? In other words, should the agency consider each additional increment of treatment control, from bare minimum to zero-emissions level? In *Weyerhaeuser v Costle*<sup>230</sup>, the court rejected this, stating that “cost need not be balanced against benefits with pinpoint precision.” All that was required was a ‘net’ cost-benefit balancing.

## II) *Corporate Burden*

1) The cost of BAT must be weighed against the cost of the finished product. Reference to cost of the product here could refer to product price or to production cost.<sup>231</sup> As Pearce and Brisson note, the distinction between price and production cost is important. installing pollution-control equipment may have a marked effect on production costs and yet not be reflected in the final product prices because the company may be forced to sell at prices which do not cover production costs in order to maintain market share <sup>232</sup> According to Pearce and Brisson, the only meaningful measure is that of production costs or profitability.<sup>233</sup>

Assuming that whether BAT is imposed does depend on the proportion it forms of overall production costs, then, according to Pearce and Brisson, there ought to be some assessment of the effect of BAT on socially ‘acceptable’ rates of return to capital <sup>234</sup> As

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<sup>228</sup>See eg. Ramchandani and Gourlay, ‘Alternative Approaches to Setting Effluent Quality Standards’ (1992) 11 *JEM* 10.

<sup>229</sup>Pearce & Brisson, note 2 *ante*, at p.38.

<sup>230</sup>*Weyerhaeuser Co. v Costle* (1978) 590 F.2d 1011 at p.1047

<sup>231</sup>Pearce and Brisson, note 2 *ante*, at p.32.

<sup>232</sup>*Ibid.*.

<sup>233</sup>*Ibid.*.

<sup>234</sup>*Ibid.*, at p.32.



they note, "If BAT forces rates of return below the socially acceptable level, then the cost of BAT can be said to be 'excessive'."<sup>235</sup> The difficulty comes in trying to define what constitutes a socially acceptable rate of return.<sup>236</sup>

2) The cost of BAT must be weighed as a proportion of the final product cost but the effect of any cost increase on competition with 'substitute' industries should also be considered. In other words, in BATNEEC, is 'excessive' an absolute, or should it be considered in relation to other industries? Thus, in *Portland*, the Environmental Protection Agency (EPA) had considered that the extra costs of control equipment to the cement industry "could be passed on without substantially affecting competition with construction substitutes such as steel, asphalt and aluminium ..."<sup>237</sup> What about excessive when compared to standards imposed on completely unrelated industries? In *Portland*, the court stated that the EPA was not required to justify different standards in different industries.<sup>238</sup>

3) The cost of imposing BAT is excessive given the effect this will have on international competitiveness. This is a similar issue to (2) above but concerns the same industry abroad rather than 'substitute' industries at home.

4) Is an excessive cost one that would close a particular firm down? In *Weyerhaeuser*, the court cited Senator Muskie's remarks from the Legislative History, that Congress did not envisage imposing on the EPA any requirement to consider the economic impact of controls on any individual plants in a single community.<sup>239</sup> In the original DOE guide on IPC, this issue was not addressed. In the updated, 1993 version, it is rejected for new processes, but as we have seen, it may be that for existing processes, costs to the particular plant will be considered.

### III) *Further Considerations Cutting Across Both the Above Approaches*

1) Must costs be weighed against benefits for each plant, or only for a class or category of industry? If the IPC sector guidance notes issued by the Chief Inspector form the sole basis of most authorisations, the latter would appear to be current practice.<sup>240</sup> The National Audit Office report confirms that this was indeed the DOE's

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<sup>235</sup>*Ibid.*

<sup>236</sup>*Ibid.*, at pp 32-3.

<sup>237</sup>Note 226 *ante*, at p.388

<sup>238</sup>*Ibid.*, at pp.389-390.

<sup>239</sup>Note 230 *ante*, at p.1045, n.52.

<sup>240</sup>Harris (note 187 *ante*, at p 617) suggests that, in the early stages at least, the notes are likely to be applied wholesale. However, the older the notes become, the less likely this will be. Of course, some of

intention.<sup>241</sup> That is to say that costs will be compared with benefits when drawing up each guidance note, and it will be up to an individual firm to present its own cost-benefit analysis to show that it should be granted a variance from the standards in the guidance note.<sup>242</sup> Broadly speaking, this is the position adopted in the US.<sup>243</sup>

2) How do all the considerations fit together? For example, in the US, under the Federal Water Pollution Control Act<sup>244</sup> section 304(b)(1)(B), in deciding on the 'best practicable control technology currently achievable' (BPCTCA), the EPA must:

- a) compare control costs with effluent reduction benefits
- b) take into account other factors such as the age of the equipment, the process employed, engineering aspects, energy requirements etc..

In *Weyerhaeuser Co. v Costle* the court held that the EPA must weigh costs and benefits separately - in the form of a 'limited balancing test', but that the 'other factors' can be considered in any fashion/structure that the EPA sees fit.<sup>245</sup> At this point, it is probably worth making a few comments about the US system of water pollution control. Section 301(b) of the Federal Water Pollution Control Act (FWPCA) (as amended) authorises the EPA to set effluent standards for new point sources. For existing sources, there was a two stage programme: all sources had to apply the 'best practicable control technology currently available' (BPCTCA) by July 1977 and, in the second stage, they had to achieve the 'best available technology economically achievable' (BATEA) by July 1983. Needless to say, the 1972 aims were never realised. The FWPCA was amended in 1977 and 1987 to reduce the stringency of the programme.<sup>246</sup> The danger with comparative law is that one will look at a different system without paying sufficient attention to the specific statutory context. Thus here, when thinking of BATNEEC, one might be inclined to look at the interpretation the US courts have given to the similarly worded BATEA, rather than BPCTCA - simply because the first three letters of the acronym are more alike. However, this would be a mistake because we do not have a two stage approach. BATEA requires a movement towards zero pollution, and because it is more a counsel of perfection, the variance provisions are more flexible - for example, economic viability will be a legitimate factor in determining BATEA but, as we saw in (4) earlier, not for BPCTCA.

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the notes are now quite old, which means that individualisation - weighing costs and benefits for each plant - may now be taking place in some cases.

<sup>241</sup>NAO report, note 5 *ante*, para. 3.9.

<sup>242</sup>See Harris, note 187 *ante*, at p.617.

<sup>243</sup>*El Du Pont de Nemours & Co v Train* (1977) 51 L.Ed. 2d 204.

<sup>244</sup>As amended, most importantly for our purposes, in 1972; it was amended again in 1977, since when it has been called the Clean Water Act.

<sup>245</sup>Note 230 *ante*, at pp.1045-1046.

<sup>246</sup>See further Goldfarb, *Water Law*; and Yeager, *The Limits of Law*.

### 5.2.6.6 Judicial Review of Waste Regulation Authorities

With WRAs, it is perhaps more difficult to suggest possible avenues for review of their decisions on licensing conditions (the waste management licence being the equivalent to the NRA consent or HMIP/local authority authorisation). Part II of the EPA 1990 introducing the waste management licensing system has now been brought into force,<sup>247</sup> but unlike with the WRA 1991 and EPA 1990 Part I, there are not many obvious features of the legislation which are likely to attract review. In fact, the waste field has already seen one review action - based not on the new legislation but on the old, and based not on breach of duty, which is the ground of challenge we have largely been focusing on, but on improper purpose.<sup>248</sup> In *AG's Ref. (No. 2 of 1988)*,<sup>249</sup> the Court of Appeal ruled that a decision to impose a condition requiring a waste disposal site to be operated in such a way as to avoid a nuisance was taken for an improper purpose.<sup>250</sup>

As for cases based on breach of duty, one obvious duty would have been the duty placed on Waste Regulation Authorities by section 61 EPA 1990 to inspect their area for contaminated land. Under subsection (7), if they find such land, they are then under a duty to clean it up so as to avoid pollution or harm to human health.<sup>251</sup> However, the section was never brought into force and the issue of contaminated land has now been tackled anew in the Environment Bill. Another section which may attract review is the duty in section 42. Under this section, WRAs are placed under a duty to take the necessary steps to ensure that operators do not cause pollution, harm to human health or a nuisance and to ensure that all the conditions of the licence are complied with. Another is the 'fit and proper person' provision of sections 36(3) and 74; similar provisions in relation to waste carriers have already been the subject of a controversial appeal to the Secretary of State.<sup>252</sup>

<sup>247</sup>The Environmental Protection Act 1990 (Commencement No. 15) Order 1994 (SI 1994 No. 1096) and The Waste Management Licensing Regulations 1994 (SI 1994 No. 1056).

<sup>248</sup>On improper purpose, see eg. *Westminster Corporation v London and Northwestern Railway Co* [1905] AC 426 and *R v ILEA ex p. Westminster City Council* [1986] 1 WLR 28. The case could equally have been decided on the ground that the authority had taken into account an irrelevant consideration.

<sup>249</sup>[1990] 2 JEL 80.

<sup>250</sup>As Ball & Bell note, it is not clear whether the case would be decided the same way under s.35(3) EPA 1990 as opposed to COPA 1974. On the one hand, the purposes of the EPA 1990 are broader than COPA in that they include the protection of the whole environment and not just water; on the other hand, it could still be argued that nuisance is to be dealt with via the statutory nuisance provisions of the EPA rather than by imposing specific conditions in licences on avoiding nuisances (Ball & Bell, *Environmental Law*, p.327).

<sup>251</sup>Owen Lomas observed that it "can only be a matter of time before an environmental group, having unsuccessfully pressed a WRA to investigate and clean up a clearly contaminated site, takes proceedings by way of judicial review to compel the authority to comply with its statutory duties" (*Environmental Liability: Nightmare of the Nineties?* (1992) *Sol Jo* 1160 at p.1161).

<sup>252</sup>217 ENDS Report (1993) 13.

### 5.2.6.7 Judicial Review of Water and Sewerage Companies

One of the issues which arises here is whether one can bring a judicial review action against sewerage undertakers relating to their decisions on trade effluent consents. After all, review is only available if an issue of public law is involved, and, following privatisation, sewerage undertakers are private companies. However, using either test for determining whether a public law issue is involved - the source of the power<sup>253</sup> or the nature of the function<sup>254</sup> - it seems clear that review would be available: the source of the undertakers' power is statutory and they are exercising a public function.<sup>255</sup>

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<sup>253</sup>*R v Statutory Committee of the Pharmaceutical Society of Great Britain, ex p. Pharmaceutical Society of Great Britain* [1981] 1 WLR 886.

<sup>254</sup>*R v Panel on Take-overs and Mergers, ex p. Datafin* [1987] QB 815.

<sup>255</sup>A view reinforced by the decision in *Griffin and Others v South West Water Services Ltd*, 236 ENDS Report (1994) 38.

## CHAPTER 6

# The Accountability of Environmental Agencies

## IV Accountability For Enforcing Emission/Process Standards

### 6.1 TORT<sup>1</sup>

Tort actions such as negligence, nuisance and trespass, provide a mechanism for holding agencies to account for their enforcement decisions, because if an agency decides not to prosecute, plaintiffs are still entitled to bring a civil claim against the polluter. However, it will not normally be possible for environmental groups to make use of civil actions to protect the environment, because there is typically a requirement that a plaintiff has a proprietary interest or has suffered damage. Environmental groups will seldom fall into this category. The draft EC Directive on Civil Liability for Damage Caused by Waste<sup>2</sup> would have introduced a specifically 'environmental right', enabling groups to bring actions despite the absence of any interference with their private rights. While this draft has not been implemented, both the EC 5th Environmental Action Programme<sup>3</sup> and the recent EC green paper on environmental liability<sup>4</sup> stress the role of environmental groups in environmental law. When the EC finally introduces legislation on environmental liability, it is thus quite likely that 'environmental rights' will play a part.

### 6.2 PRIVATE PROSECUTIONS

Private prosecutions present a mechanism for holding agencies to account for their enforcement decisions, in that if an agency decides not to prosecute, individuals or environmental organisations can step in and bring an action themselves. They are, in K.C. Davis' terms, a kind of check on its enforcement discretion.<sup>5</sup> Statute allows for private prosecutions in some areas of environmental law but in others the right to bring a private prosecution is either circumscribed or non-existent. Thus, under section 211 WIA 1991, private prosecutions for breaches of trade effluent consents can only be

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<sup>1</sup> Actions in tort will also be discussed in relation to corporate accountability in chapter 8.

<sup>2</sup> COM (89) 282.

<sup>3</sup> 'Towards Sustainability: A European Community programme of policy and action in relation to the environment and sustainable development', OJ 1993, C138/5, ch. 9.

<sup>4</sup> European Commission Green Paper on Remedying Environmental Damage, COM (93) 47.

<sup>5</sup> Davis, *Discretionary Justice: A Preliminary Inquiry*.

brought by a 'person aggrieved', a sewerage undertaker or with the written consent of the Attorney-General. The statute does not make it clear quite who will count as a 'person aggrieved' in this context. It cannot mean just anyone, or this would render obsolete the need for third parties to have the consent of the Attorney-General. By analogy with the law on statutory nuisance, where a similar provision exists (section 82 EPA 1990), it is suggested that a person aggrieved refers to someone who has suffered damage as a result of a breach of consent (eg. another factory or a person suffering personal injury through an explosion). However, it seems much more likely that they would bring a civil action for damages rather than a prosecution. Private prosecutions are not available in respect of breaches of drinking water standards - only the Secretary of State or the DPP can bring prosecutions.

One of the problems with private prosecutions is that they skew even-handed justice. This is because private prosecutions are not guided by the agency's prosecution policy (if it has one), which seeks to impose uniformity and fairness. However, that disadvantage must be weighed against the advantages of increased accountability which such prosecutions bring.

The existence of public registers should aid the cause of those bringing private prosecutions: the registers contain actual company performance alongside the standards set out in that company's consent, enabling citizens to take action where the register suggests some irregularity. The exception here is trade effluent consents: details of samples taken do not have to be placed on the register - indeed, it is a criminal offence under section 206(7) WIA 1991 for an employee of a sewerage undertaker to provide such information. In any event, as has been seen, private prosecution is somewhat limited.

While registers look like an unqualified 'good', they are not without their problems. Research has shown that ordinary individuals are unlikely to make effective use of the registers.<sup>6</sup> It has also been suggested that in practice, only fairly large interest groups such as angling clubs and pressure groups like Friends of the Earth, will be able to afford the cost of bringing private prosecutions - and even they will not find the process a simple one.<sup>7</sup> Some of the largest obstacles relate to the nature of samples that can be used as evidence in a prosecution. The first issue is whether samples have to be taken

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<sup>6</sup> See Burton, 'Access to Environmental Information - The UK Experience of Water Registers' (1989) 1(2) *JEL* 192.

<sup>7</sup>*Ibid.*. This prediction has proved to be accurate - *Greenpeace v Albright & Wilson*, note 8 *post*, is one of the few private prosecutions to have been brought; another is *Wales v Thames Water Authority* (1987) 1(3) *Env Law* 3.

only at official sampling points which may be inaccessible. In *Greenpeace v Albright & Wilson*,<sup>8</sup> Greenpeace took their (tripartite) sample at the end of the pipe rather than the official sampling point which was within the site. The company argued that this was unfair because a reaction might occur leading to a technical breach at the pipe's end, and that the official sampling point was more indicative of compliance.<sup>9</sup> The magistrates rejected this argument, finding for Greenpeace. However, as has been noted, a decision made by the magistrates is not binding on themselves or on higher courts, so the case has no precedential value.<sup>10</sup> It would therefore be open to a later court to reach a contrary conclusion. If, in a future case, a higher court did rule that samples can only be taken from the official sampling point, and as in the *Greenpeace* case, lawful access to the official sampling point is impossible for non-NRA staff, a pressure group would have to rely on information in the registers, or risk trespassing on the discharger's land. If the latter course is taken, the evidence may be excluded under section 78 Police and Criminal Evidence Act 1984 as improperly obtained, although in police cases the courts will, in their discretion, usually allow such evidence. Besides the issue of taking samples at the official sampling point, there is then the question of whether they can rely on a single sample or whether they have to take a more expensive and time-consuming tripartite sample. *NRA v Harcros Timber and Building Supplies*<sup>11</sup> establishes that NRA samples must be tripartite to be admissible - whether the sample is of effluent or river water.<sup>12</sup> However the wording of section 209 WRA 1991 refers to samples taken 'on behalf of the Authority', so private prosecutions may be able to rely on non-tripartite samples. In *Greenpeace v Albright & Wilson*, this was not an issue because the sample was tripartite.

If a pressure group is unable to gain access to the sampling point, it will have to rely on the information on the register.<sup>13</sup> There are two problems which will confront it here. First, the NRA tends not to put sampling data on the register if it is considering a prosecution.<sup>14</sup> This will have no adverse effect if the NRA does eventually decide to prosecute, but if it chooses not to, there may be a considerable delay before the information becomes available to third party interests. Secondly, for reasons of economy

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<sup>8</sup>(1991) 2(9) *ELB* 107 and (1991) 2(10) *ELB* 119.

<sup>9</sup>See further (1991) 3(6) *LMELR* 202 and (1992) 4(1) *LMELR* 23-4.

<sup>10</sup>See 203 ENDS Report (1991) 5, which suggests that pressure from other chemical companies not wishing a binding precedent to be established may have led A&W to drop its appeal by way of case stated from the magistrates.

<sup>11</sup>First instance decision reported in *The Times*, 2 April 1992, (1992) 3(6) *ELB* 73, and (1992) 3 *Water Law* 71; The NRA's appeal was dismissed - [1993] *Crim LR* 221 (DC).

<sup>12</sup>This requirement for tripartite samples will be abolished if the Environment Bill is passed - see 239 ENDS Report (1994) 19.

<sup>13</sup>As was the case in *Wales v Thames Water Authority*, note 7 *ante*, where the prosecution was successful.

<sup>14</sup>See (1991) 2(9) *ELB* 104.

and strategy, most NRA samples which appear on the register are not tripartite.<sup>15</sup> It is not clear whether these samples could be relied upon by private prosecutors.<sup>16</sup>

Although the explicit wording of section 209 points against them being admissible as evidence in private prosecutions, this seems strange given that non-tripartite samples collected by the group itself are admissible.

### 6.3 JUDICIAL REVIEW OF ENFORCEMENT DECISIONS

The alternative to bringing a private prosecution is to seek judicial review of the authority's enforcement decision. This will not fall foul of the alternative remedies rule mentioned in chapter 6, because private prosecutions cannot be regarded as an equally convenient, beneficial and appropriate remedy for checking an agency's enforcement discretion. Judicial review is undoubtedly a stronger accountability mechanism and provides a stronger check than a private prosecution, because it has the potential to get the authority to do what you want it to do, rather than, as with the private prosecutions, having to do it yourself. Judicial review may relate to enforcement of either IPC or APC authorisations, NRA consents or WRA waste management licences.<sup>17</sup> Again, trade effluent consents raise special problems. Since private prosecutions are likely to be rare, judicial review in theory provides an important means of holding sewerage undertakers to account for their enforcement decisions. However, two points need to be made. First, because sampling information is not held on the register, it will, in practice, be impossible to tell whether consents are being properly enforced, unless the Environmental Information Regulations 1992 (SI 1992 No.3240) can be used to secure access to that information.<sup>18</sup> Section 206(2)(c) does provide that no offence is committed under section 206(7) where the information is disclosed for the purposes of judicial review, but that is far from saying that the undertaker is required to provide the information. Second, individuals and environmental groups are arguably less likely to be concerned about the enforcement of trade effluent consents than with what is allowed in the consents themselves. They are much more likely to be concerned about the enforcement of sewage works' consents - the final exit point of discharges to sewers. For these reasons, sewerage undertakers will not be included in the discussion below.

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<sup>15</sup>The register must indicate whether a sample is tripartite.

<sup>16</sup>See (1991) 2(10) *ELB* 119; cf. Ball & Bell, *Environmental Law*, p.386.

<sup>17</sup>As with private prosecutions, the existence of public registers held by these bodies should aid the cause of those bringing judicial review actions because the register should make it clear what action has or has not been taken.

<sup>18</sup>For whether the Regulations could be used to this effect, see the section on the registers in chapter 3.



The enforcement decision under scrutiny may consist of a decision to prosecute or a decision not to prosecute. Environmental groups are likely to seek review of decisions not to prosecute; some firms may feel that uneven enforcement is putting them at a competitive disadvantage and likewise mount a challenge on the grounds that the agency has failed to prosecute. Most firms however, if they bring a review action, are likely to be challenging a decision to prosecute themselves.

There is a growing body of case law on judicial review of prosecutorial discretion. This case law covers decisions not to prosecute as well as decisions to prosecute. It includes bodies ranging from the police and the CPS to the Bar Council and the Inland Revenue. There are no cases involving judicial review of the prosecution decisions of an environmental prosecuting body, but the only way to determine what approach the courts might take if such a case was brought, is to look at the existing cases, which are predominantly of the more traditional criminal justice type.

One point to bear in mind is that most enforcement bodies have recourse to formal<sup>19</sup> enforcement powers besides prosecution. The police for example often issue cautions rather than prosecute. The NRA has a hierarchy of enforcement procedures including: a proposed 'action warning';<sup>20</sup> a warning letter, where the offence need not be admitted; a caution letter, where the offence must be admitted; and finally, prosecution.<sup>21</sup> In Scotland, the Forth River Purification Board have a similar system of graded warning notices leading up to referral to the Procurator Fiscal for prosecution.<sup>22</sup> Some environmental agencies have access to a much wider range of statutory enforcement tools besides prosecution. For example, under the EPA Part I, HMIP and local authorities have the power to serve enforcement notices,<sup>23</sup> prohibition notices,<sup>24</sup>

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<sup>19</sup>As opposed to informal steps such as advice, persuasion etc.. Formal steps need not necessarily be statutory.

<sup>20</sup>A concept discussed in NRA, 'Discharge Consent and Compliance Policy: A Blueprint for the Future', July 1990, at p.40 (The 'Kinnersley Report' - reported in 186 ENDS Report (1990) 24 - ENDS likens them to HSE enforcement notices). They are also mentioned in the NRA's response to the public consultation, September 1991, at p.11 and in the glossary of key terms where they are confusingly defined as a "Warning given to discharger of deteriorating performance which requires explanation and appropriate corrective action, but not the substituting for formal legal action." It would appear that they are most likely to be used as an enforcement tool where there has been no breach of consent, but where there has been a deterioration in effluent quality over time which may eventually result in a breach. In such circumstances, prosecution is not possible but it may be desirable for the NRA to give a warning requiring preventative action to be taken.

<sup>21</sup>See the NRA's response, *ibid.*

<sup>22</sup>See the Forth River Purification Board, 'Control of Pollution Act 1974: Scheme of Charges under s.53 - Enforcement Policy', January 1992.

<sup>23</sup>s.13 EPA 1990.

<sup>24</sup>s.14 EPA 1990. The prohibition notice is not intended for routine use on firms which have breached their consents - it will normally only be used as an emergency measure to shut firms down in order to prevent the aggravation of a serious pollution incident caused by somebody else.

variation notices and revocation notices.<sup>25</sup> The temptation then, is to view only prosecution as enforcement, but not all these alternatives. This is a mistake: it is important to remember that enforcement covers a much wider set of techniques than just prosecution, and therefore that non-prosecution is not necessarily non-enforcement. The fact that there is a wider set of formal enforcement tools available has implications for what is discussed below. In the first paragraph of this section, I said that we are concerned with decisions to prosecute and decisions not to prosecute. While this is true, an awareness of these other enforcement tools makes it possible to delve further. Thus, where an environmental group wishes to challenge a decision not to prosecute, the agency may have served an enforcement order; by implication, the group would consider this tool inappropriate. A company on the other hand may wish to challenge a decision to prosecute, arguing that it should instead have been served with an enforcement order. To say that we are examining judicial review of the discretion to prosecute may lead one to conclude that judicial review of the decision to serve an enforcement order would not be available. This is not the case.

### 6.3.1 The Story So Far

In *Blackburn*,<sup>26</sup> the court established that they could review a police policy not to prosecute, but they held, in effect, that the policy would have to be *Wednesbury*<sup>27</sup> unreasonable (in the sense that no other reasonable prosecuting authority would have adopted it) for an order of mandamus to be granted. In *Blackburn (No. 3)*,<sup>28</sup> Lord Denning - on the face of it providing an account of *Blackburn* - appeared to go much further. This wider *obiter dictum* from Lord Denning implied that a court would review an individual decision not to enforce the law. In other words, they might impugn the decision itself and not just a policy.<sup>29</sup> So, for example, in *Blackburn* the court said that it would review a policy of not prosecuting thefts of goods worth less than £100; following Lord Denning's dictum in *Blackburn (No. 3)*, a court might also review an individual decision not to prosecute a theft case.

*R v General Council of the Bar, ex p. Percival*<sup>30</sup> implicitly confirmed Lord Denning's approach in *Blackburn (No. 3)*, rejecting the submission of Counsel for the Bar, who had argued for a narrow reading of *Blackburn*. Furthermore, *Percival* established that

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<sup>25</sup>ss. 10 and 12 EPA 1990 respectively. According to the Act's short title, these are not enforcement powers as such - enforcement powers commence at section 13.

<sup>26</sup>*R v Metropolitan Police Commissioner, ex p. Blackburn* [1968] 1 All ER 763.

<sup>27</sup>*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

<sup>28</sup>*R v Commissioner Of Police Of The Metropolis, ex p. Blackburn (No. 3)* [1973] 1 QB 241.

<sup>29</sup>I am indebted to Osborne for this view of *Blackburn (No. 3)* - see 'Judicial Review Of Prosecutors' Discretion: The Ascent To Full Reviewability' (1992) 43(2) *NILQ* 178 at p.179.

<sup>30</sup>[1990] 3 All ER 137.

review was not limited to the police: any prosecuting authority's decision not to prosecute was reviewable - but the scope of review would vary according to the powers, functions and procedures of the particular body and the way in which proceedings had been conducted. This has been confirmed in more recent cases, where it has been suggested that it may be easier to obtain review against 'other bodies' than it is against the police or, now, the Crown Prosecution Service (CPS).<sup>31</sup> Having decided that the discretion not to prosecute was reviewable, the court in *Percival* proceeded to inquire whether the Professional Complaints Committee's (PCC) decision to prefer lesser charges than those desired by the applicant was unreasonable or procedurally improper. They found that the PCC had acted in accordance with the rules, and had not acted unreasonably because there was room for different views on the seriousness of the charge a person should face.

In *ex p. L*,<sup>32</sup> it was held that a decision *to* prosecute a juvenile was reviewable, but only if the decision was made regardless of, or clearly contrary to, established policy guidelines. This should be distinguished from the *Blackburn* case: in *Blackburn*, the court considered a policy of not prosecuting certain cases; in *ex p. L*, the court was concerned with a decision to prosecute a juvenile which ignored or ran contrary to settled policy. In *ex p. L*, Watkins LJ. considered that a successful challenge by a juvenile would be rare because an applicant would find it hard to demonstrate that a decision had been made in disregard or contrary to settled policy; judicial review of decisions to prosecute adults was, he thought, unlikely to be available. There are some comments to be made on *ex p. L*. First, in *ex p. Mead*,<sup>33</sup> Stuart-Smith LJ. suggested that it was not that review of decisions to prosecute adults would be unavailable - it was simply that *successful* review was unlikely. This, it is submitted, is the correct view. However, the reason Stuart-Smith LJ. gives for the difference in the chances of success between adults and juveniles, is that while there is a policy regarding juveniles (to caution rather than prosecute wherever possible), there is no such CPS policy in the case of adults. This is not strictly true as the cautioning guidelines which applied at the time applied to both groups. Second, while a successful challenge on the ground that policy has been ignored or breached may be rare in CPS cases,<sup>34</sup> it is submitted that this ground may be of considerable use in actions against environmental prosecutorial authorities

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<sup>31</sup>Watkins LJ. in *R v Chief Constable of the Kent Constabulary, ex p. L* and *R v DPP, ex p. B* [1993] 1 All ER 756 at p.768 (the applications were joined - I will henceforth refer to the case as *ex p. L*, except where material); see also Stuart-Smith LJ. in *R v Inland Revenue Commissioner, ex p. Mead* [1993] 1 All ER 772 at p.780.

<sup>32</sup>Note 31 *ante*.

<sup>33</sup>Note 31 *ante*.

<sup>34</sup>But see *R v DPP, ex p. C*, *The Times*, 7 March 1994, discussed below.

such as the NRA. This possibility will be explored later, after closer scrutiny of the decision in *ex p. Mead* and *ex p. C*<sup>35</sup>.

### 6.3.2 *Ex p. Mead*<sup>36</sup>

The applicants were charged with fraud together with their accountant, who was also charged with offences involving six other clients. The Inland Revenue had decided not to prosecute those six and exacted civil penalties instead. The applicants challenged the Revenue's decision to prosecute them on the ground that they should have compared their cases with those of the other six, to see whether their cases were more serious. They did not challenge the Revenue's policy of selective prosecution.

The court had to consider whether a decision to prosecute an adult was reviewable and, if it was, on what grounds review would lie. Beginning with the former, Popplewell J. thought that decisions to prosecute adults should not be reviewable because once the decision to prosecute is taken, the criminal courts are seized with jurisdiction to prevent proceedings which amount to an abuse of process. Although unstated, Popplewell J. presumably considered the position of juveniles to be different because the whole point is to keep them away from the criminal courts. Decisions not to prosecute adults on the other hand should be reviewable because there is no other way to challenge them. Stuart-Smith LJ. took a contrary view, arguing that abuse of process may not always provide an effective alternative remedy because there may be matters which can only be redressed by judicial review. If a gap exists, an applicant ought to be able to make use of it. One such gap, I would suggest, will be where the prosecuting body has acted contrary to its prosecution policy; it is hard to see how this might be dealt with via abuse of process.

#### 6.3.2.1 *Fairness*

Having decided that a decision to prosecute an adult was in principle, reviewable, Stuart-Smith LJ. went on to consider the grounds on which the applicants were seeking review. He held that there was no principle which required the Revenue to compare the applicants' cases with those of the other six taxpayers to ensure that the former were indeed more serious and hence more worthy of prosecution. Fairness did not require such a comparative exercise because it would be impracticable: there was no logical reason why the comparison should stop with the other six, but if it went further, the Revenue would have the impossible task of comparing hundreds of cases extending over

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<sup>35</sup>*Ibid.*

<sup>36</sup>Note 31 *ante*.

different time-scales. All fairness required was that each case was considered on its merits to see whether the criteria in the Revenue's prosecution policy (set out in the Keith Report)<sup>37</sup> were satisfied.

The case thus upholds a common-sense interpretation of fairness. Fairness in the sense of actually comparing like cases with like would be unworkable. Rather, fairness requires that each case be treated alike in the sense of being judged by reference to the same criteria or policy for determining whether a prosecution should be brought. While Stuart-Smith LJ. did not question the validity of a policy of selective prosecution, he did state that a prosecuting authority should consider any existing guidelines as to when prosecution might be appropriate in a particular case. In other words, while not questioning the policy *of* selective prosecution, he did stress that any decision should be in accordance with the policy *for* selecting prosecution. For the applicants to have succeeded, rather than saying: "You should have compared our cases with those of the other six - and only if ours were more serious than theirs should we have been prosecuted and not them" - they would have had to say: "Your prosecution policy says you will only bring a prosecution if X, Y and Z are satisfied. We do not match these criteria and therefore we should not have been prosecuted." Presumably, they were unable to do this, which is why they argued for the other, remarkable reading of fairness. Relying on *Blackburn*, they might also have succeeded if they had shown that the prosecution policy was *Wednesbury* unreasonable. However, as Stuart-Smith LJ. noted, they were unlikely to establish that a policy approved by the Keith Committee (chaired by Lord Keith) was irrational.

### 6.3.3 *Ex p. C*<sup>38</sup>

In *ex p. C*, a wife, Mrs C, sought judicial review of the DPP's decision not to prosecute her husband for buggery under section 12 Sexual Offences Act 1956. The application for review was successful because the prosecutor had failed to have regard to the criteria in the Code for Crown Prosecutors. Kennedy J. stated that a court could review a decision not to prosecute if the decision was guided by an unlawful policy or if the decision was not in accordance with established policy, or if the decision was perverse.

The case is significant for two reasons. First, it is the first case where an applicant seeking judicial review of a prosecutorial decision has succeeded on the merits. Second,

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<sup>37</sup>Report of Committee on Enforcement Powers of the Revenue Departments, Cmnd. 8822, 1983; see further, Uglow, 'Defrauding the Public Purse: Prosecuting in Social Security, Revenue and Excise Cases' [1984] *Crim LR* 128.

<sup>38</sup>Note 34 ante.

it establishes that applicants can seek review of decisions not to prosecute contrary to an established policy as well as decisions to prosecute made in this way.

#### 6.3.4 The Position Now

- 1) The courts will review a policy of non-prosecution - *Blackburn*.
- 2) The courts will review an individual decision not to prosecute - *Blackburn (No.3)*, *ex p. Percival*.
- 3) The courts will review a decision to prefer a less serious charge than that considered appropriate by an applicant - *ex p. Percival*.
- 4) The courts will review a decision to prosecute a juvenile made in disregard of or contrary to a settled policy - *ex p. L*.
- 5) The courts will review a decision to prosecute an adult - *ex p. Mead*.
- 6) The courts will review a decision not to prosecute which failed to take into account provisions of the enforcement policy - *ex p. C*.

As we have already seen, number (1) will be reviewable on *Wednesbury* grounds. Numbers (2), (3),(5) and (6) are reviewable either on *Wednesbury* grounds or on the basis that there was a legitimate expectation that a policy (as in (4) ) would be followed, or that in ignoring the policy, the body had failed to take into account a relevant consideration. A decision *to* prosecute a juvenile, as in number (4), would presumably also be reviewable on *Wednesbury* grounds. Finally, all of the above will be reviewable on the grounds of improper purpose or bad faith, although one might argue that decisions to prosecute adults made in bad faith or for improper purposes could be dealt with by the abuse of process jurisdiction.

The important point to note is that successful review on *Wednesbury* grounds is likely to be extremely rare, whereas pointing to a failure to follow a policy is much more easily done. Evidence of this is provided by *ex p. C* - the only successful review action of a prosecutorial decision - which involved a failure to follow a policy. It should come as no surprise that the only successful application was based on a failure to follow a policy rather than on *Wednesbury* unreasonableness. It is quite obvious that, for example, a decision that someone should face a lesser charge than that desired by the applicant will seldom surmount the *Wednesbury* hurdle, because there are many legitimate views on these matters and the courts will be wary of substituting their own judgement for that of the body concerned.<sup>39</sup> Where there is a policy on the other hand, the issue before the courts is much more clear-cut: either the decision was contrary to the policy or it was not.

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<sup>39</sup>As in *ex p. Percival* and *R v DPP, ex p. Langlands-Pearse* [1991] COD 92; *cf. Raymond v Attorney-General* [1982] 1 QB 839; *cf. also R v Liverpool Stipendiary Magistrate ex p. Ellison* [1990] RTR 220 - an abuse of process case where the magistrate was reluctant to interfere with the prosecutor's decision to prefer a less serious charge; review by the *accused* of the magistrate's decision was unsuccessful.

### 6.3.5 Applying the Case-Law to Environmental Agencies

It seems then, that successful review of a body's prosecutorial decision will be much more likely if the applicant can establish a failure to follow the enforcement policy. But for there to be a chance of successfully reviewing a body's enforcement decision on the ground that they have ignored or acted contrary to their prosecution policy, three conditions must be satisfied: a policy must obviously exist, it must be open and some of the provisions must be sufficiently detailed. I begin by examining whether these conditions *do* exist in relation to the NRA, HMIP, local authority environmental health departments and Waste Regulation Authorities. I then go on to consider whether bodies *should* adopt a policy of selective prosecution, and if so whether they should adopt detailed prosecution policies and whether such policies should always be open and useable in review actions.

#### 6.3.5.1 Do the Bodies Have Prosecution Policies and Are They Open?

If there is no prosecution policy, or if its details cannot be discovered, a review action cannot be based on a failure to follow the policy. In *ex p. Mead*, the Revenue did have an open enforcement policy in the shape of the Keith Report. While the 1983 Keith Report does not contain current tax figures which attract prosecution, one assumes from Stuart-Smith LJ.'s discussion of the facts that the applicants did have official access to those figures. The NRA does have a prosecution policy, but decided not to make it fully public because it was "concerned that general disclosure of the policy could encourage defendants to challenge its decisions to prosecute on the grounds that a particular pollution incident fell outside the relevant category."<sup>40</sup> In fact, much of the policy has since 'leaked' into academic writing so that it probably is now generally disclosed.<sup>41</sup> However, whether someone could mount a challenge based on a policy which has not been officially published or disclosed is doubtful. In this case, one might argue that the Environmental Information Regulations 1992 require official disclosure by the NRA.<sup>42</sup>

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<sup>40</sup>189 ENDS Report (1990) 28.

<sup>41</sup>See eg. Jewell, 'Agricultural Water Pollution Issues And NRA Enforcement Policy' (1991) 4(3) *LMELR* 110. At p.110, n.1, Jewell claims that the NRA Guidance Note on Enforcement and Prosecution "is a public document despite its internal circulation." However, my correspondence with the NRA states that the Guidance Note is not a public document and has not been officially published. The NRA has now published a bare summary of its enforcement policy in its Citizen's Charter guide - 'NRA Customer Charter: Our Statement of Service Standards' (1994) at pp.10-11. Some further points are covered in NRA, 'Water Pollution Incidents in England and Wales - 1990', 1992, Appendix A, and in NRA, 'Discharge Consents and Compliance: The NRA's Approach to Control of Discharges to Water', March 1994, pp.57-8.

<sup>42</sup>SI 1992 No. 3240 - the Regulations are designed to implement EC Directive 90/313 on the Freedom of Access to Information on the Environment. A test case on the scope of the Environmental Information Directive has recently been launched by the Omagh People Against Goldmining - see *The Guardian*, 25 May 1994.

The NRA might seek to rely on regulation 4(3)(d) which states that information need not be provided if disclosure would "increase the likelihood of damage to the environment affecting anything to which the information relates." However, as I hope to demonstrate shortly, the full disclosure of the policy is unlikely to lead to such damage.

The position of the English water pollution regulator can be contrasted with the Forth River Purification Board in Scotland, who do have a public enforcement policy.<sup>43</sup> HMIP does not have a *fully* public enforcement policy. Guidance on the use of enforcement and prohibition notices is contained in the internal HMIP manual and is available to the public; however, HMIP's policy on prosecution, which is in the same internal manual, is not available to the public.<sup>44</sup> Although judicial review based on a failure to follow prosecution guidelines will therefore be difficult if not impossible (unless the Environmental Information Regulations can be used to gain access to the guidelines), it may nevertheless be possible to review decisions to (or not to) issue enforcement or prohibition notices on the basis that they do not follow the policy as stated in the manual. It has not proved possible to survey all local authority environmental health departments to see whether they have enforcement policies in relation to APC. However, Leeds City Council for example, do not have a policy specific to APC. As for WRAs, again it has not proved possible to survey every WRA, but West Yorkshire WRA do have a prosecution policy contained within their internal, non-public, staff manual.

#### *6.3.5.2 Are the Provisions Sufficiently Detailed to be of Use to Individuals in Review Proceedings?*

Assuming the material is indeed available, are the provisions sufficiently detailed? With the Inland Revenue's policy one could point to a tax figure and say: "My sum was smaller than that, so I ought not to have been prosecuted"; the onus would then be on the Revenue to point to another criteria in the policy to justify prosecution. In *ex p. B*,<sup>45</sup> Watkins LJ. stated that the applicant might have successfully challenged the decision to prosecute her if she could have shown that there had been a lack of inquiry into her circumstances, previous offences etc., as required by the then applicable 1983 Attorney-General's *Criteria for Prosecution*. In the event, the evidence showed that her circumstances had been properly investigated.

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<sup>43</sup>Note 22 *ante*.

<sup>44</sup>The prosecution policy is contained in section 10 of HMIP's internal manual.

<sup>45</sup>Note 31 *ante*.



The NRA policy sets out appropriate enforcement action to be taken according, predominantly, to the effect that the pollution has had on the receiving water course. The policy sets out three categories of pollution incident: major, significant or minor.<sup>46</sup> A major incident will for example, require the presence of the following factors: potential or actual persistent effect on water quality or aquatic life; closure of a potable water, industrial or agricultural abstraction point; extensive fish kill (more than 50); excessive or repeated breaches of consent conditions; extensive remedial measures needed; major effect on amenity. The factors involved in significant incidents are similarly detailed and those for minor incidents rather less so.<sup>47</sup> The policy then states that a major incident will normally attract prosecution.<sup>48</sup> With significant pollution or where consents are breached, the action taken may be a warning letter or prosecution. A table sets out which of these two courses of action will be appropriate: prosecution will, for example, be preferred to a letter where the polluter has a history of non-compliance, or where there is a significant breach of consent. With minor incidents, a warning letter will normally be sent if the discharger is identifiable.<sup>49</sup>

A recent NRA report makes some additions to the above.<sup>50</sup> It states that the action to be taken in any case will depend on the severity of the impact and the reason for non-compliance. While the above internal policy deals primarily with the former (severity of the impact), the report (which is public) deals with the latter (reasons for non-compliance). It states that there are two basic reasons for non-compliance: either the treatment plant is inadequate or the operation and management of the plant is deficient. While it states that a case may include both, the report deals with them one at a time. Where treatment plant is inadequate for the purposes of achieving compliance, the NRA will not normally prosecute if the discharger has an existing programme of remedial works already agreed with the NRA pending completion, assuming that: the breach is not the result of poor management or factors unconnected with the remedial work; and every effort is being made to comply; and the breach is not too serious. The last of these will presumably be decided by reference to the internal policy described earlier. Other than this, it is not entirely clear how the two policies fit together. If there is a serious incident, it will clearly typically attract prosecution. However, what if a

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<sup>46</sup>These pollution incident categories (but not the enforcement action associated with each one) are set out in appendix A of NRA, 'Water Pollution Incidents in England and Wales - 1990', note 41 *ante*.

<sup>47</sup>See further Jewell, note 41 *ante*.

<sup>48</sup>In 1990, there was no sign that this was the case: while 70% of industrial major incidents were prosecuted, this figure went down to 50% for major farm incidents and 21% for major incidents caused by sewage works - see NRA, 'Water Pollution Incidents in England and Wales - 1990', note 41 *ante*, Table 11, pp.31-2.

<sup>49</sup>Jewell, note 41 *ante*.

<sup>50</sup>NRA, 'Discharge Consents and Compliance: The NRA's Approach to Control of Discharges to Water', March 1994, pp.57-8.

discharger has an agreed set of remedial works in hand but has a history of non-compliance or there is a significant breach of consent? The earlier policy points towards prosecution, while the one being described here points against it.<sup>51</sup>

If the discharger does not have a planned improvement programme in place at the time of the breach, he will be notified that continued non-compliance will attract prosecution, but that he may submit an action plan proposing how he intends to meet the consent. If he does submit such a plan which the NRA accepts and keeps to that plan, then subject to the qualifications mentioned above in relation to pre-existing remedial works, the NRA will not prosecute. If the breach of consent detected by routine sampling is caused by management failure rather than plant inadequacy, the action taken by the NRA will depend on the structure of the consent. If the consent contains absolute limits, the discharger will be sent a letter asking for an explanation and warning that the next sample will be tripartite which, if found non-compliant, may lead to prosecution. Whether or not prosecution does follow such a non-compliant tripartite sample will depend on a number of factors including the severity of the impact and the attitude of the discharger to improving the management of the treatment plant. If, on the other hand, compliance has to be assessed by reference to a look-up table (ie. in relation to a water company, but not a private, sewage treatment works), where a sample fails the look-up table limit, the discharger will be warned of the exceedance and asked for an explanation. If the NRA believes that it is unlikely to be a one-off occurrence, routine sampling will be replaced by tripartite sampling until such time as compliance is routinely restored or sufficient samples have been taken to enable prosecution to take place (with look-up tables, compliance is usually assessed over a period of at least 12 months, which means that at least 12 months of sampling data will be needed).

Assuming that the full, internal, impact-based NRA policy was made officially available, with a water pollution incident a company could thus point to the effect on the receiving water and say: "Our discharge did not have that effect;" an environmental group might say "The effect of that discharge warranted prosecution", or "There was a breach of consent and a history of non-compliance which indicates prosecution."<sup>52</sup> With the 'reasons for non-compliance' policy contained in the recent report, it would presumably

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<sup>51</sup>While it may not be clear how the policies are to interact, they are not incompatible as such because the new report does say that the NRA will not "normally" prosecute where remedial works are underway.

<sup>52</sup>It is worth recalling the *Greenpeace v NRA* case (discussed in the previous ch.) at this point. On the facts of the case, it is unlikely that Greenpeace would have been able to point to the policy in this way, because the effect on the receiving water of the *breach of consent* was temporary and negligible (see (1991) *LMELR* 3(6) 202). The effect of the *consent* itself was of course considerable, but that is separate from the issue of enforcement.

be open to a discharger not given, for example, the appropriate warning or opportunity to present an action plan, to bring a review action.

The Forth River Purification Board's policy, although public, is not as detailed as the NRA's. It states that an occasional exceedance of consent with no detrimental effect on the watercourse can be tolerated. Consistent marginal breach, even if there is no detrimental effect, will attract an enforcement programme.<sup>53</sup> Significant deviation from consent conditions and discharges causing pollution will be the subject of an enforcement programme. A significant discharge is one equal to or greater than 100% of the limit. Pollution is defined broadly as causing harm to the flora, fauna or beneficial uses of the receiving water. Despite the fact that it is not as detailed as the NRA policy, that is not to say it could not be relied upon in review proceedings - it would presumably be possible to bring an action if the Board referred a case straight for prosecution where a one-off, minor breach of consent did not cause any pollution. With HMIP, the manual contains fairly detailed policies on the use of enforcement and prohibition notices which could be raised in review actions.<sup>54</sup> With other bodies, such as WRAs and local authority environmental health departments, there are either no policies, or the policies are not public, which means that it is not possible to assess whether the provisions are sufficiently detailed.

### *6.3.5.3 Should Bodies Adopt a Policy of Selective Prosecution?*

There are two basic styles of enforcement strategy: adversarial and co-operative. UK pollution control agencies have always tended to adopt the latter approach: bargaining 'in the shadow of the law' is the norm,<sup>55</sup> strict legalism very much the exception.<sup>56</sup> However, while the co-operative approach may secure a quasi-contractual legitimacy as between regulator and regulated, it can undermine equity as well as any sense of legitimacy or accountability to the wider beneficiaries of environmental legislation. The enforcement technique which is employed is integrally linked with the type of enforcement style adopted. Prosecution will play a central part in an adversarial approach, while a co-operative approach will tend to favour discussion, compromise and warnings - regarding prosecution as a last resort. An extreme example of the adversarial approach would involve an agency prosecuting for each and every breach of a consent, however small. In other words, an extreme adversarial approach would not involve

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<sup>53</sup>I.e. a series of warning notices culminating in a possible referral to the Procurator Fiscal for prosecution.

<sup>54</sup>HMIP internal manual, section 8, pp.5-8 and Appendix 1.

<sup>55</sup>Macauley, 'Non-contractual Relations in Business' (1963) 28 *American Sociological Rev* 55.

<sup>56</sup>See eg. Hawkins, *Environment and Enforcement*, and Richardson et al., *Policing Pollution*.

selective prosecution. A policy of selective prosecution will necessarily involve something of the co-operative approach.

An extreme adversarial approach would solve the problem of equity and accountability to third party interests and it is perhaps for this reason that such an approach is often advocated by environmentalists. Their view would be that even if there is a small breach of a consent, this should be prosecuted. However, such an approach would involve enormous costs associated with bringing so many prosecutions. Selective prosecution has the distinct advantage of saving valuable resources. Despite this potential for resource savings, many environmentalists disagree with a policy of selective prosecution. Why is this?

They may argue that a policy of not prosecuting even minor breaches would remove any deterrent effect: if all crimes are prosecuted, deterrence is maximal; if there is a policy of selective prosecution, there may be a reduced deterrence to the extent that people can perceive a pattern in the offences which are not prosecuted. In other words, with selective prosecution, there may be a trade-off between resource-savings and deterrence. This is a trade-off which environmentalists are presumably not prepared to countenance. But would their worries about deterrence be justified? First, if the breach of consent is minor and a one-off, deterrence is unlikely to be threatened if the breach is not prosecuted, because it is extremely unlikely that all dischargers will rush to emit slightly more than their consent allowed just once. It would hardly be worth it in financial terms. If on the other hand, the breach is minor and continuous - non-prosecution may tempt firms to save money through non-compliance.<sup>57</sup> If they knew they would be prosecuted, they would arguably be less tempted towards non-compliance. However, it is not as though firms are given carte blanche to avoid compliance: if they breach their consent over a period of time, they know that they will attract other enforcement tools such as persuasion and warnings. Some firms may well take advantage of the leeway they are given, but one must weigh the disadvantage of a relatively small amount of pollution which this may bring, against the benefit of considerable time and cost savings in avoiding prosecution. Furthermore, it is arguably more important to be guided by the goal in sight rather than blindly follow a path which one believes will lead you to that goal. If the goal is that of reducing pollution, one could argue that prosecuting in every case, far from reducing pollution, would increase it. There would be a risk that many firms - prosecuted when they felt they were doing all that they could - would adopt a confrontational attitude towards the regulator in the future and make no attempt to go

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<sup>57</sup>In practice the NRA tend not to prosecute such offences. To this extent, their policy does not fully reflect the reality of practice - it will be recalled that the policy suggests that a breach of consent along with a history of non-compliance will attract prosecution.

beyond the minimum required of them. Experience suggests that having firms 'on your side' may help to achieve better results in the long run.

If environmentalists are not worried about selective prosecution for reasons of deterrence, they may seek to argue that non-prosecution of even minor breaches is contrary to the 'polluter pays' principle (PPP). If a firm is successfully prosecuted, the imposition of a fine ensures that the polluter, to some extent, pays for the pollution he has caused; if on the other hand the agency merely issues a warning while the firm undertakes to do what it can to prevent a recurrence (ie. a co-operative approach), the PPP may appear to have been violated. However, this assumes that a breach of consent will always give rise to pollution, which is manifestly not the case. Minor breaches will often have a negligible effect on the receiving environmental medium and hence non-prosecution of minor breaches is not necessarily contrary to the PPP. However, they will be on stronger ground when a breach *does* give rise to pollution of some kind and rather than prosecute, a warning is given. This does appear to be contrary to the PPP. The answer to this problem may lie in the introduction of a tax - so that the polluter pays something (but not as much as a fine) whenever a polluting breach of consent occurs.<sup>58</sup> This recognises the economic inefficiency of prosecuting in every case while still maintaining the essential principle of the 'polluter pays'. This tax must be distinguished from a pollution tax, under which firms pay for emissions *within* their consents. Pollution taxes will be discussed in the next chapter.

Finally, environmentalists may object to the non-prosecution of even minor breaches, not for reasons of deterrence or for moral reasons concerning the PPP, but because they believe that such breaches deserve to be *punished*. Their view would be that a breach of regulatory law is criminal and that crimes should be punished without fear or favour across all types and degrees of offence and class of offender.<sup>59</sup> While there is much in this, the problem with such a punitive rationale is that punishment comes at a price - that price here being the diversion of resources from the task of monitoring and enforcing serious pollution offences. In a world where resources are far from infinite, such trade-offs need to be carefully considered.

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<sup>58</sup>See eg. Bardach and Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness*, pp.52 and 56, where the similar concept of a 'civil' fine is discussed. Alternatively, the effective use of clean-up powers where pollution has occurred, and recovery of the cost of clean-up from the polluter (see eg. s.161 WRA 1991) would fulfill the PPP. A possible difficulty with that approach is that in relatively minor pollution cases, there may be little which can be cleaned-up as such.

<sup>59</sup>This view is the opposite to that which seems to be held by most enforcement officers. As Richardson et al. note in *Policing Pollution*, trade effluent officers tend to view a minor breach as non-criminal (pp.137-8). However, just because this reason for non-prosecution is questionable, it does not mean that there are not other valid reasons for non-prosecution (such as cost).

#### 6.3.5.4 *Should Bodies Adopt Prosecution Policies?*

An extreme example of the adversarial approach would involve an agency prosecuting for each and every breach of a consent, however small. As we have seen, this would solve the problem of equity and accountability to third party interests, but would involve enormous costs associated with bringing so many prosecutions. While it makes sense not to prosecute all offences for resource and other reasons, a policy of selective prosecution gives rise to problems of inconsistent decision-making (and hence unfairness)<sup>60</sup> and lack of accountability to third parties. One way of ensuring consistent decision-making and accountability<sup>61</sup> is to structure prosecutorial discretion by way of a policy on prosecution.<sup>62</sup> In other words, for the sake of fairness and accountability, a policy *of* selective prosecution should be accompanied by a policy *for* selecting prosecution.

However, if the respective advantages of a policy of selective prosecution and a policy for selecting prosecution are cost on the one hand and fairness and accountability on the other, what are the possible disadvantages? The principal one is a reduction in deterrence: if all crimes are prosecuted, deterrence is maximal; as we have seen, if there is a policy of selective prosecution, there may be a reduced deterrence to the extent that people can perceive a pattern in the offences which are not prosecuted. If, for reasons of fairness and accountability, an internal policy for selecting prosecution is introduced, deterrence may then be further reduced because much more of a pattern will become discernible. In other words, with selective prosecution, there may be a trade-off between resources and deterrence; with a prosecution policy there may be a further trade-off between fairness/accountability and deterrence. However, as we shall see in the next section, not all bodies have to make this sacrifice.

#### 6.3.5.5 *Should Policies Be Open and Should One Be Able to Rely on Them in Review Proceedings?*

In the previous section, we noted that the existence of an internal enforcement policy may involve a trade-off between an increase in fairness/accountability and a decrease in deterrence. If the policy is made open, there may be a further trade-off between fairness/accountability and deterrence. By adopting an open policy, you increase fairness by allowing people to see that they have been treated fairly and increase

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<sup>60</sup>See Davis, note 5 *ante*, pp.90 and 168-70.

<sup>61</sup>Albeit of a rather limited, internal kind. The enforcement discretion of officers is in theory structured by the policy, but the officer is not obliged to account externally for the exercise of his discretion either informally or formally in review proceedings.

<sup>62</sup>On structuring discretion, see Davis, note 5 *ante*, p.97. If all offences were prosecuted, a prosecution policy would obviously be unnecessary.

accountability by enabling them to make informal complaints to the agency, drawing attention to inconsistencies with policy.<sup>63</sup> However, in making the policy public, you also allow everyone to see the pattern of what is prosecuted. This may further decrease deterrence, leading to an increase in offences, because people will be able to see what they can 'get away with'. Allowing policies to be relied upon in review proceedings might make matters worse still, because if a policy is open but review is not allowed, there is always the chance that the prosecuting body might ignore the policy and decide to prosecute. This uncertainty may serve as a deterrent. If, on the other hand, review is allowed, this deterrent is removed because one can take formal action if the body ignore the policy.

However, while the above arguments about impunity and deterrence are probably apposite in the traditional criminal justice field, they will not always apply to environmental prosecuting authorities. By and large, these bodies can create detailed, open policies and have courts scrutinise these in review proceedings without fear of inviting offending. An example of a traditional criminal justice case may help to illustrate the point here. Let us say there is an open policy that the theft of goods under £5 will not be prosecuted, or that speeding will not be prosecuted unless the speed limit has been exceeded by more than 20 mph. Many people will be tempted to steal and speed within these thresholds. If review based on the policy was also allowed, then if a person who had stolen such a good or who had exceeded the speed limit by only 17 mph was prosecuted, they would, *prima facie*, be able to have the decision to prosecute quashed. Compare this with the NRA. In relation to the NRA policy, many firms would not be able to tell what effect an increase in their emissions might have on the receiving waters; even if they could calculate it, it is extremely unlikely that dischargers would rush to emit up to the threshold which attracts prosecution just once (recalling that, in the policy, a continuous breach is a valid criterion for prosecution)<sup>64</sup>. It would hardly be worth it in financial terms. In other words, the practical consequences of drawing-up enforcement policies and publicising them or allowing them to be used in review actions are very different for environmental agencies such as the NRA than they are for the police/CPS.

To conclude, if prosecution is selective, like cases will not be treated alike without a policy to act as a yardstick in each case. Ideally, fairness requires that this policy for selection is rational, visible, and of practical use to third parties. Without a sufficiently

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<sup>63</sup>See Ashworth, 'The 'Public Interest' Element in Prosecutions' [1987] *Crim LR* 595 at p.605.

<sup>64</sup>It will be recalled that, with continuous, minor breaches of consents, the NRA for example, tends not to prosecute (see note 57 *ante*). However, what is being argued here is that the *policy itself* does not invite non-compliance because the policy indicates that prosecution is a possibility.

detailed, open policy, one cannot be sure that fairness exists. If it is unenforceable by third parties, one might see unfairness, but be powerless to take formal action against it. The other value besides fairness which is served by allowing review based on failure to follow a prosecution policy, is accountability. Having a policy and making it open both provide a measure of accountability, but for that accountability to be of a worthwhile, active sort, review based on the policy is arguably required. For environmental prosecuting bodies, a requirement that they adopt detailed, open policies which can be relied upon in review actions should pose few problems.

#### 6.4 JUDICIAL REVIEW OF MONITORING DECISIONS

Enforcement really consists of two logically separate activities - monitoring, and follow-up enforcement action (where monitoring reveals breaches in consents etc.). In the previous section, I have been concentrating on the latter. However, judicial review of an environmental body's monitoring arrangements is clearly also possible. The grounds on which review may lie are likely to closely mirror those in the previous section. Review will obviously be available if the body has acted in bad faith or for improper purposes. However, where an environmental group feels that the monitoring is unduly lax,<sup>65</sup> review may be more difficult. It will be very difficult to establish that the authority has acted in a *Wednesbury* unreasonable manner, because the court will be especially wary of interfering in such an obviously scientific area. Successful review will be much more likely if an environmental group can point to a monitoring policy which sets out monitoring frequencies etc.. If monitoring is not being carried out in accordance with this policy, then review may be available on the ground that there is a legitimate expectation that the policy would be followed or that the authority has failed to take into account a relevant consideration. Of course, if the group disagrees with the policy itself, it will be back to the difficult task of establishing that it is *Wednesbury* unreasonable. In England, only HMIP appears to have published a monitoring policy.<sup>66</sup> Similar public monitoring policies should arguably be required of the NRA,<sup>67</sup> WRAs<sup>68</sup> and local authority environmental health departments in relation to APC.<sup>69</sup>

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<sup>65</sup>As in *Greenpeace v NRA*, note 52 *ante*.

<sup>66</sup>See 200 ENDS Report (1991) 28; in Scotland, the Forth River Purification Board have a monitoring policy - see their document 'Schemes of Charges Under Section 53 of the Control of Pollution Act 1974', January 1992.

<sup>67</sup>Judging by recommendation 19 of the Kinnersley Report (note 20 *ante*), the NRA does have, or was due to have, a policy on sampling frequencies.

<sup>68</sup>ENDS suggests that there is to be centralised guidance on standards of site inspection and monitoring frequencies for WRAs - see 230 ENDS Report (1994) 33.

<sup>69</sup>Especially, according to ENDS, as local authorities "appear to be adopting widely diverging inspection practices" - see 230 ENDS Report (1994) 33.



## 6.5 CONCLUSION

We have seen that civil actions, private prosecutions and judicial review can all help to keep environmental agencies accountable for their enforcement decisions. Judicial review is, without doubt, potentially the most significant of the three. It cannot be long before an environmental group again seeks review of an enforcement decision.

However, if they are forced to establish that a decision is *Wednesbury* unreasonable, it will be an uphill task. Accountability and fairness would be much better served if the courts not only allow review, but require agencies to publish their enforcement policies and allow applications where there has been a failure to follow these policies.

## CHAPTER 7

# Regulation II - Market Mechanisms

Market mechanisms cannot be equated with 'market forces' (although they do of course make use of market forces) as it is these, uncoordinated forces which help to produce many of the problems in the first place.<sup>1</sup> By market mechanisms, I mean not the non-regulatory market approaches which I will be examining in the next chapter, but mechanisms which are centred on market principles and which are directed by a regulator to achieve specific regulatory goals.<sup>2</sup> The important point to note then is that market mechanisms are regulation - they are simply a different *form* of regulation to command-and-control. At present, we have mainly command-and-control regulation as described in the previous chapters, with only some limited market mechanisms.<sup>3</sup> However, both the Government<sup>4</sup> and the EC<sup>5</sup> have promised an increased emphasis on the use of economic instruments,<sup>6</sup> so we should expect to see them playing a greater role in the future.

The values which go to form the rule of law are those of accountability, equity, certainty, efficiency and effectiveness. *In this chapter, I will be examining how these rule of law values might be applied to market mechanisms.* There are two principal types of market mechanism which I want to consider: pollution taxes (also known as charges, effluent fees

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<sup>1</sup>Jacobs, *The Green Economy*, p.24.

<sup>2</sup>This distinction between 'market mechanisms' (regulatory) and 'market approaches' (non-regulatory) is my terminology - the distinction is not often drawn by others who tend to use the term 'market mechanisms' or 'economic instruments' to include both strategies.

<sup>3</sup>Eg. NRA, 'The NRA Scheme of Charges in Respect of Applications and Consents for Discharges to Controlled Waters'. I will be discussing this and other schemes later in the chapter.

<sup>4</sup>See 'This Common Inheritance', Cm 1200, 1990, Annex A; 'This Common Inheritance - The Second Year Report', Cm 2068, 1992, pp.33-5, 101, 112, 115. The DOE has similarly been actively investigating the use of market mechanisms - see eg. DOE, 'Making Markets Work for the Environment', 1993. See also the DOE environmental economics research series reports: London Economics, 'The Potential Role of Market Mechanisms in the Control of Acid Rain', 1992; Coopers & Lybrand, 'Landfill Costs and Prices: Correcting Possible Market Distortions', 1993; and CSERGE, Warren Spring & EFTTEL, 'Externalities from Landfill and Incineration', 1993.

<sup>5</sup>See the EC 5th Environmental Action Programme, 'Towards Sustainability: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development' COM(92)23 final, OJ 1993, C138/5, ch. 7.4.

<sup>6</sup>Again (see note 2 *ante*) this is a matter of terminology. Economic instruments here refers not just to market mechanisms, but also to the types of non-regulatory market approach I discuss in the next chapter.

etc.) and tradeable pollution permits.<sup>7</sup> Pollution taxes tax the discharger on each unit of pollution he emits. The assumption is that because he has to pay for his pollution, he will cut down on his emissions to cut costs and maximise profits. Tradeable permits operate in a similar way to existing regulation, except that firms are able to trade their permits. Allocation of permits can be made on the basis of existing entitlements ('grandfathering') or via an auction in which firms have to bid for their share. After allocation, permits can be traded, which provides a similar incentive to that of charges - the incentive here being provided by firms being able to sell any of their permits which are surplus to requirement.<sup>8</sup> I will begin by comparing these two economic instruments in terms of the above values. I will then look at existing charging arrangements to see how these fare in respect of the same values.<sup>9</sup>

## 7.1 PURE MARKET MECHANISMS<sup>10</sup>

### 7.1.1 Efficiency<sup>11</sup>

Economists have made an extremely strong case for the efficiency gains to be made from switching to market mechanisms. For a charging scheme to be efficient (in the sense of being cost-effective), market forces need to operate so that those who can reduce emissions at least cost actually do so. In a charge system, a producer has an incentive to reduce emissions until he reaches the point where it is cheaper to pay the charge; the firms with the

<sup>7</sup>There are of course many other instruments which could conceivably be covered by the term 'market mechanism' - eg. refundable deposits and subsidies, to name but two; see further OECD, *Economic Instruments For Environmental Protection*, 1989.

<sup>8</sup>See further Tietenberg, 'Economic Instruments for Environmental Regulation' (1990) 6(1) *Oxford Review of Economic Policy* 17.

<sup>9</sup>A useful comparison of current charging schemes with incentive schemes is made in the Royal Commission on Environmental Pollution (RCEP), 16th Report, 'Freshwater Quality', Cm 1966, 1992, ch. 8.

<sup>10</sup>Ie. market mechanisms standing alone, not as an adjunct to existing forms of regulation. The effects may be different if market mechanisms are used in parallel with existing regulation - see DOE, 'Making Markets Work for the Environment', note 3 *ante*, pp.52-3.

<sup>11</sup>There is an element to efficiency other than that discussed below in the text - and that relates to the administrative costs of introducing and running the scheme. Implementing any new scheme will involve start-up costs, and therefore it would be unfair to assess market mechanisms on this basis. As for running costs, it is difficult to say whether either of the market schemes would impose greater costs than the present regulatory system. A charging scheme would require tax collection on top of monitoring and enforcement, but would save on calculating individual standards. A tradeable permit system could involve extra expense in monitoring the trades which took place (necessary to avoid pollution 'hot spots'). However, even if the costs involved were greater, the savings in overall costs achievable by market approaches may well compensate for any differences.

lowest control costs will reduce emissions the most, whilst those facing higher costs may prefer to pay the charge. This produces an efficient result because the greater burden of reducing emissions is taken-on by those who can do so at least cost. In fact, if firms face the same charge, the marginal costs of control will automatically be equalised, which is a condition for cost minimisation.<sup>12</sup> As Tietenberg comments:

“This is a rather remarkable finding. We have shown that as long as the control authority imposes the same emission charge on all sources, the resulting allocation *automatically* minimizes the costs of control. This is true in spite of the fact that the control authority may not have any knowledge of control costs.”<sup>13</sup>

As we saw in the chapter on command-and-control regulation, it is theoretically possible for a regulator to achieve a least cost allocation of emission reductions, but in practice they do not have easy access to the information on marginal costs. Furthermore, here, unlike there, the least cost solution achieved via equalisation of marginal cost is achieved automatically.

The efficiency case for tradeable permits is very similar: as a permit market develops, firms with high abatement costs will find it cheaper to buy permits than to cut back their emissions; firms with low abatement costs will be able to make cut-backs easily and then sell part of their permits. Because all firms have to pay the same market price for a permit, marginal abatement costs are equalised across all firms and a cost-minimising solution will be achieved.<sup>14</sup>

### 7.1.2 Equity

In discussing equity in chapters 1 and 2, I said that the precept 'treat like cases alike' requires a decision as to when firms are alike and what sort of equal treatment is to be regarded as legitimate. In the context of market mechanisms, one could end up with the following:

- 1) All firms are alike in being firms and should be treated alike in the sense of facing equal total pollution control costs;
- 2) Similar firms are alike (eg. all printworks) - and should be treated alike in the sense of facing equal total pollution control costs (proportionate to size of manufacturing output);

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<sup>12</sup>This is easily demonstrated with graphical examples. For such a demonstration, see Tietenberg, *Environmental and Natural Resource Economics*, 317. See also Baumol & Oates, *The Theory of Environmental Policy*, 164.

<sup>13</sup>Tietenberg, *op. cit.*, p.317.

<sup>14</sup>Baumol & Oates, *op. cit.*, p.177.

3) Firms are alike in being firms and should be treated alike in the sense of facing equal marginal control costs;

4) Only firms with similar discharges are alike<sup>15</sup> - and should be treated alike in the sense of facing equal marginal control costs; because their discharges are alike this will also necessarily lead to them paying the same total tax bill.<sup>16</sup>

Charging schemes and tradeable permit schemes are regarded by some as equitable because marginal control costs are the same for all firms. They would support (3) and (4) above.<sup>17</sup> Others have put forward a different interpretation of equity based on the idea of 'equal pain' which reflects (1) or (2) above.<sup>18</sup> McGarity, for example suggests that charges and tradeable permits create inequities because while marginal pollution control costs may be equal, total control costs are not.<sup>19</sup> In other words, some firms will end up paying out more than others, which may affect relative competitive positions; firms do not feel equal pain.<sup>20</sup> Despite this, McGarity would not seek to exclude market approaches on equitable grounds: he comments that, unlike a BAT approach, there is no discrimination between old and new sources,<sup>21</sup> and that the overall effect is not as bad as with BAT because a market-based system provides firms with much greater flexibility.<sup>22</sup> His argument thus seems to be that market approaches may be inequitable, but if firms have greater choice and the overall cost of the system is less, the inequity will be less keenly felt.

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<sup>15</sup>This is obviously different from (2) - similarly sized firms in the same industry will not necessarily have similar emissions.

<sup>16</sup>This can obviously only apply to taxes; with permits, there is no 'treating' being done other than at the initial allocation and unless the total number of permits is later reduced.

<sup>17</sup>These two, (2) and (3) are actually saying the same thing, but from different perspectives - the result is the same.

<sup>18</sup>These two, (1) and (2) are not saying the same thing - the result of applying (1) would be that all firms pay the same, the result of (2) that all similarly sized firms in the same industry would pay the same. (1) stresses competition between all sectors, (2) stresses competition only within sectors.

<sup>19</sup>McGarity, 'Media-Quality, Technology, And Cost-Benefit Balancing Strategies For Health and Environmental Regulation' (1983) 46 *Law and Contemporary Problems* 159 at p.220.

<sup>20</sup>Leone & Jackson, 'The Political Economy of Federal Regulatory Activity: The Case of Water Pollution Controls' in Fromm (ed.), *Studies in Public Regulation*, 231 at p.264; see further Koch & Leone, 'The Clean Water Act: Unexpected Impacts on Industry' (1979) 3 *Harv Env LR* 84.

<sup>21</sup>This may or may not be true in relation to tradeable permits, depending both on the way in which permits are initially allocated and whether they are subsequently hoarded. With initial allocation, if the permits are 'grandfathered' rather than auctioned, this may be inequitable in that existing sources gain a significant asset while new entrants will have to buy permits before they can commence production (see DOE, 'Making Markets Work for the Environment', note 4 *ante*, p.14). If hoarding subsequently occurs, this will be inequitable because new entrants are unable to buy into the existing permit market.

<sup>22</sup>McGarity, *op. cit.*, p.220.

Some further observations can be made here. I have stated previously that equalising total control costs should be seen as the *ideal* for equity, given the fact that I derived the rule of law value of equity from the need to support competition. However, the ideal is not realisable, and in any event conflicts with the goal of efficiency which requires the equalisation of marginal and not total costs. The interesting point is that while, in theory, an attempt to equalise marginal control costs under a command-and-control approach can be regarded as equitable since it can be justified on efficiency grounds, market mechanisms not only equalise marginal control costs automatically - but in doing so, they also get much closer than a flexible command-and-control approach to the equity ideal of equal total control costs. Kneese and Bower comment on command-and-control as follows:

"Perhaps the scheme that would strike one as most inequitable is the efficiently programmed effluent standards approach because it emphasises waste reduction by dischargers with low marginal waste reduction costs. In effect, it could penalize those with low costs and present the high-cost waste discharger with a free property right to continue his waste discharge unmodified."<sup>23</sup>

In contrast, with both charges and tradeable permits there is a much more even distribution of costs among firms: with a flexible command-and-control approach aiming at the equalisation of marginal costs, costs would be loaded on firms with low abatement costs; however, with charges, the high cost abater would have to pay the charges and with a tradeable permit system, the low cost abater would be able to sell permits and the high cost abater would have to buy permits.<sup>24</sup> In other words the costs are much more evenly spread, which is likely to be beneficial from a competition point of view.

Of course, while market mechanisms switch the question of equity from that under a command-and-control system of whether the standards are equitable, to the question of whether the charge or the result of permit trading is equitable, they will not affect the issue of equity in enforcement. Unequal enforcement will have just as much, if not more of an

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<sup>23</sup>Kneese & Bower, 'Standards, Charges, and Equity', in Dorfman & Dorfman (eds.), *Economics of the Environment - Selected Readings*, 159 at pp.168-9.

<sup>24</sup>For further discussion of the equity advantages of tradeable permits over 'flexible' command-and-control regulation, see RCEP, 16th Report, note 9 *ante* - report 8 of the additional reports undertaken for the RCEP, 'Appraisal of the Potential Role of Market Mechanisms in Water Quality Issues' p.351, at para.6.63. As the report notes, how equitable market mechanisms prove to be will depend on historical factors; if the only reason why some firms have low marginal control costs is because they have had an easy ride in the past and have not installed basic equipment that others have, it would be fair for them to bear the burden now rather than spreading the distribution of financial costs. It will be recalled that a similar issue arose in relation to HMIP regulation under IPC (pp.52-3); the issue also arises again in relation to eco-auditing in ch. 8 (pp.220-221).

impact on competitiveness in a system based on market mechanisms as one based on command-and-control.

### 7.1.3 Accountability

Here one has to examine accountability for the setting of ambient standards as well as accountability for the setting and enforcement of emission standards. Ackerman and Stewart have suggested that market mechanisms might enhance *ex ante* accountability for the setting of ambient standards:

"BAT focuses Congressional debate, as well as administrative and judicial proceedings, upon arcane technological questions which rapidly exhaust the time and energy that most politicians, let alone the larger public, are willing to spend on environmental matters. In contrast, the marketable permit system will allow the policymaking debate to take a far more intelligible shape. Rather than debating the difference between the "best available control technology" and "lowest achievable emission rate", citizens may focus on a different question when the environmental acts come up for revision: During the next n years, should we instruct the EPA gradually to decrease (or increase) the number of pollution rights by x percent?"<sup>25</sup>

What then should one make of this argument that the introduction of market mechanisms (specifically tradeable permits) will "enhance the democratic accountability of environmental policy decisions?"<sup>26</sup> Like Mintz,<sup>27</sup> I believe that the argument is misguided, because it is not clear that the level of debate would be made any easier by a switch to market mechanisms. Deciding on the appropriate ambient standards is necessary under both command-and-control and market-based systems: just because arguments over the means would become less technical (or rather non-existent, since decisions on means would be left to market actors) under a tradeable permit system, it does not follow that deciding on what the end should be (ie. to decrease or increase the number of pollution rights) will be any less problematic than at present.<sup>28</sup>

Therefore, while I would not agree with Ackerman and Stewart that market mechanisms might lead to an improvement in *ex ante* accountability in relation to the setting of *ambient*

<sup>25</sup> Ackerman & Stewart, 'Reforming Environmental Law: The Democratic Case For Market Incentives' (1988) 13 *Col Jo of Env Law* 171.

<sup>26</sup> Stewart, 'Controlling Environmental Risks Through Economic Incentives' (1988) 13 *Col Jo of Env Law*, 153 at p.160.

<sup>27</sup> Mintz, 'Economic Reform of Environmental Protection: A Brief Commentary on a Recent Debate' (1991) 15(1) *Harv Env LR* 149 at p.160.

<sup>28</sup> *Ibid.*.

standards, I believe that they would affect accountability for the *setting*<sup>29</sup> of *emission* standards in the way set out below.

#### 7.1.3.1 *Pollution Taxes*

Here, one might argue that the 'problem' of discretion in the setting of standards is solved by removing command-and-control standard-setting and replacing it with pollution taxes. Under a pure charge system, decision-making would be decentralised from the agency to individual firms. In other words, companies would be free to choose their own output levels (constrained of course by the charge). This would remove all discretion for the setting of standards from the agencies and would therefore make the issue of accountability irrelevant in this respect. Charges would therefore appear to lead to an increase in accountability over a system of command-and-control regulation because they remove a decision from the agency for which they need to be accountable (both *ex ante* and *a fortiori, ex post*).<sup>30</sup>

However, while taxes may remove the need for accountability for standard-setting decisions, accountability will now be required in respect of the tax-setting decision. Although this is obviously only one decision (which may need to be retaken occasionally) as opposed to the many involved in standard-setting, the impact of this one decision will be so significant that one cannot easily conclude that an accountability gain has been made.

#### 7.1.3.2 *Tradeable Permits*

Under an auction system, the market would decide permit allocation, not the agency - removing the latter's allocatory discretion. If, rather than being auctioned, permits were 'grandfathered' - in other words initial allocation was based on existing entitlement - allocation would be based on historical agency discretion. However, once trading was established, agency discretion in setting standards would be lost. Future allocation would depend on the outcome of trading decisions made by the firms themselves. Thus, as with a charging system, a system of tradeable permits might be thought to lead to an increase in accountability over a system of command-and-control regulation because they too remove a decision from the agency for which they need to be accountable.

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<sup>29</sup>But not their enforcement - as we shall see below.

<sup>30</sup>See Rowley & Peacock. *Welfare Economics: A Liberal Restatement*, p.173.



However, here, as there, there will be new decision areas for which an agency would have to be made accountable. With tradeable permits, there are likely to be two of considerable significance. First, if it was decided that the number of permits should be reduced to improve environmental quality, there would have to be decisions on how to go about achieving this. Secondly, controls on trading in a permit market would be needed to prevent the build-up of 'hot-spots'. As Tietenberg notes of the existing US trading programme:

"A lot of uncertainty is associated with emission reduction credit transactions since they depend so heavily on administrative action. All trades must be approved by the control authorities. If the authorities are not co-operative or at least consistent, the value of the created emission credits could be diminished or even destroyed."<sup>31</sup>

There is a danger of over-idealising markets - thinking that the magic invisible hand will replace the visible hand of administrative decision-making. However, markets, especially of the type at hand, do not exist in vacuums and require careful administrative control. The power necessary to achieve this control will still need to be subject to accountability.

Neither charges nor tradeable permits will, it is submitted, affect the accountability of regulatory agencies for their enforcement decisions. Enforcement of market mechanisms will still be required and hence there will continue to be decisions on enforcement for which agencies need to be made accountable.

#### **7.1.4 Effectiveness**

Charges involve a producer paying a fee for each unit of pollution he produces, leaving him relatively free to choose the level of emissions he desires. Tradeable permits, on the other hand, require an initial allocation of consents, which can then be traded between firms. Under a charging scheme, the quantity would be set by the market and the price by the regulatory authority; with tradeable permits, the quantity would be determined by the regulator and the price by the market. This points to one of the advantages of tradeable permits over pure charging schemes - the quantity (the level of ambient environmental quality) is certain. If one relies on charges alone, so-called market 'flexibility' may mean that ambient targets are not met. The process would inevitably be one of trial and error - adjusting charges up or down to achieve the desired quantity - and irreparable environmental damage could result before the charge was pegged at the correct level.

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<sup>31</sup>Tietenberg, note 8 *ante*, p.27.

However, while we have stated that tradeable permits enjoy an advantage over charges because they can guarantee a given level of environmental quality (in that the number of permits and hence the level of emissions is fixed) - this will be true only at a national level. At a local level, unless strict controls are placed on trading, the desired level of environmental quality may not be achieved:

"If the total number of permits is set to meet a single national target, it is possible that, as a result of trading, emissions will increase in sensitive areas. It may be possible for regional variations in environmental sensitivity to be taken into account by means of 'exchange rates' so that one unit of emissions in a sensitive area can be traded for more units in a less sensitive area. However, there may be problems in fully reconciling national and local objectives."<sup>32</sup>

In many ways, the problem is similar to that faced by the national plan for reducing acid gas emissions under the EPA 1990. The national plan is like a tradeable permit system except that trading is not allowed *between* firms.<sup>33</sup> One of the problems with the plan is that it aims for an overall reduction in national emissions, and by itself is unable to tailor emissions to meet particular local environmental quality objectives.

While market mechanisms may therefore be called into question for their effectiveness at achieving a given ambient goal, one might be tempted to point to the current state of our environment and conclude that command-and-control is similarly ineffective. While there is undoubtedly an element of truth in this, it is important not to make sweeping generalisations. For example, it would be dangerous to conclude that charges are no more ineffective than command-and-control and can therefore completely replace them. The important distinction is that charges are inherently ineffective, while in theory, a command-and-control approach can be effective at achieving environmental goals. One can try to alter command-and-control to make it live up to its potential, but it is arguably much more difficult to make something that is theoretically flawed work in practice.

The irony is that market mechanisms can in theory also improve effectiveness by ironing out some of the faults of the command-and-control system which contribute to its ineffectiveness. As we shall see below, market mechanisms may for example improve monitoring and enforcement - one of the areas which causes command-and-control to be less than 100% effective. The answer would thus appear to be to use both command-and-

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<sup>32</sup>DOE, 'Making Markets Work for the Environment', note 4 *ante*, p.13.

<sup>33</sup>See DOE, 'The Potential Role of Market Mechanisms in the Control of Acid Rain', note 4 *ante*, at p.xvi.

control and market mechanisms, in the hope that one can enjoy the contributions to effectiveness which a combination of both can bring. It should be noted that I am not saying that using market mechanisms as a supplement to traditional regulation will lead to a fully effective system. First, while market mechanisms may alter the structure of incentives, they will never eliminate the many other constraints or influences on agency behaviour identified by Hawkins and others.<sup>34</sup> Secondly, markets are by no means the only way to improve the effectiveness of regulation. There are many different ways in which this might be done (such as providing agencies with more funding, increasing the level of fines, increasing the number of prosecutions,<sup>35</sup> altering the monitoring system so that the future frequency of monitoring depends on the past level of compliance<sup>36</sup>); all I am doing below is pointing out how market mechanisms might logically lead to some improvements in effectiveness.

#### 7.1.4.1 *Pollution Taxes - Monitoring and Enforcement*<sup>37</sup>

Monitoring would still be necessary under a pure charging system to ensure that firms did not exceed the levels which they had chosen.<sup>38</sup> However, such monitoring in a charging system would not obviously be any more difficult than the monitoring of emission standards.<sup>39</sup> If the agency is allotted a given percentage of charge revenue, charges would provide an increased incentive for the agency to monitor output because they will be keen to ensure that firms are not under-estimating their output levels. There will be no such incentive if agencies are guaranteed a certain amount from central government. In addition, under a 'pure' charge system, revenue would far exceed administrative costs and as this revenue would probably go to national government, one would expect them to become much more concerned about effective monitoring. Industry too, would be keen to ensure

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<sup>34</sup>Hawkins, *Environment and Enforcement*; Richardson et al., *Policing Pollution*; Hutter, *The Reasonable Arm of the Law*.

<sup>35</sup>Although as Vogel points out, this does not necessarily lead to a better result than a more 'co-operative' approach (Vogel, *National Styles of Regulation*).

<sup>36</sup>Russell, 'Monitoring and Enforcement', in Portney (ed.), *Public Policies for Environmental Protection*, 243 at p.269.

<sup>37</sup>For further details on monitoring and enforcement, see Russell, *op. cit.*.

<sup>38</sup>Of course, this assumes that monitoring is intermittent and that firms or the agency do not have continuous monitoring equipment. If continuous monitoring equipment was in use, firms would not have to stick to one chosen level, but could vary their emissions as they wished and be charged accordingly. In other words, they could be charged on actual output. However, such monitoring would also 'improve' the monitoring of command-and-control regulation, so for our purposes here it is not relevant.

<sup>39</sup>OECD, 'Improving the Enforcement of Environmental Policies', *Environmental Monographs No. 8*, 1987, para. 4.2; it has been suggested that BAT standards make monitoring easier - see McGarity, note 19 *ante*, at p.210.

effective monitoring and enforcement - charges would very likely make up a significant proportion of their expenditure, and selective non-enforcement of competitors might affect their market position. Of course, at the moment, non-enforcement enables certain firms to avoid pollution control costs; however, under a charge system, they would be avoiding these and the more significant cost of paying the charge on the extra units of pollution emitted. Charges might therefore give rise to a third enforcement arm - agencies and environmental pressure groups would be joined in monitoring activities by industry 'vigilantes'.

Commenting on a mixed incentive charges and standards approach (as opposed to the 'pure' charging approach above), the OECD has suggested that charges may improve enforcement because they act like an additional fine and therefore increase deterrence:

"In the absence of an effluent charge, the reward for violating a standard is the expected gross profit of the actions, less the expected costs associated with being caught. If it is reasonable to assume that in a combined charge and standard system, those caught accidentally or intentionally exceeding the legal standard would have to pay fines plus charges which vary with the unreported quantities discharged, then the charge system reduces the expected net benefit of violating the standard."<sup>40</sup>

One of the aims of enforcement is deterrence. To talk about 'improving enforcement' is often then about improving deterrence. The level of deterrence is essentially dependent on two factors: the chances of being caught and the size of the penalty if caught. Charges add to the latter. One might add that charges may improve enforcement even where there is no prosecution and hence no fine. The Royal Commission on Environmental Pollution (RCEP), in their 16th report, cite the German system where higher charges are levied if monitoring reveals a breach of consent. This may deter infringements of consents which might not currently be thought significant enough to attract prosecution and resembles the concept of a civil fine which was mentioned briefly in the chapter on accountability for enforcement decisions. Ideally, this civil fine would reflect the actual quantities discharged in breach of consent, but they would have a similar effect even if levied as a flat-rate. The RCEP refers to this as being a "powerful reinforcement of consents."<sup>41</sup>

Although the OECD and RCEP above are commenting on a mixed standard/charge approach, the same will be true of a pure charging scheme - a company should expect to be

<sup>40</sup>OECD Mon. 8, op. cit., para. 4.2.

<sup>41</sup>RCEP, 16th report, note 9 *ante*, paras. 8.45 - 8.48.

fined for exceeding the level it had 'chosen' and charged on this extra amount as well as on its chosen amount. In other words, the charge would probably be levied in line with output figures supplied by the firm; if, after monitoring, it was found that the firm was emitting in excess of these figures, the sum levied would be adjusted accordingly.

Finally, Beckerman has implicitly suggested that a charging system would improve enforcement because while standards may be selectively enforced, taxes are collected. He states that:

"The collection of the charge or tax is then a routine matter unaffected by changes in the winds of fashion or local pressures. Tax collectors collect their taxes year in, year out, and in the same way from one part of the country to another."<sup>42</sup>

While this argument is superficially attractive, it is wrong for the simple reason that taxes can also be selectively enforced. The forces which lead to non-enforcement of pollution standards may simply be transferred into non-collection of pollution taxes.

#### *7.1.4.2 Tradeable Permits - Monitoring and Enforcement*

Monitoring under a tradeable permit system would be no different to monitoring of emission standards - the agency would still have to check emissions to make sure that companies were not exceeding their entitlement. As for improved enforcement incentives, firms with credits are likely to be keen on effective monitoring and enforcement, lest cheating companies drive down their value.<sup>43</sup> The agency will therefore be under some pressure to take a strong enforcement line. Companies may also be more inclined to monitor their competitors themselves if trading prices are very high, because cheating may confer considerable competitive advantage.

The OECD monograph comments that emissions trading does not contain the same 'automatic sanctions' described above in relation to a charging system. For this reason, it concludes that a trading system will require the same range of sanctions as traditional regulatory schemes.<sup>44</sup>

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<sup>42</sup>Beckerman, *Pricing for Pollution*, p.56.

<sup>43</sup>Ackerman & Stewart, 'Reforming Environmental Law' (1985) 37 *Stanf LR* 1333 at p.1346.

<sup>44</sup>Note 39 *ante*, para. 4.3.

Are there any other ways in which tradeable permits might improve enforcement? Firms which were 'let off' when in breach of their consent under the standard system because of financial difficulties in complying (to comply, the firm might have had to close down, with consequent effects on local employment)<sup>45</sup> may now be forced to comply - because they can afford to by selling the pollution credits acquired by reducing pollution below the level specified in their consent.<sup>46</sup> However, this rather assumes that their control costs are low - and if they were so low, then it may be the case that they could have complied without too much trouble in the first place. Nevertheless, even if a firm facing bankruptcy could not now afford to comply by selling credits, it may be that a tradeable permit scheme would still improve enforcement. Stewart, for example, has suggested that:

“The use of a permit system would not eliminate concerns over plant shutdowns and unemployment resulting from pollution control policies. But such shutdowns as might occur could be more readily seen as the product of impersonal market forces rather than a particular government decision.”<sup>47</sup>

However, while this may be true at a macro level, it is unlikely to affect enforcement decisions at a micro level. If fear of creating unemployment is one of the reasons for non-enforcement of command-and-control regulation, then it seems unlikely that enforcement officers would feel any differently disposed towards enforcing a tradeable permit (ie. by penalising anyone who does not have sufficient permits to cover their emissions). It could however become an excuse when they do feel compelled to enforce. Rather than blaming 'the law' in a 'job's-worth' manner, they would now have the opportunity to blame 'the market'.

Finally, if as Breyer suggests, current enforcement is primarily targeted at large firms and leaves smaller firms free to continue with their non-compliance,<sup>48</sup> could one say that either a charge system or a system of marketable rights would improve enforcement because all firms, large and small, would have to pay the tax or buy permits? The answer, as Breyer implicitly recognises is no, because selective enforcement is just as much a feature of revenue laws as it is of pollution standards. Just as, as we saw above, impecuniosity and the risk of unemployment may lead to the non-enforcement not just of standards but also

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<sup>45</sup>The authorities on the sociology of enforcement suggest that one reason why officers fail to enforce is because they wish to avoid the consequences on local employment. Of course, this may be used as a threat by a firm when it can in fact comply.

<sup>46</sup>See Tietenberg, note 8 *ante*, pp.28-9.

<sup>47</sup>Stewart, 'Economics, Environment, and the Limits of Legal Control' 9 *Harv Env LR* 1 at p.15.

<sup>48</sup>Breyer, *Regulation and Its Reform*, pp.277 and 280; cf. Yeager, *The Limits of Law*.

tradeable permits - so small firms may be pressured less for payment of their charges or to buy more permits.

### 7.1.5 Certainty

In relation to pollution taxes, the uncertainty in a command-and-control system which resulted from discretion in the setting of standards and their subsequent variation will be replaced by uncertainty as to the initial level of the charge and any subsequent increases needed to cope with new entrants or growth. In other words, there will be little to choose between the two systems in terms of the uncertainty they create for firms.

As for tradeable permits, firms will be faced with uncertainty if the initial allocation of standards proceeds by way of auction. Grandfathering will produce a greater level of certainty. As with any other system, increasing public expectations of environmental quality may produce a need to reduce the number of permits. Depending on how and how often this was done, such a procedure could create uncertainty for firms. However, unlike a command-and-control or a charges system, a tradeable permit system will respond automatically to new entrants and growth via the market; there will be no need for an agency to adjust standards or charges. This will mean less uncertainty for existing firms because their allocation will remain the same unless they decide to sell their permits.

## 7.2 PRESENT CHARGING ARRANGEMENTS

All of the current charging schemes which will be examined are built into the existing regulatory structure (and are therefore not 'pure' market mechanisms) and are aimed at recovering the administrative costs of regulating the consent, licence or authorisation. There are two factors which prevent these charges from acting as pollution taxes - their structure and their size.<sup>49</sup> Because they are cost-recovery schemes, they are typically structured to reflect administrative costs and not to act as an incentive to reduce pollution - although, as we shall see, some may incidentally have such an incentive effect. As for their size, this again reflects administrative costs and will often (but not always)<sup>50</sup> be too low to provide any significant incentive effect.

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<sup>49</sup>See the EC 5th Environmental Action Programme, note 4 *ante*, which recommends that existing charge schemes should, in line with the polluter-pays principle, "be progressively reoriented towards discouraging pollution at source and encouraging clean production processes, through market signals." (OJ p.71).

<sup>50</sup>For example in relation to some NRA charges, as we shall see.

So do the existing charging schemes have the effects which were noted in relation to pure pollution taxes? Do they bring benefits in terms of efficiency, equity, and some possible benefits in relation to accountability, but problems in relation to effectiveness? And what of certainty here?

In relation to equity,<sup>51</sup> with existing charging schemes, the charges are typically based on the amount of effort likely to be involved for the regulator. Firms which present a similar workload to the agencies will face similar charges. For example, as we shall see, the NRA charge is based on the volume and content of the discharge and its receiving water - all of which reflect the NRA's effort in regulating that discharge. As the consultation paper states, "similar discharges to similar receiving waters will bear the same charge,"<sup>52</sup> which will be equitable because there will be a relevant justification for those paying a different charge - the fact that the discharge places a different burden on the regulator. As the consultation paper also states, the aim of the scheme is "to demonstrate that the costs will be recovered equitably from dischargers in relation to their demands on NRA resources" and "not to show undue discrimination or undue preference."<sup>53</sup>

As for certainty, charges under the existing charging schemes are revised annually. The charges are generally, probably not sufficiently high to make the issue of how often they are changed a significant one from the point of view of corporate planning. The higher they become, the more there will be a need for safeguards of the kind contained in some of the command-and-control legislation (eg. the NRA - who, as we saw, can usually only alter consents after two years). Constant change is inimical to the certainty and stability which is required for investment planning.

In relation to accountability, assuming that the charge does have some incentive effect, pollution control is effectively shared between two forces - the force of administrative regulation and the market forces associated with the charge. Pointing to where the effect of one ends and the other begins is obviously difficult, but it has to be true to say that the agency has no control over any reductions in emissions which the charge achieves. In this

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<sup>51</sup>Equity is being used here in the sense defined for the rule of law; of course, the cost-recovery charging schemes are equitable in another sense in that they ensure that the polluter pays (to an extent at least) for regulatory costs rather than the taxpayer. As has been noted, the polluter pays principle is an equitable principle which reflects a judgment on the appropriate allocation of pollution control costs.

<sup>52</sup>NRA, 'Proposed Scheme of Charges in Respect of Discharges to Controlled Waters', 1991, p.12.

<sup>53</sup>*Ibid.*, p.9.



respect, its standard-setting discretion is partially eclipsed. Furthermore, the larger the charge, the more insignificant the agencies' power to set emissions standards would become. Insofar as its power to set emission standards becomes less significant, a charging scheme may be thought of as an improvement in terms of accountability over a straight command-and-control system. However, in reality, as we saw earlier in relation to pure charges, a decrease in the power in setting emission standards will see an increase in the charge-setting power for which the agency will still need to be held accountable. In other words, the need for accountability is simply transferred.

The values of efficiency and effectiveness are slightly more difficult. We saw that efficiency has two aspects - the equalisation of marginal control costs, and the effective use of location. In relation to marginal cost, under an incentive charging scheme, a producer has an incentive to reduce emissions until he reaches the point where it is cheaper to pay the charge; the firms with the lowest marginal abatement costs will reduce emissions the most, whilst those facing higher costs may prefer to pay the charge. This produces an efficient result because the greater burden of reducing emissions is taken-on by those who can do so at least cost. Assuming they do produce an incentive effect, the existing charging schemes will typically be efficient in the marginal cost sense because they will encourage firms which can abate at low cost to cut their emissions more than firms faced with high marginal abatement costs. However, as we shall see, not all the charging schemes are locationally efficient in relation to pollution control. As for effectiveness, it does not make sense to look at whether the existing schemes would guarantee a given level of ambient quality, because that is not their aim. If it were their aim, they would in practice be pure charges and would face the same problem which pure charges face - the fact that the achievement of ambient goals will be a trial-and-error process. Effectiveness here is in fact prior to this fine-tuning use of the word, in that there are questions as to whether the charging schemes are effective at reducing pollution at all - let alone whether they might guarantee a particular target. Many of the schemes are totally ineffective at reducing pollution because they are not structured in such a way to act as pollution taxes. It is this issue which will be the primary concern when examining each of the schemes below.

While on the subject of effectiveness, it is worth mentioning that a charging scheme which, like the existing schemes, is added on to a command-and-control regulatory system can help to improve the effectiveness of the command-and-control system. When looking at pure charges earlier, I noted OECD and RCEP reports which suggested that a charging scheme designed as a pollution tax might improve the enforcement of existing regulatory controls

and hence the effectiveness of the system. The same may be true of cost-recovery schemes which are not designed as pollution taxes as such. Richardson et al., for example, state that officers believed that the introduction of trade effluent charges had led to their demands being taken more seriously; had enabled them to present themselves as advisers who could recommend ways of reducing the amount paid out; and enabled them to use the charges as an effective enforcement device against the 'amoral calculator'.<sup>54</sup> However, they also present some evidence that charging had led some traders to adopt "the attitude that substantial payments entitled them to discharge as they wished."<sup>55</sup> This would point towards a decrease in effectiveness.

Trade effluent charges are rather unusual in that they are based on expected *treatment* costs. As we shall see, most of the existing charging schemes are based not on this, or on pollution, but on the amount of time the agency **expects** to spend in *monitoring* the permit. It has been suggested that cost-recovery schemes such as those operated by the River Purification Boards in Scotland and the one for radioactive substances - which are based on the **actual** amount of time spent in monitoring - may also lead to improved enforcement and hence the effectiveness of existing regulation.<sup>56</sup> The argument is that these could improve enforcement because if a firm is non-compliant, it knows that it will attract more monitoring thereafter and hence attract a higher charge. This will make it think twice about breaching its consent.<sup>57</sup>

### 7.2.1 The NRA Charging Scheme<sup>58</sup>

The NRA charging scheme is a cost-recovery charging scheme introduced under section 131 WRA 1991. It is designed to cover the NRA's routine costs in processing, issuing and monitoring consents, although charges will be made on the basis of bands rather than the actual time and effort the NRA have spent on a particular consent.<sup>59</sup> It is not meant to

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<sup>54</sup>Richardson et al., *Policing Pollution*, pp.146-9. An 'amoral calculator' is a discharger for whom non-compliance is a calculated and deliberate act.

<sup>55</sup>*Ibid.*, p.145.

<sup>56</sup>The system of charging for discharges to water in Scotland and that for radioactive substances consents are thus 'actual cost' cost-recovery charging schemes (see respectively, 'Scheme of Charges for Discharges to Controlled Waters' - reported in (1992) 3(5) *Water Law* 137 and DOE *Environment News Release*, 204, 1991).

<sup>57</sup>One Scottish river purification board (RPB) at least, seems to be aware of this - see 'North East River Purification Board: Charges For Discharges - Proposed Cost Recovery Scheme - An Explanatory Leaflet'. Cf. the text at note 55 *ante*.

<sup>58</sup>NRA, 'The NRA Scheme of Charges in Respect of Applications and Consents for Discharges to Controlled Waters'.

<sup>59</sup>Ie. it is forecast across all consents rather than reflecting the actual cost of dealing with each consent.

cover the NRA's costs of general water quality monitoring, administration, pollution prevention and control work which is not directly related to discharges; these costs will continue to be met by government grant. There is a charge for applications for consent and an annual subsistence charge. The annual element of the charge is based on the (consented rather than the actual) content and volume of the effluent and on the type of receiving water. Each of these are split up into bands which reflect the difficulty the NRA faces in monitoring; each band then has a numerical factor associated with it: volume is divided into 8 bands, and the factors increase with volume; content is divided into 7 bands, with substances which are the most difficult to monitor in the band attracting the highest factor; and finally, receiving waters are split up into 4 bands, the highest factor going to the band which is most difficult to monitor. The numbers associated with each band are then multiplied together with a 'financial factor' to produce the final charge. Thus, for example, a discharge of up to and including 5 cubic metres, containing site drainage, to coastal waters would attract a factor of 0.4, 1 and 0.8 respectively. These would then be multiplied together with the financial factor, which for 1993/4 was £389, so that  $0.4 \times 1 \times 0.8 \times 389 = £124.48$ . By way of contrast, a discharge of more than 150,000 cubic metres which included herbicides and was released to an estuary, would attract a charge of  $14 \times 15 \times 1.5 \times 389 = £122,535$ .

While the scheme is not intended to act as a pollution tax, it may have an incentive effect. As Litterick points out:

"Firstly, dischargers are able to look at whether they need a consent at all; for if there is no consent there is no charge. Secondly, they can look to see whether they can reduce the consented volume; and thirdly they can see whether they can reduce the content and weighting factors by taking out of their discharge those materials that are expensive to monitor and result in a higher weighting."<sup>60</sup>

Nevertheless, the criteria by which the charge is assessed prevent the charge from acting as a *fully* effective pollution tax.<sup>61</sup> As we have seen, the charge is based on the volume and content of the discharge and the type of water into which it is received. Beginning with volume and content, the bands set for these reflect the effort involved for the NRA in monitoring. Now while this will be a fairly good indication of pollution potential where volume is concerned - the larger the volume of the discharge, not only the bigger the monitoring effort required, but also the greater the likely pollution - the same will not

<sup>60</sup>Litterick, 'Charging for Discharging to Controlled Waters' (1990) 5 *IEM* 2 at p.4.

<sup>61</sup>See also the RCEP's 16th Report, note 9 *ante*.

necessarily be true of the content component. Band A for example carries by far the largest factor (15) because it contains a list of substances such as PCBs, herbicides, fungicides and pesticides, which are all very expensive to monitor. Band B, which carries a much smaller factor of 5, contains a list including metals, metalloids and cyanides. While these band B substances may be easier to monitor than band A substances, which is why they attract a lower factor, from a pollution point of view one would want dischargers to reduce emissions of band B substances such as metals just as much as the substances in band A. Thus, a pollution rather than a monitoring charge would indicate a similar factor for both sets of substances. However, while the charge is not a precision pollution tax, it will act as a pollution tax because there is still an incentive for dischargers of band B substances to eradicate discharges of band B substances and move into band C (factor 3) and so on. This points to the second problem with the charge: one has to *eradicate* one's use of the substance to move out of the band. Simply *reducing* the amount would lower the volume factor, but one would still be faced with the same contents banding. This could produce bizarre results. For example, one might be emitting a relatively small amount of herbicide in amongst a large volume of mostly harmless waste water. Reducing the amount of herbicide to a smaller level would be desirable from a pollution point of view, but the charge does not provide an incentive to do this: reducing the amount of herbicide without eradicating it altogether would make little difference to the volume of the discharge and would not take the discharger out of band A. Thus, while the charge might be effective at reducing *emissions*, it will not be as effective as it might be at reducing *pollution*.

Secondly, the types of receiving water (ground, coastal, surface or estuarial) are put into bands with a factor attached to each band which again reflects the NRA's monitoring costs (0.5, 0.8, 1.0 and 1.5 respectively). As Litterick states:

"The factors reflect the costs incurred by the NRA. One of the early suggestions was to use the 'criticality' of the receiving water as a factor but this is not necessarily a good proxy for the costs and effort involved. For example as much cost and effort may be incurred on monitoring discharges into class 4 rivers in heavily industrialized areas as into class 1 trout streams elsewhere."<sup>62</sup>

Thus groundwater ends up with the lowest charge and estuarial waters the highest, because the latter carry far greater monitoring costs than the former.<sup>63</sup> However, this is almost entirely the wrong way around as far as pollution is concerned because estuaries can

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<sup>62</sup>Litterick, op. cit., p.4.

<sup>63</sup>Because of the complex mixing effects which take place in estuaries.

assimilate pollution far better than groundwater. While the charge may be effective at reducing pollution when each type of receiving water is viewed separately, when viewed as a whole, the scheme would, in theory, provide firms with an incentive to move to discharge into waters where their pollution damage would be felt most critically. The only way of avoiding this would be to alter the differentials in favour of the most critical receiving environment.

As for the locational aspect of efficiency, although the charge is based not only on content and volume, but also on the type of receiving water, it will not produce an efficient outcome. This is because the factors attached to the four locational bands - ground, coastal, surface and estuarial waters - are not related to the capacity of that class of water to assimilate pollution. If they had been structured according to assimilative capacity, one might have expected ground and surface waters to have a higher factor (and hence a higher charge) than estuaries.<sup>64</sup> Thus, the charges are not efficient in the locational sense: from a pollution point of view a person discharging to an estuary is presented with a cost greater than necessary for the purposes of environmental improvement.

### 7.2.2 The HMIP Charging Scheme<sup>65</sup>

The HMIP charging scheme was introduced under section 8 EPA 1990, again on a cost-recovery basis. The scheme aims to recover the costs of considering and issuing authorisations, compliance monitoring, enforcement, sampling and analysis of releases, maintaining the public register and associated administrative costs, but not wider policy work. Unlike the NRA charging structure, the HMIP charge will not be effective in reducing emissions because it is not based directly on the volume and content of emissions. With the HMIP scheme, the charge is not based on a unit of pollution, but rather on the number of defined components which the process contains.<sup>66</sup> The more components, the higher the charge. Again, this broadly reflects the expense involved for HMIP in dealing with the process. While it is true that pollution levels will to some extent depend on the number of components, such a charge is an extremely blunt instrument and is unlikely to

<sup>64</sup>Even that would not reflect differences in assimilative capacity within classes, because rivers, for example, vary considerably in their ability to cope with pollution; *cf.* the RCEP who favour altering the perverse incentive of the current charge, but who do not advocate varying the charge according to location - note 9 *ante*, para. 8.47.

<sup>65</sup>HMIP, 'The HMIP Integrated Pollution Control Fees and Charges Scheme (England and Wales)'.  
<sup>66</sup>This is the 'subsistence' charge. There is also an application fee and a substantial variation fee - but needless to say that, as once only payments, these will not provide an incentive effect (except perhaps at the design stage, but since they are based on the number of components, they suffer from the same problems as I am about to describe for subsistence charges).

provide an incentive to change: it is one thing to control the amount of pollution from a particular process, but quite another to reduce the number of components necessary for a process. Furthermore, even if such a reduction could be achieved, it wouldn't necessarily lead to a cut in emissions and hence pollution because it is quite possible for a factory with relatively few components to be a sizeable polluter. A final point to make here is that if the Government decide to replace or augment BATNEEC standards with a proper incentive-based market mechanism, the first ones are likely to be used for the reduction of acid rain and are likely to be of the tradeable permit kind rather than charges.<sup>67</sup>

### 7.2.3 The APC Charging Scheme<sup>68</sup>

The local authority scheme is similar to HMIP's, only it will lack *any* incentive effect because the charge is not even related to the number of components. The rationale for this is given in the Government's response to consultation on the various charging schemes:

"It is intended to adopt the same basic charging structure for local authority air pollution control as for integrated pollution control: that is to say there will be an application fee to cover the costs of determining applications, and an annual charge payable as soon as the authorisation is issued in respect of compliance monitoring and enforcement costs (including sampling and analysis of emissions). However, it is not proposed that local authority controlled processes should be sub-divided into components. Such sub-division for processes coming under integrated pollution control is necessary because of the widely differing demands these processes will place on HMIP's resources. But the 'Part B' processes identified for local authority control are much less varied and generally of smaller scale and complexity."<sup>69</sup>

### 7.2.4 Charges for Discharges to Sewers

A charging scheme may be made under section 143 WIA 1991. Sewerage undertakers currently charge for trade effluent discharges using the 'Mogden Formula', which calculates the charge on the basis of, *inter alia*, the volume and load of the effluent and its strength as measured by the chemical oxygen demand (COD) and the level of suspended solids present.<sup>70</sup> There are no charges specifically relating to toxic substances, as it is stated that these are to be limited solely by way of consent conditions. Again the charges are of a cost-

<sup>67</sup>See the London Economics report, note 4 *ante*.

<sup>68</sup>DOE, 'The Local Enforcing Authorities Air Pollution Fees and Charges Scheme (England and Wales)'.

<sup>69</sup>DOE, 'Pollution Regulation: Cost Recovery Charges', 1990, paras. 32-3.

<sup>70</sup>For details, see the Water Authorities Association, 'Trade Effluent Discharged to the Sewer: Recommended Guidelines for Control and Charging', 1986.

recovery nature; they are intended to recover the costs of treating and disposing of the effluent via the sewage works on the basis of estimates of relevant expenditure.

Based as they are on volume and COD/solids, the charges may provide an incentive effect to reduce potentially<sup>71</sup> polluting emissions. However, empirical studies of trade effluent charges have shown that firms do not necessarily react to them - even when cutting emissions could save them reasonable sums of money.<sup>72</sup> Nevertheless, if set at a high enough level so that considerable sums could be saved, they probably would achieve an incentive effect. While the charges may thus be effective at reducing pollution, it is worth noting briefly the effectiveness problem we discussed in relation to pure charges - the trial-and-error nature of achieving ambient targets. Here, if the charge was to replace command-and-control regulation immediately, it would be a gamble as to whether it had been set at the right level; if it was set at too low a level, the sewage works could suffer significant damage. However, it might be said that given that the sewage works operates as a partial 'failsafe', sewers would be the best place to begin a trial-run of incentive charges gradually replacing traditional regulation. A gradual replacement would alleviate some of the effectiveness problems associated with an immediate replacement, and while remaining difficulties might still be critical to, for example, a river, a sewage works may have a larger threshold to cope.

Also worth noting is that sewerage undertakers may charge on a different basis for trade effluents which undergo only preliminary treatment and are disposed of through a sea outfall belonging to and maintained by the undertaker.<sup>73</sup> These charges are likely to be less than those for discharges to sewers which connect with sewage treatment works, because there is less treatment involved. Because the sea has a high assimilative capacity, the lower level of such charges can be regarded as efficient in the locational sense.

### 7.2.5 Waste Charging

Before examining WRA charging, it is worth considering for a moment the possibility of a pure charge being applied to the production of waste which is sent by a plant for external

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<sup>71</sup>Because today, most emissions will be processed by the sewage works. However, sewage works have a limited capacity, so it does make sense to talk of a pollution tax here: if trade effluent emissions are not sufficiently controlled, pollution will result at the sewage work's discharge.

<sup>72</sup>See eg. Webb and Woodfield, *Standards and Charges in the Control of Trade Effluent Discharges to Public Sewers*, cited in RCEP 16th Report, note 7 *ante* at para. 8.40. See also Pearson & Smith, 'Taxation and Environmental Policy: Some Initial Evidence' (1990) IFS commentary no. 19, p.37.

<sup>73</sup>See note 70 *ante*, p.6.

disposal. If a producer is operating a prescribed process within the IPC controls, he is under a duty to select the best practicable environmental option (BPEO) and if this turns out to be land disposal or incineration, he will have to use BATNEEC (best available techniques not entailing excessive cost) to prevent or minimise the production of his wastes. If a producer comes within IPC and the BATNEEC provisions are rigorously applied to 'outside' disposal, it is possible that market mechanisms would represent a more constitutionally legitimate alternative.<sup>74</sup> Rather than telling a producer what he has to do to reduce these emissions, or by how much he has to reduce them, one could for example set a tax per tonne which would then provide an economic incentive to reduce the waste over and above the current incentive provided by the market cost of disposal. The administrative costs of applying such a 'waste-end' tax to each producer would not be great because documentation and monitoring is already required under the duty of care provisions of the EPA 1990. Such a tax would remove the discretion of HMIP in this area (although again, the discretion would be shifted to tax-setting); it would also arguably be more equitable (each producer would face the same tax rate), more effective<sup>75</sup> and more efficient.<sup>76</sup>

In relation to landfill sites themselves, there can be no question of pure market mechanisms replacing landfill site licences and their associated conditions and thus no question of them leading to an improvement in rule of law values. While market mechanisms could conceivably replace standard-setting for some types of emission to air and water made by producers, landfill sites are like highly toxic substance releases to these media - one wants zero emissions and it seems more sensible to ban leachates than to pretend that one could set a tax to achieve the same objective. Methane gas could be taxed, but there would have to be some guarantee that dangerous, explosive levels were not reached. However, while it is not possible to replace licensing with taxes, it is possible to supplement licensing with a tax on waste disposal operators according to the categories of waste they receive - the cost of which would then be passed on to producers in the form of higher disposal costs. This extra cost would provide a greater incentive to reduce waste arisings than exists at present (the present incentives include increasing disposal costs because of tighter regulation). Waste charging, in other words may have the capacity to increase the effectiveness of the

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<sup>74</sup>If the producer does not come within IPC, there will be no regulatory control on the sending of waste for outside disposal.

<sup>75</sup>Although see the comments in the text below on landfill charges and their effect on flytipping; the same could happen with waste-end taxes.

<sup>76</sup>Although it may be cheaper in administrative terms to tax a small number of landfill site operators, as described in the text below, rather than a large number of producers as with a 'waste-end' tax - especially as the effect would be the same (an increase in the price of disposal).



regulation of production of waste arisings. On the other hand, waste charging may lead to a decrease in the effectiveness of waste regulation in that it may also increase the incentive to fly-tip or to establish unlicensed landfill sites.<sup>77</sup> In Denmark, for example, the introduction of a landfill charge led to a higher incidence of flytipping to avoid the levy.<sup>78</sup>

As with other areas, there is in fact a system of waste charging in place, under section 41 EPA 1990.<sup>79</sup> However, as with other areas, the charging scheme is aimed at cost-recovery rather than at creating incentives to reduce waste. An application charge covers the cost of processing and issuing waste management licences. A subsistence charge (the element of the charge payable annually and therefore arguably the most significant aspect of the scheme) then seeks to recover WRA costs of supervising licences (the 'standard' component), and the liaison costs of the NRA<sup>80</sup> (the 'consultation' component).<sup>81</sup> The standard component of the subsistence charge is connected to the pollution potential of sites, by using specified bands based on the quantities and types of waste disposed. Whatever the structure of the charge, if it was raised high enough, it would have the potential to act as an incentive on producers to reduce waste arisings because the cost of the charge would be passed on to them in the form of higher disposal costs. The charge is unlikely to act as an incentive on landfill operators to reduce pollution on site. If the structure remains as at present and the charge is raised significantly, it would also create a more marked incentive for producers of special waste<sup>82</sup> to reduce their waste arisings: if a producer wishes to dispose of special waste, he will have to pay a higher charge to dispose of it, because landfills accepting such waste will attract a higher charge. Because large landfill sites attract higher charges, it may also have the curious effect that producers would have an incentive to send their waste to small landfill sites.<sup>83</sup> At present this will not of course occur because the charge is not sufficiently large for it to make much if any difference to the cost to the customer.

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<sup>77</sup>See the Coopers & Lybrand report, note 4 *ante*, at p.50.

<sup>78</sup>*Ibid.*

<sup>79</sup>DOE, 'Waste Management Licensing (Fees and Charges) Scheme'.

<sup>80</sup>If consulted under s.41(5) EPA 1990.

<sup>81</sup>Enforcement and other costs not directly associated with the consideration of applications or the subsistence of licensed activities are not covered by the charging scheme.

<sup>82</sup>See The Control of Pollution (Special Waste) Regulations 1980 (SI 1980 No. 1709).

<sup>83</sup>Although, given economies of scale, the larger sites may be able to internalise the charges more easily.

## CHAPTER 8

# Market Control of Corporate Pollution

This chapter is concerned with the control of corporate pollution via market means. By market means, I mean those non-regulatory means of controlling pollution which make use of market processes, incentives and signals such as prices. Green consumerism, environmental management and auditing schemes, civil liability and green investment are just some examples of such market approaches. They are non-regulatory and should not be confused with what I term market mechanisms or economic incentive approaches to environmental regulation such as pollution taxes and tradeable permit schemes, which were examined in the previous chapter. Market mechanisms of environmental regulation are, like command-and-control techniques, a form of regulation. They involve a regulator exerting preventative control on companies, whether via initial allocation and follow-up monitoring and enforcement (tradeable permits) or via the power to set charges (pollution taxes) with similar follow-up. In contrast, market approaches, are generally characterised by their lack of a regulator. Pollution control is achieved via market signals and processes but, unlike with market mechanisms of environmental regulation, these are not used by a regulator to try to achieve a specific regulatory goal. Occasionally, as we shall see with environmental management and auditing and eco-labelling, there may be a quasi-regulator, where the body concerned is typically responsible for processing voluntary applications on the basis of already established criteria, but this is some degree removed from regulation proper where control is of a compulsory and discretionary nature, and is backed by positive sanctions. I also include civil liability in this chapter as a market approach because damages awards act as a market signal to others to take action to avoid similar liability. Some might see judges applying the civil law as regulators of sorts, but their role is essentially reactive rather than preventative and it is difficult to see them as aiming towards a particular regulatory goal.

We can expect to see an increasing emphasis on market approaches in the future. The EC 5th Environmental Action Programme, for example, encourages voluntary agreements and self-regulation as part of a concept of 'shared responsibility' between all of the relevant

actors in the environmental sphere.<sup>1</sup> It stresses a 'bottom-up' approach rather than a 'top-down approach',<sup>2</sup> stating that:

"Whereas previous environmental measures tended to be proscriptive in character with an emphasis on the 'thou-shalt not' approach, the new strategy leans more towards a 'let's work together' approach."<sup>3</sup>

In this chapter, an attempt will be made to assess the constitutional legitimacy of these market means - where legitimacy is measured by reference to the rule of law values of accountability, effectiveness, certainty, equity and efficiency. The legitimacy of corporations themselves will not be the subject of detailed scrutiny. In any event, one could not do so by examining the constitutionality of the exercise of their power, because, as non-state actors, they do not come within the reach of public constitutional analysis.<sup>4</sup> The means used to control them do come within the terms of that analysis because even a market-based, voluntary approach to pollution control is still a public policy choice which must be assessed for its compliance with the rule of law.

The question is how the rule of law values ought to be applied to market control? Should they be applied to market approaches as an addition to a system of regulation or to a stand-alone system? I am interested in applying rule of law values to both. The idea is to see how market approaches - existing as they do at present alongside a system of regulation - fare in terms of values such as equity and effectiveness and then to see how these values might apply to a stand-alone market-based system. There are two reasons for exploring the latter as well as the former: first, with a *ceteris paribus* approach, one may achieve a clearer picture of the match with rule of law values; and secondly, because many in the business world have come close to advocating a wholly market-based approach. The idea of the chapter is as much to demonstrate what such a system would look like as it is to demonstrate how it would fare in terms of rule of law values.

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<sup>1</sup>The 5th Environmental Action Programme, 'Towards Sustainability: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development', chs. 3, 4 and 8, OJ 1993, C138/5.

<sup>2</sup>*Ibid.*, executive summary, para. 34, p.17.

<sup>3</sup>*Ibid.*, para. 19, p.14.

<sup>4</sup>This does not mean that one cannot question the legitimacy of corporations in a non-constitutional sense - see further note 9 *post*.

Figure 2 below sets out the contrast between how the rule of law might be applied to market approaches, and their application to regulation proper which was examined in previous chapters. The aim of figure 2 is to act as a starting and a reference point to the question of whether one can apply the rule of law values to market approaches, stand-alone or otherwise. I will begin by examining this question at a general level before looking at specific market approaches in detail.

Figure 2

Legitimacy of Market Approaches (Corporate responsibility and accountability mechanisms - eg. eco-auditing, green consumerism, tort etc.)	Legitimacy of Regulation
Efficiency	Efficiency
Equity?	Equity
Effectiveness	Effectiveness
Certainty?	Certainty
Accountability?	Accountability

Effectiveness at achieving a desired level of environmental quality can be applied fairly straightforwardly to market approaches. In fact, the issue of effectiveness helps to highlight the point made above about the difference between market approaches existing on their own and their existing alongside a regulatory structure. In the present system where market approaches exist alongside regulation, most market approaches have some problems which are likely to limit their effectiveness. Nevertheless, despite these problems they are likely either to add to the effectiveness of the regulatory system as a whole, or rather to produce an effective joint system of pollution control.<sup>5</sup> However, as we shall see, most market controls would be relatively ineffective without any regulation. Efficiency in relation to market approaches - stand-alone or otherwise - is also reasonably unproblematic: leaving decisions in the hands of market actors is typically more efficient than having regulators impose solutions.

As for equity, it only makes sense to talk about equity where an external state body, such as a regulator, is affecting companies. Where nobody is doing any 'treating' (as in 'treat like

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<sup>5</sup>As we saw in the previous chapter, the same is true of market mechanisms of regulation: on their own, there are doubts about their effectiveness, but they may improve the effectiveness of a command-and-control system.

cases alike'), the issue of equity does not arise.<sup>6</sup> The same will be true of certainty: markets are far from certain environments, but certainty is only relevant if a state body is acting in some way.<sup>7</sup>

The same may also be true of accountability, although the issue is arguably more difficult. Do we mean the accountability of regulatory agencies under a market approach? If so because a market approach does not involve regulation (and a pure market approach would involve deregulation), the problem of holding agencies to account does not arise (or is solved by abandoning them). There will however be some areas where market approaches rely on quasi-regulators and there may then be questions as to their accountability (eg. in relation to eco-labelling and, perhaps to a lesser degree, eco-auditing - both of which are discussed further below).<sup>8</sup> Or, perhaps when we speak of accountability we mean corporate accountability? If we do mean corporate accountability rather than agency accountability, the chapters are not comparing like with like: with regulation one can for example consider various mechanisms for holding an agency to account for use of their existing regulatory means of controlling pollution (typically command-and-control regulation) and then compare this with an alternative regulatory means (such as market mechanisms) to see whether the latter adds anything to the accountability 'budget'. With market control on the other hand, different forms of corporate accountability *are* different means and hence the idea of comparing them in terms of accountability is virtually tautologous.<sup>9</sup>

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<sup>6</sup>Although, as we shall see, equity in other, non-rule of law senses may arise - eg. in relation to green consumerism.

<sup>7</sup>Eg. in relation to eco-labelling, which will be discussed later, companies will face uncertainty if the criteria for product assessment are changed too frequently.

<sup>8</sup>And possibly also concerns about equity (both eco-labelling and eco-auditing) and certainty (eco-labelling).

<sup>9</sup>The key to understanding this may lie in what I said earlier - we are concerned here with the constitutional legitimacy of the *means* used to control pollution, not with the non-constitutional, political legitimacy of corporations or agencies themselves. Corporations have been diagnosed as suffering from a crisis of political legitimacy, as have agencies (see respectively, Vogel, 'The Corporation as Government' (1975) 8(1) *Polity* 5 and Jones, 'Administrative Law, Regulation and Legitimacy' (1989) 16 *Jo of Law & Soc* 410); and accountability has been prescribed as a cure for the legitimation defects of both types of body (on the corporate side, see Craig Smith, *Morality and the Market: Consumer Pressure for Corporate Accountability*, pp.50-52). As Vogel points out, the crisis in corporate legitimacy may stem from two sources: first, their democratic deficit (the idea being that corporations - as public, political institutions - should be democratically restructured); and secondly their poor performance (in this context, their poor environmental performance). As Craig Smith establishes, corporate responsibility and accountability mechanisms (ranging from green consumerism to regulation) can help to restore corporate legitimacy. Regulatory agencies similarly suffer legitimacy problems - only these are almost exclusively associated with their democratic deficit; accountability mechanisms here are all about trying to replace or maintain the link with democracy.

While, for the above reasons, I will not be considering corporate accountability directly, I will be using the distinction between corporate responsibility mechanisms and corporate accountability mechanisms as a way of structuring the chapter's discussion of market approaches (although, as we shall see, the distinction between responsibility and accountability mechanisms cannot always easily be maintained). This is purely for expositional purposes. Corporate responsibility is synonymous with a 'voluntary' approach, where firms control their own pollution without any outside prompting. Under this heading, I would place environmental management and auditing. Corporate accountability on the other hand connotes external pressure of some kind.<sup>10</sup> Under this heading, I would place green consumerism and eco-labelling, green investment (aided by environmental reporting and accounting), boycotts, direct action, civil liability and regulation. As we shall see, 'voluntary' agreements between government and industry could be said to lie somewhere between corporate responsibility and accountability.

## 8.1 CORPORATE RESPONSIBILITY

With corporate responsibility, companies perform well on their own initiative. There are a number of reasons why one might expect them to take environmental action without outside prompting. First, company officials are themselves members of the wider public and will therefore, to some extent, share public concern about environmental issues. The extent to which personal views play a part is however limited by the need to make a profit in competitive markets. Fortunately, increased profit is often another good reason why companies will take action without external pressure: there may be marketing advantages in producing greener products and firms may be able to decrease raw material costs and waste disposal costs by altering processes and cutting back on waste.

The important question is how do companies ensure that such advantages are spotted and acted upon? The answer to this lies in environmental management systems (as part of which one might consider the restructuring of boards of directors to include some environmental input - perhaps in the form of environmental advisory boards)<sup>11</sup> and environmental audits.

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<sup>10</sup>Craig Smith, *op. cit.*, p.78.

<sup>11</sup>The main problem with, for example, environmental advisory boards will be where a conflict of interest occurs. Management may listen to their advice when it suits them, but it is hard to imagine such boards having any influence over matters of strategic importance: "There might be some exceptions, but most companies see their advisory boards neither as watchdogs nor as ombudsmen. The businesses want to be

### 8.1.1 Environmental Management and Auditing<sup>12</sup> and Voluntary Action

There are two principal schemes on environmental management and auditing.<sup>13</sup> The first is organised by the British Standards Institution and is known as the British Standard on Environmental Management Systems - BS 7750. This is not to be confused with BS 5750 on quality management, which is a non-environmental, quality management system. The second is the EC Eco-Management and Audit Scheme (EMAS) introduced by Council Regulation 1836/93.<sup>14</sup> The Regulation was agreed in 1993, and came into force in 1994, but will not apply until 1995. Since Regulations are directly applicable in member states, there is no need for national implementing legislation to be passed and the scheme will therefore automatically become a part of UK law. With BS 7750, there was some delay caused by the need to ensure compatibility with the EMAS scheme, but the standard was issued in its final form at the beginning of 1994 and should soon be fully operational.<sup>15</sup> The

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kept abreast of environmental issues so that they can plan for shifts in the market. And some companies, such as Shanks, want the board merely to comment on main board decisions. Although some companies say they use their boards to help formulate strategy, they only mean this in the most abstract sense. Hewitt, for example, sees no role for the advisory board in helping to decide company strategy. When Shanks recently bought Rechem, the high-temperature incinerator operator, the board was only told after the event" (Knight, 'Advice to turn a director green', *Financial Times*, 22 January, 1992, p.9). In addition, the advisory board has to be provided with information before it is in a position to offer any advice; such information may not always be forthcoming and, in any case, there is no guarantee that their advice will be acted upon.

<sup>12</sup>Environmental management and auditing can be seen as examples of what Teubner has called 'reflexive' law. Teubner places considerable emphasis on the potential for law as "external mobilization of internal self-control resources" (Teubner, 'Corporate Fiduciary Duties and their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility', in Hopt & Teubner (eds.), *Corporate Governance and Directors' Liabilities*, 149 at p.160). According to Teubner, modernist, regulatory law, which seeks to achieve definite social results, has not succeeded because it fails to recognise that "the complexity of socio-economic processes cannot be directed" (Teubner, 'Substantive and Reflexive Elements In Modern Law' (1983) 17(2) *Law & Soc Rev* 239 at p.268). In other words, it is faced with what Habermas has called a 'system' or 'rationality' crisis. Teubner contrasts this form of law with a more postmodern, 'reflexive' law, which aims "to structure and restructure semi-autonomous social systems, by shaping both their procedures of internal discourse and their methods of coordination with other social systems" (*Ibid.*, p.255). Reflexive rationality recognises that intervention is necessary, but "retreats from taking full responsibility for substantive outcomes" (*Ibid.*, p.254). Reflexive or 'soft' law thus aims for 'regulated autonomy', the logic of which is that companies regulate themselves and the state's role becomes that of an auditor of the various self-regulatory systems (Birkinshaw et al., *Government By Moonlight*, pp.183-4).

<sup>13</sup>The chemical industry has established its own industry-specific initiative called 'Responsible Care' - see further 222 ENDS Report (1993) 14 and 233 ENDS Report (1994) 16.

<sup>14</sup>Council Regulation 1836/93 Allowing Voluntary Participation by Companies in the Industrial Sector in a Community Eco-Management and Audit Scheme, OJ 1993, L168/1.

<sup>15</sup>The final issue which needs to be tackled before the scheme can become fully operational is the accreditation of the certifiers who will themselves assess whether a company has complied with BS 7750's requirements.

two schemes are now broadly compatible - the main, significant point of difference being that the Regulation requires the publication of a verified environmental statement.

Both are voluntary schemes; firms are not compelled to participate. For those that do so, there are three likely benefits. First, there are cost savings which may arise from identifying and hence avoiding potential legal liabilities<sup>16</sup> and from identifying waste-minimisation opportunities - savings which might not have arisen without an environmental management and audit system. Secondly, firms will be able to cite the British standard or sport the Community 'graphic' or logo on their corporate notepaper, brochures, environmental publicity and corporate advertising (although not on the products themselves or their packaging, or in their product advertising - because this would create confusion with the eco-labelling scheme).<sup>17</sup> Thirdly, and related to the last point, firms will be able to cite the standard or compliance with the Regulation to their industry purchasers - who have become increasingly concerned about the environmental performance of their supply chain.<sup>18</sup> In the future, many large companies will probably simply not deal with suppliers who are not certified under one of the schemes.<sup>19</sup> (Involving as it does external pressure, this aspect of environmental management systems is an obvious form of accountability mechanism.) Finally, HMIP for example, have suggested that registered firms can expect to receive fewer monitoring visits and, as a result, may in the future end up paying lower charges under their charging scheme.<sup>20</sup>

These then are some of the advantages of participating in a scheme, but what do the schemes actually require? With EMAS, registration under the scheme will be on a site-by-site basis.<sup>21</sup> Under the Regulation, companies must adopt a company environmental policy which must include commitments aimed at the reasonable continuous improvement of

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<sup>16</sup>Although there is also some concern that publication of environmental statements may create liabilities - see eg. 231 ENDS Report (1994) 25.

<sup>17</sup>See eg. Regulation 1836/93, Art. 10(3). Under the Regulation, the logo must be accompanied by a 'statement of participation' which explains the significance of the logo.

<sup>18</sup>B&Q, BT, and British Gas are just three examples of firms who have taken steps to check the environmental credentials of their suppliers. See eg. 239 ENDS Report (1994) 23.

<sup>19</sup>If lenders and insurers start to require registration, then another advantage besides winning tenders will be the ability to secure loans and insurance. With insurance, even if registration is not made a compulsory feature of cover, insurers are likely to offer reduced premiums to registered firms or sites.

<sup>20</sup>See 231 ENDS Report (1994) 23. The HMIP charging scheme was discussed in ch. 7.

<sup>21</sup>Although the environmental policy must be company-wide and not just site-based - Annex I, section A, para. 1; cf. BS 7750, where it is not yet clear if the standard must apply to a whole company or whether a part may be sufficient (see Hill, 'The implementation of EMAS and BS 7750' (1994) 30 *JEM* 7 at p.8).



environmental performance over defined timescales,<sup>22</sup> with a view to reducing environmental impacts to levels not exceeding those corresponding to economically viable application of best available technology - EVABAT (the acronym is formed by the initial letters from the final seven words);<sup>23</sup> these commitments or objectives must be quantified wherever practicable.<sup>24</sup> They must conduct an environmental review of the site and, in the light of that review, introduce first an environmental programme aimed at achieving the commitments towards continuous improvements made in the environmental policy and second an environmental management system for the site. From then on, they must carry out periodic environmental audits of the site and in the light of these audits, make revisions to the environmental programme. They are further required to publish environmental statements and finally, to have all of the above verified to ensure that the requirements of the Regulation have been met.<sup>25</sup> Once the member state's competent body has received a validated statement and is satisfied that the site complies with the Regulation, and once any registration fee has been paid, the site will be registered under Article 8.

BS 7750 is very similar: firms must conduct a preliminary environmental review, establish a register of environmental impacts, create a corporate environmental policy, implement an environmental management system and arrange an environmental auditing plan. To reflect the Community Regulation, the scheme requires firms to include as part of their policy a commitment to continuous improvement of environmental performance, year-on-year, with a view to reducing adverse environmental effects to levels not exceeding those corresponding to economically viable application of best available technology. The rate at which firms must move towards this goal is stated to depend on economic considerations and the degree of environmental impact and risk involved. The only significant point of difference to EMAS is that firms are not obliged to publish an independently verified environmental statement, although firms who wish to secure dual registration will obviously have to produce one of these.

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<sup>22</sup>The defined timescales part comes from Annex I, section A, para. 4.

<sup>23</sup>*Cf.* the EPA 1990 s.7 where the term 'techniques' is used. The EPA term might be thought even more appropriate for a management standard. *Cf.* also Annex I, section D, of the Regulation, which states that the company's environmental policy must be consistent with the following principle of action: "Measures necessary to prevent or eliminate pollution, and where this is not feasible, to reduce pollutant emissions and waste generation to the minimum and to conserve resources shall be taken, taking account of possible clean technologies" (para. 4). If this principle is seen as a requirement and is read literally, it would seem to require the minimisation of pollution emissions and waste without any reference to economic feasibility or viability.

<sup>24</sup>Annex I, section A, para. 4.

<sup>25</sup>The requirements set out in this paragraph are mostly contained within Article 3 of the Regulation.

### 8.1.1.1 Effectiveness

I will begin by examining some of the specific effectiveness problems of eco-management and audit schemes, before moving on to consider the pervasive effectiveness problems of voluntary measures as a whole. Both EMAS and BS 7750 require firms to comply with existing regulatory standards. Under Article 8(4) of the EC Regulation for example, if a competent body is informed by the competent enforcement authority of a breach of relevant regulatory requirements, it must refuse or suspend registration of the site, and is only required to reinstate it if satisfied that the breach has been rectified and that suitable arrangements are in place to prevent a recurrence.<sup>26</sup> Thus, compliance with regulatory standards is a minimum requirement.

Beyond this, both schemes now require firms to have a commitment both to continuous improvement in environmental performance and to EVABAT.<sup>27</sup> However, in both schemes, the wording surrounding this requirement is exceptionally vague and it remains to be seen how it will be interpreted in practice.<sup>28</sup> With EMAS for example, as we have already mentioned, firms must make commitments in their company policy aimed at the reasonable continuous improvement of environmental performance, with a view to reducing environmental impacts to levels not exceeding those corresponding to economically viable application of best available technology. This could have a number of different implications. First, it could mean that whilst firms must have written commitments in their policy aimed at reasonable continuous improvement and EVABAT, the programme need literally only be *aimed* at achieving these; it does not actually have to achieve any substantive improvement in environmental performance - still less achieve its policy targets.<sup>29</sup> Secondly, it could

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<sup>26</sup>As Hill notes, the way this is handled in practice will have an important bearing on the credibility of the schemes: on the one hand, one doesn't want a situation where firms have gone through all the trouble of registering "only to lose the badge at the merest mishap;" on the other hand, to maintain public confidence in the schemes, firms who break the rules must be seen to be sanctioned in some way (Hill, note 21 *ante*, at p.9).

<sup>27</sup>Firms which are subject to Part I of the EPA 1990 will be forced by stick to achieve BATNEEC. As the Electricity Association has stated, one cannot expect them to improve beyond BATNEEC because, *a fortiori*, improvement beyond compliance with this regulatory standard would come at an excessive cost (231 ENDS Report (1994) 24). Firms which are not subject to EPA Part I control will, in contrast, be enticed by carrot to achieve EVABAT. Time will tell if EVABAT is a less stringent standard than BATNEEC, but as I argue in the text between notes 32 and 33, it may need to be less stringent if the schemes are to have any impact.

<sup>28</sup>In principle of course, the Regulation will be for the ECJ to interpret, and if the British Standards Institution (BSI) wishes to stick with the idea of dual registration, BS 7750 will have to follow the EC interpretation.

<sup>29</sup>This interpretation could be inferred from the requirement in Annex I, section D, that a company's environmental policy should contain "Procedures and actions to be pursued in the event of detection of non-

mean that whilst firms do not have to achieve the targets set in their policy, they must nevertheless achieve a reasonable substantive improvement (with EVABAT literally *in view*, although perhaps a long way in the future). Thirdly, it could mean that firms must achieve the reasonable improvement targets they have set themselves in their policy. Fourthly, it could mean that firms must achieve EVABAT. Fifthly, it could mean that firms must achieve the EVABAT target set by them in their policy. Things begin to get rather complicated at this point. One might ask whether there is any difference in effect between the second and third, or between the fourth and fifth interpretations above? The answer is that there may or may not be, depending on the method of assessment used by the verifier in the second and fourth of the above approaches.

For example, if the second of the above interpretations is adopted, the verifier will need to decide whether a reasonable improvement has taken place; this could either be a subjective assessment by the verifier, or he could refer to sector application guides (SAGs).<sup>30</sup> SAGs would set out quantitative improvement targets for each class of industry. They could be drawn up by a regulator, as with IPC guidance notes, or they could, as under the BS 7750 pilot programme, be drawn up by trade associations. If the verifier was making a subjective assessment without reference to SAGs, he may decide that there has been a reasonable improvement, even though this falls short of the target set out in the policy. If, however, the verifier relies on a SAG, then that SAG will typically have been used by the company to set its target, so there will be no difference between the second and third approach above.<sup>31</sup> The same is true if EVABAT is held to be the requirement: a verifier may be satisfied that a company has achieved EVABAT, albeit not the EVABAT target set out in the policy (this would of course require verifiers to be expert in technology assessment); however, if a SAG is used by the verifier to assess what EVABAT requires, the company itself is likely to have used that same SAG as the basis for its target. In other words, there will be no difference between the fourth and fifth approaches if a SAG is used by the verifier in his assessment.

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compliance with its environmental policy, objectives or targets" (para. 7). Why would a firm need this if non-compliance led to deregistration?

<sup>30</sup>See 218 ENDS Report (1993) 20.

<sup>31</sup>Of course, with the third approach, the verifier must still assess the policy targets to judge whether they have aimed at a reasonable improvement and this too will either be a subjective judgment or one made with the aid of a SAG. The important point is that a company may have set itself a stricter target than one regarded as reasonable by the verifier on a subjective basis; this is why the second approach in the text is potentially less stringent than the third approach.

Having decided which of the five interpretations is to apply, the next matter of importance will come in deciding how stringent the relevant requirements of 'reasonable' improvement or EVABAT are to be. If subjective assessments are to be made by verifiers, it is hard to tell whether they would take a strict or a relaxed approach; indeed, different verifiers might adopt different stances. If SAGs are used and are provided by trade associations, the phrases are likely to be interpreted generously, because as ENDS notes, trade associations are apt to operate at the level of the lowest common denominator of their members.<sup>32</sup>

Both which of the five approaches is adopted and then how stringent the relevant phrases are interpreted will have major implications for the effectiveness of the schemes. If, for example the fifth approach is adopted and a strict EVABAT standard tantamount to BATNEEC is applied, then few firms are likely to qualify for registration and the scheme will have very little support and hence little impact. If, at the other extreme, the first approach is adopted companies will have to achieve nothing in concrete terms, but more of them are likely to participate and some of them will achieve something. In other words, at first sight, the fifth, strict BATNEEC approach might appear to be the one which would create a greater cutback in emissions because it imposes more stringent requirements. However, this assumes that firms not covered by Part I of the EPA 1990 would be tempted to adopt stringent BATNEEC requirements by the enticement of the logo.<sup>33</sup> One might argue that the less strict interpretations would give rise to just as much if not more of an improvement in pollution control because while the measures taken by firms will be smaller, many more firms are likely to think that the benefit of the carrot outweighs the cost of achieving it.

What about the effectiveness of the EMAS and BSI schemes if they stood alone without an existing framework of regulation? Such schemes would be very much like our present system of regulation only with all carrots (and not terribly big ones - the ability to sport a logo) and no sticks - total 'entice-and-control' perhaps, rather than 'command-and-control'. Because we are assuming a stand-alone scheme, it follows that firms would not have any regulatory standards to meet as a minimum requirement; from a baseline of zero control, they would have to demonstrate the same commitment to continuous improvement and EVABAT (whatever these prove to be) to be awarded the logo. Needless to say, an inadequate level of environmental quality would be achieved. Some firms might be tempted

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<sup>32</sup>Note 30 *ante*.

<sup>33</sup>It has already been noted that it could not improve effectiveness in respect of a firm already subject to EPA Part I control, because it must achieve BATNEEC in any event.

to comply with the standard if the benefit of the logo outweighed the cost of compliance, but many would not. While this sort of take-it-or-leave-it approach may be suited to an attempt to carry firms beyond existing regulatory requirements, it cannot work on its own.

The effectiveness problem of a stand-alone eco-management and audit scheme is one which would face any attempt to replace regulation with a voluntary approach. It is somewhat optimistic to expect firms which are constrained by the need to make a profit to attend to expensive environmental problems, when doing so would inevitably affect their competitiveness. Firms will only take expensive environmental measures if there is some profit in it for them; they are unwilling to take unilateral loss-making action for fear of the effect on their competitive position. And a satisfactory level of environmental quality cannot be achieved without some loss-making action on the part of firms. Expensive, unilateral action is therefore unlikely to occur in a market-based system - hence the need for regulation, which solves the 'prisoners' dilemma'<sup>34</sup> by imposing constraints multilaterally. Regulation makes loss-making action easier to swallow because everyone is subject to it and thus competition is less of an issue. In any event, even if firms did unilaterally adopt expensive pollution control techniques, there would still be the problem of co-ordination: only a regulatory agency can stop firms congregating in one area. This would only cease to be a problem if such firms reached near zero emission levels - an unlikely prospect under any system.

#### *8.1.1.2 Efficiency*

There can be little doubt about the efficiency of a voluntary approach. Each company knows its own costs and processes and is in the best position to find the cheapest way of controlling pollution.<sup>35</sup> Regulators, lacking such information, are unlikely to apply the least-cost method. One top chemical industry executive has been quoted as saying: "We must move from a command and control phase to a voluntary phase;" another, that "Self-regulation is best because each company knows its own processes and the most effective way of reducing emissions ... That is the most practical approach and the least costly to business. That means the consumer will not have to pay more and more for stupid legislation. We have to prove to society that the best way to solve a problem is before it

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<sup>34</sup>See Axelrod, *The Evolution of Cooperation*.

<sup>35</sup>See eg. Abrahams, 'Stark choice - clean up or be wiped out', *Financial Times*, 18 June, 1993, p.1 of a survey section entitled 'Chemicals And The Environment'. Of course, in relation to the second quote in the text, one might respond that only large companies are likely to possess detailed knowledge of the range of options open to them for reducing emissions.

hits the table of the bureaucrats."<sup>36</sup> However, while the efficiency argument for a voluntary approach is undoubtedly a strong one, here as elsewhere, the crucial point is that efficiency cannot be isolated from other key values. And the other key value to be considered here is obviously effectiveness. Thus, a voluntary, market-based approach may be efficient but as we have seen, there must be question marks about its effectiveness, by itself, at controlling pollution.

### 8.1.1.3 Equity

Equity is not an issue if firms are acting independently in the market. Equity is only an issue if there is an external, official body doing some 'treating' (as in 'treat like cases alike'). However, the important point to note is that 'treatment' can just as well involve carrots (dominium) as the more familiar sticks (imperium) of regulation. The EMAS and BSI schemes both supply carrots in the form of an eco-logo and the ability to cite the standard respectively, and hence equity is a legitimate concern.

As we have seen, both schemes require a commitment to continuous environmental improvement and EVABAT before the logo or standard can be used. When discussing the effectiveness of the schemes, I said that there were five ways in which these requirements could be interpreted. First, it could mean that whilst firms must have written commitments in their policy aimed at reasonable continuous improvement and EVABAT, the programme need literally only be *aimed* at achieving these; it does not actually have to achieve any substantive improvement in environmental performance - still less achieve its policy targets. Secondly, it could mean that whilst firms do not have to achieve the targets set in their policy, they must nevertheless achieve a reasonable substantive improvement (with EVABAT literally *in view*, although perhaps a long way in the future). Thirdly, it could mean that firms must achieve the reasonable improvement targets they have set themselves in their policy. Fourthly, it could mean that firms must achieve EVABAT. Fifthly, it could mean that firms must achieve the EVABAT target set by them in their policy.

With the first interpretation, having put in place the various procedures, all firms would be entitled to registration without the need to achieve anything substantive. This might be considered to raise obvious equity issues because a firm which had made no substantive improvement would gain the carrot as easily as one which had achieved considerable results. However, if one relates equity to the purpose of the scheme and this is - as it is in

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<sup>36</sup>*Ibid.*

the first interpretation - regarded as procedural rather than substantive, then a disparity in substantive results may be regarded as posing fewer dilemmas in terms of equity.

If any of the other four approaches above were taken, it would be crucial to equity whether the verifier made his assessment on a subjective basis or by reference to SAGs. For example, if the second interpretation was adopted, there are two ways of checking on continuous improvement. First, the verifier could make a subjective assessment of whether a firm had made a reasonable improvement. The trouble with this approach is that verifiers may find it difficult to be consistent between different types of firm and there may also be differences between verifiers in relation to similar types of firm. Thus, a situation might arise where there are widely differing standards of improvement between two firms and yet both firms have qualified for the carrot. This method of assessment could pose equity problems both between and within industries. The second way of checking on continuous improvement would involve verifiers referring to SAGs setting out quantitative environmental performance targets for different industrial sectors. This would avoid the concern of some firms improving more than others, because all firms in a sector would be required to reach the same target. However, this approach has another problem - as the ENDS Report notes, "There is also a clear potential for the SAG for one sector to be more demanding on companies than SAGs for others. The implication that certification could mean much less in some sectors than in others also raises credibility problems."<sup>37</sup> In other words, while SAGs would ensure equity within industrial sectors, they would not ensure equity between sectors.

Similar issues would be raised in the fourth interpretation was adopted. Verifiers would either need to be expert in technology assessment or they would have to refer to SAGs. Again, this would raise equity issues whatever the method of assessment: if verifiers assessed EVABAT themselves, there would be a subjective judgment involved, and the judgment applied to one firm could be different to that applied to another similar firm; if SAGs were used to assess EVABAT, there may be questions as to whether EVABAT for one industry is unfair in relation to the standards for another industry (which may be the case, if for example, one industry has historically put a great deal of effort into developing pollution control technology, while another has done very little). As we have seen, similar

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<sup>37</sup>218 ENDS Report (1993) 20. Particularly, if trade associations drew-up the SAGs (unless all industry sectors adopted their lowest common denominator). If a regulator drew them up, inter-industry equity might be greater, because there would be less danger of one industry pulling its weight while another lagged behind.

issues arose in relation to the system of regulation under integrated pollution control (IPC) where, instead of SAGs, one has the Chief Inspector's guidance notes.<sup>38</sup>

#### *8.1.1.4 Accountability*

As a public scheme, the accountability of the competent body established for the purpose of registering sites under the EMAS Regulation is of some importance. However, accountability is of much less significance here than with regulatory bodies proper, because it is a voluntary scheme and because the range of functions performed, and powers possessed, by the competent body, is very narrow. Nevertheless, there are some accountability requirements built into the Regulation. Under Article 18(2), the body must have procedures for considering observations from interested parties concerning registered sites. And, if it proposes to delete a site from the register under Article 8, the body must inform the site management.

#### **8.1.2 Government-Industry Bargaining**

Midway between corporate responsibility and accountability lie agreements between government and industry. Here, companies do not perform entirely on their own initiative, and there is no carrot - only the possible latent threat of the stick (regulation) if a 'voluntary' approach cannot be made to achieve the desired target. A good example of this in a UK context would be the agreement between the Government and the newspaper industry to use at least 40% recycled fibre by the year 2000.<sup>39</sup> Another would be the recommendation by the Advisory Committee on Business and the Environment (ACBE), a group of high-level business executives established in May 1991, that voluntary targets for energy efficiency be agreed between government and all sectors of industry.<sup>40</sup> The Government is currently considering the scope for further such voluntary agreements between government and industry sectors.<sup>41</sup>

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<sup>38</sup>See p.53, n.58; see also p.187, n.24 for a similar problem in relation to market mechanisms.

<sup>39</sup>200 ENDS Report (1991) 13.

<sup>40</sup>201 ENDS Report (1991) 3. The Government has not taken-up the idea and ACBE's own attempts to secure the agreement of industry to such energy efficiency targets have failed - see 223 ENDS Report (1993) 4.

<sup>41</sup>See DOE, 'Improving Air Quality', 1994, para. 4.17. One of the factors giving the Government pause for thought is the legal status of such agreements and their enforceability - on this and other problems of implementing voluntary agreements in a UK context, see 224 ENDS Report (1993) 3.



Voluntary agreements form an integral part of pollution control in the Netherlands.<sup>42</sup> The Environment Ministry sets targets for particular sectors on matters ranging from energy efficiency to waste reduction which are then translated into primary sectoral covenants. Homogeneous sectors (firms with similar processes) come up with uniform measures to achieve their targets which are incorporated in a second covenant. In the 'heterogeneous' sectors (principally the basic metal and chemical industries), it is up to each firm to produce a plan of environmental improvement. The Environment Ministry then aggregates these individual plans to see whether they will lead to the sector target being reached; if this seems unlikely, the plans are returned to the companies for improvement.

What of the rule of law values here? First, voluntary environmental agreements are equitable in that for homogenous sectors, the covenants will ensure that all firms face similar standards.<sup>43</sup> Second, and perhaps most significantly, they are efficient (in the sense that they are likely to achieve an environmental objective at less cost than traditional command-and-control regulation): companies are able to choose the most appropriate time at which to introduce improvements since the target approach provides them with reasonable lead-times; and rather than regulatory agencies imposing costly solutions without first-hand experience, the system relies upon industry knowledge. Accountability of regulatory agencies is obviously less of an issue because there are no detailed emission/process standard-setting decisions for which they need to be held accountable. Nevertheless, it will become crucially important to hold the Environment Ministry accountable for the decisions it makes when making agreements with industry. Significantly, Dutch environmental groups have complained about being left-out of the target-setting process.<sup>44</sup> As for effectiveness, it is as yet too early to judge the effectiveness of the Dutch approach. The next 5-10 years should be enough to see whether the scheme has been a success. However, from a theoretical point of view, there is nothing inherent in the approach to limit its effectiveness in achieving desired environmental objectives. Indeed, in relation to certain areas (such as transport, energy conservation and production waste arisings which are sent for outside disposal) which are difficult to regulate via traditional regulation, it seems likely that voluntary agreements will prove more effective than such regulation.<sup>45</sup>

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<sup>42</sup>The following passage is largely based on material in 205 ENDS Report (1992) 18.

<sup>43</sup>As we have seen in previous chapters, the same is not true of all forms of traditional regulation.

<sup>44</sup>224 ENDS Report (1993) 3 at p.5.

<sup>45</sup>Potier, 'Agreement on the Environment' (1994) 189 *The OECD Observer* 8 at p.11.

## 8.2 CORPORATE ACCOUNTABILITY

### 8.2.1 Green Consumerism and Eco-Labeling

In contrast to corporate responsibility, where companies effectively control themselves, corporate accountability entails external pressure - in this case, private, typically market pressure. Green consumerism - perhaps the best example of such an accountability mechanism - involves consumers changing their consumption behaviour in the direction of less-polluting products.<sup>46</sup> The idea is that producers will therefore have an incentive to switch to more 'environmentally friendly' production methods: if they do not, they will lose customers and therefore, profits.<sup>47</sup>

#### 8.2.1.1 Effectiveness

There are however, various barriers which limit the effectiveness of green consumerism. The first of these is information: at the moment, consumers are provided with environmental information on only a limited number of products (eg. aerosols, washing powders, tissues), and even then, this information does not provide a full picture of the polluting potential of the product or the company. Washing powders, for example, may display information on matters which are important for disposal - such as biodegradability and phosphate content - but they do not give details of pollution caused by production.

However, the need for detailed 'life-cycle' analysis (LCA) of a large range of products - examining the pollution associated with a product from 'cradle to grave' - has now been addressed by the introduction of the Community eco-labelling scheme under Council Regulation 880/92.<sup>48</sup> The scheme operates "by identifying for consumers those products which are significantly less damaging to the environment than alternatives which serve the same purpose."<sup>49</sup> Products are divided into product groups (eg. washing machines,

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<sup>46</sup>For a good account of some of the issues surrounding green consumerism, see Irvine, *Beyond Green Consumerism*.

<sup>47</sup>Of course, while green consumerism usually conjures up thoughts of retail consumers, 'greening the supply chain' is a form of green consumerism too. Firms checking the environmental credentials of their suppliers are likely to be aided not by the eco-label, which is described below in the text, but by EMAS or BS 7750 registration.

<sup>48</sup>Council Regulation 880/92 on a Community Eco-Label Award Scheme, OJ 1992, L99/1. On eco-labelling in general, see further DOE, 'Giving Guidance To The Green Consumer - Progress On An Eco-Labeling Scheme For The UK', 1991; HC Environment Committee, 8th Report, 'Eco-Labeling', HC474-I, session 1990-91; the Government's response, Cm 1720, 1991 and 203 ENDS Report (1991) 18.

<sup>49</sup>DOE, note 48 *ante*, para. 3.1.

detergents) and specific criteria are set for each group which a product must meet if it is to be awarded a label. The criteria reflect a cradle-to-grave, life-cycle assessment and include such factors as the choice of raw materials, distribution, consumption and use of the product and disposal after use. Under Article 5, either the Commission or the competent body of the member state (in the UK, the Eco-labelling Board) can take responsibility for developing the product assessment criteria. However, so far, the criteria have mostly been developed at national level by competent bodies, with different member states having responsibility for different product groups. The UK, for example, were responsible for developing the product assessment conditions for washing machines; Germany for laundry detergents. Once the criteria have been developed and consultation and agreement have taken place at national level, consultation must occur at EC level. Under Article 6, the Commission must consult a consultation forum made up of up to three Community-level representatives from each of industry, commerce, consumer organisations and environmental organisations. Finally, the criteria must be agreed upon at EC level by a committee composed of representatives of member states. If the committee accepts the criteria, the Commission will adopt them. If it rejects them or if no decision is reached, the measures are submitted to the Council.

Applications for a label are made to the competent body of the member state in which the product is manufactured, or first marketed or imported from a third country. A fee for applications is payable to the competent body to cover administrative costs (currently £ 500). In the UK, testing to see whether the product satisfies the criteria can be done either by an independent, accredited laboratory, or by the firm itself as long as their test results are externally verified.<sup>50</sup> The competent body then decides whether to award a label after consultation with the Commission.<sup>51</sup> Products awarded a label are entitled to sport a logo on the product concerned (and only that one)<sup>52</sup> or its packaging, and an annual fee is payable for this privilege (0.15% of sales). Although the Regulation is in force, criteria have been agreed at EC level for just four product groups - dishwashers, washing machines, soil improvers, and toilet paper and kitchen rolls - and only one eco-label has so far been awarded (to Hoover, for a range of their washing machines) and appeared in the shops.<sup>53</sup>

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<sup>50</sup>223 ENDS Report (1993) 24.

<sup>51</sup>If the Commission or any other competent body objects, then the matter may be referred to the committee of national representatives (the same committee which is responsible for agreeing product criteria).

<sup>52</sup>Art. 16.

<sup>53</sup>Although the UK Eco-labelling Board are under a duty to explain and advertise the scheme under Art. 15, they apparently cannot spend their advertising budget until another label is awarded (see 234 ENDS Report (1994) 27). This may be one reason why the scheme has got off to such a slow start.

The publication of other criteria has been delayed by disagreements over their validity and the scope of consultation. With washing machines, where criteria have been agreed and published by the Commission, only one company has applied for a label (which it was awarded) because, it seems, other firms are either waiting to see what effect the eco-label has on their sales, or think that the cost of securing the eco-label would outweigh any economic benefits it might bring.<sup>54</sup> In fact, the very future of the eco-labelling scheme is now in some doubt.<sup>55</sup>

In any event, there are inevitable limitations to the environmental effectiveness of the scheme, which various reports highlight. The first of these is that it merely seeks to rank alternatives within the same product category: so, for example, cars would be compared with other cars rather than bicycles - which are an alternative form of transport - and batteries with batteries as opposed to mains electricity.<sup>56</sup> Choosing a less polluting car will, admittedly, make some difference, but choosing a bike would have a much greater impact on environmental quality. Secondly, labels are awarded on the basis of a straight pass or fail, because "Grading performance was judged likely to lead to confusion among consumers by presenting them with over elaborate information; it would also in practice be extremely hard to arrive at defensible grades, especially in the early stages of the scheme, because of the complexities of the environmental assessment likely to be involved."<sup>57</sup> Although there is inevitably a trade-off between ideal information supply and

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<sup>54</sup>234 ENDS Report (1994) 27. Many manufacturers seem to think that consumers will be happy enough with their own, unofficial environmental information and that the expense of the scheme is therefore unnecessary (*ibid.*).

<sup>55</sup>See 235 ENDS Report (1994) 25; 236 ENDS Report (1994) 27 and 237 ENDS Report (1994) 24.

<sup>56</sup>*Ibid.*, pp.6-8. However, to an extent this may be taken into account by excluding certain product groups altogether - eg. in Germany air fresheners are not considered for their national version of an eco-label because opening the window is seen as more environmentally friendly (HC 474-I, note 48 *ante*, p.xvii). Not surprisingly our Government does not approve of this German concept of 'utility', stating that "it would be inconsistent with the objective to debar products with consumer appeal for the scheme because of a value judgment that consumers should not buy any products in that group, but change their lifestyle instead" (Cm 1720, note 48 *ante*, p.3). However, this is followed by a comment that some product groups which are not worthy of serious attention under the scheme (eg. confetti), may be excluded as a "matter of commonsense". As ever, when it is a decision made by the Government it is classed as commonsense, but when it is a decision of which they disapprove, it becomes an authoritarian value judgment.

<sup>57</sup>DOE (*op. cit.*), para. 2.2; see also HC 474-I (*op. cit.*), p.xxii which notes the problem with a graded scheme that companies wouldn't want a label which told the world that they had just scraped through as opposed to passing with honours. That is the advantage of a pass/fail approach compared to a graded approach. The advantage of the pass/fail approach over the present state of affairs is, of course, that consumers receive the benefit of more information than at present (life-cycle analysis or LCA rather than, eg., only disposal information), but in a more manageable and comparable form (pass/fail rather than, at present, occasionally complex environmental information which is non-uniform and therefore difficult to use for the purpose of comparing one product with another).

practicality/workability, the straight pass/fail approach may make eco-labelling into something of a blunt instrument: if too many products pass, the scheme is virtually meaningless; on the other hand, if too many fail, the scheme is unlikely to secure the backing of industry - a crucial issue if the scheme is to remain voluntary.<sup>58</sup>

Next, a green consumer may be unwilling to buy an apparently environmentally friendly product from a company with say, a poor record in relation to accidental pollution incidents and environmental prosecutions. This type of information is not likely to be taken into account in an eco-label lifecycle analysis, which is based on 'consented' rather than actual emissions and effects. Environmental reporting, (whether as part of an eco-management and audit system or not) may provide the consumer with information on such matters. There are, however, two major obstacles. The first is that comparatively few companies produce environmental reports, and most of those that have been produced have been criticised as being simply glossy, PR exercises (although of course, this will change for those companies who wish to register under the Community Regulation on Eco-Management and Audit, since this requires publication of detailed environmental statements). The second obstacle is that if companies were to produce detailed reports containing information on matters such as emission levels and pollution prosecutions, few consumers would be likely to take the trouble to read them. Unfortunately, a Catch 22 situation prevails.

Another barrier in the way of green consumerism - which is also informational - is price.<sup>59</sup> As long as environmentally friendly products often still cost more than those which are relatively unfriendly, and as long as products generally fail to reflect the full environmental costs of their production, use and disposal, prices will convey the wrong information to consumers, leaving little hope for meaningful consumer pressure. Increases in the stringency of regulation and the introduction of market mechanisms such as pollution taxes would make more and more products reflect their full environmental cost.<sup>60</sup>

Even if price differentials disappeared - and they have certainly lessened in many product areas without the introduction of taxes in their favour - green consumerism can still only play a part in solving our environmental problems; by itself, it would not be effective at

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<sup>58</sup>There is apparently an unofficial target that 10-20% of the market share in a product group should pass - see 227 ENDS Report (1993) 26.

<sup>59</sup>The 5th Environmental Action Programme, note 1 *ante*, ch. 3, p.27.

<sup>60</sup>*Ibid.*, ch. 7, p.71.

reducing pollution. There are various reasons for this. First, consumers cannot be obliged to make consumption decisions on the basis of environmental performance. There will always be room for those "who neither know nor care about the impact of what they choose" to continue to buy more polluting products "and thereby perpetuate waste and pollution."<sup>61</sup> Another reason is that green consumerism alone could not guarantee that environmental quality objectives would be met: even if everyone purchased the least polluting products, green consumerism could not prevent the industries making these products from congregating in one area. Of course, one might think that if this were the case and massive pollution resulted, then this pollution would be reflected in the eco-labels. However, this would not occur under the present system, because eco-label life-cycle analysis is based on consented emissions - not on the effect actual emissions have on ambient quality. A labelling scheme which reflected local quality would involve a considerable regulatory bureaucracy and would resemble regulation more closely than a market approach. However, perhaps the most important reason is again that manufacturers cannot afford to proceed too far unilaterally: environmental measures are often expensive and over-expenditure may price a product out of the market. Some unilateral expenditure may be justified to attract green consumers and to establish a market position, but a producer will have to balance this carefully with the effect on price.

#### 8.2.1.2 Equity

Just as with the eco-management and auditing regime there may be a question of equity *between* industries, raised by the ability of industries with differing improvement levels to secure registration, a similar issue may arise with eco-labels if labels for some product groups are much more stringent than others - perhaps reflecting an already significant head-start in terms of effort on the part of the industry.<sup>62</sup>

Of course, unlike eco-management and auditing where (depending on the approach taken to continuous improvement) equity *within* an industry is only likely to be achieved if sector application guides (SAGs) are drawn up for that industry, with eco-labels the arrangement of products into groups would appear, at first sight, to guarantee equity within an industry sector. However, this is not the case. The main reason for this lies in the imprecise nature

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<sup>61</sup>Irvine, note 46 *ante*, p.14.

<sup>62</sup>Of course green consumerism and eco-labelling also have equity implications in the political sense in that green products are often more expensive which means the poor cannot afford them. This should become less of a problem as increased regulation and taxes make more and more products reflect their full environmental cost (unless of course there is no environmentally friendly alternative - eg. VAT on fuel).

of life-cycle analysis (LCA).<sup>63</sup> For example, the greater weighting of one factor rather than another in the LCA (eg. with washing machines - weighting electricity consumption rather than powder usage) may be seen as unfair on the part of a manufacturer whose product fails to get a label because of that weighting, but who would have got one if the weighting was slightly different. One cannot level the same accusations at regulatory orders to install pollution control equipment, because, unlike LCA, that is at least a reasonably precise science. At worst, the skewing of eco-labelling product assessment criteria may be deliberate rather than simply a natural result of LCA's impreciseness. Because responsibility for the development of assessment criteria has been shared out amongst different member states, there is a danger that a member state may put a greater weighting on criteria which favour their national products in that group.<sup>64</sup> However, the need for final agreement on the criteria at EC level by a committee comprising representatives from all member states should prevent most such deliberate manipulations.

#### 8.2.1.3 Efficiency

Again, insofar as green consumerism leaves decisions in the hands of firms (they after all can choose what process and product changes to make to woo the green consumer), it is likely to be more efficient than a regulatory approach. The least-cost solution is more likely to be chosen by the firm itself than by a regulator who lacks the detailed information on cost which the firm possesses.

#### 8.2.1.4 Accountability and Certainty

It was mentioned earlier that there will typically be two levels of consultation on product criteria. If the criteria have been developed at national level, then there must first be consultation at that level. In relation to this *ex ante* accountability in the UK, both industry<sup>65</sup> and environmental groups have complained of a lack of consultation, although

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<sup>63</sup>This may be another reason for a lack of equity *between* product groups - if, for example, the member states drawing-up the assessment criteria are relying on different approaches to LCA. This is one reason for concern over the fact that the Commission had not commissioned a LCA expert to draw up a common LCA methodology until recently (see 225 ENDS Report (1993) 26, and 227 ENDS Report (1993) 26).

<sup>64</sup>Intended or not, the effect of the proposed criteria for paper drawn up by Denmark would be to favour Scandinavian mills. For example, the criteria include CO<sub>2</sub> and SO<sub>2</sub> emissions from energy usage. British paper manufacturers, who use high sulphur content British coal to generate in-house energy, would therefore be placed at a disadvantage compared to Scandinavian mills who use biomass, with its lower CO<sub>2</sub> and SO<sub>2</sub> emissions (see 219 ENDS Report (1993) 24 at p.25).

<sup>65</sup>See eg. 234 ENDS Report (1994) 27.

some complaints by the former appear unfounded,<sup>66</sup> and the UK Eco-labelling Board claims that it has invited the latter to meetings which they have chosen not to attend.<sup>67</sup> Then, in all cases, before conditions are agreed for a product group, Article 6 of the Regulation requires consultation with interest groups to take place at Community level. These consultation procedures have also implicitly been criticised for failing to ensure that industry's views are taken into account.<sup>68</sup> Some of these concerns over consultation were due to be addressed in a review of the eco-labelling scheme by the European Commission in 1993.<sup>69</sup>

Also of note in relation to accountability is Article 10(9), which requires a register of all applications<sup>70</sup> to be held by the Commission. For reasons of commercial confidentiality, this register will only be open to the competent bodies of the member states. However, Article 14 does require the Commission to publish in the Official Journal the product groups and associated criteria, a list of products which have been awarded an eco-label, and names of the manufacturers or importers. Finally, another important accountability requirement is contained in Article 10(7) which states that, where an application for the award of a label is rejected, the competent body has to inform the Commission immediately and must give reasons for the rejection to the applicant.

As for certainty, the speed at which the product criteria are reviewed or tightened will have a considerable bearing on a manufacturer's ability to plan. At present, once agreed, the criteria will typically be valid for a period of three years before they are reviewed.<sup>71</sup>

### 8.2.2 Green Investment

There are two different types of green investor - individual and institutional. An individual investor may himself purchase shares in green companies. Alternatively, he may choose to place his money with an institutional investor such as a bank (eg. the Cooperative Bank, which claims green credentials), or an ethical/green fund who will manage a share portfolio

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<sup>66</sup>See eg. 234 ENDS Report (1994) 27, where ENDS reports that, although Zanussi claimed to have no record of any contact with the UK Eco-labelling Board, the industry trade association was closely involved in the development of the criteria for washing machines.

<sup>67</sup>See 221 ENDS Report (1993) 26.

<sup>68</sup>See 235 ENDS Report (1994) 25.

<sup>69</sup>See 227 ENDS Report (1993) 26.

<sup>70</sup>Made to the competent body - in the UK, the Eco-labelling Board.

<sup>71</sup>See Art.5(5). See further 223 ENDS Report (1993) 24 at p 25, and also 219 ENDS Report (1993) 24 at p.25, where ENDS notes that the British paper industry "with its long investment lead-times, is also arguing that the period for reviewing - and almost certainly tightening - the initial criteria should be extended to "substantially in excess of the three years presently envisaged."."



on his behalf (eg. the MPI Global Care Fund). Unlike green consumerism, where consumers typically rely on 'exit' rather than 'voice', green investment may involve both strategies.<sup>72</sup> Investors can avoid environmentally unsound companies or funds and can also raise matters concerning corporate environmental performance at shareholder meetings. Historically, it has been very rare for shareholders to apply the latter form of pressure on *any* issue,<sup>73</sup> let alone the environment, but there are signs that green and ethical investment funds may be moving towards this strategy.

#### 8.2.2.1 Effectiveness

Just as eco-labelling is central to increasing the effectiveness of green consumerism, so environmental reporting and accounting<sup>74</sup> are the key to increasing the effectiveness of green investment. Environmental reporting was mentioned briefly in relation to green consumerism, but it is undoubtedly of much greater significance in the investment sphere.

While eco-labels can only realistically be based on consented emissions and green consumers are unlikely to read company environmental reports before making purchases, environmental investment does have the capacity to be guided by actual company performance. Investors, who are used to reading company financial reports and accounts may read the environmental equivalents. Alternatively, they may read reports on corporate environmental performance drawn up by others. The Ethical Investment Research and Information Service (EIRIS) for example, used the public registers to produce a report for investors detailing all breaches of consents and prosecutions brought by the water pollution regulators in England and Scotland.<sup>75</sup> However, as ENDS notes, EIRIS's approach was not without its problems. The report not only failed to stress sufficiently the difference between a company which had had a one-off and trivial breach, and a regular and serious polluter; it was also biased towards non-manufacturing (and therefore non-directly polluting) financial and retail businesses. As ENDS points out, the unfortunate result of the list may have been

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<sup>72</sup>Note that green consumers could employ 'voice' tactics by writing letters of complaint to polluters - indeed this is preferable because otherwise the polluter cannot be sure that sales have slipped away for environmental reasons, unless market research covers this aspect. However, such activity is probably rare, and the pressure that one consumer can apply cannot match the power of, for example, the institutional investor. Note also that 'entrance' ought really to be added to 'exit' for both green consumerism and investment - a conscious decision to support a product or shares/fund is the other side of the coin to exit. The distinction between exit and voice comes from Hirschman, *Exit, Voice and Loyalty*.

<sup>73</sup>Although see eg. Laurance, 'Leader of the new militant tendency', *The Guardian*, 11 July 1991, p.15.

<sup>74</sup>On environmental accounting, see eg. Gray, *The Greening of Accountancy: The Profession After Pearce* and Quirke, 'Accounting for the Environment: Current Issues' (1991) 1(5) *European Env* 19.

<sup>75</sup>205 ENDS Report (1992) 9.

to make investors shy away from a manufacturing company with a sound environmental policy but with a single instance of non-compliance against it, to choose instead a non-manufacturing company with no direct emissions but with other environmental skeletons in its closet.<sup>76</sup>

There has also been some confusion over exactly what constitutes a 'green' investment: the 'Body Shop' and companies in the waste disposal industry feature in some lists but many have questioned whether these are particularly 'green' companies. The fact is that they are both highly profitable. The true 'green' investment would more likely be in companies with zero emissions and/or perhaps only in companies which produce what is seen by the investor as a socially necessary product (many of the Body Shop's products for example could be said not to be socially necessary). In many ways, this problem is similar to the one of 'utility' in relation to green consumerism, where the question of whether air fresheners deserve to be considered for an eco-label was discussed.

While green investment is still very much in its infancy, its future impact is likely to be limited - whatever the improvements in corporate environmental reporting. This is because investment is largely concerned with making profits and the true 'greening' of production involves considerable financial outlay, which can only lessen these profits. It may simply be too much to expect many people voluntarily to forgo a greater return on their investments. Thus, green investment is unlikely to lead companies to move much beyond what is required by regulations. Green investment (like green consumerism), must strike a balance: if companies spend too much on environmental controls, the absence of profits (or, for consumers, the increase in price) will drive shareholders (or consumers) away; instead they may need to spend just enough to make themselves stand-out as the green alternative.

### **8.2.3 Direct Action and Boycotts**

Other activities which seek to achieve environmental goals include boycotts and 'direct action'. While green consumerism might be thought of as a 'primary' boycott, what most of us would recognise as a boycott is a 'secondary' boycott<sup>77</sup> - with pressure groups encouraging people to avoid specific products (eg. peat, aerosols containing CFCs, unsustainable timber). Direct action may comprise individuals, loose coalitions (eg. road protestors) or pressure groups (Greenpeace, Earth First!) taking real action on the ground

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<sup>76</sup>*Ibid.*

<sup>77</sup>See Craig Smith, note 9 *ante*, at p.148.

to prevent environmentally offensive behaviour. With this form of direct action, the action itself is directly instrumental in achieving the goal. Alternatively, direct action may involve pressure groups (notably Greenpeace) arranging spectacular events which will attract media attention. In the past, this has involved such diverse activities as scaling chimney stacks, attaching banners to toxic waste ships, and blocking highly-polluting outfall pipes to create a fountain effect. With this type of direct action, the action itself is symbolic; the hope is that the media coverage that these events attract will either compel the firm to clean up its act for fear of further bad publicity, or create public pressure for state action. All forms of direct action are now under threat because of the provisions on criminal trespass in the Criminal Justice and Public Order Act 1994. Depending on the reaction to the Act - both by activists and by the police - we may see the loss of a considerable means of holding not only companies but also the Government to account for their decisions and actions affecting the environment. It used to be the case that direct action took off from where environmental law ended or was of no further use. Now, it appears that where environmental law of one sort ends, environmental law of a different order may begin.

#### 8.2.4 Tort

As I mentioned briefly at the beginning of the chapter, tort should be seen as a market approach and not as a form of regulation. After all, it relies on private actors and may provide an incentive effect.<sup>78</sup> On the other hand, it is enforced by the judiciary, who constitute an organ of the state. Nevertheless, it would, I believe, be wrong to describe tort as regulatory because, unlike most regulators, the judges act only in a reactive manner when cases are brought to court (although, as will be seen below, like regulation, tort may have a preventative effect).

##### 8.2.4.1 Efficiency

The best-known exponent of the efficiency of tort law is probably Posner.<sup>79</sup> While I do not intend to concentrate on the details of Posner's theory or the criticisms which have been levelled against it,<sup>80</sup> its central thesis needs outlining here. Posner's theory has both a positive or descriptive component and a normative component.<sup>81</sup> The normative component suggests that laws should be measured against the value of efficiency and,

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<sup>78</sup>The European Commission regard civil liability as an economic instrument - see the Green Paper on Remedying Environmental Damage, COM (93) 47.

<sup>79</sup>See eg. Posner, *The Economic Analysis of Law*, and his *The Economics of Justice*.

<sup>80</sup>See eg. Rizzo, 'The Mirage of Efficiency' (1980) 8 *Hofstra LR* 487.

<sup>81</sup>See Posner, *The Economic Analysis of Law*, pp.17-19.

assuming there is no conflict with other key social values, reformed if they are inefficient. The essence of the positive component is that there is in common law judicial decision-making, as in the market, an invisible hand guiding judges towards the creation of efficient legal rules. In other words, judges may not know it, but many of their judgments achieve an efficient solution. However, Posner uses efficiency in a sense different from that of 'least-cost' efficiency. Efficiency for Posner is Kaldor-Hicks efficiency - a variant of Pareto efficiency.<sup>82</sup> In economic theory, markets are efficient, but where there are 'market failures' such as externalities, they will not be so. An externality exists where a firm imposes external social costs on others which it does not have to pay for. To correct this source of market failure and restore efficiency, these external costs have to be 'internalised' so that the firm is forced to take them into account in its decision-making. Pollution is a classic externality and tort law is one way of internalising the external costs which pollution places on the local population.

Assuming the local population has an absolute entitlement<sup>83</sup> to be free from pollution, there are two ways in which a court could protect this entitlement in a civil action. First, a court could impose a 'property rule' - granting local residents an injunction to protect their entitlement to be free from pollution. This will only be efficient if the benefit to the local community of being free from pollution (as measured by CBA) is greater than the cost to the firm of not polluting.<sup>84</sup> On the other hand, a court may proceed by way of 'liability rules' rather than property rules.<sup>85</sup> In other words, rather than protecting the local residents' entitlement by way of an injunction, the court may require the factory to pay damages. If the common law is to achieve efficiency, these damages would have to be awarded at the

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<sup>82</sup>See Posner, *The Economics of Justice*, pp.91-2. On Pareto and Kaldor-Hicks efficiency, see further p.28 of this thesis, n.81.

<sup>83</sup>For the sake of simplicity, I am assuming here that their entitlement is an 'absolute' one - ie. a right to be completely free from pollution. In reality, a court may also grant an 'intermediate' entitlement - ie. a right to be free of pollution above a given level. This intermediate entitlement could similarly be protected by way of a property rule (injunction) or a liability rule (damages). On this, see further Polinsky, *An Introduction to Law And Economics*, p.19.

<sup>84</sup>The 'Coase theorem', which is considered later in the text, suggests that, in the absence of transaction costs (barriers to bargaining), an efficient result will be reached whatever entitlement or remedy is imposed by the courts because the sides will bargain around the legal allocation. However, while this means that an efficient solution will be reached *if* there are no transaction costs (and that is a big 'if'), it does not mean that tort law itself is efficient: tort law will only be efficient if the courts grant injunctions where benefits outweigh costs. If they grant an injunction to local residents where the value to the firm of polluting is greater than the value to the residents of being free from pollution, then while the parties may bargain around this to achieve an efficient solution, tort law itself is not efficient.

<sup>85</sup>The terms 'property rules' and 'liability rules' derive from Calabresi & Melamed, 'Property Rules, Liability Rules, And Inalienability: One View of the Cathedral' (1972) 85 *Harv LR* 1089.

level which reflected the social cost of the pollution to the local population.<sup>86</sup> A Pigouvian pollution tax would be set on much the same basis.<sup>87</sup>

Saying that the common law is efficient in the above sense<sup>88</sup> is a far cry from our least-cost version of efficiency. In many ways it does not make sense to talk about the common law achieving a level of ambient environmental quality at least cost, because tort law does not aim at achieving a predetermined level of quality.<sup>89</sup>

#### 8.2.4.2 Effectiveness

It has long been claimed that tort is relatively ineffective as a means of pollution control. The reasons given for this have been well documented elsewhere,<sup>90</sup> so I will list them only briefly. It should come as no surprise to find that many of the reasons are similar to those given above for the ineffectiveness of other forms of market solution. First, the victim of pollution is under no obligation to take action - and indeed is likely to be put-off by the delay, expense and uncertainty of going to court. Second, there is often a difficulty in establishing causation, especially where there are a number of possible sources in the same area. Other problems include: the need to bring an action within the appropriate limitation period; the need to establish fault in many cases; and the need to establish that personal or proprietary rights have been interfered with (specifically 'environmental' rights are as yet, non-existent, which means that environmental groups are usually unable to bring tort actions).

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<sup>86</sup>Damages under the US Oil Pollution Act introduced in the wake of the Exxon-Valdez Alaskan oil spill are apparently to be calculated on the basis of CBA (*The Economist*, 18 June 1994, p.20; *The Economist* disapproves of this method of establishing legal damages because it makes the costs of doing business incalculable and uninsurable). NB. also note 84 *ante* - the same is true if the courts choose a damages approach.

<sup>87</sup>Pigouvian taxes will be discussed further below in the section on Coaseian bargaining.

<sup>88</sup>Posner appears to be claiming that the law of tort is efficient. Of course it seems unlikely that the courts will always achieve an efficient outcome. If they grant an injunction, to achieve efficiency they would have to have information of the firm's abatement control costs and the residents' damage costs. Historically, they have lacked both sets of information, except perhaps at an intuitive level. If they award damages, they need to know the residents' damage costs, which would involve CBA.

<sup>89</sup>Although, as I have stated before, one might argue that a nuisance standard is a form of quality standard, albeit 'predetermined' only in a very general sense.

<sup>90</sup>See, for example, Ball & Bell, *Environmental Law*, pp.142-5; Baram, *Alternatives to Regulation: Managing Risks to Health, Safety and the Environment*; McLaren, 'Nuisance Law and the Industrial Revolution - Some Lessons from Social History' (1983) 3 *OJLS* 155; Brenner, 'Nuisance Law And The Industrial Revolution' (1974) 3(2) *Jo of Legal Studies* 403.

These then, are some of the reasons which are usually offered as an explanation for the poor performance of tort in pollution control. However, I believe that they are potentially misleading because they conflate the alternative roles which tort plays. It has long been said that tort plays (at least) a dual role: the first role is preventative or incentive based, in that the risk of a civil action encourages people to adapt their behaviour; the second role is restorative or reparative - whence the maxim '*restitutio in integrum*' which is the professed aim of damages in tort. It is undoubtedly true that a number of the aforementioned 'problems', such as causation and the proprietary basis of civil actions, serve to reduce the reparative effectiveness of tort. This explains why, for example, statutory clean-up powers have been introduced<sup>91</sup> and why further reforms such as the introduction of strict liability have been canvassed, with the aim of cleaning up contaminated land.<sup>92</sup> However, it would be wrong to say that these problems have a similarly marked impact on tort's deterrent or incentive effect in the environmental field. Despite tort's weaknesses, it appears that the threat of civil liability does influence corporate environmental performance (particularly as long-term pollution damage is practically uninsurable).<sup>93</sup> Thus, what I am claiming is that the above obstacles have a more significant impact on the reparative effectiveness of tort than on its power as an incentive.

One must then ask what incentive effect tort has? The answer to this is that it is likely to make firms keep within the regulations, because these will often (but not necessarily) provide a defence to any civil claim.<sup>94</sup> Of course, this very much assumes that tort exists alongside a system of administrative regulation; we are also interested in what effect it would have without such a system in place. After all, we want to know not only how effective tort is under present arrangements, but also how effective a stand-alone system would be at controlling pollution. An idea of how such a stand-alone system might operate can be gleaned from thinking back to the operation of tort law during the industrial revolution, before most pollution legislation and regulation was introduced. At the same time however, one must bear in mind that expectations of environmental quality have radically changed since that period. What this lesson from history tells us is that while tort

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<sup>91</sup>Eg. s.161 WRA 1991 and ss. 27, 59 and 61 EPA 1990.

<sup>92</sup>Eg. the draft Directive on Civil Liability for Damage Caused by Waste, COM (89) 282 - now overtaken by the EC Green Paper on Remedying Environmental Damage, note 78 *ante*; the Council of Europe Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment (Council of Europe, European Treaty Series 150, Lugano, 21 June 1993) contains strict liability provisions, but the UK is not a signatory.

<sup>93</sup>M. Forster, lecture, IALS, Law & Development Forum, 19 February 1992.

<sup>94</sup>See the EC Green Paper on Remedying Environmental Damage, note 78 *ante*.

may have an effective deterrent effect as part of the current system of regulation, if tort was to stand alone, it would find it very difficult to act as an effective controller of pollution. In fact, as we shall see, the sorts of changes to our system of tort law that would be necessary to make it effective at controlling pollution as a stand-alone system, would make it cease to look like a part of the common law at all.

Courts can award two different remedies in civil cases - damages or an injunction. Beginning with damages, if the aim was not only to compensate the individual who had brought the action, but also to manipulate the remedies to achieve a given level of environmental quality, the judge would have to award an enormous sum in damages to produce a deterrent effect on other producers. If damages were set at purely 'compensation' levels, they would not produce a general reduction in emissions; McLaren for example speaks of a land agent at the time of the industrial revolution, who "evinced no doubt that the manufacturers were capable of paying the levels of damages assessed, and asserted that the payment of damages did nothing to reduce the nuisance."<sup>95</sup> Furthermore, the chances of a judge setting damages at the correct level to achieve an overall desired level of ambient quality - if indeed an effective level which did not bankrupt the firm could be set - would be remote.

The alternative remedy - an injunction - would bring similar problems. In this context, a court could not realistically ban companies from making any emissions; in a system with only civil liability as its means of pollution control, there would be far too many of them and the economy would be paralysed. Rather, a judge would have to impose emission reductions or order the introduction of abatement equipment in the manner of a regulator. Effectively, the judge would be setting standards like an agency, but with incomplete knowledge about pollution technology and the effects of emissions on the ambient environment.

It can be seen from the above discussion that the structure of a stand-alone system of tort law that was concerned to prevent pollution would be radically different from current and historical forms (although the latter can help one to conduct a thought experiment to envisage a preventative scheme), which have been concerned primarily with reparation. The efficacy of a court-based preventative scheme is open to question: either it would be so

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<sup>95</sup>McLaren, note 90 *ante*, at p.195.

much like regulation that the difference would be purely semantic, or it would fail due to lack of information on the part of the judges.<sup>96</sup>

#### 8.2.4.3 *Equity*<sup>97</sup>

As a recent report issued by the DOE has commented, "People may see a liability regime as fair because polluters compensate individuals or society for the damage caused to them. On the other hand, it is unlikely that every polluter will be pursued through the Courts to the same extent."<sup>98</sup> While successful civil actions may be equitable in a non-rule of law sense in that they uphold the polluter pays principle, they are inequitable from a rule of law point of view: because tort is highly selective, both in who is able to sue and who is sued, it presents considerable problems concerning equity between firms.

#### 8.2.5 *Coaseian bargaining*<sup>99</sup>

A study of market approaches to environmental problems would not be complete without examining Coaseian bargaining. By this, I mean the possibility of a bargain being struck between polluter and polluted (as opposed to government-industry bargaining which was examined earlier - where the agreement is made between polluter and government).<sup>100</sup> Is this a form of corporate responsibility or accountability? The issue is again problematic, but I include it within this section on corporate accountability because the polluted may be putting some form of pressure on the polluter to come to an agreement.

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<sup>96</sup>However, whilst it appears that regulation is necessary to implement a preventative approach, the same is not necessarily true of reparation. Regulation has been introduced to reinforce this area - in the shape of statutory clean-up powers (eg. s.161 WRA 1991) - but tort could possibly come close to coping on its own, especially if reforms were brought in to iron out some of the problems associated with bringing a civil claim.

<sup>97</sup>Civil liability raises two other equity issues beyond the rule of law version described below in the text. First, civil liability regimes fulfil the polluter pays principle (PPP) because the polluter pays for the cost of pollution he has caused. As I stated in chapter 1, the PPP is an equitable principle because it determines the distribution of pollution control costs between polluter and polluted. Second, civil liability is potentially a regressive means of pollution control since the poor are less able to bring actions (although the very poor may have access to legal aid in some cases).

<sup>98</sup>DOE, 'Making Markets Work for the Environment', 1993, p.18.

<sup>99</sup>See Coase, 'The Problem of Social Costs' (1960) 3 *Jo of Law & Econs* 1.

<sup>100</sup>Of course, this contractual approach to pollution problems does not represent the totality of the 'Coase theorem' - the theorem has a multiplicity of meanings and uses. By referring to a bargaining approach to pollution control as 'Coaseian bargaining', I am simply identifying the origins of this way of thinking about tackling pollution.



### 8.2.5.1 Equity

As with tort, a bargaining approach would raise the issue of equity between polluters themselves.<sup>101</sup> Those companies operating in densely inhabited areas would, for example, be at a severe disadvantage vis-à-vis their counterparts in the open countryside.

### 8.2.5.2 Efficiency

Efficiency in this context can only mean Pareto efficiency (or a variant thereof), because a bargained solution rules out a predetermined ambient goal which can be reached at least cost. An outcome is said to be Pareto efficient when nobody can be made better off without someone else being made worse off. Welfare economics views pollution as an externality - the social cost of pollution is not taken into account by companies. The Pigouvian<sup>102</sup> solution is a tax or charge on each unit of pollution; by paying this tax, companies are made to internalise this external cost. If the level of the tax is based on a cost-benefit analysis (CBA), then the Pigouvian approach will be Pareto efficient, because the tax will be set at the level where the social costs of pollution are equal to the benefits.

The Coaseian approach suggests that a Pigouvian tax is not necessary to achieve the economists' ideal of Pareto efficiency - all that is required is a bargained solution. Pigou would have government intervene in the market to correct market failure - albeit that such regulation would be modelled on market principles (the price mechanism of a tax or charge); Coase is a true free marketeer, who believes that an efficient solution can be found without the need for government intervention of any kind. Coase's insight was that the matter of costs was reciprocal: the polluter could be seen as imposing external costs on the victim; on the other hand, should the polluter have to reduce emissions, the victim could be regarded as imposing costs on the polluter. Thus, it makes no difference from the point of view of efficiency whether the victim bargains with the polluter to make cutbacks, or whether the polluter compensates the victim.<sup>103</sup> The outcome of the Coaseian bargain will be Pareto efficient because contracts are, by their nature, efficient: if it was possible for

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<sup>101</sup>There are two other equity issues raised by a bargaining approach beyond this rule of law version. First, a bargaining approach would not necessarily be in accordance with the polluter pays principle. Under a bargaining approach, the polluter may pay, but payment may equally be made by those suffering the pollution. Secondly, a bargaining approach would have regressive implications - it is generally the poor who currently live nearest pollution, and yet they have less money with which to 'bribe' the polluters.

<sup>102</sup>Pigou, *The Economics of Welfare*.

<sup>103</sup>Although it will make a difference to equity and the polluter pays principle. In the eyes of neo-classical economists, the Pigouvian approach commits the fatal error of confusing distributional issues with efficiency.

either party to be made better off without making the other worse off, the bargain would have been struck differently.

### 8.2.5.3 *Effectiveness*

One must then consider how effective a bargaining approach would be? Of course, that raises the issue - 'effective at what?' - and for our purposes, the answer has been 'effectiveness at protecting the environment to a desired level.' The result is that where bargaining can take place, then if one takes the bargain at face value, such an approach is very effective at protecting the environment to a desired level. After all, the parties have agreed to that level.

Of course, one might point out that the agreed level is only desired by the contractors and that others arguably have a legitimate interest in the matter. One might also question whether the agreed level is truly desired by the contractors themselves. However, these issues are relatively insignificant compared with the major problem, which is that bargaining cannot always take place. The Coaseian approach is all very well if one takes the usual examples such as soot affecting a neighbour's washing, cows trampling crops, or trains creating sparks which set alight farmland. However, it has long been pointed out that the theorem falls down where large numbers are involved and where bargaining cannot therefore take place without considerable transaction costs.<sup>104</sup> Most modern pollution problems involve large numbers, which means that a bargaining approach would, for the most part, be totally ineffective at controlling pollution.

### 8.2.6 **Regulation**

The final form of corporate accountability is regulation, which may be of the traditional command-and-control type, or which may come in the form of market mechanisms such as pollution taxes or tradeable permit schemes. The application of the rule of law values to both of these types of regulation was dealt with in previous chapters.

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<sup>104</sup>See Helm & Pearce, 'Assessment: Economic Policy Towards the Environment', (1990) 6(1) *Oxford Review of Economic Policy* 1 at pp.6-7.

## CONCLUSION

At the end of chapter 1, I stated that there were a number of ways in which the rule of law might be used or operationalised (as opposed to enforced). First, and most stringently, one might take each rule of law value separately and if a system of pollution control failed any one of the values, it would be judged to be in breach of the rule of law. This was very much Hayek's approach. Secondly, one might compare a pollution control system with each of the values in turn and then assess, across the whole range of values, whether that system was in accordance with the rule of law. Thirdly, one might use the values to assess whether one system could be said to be more in accordance with the rule of law than an alternative system. Finally, and least stringently, one might merely require that those designing a system of pollution control had checked the system against each of the values. In other words, in this last case, the rule of law would take the form of a procedural policy-design framework and a system of pollution control would satisfy the rule of law if it had been assessed by reference to that framework.

At the end of chapter one, I also stated two theses. The first was that the rule of law could be used in either the first or the second of the above ways. In other words, that the legitimacy of pollution control instruments could be assessed using rule of law values. The second thesis, which is to an extent dependent on the first, was that market mechanisms of regulation (examined in chapter 7) and market approaches to pollution control (examined in chapter 8) represented a more constitutionally legitimate system of pollution control than command-and-control regulation (examined principally in chapter 2, with the accountability value further taking up chapters 3-6). The presupposition of this second thesis was that the rule of law could further be used in the third way described in the previous paragraph. As I said then, if these theses and any presuppositions have not been proved, we may be left with the final possible application of the rule of law - the policy-design framework.

Having now examined the various pollution control instruments or programmes (market approaches, command-and-control regulation and market mechanisms) in terms of the values of equity, accountability, efficiency, certainty and effectiveness, our conclusion must be that the above two theses and any associated presuppositions cannot be proved.

Beginning with the first thesis; while one can usually apply the rule of law values to the

various forms of pollution control,<sup>1</sup> one cannot use them to judge the legitimacy of regulatory<sup>2</sup> policy. This is true of both the single value pass/fail approach favoured by Hayek, and the range of values approach. The reason for this is that the values which form the rule of law are at once broad, slippery and incommensurable. One certainly cannot take one value such as equity and, having assessed that a policy leaves a lot to be desired in that department, conclude that the policy is in breach of the rule of law. Neither, without a complex system of weighting, can one assess policies in the round for their compliance with the rule of law.

The second thesis was that market approaches of pollution control and market mechanisms of regulation represented a more constitutionally legitimate system of pollution control than command-and-control regulation. Since the first thesis has been disproved and the second thesis is arguably dependent on the first, it follows that the second thesis is also likely to face difficulties.<sup>3</sup> Looking back, one can see that market mechanisms may appear to win on the accountability front because they remove discretion, but on closer inspection, the need for accountability is simply shifted to another type of decision. In any event, can one really say that 'removing' discretion is better than structuring, controlling or checking it under a command-and-control approach? Only someone with a complete aversion to discretion could reach such a conclusion. Market mechanisms may also come out on top in relation to efficiency and possibly equity (depending on which view of equity is taken and which command-and-control regime they are compared with), but charges fall down when it comes to arguably the most important value - effectiveness. Tradeable permits may also share this failing unless strict controls are placed on trading; these controls may then lead to other problems such as market thinness which will reduce their whole rationale - efficiency.

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<sup>1</sup>Although there was considerable difficulty in doing so in relation to non-regulatory market approaches since the values of certainty and equity only come into play when there is some kind of state involvement, and accountability can conceivably be used either in the sense of the accountability of a state agency (if - as with equity - one is involved) or in the sense of corporate accountability.

<sup>2</sup>Using the word in the broad sense to include non-regulatory programmes or instruments.

<sup>3</sup>There is a difference however. While one might not be able to look at, for example command-and-control regulation and say whether it is or is not in accordance with the rule of law because there is no obvious place to draw the line in a set of unstable values; with a comparison of say command-and-control with market mechanisms (or indeed a comparison of different command-and-control regimes themselves), there is no need to draw such a line of legitimacy - one simply has to judge if one performs better than the other. Of course, the latter is only a realistic possibility if all other things remain equal, and they seldom will: if for example market mechanisms were similar to command-and-control in relation to all the values but brought an improvement in relation to say accountability, one might conceivably conclude that market mechanisms were more legitimate; if however, their introduction would see an improvement in accountability but a fall in equity, one could not come to this conclusion without a complex weighting system to act as a guide.

If very little trading actually occurs, a tradeable permit system is really no different to traditional command-and-control regulation. The same is true of market approaches to pollution control. While they may produce an apparent improvement over command-and-control in relation to one value (such as efficiency, the value usually cited by industry supporters of market approaches), this may come at the expense of other values such as effectiveness. Given these general observations about market approaches and regulatory market mechanisms,<sup>4</sup> one is forced to conclude not simply that they do not represent a more legitimate form of regulation, but that the constitutional values of the rule of law cannot be used to come to conclusive judgments of this sort - at least not without a complex weighting system. Thus, the second thesis and its presupposition have also been disproved.

It may then be asked whether the rule of law has any valuable role to play in the regulatory context: if the promise of the rule of law as a litmus test for regulatory legitimacy has turned out to be an empty one, what is its role?

As suggested earlier, having dismissed my two starting theses, the only role left that allows the rule of law a practical and workable realisation is that of a policy-design framework. The rule of law would continue to provide a test of regulatory legitimacy, albeit a rather less strict one than originally envisaged. A policy would only be in breach of the rule of law if the policy makers had not assessed it in terms of all the rule of law values. In other words, the rule of law would act in a relatively weak, procedural manner rather than in a strong, substantive one. It would be concerned not that policies met given, concrete substantive ideals, but rather that a procedure was in place to ensure that substantive ideals were assessed, discussed and weighed against each other.

As for the enforcement of the rule of law: either policy makers could be entrusted to police themselves - in other words to make sure for themselves that they do indeed use the rule of law as a framework for environmental policy design; or, alternatively, the rule of law could be subject to enforcement by the courts. With enforcement by the courts, a policy would be struck out as unconstitutional if the policy-makers had not performed the appropriate procedural task of passing the policy through the framework.

Finally, the question was posed above whether the rule of law has any valuable role to play in the regulatory context if the promise of the rule of law as a litmus test for regulatory

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<sup>4</sup>And the same goes for our existing charging schemes - they add elements of some of the rule of law values, but lack others.

legitimacy has turned out to be a rather hollow one? Having concluded that the rule of law can still have a role (as a framework) and that it can still provide a test of regulatory legitimacy (albeit a weak, procedural one), the question remains as to whether it has a *valuable* role to play? If it is simply to make sure that the values of certainty, accountability, effectiveness, equity and efficiency are considered by policy-makers, there are surely many other ways of doing this than by dressing them up in constitutional apparel. Besides which, there are many other values, such as the political/distributive aspect of equity and the way in which different policies provide an incentive to innovate, which deserve equal consideration when assessing environmental regulatory policy.<sup>5</sup> These are difficult points to refute. However, the rule of law has been used, at an abstract level, by others such as Hayek and Harden and Lewis to judge the legitimacy of policy. My thesis has simply attempted to follow through the logic of these writings - to apply the rule of law in a practical regulatory context to see whether it can be used in this way. The value of the exercise perhaps lies less in providing a practical blueprint for public policy-makers than in making theoretical sense of the rule of law in the modern regulatory state.

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<sup>5</sup>See eg. DOE, 'Making Markets Work for the Environment', 1993. This guide assesses instruments, as I have done (other than accountability, which it does not consider), on the basis of environmental effectiveness, efficiency (resource costs and administrative costs), fairness - and also on the basis of revenue brought in, innovation, and competition. Interestingly, the guide also assesses civil liability in terms of these values - as I did in the chapter on market approaches. Of course, as I mentioned in chapter 1, one could introduce all of the missing considerations into the value of effectiveness; effectiveness presupposes a particular goal (ie. effectiveness at what?) and this goal might become that of providing a continuous incentive to innovate, political equity etc..

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