

9

Environmental crime

→ Overview

This chapter is concerned with environmental crime and the enforcement of environmental law. The chapter starts with some consideration of the difficult definition of 'environmental crime', including the distinction between moral and legal meanings of the term. We then consider some of the basic framework of environmental crime, which helps to explain some of the approaches to the enforcement of environmental regulation. For example, the fact that many environmental crimes are strict liability offences explains why the rate of successful prosecutions is high (at around 95 per cent), but it may also provide an explanation as to why some consider the sanctions that are imposed by the courts to be too low.

The largest part of this chapter describes the enforcement practices adopted by regulatory agencies in England and Wales. There is a vast discrepancy between the number of potential offences committed and the number of prosecutions, which is explained by the 'cooperative approach' adopted by enforcement agencies. The reasons for this approach are discussed, along with alternative approaches. Because the majority of environmental crime is policed by the Environment Agency, there is greater emphasis placed upon the laws, policies, and practices that relate to the Agency's activities, as opposed to those of other environmental regulators, such as Natural England, local authorities, or HM Customs and Excise (in relation to the landfill tax).

At the end of this chapter, you should be able to:

- ✓ appreciate some of the difficulties in defining 'environmental crime';
- ✓ appreciate a basic outline of the legal characteristics of environmental crimes, including the nature of, justification for, and consequences of strict liability;
- ✓ identify and understand the law on corporate and individual liability for environmental offences;
- ✓ identify the main regulatory agencies with responsibilities for enforcing environmental crime and understand the main factors that influence the way in which they operate;
- ✓ appreciate the main issues involved in enforcing environmental law, including the characteristics that underpin the 'British' approach to enforcement;
- ✓ identify and distinguish the different approaches that might be taken when enforcing environmental law;
- ✓ identify in outline the main sanctions for environmental crimes;
- ✓ appreciate and evaluate the current dissatisfaction with the existing structures, processes, and outcomes of the enforcement of environmental regulation.

What is 'environmental crime'?

Various writers have attempted to define what is meant by an 'environmental crime' (see Box 9.1). As with other key terms in environmental law, these definitions tend to reflect different perspectives. Some writers consider that environmental crime should cover activities that may be lawful or licensed, but which cause significant environmental harm.¹ For example, activities such as peat extraction at nationally important nature conservation sites under the benefit of long-standing planning permissions might be considered to be 'criminal' in the eyes of many conservationists (see Box 19.4). Other influential perspectives could be spatial—that is, looking at crimes across international boundaries, as compared to more localized amenity offences²—or might relate to race or social justice—that is, to the inequalities of the causes and effects of environmental harm as between the developed and developing world, and between rich corporations and poorer sections of society.³ These general notions of environmental crime convey a sense of judgment about what is 'wrong' about certain activities, but take us no further.

The definitions set out in Box 9.1 reflect different perspectives on environmental crime, from moral and philosophical, to legal and local amenity-led perspectives. Each of these perspectives characterize environmental crime differently from a broad interpretation incorporating the notion of environmental harm that may be lawful as a crime, to more legalistic definitions that place law at the centre of defining what is 'right' and 'wrong'.

BOX 9.1 Definitions of environmental crime

An environmental crime is an act committed with the intent to harm or with a potential to cause harm to ecological and/or biological systems and for the purpose of securing business or personal advantage.

(M. Clifford (1998) *Environmental Crime: Enforcement, Policy and Social Responsibility*, Gaithersburg: Aspen, p. 26)

An environmental crime is an unauthorised act or omission that violates the law and is therefore subject to criminal prosecution and criminal sanction. This offence harms or endangers people's physical safety or health as well as the environment itself. It serves the interests of either organizations—typically corporations—or individuals.

(Y. Situ and D. Emmons (2000) *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment*, Thousand Oaks, Calif: Sage, p. 3)

Environmental crime includes littering, abandoned vehicles, graffiti, fly posting, dog fouling, fly-tipping, dumped business waste, vandalism, abandoned shopping trolleys and noise nuisance.

(*Tackling Environmental Crime Together*, available online at www.together.gov.uk)

Environmental crime includes all offences either created by statute or developed under the common law that relate to the environment.

(Sixth Report of the Environmental Audit Committee (Session 2003–04) *Environmental Crime*)

1 See M. Halsey (1997) *Current Issues in Criminology* 217.

2 For example, illegal transfrontier shipments of waste as compared to local fly-tipping.

3 See, e.g., in relation to the literature on environmental justice, R. Bullard (1993) *Yale J Intl L* 319.

The definition of environmental crime matters because it helps to frame many of the key aspects of criminal liability for environmental harm:

- whether an activity is viewed as a technical regulatory breach or as a ‘crime against the environment’;
- whether liability for environmental crime should be strict and, if so, what the justification is for this;
- the extent to which offenders should be viewed as truly criminal;
- the attitudes that should be taken towards enforcing the law;
- the sanctions that should be imposed for breach.

Legal approaches to defining environmental crime

The most obvious way for lawyers to define environmental crime is to include only those actions or omissions that directly or indirectly damage the environment and which are prohibited by law. This has the advantage of being value-free and objective. This approach includes both direct polluting acts (for example, depositing waste without a licence) and indirect omissions (for example, failing to pay landfill tax). But taking a legalistic, positivist approach to defining environmental crime still leaves a number of issues.

First, the problematic and uncertain definition of environmental law raises questions of where the outer boundaries of environmental crime are located. For example, compare and contrast the third and fourth definitions in Box 9.1. The fourth definition relies on a common understanding of what statutes ‘relate to the environment’. Whereas this might not be an issue in relation to core topics such as pollution control and wildlife crime, there are other areas in which there is uncertainty. The third definition refers to the local environment, and includes such things as vandalism and graffiti, which might otherwise be classified as ‘criminal damage’. While the definitions in Box 9.1 are not mutually exclusive, they illustrate that a legal approach can elicit broad and narrow definitions of ‘environmental crime’.

Secondly, and following on from the first problem, a legal definition of environmental crime is uncertain, because there is such a wide range of activities and offenders to which the phrase could be applied. Under a broad definition, environmental crimes can be committed by the careless driver, the fly-tipping ‘man in a white van’, organized criminal gangs, the egg collector, and the global corporation. As we can see from the definitions in Box 9.1, typical offences might include littering, antisocial behaviour (such as noise nuisances), trade in endangered species, and major incidents of oil pollution. Thus, while it may be possible to characterize particular groups of offences by reference to particular criteria, these would not necessarily be applicable across all possible environmental offences. For example, the typical characteristics of pollution control offences may not be the equivalent of typical ‘wildlife crimes’ or landfill tax evasion.⁴

Thirdly, taking a legalistic approach to defining environmental crime has jurisdictional and geographical limitations. While there are some international agreements that require signatories to impose standard criminal sanctions,⁵ there is no guarantee that an environmental crime in one country will be a crime in another. This is particularly the case in civil law countries, where the distinction between administrative offences and truly criminal offences is significant.⁶

4 For examples of typical characteristics of pollution control offences, see P. De Prez (2000) 12 JEL 65 at 66.

5 Examples include illegal waste transport and trade in endangered species.

6 H-U. Paeffgen (1991) 13 JEL 247.

BOX 9.2 Europe and the definition of 'Environmental Crime'

In relation to the EC, the issue of deciding who has the authority to determine whether environmentally harmful conduct should be subject to criminal sanctions is particularly topical and is the subject of a long-running dispute between the European Commission and the member States. In Case C-176/03 *Commission v. Council* [2006] Env LR 18, the ECJ effectively determined that the Commission had the right to define environmental crimes and sanctions. In doing so, the Court chose to distinguish environmental crimes—with their essential regulatory, economic, and social dimensions—from more traditional crimes. The Court held that the EC Treaty gave the Commission the power to lay down common criminal rules for environmental crimes and sanctions, which it could use if it could show that there was a need to do so. The Court stated:

As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence... However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

This decision was followed by a Commission proposal for a Directive on environmental crime (see COM (2007)51 final). The rationale behind the proposed Directive is seemingly to provide consistency between different member States' regimes for environmental crime. The Directive would make no wholesale changes to domestic legislation, although the treatment of 'serious' offences committed intentionally or with serious negligence could raise some definitional issues. These 'serious offences' must be punishable by a maximum of at least five years' imprisonment and fines for companies of at least €750,000. In addition, the role of alternative sanctions, including restorative and administrative penalties, is also included. All of this is, of course, subject to the approval of Parliament and ultimately the Council—which leads to the very conflict upon which the ECJ adjudicated in the original case.⁷

For the purposes of this chapter, we adopt a fairly broad legal definition of 'environmental crime' based around the offences set out in the main environmental statutes outlined in Chapter 2. Box 9.3 sets out some of the main classes of environmental crime. Some are straightforward offences in and of themselves;⁸ in other cases, these might be general acts, such as causing the entry of polluting matter into controlled waters,⁹ or they might be specified activities that require a permit or authorization before being undertaken. In many of these latter offences, acting in accordance with a regulatory permit or licence will normally act as a defence.

Box 9.3 covers only the main groupings of environmental offences, but it conveys the breadth of topics that might be considered to be mainstream environmental offences. There are many other environmental regulatory offences,¹⁰ as well as other non-regulatory criminal offences.¹¹

7 Another very important case in this area is Case C-440/05 *Commission v. Council*, ECJ (Grand Chamber), 23 October 2007, a decision concerning EC criminal offences for ship-source pollution (although not directly relevant to the Environment title of the EC Treaty). For analysis, see the Online Resource Centre.

8 For example, supplying unwholesome drinking water—see p. 597.

9 Water Resources Act 1991, s. 85.

10 For example, under planning legislation—see p. 423.

11 For example, public nuisance is a common law offence, as well as a tort, and the uprooting of wild plants for sale or commercial purposes can be theft under s. 4(3) of the Theft Act 1968.

| BOX 9.3 Typical environmental crimes ¹² | | | |
|--|--|---|--|
| Subject of offence | Nature of offence | Statutory provisions | Enforcement body |
| Air pollution | Emissions of dark smoke | Clean Air Act 1993, Pt I | Local authorities |
| Contaminated land | Failing to comply with a remediation notice | Environmental Protection Act 1990, s. 78M | Environment Agency and local authority |
| Drinking water quality | Supplying water unfit for human consumption | Water Industry Act 1991, s. 70 | Secretary of State Drinking Water Inspectorate |
| Environmental taxes | Avoiding landfill tax Avoiding Climate Change Levy | Finance Act 1996, Pt III Finance Act 2000, Pt II and Sch. 6 | HM Customs and Excise |
| Forestry | Illegal felling of trees | Forestry Act 1967, s. 17 | Forestry Commission |
| Genetically modified organisms (GMOs) | Unauthorized release of GMOs | Environmental Protection Act 1990, Pt IV | Secretary of State Health and Safety Executive |
| Hazardous substances and major accident hazard sites | Offences relating to the storage, notification, and emergency planning at major accident hazards | Control of Major Accident Hazards Regulations 1999 ¹³ | Health and Safety Executive and Environment Agency |
| Environmental Permitting | Environmental Permitting (e.g. operating without required permit) | Environmental Permitting (England and Wales) Regulations 2007 ¹⁴ (reg. 38) | Environment Agency and local authorities |
| Pesticides | Misuse of pesticides | Control of Pesticides Regulations 1986 ¹⁵ | DEFRA |
| Statutory nuisances | Failing to comply with an abatement notice | Environmental Protection Act 1990, s. 80(4) | Local authorities |
| Waste management | Illegal waste disposal/treatment | Environmental Protection Act 1990, s. 33 | Environment Agency |
| Water abstraction | Abstracting water without a licence | Water Resources Act 1991, s. 24 | Environment Agency |
| Water pollution | Causing or knowingly permitting entry of polluting matter into controlled waters | Water Resources Act 1991, s. 85 | Environment Agency |

12 Adapted from C. DuPont and P. Zakkow (2003) *Trends in Environmental Sentencing in England and Wales*, London: DEFRA.

13 SI 1999/743.

14 SI 2007/3538.

15 SI 1986/1510.

| Subject of offence | Nature of offence | Statutory provisions | Enforcement body |
|--------------------|---|---|---|
| Subject of offence | Nature of offence | Statutory provisions | Enforcement body |
| Wildlife crime | Controls on trade and possession of wild animals and plants | Wildlife and Countryside Act 1981, Pt I | Police |
| | Protection of habitats | Wildlife and Countryside Act 1981, Pt 11 | Natural England Police |
| | Trade in endangered species | EC Regulation 338/97 Control of Trade in Endangered Species (Enforcement) Regulations 1997 ¹⁶ | Secretary of State HM Customs and Excise Police |

The lack of uniformity of environmental crime

In keeping with the growth of the subject as a whole, the development of environmental criminal law has been fragmented and inconsistent.¹⁷ One of the consequences of this is that there are many disparities between the laws that seek to address different types of environmental crime. This can be seen in the many different ways in which environmental crime is constructed within statutes. Slight differences between the strictness of liability or defences can be detected between different offences,¹⁸ and such differences are not insignificant. For example, on the one hand, one of the historic weaknesses of nature conservation legislation has been the relative narrowness of both the rules and enforcement options. On the other hand, the offence of causing the pollution of controlled waters under the Water Resources Act 1991, s. 85, is comparatively wide, covering a broad range of potential polluters.¹⁹ Moreover, there is a range of other enforcement mechanisms that can be selected to try to deal with any water pollution that has been caused.²⁰ These examples illustrate how, at one extreme, an officer working for Natural England has relatively few enforcement options available to deal with damage to a site of special scientific interest (SSSI)—indeed, he or she may not be able to do anything at all—whereas the Environment Agency officer has the ability to select from an assortment of formal enforcement powers and possibly even from a list of potential polluters.

The moral dimension of environmental crime

Perhaps the fundamental problem in defining environmental crime by reference to legal criteria is that relatively few activities that harm the environment are crimes in and of themselves. Clearly, any definition that characterizes environmental crime as being ‘activities that

¹⁶ SI.1997/1372, as amended.

¹⁷ W. Wilson (1998) *Making Environmental Laws Work*, Oxford: Hart, p. 110.

¹⁸ For example, the absence of a due diligence defence in water pollution—see p. 608.

¹⁹ The breadth of potential polluters stems from a liberal interpretation of the concept of ‘causing’ as found in s. 85—see p. 609.

²⁰ For example, the Water Resources Act allows for the service of an enforcement notice under s. 90B or a works notice under s. 161A.

caused harm to the environment' would ignore the fact that many such activities are perfectly lawful. Criminal law is normally reserved for the punishment of socially unacceptable behaviour; harm to the environment is, in many situations, considered to be acceptable. For example, we are prepared to allow certain industrial activities that cause significant pollution, as long as those activities are controlled under licence or authorization, because it is an inherent consequence of many industrial activities that provide us with significant benefits. This is the rationale for having a system of regulation that defines the framework for determining whether such benefits outweigh the harm caused. The criminal law is not suited to such a balancing process and thus is used mainly to address clearly unacceptable behaviour or to reinforce the regulatory system.

The nature and extent of the environmental harm caused by these various crimes may be contested. There are many types of activity that cause harm to the environment, but which would not necessarily be classed as an *environmental* crime. Consider, for example, the offence of driving a car with exhaust emissions that exceed the legal limit. The emissions may cause harm when aggregated with many other vehicles, but should their release be classified as an environmental crime? Whether this is an environmental crime depends largely upon whether a broad or narrow definition of the term is adopted.

This uncertainty contributes to the moral ambivalence surrounding regulatory offences in general and in certain aspects of environmental crime in particular. The central question is whether environmental crime should be distinguished from 'real' crimes, such as murder or theft. These latter offences are viewed as being acts that are 'evil in themselves', whereas environmental crime is not thought to be inherently immoral (indeed, it is considered to be acceptable in some circumstances), but rather as made unlawful only by statute. This is not merely a theoretical consideration: the extent to which pollution or other environmental harm is viewed as a 'crime' by operators, regulators, and the general public is a factor that influences such things as whether to enforce and how to sanction or punish offenders. Thus, the moral opprobrium that attaches to environmental crime influences the exercise of discretion in taking enforcement action—that is, which power to exercise or whether to prosecute—and in sanctioning pollution by taking into account mitigating factors when sentencing.

Historically, the commission of environmental crimes by industrial operators was viewed as purely regulatory in nature and therefore 'not criminal in any real sense'.²¹ It was thought that pollution was a natural consequence of industrial activity and the operators made a positive contribution to the local and regional economy. Arguably, attitudes to environmental harm, generally, and environmental crime, more specifically, have shifted over the years.²² This has led to calls to distinguish between routine cases of environmental harm that result from general activities and environmental crimes that have been wilfully committed with a view to personal or business advantage. In the former case, it has been argued that civil penalties administered through civil or administrative means, such as standardized 'fines' for breaches of licence conditions, would be more appropriate, leaving criminal sanctions only for the worst type of offences.²³

Other factors have played a part in the ambiguous nature of the moral dimension of environmental crime. Traditionally, those who have polluted have been of high status in society and those affected by pollution of low status. Pollution was more commonplace in working-class areas of high industrial activity. For example, one of the reasons that the 'west end' of cities tends to be more affluent than the 'east end' is partly connected to the historical transmission of pollutants from the west to the east either by prevailing winds or via rivers. Many

21 *Sherras v. De Rutzen* [1895] 1 QB 918.

22 See Box 3.2.

23 M. Woods and R. Macrory (2003) *Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach*, London: University College London.

of those living in the area would have been working in the factory that was polluting the area; the pollution was often seen as a way of life, rather than as a matter for complaint.²⁴

The changes in fundamental attitudes to the environment have started to have an impact upon attitudes to environmental crime. Underlying these changes is a basic shift in the way in which environmental problems are perceived, not only by the public, but also by the enforcement agencies and even by the general category of ‘polluters’. The acknowledgement that environmental protection is important in its own right has undermined previous assumptions about the benefits of activities that cause environmental harm.

As environmental issues have become more important in the public eye, there is a desire to ensure that environmental standards are maintained and environmental damage minimized. Moreover, when public interest in the environment and the understanding of the consequences of environmental harm increases, there is an equivalent escalation in the amount of moral opprobrium that attaches to environmental offences. The publicity that is given to pollution incidents and other notorious examples of environmental damage tends to amplify the view that such harm and pollution is caused by something more than mere administrative difficulties, and should be dealt with severely. Given this increase in the public perception of the importance of environmental interests, it is not inevitable that environmental crime will always be viewed as being somehow a ‘lesser’ offence than ‘real’ crimes, such as burglary or assault. Indeed, some writers have argued for the idea that environmental crimes might ‘swap places’ with traditional crimes in the criminal justice system.²⁵

Strict liability

Many of the common environmental offences impose strict liability. Thus, to establish an offence, the only thing that needs to be proved is the act or omission that forms part of the offence and there is no need to prove any negligence or fault on the part of the defendant or operator. There is a link between the moral dimension of environmental crime and the imposition of strict liability. The moral foundation of ‘real’ criminal law is that a crime requires both an unlawful act and the requisite mental responsibility or fault. The use of strict liability can be justified by reference to both trivial offences, through ease of prosecution, *and* serious offences, by acting as a deterrent and through the Polluter Pays Principle.

As a precursor to the following discussion of the arguments for the use of strict liability for environmental crimes, it is important to inject a note of realism. Although the absence of fault is irrelevant to the commission of many environment crimes, in practice, fault and blame are considered throughout the criminal process. First, enforcing authorities exercise a discretion when deciding whether and how to enforce, and they are often reluctant to use the ultimate sanction of prosecution unless moral blame is towards the top end of the scale—that is, in cases of criminal negligence or actual intent on behalf of the offender.

Secondly, evidence of fault and blame is gathered and presented by enforcing authorities in order to establish the blameworthiness of defendants so that courts can exercise sentencing discretion properly.

Finally, the courts use that sentencing discretion to differentiate between offences that are characterized as having high levels of culpability and those in relation to which the strictness of the liability catches otherwise blameless defendants.

²⁴ See J. Brenner (1974) JLS 403 and J. McLaren (1983) JLS 155.

²⁵ See D. Nelken (1990) MLR 834.

Arguments for the use of strict liability

There are thought to be four main arguments for the use of strict liability²⁶—that the imposition of strict liability:

- promotes the public interest goal inherent in environmental legislation;
- acts as a deterrent, which improves the quality of environmental risk prevention measures;
- increases the ease of prosecution, which increases the deterrent effect;
- accords with the Polluter Pays Principle.

The public interest goal

Environmental regulation is primarily aimed at preventing environmental harm, on the basis that this is in the public interest. Imposing strict liability for environmental crime ensures that this public interest goal is achieved by divorcing questions of blame or fault from the consequences of actions that cause environmental harm. Thus the emphasis is upon the prevention and minimization of harm, rather than on the motivation of a particular offender. The courts have implicitly emphasized the public interest goal inherent in environmental legislation by interpreting criminal liability for environmental crime in a broad fashion.²⁷

Deterrence and risk management

Strict liability encourages those to whom the law applies to be extra-cautious in their attempts to comply with environmental regulation. The imposition of strict liability acts as a deterrent, which ensures that a broad approach is taken to environmental risk avoidance. The courts have emphasized this in adopting an expansive interpretation of criminal conduct in environmental cases. This can be found in cases such as *Alphacell v. Woodward* [1972] AC 824 (see Case 17.4), in which the House of Lords emphasized the need to do ‘everything possible’ to prevent pollution—as opposed to merely taking reasonable steps.²⁸ This approach has included imposing criminal liability for failing to conduct an assessment of the risks associated with *other people’s* conduct (see Case 9.1). In such circumstances, it is clear that there will be an incentive to conduct operations going far beyond what is reasonable, to taking extreme steps to prevent pollution.

CASE 9.1 *Express Dairies v. Environment Agency* [2005] Env LR 7

The defendant, Express Dairies (ED), owned a dairy depot at which it allowed one of its customers to take delivery of cream from an outside supplier. During the transfer, the cream escaped into the surface drains and consequently into the nearby river. ED was found guilty of an offence under s. 217(3) of the Water Resources Act 1991 in that its customer had caused the entry of polluting matter into controlled waters and the offence was committed as a result of ED’s default. The alleged default was that ED had failed to undertake an assessment of the risks associated with transferring cream in the yard.

ED appealed against the conviction arguing that there was no statutory requirement to undertake such a risk assessment. The High Court held that, in order to establish criminal liability under these

²⁶ For a broader discussion of the difficult question of the precise definition of ‘strict liability’ and more generally, see A. Simester (ed.) (2005) *Appraising Strict Liability*, Oxford: Oxford University Press.

²⁷ For example, the broad interpretation of ‘causing’ in relation to water pollution offences—see p. 608.

²⁸ See Case 17.4.

provisions, all that had to be shown was that the offence committed by ED's customer was due to an act or default of ED. Land owners like ED, who allowed risky operations on their land, were under an obligation to carry out a risk assessment and to address the matters raised in that assessment. Only in those circumstances could they then argue that they were not in default.

The counter to this argument is that, instead of acting as a deterrent, it actually undermines the moral force of identifying and distinguishing environmental crimes as serious offences. There are some cases (see, for example, Case 9.2) in which the defendant's conduct can hardly be said to be criminal in any true sense of the word. Branding such actions as 'crimes' devalues the use of criminal law to address serious cases of environmental harm. According to this argument, criminal sanctions should only be used to address the worst examples of environmental harm. In prosecuting and punishing seemingly trivial breaches of the law, regulatory agencies may discourage people from taking a stringent approach to compliance, on the basis that they might as well be 'hung for a sheep as a lamb'.

Although fault is often taken into account when deciding whether to prosecute, there will be cases in which no significant fault can be found, but in which the environmental harm caused is so significant that prosecutions will still be brought.

CASE 9.2 *CPC (UK) v. National River Authority* [1995] Env LR 131

Piping at the defendant's factory had fractured, causing cleaning liquid to enter the drainage system and be discharged into the nearby river. The fracturing of the pipe had been caused by a failure to stick two sections together properly. A subcontractor had undertaken this work before the defendant had purchased the factory. It was accepted that the defendant could not have known or foreseen the crack in the pipe work. The defendant was found to have 'caused' the pollution.

The Court of Appeal upheld the conviction, finding that the fact that the defect was latent and that the defendant could not have foreseen the problem was irrelevant, because liability was strict.

A general counter to the deterrence argument in favour of strict liability is that, given the relatively long history of criminal regulation of environmental harm, there is no objective evidence to suggest that imposing strict liability makes any difference to compliance rates. There may be a number of reasons for this, including low sentences or the low rate of prosecution, but these are inextricably linked to the imposition of strict liability in the first place. Thus we have a 'chicken and egg' argument: is it strict liability or the responses to the harshness of strict liability, such as lenient sentences and low prosecution rates, which lead to ineffective deterrence?

Efficiency and ease of prosecution

A third reason for imposing strict liability presents a different aspect of this deterrence factor. The imposition of strict liability makes it easier for prosecutors to prove their case:²⁹ all that is needed is to establish the criminal act and the added complication of fault or blame can be ignored. Thus, when prosecutions are brought, they rarely fail. This 'freedom to prosecute' acts as a deterrent in various ways to those who would otherwise wish to fight cases on the basis that an offence had been accidental or that reasonable steps had been taken to avoid the commission of the offence. The imposition of strict liability also promotes flexibility in enforcement, in the sense that enforcement agencies are able to target particular offences or classes of offenders, in relation to which or whom non-compliance may be a problem, in

²⁹ C. Abbot (2004) 16(2) ELM 67.

order to emphasize the deterrence factor. Of course, this also raises the question of whether this selective approach would be a fair or efficient approach to environmental enforcement.

The Polluter Pays Principle

The final argument in favour of imposing strict liability is that it accords with one interpretation of the Polluter Pays Principle, in the sense that the punishments imposed by criminal courts for environmental crime represent a ‘payment’: sometimes in the shape of a fine; in other situations, through compensation or even non-monetary sanctions, such as imprisonment.

Defences

Although there are many arguments in favour of imposing strict liability for environmental crimes, there is still a basic objection that criminalizing innocent or accidental actions is somewhat problematic. The true position is that there are very few environmental crimes that impose absolute strict liability—that is, for which there are no defences—because most offences balance the potential unfairness of such liability with certain statutory defences.³⁰

The courts have tended to construe these defences narrowly in order to protect the underlying aims of environmental legislation. For example, in *Durham County Council v. Peter O'Connor Industrial Services* [1993] Env LR 197, the Court specifically rejected the notion that taking ‘reasonable care’ to avoid the commission of an offence would amount to ‘due diligence’, because this would negate the strictness of criminal liability for environmental crime. In that case, the Court suggested that, for due diligence to be established, all that could be done to ensure compliance should be done, even if that involved checking every transfer of waste from a site.

Examples of typical defences include the following.

- **Acting in accordance with a statutory consent**
Typically, this will include complying with the conditions of such things as discharge consents.³¹ Breaching conditions of a consent or authorization is generally an additional or alternative offence.³²
- **Emergency situations**
This defence is normally subject to a requirement to minimize harm and to report to the enforcement agency within a reasonable period.³³ Environmental harm caused in response to an emergency situation—such as water pollution from firefighting run-off—can still amount to an offence, because the emergency does not necessarily break the chain of causation.³⁴
- **Exercising due diligence in carrying out operations**
This would include explicit defences³⁵ and implicit due diligence requirements in relation to the use of Best Practicable Means (BPM) or Best Available Techniques (BAT).³⁶

³⁰ This is strongly linked to the historic use of use of criminal liability with broad defences for environmental crimes.

³¹ See, e.g., the Water Resources Act 1991, s. 88.

³² For example, *ibid.*, s. 85(6).

³³ See, e.g., in relation to: waste—EPA 1990, s. 33(7); nature conservation—Wildlife and Countryside Act 1981, s. 28(8)(b); water pollution—Water Resources Act 1991, s. 89.

³⁴ This does not apply in cases in which the emergency arises in extraordinary conditions: see *Express Ltd (t/a Express Dairies Distribution) v. Environment Agency* [2003] Env LR 29.

³⁵ For example, EPA 1990, s. 33(7), in relation to waste management.

³⁶ For example, the requirement for BAT under the IPPC Directive—see Chapter 14.

Whether or not the due diligence defence can be made out is a question of fact in every case. The question arises of whether due diligence applies to actions taken by a company or by the employee. For example, would it fulfil the requirement to exercise due diligence if a very large company in delegating responsibility to individual sites were to provide rigorous training and supervision on the steps to take to prevent pollution, but if an individual employee were to ignore these steps? The *Durham County Council* case suggests that it will be the company that will be held responsible for the failures of its employees. Thus it would be harder to prove that a large undertaking has exercised sufficient due diligence to amount to a defence, because higher standards will be expected.³⁷ Greater resources are expected to be available to maintain standards in a large company. The ‘due diligence’ must relate to conduct aimed at preventing the offence, not to putting matters right afterwards. The burden of proving due diligence is on the defendant.

- **Having a ‘reasonable excuse’**

The test of whether something is a reasonable excuse is normally objective—that is, would a reasonable person consider that the excuse was consistent with a reasonable standard of conduct?³⁸

Individual and corporate offenders

A diverse range of individuals and corporate bodies carry out the activities that lead to breaches of environmental law, from solo fly-tippers, to huge multinational corporations. The most significant acts of environmental harm through breaches of pollution control legislation tend to be caused by companies, simply because of the scale of the industrial operations. There are, however, important exceptions to this general rule in areas, such as wildlife crime, pollution from agricultural sources, and fly-tipping waste. Indeed, figures suggest that individuals are responsible for the majority of environmental crimes as a whole.³⁹ These figures are, however, slightly misleading, because they exclude local authority prosecutions, but include a significant proportion of individual wildlife offences (for example, egg collecting and animal cruelty) and from some sectors in which individual offenders are far more prevalent (for example, agriculture).

BOX 9.4 Individual vs corporate offenders⁴⁰

| Offender type | Year | | | |
|---------------|------|------|------|------|
| | 1999 | 2000 | 2001 | 2002 |
| Corporate | 359 | 625 | 732 | 880 |
| Individual | 487 | 965 | 1020 | 922 |
| Total | 846 | 1590 | 1752 | 1802 |

³⁷ A point that was reinforced by the decision in *Express Ltd v. Environment Agency* [2005] Env LR 7.

³⁸ See, e.g., the Wildlife and Countryside Act 1981, s. 28(7), and, in relation to statutory nuisances, e.g., EPA 1990, s. 80(4).

³⁹ See also Environment Agency evidence to House of Commons Audit Committee on Corporate Crime, 2004 HC 1135-I, in which it was estimated that the 38–40 per cent of all prosecutions were brought against registered companies.

⁴⁰ Adapted from DuPont and Zakkow (2003).

This distinction between individual and corporate offenders raises a number of issues. First, it is often much easier to classify environmental offences as ‘white collar’ or business crimes, and therefore as being morally neutral, in which the defendant is a major corporation. In circumstances under which it is an individual who is responsible for the commission of an offence, however, there is likely to be criminal intent or negligence. On the one hand, then, in cases in which individuals are found to have committed an environmental crime, it will normally be easier for prosecutors to establish blameworthiness, which would lead to a prosecution. On the other hand, the number of prosecutions of corporate offenders does not correlate with corporate non-compliance with environmental law. In other words, although there may be fewer corporate defendants, the offences for which they are being prosecuted will tend to be at the serious end of the spectrum of environmental harm and there will be many more companies who are in breach, but not prosecuted.

Secondly, the structure of large companies means that it is often difficult to identify the root cause of many pollution incidents. Arguably, this has the effect of obscuring the blameworthiness of offending companies, because they seek to ‘trivialize’ their conduct by reference to factors outside their control.⁴¹ This, however, obscures the fact that, in large organizations, management deficiencies are often to blame and truly innocent offenders are rare.

Finally, the prosecution of corporate offenders can be justified by the existence of the deterrence factor of the bad publicity associated with the prosecution for environmental crimes, and the development of a ‘name and shame’ policy for such offenders. This justification does not exist to the same extent for individual offenders.

Corporate liability

The nature of liability of companies for environmental crime is not necessarily straightforward. Some offences apply directly to companies—for example, where offences relate to the breach of licence conditions and the licence is held in the name of the company. In other situations, however, it is the acts or omissions of individual employees that will incur criminal liability. This raises the central question of corporate criminal liability—namely, in what circumstances can a company be held to account for the acts of its employees?

It had been thought that such corporate liability would only be established in cases in which the employees responsible were of sufficient seniority to act as the ‘controlling mind’ of the company.⁴² The problem is that many pollution incidents are the responsibility of operational staff who are far removed from the ‘controlling mind’. The courts have held that the actions of employees will create corporate criminal liability if it is clear that the relevant statutory purposes would be defeated if a company could not be prosecuted for the acts of its employees.

CASE 9.3 *National Rivers Authority v. Alfred McAlpine Homes East Ltd* [1994] Env LR 198

The defendant (AMHE) caused water pollution during construction works. At the trial, AMHE was acquitted on the basis that the prosecution had failed to demonstrate that the employees that had caused the pollution were of sufficiently senior standing within the company to bind the company by their actions. On appeal, the Court found AMHE to be liable. In particular, Morland J expanded on the purposive approach to vicarious liability—namely, that the offence under s. 85 of the Water Resources Act 1991 was designed to prevent water pollution. In order to make the legislation effective, there was a necessary implication that companies should be liable for the acts or omissions of *all*

⁴¹ P. DePrez (2000) 12 JEL 11.

⁴² See *Tesco Supermarkets Ltd v. Natrass* [1972] AC 153.

of their employees as opposed to simply the senior employees who were 'controlling minds'. Morland J reinforced this by referring to the idea that companies were, in fact, best placed to control activities of even very junior employees through such things as training and supervision.

CASE 9.4 *Shanks and McEwan (Teesside) Ltd v. Environment Agency* [1997] Env LR 305

The defendant waste company (SM) was prosecuted for 'knowingly causing' the deposit of waste in breach of licence conditions. The relevant facts were that the supervisor of a landfill site, while complying with the requirements of the waste management licence on the delivery of some waste, had failed to complete a necessary waste disposal form when he redirected it to a containment bund rather than to the anticipated storage tank. At the trial, SM argued that it did not have the requisite knowledge of the deposit, because it had only been in the knowledge of the supervisor. SM was convicted on the basis that the site supervisor was part of the 'controlling mind' of the company.

On appeal, the Court held that the only knowledge that was required was general knowledge that waste was deposited as opposed to specific knowledge of the breach of condition. On this basis, either the supervisor's knowledge could be attributed to the company or the company had the general knowledge of waste deposits at the site because it was a landfill site. Thus, the purposes of this particular waste offence—that is, to prevent the unlawful disposal of waste—could be met either by saying that the 'controlling minds' of the company knew that waste was deposited at its landfill sites or that the supervisor's knowledge of specific deposits could be attributed to the company.

To underline the flexibility of the purposive approach, the decisions in Cases 9.3 and 9.4 can be contrasted with the approach to corporate liability taken in other areas, in which a company can only be held criminally liable for the acts of those who possess the 'controlling mind' of the company.⁴³

Directors' liability

Generally, in the UK, when companies commit environmental offences, prosecutions are brought against that company rather than against any individual who might have responsibility within that company. This is in contrast to the practice in many civil law countries, where the doctrine of corporate liability is not particularly well developed and where it is far more common for individual managers of companies to be prosecuted.⁴⁴ The 'British' approach is not, however, restricted by law. Under many environmental statutes, directors and managers can be prosecuted individually in certain circumstances, and the trend in such prosecutions is upwards. For example, in 2006, 29 company directors were fined for environmental offences, up from 11 in 2003.⁴⁵

Any director, manager, secretary, or other similar officer of a corporate body can be prosecuted personally if the offence is committed with their consent or connivance, or is attributable to their neglect.⁴⁶ (Note that these sections do not apply if the allegation is against an

⁴³ Ibid.

⁴⁴ C. Wells (2001) *Corporations and Criminal Responsibility*, 2nd edn, Oxford: Oxford University Press, pp. 138–40.

⁴⁵ Environment Agency (2006) *Spotlight on Business: Environmental Performance in 2006*, and equivalent report from 2003.

⁴⁶ See, e.g., EPA 1990, s. 157, Water Resources Act 1991, s. 217, and the Town and Country Planning Act 1990, s. 331.

individual as principal in his or her own right.) To establish personal liability for directors, there must be both:

- an offence committed by the company; and
- consent, connivance, or neglect by the individual.

The liability applies primarily, but not exclusively, to ‘directors,’ although the name is not critical. Section 741 of the Companies Act 1985 defines the term that covers ‘shadow directors’ and de facto directors—that is, those who do not take the title ‘director,’ but who effectively run the business. As for the other categories, the case law suggests that what matters is whether the individual has sufficient responsibilities to amount to the ‘controlling mind’ of the organization.

CASE 9.5 Directors’ liability—who is a manager? *Woodhouse v. Walsall Metropolitan Borough Council* [1994] Env LR 30

The use of the term ‘manager’ is not particularly illuminating, because the phrase can cover everyone from people acting in a chief executive role down to a lowly ‘trainee manager,’ who may have been in the job for a day.

In *Woodhouse v. Walsall Metropolitan Borough Council* [1994] Env LR 30, the general manager of a waste disposal site (along with his employers) was convicted of the illegal storage of waste at a waste disposal site. At the trial, the magistrates found the general manager guilty on the basis that he was in a position of ‘real authority.’ The manager appealed and the High Court was asked to determine whether the defendant was of sufficient status to be personally liable under EPA 1990, s. 157. The Court held that what was important was not only the existence of authority, but the *scope* of the authority. The correct test was to determine whether a defendant was in a position of control and guidance in terms of policy and strategy. This is, of course, a question of fact and degree in every case.

Enforcement agencies

Historical background—‘poachers and gamekeepers’

Historically, there were many overlaps between the operational and regulatory functions carried out by environmental agencies. The two main examples of this dual role were in the control of water pollution under the regional water authorities and the control of the disposal of waste to land through the countrywide waste disposal authorities under the Control of Pollution Act (CoPA) 1974. Both of these authorities carried out activities that they had to police themselves. The failure to separate these two contradictory roles created great problems. Often, the operational arms of the regulatory bodies caused the greatest breaches of environmental laws. This, in turn, led the private sector to argue that it was inequitable for the enforcement agencies to enforce against private companies when their own operations were also in breach. In addition, it influenced attitudes towards the regulated. Many officers within enforcement agencies empathized with those in the private sector and therefore were happy to pursue options other than prosecution. In cases in which officers had experienced the discomfort of striving, but failing, to comply with environmental laws, they were much more ready to be sympathetic as an educator and adviser, rather than as a policeman.

The creation of the National Rivers Authority (NRA) under the Water Act 1989, and the formation of the system of regulation in the waste disposal industry under Pt II of the

Environmental Protection Act (EPA) 1990, allowed the new and separate enforcement agencies to adopt an arm's length relationship with operators. This, in turn, allowed, for example, the NRA to employ a more aggressive attitude towards the enforcement of environmental crime. This was evidenced by an increase in the incidence of prosecution, with figures suggesting that water pollution prosecutions rose by at least 25 per cent each year in the initial years of the NRA's life.⁴⁷

The creation of the Environment Agency in April 1996 further redefined the relationship between enforcers and operators, with the integration of the enforcement functions in relation to various pollution control responsibilities.

Other steps have been taken to increase the distance between regulator and regulated, including the adoption of transparent policies on enforcement, and greater third-party involvement in the setting of standards and drawing up of guidance. This is not to say that there is a complete separation of operational and regulatory powers. For example, the Environment Agency has a number of operational duties in relation to flood defence management.

Regulatory agencies

Box 9.5 identifies some of the main environmental enforcement bodies with responsibility for prosecuting environmental crimes and other enforcement action in England and Wales. Research suggests that over 90 per cent of all non-local authority prosecutions for environmental crime are brought by the Environment Agency.⁴⁸

BOX 9.5 Prosecutions for environmental crime⁴⁹

| Regulatory agency | Number of prosecutions brought (per year) | | | |
|--|---|------|------|------|
| | 1999 | 2000 | 2001 | 2002 |
| Environment Agency | 768 | 1478 | 1620 | 1713 |
| Crown Prosecution Service | 54 | 74 | 101 | 74 |
| Forestry Commission | No data | 12 | 18 | 3 |
| Customs and Excise | No data | 1 | 1 | 6 |
| Health and Safety Executive | — | 4 | 3 | 3 |
| Royal Society for the Prevention of Cruelty to Animals (RSPCA) | 22 | 25 | 19 | 7 |
| Department for Environment, Food and Rural Affairs (DEFRA) | 2 | — | — | — |

Along with the major environmental regulators such as the Environment Agency, the nature conservation bodies, and local authorities, other groups, such as the Drinking Water

47 W. Howarth and D. McGillivray (2001) *Water Pollution and Water Quality Law*, Crayford: Shaw, p. 105.

48 DuPont and Zakkow (2003).

49 Adapted from DuPont and Zakkow (2003). Note that these figures include some offenders who will have been prosecuted for more than one offence.

Inspectorate and the police, play an enforcement role in relation to certain offences—for example, in relation to wildlife crime (see Box 9.5).

BOX 9.6 Responsibility for wildlife crime

A mixture of statutory agencies, the police, and non-government organizations (NGOs) undertakes the policing and enforcement of wildlife crime. Natural England plays a significant part in policing the protection of habitats, but the police have primary responsibility for investigating offences that relate to species.

Appointed police wildlife liaison officers coordinate the response to wildlife crimes. They are assisted in relation to the illegal international trade in endangered species by HM Customs and Excise, and by NGOs such as the Royal Society for the Protection of Birds (RSPB) and WWF (formerly the World Wildlife Fund). Domestic groups, such as the RSPB, Royal Society for the Prevention of Cruelty to Animals (RSPCA), and others, assist in the detection of domestic wildlife crimes. Although some of these groups bring private prosecutions, the general trend is to encourage prosecution through public authorities. For example, the RSPB has not taken a private prosecution since 1992.

The Partnership for Action Against Wildlife Crime was created in 1995 to coordinate these various groups' actions to address wildlife crimes. This group promotes cooperation between the different bodies, and supports the police and HM Customs and Excise.

Resources

The allocation of resources of enforcement agencies, in terms of personnel and funding, plays an important role in the policing of environmental crime. Historically, environmental enforcement bodies have had to cope with cuts in funding and understaffing. Partly, this has been connected to the source of funding from central government—by way of grant-in-aid (GIA)—and the restrictions on raising extra revenue. The funding limits imposed on local government are well documented and similar issues arise with other centrally funded agencies, such as English Nature.

These problems have a knock-on effect in terms of enforcement and inspection. For example, the Environment Agency has a mixed approach to funding, with part coming in revenue from charges and a declining part from central grant. Funding for enforcement is paid solely from the central GIA budget, over which the Agency has no control (as opposed to the income from charges). As GIA decreases in real terms, the proportion of money available to monitor and enforce against environmental crime also decreases. There has been a steady decline in the number of inspections carried out by the Agency, with inspections of industrial sites and waste sites dropping by 50 per cent and 30 per cent over a five-year period respectively.⁵⁰ These cuts in inspection, when coupled with an increase in the use of self-monitoring requirements as an automatic condition of pollution control licences, calls into question the role of the Agency in this important aspect of enforcement. This has seen a move towards so-called 'risk-based regulation', whereby inspection and enforcement resources are focused on areas in which environmental risks are thought to be greatest.⁵¹ While this might be seen as a means of promoting regulatory efficiency, there is a danger that it is

50 (2003) ENDS Report 346, 9–10.

51 See P. Hampton (2005) *Reducing Administrative Burdens: Effective Inspection and Enforcement*, HM Treasury.

only a way of disguising the overall reduction in monitoring, inspection, and enforcement activity.

Inspection, entry, and enforcement powers

As the main environmental regulator, the Environment Agency has a wide range of inspection and enforcement powers. These powers are exercised for the purpose of: determining whether any environmental legislation is being complied with, exercising or performing any of the agency's pollution control functions, and determining whether or how a pollution control function should be exercised (Environment Act 1995, s. 108(1)). Section 108 of the Environment Act 1995 provides that an officer appointed by the Agency can, when there is no emergency:

- enter premises at any reasonable time (s. 108(4)(a));
- be accompanied onto premises by a police constable, should the officer apprehend that they will be obstructed in their duty (s. 108(4)(b));
- make any investigation as necessary, including measurements, taking samples and photographs, and questioning individuals (answers given to such questions will not be admissible in any prosecution brought against *that person*, although they can be—and, in practice, are—used against another person, such as an employer) (s. 108(4));
- carry out experimental borings, and install and maintain monitoring equipment (with at least seven days' notice) (s. 108(8)).

In situations in which occupants are likely to refuse entry, the officer can seek a warrant prior to entry onto premises. Documents that are subject to legal professional privilege are exempt from the above requirements (s. 108(13)).

In cases of emergency, entry can be gained at any time—with force, if necessary (s. 108(4)). In such circumstances, no prior notification is required when setting up monitoring equipment or carrying out experimental borings (s. 108(5)). Under s. 110 of the Act, it is an offence to obstruct intentionally an authorized officer in the exercise of his or her duties. There are specific offences in relation to the intentional obstruction, and failing to comply with the requirements, of authorized persons exercising these powers of entry (s. 108(4)).

In addition, there are specific powers to requisition information in writing in relation to individual functions.⁵² The answers to such requisitions are not subject to the rule against self-incrimination—referred to in s. 108—because the section impliedly excludes this protection on the basis that the purpose of the legislation would be defeated if a person could refuse to answer written requisitions.⁵³ In exercising these powers, the Agency cannot go on a 'fishing expedition'—that is, it must have some evidence that justifies its seeking written answers.⁵⁴

Although these powers are extensive, the Agency does not have a total freedom to investigate breaches of environmental law. Unlike the police, Environment Agency officers have no general right of arrest or to require the names and addresses of suspects, although there is a limited right to stop, search, and seize vehicles (for example, in relation to suspected transportation of controlled waste without registration).⁵⁵ Although the power to secure written answers is wide, there is no requirement for suspects to take part in interviews.⁵⁶ In

⁵² For example, EPA 1990, s. 71, in relation to waste management offences.

⁵³ *R v. Hertfordshire County Council, ex parte Green Environmental Industries* [2000] 2 WLR 373.

⁵⁴ *JB & M Haulage Ltd v. London Waste Regulation Authority* [1993] Env LR 247.

⁵⁵ Control of Pollution (Amendment) Act 1989, ss. 5 and 5A, as amended by the Clean Neighbourhoods and Environment Act 2005, s. 37.

⁵⁶ Environmental Justice Project Report (2004) *Environmental Justice*, p. 70.

non-emergency cases, the Agency is also unable to gain entry to residential premises or take heavy equipment on to any premises without seven days' notice and either the consent of the occupier or a warrant (s. 108(6)).

Private prosecutions

The power to prosecute some environmental crimes does not rest only with the statutory enforcement agencies. The general right to bring a private prosecution for any offence is preserved in s. 6(1) of the Prosecution of Offenders Act 1985. Indeed, there are specific powers to bring private prosecutions for statutory nuisances.⁵⁷ This general right is, however, restricted in certain statutes.⁵⁸ Private prosecutions are relatively rare, although not unknown. Groups such as the Royal Society for the Prevention of Cruelty to Animals (RSPCA) and local badger groups utilize private prosecutions in relation to wildlife crime and animal cruelty offences. Indeed, the RSPCA has been formally recognized by the Department for Environment, Food and Rural Affairs (DEFRA) as an 'approved prosecutor' in relation to certain animal welfare offences under the Protection of Animals (Amendment) Act 2000.⁵⁹ This is very much the exception rather than the rule.

There are many factors that discourage private groups or individuals from taking action, including funding and costs issues, the need to gather and present expert evidence, and the fear of the technical aspects of preparing and presenting a criminal case. In addition, many of the factors that influence the regulatory bodies in taking enforcement action, such as the relatively low penalties imposed by the courts, shape private attitudes to prosecution.

BOX 9.7 Examples of private prosecutions

Although private prosecutions are uncommon, they are still important. For example, a member of the public brought a private prosecution against Anglian Water for gross water pollution that resulted in a fine of £200,000.⁶⁰ It was notable in that case that the Court of Appeal appeared to discourage the bringing of private prosecutions in such cases. Scott Baker LJ took the view that it was 'unfortunate' that the private prosecutor had not allowed the Environment Agency to take over the proceedings. There appeared to be nothing to indicate why this should have been the case and the appeal had been brought against sentence, rather than conviction, which would seem to indicate that the prosecution had been brought meritoriously.

In a number of other cases, the *threat* of private prosecution by groups such as Friends of the Earth and Greenpeace has acted as a trigger for action by the regulatory bodies. For example, in relation to the *Sea Empress* pollution incident, the threat of private prosecution by Friends of the Earth brought pressure to bear upon the Environment Agency, which appeared to be reluctant to prosecute. The subsequent eventual successful prosecution by the Agency resulted in one of the largest ever fines for water pollution.

⁵⁷ See EPA 1990, s. 80.

⁵⁸ For example, in relation to water abstraction and related offences—see Water Resources Act 1991, s. 216.

⁵⁹ Guidance on Approved Prosecutors under the Protection of Animals (Amendment) Act 2000, available online at www.defra.gov.uk.

⁶⁰ This was later reduced to £60,000 on appeal: see *R v. Anglian Water Services Ltd* [2004] Env LR 10—see further Case 17.6.

The enforcement of environmental law

The focus on the prosecution of environmental crime is only part of the picture. The use of powers of prosecution and consequent criminal sanctions are only a small element of a varied approach to the enforcement mechanisms. Pollution control legislation typically provides for licences, authorizations, etc., to be varied or revoked and for activities to be prohibited or enforced against without any reference to the criminal courts. Although the use of these powers does not impose any formal penalty in the same way as criminal penalties, there are other sanctions that are either explicit (for example, the cessation or restriction of previously authorized activities) or implicit (for example, steps that can lead to a prosecution). For example, the service of a statutory nuisance abatement notice or a notice for the requisition of ownership details under the Town and Country Planning Act 1990 are enforcement steps that can lead to prosecution, although there is no element of direct punishment in taking such an action when taken in isolation.

Beyond these formal enforcement mechanisms, there are other informal and subtler practices which can be used to influence behaviour in cases where regulatory non-compliance is an issue. These might include educating and advising the ignorant operator, imposing deadlines for the improvement of environmental performance, increased monitoring or inspection visits, or issuing verbal and written 'last warnings' prior to more formal enforcement action. As we shall see, these informal mechanisms play a central role in the enforcement practices of the UK's environmental regulatory agencies. On an even wider interpretation, the 'enforcement' of environmental law could include *any* mechanism that might be used to secure compliance with a legal obligation that afforded environmental protection. This might involve the enforcement of private obligations,⁶¹ the use of information by regulators or third parties,⁶² or even the threats of action or prosecution from the Secretary of State or regulator.

Understanding enforcement practices

Why do we need to understand the enforcement practices of environmental agencies? When the figures for formal enforcement action are considered, it is clear that, although there are significant numbers of breaches of environmental legislation, the proportion of prosecutions or other enforcement action is very low. This is the case for different environmental enforcement agencies, including local authorities. For example, only 16 authorities brought prosecutions for local authority air pollution control offences in an eight-year period⁶³ and prosecutions under the Clean Air Act 1993 form less than 1 per cent of the total number of statutory breaches.⁶⁴ In relation to nature conservation, Natural England (through its statutory predecessor English Nature) brought fewer than two prosecutions a year over a 16-year period.⁶⁵ In the case of the Environment Agency, the figures, including administrative enforcement such as enforcement and revocation notices, are just as stark. For example, in 2002, there were only 36 formal enforcement actions taken against breaches of industrial pollution prevention and control legislation, of which three were prosecutions.⁶⁶ On average,

61 For example, Natural England enforcing the terms of a management agreement to compel an owner to manage an SSSI either by injunction or by an action for breach of contract, or a property owner bringing an action in nuisance to prohibit the operations of a nearby factory.

62 For example, the 'naming and shaming' of polluters in the national press.

63 DETR (1998) *Local Authority Progress in Implementing the LAAPC Regime*.

64 Chartered Institute of Environmental Health (1997–98) *Environmental Health Report*.

65 This includes eight prosecutions under CROWA from February 2003 to July 2006; the remainder dated back to 2003: see www.naturalengland.org/foi/Disclosure%20docs/EN-PreCROWProsecutions.xls.

66 EJP Report (2004) p. 113.

there have been around 25,000+ pollution incidents per year since the late 1990s.⁶⁷ With most, if not all, of these incidents being potential strict liability crimes, it is clear that there are still significant numbers of breaches of environmental legislation of all types that are not enforced against in any formal sense.⁶⁸

Styles of enforcement

In trying to understand why there is such a disparity between the number of potential breaches of environmental law and the formal enforcement action that is taken, we must explore the purposes of enforcing environmental law and the different styles of enforcement that might be employed to meet those purposes. The central aim of the enforcement of environmental regulation is to *prevent* harm to the environment or human health, rather than to detect and then punish those who cause such harm (although this is obviously a closely connected aim). Environmental enforcement is not, therefore, only concerned with punishment for breach of environmental laws, but also with preventing those breaches from occurring and with assisting those who are regulated.

These two elements of an enforcement strategy are linked with two different styles of enforcement: the cooperative approach, under which there is an emphasis on all mechanisms other than prosecution in order to promote compliance with environmental laws, and the ‘sanctioning’ approach, which prefers strict punitive measures—notably, prosecutions—to deter operators from future non-compliance.⁶⁹

Cooperative

The cooperative (or conciliatory, or compliance) approach is typically characterized in environmental enforcement by the development of a continuing relationship between enforcement agency and ‘polluter’. At one extreme, this might involve a patient, persuasive, educative role for the enforcer, which almost acts as an external adviser. In this case, mutual respect and trust can develop, which can be used to ensure compliance with laws or environmental quality standards. At the other extreme, the relationship might be more detached, with the regulator seeking compliance within strict time limits—for example, installing pollution abatement equipment or applying for a requisite licence.

Sanctioning

The sanctioning (or confrontational) approach punishes those who are responsible for causing environmental harm. At an extreme level, such an approach would result in the punishment of every breach of environmental laws. At first glance, this would not appear to meet the central aim of any enforcement strategy—namely, preventing harm to the environment—but compliance is achieved through the desire to prevent future breaches and thereby avoid any further enforcement action.

Responsive regulation

If deterrence and compliance styles are seen as two ends of an enforcement spectrum, a third approach has been identified as a ‘pick-and-mix’ blend of different enforcement mechanisms, with officers varying strategies in response to whether the regulated are complying with

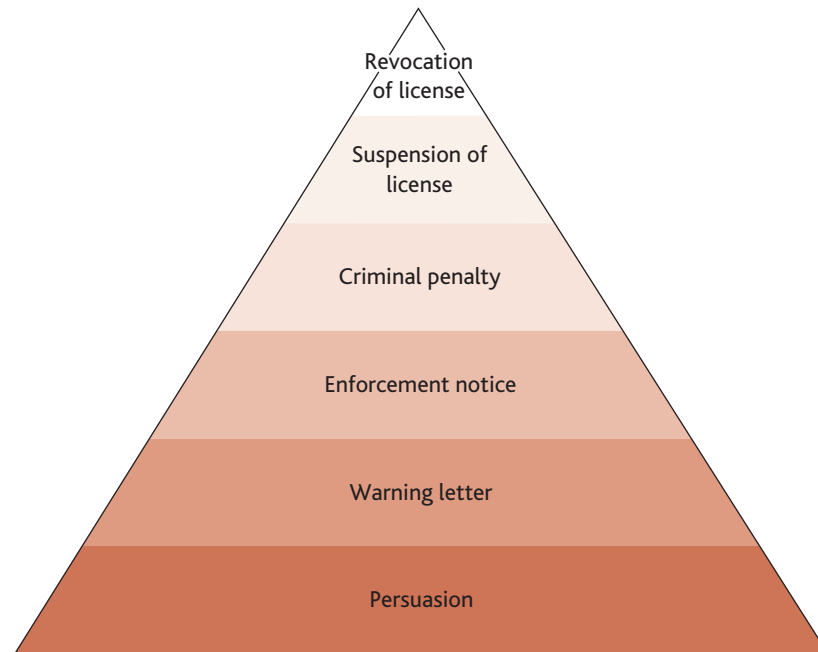
⁶⁷ Although recent years have seen notable falls: see Environment Agency (2007) *Spotlight on Business Environmental Performance 2006*.

⁶⁸ See further A. Ogus and C. Abbot (2002) 14 JEL 286–88.

⁶⁹ See, generally, G. Richardson, A. Ogus and P. Burrows (1982) *Policing Pollution: A Study of Regulation and Enforcement*, Oxford: Clarendon Press, and K. Hawkins (1984) *Environment and Enforcement: Regulations and the Social Definition of Pollution*, Oxford: Clarendon Press.

Figure 9.1 The enforcement pyramid

Source: Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, © 1995 by Oxford University Press, Inc. Used by permission of Oxford University Press, Inc.



their obligations.⁷⁰ Under ‘responsive regulation’, officers will use mechanisms of increasing formality and impact as the regulated fail to meet their legal obligations. Thus the process of responsive regulation is described as forming an ‘enforcement pyramid’⁷¹ (see Figure 9.1). For the majority of operators, persuasion and education will secure compliance. Smaller numbers of operators may need more formal mechanisms, such as warning letters or enforcement notices, to bring them into compliance. At the upper end of the spectrum, prosecution, and even prohibition or revocation, notices may be used on the very small minority of trenchant recalcitrants. The other side of this approach is that there will be more informal mechanisms used when the regulated come within compliance. The essence of responsive regulation is that an enforcement officer will use the minimum amount of formal regulation possible in order to achieve compliance.⁷²

Using different enforcement styles

These different enforcement styles have been identified as distinctive for the purposes of explanation. In practice, however, the boundaries between the styles are much more imprecise. Regulators will adopt different styles with different people. The compliance style of enforcement is largely based upon the continuing relationship that exists between regulators

70 I. Ayres and J. Braithwaite (1992) *Responsive Regulation*, Oxford: Oxford University Press.

71 *Ibid.*, pp. 35–8. The pyramid has been adapted slightly to be more relevant to UK enforcement.

72 A more sophisticated analysis of optimal compliance can be found in A. Ogus and C. Abbot (2002) 14 JEL 283.

and the regulated. Research has shown that, in cases in which there were problems with trade effluent discharges, offenders were far more likely to be subjected to formal enforcement action and prosecution if the relationship was threatened or made more difficult as a result of the actions of the regulated.⁷³ The reverse was also true: if the offender had a good relationship with the regulator, then the prospect of formal enforcement action was reduced.

The type of relationship was strongly influenced by the attitude taken by officers to individual operators. Certain offenders would be viewed as putting profit or their own interests before the environment and disobeying the law when it suited their interests to do so. In these circumstances, the enforcement agencies would adopt a strong deterrence style of enforcement. Another group of offenders would be viewed as breaching the law because the imposition of environmental controls was considered to be unreasonable in terms of the financial or technical burden. A further identifiable group would be viewed as well meaning, but organizationally incompetent. In this last case, the regulators would adopt a compliance style of enforcement, particularly relying upon advice and education to overcome incompetence.⁷⁴ The idea of responsive regulation reflects this variable approach by concentrating on the most effective method of securing compliance at the least level of regulatory interference. This will often depend upon the nature of the relationship between the regulator and the regulated.

Capture theory

It has been argued that the closeness of the relationship between ‘polluters’ and regulatory agencies can lead to the ‘capture’ of the agency, in which situation the agency concentrates on the interests of the regulated to the exclusion of the public interest. A good example of the potential effects of ‘capture theory’ can be seen in the attitude of the Alkali Inspectorate to the disclosure of pollution information, when the Inspectorate favoured the protection of private companies (through the maintenance of a secrecy policy) over public disclosure of information on pollution.⁷⁵

There have been various explanations as to why ‘capture’ occurs, including the political influence that major industrial or other interest groups (for example, the farming community) hold over the rule makers and the regulators,⁷⁶ the distinction between the class of the regulator or regulated companies (tending to be middle or professional class) and those affected by pollution (tending to be working class), and the common interests that can be found among both regulators and regulated (for example, some Environment Agency officers have worked for the industries that they now regulate).

The ‘British’ approach to environmental enforcement

The ‘British’ approach to environmental enforcement, as exercised by administrative regulatory bodies, is strongly underscored by the themes that dominate Parts I and II of this book, including:

- flexibility in the setting of individualized emission and process standards;
- wide definitions found in key statutory provisions;

⁷³ Hawkins (1984) n. 69 above.

⁷⁴ For example, see, in relation to integrated pollution control (IPC), A. Mehta and K. Hawkins (1998) 10 JEL 69 and C. Lovat (2004) 16 JEL 49, 52–61.

⁷⁵ As reflected in the statutory provisions adopted in the Health and Safety at Work Act 1974, s. 24.

⁷⁶ See P. Lowe, J. Clark, S. Seymour, and N. Ward (1997) *Moralizing the Environment*, London: University College London.

- informal guidance on the interpretation of statutory rules;
- reliance on self-regulation and voluntary compliance;
- the use of discretionary powers rather than mandatory duties.

BOX 9.8 Enforcement in Scotland and Northern Ireland

All of these factors (along with others) have a role to play in the style of enforcement that is adopted by the variety of environmental agencies. While it is not possible to generalize across all agencies (indeed, there will be variations of style between individual officers within the same agency), the 'British' approach to environmental regulation facilitates the development of a flexible relationship between the regulator and regulated, which is characteristic of the compliance style of enforcement. The amount of discretion given in setting the standards and in using enforcement powers means that enforcement officers can use the informal problem-solving approach to breaches of environmental regulation, rather than being forced to resort to formal sanctions, such as prosecution.

Although the general characteristics of enforcement practices can be classified as a 'British' approach,⁷⁷ there are variations, certainly in relation to the Scottish and Northern Irish approach to enforcement. Mostly, these variations are associated with institutional differences. These differences mean that, although the general approach to the enforcement of environmental law is similar to across the UK—that is, the adoption of a cooperative approach—the increase in the use of prosecution is much less marked outside England and Wales.⁷⁸

For example, in Scotland, all prosecutions are brought by the Crown Office and Procurator Fiscal Service (COPFS), which has lacked expertise in relation to the enforcement of environmental offences.⁷⁹ Thus, unlike England and Wales, where enforcement and prosecution are undertaken by the Environment Agency, the right to prosecute in Scotland is effectively held solely by COPFS and the final decision to prosecute is determined outside the Scottish Environment Protection Agency (SEPA).⁸⁰ This separation of enforcement and prosecution, and, in particular, the lack of specialist environmental expertise within COPFS, explains why the number of prosecutions for environmental crimes is much lower in Scotland than that in England. For example, in Scotland, there were 38 and 31 prosecutions in 2001–02 and 2002–03 respectively.⁸¹ This is about 2.5 per cent of the number of prosecutions brought by the Environment Agency over the same period. Attempts have been made to address this imbalance, including the introduction of trained environmental prosecutors within COPFS to liaise with SEPA, and to coordinate enforcement and prosecutions, and the introduction of an agreed protocol on conducting investigations and prosecutions.⁸²

⁷⁷ The findings of Scottish research into enforcement practices broadly reflect the above studies: see P. Watchman, C. Barker, and J. Rowan-Robinson [1988] JPL 764.

⁷⁸ For example, see C. Lovat (2004) 16 JEL 49 for a study of IPC regulation in Scotland.

⁷⁹ SEPA Board Paper 97/00, *Environmental Prosecutions in Scotland and Levels of Fine*, available online at www.sepa.org.

⁸⁰ M. Poustie (2007) *The Laws of Scotland: Stair Memorial Encyclopaedia: Environment*, Edinburgh: LexisNexis, Butterworths, para. 114, and A. Brown [1995] 47 SPEL 4.

⁸¹ www.sepa.org.uk/publications/sepaview/html/16/sepa/environmental_crime.htm. Notably, this report begins 'SEPA is delighted that there were fewer prosecutions for environmental offences last year but almost double the level of fine was handed down'.

⁸² (2004) ENDS Report 349, 10.

There has been criticism of the enforcement of environmental law in Northern Ireland.⁸³ In part, this is because of the low priority historically given to environmental issues and the inadequacies of the institutional framework for enforcement bodies. The body with responsibility for enforcing environmental law in Northern Ireland is the Environment and Heritage Service (EHS), which is an Executive Agency of the Department of the Environment. Because the provision of water and sewage services remains a public sector function in Northern Ireland, this raises the sort of 'poacher–gamekeeper' issues referred to above. In addition, the poor performance of the EHS in enforcing environmental law has been the subject of criticism both within and outside government.

Other factors that have contributed to poor levels of enforcement in Northern Ireland include the lack of detailed policy guidance, in the form of an enforcement and prosecutions policy, and insufficient resources.⁸⁴ There is, however, the more fundamental issue of the late implementation of European Directives, and the consequent disparity between Northern Irish environmental legislation and that of the rest of the UK, which has often meant that actions that would have been considered to be an offence in England, for example, were not illegal in Northern Ireland. Proposals for reform, including the establishment of an enforcement agency that is separate from government, are intended to address these inadequacies.⁸⁵

There have been a number of empirical studies of the activities of environmental enforcement bodies in England in relation to the enforcement practices of the old-style water authorities⁸⁶ and in relation to local environmental health officers.⁸⁷ Each of these studies tended to confirm the adoption of a 'compliance' style of enforcement, with officers often walking a tightrope between a cooperative approach and the effective enforcement of pollution control rules. In other areas of environmental regulation, such as nature conservation, in which the emphasis has traditionally been on voluntary measures, the cooperative approach is even more important.⁸⁸

These studies indicated that a hierarchy of enforcement mechanisms was utilized in order to maintain good relationships between the regulator and the regulated. The first stage of the enforcement process focused primarily on advice and education about the mutual 'problem' that was connected with the breach. If this was not successful in gaining compliance, further warnings—both informal and formal—were given, with prosecution only an option in cases in which the offence was serious or the offender culpable. The development of an ongoing relationship was central to the enforcement style. The work of environmental agencies was technically and scientifically based, rather than founded on concepts of rules, sanctions, and other penalties. Thus, education and advice were perceived as being more important than prosecution or other formal enforcement mechanisms. The continuing relationship with the operator or offender was designed to prevent harm and promote environmental protection, and this could be achieved more effectively by cooperating with polluters than by confronting them by adopting a 'sanctioning' style.

83 See, generally, R. Macrory (2004) *Transparency and Trust: Reshaping Environmental Governance in Northern Ireland*, London: UCL Press.

84 Northern Ireland Audit Office (Session 1997–98) *Control of River Pollution in Northern Ireland*, HC 693.

85 See, for a general overview of regulatory reform in Northern Ireland, S. Turner (2006) 18(1) JEL 55 and (2006) 18(2) JEL 255.

86 Hawkins (1984) and Richardson et al. (1988).

87 B. Hutter (1983) *The Reasonable Arm of the Law*, Oxford: Clarendon Press.

88 This approach appears to continue, notwithstanding the introduction of greater enforcement powers under the Countryside and Rights of Way Act 2000—see p. 695. For a historical account, see D. Withrington and W. Jones (1992) 'The enforcement of nature conservation legislation: the protection of SSSIs' in W. Howarth and C. Rodgers (eds) *Agriculture, Conservation and Land Use*, Aberystwyth: University of Wales Press.

CASE 9.6 Enforcement styles in practice—*Environment Agency v. Stanford* [1999] Env LR 286

The use of a cooperative approach to enforcement can have practical significance, particularly in circumstances under which cooperation fails and more formal action is required. In this case, a scrap metal dealer (S) notified the Environment Agency that his activities were exempt from the need for a waste management licence. An Agency officer visited the site, and informed S that the activities were, in fact, unlawful and that he was committing an offence. Instead of prosecuting, the officer gave advice on the various steps that were required to make the activities exempt. On subsequent site visits, Agency officers gave the impression that no prosecution would be commenced if the works were carried out within a specified time period. The works were not carried out and the Agency prosecuted. S tried to argue that the prosecution was an abuse of process and should be dismissed, because of the promises that had been made by the various officers. The argument was dismissed on the ground that the Agency had never promised not to prosecute; indeed, it was clear that it had always stated that the conduct was unlawful.

This decision implicitly supports the idea of the cooperative approach to enforcement by ensuring that regulatory agencies are not estopped from taking formal enforcement action when they permit offenders some time to bring operations into compliance.⁸⁹ There may, however, be circumstances under which there is such a clear promise or representation that no criminal proceedings would be brought that any subsequent prosecution would be an abuse of process (see *R v. Croydon Justices, ex parte Dean* [1993] QB 769). Thus agencies have to balance the need to secure compliance with the need to be fair to those who are regulated, while not fettering their enforcement discretion.

Prosecution and enforcement policies

One of the findings of the different research projects carried out in the 1980s was that there were differing levels of enforcement in different geographical locations.⁹⁰ For example, it was shown that, over a three-year period, one water authority brought 48 prosecutions for the contraventions of trade effluent consents—with 90 per cent coming from one area—whereas another did not bring any prosecutions during that time. There could be a number of explanations for regional variations in enforcement figures, such as a particular area having a disproportionate number of breaches or ‘difficult’ operators, but it is primarily characteristic of the lack of uniformity created by a wide discretion. The research found that different officers were disturbed by this lack of consistency in enforcement practices. They favoured a more explicit policy applicable throughout different divisions. They were evidently anxious to ensure procedural reasonableness and the application of predetermined rules to guide the exercise of discretion.

The creation of new environmental agencies in the late 1980s saw the development of specific policies on enforcement, which were designed to structure discretion and improve the consistency of enforcement style. During its lifetime, the NRA had an enforcement policy that used prosecution as an active component and this approach has been adopted by the Environment Agency, which has a published enforcement and prosecution policy. The policy consists of a statement of the Agency’s policies on enforcement and prosecution.⁹¹

⁸⁹ A similar example in relation to the interpretation of statutory exemptions can be found in *Environment Agency v. Newcomb* [2003] Env LR 12.

⁹⁰ Richardson et al. (1988).

⁹¹ Environment Agency (1988) *Enforcement and Prosecution Policy*.

BOX 9.9 Enforcement policy and principles

The Environment Agency's enforcement and prosecution policy sets out four principles of enforcement:

- proportionality in the application of law and in securing compliance;
- consistency of approach;
- transparency about how the Agency operates;
- the targeting of enforcement action at activities that give rise to the most serious environmental damage or in relation to which the hazards are least well controlled.

In determining whether to *prosecute*, the Agency also considers the Code for Crown Prosecutors, which sets down a two-stage test.

1. Is there sufficient available evidence to raise a realistic prospect of conviction?
2. Is it in the public interest to bring the prosecution?

The former question is made much simpler in cases of strict liability (see above). The latter question is answered by reference to criteria set out in the enforcement and prosecution policy, which are summarized in Box 9.9.

BOX 9.10 Factors taken into account when deciding to prosecute

Prosecutions will 'normally' be taken in relation to:

- incidents or breaches with significant environmental consequences;
- operating without the required licence, consent, or authorization;
- persistent or excessive breaches of statutory requirements;
- failure to comply with formal requirements to remedy environmental harm;
- 'reckless disregard' of environmental management or quality standards;
- obstructing Agency staff in the gathering of information.

Other influential factors are whether an incident was foreseeable, the intent of the offender, previous offences, and the deterrent effect of prosecuting.

In addition to the general policy on enforcement and prosecution, there are internal guidelines relating to particular offences and breaches.⁹² These guidelines are comprehensive, dealing with every aspect of the Agency's functions, and set out the Common Incident Classification Scheme (CICS), which is a national system for recording and categorizing pollution incidents, and for assessing the appropriate level of enforcement response.⁹³ The CICS classifies incidents in four categories, from Category 1—that is, a major actual or potential

⁹² Environment Agency (periodically updated) *Guidance for the Enforcement and Prosecution Policy*, available online at www.environment-agency.gov.uk.

⁹³ There is a compliance classification scheme that works in a similar fashion in relation to breaches of licence conditions as opposed to incidents: see www.environment-agency.gov.uk/commondata/acrobat/ccsbriefingnote_745332.pdf.

environmental impact—to Category 4—that is, no actual or potential environmental impact. This general approach to categorizing incidents is supplemented by different methods of enforcement in relation to each of the Agency's functions—namely, environmental protection, water resources, fisheries, flood defence, and navigation. Each individual section includes details of: the purpose of enforcement for that function, the enforcement powers available, the factors determining enforcement action, enforcement for non-criminal non-compliance, and the various criminal offences and enforcement options.

Although these policies attempt to introduce some consistency to enforcement across the Agency, it is arguable that all they actually do is to formalize policies that had been used on an informal basis over a number of years. The policies are worded in such a way as not to restrict the Agency's enforcement discretion and it is doubtful whether any enforceable legal rights are created upon which the regulated can rely, such as creating a legitimate expectation that the policy will be followed. This continuing discretion is reflected in the fact that there are still identifiable discrepancies in the numbers of prosecutions in different Environment Agency regions, although this may be connected to the different ways in which a 'prosecution' is recorded in each region (which, in turn, makes the figures difficult to interpret, because of inconsistencies in charging practices across the regions).⁹⁴

The courts have made it clear that, in general terms, the decision to prosecute (or not to do so, as the case may be) is essentially within the discretion of the regulatory authority and cannot be subject to challenge on anything other than on the ground of *Wednesbury* unreasonableness⁹⁵ (although there is the potential for a challenge in circumstances under which a regulator such as the Environment Agency fails to follow an unambiguous enforcement or prosecution policy).⁹⁶ The published enforcement and prosecution policy adopted by the Agency is worded in such a way as to leave considerable discretion in determining whether to prosecute. The width of that discretion would be sufficient to ward off claims that the policy was unambiguous enough to found a successful challenge to any decision to prosecute or not.⁹⁷

In the light of the detailed nature of the internal and external enforcement policies of the Environment Agency, it is perhaps surprising to find that other bodies with environmental regulatory functions are not covered by such guidance. For example, local authority enforcement of the air pollution control system has been criticized as being inconsistent and 'ad hoc'.⁹⁸ The Cabinet Office, through its 'Better Regulation' initiative, has published an 'enforcement concordat' that local authorities have been urged to adopt.⁹⁹ In the absence of more prescriptive guidance, however, it is likely that inconsistency and lack of transparency will continue.

The enforcement concordat is the latest stage of the development of deregulatory initiatives as an influence over enforcement policy. The move towards more complex environmental rules has led industry to argue that legislation is becoming too complex and that compliance entails excessive expenditure in comparison with the environmental benefits that are produced. The introduction of the Deregulation and Contracting Out Act 1994 was considered to be an initial response to this alleged problem and the deregulatory thrust was continued into the Environment Act 1995, with general restrictions on enforcement, such as the duty to consider the costs and benefits of taking enforcement action, and other similar

⁹⁴ In addition, limited empirical research indicates that enforcement policies do not play a major part in the decision of whether to prosecute: see Lovat (2004) at 63.

⁹⁵ See, e.g., in relation to the decision to prosecute in general criminal offences, *R v. Metropolitan Police Commissioner, ex parte Blackburn* (No. 3) [1973] 1 QB 241.

⁹⁶ For example, *R v. DPP, ex parte C* (1995) 1 Cr App 136.

⁹⁷ See further C. Hilson (2000) *Regulating Pollution*, Oxford: Hart, pp. 163–66.

⁹⁸ See DETR (1998) *Local Authority Progress in Implementing the LAPC Regime*.

⁹⁹ Over 96 per cent of local authorities have adopted the concordat: see Cabinet Office and Local Government Association Enforcement Concordat (1998), available online at www.cabinetoffice.gov.uk.

provisions.¹⁰⁰ Ironically, the deregulation initiative that started out as a ‘war on red tape’ has now produced numerous administrative tests and policies that the Environment Agency is under a duty to consider before commencing enforcement action.

Sanctions for environmental crime

Administrative sanctions

The final element of the process of addressing environmental crime is the variety of sanctions imposed upon those who breach the law. As mentioned above, some administrative enforcement mechanisms can be imposed under administrative mechanisms—that is, through the use of enforcement, suspension, and revocation of environmental licences, etc. Such notices can be used irrespective of whether a crime has been committed (although, in most cases, the need for some form of administrative notice would indicate breaches or potential future breaches of licence conditions, which could amount to a criminal offence).

As the ‘enforcement pyramid’ in Figure 9.1 demonstrates, some of these administrative sanctions are, in effect, more serious than criminal penalties. Revocation, suspension, and prohibition notices all have the effect of preventing a holder of a licence from carrying on otherwise lawful activities, which, in the case of companies, is the most serious sanction available and the equivalent of imprisonment for an individual.¹⁰¹ In practice, however, these extreme administrative powers are used very sparingly. For example, there were 37 revocations of waste management licences from 1996 to 2003 and, among these cases, there were some revocations in cases in which the licence holder had ceased to exist or failed to pay fees.¹⁰²

Given the draconian consequences of these types of sanction, it is perhaps unsurprising that they are used very infrequently. One of the consequences of this, however, is that the deterrent effect of such mechanisms and any threats to use them is weakened. But if such sanctions were to be used more widely, there would be dangers that the substantive and procedural protections offered by the criminal process could be bypassed. For example, although there is the right of appeal against such notices, in many cases, the effect of the notice is not suspended pending the appeal—effectively reversing any presumption of innocence—and the final decision may be swayed by policy factors that would be assessed by a non-judicial inspector or the Secretary of State.¹⁰³

Criminal sanctions

Sanctions can also be imposed through the criminal process—for example, fines, imprisonment, or community sentences following a successful prosecution for an environmental offence. In recent years, there has been a growing sense of dissatisfaction with the sanctions imposed upon those who commit environmental crime. Various critics, including the Environment Agency itself, have questioned the extent to which the sanctions imposed are sufficient to act as a punishment and deterrent.¹⁰⁴ In response to these concerns, DEFRA commissioned research to establish an accurate picture of sentencing for environmental crime in England and Wales in the years 1999–2002.¹⁰⁵ The key findings are summarized in Box 9.11. The overall conclusions were that the vast majority of environmental offences that

100 For example, under s. 39 and EPA 1990. See also Hilson (2000) pp. 26–8.

101 A. Ogus and C. Abbot (2002) 14 JEL 288.

102 (2003) ENDS Report 347, 15.

103 For example, EPA 1990, s. 43, in relation to the suspension of waste management licences and see Ogus and Abbot (2002) 296.

104 For example, see Environment Agency (2005) *Spotlight on Business Performance*, p. 5. The details of others can be found in the Further Reading, at the end of the chapter.

105 DuPont and Zakkow (2003).

are taken to court are dealt with at a low level and are punished with relatively small fines, which do not appear to be an effective sanction when compared with the profits that can be generated from activities that cause environmental damage.

BOX 9.11 Key data on sentencing for environmental crime

- Over 90 per cent of all environmental crimes are dealt with in the magistrates' court.
- Fines are the most common sanctions for environmental offences (68 per cent of all offences) with the vast majority of corporate environmental offenders (over 80 per cent) being punished in this manner.
- In the magistrates' courts, the average fines for environmental offences rose over the three-year period from £1,979 to £2,730.
- All other types of sentence—for example, the community service order, conditional or absolute discharge, compensation, etc.—are used in fewer than 10 per cent of cases.
- Custodial sentences are passed in relation to approximately 1 per cent of all environmental offences.

(From C. DuPont and P. Zakkow (2003) *Trends in Environmental Sentencing in England and Wales*, London: DEFRA)

The low levels of fines that have been imposed by the judiciary can be attributed to a number of factors, including the lack of judicial experience in dealing with environmental offences (which is closely connected to a paucity of prosecutions),¹⁰⁶ some of the conceptual difficulties in punishing strict liability offences referred to above, and the technical nature of some of the consequences of pollution that form the basis of the defendant's culpability.¹⁰⁷

These low levels of fines have a knock-on effect, in the sense that they tend to reinforce the view that environmental offences are morally neutral in the eyes of the judiciary. In the 1990s, the maximum level of fines in the magistrates' court was raised to take into account the need for the lower court to have wider powers to reflect the seriousness of the offences that do not merit being heard in the Crown Court. EPA 1990 increased the level of fines for a number of pollution control offences, from £2,000 to £20,000, although it was not until much later that the maximum fine for damage to SSSIs was raised from a derisory £2,500 to £20,000.¹⁰⁸ Under the Environmental Permitting regime the maximum fine for breach is £50,000.¹⁰⁹

Although many environmental offences are triable either in the magistrates' court or the Crown Court, the option to try a matter in the Crown Court—with the opportunity to seek an unlimited fine and even imprisonment in the case of individual offenders—has not often been taken. It is, however, becoming slightly more common for matters to be committed to the Crown Court for sentencing. Two significant examples are the cases of the prosecution of Shell (UK) in February 1990 and of Milford Haven Port Authority in relation to its role in the *Sea Empress* disaster, both for water pollution offences under s. 85 of the Water Resources Act 1991.

¹⁰⁶ Ibid., p. 44.

¹⁰⁷ Which has been characterized as part of the 'trivialization' of environmental prosecutions—see P. De Prez (2000) JEL 65.

¹⁰⁸ Countryside and Rights of Way Act 2000, s. 28P(1).

¹⁰⁹ See Environmental Permitting (England and Wales) Regulations 2007, SI 2007/3538, reg. 39.

There are other powers of sentencing available to the courts in serious cases with individual defendants (as opposed to companies). These include community service orders, anti-social behaviour orders, and custodial sentences in the severest cases. These have been used sparingly in the past, although, in keeping with other sentencing trends, there has been an increase of these types of sentence, certainly in relation to imprisonment.

BOX 9.12 Custodial sentences for environmental crime

The courts' approach to custodial offences for environmental crime was considered in *R v. O'Brien and Enkel* (2000) Env LR 156. In that case, the defendants had pleaded guilty to an offence of illegally storing 2,000 waste tyres at an unlicensed site and had been sentenced to eight months' imprisonment. The defendants appealed, arguing that the sentence was excessive.

In quashing the sentence, the Court of Appeal identified certain factors that were relevant in deciding whether to send an offender to prison for an environmental crime. These included:

- repeated or blatant offences;
- offences committed in a public place;
- offences committed in circumstances under which the public had been exposed to hazardous substances.

In relation to the particular circumstances of the case, the facts that the tyres presented no long-term risk to the environment, that this was the first environmental offence, and that the defendants had pleaded guilty were all thought to indicate that a sentence of imprisonment was unjustified.

In contrast to pollution control offences, there is a growing recognition of the serious nature of wildlife crime and this is reflected in the proportion of significant custodial sentences for such crimes. For example, one of the longest prison sentences for environmental crime was passed in 2000 for the illegal importation of some of the world's rarest species of birds. At trial, the defendant Harry Sissen, a famous Parrot breeder, was imprisoned for 30 months for illegally importing three Lear's Macaws and six Blue-Headed Macaws into the UK. On appeal, the Court of Appeal reduced the sentence to 18 months after taking into account, among other things, the age of the defendant (61 years old), his financial position, and his albeit misguided motives for breeding the birds in order to try to maintain the species. Ouseley J emphasized the seriousness of such offences when he said:

The law is clear as to where the interests of conservation lie. These are serious offences. An immediate custodial sentence is usually appropriate to mark their gravity and the need for deterrence. There is nothing wrong in principle with a sentence of 30 months for an offence such as this.¹¹⁰

Other reported examples of custodial penalties include a sentence of 18 months' imprisonment passed for a waste management offence, although this was reduced to 12 months on appeal.¹¹¹

It is interesting to note that, in terms of pollution control offences, the vast majority of sentences of imprisonment are passed in relation to waste management offences, whereas in other areas, such as water pollution and pollution prevention and control (PPC), the prevalent punishment is financial. The reason for this is closely connected to the identity of the polluter, with typical prosecutions for water and PPC offences involving major companies, with consequent restrictions on the nature of the sentence that can be passed and a significant proportion of serious waste management offences being committed by single 'cowboy' operators.

¹¹⁰ *R v. Sissen* [2001] 1 WLR 902, [51].

¹¹¹ *R v. Garrett* [1998] Env LR D2.

Sentencing guidelines

The general concern about the levels of sentence for environmental offences led, in 1999, to the (then newly formed) Sentencing Advisory Panel to issue proposals to the Court of Appeal to frame sentencing guidelines for environmental offences. On two separate occasions, however, the Court of Appeal rejected the guidelines in favour of a case-by-case approach based upon certain general principles (see Box 9.13).

BOX 9.13 Sentencing principles for environmental crime

The Court of Appeal has consistently rejected the idea of a tariff for environmental offences, notwithstanding the Sentencing Advisory Panel's Advice on the matter. In a number of cases, the Court has stressed the need to consider each case on its own facts.

In the two main cases—*R v. Yorkshire Water Services Ltd* [2002] Env LR 18 and *R v. Anglian Water Services Ltd* [2004] Env LR 10—the Court considered the following factors to be relevant.

- The degree of culpability involved in the commission of an offence of strict, but not absolute, liability. In *Anglian Water*, in which sewage effluent escaped and severely polluted a river, the Court made it clear that, notwithstanding relatively low culpability, a major industrial operator such as Anglian Water is under a greater obligation to minimize the chance of environmental harm. Presumably, this would also apply to any significant industrial operation, such as the waste management industry or IPPC installations, in which the risk of pollution was relatively high and the consequences of pollution potentially significant. When assessing the appropriate sentence in such circumstances, less weight should be given to the relative lack of culpability.
- The damage done in physical and economic terms.
- The defendant's previous record, including any failure to heed specific warnings.
- The defendant's attitude and performance after the event, including any guilty plea (and, presumably, any clean-up operation).
- An analysis of the costs and benefits of promoting environmental benefits as against the costs of doing so. There is a need to assess potential risks to the environment in addition to the extent and nature of the harm if the risk were to be realized. In situations in which the risk of harm was low, but the nature of the potential harm was significant, serious steps would need to be taken to ensure that the risk did not materialize and that, if it were to do so, further steps could be taken to minimize any consequential impacts.
- The financial impact on the defendant. Any imposition of a financial penalty must be an effective sanction when viewed against the resources of the defendant. In the words of Scott Baker LJ in *Anglian Water*:

... the fine must be at a level to make some impact on the company and overcome any suggestion that it is cheaper to pay the fines than undertake the work that is necessary to prevent the offence in the first place.¹¹²

On the other hand, the fine should not be so high as to threaten the viability of the company itself.

112 At [31].

One of the problems with these principles is that there is a degree of tension between the first two. This has proved to be confusing, because courts struggle to identify the rationale for punishing environmental crime. On the one hand, there is the culpability of the defendant and, on the other, the environmental harm caused. At one extreme, there may be defendants who have caused significant environmental harm as a consequence of an accidental chain of causation; at the other, we might have a deliberate act of environmental vandalism that resulted in limited harm. The true position is that both factors are relevant consideration.¹¹³

Notwithstanding the situation in the higher courts, the Magistrates' Association has produced sentencing guidance for the lower courts. In *Anglian Water*, the Court of Appeal endorsed as 'helpful advice' the Association's 'Fining of Companies for Environmental Health and Safety Offences'.

One final area of note is the use of compensation and confiscation orders in environmental cases. Under s. 130 of the Powers of the Criminal Court Sentencing Act 2000, the courts have the power to award compensation to anyone who has directly suffered as a result of an environmental offence. These powers have rarely been used. The Sentencing Advisory Panel suggested that, in cases in which there is a specific victim (such as an owner who has had to pay to clean up after an incident or to restock after a fish kill), a court should always consider a compensation order, although not before imposing a fine. The significance of the use of compensation orders is, however, reduced as a result of the existence of many statutory powers of clean-up and cost recovery available to regulatory agencies in defined situations (for example, EPA 1990, s. 59, or Water Resources Act 1991, s. 161A) and the fact that there is currently a limit of £5,000 for each order.

Alternative sanctions

Another consequence of the dissatisfaction with existing criminal sanctions has been the development of alternatives to the traditional penalties such as fines. One of the earliest forms of alternative sanction was the 'naming and shaming' of corporate polluters by the Environment Agency (see Box 9.14).

BOX 9.14 'Naming and shaming' polluters

In 1999, the Environment Agency published a 'league table' of those corporate offenders who had committed environmental crimes in the previous year.¹¹⁴ This policy of 'naming and shaming' companies was the first real attempt to increase the effect of prosecuting environmental crimes by publicizing those companies who were not performing to the required standard. This first edition was relatively simplistic in its aims and was inadequate in that it failed to address issues of general environmental compliance, such as the numbers of administrative actions taken against individual companies. Nor did it seek to identify those companies who had improved compliance rates and made significant progress in, for example, pollution abatement.

A year later, these issues were addressed with the publication of the more comprehensive *Spotlight on Business Environmental Performance—2000*, which sought to identify those who had reduced pollution alongside the notorious 'league table'. These reports have been published on an annual basis since 2000.

¹¹³ For an example of how the courts have addressed these issues, see *R v. Cemex* [2007] EWCA Crim 1759, in which, in the absence of any serious environmental harm or any deliberate failure by the defendant, the Court of Appeal reduced a fine of £400,000 for an IPC offence to £50,000.

¹¹⁴ See further P. De Prez (2000) Env LR 11.

In addition to the obvious effect of publicizing poor environmental performance and the media interest that brings, the league table has other direct impacts. For example, the water regulator has considered environmental compliance as an issue when determining water pricing. In addition, others, such as institutional investors, insurance companies, and even customers and consumers, are influenced by a poor criminal record in comparison with industry sector competitors.

This last point raises one of the main criticisms of the whole process of 'naming and shaming': the comparative nature of the rankings. The tables have little to say about overall performance and the worst performers could arguably be seen as the 'tip of the iceberg', with the best being the 'best of a bad bunch'.

Various studies have been undertaken to explore the use of alternative sanctions in relation to environmental and other regulatory offences.¹¹⁵ Notably, these studies have been undertaken within a broad deregulatory initiative started under the Regulatory Reform Act 2001, reflecting the fact that alternative sanctions are seen as a way of improving the regulatory system as opposed to more effective punishment (although there is a clear link between the two). The formal process of review began as part of a wider initiative found in the Hampton Review of regulatory inspections and enforcement.¹¹⁶ This review suggested, among other things, that regulatory enforcement should be more flexible, and should be based firmly on a proportionate and targeted view of risks. This process was refined further with a review of regulatory penalties.¹¹⁷ The review developed the Hampton Review's conclusions and made recommendations that suggested a broader, more flexible set of alternative sanctions for regulatory offences. One of the key areas considered by the review was the differentiation between those offences that are 'regulatory' in nature—that is, those of which criminal intent or negligence is the cause—and cases involving serious harm to the environment or human health.

Four of the key recommendations have been incorporated into the Regulatory Enforcement and Sanctions Bill, currently before Parliament. Part 2 of the Bill provides for alternative sanctioning powers:

- fixed monetary penalties;
- discretionary requirements—including the ability to impose a monetary penalty in the place of a criminal fine, a requirement to take action to do or stop something, or a requirement to restore a situation to what it was before a breach;
- enforcement undertakings—namely, an undertaking to cease or to do something to prevent or rectify a breach.

One of the fundamental problems with this approach is that, in the case of a regulatory body such as the Environment Agency, the lack of any explicit accountability mechanism raises the question of how the use of such powers is to be monitored in the public interest. For example, it may be preferable to the Agency and an operator to deal with a breach by way of fixed penalty notice or voluntary undertaking, but that is not the same as saying that such conduct may not be better dealt with by way of criminal prosecution. The suggested way of dealing with this has been to structure discretion through the use of clear policies and guidance—but the backstop of judicial supervision should be available.

¹¹⁵ Woods and Macrory (2003).

¹¹⁶ P. Hampton (2005) *Reducing Administrative Burdens: Effective Inspection and Enforcement*, London: HM Treasury.

¹¹⁷ R. Macrory (2006) *Regulatory Justice: Making Sanctions Effective*, available online at www.bre.berr.gov.uk/regulation/reviewing_regulation/penalties/index.asp.

Restorative enforcement

This discussion of ‘sanctioning’ excludes the use of methods of enforcement that seek to prevent harm or to promote the restoration of the environment to a pre-breach state.¹¹⁸ These powers form the basis of a compensatory model of enforcement that is becoming more popular as a broader range of sanctioning mechanisms are considered.¹¹⁹ These powers come in many different forms, but all require preventative works or some form of clean-up, or provide a default mechanism whereby such works or clean-up by a third party (normally the regulator) must be paid for under cost-recovery regimes.¹²⁰ The compensatory model seeks both to compensate the environment for the damage done to it and compensate those most affected by unlawful environmental harm. It also seeks to return the polluter/offender to the financial position in which they were before embarking on the unlawful activity.

These powers are not necessarily dependent on the criminal law being used—although, in many circumstances, they will form part of a range of responses.¹²¹ As such, they represent a model of enforcement that moves away from pure sanctioning based largely upon deterrence towards restoration—they are thus more in keeping with the essential aim of environmental enforcement. This shift also reflects a move towards decriminalization for certain activities, emphasizing the divide between sanctioning and deterrence for deliberate or grossly negligent acts of environmental vandalism and more routine breaches, in relation to which fault may not be a major consideration.

Optimal enforcement

Most of the research on the enforcement of environmental crime referred to above dates back to the 1970s and early 1980s. Just as there has been a move away from discretionary styles of environmental regulation (see Chapter 8), there has also been a discernible shift away from the informal, cooperative approach to enforcement. For example, notwithstanding the low percentages, there has been a rise in the total number of prosecutions for pollution control offences. Although this shift can just about be perceived in the empirical data, this does not necessarily mean that a ‘deterrence’ style of enforcement has been adopted across the board. The subtle blend of influencing factors means that a decision about when and how to enforce against breaches of environmental law is becoming much more complex. Any list of the factors that influence enforcement could never be comprehensive, because each individual case will have peculiar circumstances that shape the exercise of an enforcement agency’s discretion.

Although decisions to prosecute or to take other formal enforcement action are still made on a discretionary basis, there is much more public scrutiny of individual incidents and enforcement policy suggests that moral culpability is only one factor in determining whether or not to take action against an offender. It would be easy to overstate any shift in emphasis in enforcement style: the true picture is that cooperation between regulator and regulated has not broken down, and, in some cases—particularly those in which a voluntary approach is relied upon, such as nature conservation—it is probably the case that the continuing relationship is vital to the effectiveness of the rules that are being enforced.

It is likely that the future styles of enforcement will be eclectic, with different approaches being taken in relation to different offenders. With more reliance on self-monitoring and inspection, and voluntary performance indicators, such as accredited environmental

118 As to whether such compensatory measures actually work, see p. 712.

119 Arising out of the Hampton Review and resulting in the Regulatory Enforcement and Sanctions Bill.

120 Examples include works notices under WRA 1991, s. 161A, and clean-up notices under EPA 1990, s. 59—see pp. 616 and 661 respectively.

121 See p. 616 on the law and practice regarding works notices under WRA 1991, s. 161A.

management standards,¹²² there will inevitably be a greater targeting of those who might be labelled ‘free-riders’—that is, those who allow others to comply with legislative requirements while they evade responsibility. For example, the enforcement of packaging waste legislation initially concentrated on those companies who failed to register, rather than on monitoring those who have already registered.

This approach reflects the fact that the interpretation of enforcement and sanctioning practices is becoming more sophisticated. For the sake of simplicity, enforcement is often considered as a linear process whereby regulatory agencies seek compliance from the regulated. In fact, enforcement is much more than even a two-way process, with many different factors and actors playing a part.¹²³ This means, for example, that if the Environment Agency identifies a problem with compliance rates in a particular area, it can target that area until such time as compliance rates rise. Once this happens, there is less need to undertake enforcement and other areas of non-compliance can be targeted. A more general form of this process involves the review of the reasons for non-compliance and the ineffectiveness of environmental regulation, in the light of experience of the regulatory agencies, the regulated, and the wider regulatory environment.

All of the above points raise the issue of optimal enforcement. Just as optimality in regulation aims to use the right blend of instruments (see p. 249), so enforcement agencies and the criminal courts must keep in mind the right blend of enforcement and criminal sanctions in relation to environmental crime. Optimal enforcement is concerned with securing compliance with the least amount of interference and optimal punishment should be designed to ‘press the right buttons’ in relation to individual offenders. Thus the importance of developing alternatives to traditional sanctions is that, in seeking to secure future compliance, different offenders will respond to different penalties. For example, in cases of incompetence or technical inadequacy, it would arguably be more efficient to supervise the upgrading of plant and equipment, and proper training, than it would be to pay a fine.¹²⁴

Whatever style of enforcement and punishment is adopted in future, it is worth noting that there will continue to be incidents that cause significant pollution in relation to which no formal enforcement action is taken. The aftermath of the *Braer* oil pollution incident off the Shetland Islands in 1993 is a good example of an event that caused significant environmental damage in relation to which no prosecution resulted. Perhaps this illustration is a postscript to the problems of enforcing environmental law in the real world: that there is no simplistic connection between criminal activity, environmental pollution, and the imposition of appropriate enforcement mechanisms or sanctions.



CHAPTER SUMMARY

- 1 It is difficult to define an ‘environmental crime’ with any degree of certainty, primarily because there are relatively few activities that harm the environment that are crimes in, and of, themselves. The criminal law is mainly used to address clearly unacceptable behaviour and to underpin a system of environmental regulation.
- 2 Generally, environmental crimes are not ‘evil in themselves’, but are made so under regulatory systems, and there is no necessary connection between pollution and environmental crime, because many polluting acts are lawful.

¹²² For example, ISO 14001.

¹²³ Including the operating environment for the operators and institutional frameworks of the regulator—perhaps, differences in approach as between, e.g., the Environment Agency regulating major international corporations and Natural England regulating farmers. See R. Baldwin and J. Black (2008) 71(1) MLR 59.

¹²⁴ Although it might be argued that such steps might not go beyond what a regulator could require through administrative means.

- 3 Most environmental crimes impose strict liability—that is, there is no requirement of fault.
- 4 The justifications for imposing strict liability for environmental crimes include that it is in the public interest to do so, that it acts as a deterrent so that those who have to comply with the law do not take risks, and that it makes it easier for regulators to enforce and prosecute environmental offences.
- 5 The potential unfairness of strict liability is balanced by the existence of certain statutory defences, selective enforcement, and the nature of any sanction (for example, a nominal fine).
- 6 Although both individuals (particularly in relation to wildlife crimes) and corporations can commit environmental crimes, the most significant crimes tend to be committed by companies, because of the scale of their operations.
- 7 Companies will be liable for the criminal acts of employees in cases in which the purposes of environmental legislation would be defeated if the company could not be prosecuted.
- 8 Senior managers of companies can be prosecuted in their capacity as managers for many environmental crimes in relation to which an offence is committed with their consent or connivance, or is attributable to their neglect.
- 9 The Environment Agency is responsible for enforcing the vast majority of breaches of environmental law and approximately 80–90 per cent of all prosecutions for environmental crime. Other regulatory bodies, such as Natural England, play a subsidiary role in certain areas.
- 10 There is a general right to bring a private prosecution in relation to many environmental offences, although this is seldom used in practice.
- 11 Prosecution rates for environmental crime are very low in relation to the number of breaches of environmental law. This is explained partly by the development of a cooperational style of enforcement, but other reasons include a lack of resources to detect crimes.
- 12 There are alternative enforcement styles that are based around sanctioning breaches (deterrence) and responsive regulation, which uses the minimum amount of formal regulation possible to achieve compliance.
- 13 The Environment Agency has policies that guide the exercise of discretion over whether and how to enforce or prosecute. These policies are worded in such a way as to make it very unlikely that a challenge to a decision to take, or not to take, any particular enforcement decision would be successful.
- 14 There is a marked dissatisfaction with the low sentences that courts impose for environmental offences, particularly in relation to fines. Attempts to introduce sentencing tariffs have been rejected by the Court of Appeal in favour of a case-by-case approach.
- 15 In routine cases of environmental harm that result from general activities, it has been argued that civil or administrative penalties would be appropriate, leaving criminal sanctions only for crimes that have been wilfully committed with a view to personal or business advantage. These penalties place a greater emphasis on environmental restoration and compensating the victims of environmental crime than the criminal law does currently.
- 16 Securing compliance with environmental law is strongly connected with optimal enforcement. This involves selecting the right style of enforcement for individual operators and having a broader, more flexible, range of sanctions.

Q QUESTIONS

- 1 Why is the definition of 'environmental crime' problematic? How do values and environmental perspectives play a part in establishing any definition of an environmental crime?

- 2 What are the arguments for and against strict liability for environmental offences? How do regulators and the courts deal with cases in which the imposition of strict liability might be unfair?
- 3 What is meant by 'enforcement styles' in relation to the enforcement of environmental law?
- 4 What single change in environmental law, procedure, or enforcement practice would you introduce in order to reduce the number of environmental crimes?
- 5 A small firm cleans used solvents (and might therefore be seen as an environmentally beneficial industry). The firm is owned by A, but is managed on a day-to-day basis by B. C has recently started working for the firm and does odd jobs, including storing the drums of solvents. Unbeknown to anyone within the firm, the drums in which the used solvents come have a hidden defect: when it is very hot, they are prone to leak. Because this is not known, no particular care is taken in storing them out of the sun and, on an exceptionally hot day, several drums leak, spilling into a river. The river is polluted for a mile and many fish are killed. It will take years for the river to be restored to its original condition if left to rejuvenate naturally, but the process will be quicker if there is intervention (which will cost £50,000). The annual turnover of the firm is £200,000 and, last year, it made a profit of £30,000. The firm has an otherwise unblemished pollution record and has always cooperated fully with the environmental regulators.
The firm that made the drums has since become insolvent.
Would it be right, fair, or feasible to criminalize anyone for what has happened? If so, what should the appropriate penalty(ies) be?
- 6 Read 'Flexible penalties, the US way' (2004) ENDS Report 359, 31, and the outline discussion it contains of the use in the USA of 'supplemental environmental projects'. Discuss the pros and cons of these in a UK context.

FURTHER READING

General

There are no recommended general texts on environmental crime. Two US books—M. Clifford (1998) *Environmental Crime: Enforcement, Policy and Social Responsibility*, Gaithersburg, Md: Aspen, and Y. Situ and D. Emmons (2000) *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment*, Thousand Oaks, Calif: Sage—provide a general introduction. There is an interesting comparative perspective of US and UK approaches to environmental crime in W. Wilson (1998) *Making Environmental Laws Work*, Oxford: Hart. In particular, chs 6 and 7 focus on the use of the criminal law, and civil and administrative law enforcement.

EC

We do not consider the European aspect of environmental crime in this chapter, partly for reasons of space. But the idea is also relatively underdeveloped in comparison with other areas of environmental law. For an overview of the issues, have a look at F. Comte, 'Criminal environmental law and Community competence' [2003] EELR 147, M. Faure, 'European environmental criminal law: do we really need it?' [2004] EELR 18, R. Pereira, 'Environmental criminal law under the first pillar' [2007] EELR 254, and the collection of essays in F. Comte and L. Krämer (eds) (2004) *Environmental Crime in Europe: Rules of Sanctions*, Groningen: Europa.

Definitional Issues

On a practical level, the House of Commons Environment Audit Committee's Sixth Report of Session 2003–04, *Environmental Crime and the Courts*, provides the context for many of the issues in this chapter. The report examines some of the contemporary problems of enforcing and sanctioning environmental crime, and comes up with some interesting suggestions and solutions for addressing them. Finally, for an empirical survey of environmental crime and related opinions, see the Environment Justice Project (2004) *Environmental Justice*, especially Pt III (see Web Links below).

There is not a huge amount of literature on the definitional aspects of environmental crime. There have been some attempts to develop 'green' criminology or a theory of environmental crime. M. Lynch and P. Stretsky, 'The meaning of green: contrasting criminological perspectives' (2003) 7(2) *Theor Crim* 217, and R. White, 'Environmental issues and the criminological imagination' (2003) 7(4) *Theor Crim* 483, comprise a two-part series on the definition and goals of environmental criminal law. In addition, a special issue of the journal *Theoretical Criminology* (*Theor Crim*) focused on the different perspectives on environmental crime: see 'For a green criminology' (1998) 2(2) *Theor Crim*. Readers may also find P. Lowe, J. Clark, S. Seymour, and N. Ward (1997) *Moralizing the Environment*, London: UCL Press, an interesting study of the way in which shifts in the perception of the harm caused by agricultural pollution brought about tighter regulation and enforcement.

Enforcement

Anyone looking for some wider reading material on the enforcement of environmental law will find a number of good works and there are additional texts that cover regulatory enforcement generally, but which can be extremely useful when considering the theory of enforcement. In the former category, there is G. Richardson, A. Ogus, and P. Burrows (1982) *Policing Pollution: A Study of Regulation and Enforcement*, Oxford: Clarendon Press, K. Hawkins (1984) *Environment and Enforcement: Regulation and the Social Definition of Pollution*, Oxford: Clarendon Press, and B. Hutter (1988) *The Reasonable Arm of the Law*, Oxford: Clarendon Press, all of which provide an examination of environmental enforcement officers' experience of enforcing the law in the real world. In the latter category, K. Hawkins (2002) *Law as a Last Resort: Prosecution Decision Making in a Regulatory Agency*, Oxford: Oxford University Press, examines the process of prosecutions brought by the Health and Safety Executive, and I. Ayres and J. Braithwaite (1992) *Responsive Regulation*, Oxford: Oxford University Press, as the main text explains, provided an alternative view of regulatory enforcement (we hesitate to call it the 'third way'). B. Lange, 'Compliance construction in the context of environmental regulation' (1999) 8 *Social and Legal Studies* 549 brings out the complexity of the very concept of compliance in an environmental context and D. Farber, 'Taking slippage seriously: non-compliance and creative compliance in environmental law' (1999) 23 *Harv Evtl LR* 297, although using US examples, is helpful.

Other relevant material includes J. Rowan-Robinson and A. Ross, 'The enforcement of environmental regulation in Britain' [1994] *JPL* 200. There are two articles that examine the practices and opinions of industrial pollution control enforcement officers: A. Mehta and K. Hawkins, 'IPC and its impact: perspectives from industry' (1998) 10 *JEL* 61; C. Lovat, 'Regulating IPC in Scotland: a study of enforcement practice' (2004) 16 *JEL* 49.

Sanctions

There has been an upsurge of interest in the different sanctions for environmental crime. The weight of opinion and evidence suggests that current criminal penalties (largely fines) are too low, and that they are an inadequate response to environmental offences. The best-aggregated data source can be found in C. DuPont and P. Zakkow (2003) *Trends in Environmental Sentencing in England and Wales*, London: DEFRA. The Environmental Justice Project's report referred to above also has some empirical data. For a general introduction to the issues, read A. Ogus and C. Abbot, 'Sanctions for pollution: do we have the right regime?' (2002) 14 *JEL* 283, and the short response from top prosecutors in the Environment Agency, R. Navarro and D. Stott, 'A brief comment: sanctions for pollution' (2002) 14 *JEL* 299.

Different solutions have been proposed. The most common theme is the introduction of civil penalties. The idea has been around for some time, although the most comprehensive treatment can be found in M. Woods and R. Macrory (2003) *Environmental Civil Penalties: A More Proportionate Response to Breach?*, London: University College London, and the government's Consultation Document (2006) *Regulatory Justice: Sanctions in a post-Hampton World* (available online at bre.berr.gov.uk/regulation/documents/pdf/macrory060524.pdf). N. Parpworth, K. Thompson, and B. Jones, 'Environmental offences: utilising civil penalties' (2005) *JPL* 560 provides a detailed survey of the literature relating to the use of civil penalties in criminal cases.

Other useful articles on this topic include M. Grekos, 'Environmental fines: all small change' [2004] JPL 1330 and R. Malcolm, 'Prosecuting for environmental crime: does crime pay?' (2002) 14(5) ELM 289. Another approach is the 'name and shame' policy adopted by the Environment Agency. A discussion of this can be found in P. De Prez, 'Beyond judicial sanctions: the negative impact of conviction for environmental offences' (2000) 2(1) Env LR 11. Finally, P. de Prez, 'Excuses, excuses: the ritual trivialisation of environmental prosecutions' (2000) 12 JEL 65 provides a real-world view of the ways in which companies address environmental crime and the mitigation they put before a court when sentencing. It is perhaps unsurprising to learn that companies play down their culpability.

@ WEB LINKS

Many of the reports which are referred to in this chapter can be accessed through the Department for Environment, Food and Rural Affairs (DEFRA) environmental justice web page at www.defra.gov.uk/environment/enforcement/justice.htm. The reports available from this site include the University College London (UCL) report, the environmental justice report and the ERM report all referred to above. More recent reports, in relation to the Hampton Review and the Regulatory Enforcement and Sanctions Bill, are available at www.defra.gov.uk/environment/enforcement/index.htm. The Partnership For Action Against Wildlife Crime's web page provides a database of wildlife prosecutions and can be found at www.defra.gov.uk/paw/prosecutions. The Centre for Corporate Accountability at www.corporateaccountability.org is aimed largely at health and safety legislation, but is a good source of information of corporate liability. Any study of the enforcement of environmental law must keep abreast of current policy developments and figures, which can be found in the most recent editions of the Environment Agency's Enforcement and Prosecution Policy and its annual *Spotlight* report (both available from www.environment-agency.gov.uk).