A Report by the Environmental Justice project

The purpose of the Environmental Justice Project (EJP) is to review the operation of environmental law in England and Wales, to identify any inadequacies with regard to access to justice and make recommendations for change.

The Environmental Justice Project includes:

Pamela Castle

Pamela is the Chairman of the Environmental Law Foundation (ELF) and co-Chairman of the London Sustainable Development Commission. She holds a number of other public appointments. She has an Honours degree in Chemistry and worked in industry for a number of years before qualifying as a solicitor. She is the former Chairman of the United Kingdom Environmental Law Association (UKELA) and former Partner and Head of Environmental Law at the law firm CMS Cameron McKenna.

ELF is the leading national charity providing legal advice for all communities and individuals facing a threat to their environment. Through its nation-wide network of specialist lawyers and consultants, it provides *pro bono* guidance and continuing support to those in such need. ELF is particularly concerned with securing access to justice for the socially disadvantaged and has been involved in some of the most significant environmental test cases in recent years. Since its launch in 1992, ELF has won a number of awards for justice and community action.

Martyn Day

Martyn is the Senior Partner of Leigh, Day & Co. He specialises in representing groups of injured claimants both in the UK and abroad. He is Chair of the Board of Greenpeace UK and a former Labour Councillor. He has written numerous articles and books covering, amongst other issues, the environment, personal injury and multi-party actions.

A Report by the Environmental Justice project

Leigh, Day & Co Solicitors specialise in accident and personal injury, administrative and public law, clinical negligence, environment, human rights, multi-party actions and product liability.

The company was formed as a specialist personal injury law practice in 1987 by founding partners Sarah Leigh and Martyn Day. The firm has acted in many ground breaking actions representing the Sellafield leukaemia children, tobacco victims, Japanese Prisoners of War, asbestos workers in South Africa and India and Kenyan women and children in claims against the British Army. The firm won *The Lawyer* Litigation Team of the Year (2003) for its work in Kenya representing children and adults injured by unexploded ordnance.

Carol Hatton

Carol is a solicitor at the World Wide Fund For Nature (WWF) and works on a variety of UK and international conservation issues. She has an Honours degree in Environmental Sciences and a Masters degree in Nature Conservation from University College London. She has worked on land use policy issues for environmental charities for 17 years including the Wildlife Trusts, Friends of the Earth and WWF-UK.

WWF is the world's largest and most experienced independent conservation organisation, with 52 offices working in more than 90 countries, and over five million supporters world wide. WWF-UK was launched in 1961 and since then it has funded more than 3,000 projects in the UK and spent some £64 million on conservation work overseas. WWF-UK has offices in Northern Ireland, Scotland and Wales and a network of around 200 volunteer groups. It is a challenging, constructive, science-based organisation that addresses issues from the survival of species and habitats to climate change, sustainable business and environmental education. In the last 15 years, WWF-UK has undertaken and financially supported a large number of high-profile environmental cases in the UK and European Courts.

Paul Stookes

Paul is a solicitor, Member of the Institute of Environmental Management and Assessment and Chief Executive of the Environmental Law Foundation (ELF). He is co-author of Environmental Action: a guide for communities and individuals and editor of the environmental sentencing guidelines *Costing the Earth* published by the Magistrates Association and ELF. He has published numerous articles in the environmental and legal press. He recently completed a Masters degree in Environmental Management at the University of Bath.

Acknowledgments

Acknowledgments

The EJP would like to thank the Department for Environment, Food and Rural Affairs (DEFRA) for funding the statistical analysis of data on criminal prosecutions provided by government departments, regulatory authorities and NGOs.

Our gratitude is also due to all those providing data and/or views on the effectiveness of the legal system. In particular, we wish to thank Anne Brosnan (Environment Agency), Martin Fox (English Nature), Wyn Jones (Joint Nature Conservation Committee), Howard Price (Chartered Institute of Environmental Health), Sergeant Peter Charleston (North Wales Police), Inspector Nevin Hunter (Devon and Cornwall Constabulary), Stephanie Pendry (TRAFFIC), Dr Tony Gent and Dr Keith Corbett (Herpetological Conservation Trust), Alan Care (APIL), Phil Michaels (Friends of the Earth), Rosie Sutherland (RSPB) and Peter Roderick for devoting a significant amount of time to providing materials and views.

We wish to acknowledge the assistance of Professor Klim McPherson and Rebecca Mant, formerly of the University of Bristol, for undertaking the analysis of criminal data and addressing subsequent questions. We also wish to thank Helen Forsey, who undertook the research on District and Unitary Authorities for the Criminal Section of the Report.

Finally, we acknowledge the support of the Law Society for hosting the Workshop in October 2003 and the launch of the final Report in March 2004.

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Executive Summary and Recommendations

The purpose of the Environmental Justice Project (EJP) is to review the operation of environmental law in England and Wales, to identify any inadequacies with regard to access to justice and make recommendations for change. The premise upon which the Environmental Justice Project was founded is that the judicial system should provide protection to the environment and to the environmental rights of each citizen within our society.

Methodology

The EJP received views on the effectiveness of the civil law system in providing access to environmental justice from over 50 respondents, including 18 solicitors, 20 barristers and 15 environmental NGOs. In a limited field, this represents a high response rate. We recognise the findings of this section are based on comments made in response to a questionnaire, which are - by their nature - anecdotal. In the absence of centrally held data on environmental cases (both those going through the Courts and those that do not reach the Courts) these views represent the extent of information that is currently available. Taken together with the analyses of sample case law undertaken by the EJP, the Environmental Law Foundation and University College London[1], these views tell us much about the effectiveness and parity of the present system.

Data on environmental and wildlife crime was gathered from a range of Government departments, enforcement agencies and NGOs. Views were canvassed as to whether the criminal justice system provides a fair platform for environmental issues and the extent to which the penalties imposed provide an effective deterrent to environmental and wildlife crime.

A draft report was presented to a Workshop attended by over 50 practitioners and NGOs at the Law Society on 9th October 2003. The draft Report was also refined in the light of discussions held with politicians, civil servants and senior members of the judiciary in early 2004.

The EJP presents its conclusions and recommendations below. As a general point, we echo the view of Lord Brennan QC[2], who believes that a Government review of the civil and criminal justice systems in the context of access to justice is now required in the light of the findings of this, and other DEFRA-funded, research.

1 Discussed in paragraphs 58 and 59, below

2 Matrix Chambers

Civil law

Ninety seven per cent (97%) of leading practitioners and NGOs questioned in England and Wales believe the civil law system fails to provide environmental justice. The most significant single barrier is perceived to be the application of the current rules on costs, followed by a lack of judicial understanding of, and/or sympathy with, environmental issues, the limited scope of judicial review proceedings and an inability to obtain interim (injunctive) relief.

Costs

Eighty two per cent (82%) of respondents are "not satisfied" with the current rules on costs. Of the remaining respondents, eighteen per cent (18%) are only "quite satisfied", and none are "very satisfied". Practitioners advise many potential clients about Judicial Review (JR), but arguable cases are often not progressed because of the costs implications. As such, many practitioners believe the current costs rules are a major impediment to access to Environmental Justice by a highly significant proportion of the population. These concerns are echoed by the NGOs, who take strategic decisions on legal action with an eye as much to resources as legal principles. Many respondents point out that the current regime precludes the UK from compliance with the Aarhus Convention and by implication, social exclusion from the Courts, and believe that a review of the current costs regime for public interest cases lies at the very heart of achieving access to environmental justice.

Understanding of environmental issues

Nearly two thirds of respondents (66%) do not think the Courts' understand environmental issues, and 44% of respondents recommend environmental training for the judiciary. However, there is an important distinction to be made between different types of civil claim. Private claims relating to property damage and nuisance appear to fare reasonably well if they get to court, but private law claims concerning environment/personal injury and public law claims appear to experience a more fundamental challenge in the form of an inherent discrimination within the judiciary. This may be because these claims often concern wider issues, affect large numbers of people (hence raising concerns about floodgates), or require the judiciary to take a bold or expansive approach.

Limited scope of judicial review

Although not questioned directly about this issue, over a quarter of respondents (26%) raised the limited scope of JR as a barrier to environmental justice.

Injunctions and standing

Other concerns raised about JR include an inability to obtain interim relief (injunctions) (21%) and uncertainty on the position with regard to standing. Thirteen per cent (13%) of respondents are "not satisfied" with the application of the current rules on standing, and a further 59% are only "quite satisfied".

Land-use planning and awareness

Respondents are clear that public inquiries must be seen as part of the access to justice regime, however, the absence of public funding for third party objectors is perceived to be a barrier to public participation by two respondents. Eighteen per cent (18%) of respondents are concerned about the absence of a third party right of appeal in the land use planning system.

Finally, two practitioners[3] perceive a lack of knowledge amongst their clients about "environmental rights" and how to enforce them.

Recommendations

The EJP received wide-ranging views as to how the civil law system could be reformed to improve access to environmental justice. These views arose from questionnaire responses, out of discussions held at a Workshop held on 9th October 2003 and interviews with individuals in early 2004. It was not always easy to establish a consensus.

We also benefited from the fact that other DEFRA sponsored projects published their findings during the course of the Project. This included the UCL Project, which recommends the establishment of an Environmental Tribunal to hear regulatory appeals and research conducted by Capacity Global, which makes eight recommendations to facilitate the delivery of environmental justice in England and Wales. These include, amongst others, a reform of the cost rules (Recommendation 7) and increased public funding for environmental cases (Recommendation 5).

After much consideration of the published material and views received, a number of options for reform have emerged. We have not considered the "do nothing" option because it is abundantly clear to us that reform of some sort is necessary if we are to ensure access to environmental justice and comply with the requirements of the Aarhus Convention.

The Options essentially comprise the following:

Option 1

Environmental Court (or Tribunal) [4]

This option includes an all-encompassing environmental court or tribunal, for which the achievement of environmental justice is a constitutional requirement - thus providing a statutory benchmark and a basis for future evaluation.

Such a court or tribunal could hear all civil environmental cases including JRs, statutory applications and appeals to the High Court and environmental claims relating to nuisance, property damage, impairment of human rights and "toxic tort" or chemical poisoning personal injury/nuisance claims. It is suggested the basis for JR be reviewed to encompass the procedural *and* substantive legality (including merits) of a decision in cases falling within the scope of the Aarhus Convention.

The court could appoint Judges from beyond the Bar, to include those with demonstrably diverse environmental experience (i.e. a history of representing a range of clients including individuals, community/residents groups to include solicitors and academics with relevant legal and environmental qualifications and/or experience. Consideration could also be given to the use of impartial technical experts or witnesses to assist the judiciary where necessary.

Any restriction on standing before the environmental court should be formally removed or substantially narrowed to ensure compliance with Article 9(2) of the Aarhus Convention. At the very least, the position with regard to public interest groups should be reviewed to ensure that organisations promoting environmental protection are assured access to the court.

Judges in the environmental court could be given the power to certify whether a case falls within the scope of the Aarhus Convention, or is otherwise in the "public interest", at the outset or permission stage[5]. Such cases could qualify for special rules and procedures with regard to costs and remedies. For example, Judges could order the current cost rules be dis-applied and substituted with rules whereby each party is ordered to pay its own costs or pre-emptive cost orders apply. It may also be appropriate to give the court the power to waive the £180 court fees for applicants in certified cases. With regard to injunctive relief, Judges could be given the power to waive the need for a cross undertaking in damages. All of the above measures would help to remove uncertainty about costs and concerns about fairness – thus ensuring the review procedure is Aarhus compliant, i.e. that it is effective and not prohibitively expensive[6].

4 In this context, the Authors note that an Environmental Tribunal with the jurisdiction to hear all civil matters may also suit this purpose. Whilst beyond the scope of this Report, we recommend that a review of the merits and practicalities of a Court as opposed to a Tribunal be undertaken.

5 Friends of the Earth, Pers Comm.

6 Article 9(4) Aarhus Convention

When asked about ways of improving access to environmental justice, almost a quarter of questionnaire respondents raised the need for an environmental court as their first priority. We also note that approximately three quarters of those responding to the Study by Capacity Global thought the best way to achieve environmental justice was through the creation of a new specialist environmental court or tribunal[7].

Option 2

Environmental Tribunal (UCL Model)

The Centre for Law and the Environment at University College, London examined the merits of the Royal Commission on Environmental Pollution's proposal for setting up environmental tribunals and investigated systems of appeal currently in place for environmental regulation[8]. The report concludes that the current system of environmental appeals is haphazard and lacks coherence and recommends, in the wake of the Leggatt reforms[9], the setting up a single Environmental Tribunal. The Tribunal would be made up of a panel of legal and non-legal experts and would hear regulatory appeals (including IPCC, waste, water and GM licensing and contaminated land and statutory notice appeals). As such, the model proposed would consolidate environmental appeals to a single appeal tribunal.

The UCL model for a Tribunal envisages that the Planning Inspectorate would continue to handle appeals under planning legislation, recognising that there would need to be close liaison between the two institutions. The report points out that a considerable number of planning judicial reviews are concerned with the interpretation and application of environmental assessment requirements in relation to development projects, and sees the opportunity to transfer Jurisdiction relating to legal challenges concerning environmental assessment to the Tribunal.

The Report states that the costs and administrative charges involved in setting up such a Tribunal to handle the majority of existing appeals would be modest compared to the policy gains to be made. It is argued that such a Tribunal would bring a greater consistency of approach to the application and interpretation of environmental law and policy.

7 Adebowale, M. (2003) *Using the Law: Barriers and Opportunities for Environmental Justice.* Capacity Global

8 See Macrory, R and Woods, M (2003) *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal.* UCL. See http://www.ucl.ac.uk/law/environment/tribunals/

9 Sir Andrew Leggatt (2001) *Tribunals for Users One System, One Service – Report of the Review of Tribunals* (available on the DCA website at http://www.tribunals-review.org.uk/)

Option 3

Amendments to the Civil Procedure Rules and Practice Directions

Participants in the Judicial Review working group expressed concerns about the establishment of a separate environmental court or tribunal, pointing out that environmental interests are a fundamental consideration and, as such, should remain firmly integrated within mainstream issues. It was felt that addressing environmental considerations separately would reinforce the view that the environment is an "add-on", an eccentricity or in some way secondary to economic or other concerns – all of which run counter to judicial philosophy at European and international levels.

The model that emerges is one in which the existing structural regime remains as it is, but amendments to the Civil Procedure Rules (CPR) and Practice Directions (PDs) enable public interest cases to enjoy special procedures. It was pointed out that this could be done without any changes to legislation, although such changes could be brought about by an Access to Justice in Environmental Matters Act (as suggested by Friends of the Earth) with relevant provisions to ensure compliance with the Aarhus Convention. The newly amended CPR and PDs could incorporate a revised regime giving Judges the power(s) to certify that cases are in the public interest, in which case the procedures outlined below may apply:

(1) A revised costs regime, in which the judge could dis-apply the present costs rules and substitute them with an order that each party bears its own costs. The revised rules could also give the judge the discretion to order that the costs of the applicant be paid out of public funds. Alternatively, the judge may rule that a pre-emptive costs order is appropriate. The revised rules could also give the judge the discretion to waive the court fees where appropriate.

(2) A presumption against the requirement to provide a cross undertaking in damages in order to achieve interim (injunctive) relief.

EJP Preferred Option

We have given much consideration to the options outlined above. We are mindful of the views of the practitioners and NGOs responding to our questionnaire and attending our Workshop in October 2003 and the findings of research undertaken by UCL and Capacity Global. We also benefited from discussions in early 2004 with: the Lord Chief Justice, Lord Woolf; the Master of the Rolls, Lord Phillips; Lord Justice Carnwath; the Parliamentary Under Secretary at the Department of Constitutional Affairs, Mr David Lammy MP; and the Minister for Environment and Agri-Environment, Mr Elliot Morley MP.

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Given the palpable disquiet about the present regime expressed by environmental public interest groups and practitioners, we are clear that significant change is necessary. Improvements are most needed with respect to the present rules on costs and interim relief (injunctions), but it is clear that any procedural changes must also be underpinned by a shift in judicial understanding of, and empathy with, environmental issues. We are of the view that change of this magnitude can best be realized by the creation of a specialist forum, i.e. a separate environmental court or tribunal, with the jurisdiction to hear all civil law claims with a significant environmental component (as outlined in option one, above).

We are persuaded by the concept of a specialist environmental court for several reasons.

Firstly, we are sceptical that sufficient change can be effected without some degree of structural reform. One NGO observed that we already have Judges with specialist environmental expertise sitting in the High Court (achieving *de facto* an important element of a specialist court or tribunal), but that, on the whole, this has done little to improve the prospects of success or to alleviate financial concerns. As such, we are concerned that procedural amendments (i.e. a revision of the Civil Procedure Rules) alone will not elicit root-change in the treatment of environmental issues. While we appreciate the arguments against singling out environmental law for judicial attention (on the basis of its pervasive nature), we are not convinced that it will receive due emphasis in the judicial process *unless* a specialist forum is devoted to it.

Secondly, environmental protection and enhancement is a fundamental principle of sustainable development (along with social and economic progress) and, as such, is deserving of special treatment by the Courts. It is fundamental to the well-being and quality of life of all members of society and because of this we are of the view that it can be sufficiently distinguished from other deserving public interest issues to warrant the establishment of a specialist court.

Thirdly, much environmental law is based on scientific and technical issues, the understanding of which would be enhanced by the regular handling of such cases in a specialist court.

Fourthly, we believe that the establishment of a specialist court or tribunal would have the social benefit of significantly simplifying the structure and procedure for potential claimants and applicants, thereby improving access to justice especially to those who are currently socially excluded by the complexity of the system. In this respect, we note the preamble to the Aarhus Convention, which is concerned that "…*effective judicial mechanisms should be accessible to the public…so that its legitimate interests are protected and the law is enforced*".

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On the question of resources, we do not believe the establishment of an environmental court as part of the High Court would be prohibitively expensive. It does not require a new building or extensive structural reforms – it could simply form a specialist arm of the High Court, in much the same way as the Technology and Construction Court. The relative costs and benefits of specialist environmental courts at County Court level are beyond the scope of this Report, as are those relating to an environmental tribunal, although this will obviously need to be clarified as part of the process of taking any such initiative forward.

We propose the Planning Inspectorate would continue to handle appeals under Planning legislation, but that the environmental court/tribunal we propose could hear regulatory appeals identified by the UCL Report as suitable for submission to a specialist environmental tribunal. We do not, however, believe that a tribunal of such limited scope as identified in the UCL Report is, in itself, sufficient to achieve access to environmental justice. Moreover, we are concerned that the establishment of a tribunal limited to regulatory appeals could fill the "window of opportunity" to improve access to environmental justice at a time when more fundamental reform is clearly necessary.

We recognise the concept of an environmental court is not a new idea, having been recommended in 2000 by Professor Malcolm Grant.[10] It is clear from our discussions with senior members of the judiciary that the establishment of an environmental court or tribunal is still viewed with sympathy and, in fact, continues to be viewed as somewhat inevitable. In 1999, Sir Robert Carnwath observed that he "*remain[ed] confident that the Environmental Court [or Tribunal] is an idea whose time will come*[11]." This feeling is still shared by a number of senior members of the judiciary.

The creation of an environmental court (or tribunal) will require primary legislation. We therefore call on the Government to bring forward proposals for an **Environmental Court (or Tribunal) Bill**. We are aware of the use of the Regulatory Reform Act 2001[12] as an alternative route given the difficulty of securing Parliamentary time for new primary legislation. While this may be worth investigating as a fall-back option, our preference is for an Act of Parliament which provides due opportunity for public consultation and debate - as such reflecting both the letter and spirit of the Aarhus Convention.

Finally, we would point out that the establishment of an environmental court or tribunal must form part of a suite of measures to improve access to environmental justice by all sections of society, some of which could be progressed while securing Parliamentary time. These include:

- amendments to the Civil Procedure Rules (and associated Practice Directions) in relation to costs on the basis of the "polluter pays" principle;

10 Grant, M (2000) *Environmental Court Project: Final Report.* Department of the Environment, Transport and the Regions: London.

11 [then] Sir Robert Carnwath (1999) *Environmental Litigation – A way through the Maze?* Journal of Environmental Law Vol 11 No. 1 Oxford University Press

12 The Regulatory Reform Act 2001 provides Ministers with a wide power to use Orders to reform primary legislation.

- amendments to the Civil Procedure Rules (and associated Practice Directions) in relation to standing and interim relief (injunctions);
- a programme of training and guidance on environmental matters. We recommend the Judicial Studies Board be asked to initiate a programme of judicial training, to include the principles of sustainability. We acknowledge that some Judges are fully up to speed on environmental issues, but this high standard must be demonstrated consistently across the judiciary;
- guidance on "*Wednesbury* unreasonableness" as a ground for judicial review in environmental cases, which would allow the Courts to take the merits of an environmental case into account;
- prioritising funds within the Community Legal Service towards public interest environmental cases. This will ensure that public funding continues to be available across the board, as opposed to only those who are socially excluded;
- the establishment of a national database (or e-library) of civil cases, providing empirical evidence about the number and nature of environmental cases going through the Courts; and
- action to increase knowledge about "environmental rights" and how to enforce them. This may include consideration for the establishment of an environmental advice agency similar to the Environmental Defenders Office in Australia (as recommended by Capacity Global) or the provision of information about issues of concern (waste, nuisance, pollution etc.) and details of organisations active in environmental law (and how to contact them).

Miscellaneous Recommendations

In addition to the above, we recommend consideration be given to the following:

Land-use Planning

- the introduction of a limited third party right of appeal in the land-use planning system; and
- individuals making representations to a planning authority should be informed, on or before receiving the authorities' decision, of the availability of JR.

Procedural matters

- removing the requirement for duplicate documents in the Administrative Court and requiring skeleton arguments to be served earlier.

Research

- further research into complex issues of causation (e.g. the effects of pesticides and hazardous chemicals on the environment).

Criminal Law

In contrast to the civil law system, respondents and workshop participants *do* believe the existing criminal justice framework is one within which environmental justice can be obtained. We do not, therefore, recommend any substantial change to present structures within the criminal system.

However, environmental and wildlife crime encompasses individuals and corporations in whose financial interest it remains to pollute, damage, and trade in the environment. In general, we conclude the fines for environmental offences, despite recent guidance from the Court of Appeal, remain too low and that tariff guidelines (as opposed to Guid*ance*) would be helpful. This conclusion is supported by the findings of the ERM study, which concludes that fines are still well below the maximum possible amount that Magistrates can impose[13]. The need for higher fines for health *and safety offences has already been recognised in R v Anglian Water Services Ltd sub nom Hart v Anglian Water Services Ltd*[14]. In this case, the Court of Appeal emphasised that Magistrates should accustom themselves to imposing much greater fines where appropriate. We believe such reasoning should also apply to environmental and wildlife crime.

It is clear that many determined and persistent offenders do not respond to fines. As such, the criminal system risks failing to meet the basic requirements of the Aarhus Convention, in that the penalties imposed are neither "adequate" nor "effective" to address environmental and wildlife crime. Our research, alongside that conducted by ERM[15], suggests that alternative penalties are rarely used.

Respondents perceive the Courts' understanding of environmental issues, and treatment of environmental offences, to be variable. While there may be valid reasons for the differential in fines imposed, many respondents believe the penalties should show a greater correlation with the environmental damage caused, thus providing an effective deterrent to would-be and re-offenders. While Guidance in relation to some offences for Magistrates does exist (in the form of "*Costing the Earth – Guidance for Sentencers*"), it is not widely known about within some enforcement spheres and it does not cover all offences. There is also no equivalent Guidance for the Crown Courts.

The EJP finds the statutory regime within which the enforcement agencies operate to be broadly satisfactory, with the exception of the marine environment, species conservation and some specific powers of the enforcement agencies (as identified). In terms of policy, we note the recommendation made by Capacity Global that the delivery of policy relating not only to environmental quality, but also regeneration, social inclusion, health and legal services, is required from the DCA, DEFRA, the Office of the Deputy Prime Minister and the Department of Health[16].

13 Dupont, C and Zakkour, Dr. P (2003) *Trends in Environmental Sentencing in England and Wales.* Environmental Resources Management Ltd (ERM)

14 [2003] EWCA Crim 2243

15 The average use of custodial sentences across all regions in England and Wales is 1.2% and all other types of sentence, including Community Service Orders, conditional/absolute discharge, compensation etc are used infrequently (from 4.9% to 8% in the Crown and Magistrates' Courts respectively. See Dupont, C and Zakkour, Dr. P (2003) *Trends in Environmental Sentencing in England and Wales.* Environmental Resources Management Ltd (ERM)

16 Adebowale, M (2003) *Using the Law: Barriers and Opportunities for Environmental Justice.* Capacity Global

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A great deal of dedication is shown by many regulatory authorities, especially the network of Police Wildlife Liaison Officers (PWLO) who spend a significant amount of their personal time pursuing wildlife offenders – for which they gain much personal satisfaction but, perhaps, little public recognition. Despite this, it is clear that the Police Service, district and unitary authorities and, to an extent, the Environment Agency, are not always adequately resourced to perform their statutory duties.

Recommendations

1. Penalties

- We recommend the introduction and application of tariff guidelines for environmental and wildlife offences, operating alongside the Guidance. In this respect, we urge the Sentencing Guidelines Council to issue a fresh report.
- When sentencing, the judiciary should place particular emphasis on the environmental or ecological impact, or potential ecological impact, of an offence. Wherever possible, the level of fine should reflect the economic gain arising from the offence. Magistrates should be encouraged to take account of the maximum fine available for environmental offences, i.e. £20,000.
- We recommend the greater use of custodial sentences for serious environmental or ecological offences, including offences under the WCA 1981 and CroW Act 2000.
- Magistrates and Judges are encouraged to apply the full range of sentencing options available, i.e. the fining or imprisonment of individual company directors, disqualification of company directors under the Company Directors Disqualification Act 1986 and the imposition of Community Service Orders in respect of individuals.
- There should be a requirement for successful prosecutions to be recorded in company annual reports.
- Consideration should be given to the development of a “fit and proper person test” to ensure company directors have a proven “clean” environmental record.
- The Courts are urged to routinely award successful individuals and organisations bringing environmental and wildlife cases all reasonable costs of investigation and legal costs. With respect to corporate offenders and offences involving wildlife trade, the order for costs should not be disproportionate to the fine imposed.
- We encourage enforcement agencies and voluntary organisations to publicise enforcement action wherever possible and appropriate.

- Finally, we believe there is merit in pursuing the concept of civil environmental penalties, although they should represent an additional measure, in terms of flexibility and proportionality, over and above an effective criminal justice system. If such penalties are to be pursued, we recommend consideration be given to requiring the enforcement agencies to provide a reasoned decision as to why it has chosen to pursue a civil penalty rather than a criminal prosecution when significant environmental damage has ensued. Furthermore, the use and effectiveness of such penalties should be monitored closely, and guidelines drawn up regarding the level of the penalty. Such guidelines should place particular emphasis on:
- the nature of the offence (seriousness, repeated etc.);
- the environmental damage caused;
- any profits gained;
- the defendant's ability to pay; and
- other aggravating or mitigating circumstances.

ii) Handling of Environmental Cases

- Magistrates should apply "*Costing the Earth - Guidance for sentencers*". We also recommend the Guidance be expanded to cover other environmental offences (e.g. s.70 Water Act 1991 and other "bread and butter" issues dealt with by the Police Service and the RSPCA) and information on sustainable development. Guidance should be produced for use in the Crown Courts and accompanied by a programme of training for Crown Court Judges (a responsibility of the Department of Constitutional Affairs). The effectiveness of the Guidance should be monitored and evaluated.
- We strongly support the designation of specialised Magistrates' Courts and/or Magistrates.

iii) Statutory powers

The powers of the enforcement agencies should be augmented as follows:

Environment Agency:

- the power to stop people/vehicles to request names and addresses;
- the power to require suspected offenders to take part in interviews;
- the power to serve notices with immediate "stop" provisions without the need to obtain injunctions or provide time to comply; and
- clearer legislation with regard to flood defence enforcement.

The Agency also identified amendments to other legislation to enhance environmental protection (see section 4.3.1).

English Nature:

- the power to stop people/vehicles and request names and addresses;
- the power to require suspected offenders to take part in interviews (PACE 1984); and
- the power to require immediate restoration following an offence being committed when not in the public interest to bring a prosecution.

Police Service:

- powers of entry onto land, arrest, and search warrants for wildlife offences; and
- wildlife offences to be listed as "notifiable" offences.

In addition, the statutory regime should be strengthened by:

- the introduction of a UK Marine Act, which enables stakeholders to take an integrated and strategic approach to the protection and management of the marine environment; and
- comprehensive species legislation, including a review Part I of the WCA 1981 with regard to its effectiveness for species conservation, including marine species, invertebrates and plants.

iv) Resources

- Enforcement agencies such as the Police Service, CPS, Environment Agency and district and unitary authorities should be adequately resourced to investigate offences and pursue the full range of enforcement options available to them. Similarly, NGOs should be adequately resourced to support the enforcement agencies in fulfiling their statutory duties.
- Subject to suitable safeguards, regulatory authorities should be able to retain fines imposed by the Courts.

v) Miscellaneous issues

Recording

- As for civil law, there is no central record of environmental offences, nor any publicly accessible information about how many reports lead to action by the enforcement authorities, and subsequent prosecution. This makes it impossible to assess the extent to which the activities of enforcement agencies and voluntary organisations are impacting upon environmental crime. We therefore recommend the establishment of a national database for recording criminal environmental cases. To ensure any such database is comprehensive, wildlife offences should be listed as "notifiable offences". One possibility is that the National Wildlife Crime Intelligence Unit (NWCIU) could be funded to establish and maintain a central record of wildlife offences, including all recorded incidents and not just convictions.

Awareness raising

- A range of available materials about environmental and wildlife crime should be promoted more widely within the judiciary, legal practitioners and relevant voluntary organisations. Consideration should be given to the formation of an environmental advice agency, along the lines of the Environmental Defenders Office in Australia, as recommended by Capacity Global. As for civil law, we also recognise the benefits of providing some sort of central "database" providing information about issues of concern (waste, nuisance, pollution etc.), including details of regulatory bodies and organisations active in environmental law (and how to contact them).

Introduction to the EJP

Opening Remarks

1. In 1998, the UK Government became a signatory to the UNECE Aarhus Convention[17], which seeks to establish a consistent standard for access to information, public participation in decision-making and access to justice in environmental matters. It seeks to ensure contracting parties provide review procedures that are real and affordable thereby ensuring that all 'members' of society are able to have access to the Courts under environmental law. Five EU Member States have already ratified the Convention[18].

2. The environment is constantly reacting to the complex array of demands placed upon it, and our choices have a major influence on how the tapestry of our landscape, coasts and seas unfold. Whilst significant steps have been taken to prevent further losses in biodiversity in recent years, the UK environment is still in a precarious shape. The Intergovernmental Panel on Climate Change predicts that, on current climate models, we can expect a rise in global temperatures of between 1.4°C and 5.8°C by the end of the 21st century[19]. New climate change scenarios for the UK in 2002 suggest that the average temperature across the UK could increase by 2 to 3.5°C by the 2080s[20]. The UK Government's sustainability indicator for wild birds shows that between 1970 and 2002, woodland birds declined moderately and farmland birds, such as the yellowhammer and the skylark, declined steeply[16]. Over a quarter of fish, amphibians and reptiles in, or around, the UK are considered "threatened"[22].

3. Environmental law carries a responsibility to ensure justice not only for the individual citizen, but for the collective benefit in terms of protecting our environment – both now and for future generations. This Report seeks to clarify the extent to which our legal system achieves this.

Background to the EJP

4. The Environmental Justice Project (EJP) arose from a meeting on environmental justice convened in June 2002. Mindful of the UK's desire to ratify the Aarhus Convention, the Government sought views on the effectiveness of the present judicial system in fulfiling the third pillar of the Convention on access to justice. The conclusion was that while most people could provide anecdotal evidence, no-one could point to any comprehensive data-source giving a general picture about environmental justice. There is presently no central system for recording environmental cases – either civil or criminal – that can provide accurate information about the number, nature and outcome of environmental cases going through the courts.

17 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

18 Belgium, Denmark, France, Portugal and Italy

19 See http://www.defra.gov.uk/environment/statistics/eiyp/globatmos/index.htm

20 DEFRA (2003) *The environment in your pocket: Key facts and figures on the environment of the United Kingdom*

21 BTO, JNCC, RSPB, WWT (2003). The State of the UK's Birds 2002

22 See http://www.defra.gov.uk/environment/statistics/eiyp/wildlife/wld49.htm

Introduction to the EJP

5. Soon after this meeting, the EJP was formed, the aim of which is to review the operation of environmental law in England and Wales, to identify any inadequacies with regards to access to justice and make recommendations for change. Whilst this review is necessarily broad-based, this report is the conclusion of 18 months investigation, and we believe that we have been able to gain a real understanding as to the way in which the current system operates – something never before achieved.

Related Projects

6. A number of other initiatives emerged from the meeting convened in June 2002. The Centre for Law and the Environment at University College, London examined the merits of the Royal Commission on Environmental Pollution's proposal for setting up environmental tribunals and investigated systems of appeal currently in place for environmental regulation[23]. This report recommended setting up a single Environmental Tribunal made up of a panel of legal and non-legal experts, which could sit throughout the country to hear regulatory appeals (including IPCC, waste, water and GM licensing and contaminated land and statutory notice appeals). The UCL Report considered this flexible model of tribunal would make a significant contribution to our justice system and could be established without undue cost or upheaval.

7. A follow-up project by UCL examined the potential use of environmental civil penalties[24]. It concluded that penalties in the form of a discretionary monetary sum imposed flexibly under the civil law could make a significant contribution to improving compliance in many areas of environmental regulation in a manner that both commands public confidence and is more intelligible to those being regulated. Such penalties are used in different forms in countries such as Germany, the USA and Australia, and can be adjusted to allow the regulator to recover the financial costs of damage caused to the environment, without requiring the full administrative and procedural burden of raising criminal prosecutions or applying the moral condemnation more appropriate for the most serious offences. Civil penalties are already used in this country for less serious regulatory breaches under tax, company and pensions law.

8. The Environmental Law Foundation sought to evaluate the effectiveness of environmental justice for communities and individuals experiencing environmental problems[25]. The methodology of the ELF Study essentially comprised:

- Part I: a review of cases from ELF's Advice and Referral Service;
- Part II: an evaluation of concluded environmental cases commencing in the County Courts and High Court of England and Wales relating to private civil law matters; and
- Part III: an analysis of reported environmental law cases.

23 See Macrory, R and Woods, M (2003) *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal.* UCL. See http://www.ucl.ac.uk/law/environment/tribunals/

24 See Woods, M and Macrory, R (2003) *Environmental Civil Penalties – A More Proportionate Response to Regulatory Breach.* UCL

25 Stookes, P. *Civil law aspects of environmental justice.* ELF

9. Capacity Global undertook research on the accessibility of the Court system in the context of environmental democracy[26]. The Study held focus group discussions with members of the public, each with a wide range of experience in accessing the Courts. These groups raised a number of concerns including, amongst others, the invisibility, and lack of access to, specialist legal advice and information for environmental cases and a fear of costs – both in gaining legal advice and taking cases to court. The groups identified the need for specific assistance in areas of high social, economic and environmental deprivation and recognised the inequalities, both structural and resource based, in the public taking cases against companies, commercial enterprises or "the establishment". The Project also conducted interviews with environmental lawyers and NGOs, which highlighted a distinct lack of expertise within the ranks of the judiciary and Magistrates, a perceived bias of the adjudicators towards development and commerce and problems with rules relating to standing, and costs. The Study concludes there are presently numerous barriers to environmental justice, which weaken any agenda for social inclusion and undermine the enforcement of environmental laws. The Report makes eight recommendations to facilitate the delivery of environmental justice in England and Wales.

10. Finally, DEFRA commissioned Environmental Resources Management Ltd (ERM) to undertake research into environmental offences and sentencing[27]. Their Report found that there were inconsistencies and disparities in Magistrates' and Crown Courts environmental sentencing practices, mainly in terms of regional disparities and variations over time in the average level of fines. Their research also suggested that the fines are still well below the maximum possible amount that Magistrates can impose, and that other types of sentencing are rarely used. The report recommendations that further guidance and training should be considered, in view of the complexity and specificity of the concepts involved in environmental cases. Such guidance would be aided by the development of standard procedures and formats specific to environmental offences for bodies who bring prosecutions for a range of offences, e.g. district and unitary authorities and the Crown Prosecution Services (CPS).

Methodology

Civil law - Private and Public

11. The aim of the EJP was to review the extent to which the civil law system provides effective environmental protection. The Project gathered the views of solicitors and barristers specialising in environmental and environment related personal injury claims through the Association of Personal Injury Lawyers (APIL), the Environmental Law Foundation (ELF) and NGOs through Wildlife and Countryside Link (WCL)[28].

26 Adebowale, M. (2003) *Using the Law: Barriers and Opportunities for Environmental Justice.* Available from Capacity Global, University of Westminster, 35 Marylebone Road, London NW1 5LS

27 Dupont, C and Zakkour, Dr. P (2003) *Trends in Environmental Sentencing in England and Wales.* Environmental Resources Management Ltd (ERM)

28 Wildlife and Countryside Link brings together environmental voluntary organisations in the UK united by their common interest in the conservation and enjoyment of the natural and historic environment.

Practitioners and NGOs were questioned about the number and nature of environmental legal actions undertaken since 1990 and their views on the present system. Although more than 50 legal practitioners and NGOs responded to the EJP, we received a substantive response to the questionnaire from 17 solicitors, 20 barristers and the 5 NGOs active in environmental law. The remaining ten NGOs were able to indicate why they did not routinely use the law in their work, but were unable to give detailed views on the efficacy of the system. A copy of the questionnaires can be found in Appendix 4 and a list of those responding can be found in Appendix 3.

12. To complement this study group, ELF embarked on an Environmental Law Study (the ELF Study) which sought to examine the effectiveness of civil law for individuals and communities (see paragraph 8, above).

Criminal Law

13. The EJP gathered data from Government departments, regulatory authorities and voluntary bodies concerned with environmental offences. Although initially requesting data on prosecutions between 1997 and 2002, the information received included a considerable variety of different data sources over recent periods. The data was sent to Professor Klim McPherson, formerly of the Department of Social Medicine, University of Bristol, for analysis.

14. For the most part, the data was organised by region (of which there were several discordant definitions) and by calendar period. The data was then subjected to analysis to look for temporal trends in various indices and for geographic differences. The statistical methods used were standard tests of heterogeneity (i.e. systematic differences) and of trend. Broadly speaking, Chi-squared tests investigate systematic differences in proportions and regression techniques of trends (often with time). The basic premise was to estimate the size of the effects and their likely confidence bands (95% confidence intervals) and to test for the extent to which such differences could be explained by random variation – as opposed to systematic effects. The results of the analysis can be found in Appendix 5 of the Report. We are aware that since conducting this analysis, some data for 2002/3 has become available[29]. However, we were mindful that because we could not update the picture across the board this could make comparisons between datasets problematic.

15. The results of the statistical analysis formed the basis for further research with regulatory authorities and NGOs concerned with environmental offences. Organisations were sent a generic questionnaire inviting their views on the effectiveness of the criminal justice system and a list of detailed questions teasing out issues of relevance to them. For example, the Police Service, HM Customs & Excise, RSPCA, RSPB and TRAFFIC were questioned about findings in relation to wildlife crime.

29 Some data for the Environment Agency was reported upon in ENDs Report 346 (November) 2003, pp 9-10

A copy of the generic questionnaire can be found in Appendix 6 and a list of organisations providing a substantive response to the findings can be found in Appendix 7. Additionally, a number of NGOs responding to the civil questionnaire provided views on criminal prosecutions. These organisations are also listed in Appendix 7.

16. The EJP encountered a notable omission in the criminal arena relating to offences prosecuted by district and unitary authorities. There is currently no central data-source for such offences, although the Chartered Institute for Environmental Health holds some data. Accordingly, the EJP initiated a separate survey whereby some 40 district and unitary Authorities were interviewed about their enforcement practices and views on the system. A list of those interviewed (including the rationale for their selection), a distribution map and an analysis of their responses can be found in Appendix 9.

EJP Workshop and follow-up

17. The EJP held a Workshop to discuss its preliminary findings at the Law Society on 9th October 2003. We remain grateful to the Environment Agency for making a presentation to the plenary session, the chairs and rapporteurs of the working groups, those attending the event and the Law Society for kindly hosting the event. Discussion in the plenary and the three working groups on civil private law, judicial review and criminal law substantially influenced the development of the report.

Scope and Definitions

Access to Justice

18. The EJP defined access to justice as the ability for concerned citizens and public interest groups to: access the courts and judicial advice at reasonable cost; be provided with a fair and equitable platform for the treatment of environmental issues; and obtain adequate and effective remedies (including injunctive relief) for environmental offences.

Jurisdiction

19. The Project focussed on environmental action and court cases within the jurisdiction of England and Wales. However, as part of the Project it was necessary to consider matters outside the jurisdiction, including case law from the European Court of Human Rights and the European Courts of Justice and legal systems in other parts of the European Union and beyond.

Spatial boundaries

20. The data for criminal prosecutions obtained from the Department of Constitutional Affairs was based on the following local government regions: South (Avon, Devon and Cornwall, Gloucester, Hampshire, Kent, Surrey, Sussex, Thames Valley and Wiltshire), London (Metropolitan City of London), East (Bedfordshire, Cambridgeshire, Essex, Hertfordshire, Norfolk and Suffolk), Midlands (Derby, Leicester, Lincolnshire, Northamptonshire, Staffordshire, Warwickshire, West Mercia and West Midlands) and North (Cheshire, Cleveland, Cumbria, Durham, Greater Manchester, Humberside, Lancaster, Merseyside, Northumbria, North Yorkshire, Nottinghamshire, South Yorkshire and West Yorkshire).

Public/private law

21. There are two broad legal categories: private and public law. Private law covers relationships, agreements and disputes between two or more persons. These claims are wholly civil in nature and include claims relating to nuisance, breach of contract and negligence. Public law covers the administration and regulation of activities taken on behalf of, and for the benefit of, society. It includes criminal law, which aims to protect society and punish those who act unlawfully, and administrative law, which covers the regulation of public bodies and agencies through, for example, Judicial Review[30] (JR). Part I of this report focuses on Civil Private Law (claims relating to nuisance, personal injury, property damage and statutory applications and appeal to the High Court). Part II focuses on Civil Public Law (JR) and Part III focuses on Criminal Law.

Environmental action

22. The Project defined an environmental action as one relating to the direct and indirect effects on human beings, fauna, flora, cultural sites and built structures, soil, water, air atmosphere, climate, the land, landscape, natural sites, biological diversity, energy, noise, radiation, waste, material assets and the cultural heritage. Statutes included within the scope of the EJP are listed in Appendix 8.

Legal Action

23. For the purpose of the questionnaires, a legal action was defined as any case going through the Courts including judicial review, nuisance claims, statutory appeals and compensation claims.

30 Extract from Section 3.1 of the proposed *Environmental Management Handbook*. IEMA: Lincoln

Private Civil Law

1.1 Introduction

24. Civil law was separated into two fields - private law and public law. The former includes statutory applications and appeals to the High Court, and claims for nuisance, personal injury compensation and property damage. Public law primarily covers Judicial Review, human rights claims and cases taken to the European Courts (including the European Courts of Justice and the European Court of Human Rights). This section of the Report covers Civil Private Law.

1.2 Summary of responses

25. There was a mixed response from respondents in this field. A small number of land-owning NGOs[31] reported a handful of private disputes including trespass, eviction of gypsies, criminal damage, defamation etc., but on the whole these cases were either settled out of court or otherwise resolved. As a result, substantive views about private civil law came predominantly from practitioners. While practitioners report varying degrees of satisfaction with the system, it seems the outcome of their claims depends somewhat on their speciality. However, the overwhelming conclusion on reading the responses is of how few claims within this field are now brought. It seems that many respondents now perceive this to be a "barren field" of the law.

1.3 Handling of environmental cases

26. At first sight it seems private law claims are more likely to be successful than public law claims (see paragraphs 58 to 63 below). Some practitioners report a success rate of just over 70%. Richard Buxton refers to *Dennis v Ministry of Defence* (2003) in which the Dennis' were awarded £950,000 in damages to compensate for past and future nuisance until around 2012 (although as an aside it has been noted that *Dennis* also clearly illustrates that access to justice in environmental matters is often only available to those with very significant funds at their disposal[32]). However, the average success rate for solicitors responding to the EJP was 51% in relation to "other environmental claims"[33].

27. However, there is a distinction to be made between the different types of private law claims. Overall, practitioners involved in nuisance and land damage report a higher level of success and a reasonable degree of satisfaction with the manner in which the Courts deal with their claims. For injury related claims the picture is very different. The Association of Personal Injury Lawyers (APIL) defines "environmental" claims undertaken by practitioners as being concerned with either "toxic tort" or chemical poisoning personal injury/nuisance claims. As such, practitioners are not representing the environment *per se*, but individuals harmed by pollutants within the environment. For example, APIL referred to a number of claims concerning the effects of "lindane" pesticide on humans, which arose out of workplace exposure to hazardous pesticides or product liability.

31 e.g. Woodland Trust, Wildfowl and Wetlands Trust

32 Stookes, P. *Civil law aspects of environmental justice.* ELF

33 This includes statutory appeals and claims relating to statutory nuisance, personal injury and property damage

Private Civil Law

These cases fit within our definition of environmental cases and any distinction now seems academic. It is widely recognised that hazardous chemicals affect humans, animals and the environment alike - WWF's Chemicals and Health Campaign, encompasses a child's right to a clean environment on the premise that "*what we do to the animals we do to ourselves*"[34].

28. Practitioners report a degree of success in claims for acute exposure to pollutants, including one-off spills where those living in the immediate vicinity suffer illness. One such example was a chemical leak in the mid 1990s at the Monsanto plant in Wales, which resulted in nausea and vomiting in several hundred people. Leigh, Day & Co managed to obtain compensation for the acute effects suffered. But practitioners involved in chronic exposure cases report one failure after another in the Courts, starting with the Camelford aluminium exposure claims of the late 1980s.

CASE STUDY

Camelford

In 1988, thousands of homes were affected when a lorry driver accidentally dumped 20 tonnes of aluminium sulphate into the wrong tank at a treatment works in Camelford, North Cornwall.

The first Government report into the incident in 1989 found that there should be no long-term effects from drinking the water, but a subsequent report in 1991 stated there could be "unforeseen late circumstances". A later study in 1999 by Dr Paul Altmann, a consultant nephrologist at the John Radcliffe Hospital in Oxford, looked at 55 people who alleged the accident had caused symptoms such a short-term memory loss and poor concentration. He compared the results with their siblings and people from outside the area and found clear evidence that something had damaged their cerebral function[35].

In 1993, the Camelford victims took the Defendants to court in an attempt to obtain exemplary damages, but the Court of Appeal ruled against making such an award where the damage resulted from an act of public nuisance.

About 700 people subsequently won compensation for short-term health problems such as diarrhoea and sickness, but several dozen people believe their health has suffered permanent damage. Five years ago, 148 victims accepted out-of-court damages totalling £400,000 but in the light of Dr Altmann's research, residents now fear the incident could also have left them with a greater risk of Alzheimer's disease and other serious health problems.

In August 2001, the Government launched an investigation into the incident.

34
Carson, R. (1962) *Silent Spring.* Penguin Books

35
Altmann, P. et al (1999) *Disturbance of cerebral function in people exposed to drinking water contaminated with aluminium sulphate: retrospective study of the Camelford water incident* BMJ 1999;319:807-811

29. Similarly, in the late 1980s, residents near Sellafield sought compensation from British Nuclear Fuels Ltd for the diminution in the value of their houses caused by radioactive contamination[36]. The judge held that the Act was based on the Vienna Convention on Civil Liability for Nuclear damage 1963 which related to physical damage and should not be extended to economic loss when such was not recoverable at common law[37]. The trend continued with the Electro-Magnetic Field claims of the mid-1990s.

CASE STUDY

Studholme v Norweb

Simon Studholme was ten years old when he contracted leukaemia and died in 1992. At his family home in Bury, Simon slept with his head against a thin partition wall, on the other side of which was the electricity meter. There was also an electricity substation only a few feet from his bedroom.

A series of studies were conducted after a US study in 1979 found a statistical link between levels of leukaemia and people living close to power lines. The proposition was that it was the electromagnetic fields that triggered the cancers.

In 1995, Leigh, Day & Co sued the electricity company, Norweb, in a test case, with many others waiting in the wings. However, the case suffered from the shifting nature of the evidence as new studies were being published all the time. However, a significant study in 1997 showed only a weak association between leukaemia and power lines. As a result, the case was withdrawn later that year.

30. The crucial question is what is the reason for the failure of these claims? It seems unlikely to relate to the quality of the legal teams involved, as the reports of failure come from some of the country's pre-eminent personal injury practices, such as Irwin Mitchell, Alexander Harris and Leigh, Day & Co – all of which have demonstrated considerable success in other ground-breaking personal injury claims. Another possibility is that the pollution emanating from UK manufacturers is not, in fact, causing any harm to local populations, although this seems highly unlikely.

31. The position simply seems to be that the hurdles claimants have to overcome in these claims are too high. For example, in the US, where many similar claims have succeeded, it is a jury rather than a judge that determines liability. Leigh, Day & Co observes that a jury is likely to be more claimant sympathetic than a judge, and that the ensuing "lower hurdle" allows in more claims. This certainly seems to be borne out by data concerning the number of cases brought in the UK as opposed to the US. Data from EJP respondents indicates that, on average, practitioners (solicitors and barristers together) undertake approximately 27 personal injury claims each year. Data provided by Greitzer and Locks Attorneys at Law in Pennsylvania shows the firm has undertaken 875 cases since 1990 (i.e. 62.5 cases a year).

36 Under Section 7 of the Nuclear Installations Act 1965 which provides that a nuclear site shall not cause personal injury or damage to property

37 *Merlin & ORS v British Nuclear Fuels Ltd* (1990) 3 All ER 711

32. Another major problem for these claims results from the complexity of the proposed causative relationship between the injury and the pollutant, often requiring a large number of experts to give evidence. For example, in the Sellafield case (below) there were some 35 experts submitting evidence in a trial lasting almost a whole court year, to a judge operating without scientific assistance and any sort of background in this work.

33. The APIL suggested that an in depth consideration of the impact of the present law of causation is necessary. It was also suggested that the burden of proof in these claims should be reversed, i.e. that the claimant has to show a *prima facie* case that a particular injury is caused by a particular pollutant and, after that, it is for the corporate defendant to disprove the case, rather than the other way around.

CASE STUDY

Sellafield

In the 1980s, a cluster of leukaemias, at ten times the normal incidence, was discovered around the Sellafield nuclear plant. In subsequent reviews similar, albeit smaller, increases were found around some of the other nuclear facilities in Britain.

In 1990, Professor Martin Gardner of Southampton University published a study showing a strong statistical association between the level of radiation exposure of workers at the Sellafield nuclear plant and the level of risk of workers' children contracting leukaemia.

In 1990, Leigh, Day & Co commenced legal action on behalf of two families whose children had contracted leukaemia or related cancers. These cases were test cases representing a cohort of some 30 other claims. The trial took place in 1992/3 and lasted almost a full year, with 35 experts giving evidence. In the end, the Judge decided against the Claimants, ruling that they had not proven their case to the required burden of proof[38]*.*

Postscript: Research published in the International Journal of Cancer in 2002, found that children of men exposed to radiation while working at the Sellafield nuclear plant have twice the normal risk of developing certain types of cancer such as leukaemia and non-Hodgkin's lymphoma[39]*.*

38 *Hope v British Nuclear Fuels Ltd: Reay v Same* (1994) 5 MedLR 1

39 See http://news.bbc.co.uk/1/hi/health/2054694.stm

1.4 Costs

34. While the relatively high success rate in some areas of private law renders exposure to the other side's costs less likely, the Civil Law working group at the EJP Workshop find the costs rules to be a "pivotal stumbling block" for those wishing to progress claims in this area, and feel that reform is necessary. Lord Dan Brennan QC[40] is of the view that much environmental work should not incur cost penalties because the resolution of such cases is in the public interest.

35. With regard to funding, one participant identified the Funding Code as a problem, alongside convincing the LSC that an environmental case has a 50% chance of success when only about 10% actually do succeed. It was felt important to educate the LSC as to why environmental cases are different, in that they have potentially wide and permanent implications and outcomes.

36. Both the Civil Law working group and practitioners responding to the civil law questionnaire expressed a general dissatisfaction with "after the event" insurance and Conditional Fee Agreements (CFAs). Hugh James Solicitors report extreme difficulty in obtaining Legal Aid or CFA insurance[41]. In this regard, Leigh, Day & Co, also cite the "tobacco cases" of the late 1990s. Because insurance companies are wary of the high failure rates and costs associated with environmental claims, they tend to demand a hefty premium – often as much as 40% of the total risk exposure. As the defendant's costs in the tobacco case were estimated to be in the order of £10 million, the cost of the premium came in at £4 million – clearly an impossible sum for the claimants to find.

37. Patwa Solicitors and Veale Wasbrough expressed concerns about the lack of funding for environmental cases. Veale Wasbrough provide a considerable amount of advice that is not subsequently actioned due to funding difficulties and costs risks. Barristers William Edis[42] and Charles Pugh[43] both identified the cost of litigating as a barrier to environmental justice.

38. EJP respondents and the Civil Law working group suggested a number of ways to address the problems outlined above, ranging from a fully-fledged environmental court or tribunal to the establishment of an "industry fund" for potential litigants on the basis of the "polluter pays" principle. Many of these solutions centred on providing certainty for claimants – both in relation to costs and the provision of a fair platform for environmental interests.

Please see the Executive Summary for the Conclusions and Recommendations of the Civil Section of the Report.

40 Matrix Chambers

41 A process whereby applicants take out an insurance premium to cover their own costs, and the costs of the opposing party(ies), in the event of losing a case

42 1, Crown Office Row

43 Old Square Chambers

2.1 Introduction

39. This section of the report discusses respondents' views on Judicial Review (JR) – thought by many to be an inappropriate mechanism for securing access to environmental justice by society as a whole and, crucially, the mechanism being relied upon by the UK to meet the access to justice requirements of the Aarhus Convention. In this respect, it is appropriate to note an observation made by Greenpeace, which is that judicial review is, in fact, a discretionary remedy. The Aarhus Convention states that each State "***shall**, within the framework of its national legislation, ensure that members of the public concerned…have access to a review procedure before a court of law…*"[44]. The fact that JR is not an assured remedy may, therefore, become a cause for wider concern.

40. Respondents made a number of proposals for amending the current system - on the basis of compliance with the Aarhus Convention. Richard Stein of Leigh, Day & Co Solicitors pointed out that the process of JR has evolved considerably in recent years to accommodate the requirements of EC law and human rights legislation, both of which have considerably influenced the Courts' approach. As such, he does not see further change as a significant departure from the existing legal basis of JR, more a continuing process of adaptation. Proposed amendments relate to cases falling within the scope of the Aarhus Convention[45] and, as such, do not set a precedent for change in other types of cases.

2.2 Summary of responses

41. EJP Respondents and participants in the Civil Law working group highlighted, almost universally, two concerns about the civil law system: (1) the application of the current rules on costs and (2) the extreme difficulty in funding environmental cases. Not one of the 53 practitioners and NGOs questioned indicated they were "very satisfied" with the application of the current rules on costs, and while 18% were "quite satisfied", the remaining 82% were "not satisfied". With respect to the funding of environmental cases, APIL remarked that without proper funding for lawyers, environmental change in the legal system remains simply a "*pipe dream*".

42. There was also great concern about the judiciary's understanding of environmental issues and handling of environmental claims.

44
Article 9(2) Aarhus Convention (own emphasis added)

45
Article 6(1) (a) and (b) Aarhus Convention

43. Many practitioners advise clients about JR, but report that most of them are deterred by a lack of funding or the possibility of a costs order against them. Perhaps as a result of this, EJP practitioners undertake a relatively modest number of environmental JRs every year (the average number of cases since 1990 is approximately 13 per year).

44. In terms of the NGOs, the use of JR is a relatively recent phenomenon. There was a significant rise in the number of cases in the early 1990s, but the number appears to have reached a plateau in recent years. The majority of cases are progressed by the larger NGOs. While a few of the more established NGOs now have in-house legal expertise[46], the vast majority of specialist groups do not – in fact many have only a handful of staff, and some only one or two. Buglife remarks that it has nothing against using the law in principle, but with only one member of staff it is not able to access the sort of legal advice it would need to move forward with confidence. Other organisations expressed similar intent, and some have lent support to other organisations progressing JR, but have thus far refrained from doing so themselves[47]. The main concerns and issues raised by respondents are discussed below.

2.3 Standing (Locus standi)

45. Section 31(3) of the Supreme Court Act 1981 provides that the Court will not give leave for an application for review unless the applicant has sufficient interest in the matter to which the application relates. In determining whether the applicant has standing the Courts consider: (1) the merits of the application; (2) the nature of the applicant's interest; and (3) the circumstances of the case.

46. The early 1990s saw the Courts relax their interpretation of the rules on standing for public interest groups[48] to the extent that 59% of respondents are now "quite satisfied" with the current position. In *R v Somerset County Council, ex parte Richard Dixon*[49], the High Court held that public law was concerned about the misuse of public power, and that a person or organisation with no particular stake in the issue or the outcome might, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. Recognising the applicant was neither a busybody nor a troublemaker, the court held that he was perfectly entitled as a citizen to be concerned about, and to draw the court's attention to, what he contended was an illegality which would have an impact on the natural environment.

46 The following organisations have at least one in-house environmental lawyer: FOE, Greenpeace, National Trust, RSPB, Woodland Trust, WWF-UK

47 e.g. Butterfly Conservation, EIA, Plantlife

48 *R v Poole Borough Council, ex p. Beebee* (H.L. 1991) and *R V H.M. Inspectorate of Pollution, ex p. Greenpeace* (D.C. 1994)

49 (1998) Env LR 111

47. However, while the requirement to show sufficient interest remains embedded in statute, a return to a more conservative approach always remains a possibility. Some thirteen per cent (13%) of our respondents are "not satisfied" with the lack of an assured position on standing. Friends of the Earth is concerned there may be a backlash against the present relatively liberal interpretation of standing (as has been experienced in the US) and point out that the statutory hurdle places an additional and unnecessary resource burden on public interest groups. This concern is reinforced by a number of practitioners, who variously report that "*standing in JR still carries a degree of uncertainty*" (Kate Markus[50]) and "*Environmental NGOs often face an uphill battle on standing before the merits of the action are even considered, especially when there is an aggressive third party whose commercial interests are at stake…*" (Gerry Facenna[51]).

48. A number of respondents are concerned about the disparity between the existing rules on standing and evolving case law. Some respondents are concerned that the current rules conflict with the Aarhus Convention, which recognises that organisations promoting environmental protection have both a sufficient interest and rights capable of being impaired to have access to a review procedure before a court of law[52]. A number of EU Member States have granted environmental organisations a statutory right of access to the court, including Finland, Italy, Luxembourg and Sweden[53], although in some instances the right is prescribed. In Sweden, for example, qualifying organisations must have been operating for at least three years and have not less than 2,000 members. Such a restriction would not be helpful in England and Wales because it would rule out a number of specialist wildlife charities.

49. Barrister Fiona Darroch[54] observes concisely - "*there should be no barriers to standing on environmental issues. Any citizen concerned about an environmental matter should be entitled to come to court after all other attempts to resolve the matter have been exhausted*". Thus, while the need to demonstrate a sufficient interest in a matter does not appear to present a formidable barrier to environmental cases, the continuing requirement to address it – and the discrepancy between the existing rules and developing case law – both cause a degree of concern.

50. Finally, although the scope of this Report is limited to the jurisdiction of England and Wales, a number of NGOs and practitioners, including Philippe Sands QC[55], remain very concerned about restrictions on standing before the European Court of Justice. Applicants challenging a decision addressed to another person have to satisfy a test of direct and "individual concern"[56] which was originally defined in *Plaumann & Co. v Commission* and has been consistently applied by the EC Courts since 1963. While it was originally hoped that the Draft Treaty Establishing a Constitution for Europe[57] would result in a relaxation of the rule for public interest groups, it would seem that this is unlikely[58].

50 Doughty Street Chambers

51 Monckton Chambers

52 Article 9(2) Aarhus Convention

53 European Union Network for the Implementation and Enforcement of Environmental Law (2000). *Complaint Procedures and Access to Justice for citizens and NGOs in the field of the environment within the European Union*

54 10-11, Gray's Inn Square

55 Matrix Chambers

56 [1963] ECR 95

57 Available at http://european-convention.eu.int/

58 WWF

2.4 Time limits

51. The Supreme Court Act 1981 and the CPR require the claim form to be filed with the court promptly and, in any event, not later than three months after the grounds to make the claim first arose[59]. The time limit may not be extended by agreement between the parties and this rule does not apply when any other enactment specifies a shorter time limit. In planning matters, where the delay in reviewing a decision may result in undue uncertainty or pecuniary loss, the time limits are shorter (six weeks). Even though this represents a challenging deadline, particularly for an organisation unfamiliar with JR, only one practitioner reported regular client difficulties with regard to the time limit.

52. However, participants in the Civil Law working group report a significant number of valid claims run out of time. For example, where local residents object to a planning proposal, they are often not informed that they may be able to challenge the decision of the local planning authority. The Working Group suggested that people making representations to a planning authority should be informed, on or before receiving the authorities' decision, of the availability of JR. This would not be onerous, indeed developers who do not secure a planning permission as requested are informed of their right to appeal. Those making representations could be informed of their rights in a similar fashion, with details of who to contact in the circumstances, e.g. the Environmental Law Foundation.

2.5 Treatment of environmental issues

53. Nearly two-thirds (66%) of respondents are not satisfied with the Courts' understanding of environmental issues. A number of practitioners observe that understanding is variable and depends very much on the judge one draws. Many practitioners, including barrister Kate Cook[60] find that, with notable exceptions, there is often a lack of comprehension of (and/or sympathy with) central tenets of environmental law such as the precautionary principle, sustainable development and favourable conservation status, as well as the relationship between EC and domestic law in this area. WWF observes that while European instruments often incorporate these principles there seems to be a definite reluctance, especially in the High Court, to refer cases to the ECJ for a preliminary ruling under Article 234 EC Treaty. By way of contrast, a senior judge defended the Courts' record on environmental cases observing that cases are allocated to Judges with appropriate expertise and a thorough grasp of environmental principles. In his view, the demonstrably poor success rates associated with environmental cases are largely due to the absence of a merits-based review, and the fact that a proportion of them are simply "*poor cases*".

59 Supreme Court Act 1981, s.31(6) and Civil Procedure Rules Part 54.5

60 Matrix Chambers

Public Civil Law - Judicial Review

54. Over a quarter of respondents (26%) are concerned about the limited scope of JR. The RSPB notes that most environmental cases concern the interpretation of scientific facts (i.e. are essentially merits based) and, as such, are outside the scope of the Courts. As the Courts are reluctant to quash a decision unless it is totally and utterly unreasonable, there seems to be "*no middle ground for decisions that are simply poor decisions*". One consequence of this is that Claimants often disguise merits based claims as procedural challenges – an observation reinforced by the UCL study. UCL examined 55 environmental JRs (from an estimated 60-70 which arose during the last 3 years) and found that two-thirds of them were essentially merits-driven, i.e. seeking a substantial rehearing of the facts[61].

55. In JR, the Courts are not considering challenges to the merits of the decision, but rather whether it is a decision the body is entitled to make. In reality, this often means the executive body is forced to go back and rectify procedural errors, but ultimately makes the same decision. As such, in many cases, JR does not change the final outcome - it merely delays it. This distinction is not always understood by applicants, and can lead to frustration as illustrated below.

CASE STUDY

Peace Close, Hertfordshire

In 2002, Broxbourne Borough Council granted planning permission for the construction of bungalows adjacent to the ruins of a Listed Building and the last remaining area of green space in Peace Close, near Cheshunt, Hertfordshire. A group of local residents applied for judicial review on a number of grounds, including the impact of the housing on the ruins of the Listed Building.

Permission for judicial review was granted and the Council subsequently withdrew the planning permission in April 2003. The group was delighted by the decision and thought the ruins were preserved. However, to their shock, in June 2003 an identical planning permission was granted rectifying earlier procedural faults. Development is expected imminently. The group was deeply disappointed that all their efforts were fruitless.

61 Macrory, R and Woods, M, M (2003). *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal.* UCL: London

56. During the Workshop our attention was drawn to the argument that substantive legality is covered by the doctrines of, amongst other things, ultra vires and *Wednesbury* unreasonableness as well, increasingly, of proportionality etc[62]. However, WWF supports the RSPB's view that *Wednesbury* unreasonableness no longer appears to exist as a ground for review and that decision has to be not just unreasonable but "*fantastic in the true sense of the word*" before it provides a potential ground for review before the Courts. As such, poor decisions that do not come within the scope of ultra vires etc. fall through the net.

57. WWF raises the inability to challenge the merits of a decision (as opposed to an ability to challenge substantive legality) as a shortfall in the UK's compliance with the Aarhus Convention[63]. It suggests one possibility would be to lower the "hurdle" on *Wednesbury* unreasonableness for cases falling under the Aarhus umbrella. As such, allegedly poor decisions on environmental facts could become challengeable.

2.6 Handling of environmental cases

58. EJP respondents report a success rate of 40% (solicitors) and 30% (barristers) with respect to JRs, which contrasts unfavourably with an average success rate of 51% for "other civil environmental claims". Respondents observe that successful JRs in recent years seem to concern the treatment of Environmental Impact Assessments[64], in which the presence or absence of pre-determined factors (e.g. a Non-Technical Summary, treatment of alternatives or due consultation processes) is largely procedural.

59. The UCL Project examined 55 environmental JRs and found that only 4 were successful (18 cases were dismissed, 13 withdrawn, and leave for JR refused in 12 cases. The remaining cases were still outstanding at the time of examination[65]). The cause of this was felt to be the fact that environmental cases are frequently merits-driven. This view was reinforced in an interview with a senior judge who observed that the demonstrably poor success rates associated with environmental cases are largely due to the absence of a merits-based review.

60. The ELF Study found that over two thirds of environmental cases (including a large proportion of JRs) referred to ELF members were not concluded successfully. In fact, the Courts appear to go to great lengths to avoid finding for environmental interests. Friends of the Earth cited *R v Secretary of State for the Environment and MAFF, ex parte Watson*[66], in which the Court of Appeal avoided finding for Guy Watson, an organic farmer, even though it recognised the GM plant variety trial in question was unlawful (by saying that he was only interested in the GM aspect of the trial, not in whether it was legal under the Plant Variety Regulations). The corollary of this is that the Courts remain distinctly unsympathetic to public law applications.

62 Friends of the Earth, Pers Comm.

63 Article 9(2) Aarhus Convention as defined by Article 6 (1)(a) and (b), Aarhus Convention

64 Practitioner Richard Buxton tends to specialise in this area and reports 22 of the 51 cases he has progressed in the High Court since 1990 have been successful. This contrasts markedly with the success rates reported by other practitioners

65 Macrory, R and Woods, M, M (2003). *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal*. UCL: London

61. Exactly why environmental JRs fare so badly is difficult to gauge. Barrister Michael Fordham perceives that "in general the courts too readily treat environmental issues from a property/planning mindset, as complex scientific areas warranting an unduly hands-off approach". This view was strongly supported in principle by a significant majority of EJP respondents. Furthermore, McCracken and Jones report the "English courts have sometimes in the environmental field taken what might be described as an approach of technocratic paternalism, viewing with suspicion the calls of participatory democracy as no more than undesirable obstacles to enterprise. Again, a view supported by a large proportion of EJP respondents.

62. Yet there appears to be no basis for such apparent bias. The ELF Study concludes that, on average, 869 people are affected by each environmental problem, which suggests that many cases have a collective benefit. Furthermore, the estimated 25-30 environmental JR applications per year can hardly be said to clog up the system.

63. The need to provide a review procedure that is fair and equitable is another requirement of the Aarhus Convention[72]and fundamental to social inclusion within the environmental justice system. Participants in the JR working group recommend the Bar Council and the Law Society incorporate environmental law into the training for all practitioners. The group also recommends the judiciary be subject to environmental and sustainability training and that, generally, awareness about the impacts and effects of economic and other decisions taken on the environment should be raised. There was also a general view that the judiciary would benefit from the presence of independent environmental assessors and advisors in Court where appropriate.

2.7 Remedies

64. The available remedies for JR include a mandatory order (mandamus), a prohibiting order (prohibition) and a quashing order (certiorari)[73]. These prerogative orders are discretionary and, respectively, serve to compel or prohibit a public authority from performing its duty, or quash an unlawful decision of a public authority. A claim for JR may include a claim for damages but may not seek damages alone[74].

65. Applicants may apply for interim relief (an injunction), the most useful in environmental terms being an interim, prohibitory injunction which seeks to prevent a respondent from causing (further) environmental damage until a full hearing takes place. The main problem with interim injunctions is that they require the applicant to give a cross undertaking in damages, i.e. in the event of losing the case the applicant undertakes to reimburse a party prejudiced by the decision (usually a third party) for any profit lost as a result of halting the activity likely to cause damage.

66
(1999) Env LR 310

67
Blackstone Chambers

68
(1998) Env LR 741

69
Friends of the Earth, Pers Comm

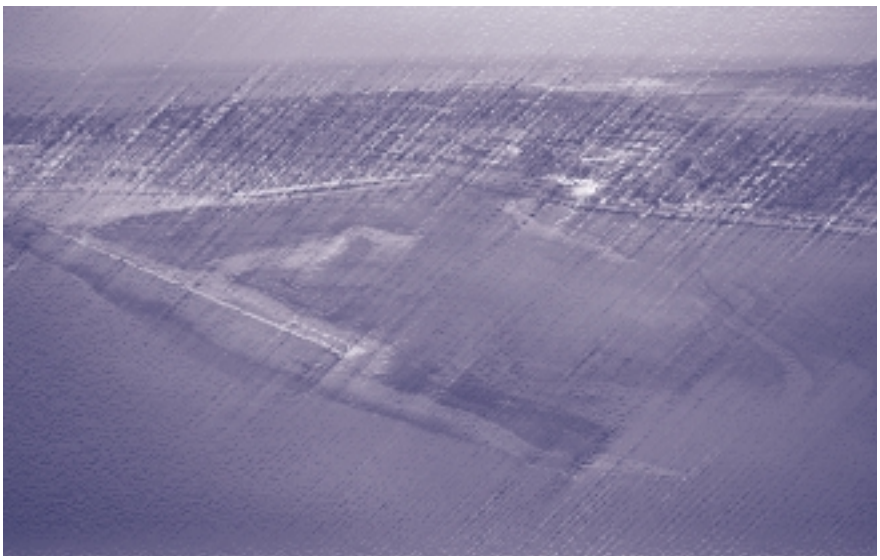
70
McCracken, R. and Jones, G. *The Aarhus Convention.* J.P.L. 2003, JUL, 802-811

71
Macrory, R and Woods, M, M (2003). *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal.* UCL: London

Public Civil Law - Judicial Review

Given that in most major construction projects the potential liability could run into several hundred thousand, if not millions, of pounds, interim injunctions are rarely pursued by individuals or NGOs. Yet the consequences of this can be disastrous and irreversible. Twenty-one per cent (21%) of respondents raised an inability to provide a cross undertaking in damages as a barrier to environmental justice.

Pictures of Lappel Bank reproduced with kind permission of the RSPB



72 Article 9(4) Aarhus Convention

73 Civil Procedure Rules Part 54.1(b), (c) and (d).

74 Civil Procedure Rules Part 54.3(2)

CASE STUDY

Lappel Bank

In July 1991, the Government listed the Medway Estuary and Marshes as a potential Special Area for Birds (SPA) under the Wild Birds Directive[75] on account of its international importance for a number of wildfowl and wader species and its national importance for the avocet and little tern. On March 16th 1993, the [then] Secretary of State for the Environment indicated his provisional view that the area for designation should exclude an area of mudflats known as Lappel Bank. At this stage, the Port of Sheerness had planning permission to reclaim parts of the estuary, which formed part of Lappel Bank, to facilitate expansion without which the commercial viability of the port would be inhibited. Although the Lappel Bank mudflats formed less than 1% of the estuarine area, the RSPB was of the view that it was an important component of the overall estuarine ecosystem and provided sheltering and feeding grounds for a number of wader and wildfowl.

The RSPB duly applied for a judicial review of the Secretary of State's decision to exclude Lappel Bank from the boundary of the SPA. In July 1994, the Divisional Court refused to quash the Secretary of State's decision and in August 1994, the Court of Appeal dismissed the RSPB's appeal. The RSPB were given leave to appeal to the House of Lords and in February 1995 sought interim declaratory relief in the event of a reference to the European Court of Justice (ECJ). The House of Lords held that the matter would be referred to the ECJ but refused to grant interim relief as the RSPB was not prepared to give any cross undertaking in damages in relation to the large commercial loss which may result from delay in development of the port. The House of Lords held that the relief sought would in effect amount to a mandatory order and the Secretary of State could not comply with it until the ECJ had given its judgment[76].

In February 1996, the ECJ ruled that a Member State was not entitled to take economic requirements into account when designating an SPA and defining its boundaries. However, in the 12 months that had elapsed between the RSPB's application for interim relief in the House of Lords and the ruling of the ECJ, Lappel Bank had been turned into a car park. Even though the RSPB achieved victory in a landmark case for nature conservation (which has been relied on many times since), its inability to provide a cross undertaking in damages resulted in the loss of a site of international importance for nature conservation.

75
EC Directive 79/409/EEC

76
R v Secretary of State for the Environment ex parte the Royal Society for the Protection of Birds [1997] Env. L.R. 431

66. The Aarhus Convention requires contracting parties to provide a review procedure with adequate and effective remedies, including injunctive relief as appropriate[77]. If the RSPB, arguably the largest environmental organisation in the UK, cannot afford to give an undertaking in damages, there is little reality that others will be able to do so. Indeed, many respondents contend they should not be expected to do so. WWF points out that the loss of an internationally important site for wildlife is a loss to the nation and it is the public purse - not an individual or a private, membership based charity - which should bear the responsibility for preventing such loss. Respondents suggest the Civil Procedure Rules be amended to give the courts the power to refrain from requiring an undertaking in damages in cases falling within the scope of the Aarhus Convention, and other certified public interest cases.

67. Finally, Friends of the Earth drew attention to *The Belize Alliance of Conservation Non-Governmental Organisations v. The Department of the Environment and Belize Electricity Company Limited*[78], in which the Privy Council declined to grant an injunction restraining further work on the Chalillo dam. While the Committee of the Privy Council referred to the judgment of the Court of Appeal in *Allen v Jambo Holdings*[79], which had the result that in England a very large class of litigants (that is, legally assisted persons) are as a matter of course exempted from the need to give a cross-undertaking in damages, it did not feel it was appropriate to extend this reasoning to this case. As such, the Committee did not take the opportunity to advance the case law and, essentially, restated the current, and very unhelpful, orthodoxy[80]. We are also disappointed to note that the Privy Council dismissed the appeal, although Lord Walker of Gestingthorpe and Lord Steyn, dissenting, held that they would have allowed the appeal and quashed the decision to grant environmental clearance for the dam on the grounds that the Environmental Impact Assessment was flawed by important errors about the geology of the site as to be incapable of satisfying legal requirements[81].

2.8 Costs

68. As highlighted above, respondents believe the current costs rules represent the single largest barrier to environmental justice. Concerns primarily focus on the application of the usual rule that costs follow the event (i.e. the loser pays the winner's costs), public funding for environmental cases and the current level of lawyers' fees.

77 Article 9(4) Aarhus Convention

78 Judgment delivered on 13th August 2003. Available from the Privy Council website at: www.privycouncil.gov.uk/output/page331.asp

79 [1980] 1 WLR 1252

80 Friends of the Earth, Pers Comm.

81 Privy Council Appeal No. 47 of 2003, Judgment delivered 29th January 2004

2.8.1 Costs follow the event

69. It is widely known that litigation is a remote possibility for most people. In 1999, Sir Robert Carnwath remarked "*Litigation through the courts is prohibitively expensive for most people, unless they are either poor enough to qualify for legal aid, or rich enough to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds.*"[82] The EJP found that the possibility of an order for costs remains a major deterrent to the pursuit of legal action. Eighty-two per cent (82%) of respondents are "not satisfied" with the current rules on costs. Eighteen per cent (18%) are "quite satisfied", but none are "very satisfied". Space (and diplomacy) preclude us from reproducing all the views we received, but practitioners variously comment that "the rules on costs are a bar to public interest litigation where a serious challenge is being brought for proper reasons" (Ben Jaffey[83]), "uncertainty about costs causes great difficulty for all our non publicly funded claimants in all domestic Courts" (Richard Stein[84]) and "the current rules on costs are the primary impediment to significant growth in environmental litigation" (Gerry Facenna[85]).

70. Concerns surrounding the potential to pay the other side's costs were echoed by many other practitioners and NGOs[86] and are supported by research conducted by Capacity Global[87]. Greenpeace cited a recent case in which a defending junior served a costs estimate for a half-day hearing of £70,000 – ironically something that is allowed for in the rules but which has the clear effect of intimidating opponents. Similarly, McCracken and Jones[88] report that in 2001, Mrs Shirley of the Canterbury Green Party was faced with a claim for over £100,000 for a one day hearing in her legal challenge in respect of breaches of the EA Directive in the approval of an out of town college.

82 [then] Sir Robert Carnwath (1999) *Environmental Litigation – A way through the Maze?* Journal of Environmental Law Vol 11 No. 1 Oxford University Press

83 Blackstone Chambers

84 Leigh, Day & Co Solicitors

85 Monckton Chambers

86 CNP, CPRE, HCT, MCS, RSPB, WWT

87 Adebowale, M. (2003) *Using the Law: Barriers and Opportunities for Environmental Justice.* Capacity Global

88 McCracken, R. and Jones, G. *The Aarhus Convention.* J.P.L. 2003, JUL, 802-811

CASE STUDY

Canterbury Travel Plan

In September 2001, Residents group PACE opposed planning permission to relocate 60 acres of farmland on the fringe of Canterbury as part of a travel plan which aimed to reduce the amount of traffic travelling to and from Canterbury college. PACE did not believe the plan would be effective and thought the proposal would significantly reduce access to public space. Overall, the residents believed the Secretary of State had not taken the environmental effects of the proposal into account in his decision.

PACE investigated the possibility of challenging the decision by way of judicial review, estimating that it would cost them in the region of £15,000 if they lost. They set about raising money by leafleting and campaigning and with the help of an ELF referral member, issued a Writ against the Secretary of State.

In the meantime, Canterbury college issued a Writ against PACE, with sought to invalidate their Writ on the basis of technical difficulties and requesting security for costs. By the time the case reached the High Court, costs were mounting on both sides. Counsel representing the college said they had already incurred £126,000 which meant that some members of PACE were set to lose their homes if they lost. It was at this point that the Secretary of State admitted that the decision to grant planning permission had been a mistake. By the following January, the High Court had ruled in PACE's favour and finally the Secretary of State quashed the decision. Had this not have happened, however, PACE may have had to withdraw its case because of the costs implications of losing.

71. In some cases, specialist NGOs are also keen to use the law, but their limited size and resources prevent them from being able to expose themselves to the risk of costs. The Herpetological Conservation Trust reports that it "*would be reluctant to invest resources in taking on such court cases simply because of the amount of other work that needs to be undertaken elsewhere. To be successful, you may need to invest a huge amount of energy and run the risk of incurring costs on legislation that is often open to interpretation (and hence won by the best barrister)*". CPRE reports that it has occasionally threatened JR (which has had the desired "change of heart" outcome), but is rarely able to pursue it any further because it is too expensive and too risky.

Conversely, public bodies subject to review are usually funded by the public purse and, whilst often working within financial restrictions, a costs order will not result in any personal or significant organisational loss.

72. Where there are multiple respondents (i.e. a planning authority and a developer), some clarification on costs was brought by the House of Lords' decision in *Bolton MBC v Secretary of State*[89]. This case concerned a challenge by a number of authorities to the Secretary of State's decision to grant planning permission for a superstore. There was a separate judgment on the question of costs, which established that where the Secretary of State was successful in defending his decision he would normally be entitled to the whole of his costs, but that the developer would not normally be entitled to a separate award of costs unless he could show there was likely to be a separate issue on which he was entitled to be heard. The mere fact that he was a developer would not, of itself, justify a second set of costs in every case. It has been observed that a developer does not expect to get his costs where the local authority's refusal of permission results in a public inquiry, unless his refusal is shown to be unreasonable; defending his permission in the High Court may be seen as part of the same process[90]. The same author also suggested that this could usefully form the basis for a clear rule, in the sense that it would be reasonably clear and defensible and enable the parties to know in advance where they stand.

73. A number of NGOs are particularly concerned about the potential costs of third party interveners, most usually commercial organisations with much to gain or lose in the proceedings. Most invest heavily in their defence and are unforgiving on detailed assessment of the costs[91].

CASE STUDY

US "Ghost Ships" fleet

On 10th December 2003, the day before the hearing on the "ghost ships" case in the High Court[92], interested third party Able UK served Friends of the Earth with a Schedule of Costs for the purpose of Summary Assessment. These costs were slightly over £100,000 for a one day judicial review hearing on a preliminary issue (on which the company chose to instruct leading Counsel and two junior barristers). Friends of the Earth consider it abundantly clear that most members of the public and NGOs would consider costs of that level prohibitive. Fortunately, Friends of the Earth were successful and were not, therefore, required to pay the company's legal costs. It anticipates its own legal costs will be less than £100,000.

89 [1995] 1 WLR 1176

90 [then] Sir Robert Carnwath (1999) *Environmental Litigation – A way through the Maze?* Journal of Environmental Law Vol 11 No. 1 Oxford University Press

91 WWF

92 [2003] EWHC 3193 (Admin)

74. Friends of the Earth welcomed the approach of the courts in *R v Secretary of State for the Environment, Food & Rural Affairs, ex parte Friends of the Earth and Greenpeace*[93]. At first instance, the NGOs were only required to pay the costs of the Government and not the considerably greater (one assumes) costs of BNFL. At the Court of Appeal, the NGOs avoided any award of costs at all on the basis that the case was an important one and brought in the public interest and that no other party would have brought it had the NGOs not done so. However, this remains a rare exception to general practice, which - as Greenpeace points out - only serves to magnify the unequal power and resources of the opposing parties.

75. Ironically, a number of NGOs note that third party intervention can provide them with a welcome opportunity to support the approach taken by public authorities, with the added advantage they are usually able to ascertain the extent of their liability in advance. For example, in *R v Secretary of State for the Environment, Transport and the Regions ex parte First Corporate Shipping Ltd*[94], WWF and the Avon Wildlife Trust intervened in support of the DETR regarding its interpretation of the EU Habitats Directive[95]. The Divisional Court referred the case to the ECJ, which agreed to the intervention on the proviso that first, the defendant was in agreement and second, that WWF was willing to cover its own costs in the event of the DETR losing the case. In the event, the ECJ ruled in support of the DETR, thus setting an important precedent for the delineation of sites identified under the Directive. Additionally, WWF was able to support the Government on an important principle of EU law (one which, ironically, had been the subject of an unsuccessful challenge by WWF and the RSPB on the same point in Scotland some months earlier[96]) in the knowledge that, at worst, it would only be exposed to its own costs. Similarly, Friends of the Earth cited a case in which Aventis (now Bayer) commenced JR proceedings against DEFRA to restrain its proposed release of pesticide data studies in which it joined the proceedings as an interested third party.

76. However, while a useful mechanism in some instances, third party intervention is not the sole route to environmental justice. Many respondents believe the current situation simply cannot be justified. A number of cases brought by individuals and NGOs raise important issues of public interest (and, as mentioned above, involve large numbers of people), yet those progressing them are often paying to perform this public function. As raised in *ex parte Dixon*, an individual or an organisation with no particular stake in the issue or the outcome might, without in any sense being a mere meddler, "*wish and be well placed to call the attention of the court to an apparent misuse of public power*".

77. The need to have a review procedure that is not prohibitively expensive, is socially beneficial and another key requirement of the Aarhus Convention[97]. Friends of the Earth suggest the current "loser pays" costs rule should be dis-applied in cases certified by the court to be in the public interest and which relate to issues which come under the Aarhus umbrella.

93 (2001) 47 EG 148 (CS)

94 Case C-371/98 judgment of the Court given on 7th November 2000

95 Articles 2(3) and 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p.7)

96 See *(1) WWF-UK (2) RSPB v (1) Scottish Natural Heritage (2) Secretary of State for Scotland (3) Highland Council (4) Highlands and Islands Enterprises (5) Cairngorm Chairlift Co Ltd* (1999) Env LR 632

97 Article9(4) Aarhus Convention

Patwa Solicitors suggest developers should cover the costs of a successful challenge against them, and that these costs should routinely be built into their business plans on the basis of the polluter pays principle. This approach has some similarity with a recommendation made by Lord Woolf in his final report on Access to Justice[98]. Recommendation 64 states that where one of the parties is unable to afford a particular procedure, the court, if it decides that that procedure is to be followed, should be entitled to make its order conditional upon the other side meeting the difference in the costs of the weaker party, whatever the outcome.

78. Participants in the Civil Law working group were inclined to support a regime in which the judge at permission stage decides whether the issue is one of general public importance, in which case he or she could dis-apply the usual rule and replace it with an order that within the litigation each party bears its own costs. The downside of this is that, if the applicant wins then they will be unable to recover their costs from the other side, however, on balance participants felt that that this may be more appealing to potential applicants. It is the certainty of liability that is crucial. Such an approach would not be untested, in full or in part, on the basis of experience in Austria, Finland (with respect to licence reviews), Luxembourg (with respect to lawyers' costs) and Portugal (where environmental organisations are exempted by law of the duty to pay the costs of the proceedings)[99]. Furthermore, in *New Zealand Maori Council v AG of New Zealand*[100], the Privy Council adopted a similar approach. Lord Woolf referred to the fact that the applicants were bringing the proceedings not for personal gain, but in the interests of preserving an important part of the New Zealand heritage and because there was an undesirable lack of clarity in the law. Finally, in *Oshlack v Richmond River Council* [101], the New South Wales Land and Environmental Court departed from the general rule that costs follow the event due to the character of the litigation and the potential for injustice to the minority side. There is no evidence from New South Wales that the application of this rule opens the flood-gates[102] and this approach has also been supported by members of the UK judiciary[103].

79. Participants in the Civil Law working group also suggested a variation on the approach outlined in paragraph 78 (above), in which the judge could make an order that the costs of the applicant be paid out of public funds when a matter of public interest is being litigated. We note that Lord Woolf also supported this approach in his Final Report[104].

80. Many respondents, including barristers David Wolfe[105] and Ben Jaffey[106], support the wider use of pre-emptive cost orders, whereby the scope of the applicant's liability is determined at an early stage. The Court has jurisdiction to make a pre-emptive order for costs, although it seems that it is rarely exercised.

98 The Right Honourable Lord Woolf, [then] Master of the Rolls (1996) *Access to Justice – Final Report to the Lord Chancellor on the civil justice system in England and Wales*

99 European Union Network for the Implementation and Enforcement of Environmental Law (2000). Complaint Procedures and Access to Justice for citizens and NGOs in the field of the environment within the European Union

100 [1994] 1 AC 466

101 (1996) 39 NSWLR 622

102 Grant, M (2000). Environmental Court Project – Final Report. DETR

103 P. 6, LJ Sedley (2002) Aarhus Convention Conference Report: Environmental Law Foundation: London

104 The Right Honourable Lord Woolf, the [then] Master of the Rolls (1996) *Access to Justice – Final Report to the Lord Chancellor on the civil justice system in England and Wales,* P. 255, paragraph 22

105 Matrix Chambers

106 Blackstone Chambers

In *R v Lord Chancellor ex parte CPAG*[107], Dyson J refused to make such a pre-emptive order in favour of a charity seeking to challenge the Lord Chancellor's refusal to extend public funding to certain Social Security Tribunals. He concluded that the necessary conditions for the making of a pre-emptive costs order in public interest challenges were "*…that the Court is satisfied that the issues raised are truly ones of general public importance, and that it has a sufficient appreciation of the merits of the claim that it can conclude that it is in the public interest to make the order. Unless the Court can be satisfied by short argument, it is unlikely to make the order in any event. Otherwise, there is a real risk that such applications would lead, in effect, to dress rehearsals of the substantive application…*". A senior judge noted that this is a relatively restrictive test and that a leaf might be taken from the Chancery practice in this area, where there has been a gradual extension of the so-called *Beddoe's* jurisdiction (*Re Beddoe*[108]), under which the Court can authorise trustees or beneficiaries to litigate at the expense of a trust fund (see *McDonald v Horn*[109])[110]. We are pleased to note that one notable and recent exception to common practice was demonstrated in *Campaign for Nuclear Disarmament v (1) Prime Minister of the United Kingdom (2) Secretary of State for Foreign and Commonwealth Affairs (3) Secretary of State for Defence*[111]).

81. Richard Stein of Leigh, Day & Co stresses that an important component of this process would be that any hearing to determine the extent of the applicant's liability should be costs neutral. The firm suggests the Civil Procedure Rules could be amended to ensure applicants do not face a costs liability at the permission stage. However, in general, respondents believe that pre-emptive cost orders would go some way towards removing the uncertainty experienced by potential applicants and would not upset the present system unduly.

82. Whatever changes may be considered, respondents recognise that an exception for vexatious or frivolous conduct (e.g. very late adjournments or discontinuances) that may attract a costs award, should remain.

107 (1998) 2 All ER 755

108 [1893] Ch 547

109 [1995] 1 All ER 961

110 [then] Sir Robert Carnwath (1999) *Environmental Litigation – A way through the Maze?* Journal of Environmental Law Vol 11 No. 1 Oxford University Press

111 (2002) EWHC 2759 QB

2.8.2 Fees for Judicial Review

83. Fees for JR are £180. This does not seem to represent a significant barrier to environmental justice, but it was suggested that the fee could be waived for cases falling within the scope of the Aarhus Convention and other certified public interest cases. The Republic of Ireland operates a system whereby An Taisce (the National Trust for Ireland) enjoys a reduced fee for filing an application for review, however, WWF would prefer any exemption to apply to certain classes of case rather than certain classes or organisation.

2.8.3 Public funding (Legal Aid)

84. Whilst EarthRights reports that the position of litigants managing to secure funding from the Legal Services Commission has improved marginally with the Access to Justice Act 1999, a number of respondents are unable to progress JR (either on their own behalf or on behalf of their clients) due to a lack of funding[112]. Solicitors responding to the EJP report that, on average, 33% of their clients are publicly funded, although the figure for barristers was much lower (14%). It is possible that a disproportionately high number of solicitors with public funding contracts or franchises may have fallen within our study group, in which case our figure of 33% may be artificially inflated. This observation is borne out by the findings of the UCL Study, which suggests that only 4 of the 55 (7%) environmental JRs studied in detail have public funding[113]. The report by Capacity Global also concludes that CLS funding was found to be extremely hard to gain for public interest environmental cases[114].

85. The ELF Study points to the negative effect of this lack of funding - 45% of people requesting referral to an ELF member fell within the lowest income bracket (i.e. under £10,000) and that in 31% of referrals, individuals were advised that they could reasonably pursue the matter but for the costs of doing so[115]. The ELF Study concluded that public funding is not widely available because of the small number of expert environmental lawyers with public funding contracts or franchises and because of the financial and other restrictions placed on applicants for public funding[116]. This includes satisfying the "reasonableness" test, which requires individuals to show a reasonable prospect, not only of success, but also of some tangible benefit from the success, such as would justify a person of reasonable means bringing the action if required to finance it himself. There is also a provision for the Legal Services Commission to reduce the amount paid to the assisted individual if others are going to benefit from the case. In practice, it seems that the combination factors outlined above may prevent arguable cases from being pursued (see below).

112 e.g. RSPB, FOE, WWF, Gamlins Solicitors, Hugh James Solicitors, Patwa Solicitors

113 Macrory, R and Woods, M, M (2003). *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal.* UCL: London

114 Adebowale, M. (2003) *Using the Law: Barriers and Opportunities for Environmental Justice.* Capacity Global

115 Stookes, P (2003) *Civil law aspects of environmental justice.* ELF. Paras 45 and 51

116 In March 2002, just 30 out of 8,319 solicitors firms in England had a full legal aid franchise for public law: p. 51, Stookes, P & Razzaque, J (2002): *Community participation: The UK planning reforms and international obligations.* ELF: London

CASE STUDY

Quarry conversion, Cotswolds

In November 2003, Gloucestershire County Council granted planning permission to convert an old quarry into a recycling unit and remove a source of water by aggregate extraction. The local residents group ("Cotswalds Against Landfill") objected to the proposal due to the possibility of contamination of the source of the drinking water and an increase in traffic and noise. The group sought legal advice and were advised that they had grounds to pursue a judicial review of the planning permission, but due to a lack of funding and the likelihood of incurring heavy costs the group decided not to proceed with the case.

86. Respondents recognise that moving from a situation where an applicant is unlikely to obtain public funding to one in which public funding is freely available may be somewhat unrealistic. One suggestion was that public funding could be conditional upon a contribution from the applicant, which could be determined by the LSC on a case-by-case basis having regard to the applicant's means. Leigh, Day & Co felt that this would go some way towards ensuring the applicant demonstrates a sufficient level of commitment to the case. Similarly, a senior judge observed that the Legal Services Commission could do more to prioritise environmental public interest cases taken by individuals and NGOs.

2.8.4 Lawyers' fees

87. This was one issue in which respondents express a dichotomy of views. NGOs are very concerned about the level of fees chargeable by lawyers (which are commonly in the order of £200-300 per hour). The JR working group also notes that instructing Counsel may cost anything between £5,000 and £15,000 for a simple one-day hearing and, as such, is prohibitively expensive for most. This observation was borne out by our own respondent practitioners who report that, on average, only just over a quarter of their clients are privately funded[117]).

88. It has been noted that the advent of "no win no fee" arrangements may significantly impact upon civil litigation in the environmental context[118]. Richard Stein of Leigh, Day & Co has run a number of cases for Transport 2000 on the basis of Conditional Fee Agreements (CFAs), but notes the real problem, as in civil private claims, is obtaining insurance to cover the applicant's liability for the other side's costs (in the event of losing the case) while the chances of success remain so remote. Stein points out that any future use of CFAs will depend upon the availability of insurance cover which, in turn, depends upon either demonstrating a higher success rate for environmental JRs or a wider use of pre-emptive cost orders.

89. A number of public interest lawyers are prepared to undertake work on a *pro bono* basis as demonstrated by ELF member lawyers. However, whilst conducive to one-off pieces of advice or research, this is not thought to be sustainable for either party in the longer term. Many NGOs regularly instruct lawyers and are keen to establish a more symbiotic relationship, i.e. one which enables them to be treated as a fully fledged (i.e. fee-paying) client and which also rewards the time and expertise of those providing a specialist service – albeit often at a reduced rate. Notwithstanding the above, many respondents report that without the commitment of specialist lawyers a number of important environmental cases would no doubt otherwise have foundered[119].

117 Note that this figure was significantly affected by one practitioner whose privately funded clients made up 75% of the total. Without this practitioner, the average figure was just over 16%

118 European Union Network for the Implementation and Enforcement of Environmental Law (2000). *Complaint Procedures and Access to Justice for citizens and NGOs in the field of the environment within the European Union*

119 e.g. RSPB, WWF

90. Most worryingly, practitioners report that, in general, there is little or no profit in environmental cases and that this has led, save for the few concerned and interested individuals, to little interest in environmental issues by UK lawyers. The Chair of the APIL Environment Special Interest Group reported that attendance at meetings is extremely poor, with usually less than 10 lawyers turning up, and that he has not been instructed in any truly "environmental" claims in the last three years. Putting any sort of cap on lawyers' fees (as suggested by one respondent), unless applied across the board, may exacerbate the contracting environmental "market". On balance, respondents recommend the wider use of measures outlined above rather than cap on fees.

2.9 Miscellaneous matters

2.9.1 Public inquiries

91. Respondents were clear that public inquiries must be seen as part of the access to justice regime. Patwa Solicitors and Friends of the Earth identify the absence of public funding for third party objectors as a barrier to public participation. Developers routinely instruct lawyers and expert witnesses to submit evidence to inquiries, a process that can take weeks, or even months, to complete. Whilst inquiries routinely hold evening sessions to enable members of the public to be heard – individuals are rarely able to attend all of the day-time sessions during which relevant evidence may have been submitted. As such, the public (and the public interest) may be operating at a disadvantage. Friends of the Earth suggest the following: public funding for call-in inquiries raising issues of national importance; widened costs rules to place third parties on an equal footing to local authorities; and public funding for representatives/expert witnesses.

2.9.2 Third Party Right of Appeal

92. The current system, whereby the applicant can apply for a re-hearing of the merits of a case but that a third party, who may be significantly affected by a proposal, cannot - has been widely recognised as inadequate in a democratic society[120]. Eighteen per cent (18%) of respondents, including barrister Deborah Tripley[121], find the absence of a third party right of appeal in the land use planning system a significant barrier to environmental justice. The ELS supports a limited third party right of appeal in the land use planning system – likewise the UCL study[122], which supports a third party right of appeal to an Environmental Tribunal.

120 Green Balance, Leigh, Day & Co Solicitors, Popham, J. and Purdue, M. (2002). *Third Party Rights of Appeal.* A research project for the Civic Trust, CPRE, ELF, FOE, RSPB, room, TCPA, WWF-UK. Also see Macrory, R and Woods, M, M (2003). *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal.* UCL: London

121 Fenners Chambers

122 See Macrory, R and Woods, M (2003) *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal.* UCL.

Respondents believe that strengthening the rights of third parties would raise public confidence in the planning system and introduce higher standards for deciding planning applications. Increased transparency at an early stage and a right of redress at a later stage would go a long way to addressing concerns about the way planning decisions are presently taken.

2.9.3 Raising awareness

93. Finally, two practitioners[123] perceived a lack of knowledge amongst their clients about "environmental rights" and how to enforce them. This may also apply to a number of specialist NGOs - should legal action ever come within their radar.

Please see the Executive Summary for the Conclusions and Recommendations of the Civil Section of the Report.

Workshop plenary

123 Ashurst Morris Crisp and Hugh James Solicitors

3.1 Introduction

94. According to the 2001 Census, there are over 49 million people resident in England, representing some 83.6% of the UK population[124]. The population continues to show a steady growth (some 4.4% since 1981) due largely to net natural change. Such a dense population puts intense pressure on the landscape resulting in construction, associated infrastructure, overcrowding and pollution incidents, all of which have consequences for the environment. A recent report by the Environment Agency (EA) links poor environmental quality with social deprivation[125]. Although the EA also reports that the number of major spills has declined, the Sea Empress disaster in 1996 killed over 7,000 sea birds and harmed other marine life. There have been 73 major industrial accidents in the UK since 1985, petrochemicals being one of the worst affected sectors. Eight led to off-site human or ecological harm[126]. To counter this, DEFRA reports that UK industry spends an estimated £4.2 billion on environmental protection every year[127].

95. Similarly, as populations and infrastructure have expanded - natural habitats have shrunk. Whilst broad-leaved, mixed and yew woodland would have covered much of lowland Britain 2,000 years ago, it now accounts for just 6% of the UK. Neutral grasslands, which include species-rich grassland, cover less than 4% of the UK. As a result, a large number of species and habitats have become endangered and action has been taken to prevent their extinction - by listing them in "Red Data Books" and providing them with protection via international commitments, EU Directives and UK statutes.

96. Every five years, the Joint Nature Conservation Committee (JNCC) advises the Government on a review of Schedules 5 and 8 of the Wildlife and Countryside Act 1981 (which list protected animals and plants respectively). The last "Quinquennial Review" recommended increased protection for one species (the water vole), partial protection for one species (Roman snail) and full protection for seven species (two seahorses, five elasmobranchs (sharks and their relatives) and two Burnet moths)[128]. Of these species, the Roman snail is collected for food, the seahorses are collected for sale and display, the elasmobranchs are largely caught as by-catch and evidence has recently been collected that the two rare Burnet moths in Scotland have been collected exclusively for sale.

97. The protection of our species and habitats remains almost wholly reliant upon the efforts of individuals and organisations seeking to protect them, which in turn rely on the effectiveness of their statutory powers and the criminal justice system. But to what extent does the system serve the particular needs of environmental and wildlife crime? Does it enable concerned individuals and organisations to investigate potential breaches of the law?

124 See http://www.statistics.gov.uk/census2001/downloads/pop2001ew.pdf

125 R&D Project E2-067/1 November 2003

126 Joint Research Centre, 2000

127 See www.defra.gov.uk/environment/statistics/eiyp/general

128 JNCC (2002) *Fourth Quinquennial Review of Schedules 5 and 8 of the Wildlife and Countryside Act 1981: Report and Recommendations from the Joint Nature Conservation Committee*. JNCC

Does it enable them to progress enforcement action – whether through prosecutions or other measures? If offenders are brought to court, does the judiciary acknowledge the need to treat these offences seriously and understand the need to deter would-be offenders? It is these issues the EJP sought to address.

3.1.1 Definition of offences against the environment

98. Environmental crime arises from breach of statutory provisions, permits and/or enforcement notices issued by regulators. It predominantly encompasses the management of waste, the pollution of controlled waters, the contamination of land and the failure to abate any of the "statutory nuisances" that district and unitary authorities control. Notable statutes include the Environmental Protection Act 1992, the Environment Act 1995 and the Water Resources Act 1991.

99. "Wildlife crime" can be loosely divided into three main categories[129]

- **Illegal trade in endangered species**

The import and export of many threatened species is controlled through European Regulations transposing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[130]. Internal trade in these species is controlled by the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (COTES). The exploitation of wildlife is big business – Interpol has estimated the world wide trade is worth US$ 5 billion a year and it seems illegal exploitation, including international smuggling of endangered species, is on the increase.

- **Crimes involving native species**

In the UK, the protection of wildlife and important habitats is provided by the Wildlife and Countryside Act (WCA) 1981, the Countryside and Rights of Way (CroW) Act 2000 and the Conservation (Natural Habitats, &c.) Regulations 1994 (the "Regulations"). Crimes against protected species involve taking them from the wild (e.g. birds of prey or plants), collecting their eggs or skins for personal collections, trading in them and taxidermy offences. Destroying nests and breeding sites, bat roosts and other protected habitats can also be offences.

- **Cruelty to and the persecution of wildlife species**

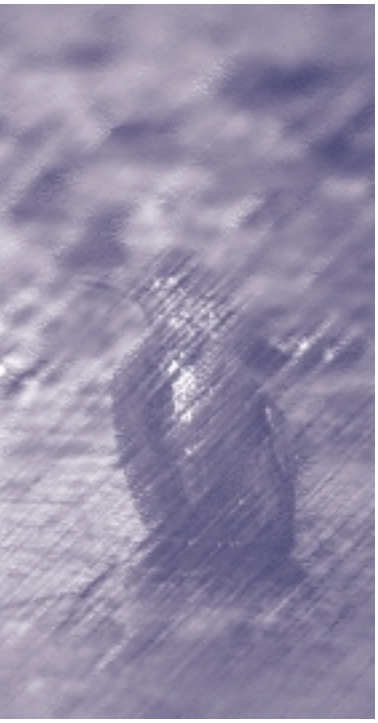
Some legislation protects particular species e.g. the Protection of Badgers Act 1992 and the Deer Act 1991. The Wild Mammals (Protection) Act 1996 protects wild mammals by making it an offence to cause them unnecessary suffering by certain acts. Crimes include badger baiting and other cruelty cases, illegal snaring, poaching, poisoning and hunting.

129 Taken from www.defra.gov.uk/paw/crime

130 More information can be found at www.ukcites.gov.uk

With regard to both types of crime, prosecutions are usually brought by the relevant regulator or enforcement agency, but in certain circumstances private individuals, or action groups may seek to prosecute offenders themselves.

3.1.2 Responsibilities for enforcement and prosecution



Oil covered Guillemot, Sea Empress oil spill, Manorbier Beach, Milford Haven, Wales, UK
© WWF-Canon/ Paul Glendell

100. The Environment Agency regulates waste management through a system of licences, is responsible for the quality of fresh, marine, surface and underground water and aims to secure the proper use of water resources in England and Wales through the issue of abstraction licences. The EA regulates the most potentially polluting discharges into all media via Integrated Pollution Control (IPC) and Integrated Pollution Prevention Control (IPCC). It also issues discharge consents and provides for aqueous discharges to controlled waters subject to conditions that are designed to prevent adverse environmental impact. It monitors such discharges for compliance and will take enforcement proceedings in the event that standards set out in consents[131] are not being met. Finally, it also has responsibilities in relation to fisheries (including rod licences), flood protection, navigation and conservation along rivers and in wetlands.

101. District and unitary authorities regulate two main areas: statutory nuisances (including smoke, dust, smells and in particular noise) and "prescribed processes" i.e. Part B processes under the 1991 Environmental Protection (Prescribed Processes and Substances) Regulations, together increasingly with "Part B" and "Part A2" installations as defined under the Pollution Prevention and Control Regulations 2000. Litter, other accumulations of rubbish, abandoned vehicles and dog fouling are also Town Hall responsibilities. The Chartered Institute of Environmental Health (CIEH) is the independent professional body to which most local Environmental Health Officers belong.

102. The Drinking Water Inspectorate (DWI) acts for and on behalf of the Secretary of State for Environment, Food and Rural Affairs and the National Assembly for Wales in regulating the quality of public water supplies in England and Wales. Most of the prosecutions taken by the DWI are for supplying water unfit for human consumption. The majority of these are associated with discoloured water incidents resulting from the mismanagement of the distribution system.

103. The Health and Safety Commission (HSC) and the Health and Safety Executive (HSE) are responsible for the regulation of almost all risks to health and safety arising from work activity in Britain including: health and safety in nuclear installations and mines, factories, farms, hospitals and schools; offshore gas and oil installations; the safety of the gas grid and the movement of dangerous goods and substances; railway safety; and many other aspects of the protection both of workers and the public.

131 Under Schedule 10 Water Resources Act 1991 (as amended)

District and unitary authorities are responsible to the HSC for enforcement in offices, shops and other parts of the services sector.

104. English Nature (EN) and the Countryside Council for Wales (CCW) have statutory powers to protect land of nature conservation importance in England and Wales including, amongst others, Special Protection Areas (under the EC Wild Birds Directive), Special Areas of Conservation (under the EC Habitats and Species Directive), National Nature Reserves (NNR) and Sites of Special Scientific Interest (SSSI)[132].

105. The Police Service is the lead agency for investigating offences relating to species, working closely with HM Customs and Excise, voluntary organisations and other groups. Most forces now have at least one Police Wildlife Liaison Officer (PWLO), although they commonly carry out these duties in addition to their other policing responsibilities. Each Customs region has a designated Customs Wildlife and Endangered Species Officer (CWESO).

106. Voluntary organisations most active in preventing wildlife trade include the Royal Society for the Protection of Birds (RSPB), the Environmental Investigations Agency (EIA), TRAFFIC International and WWF. Each year TRAFFIC and WWF run an "Eyes and Ears Campaign", calling on the public to help stamp out illegal wildlife trade.

107. NGOs assisting the Police Service to address offences against native wildlife include, amongst others, the Bat Conservation Trust (BCT), Buglife, Butterfly Conservation, Herpetological Conservation Trust (HCT), Plantlife, RSPCA, RSPB, Whale and Dolphin Conservation Society and the Shark Trust.

108. The Partnership for Action Against Wildlife Crime (PAW) was launched in 1995 and brings together the Police Service, HM Customs and Excise, representatives of Government departments and approximately 90 other bodies with an interest in wildlife law enforcement. It provides a strategic overview of enforcement activities, considers and develops responses to strategic problems and examines issues of strategic concern. Its main objective is to support the networks of PWLOs and CWESOs, but it is also concerned with awareness raising, publicity, training and education, as well as supporting investigations.

3.1.3 An overview of Criminal Procedure[133]

109. In general, offences can be classified as "summary" offences or "indictable" offences. Summary offences are less serious than indictable offences and are tried before the Magistrates' Court. Indictable offences are tried in the Crown Court before a judge and a jury. Some offences, including most environmental offences, are triable either way, i.e. either in the Magistrates' Court or in the Crown Court[134].

132 Notified under the WCA 1981 as amended by the CroW Act 2000

133 Taken from European Network for the Implementation and Enforcement of Environmental Law (2000) *Complaint Procedures and Access to Justice for Citizens and NGOs in the field of the environment within the European Union: Final Report and Allen, M J (1991) Textbook on Criminal Law.* Blackstone Press Ltd

134 S.17 and sch.1 to the Magistrates Court Act 1981

110. Environmental cases come before District judges or their deputies in the Magistrates' Courts, who are legally qualified. The mode of trial determination occurs after the defendant has made his or her plea (plea before venue). A defendant is put to plea in the Magistrates' Court. In the event of no plea or a not guilty plea, the Magistrates then determine the appropriate forum for trial, having regard to the representations made by the prosecutor and the accused and all the circumstances of the case. Obvious considerations include the gravity of the offence and the sentence available to the Magistrates' Court as compared to that available before the Crown Court.

111. If the offence proceeds in the Magistrates' Court and the defendant is convicted, the Magistrates may commit him or her to the Crown Court for sentencing. If the case is to proceed to the Crown Court, there will be committal proceedings in the Magistrates' Court, and then trial by judge and jury in the Crown Court. If the offence is an indictable only offence, the Magistrates must send the defendant to the Crown Court to be tried. The judges of the Crown Court are recorders, circuit judges and High Court judges.

3.1.4 The Aarhus Convention and the EJP

112. The Aarhus Convention requires contracting parties to ensure members of the public have access to judicial procedures to challenge acts or omissions by private persons and public authorities which contravene provisions of its national law relating to the environment[135]. These procedures should provide adequate and effective remedies, and be fair, equitable, timely and not prohibitively expensive[136]. As such, the Convention provides the EJP with a basis against which the performance of the criminal law system can be measured.

3.1.5 Methodology

113. The EJP approached Government departments, regulatory authorities and NGOs concerned with offences against the environment and wildlife for data on prosecutions undertaken between 1997-2002. Our aim was to see whether the data revealed any general trends in relation to prosecution rates, conviction rates and penalties imposed by the courts so that we could assess whether the remedies were "adequate" and "effective", and that environmental issues received "fair" treatment in the criminal courts.

114. The data received is summarised in Table 1 (below) and included a considerable variety of different data sources over recent periods. Statisticians at the University of Bristol were instructed to examine the data for temporal and geographic trends and the EJP remains grateful to DEFRA for funding this aspect of the project.

135 Article 9(3) Aarhus Convention

136 Article 9(4) Aarhus Convention

For the most part, the statisticians organised the data by regions (of which there were several discordant definitions) and by calendar period. The data was then subjected to analysis to look for temporal trends in various indices and for geographic differences. The results of the statistical analysis can be found in Appendix 5 and the main findings of the analysis are summarised throughout the report. We are aware that since conducting this analysis, some data for 2002/3 has become available. However, we were mindful that because we could not update the picture across the board this could make comparisons problematic. Moreover, it seems that the number of prosecutions, for the Environment Agency at least, show a continuation of recent trends[137].

115. The results of the statistical analysis were sent to relevant Government departments, regulatory authorities and NGOs concerned with environmental offences (see Appendix 7). Organisations were sent a generic questionnaire inviting their general views on the efficacy of the criminal justice system and a list of detailed questions teasing out issues of relevance to them (see Appendix 6).

116. One notable omission in the data concerned offences prosecuted by district and unitary authorities (although we remain grateful to the CIEH for providing some data held centrally). Accordingly, we took a sample of some 39 authorities and questioned them directly about their enforcement practices and their views on the criminal law system. A list of the authorities interviewed (including the rationale for their selection), a distribution map and an analysis of their responses can be found in Appendix 9.

117. Finally, we would point out that two of our respondents highlighted differences in the data obtained from the Department of Constitutional Affairs and their own datasets. The Environment Agency (EA) noted the DCA boundaries did not accord with its Regions, which made comparisons problematic. There was also a discrepancy in the datasets in that the EA seems to record prosecutions and the DCA's data seems to concern charges. Similarly, the CIEH noted a significant difference with respect to data on the conviction rates for statutory nuisance, which significantly skewed the findings of the statistical analysis. Accordingly, the EJP focussed its attention on the analysis of data from the EA's National Enforcement Database (NED) and data on district and unitary authorities obtained directly from the authorities themselves and the CIEH.

137
ENDs Report 346
(November) 2003, pp 9-10

118. Table 1

Data supplied to the EJP

Data source	Data provided	Time period
DCA (former Lord Chancellor's Department)	Number Defendants Tried and/or Sentenced at the **Magistrates' Courts** by Police Force area for environmental offences by County in England and Wales	1998-2001
	Number Defendants Tried and/or Sentenced at the **Crown Courts** by Police Force area for environmental offences by County in England and Wales	1998-2001
	Graphs showing Summary of distribution of environmental offences (**Magistrates' Courts**) and Summary of Environmental prosecutions in England and Wales (**Magistrates' and Crown Courts**)	1998
Home Office	Defendants proceeded against at Magistrates' Courts for various environmental offences in England and Wales	1997 – 2001
	Number of Defendants proceeded against at the Magistrates' Courts and convicted at all Courts under various wildlife Acts by Region in England and Wales	1998 – 2000
Environment Agency (EA)	**National Enforcement Database** (NED) statistics showing Court Cases and Cautions per Region for offences relating to: Waste, Water Quality, Water Resources, Radio Active Substances, Fisheries (non- standard offences), Process Industry Regulation, Flood Defence and Navigation	1999-2001
	Printouts showed: Number of prosecutions, Cautions, Enforcement Notices, fines imposed, costs, number of Charges/Notices, number acquitted and number of custodial sentences imposed	
English Nature (EN)	Table of prosecutions brought under ss.28/9 of the WCA 1981 and Regulation 23 of "the Regulations"	1981 to date
	Table showing number of the following measures issued: solicitor's letters, s.51 authorisations, Regulation 90 authorisations, Possession Orders, injunctions, JRs	April 2001 – September 2002
	Table showing SNCOs	1982-2001
	Stop Notices Register	2001/2002
Health and Safety Executive (HSE)	Number of convictions and average fine by court and by regulation	2001/2002
	Number of convictions and average fine by court and by statutory provisions	2001/2002
	Average fine for Health and Safety offences	1997/8 – 2001/2
Drinking Water Inspectorate (DWI)	Record of prosecutions: date of incident, date of court case, company, court, incident, offence, potential number of consumers affected, outcome and costs.	Incidents span 1993 – 2000. Court dates cover 1995-2002

Criminal Law

Data source	Data provided	Time period
Chartered Institute of Environmental Health (CIEH)	Number of Prosecutions and convictions per million population and % found guilty for Domestic Noise Nuisance (DNN) Detailed information on prosecutions undertaken by Salford MBC, Liverpool City Council and Birmingham City Council	1997/8 – 2001/02 Various (1993- 2002)
Ports Authorities	Port of London Authority prosecutions for oil pollution: date of incident, company, quantity of oil released, fine and costs	1998 – 2000
Nuclear Inspectorate	Data on six prosecutions (mainly health and safety related), including penalty given	
TRAFFIC and WWF	Table showing successful prosecutions under CEMA 1979 and COTES Table showing outcome of COTES offences where no prosecution took place Table showing outcome of CEMA offences where no prosecution took place	1987 to date
RSPCA	Convictions obtained under specific pieces of legislation	1997-2001
RSPB	Spreadsheet of wild bird offenders: date of offence, section and Act concerned, counts, prosecutor, court, constabulary, surname, outcome (fine or punishment) and details of offence	1998-2002

3.2 Enforcement and prosecution

3.2.1 Number of prosecutions

118. Data supplied by the Environment Agency shows the waste sector was responsible for the largest number of actions between 1999-2002[138]. This trend continued in 2002/3[139]. The next highest category concerned actions relating to water quality, with process industry regulation and water resources in joint third place. The least number of actions occurred in relation to flood defence. The results of the data are summarised in Table 2, below.

Table 2

Summary of actions progressed by the Environment Agency between 1999 and 2002

Sector	Number of actions progressed annually between 1999-2002
Waste	795-1,008
Water Quality	392-450
Water Resources	15-52
Process Industry Regulation	36-51
Fisheries (non-standard offences)	1-35
Radioactive Substances Regulation	10-25
Navigation	3-14
Flood Defences	1-8
Total	**1,315-1,539**

119. Data provided by the HSE shows the total number of offences prosecuted between 1997/98-2001/02 varied between 1,627 and 2,035 per year[140]. Data provided by the DWI shows the number of prosecutions between 1995 and 2002 varied between 1 and 9[141].

120. Data collected directly from the 39 district and unitary authorities shows that over half of them (21) have progressed under 50 prosecutions in the last five years[142]. The most common offence brought to the Courts was statutory nuisance (25). Appeals against, and non-compliance with, Abatement Notices were also reported (4). Other types of offences brought to the Courts include non-payment of fines (2), licensing/authorisation offences (3), prosecutions for repeat offenders (1), and bill payment for remedial action carried out by the authority (1). Most offences were committed under the EPA 1990, although use of a local by-law, the Dog Fouling Act and the Health and Safety at Work Act were also reported. Only two authorities reported using the Crown Court, all others used only the Magistrates' Court[143].

138 Appendix 5, figure 2.1

139 Waste prosecutions accounted for 70% of the total in 2002/2003, ENDs Report 346 (November) 2003, pp.9-10

140 Appendix 5, figure 4.1

141 Appendix 5, figure 3.1

142 Appendix 9, Survey Analysis, question 2

143 Appendix 9, Survey Analysis, question 3

The information collected by this survey is supported by information provided by the CIEH (which shows an upward trend in the number of statutory nuisance offences charged between 1998/9 and 2001/2[144]) and ERM (which indicates that statutory nuisance offences make up three-quarters of the cases prosecuted by local authorities)[145].

121. For offences involving wildlife crime, we note that less than 1% of SSSIs are subject to criminal acts every year[146]. For offences involving wildlife trade and native species, the highest number of charges or summonses between 1987 and 2002 involved birds or birds' eggs and the lowest involved plants[147]. Table 3 (below) summarises the % of actions for each species group on the basis of data provided by TRAFFIC and WWF[148]. The proportion of cases for birds and their eggs increased from 47% to 63% between 1987-2002.

Table 3

Percentage of actions in each species group (1987-2002)

Period	Birds & bird eggs	Reptiles, spiders and amphibians	Plants	Artifacts	Mixture	Total
1987-1990	46.7%	26.7%	13.3%		13.3%	100%
1991-1994	50%	27.8%	5.6%	16.7%		100%
1995-1998	52.4%	4.8%	4.8%	33.3%	4.8%	100%
1999-2002	62.5%	6.3%	3.1%	12.5%	15.6%	100%
Total	54.7%	14%	5.8%	16.3%	9.3%	100%

122. There are a number of reasons why the highest number of charges or summonses involved birds or birds' eggs. Firstly, the RSPB is extremely active in the prosecution arena – it has its own enforcement team and a network of volunteers providing information, support and encouragement to police officers investigating bird crimes. The RSPB receives upwards of 600 reports of wild bird incidents each year relating to the destruction of birds and their nests and eggs. Secondly, TRAFFIC observes that a number of bird species involved in CITES are native to the UK and therefore appear more commonly in trade offences because they are more readily available than, for example, CITES listed mammals not native to the UK. Thirdly, the range of controlled species is the largest and it is therefore also more likely that this contributes to a greater proportion of offences than for other taxa. Finally, bird cases are more likely to be prosecuted as there is a long history of prosecutions and case precedents and, therefore, a greater likelihood that prosecutors will progress bird cases than other species.

144 CIEH, Pers Comm.

145 Dupont, C and Zakkour, Dr. P (2003) *Trends in Environmental Sentencing in England and Wales.* Environmental Resources Management Ltd (ERM)

146 Appendix 5, figure 6.1

147 Appendix 5, figure 7.1

148 Appendix 5, figure 7.13

123. With respect to other species, TRAFFIC also observes there are very few species of spider listed on CITES, so it is unusual to see cases involving them. Furthermore, all cases in the UK concerning amphibians (and to a lesser extent, reptiles) are tried under the WCA 1981 as none of our native amphibians and reptiles are listed on CITES. Finally, TRAFFIC reports that, in general, the influence of increased captive breeding may be offsetting the demand for wild specimens, and that a greater understanding of the need for permits for shipments and sales could also be partially responsible. The influence of domestic trade bans being lifted for tarantulas may also have meant an increase in legal shipments and it no longer being necessary to smuggle.

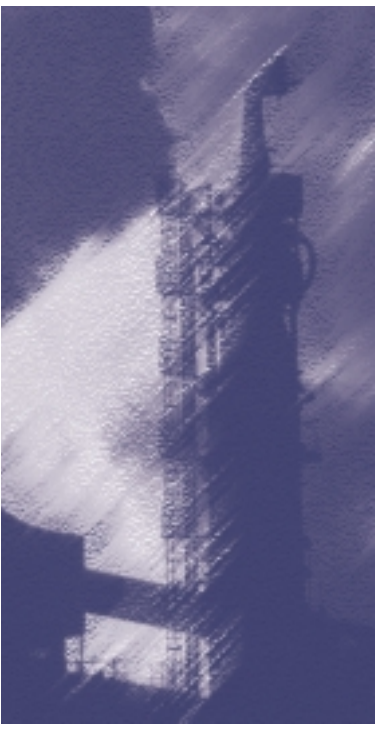
124. However, there are also a number of more subtle factors operating. Plant crimes[149] are not detected as often as those involving animals – partly because the public are not so aware that they are indeed crimes and are less likely to report them, and partly because there is less interest in pursuing plant crime by enforcers. TRAFFIC observes this is not only about public awareness. Ultimately, there is so much trade in genuine artificially propagated plants that there is less need for illegal trade. Plant propagation in rare species offsets the need for illegal collection, especially due to the large volumes that can be produced from a few plants. Plants, if smuggled or illegally traded, are easier to conceal than animals and far less likely to be detected, especially if in seed form. Finally, the Police Service acknowledges that it is responsible for plant crime, but points out that the wording of Section 14 WCA 1981 causes difficulties for enforcers in relation to non-native species. Nonetheless, a number of convictions relating to the theft of wild plants have been obtained. Such theft is recognised as being financially rewarding and links to other areas of criminal behaviour are often found[150].

125. With respect to the rising number of wildlife offences, respondents suggest this could be attributed to an increased awareness amongst enforcers, prosecutors and the judiciary of these types of crime. This, in turn, has come about through a number of campaigns and activities promoted by NGOs, as well as more support coming from Government agencies e.g. DEFRA which provides support and guidance through umbrella organisations such as the PAW. In addition, the COTES Regulations were improved in 1997, the CITES Team at Heathrow has expanded since its establishment in the early 1990s and enforcers are better equipped to deal with such offences through the introduction of ongoing training programmes.

149 Part I, Wildlife and Countryside Act 1981

150 Sergeant Peter Charleston, Pers Comm.

3.2.2 Criteria for progressing a prosecution



Air Pollution
© WWF-Canon/ Maurice Rautkari.

126. Not every environmental offence leads to a prosecution – the RSPB reports that only 50 of the 600 reports of wild bird incidents every year progress to prosecution. Enforcement agencies take a variety of issues into consideration when deciding upon enforcement action. The Environment Agency follows the Code for Crown Prosecutors and its own Enforcement and Prosecution policy, Functional Guidelines, Common Incident Classification Scheme and National Investigations Manual. The Enforcement and Prosecution Policy states the aims of prosecution being to punish wrongdoing, to avoid a recurrence and to act as a deterrent to others. The EA takes a number of factors into account when deciding whether to prosecute including: (a) sufficiency of evidence (leading to a realistic prospect of conviction); and (b) public interest factors (e.g. the environmental effect of the offence, the intent and attitude of the offender and the deterrent effect of a prosecution). Where there is sufficient evidence, it will normally prosecute where incidents or breaches have significant (or potentially significant) environmental consequences, where operations have been carried out without a relevant licence and/or where there have been excessive or persistent breaches of regulatory requirements. To increase effectiveness, it has established an Environmental Crime Service, which provides information to investigators, gathers intelligence, analyses patterns and trends in environmental crime and provides a contact point for investigators.

127. The HSE decides whether to prosecute on the basis of the Health and Safety Commission's Enforcement Policy Statement[151], which also takes account of the Code for Crown Prosecutors. Inspectors use the Incident Investigation Selection Procedure, which lines up the broad factors in the EPS so that all reasonable lines of enquiry are followed. Any decision to prosecute must be taken on the basis that there is sufficient evidence available to provide a realistic prospect of conviction and must also be in the public interest. An Enforcement Management Model (EMM) has also recently been introduced which provides inspectors with a decision-making process to help ensure that enforcement decisions are consistently in line with the HSC Enforcement Policy Statement. Prosecution is normally reserved for the most serious breaches of health and safety.

128. The DWI's prosecution policy, published in 1995, provides that a prosecution will be brought for an alleged offence under section 70 of the Water Industry Act 1991 of supplying water unfit for human consumption when there is sufficient evidence to demonstrate that:

- illness or other health effects associated with the quality of the water supplied were experienced by (normally) at least two consumers; or

151 See http://www.hse.gov.uk/pubns/hsc15.pdf

- the quality of the water supplied was such that at least (normally) two consumers rejected it for drinking, cooking or food production on aesthetic grounds (i.e. discolouration or taste/odour); or

- the concentration of a substance in, or the value of a property of, the water supplied was at a level at which illness or other health effect may be expected in the long-term, even though none was manifest in the community at that time; and

- the Inspectorate considers the water company does not have a defence that it took all reasonable steps and exercised all due diligence to ensure the water was fit to leave its pipes, or was not used for human consumption; and

- such a prosecution is regarded as being in the public interest.

The DWI has well-established procedures for investigating incidents affecting drinking water quality, within which there is a subset of procedures for investigating potential cases for prosecution and for preparing cases for Court.

129. English Nature also follows the Code for Crown Prosecutors and works within a Code of Guidance published by DEFRA[152]. The Code of Guidance seeks to encourage positive partnerships between landowners and EN, but makes it clear that enforcement action is necessary and appropriate as a "last resort" in cases where people deliberately ignore the law.

130. The procedure for district and unitary authorities seems to be somewhat more complex and rather more independent. As a rule, authorities concentrate on informal resolution and rely heavily on the statutory notice system[153], but this seems variable and some seem more likely to pursue prosecution than others. The CIEH reports the majority of authorities have adopted the Cabinet Office's Enforcement Concordat and many have developed corporate and sometimes departmental (or even service-level) enforcement policies. By way of example, in 2002/3, Liverpool City Council issued 2,448 warning letters, 93 statutory notices, but has only progressed two prosecutions in the last five years[154]. Similarly, in 2001/2, Birmingham City Council served 239 statutory notices, but progressed only 11 prosecutions in relation to domestic noise nuisance[155].

131. This finding is supported by our survey of 39 district and unitary authorities. All of those questioned have specific enforcement policies derived from the Enforcement Concordat, but over half of them have progressed less than 50 prosecutions in the last five years[156].

152 DEFRA (2003) *Sites of Special Scientific Interest. Encouraging positive partnerships – Code of Guidance.* See www.defra.gov.uk

153 Salford MBC, Pers. Comm.

154 Liverpool City Council, Pers. Comm.

155 Birmingham City Council, Pers. Comm.

156 Appendix 9, Survey Analysis, questions 1 and 2

There appear to be a variety of reasons for this. Firstly, it is thought that the control of some issues can be better achieved through other mechanisms, such as domestic noise nuisance and Abatement Notices. However, many authorities cited a lack of time (20), financial restrictions (12) and staff shortages (8) as other barriers to prosecution. A significant number also report that collecting sufficient evidence (6) and the likelihood of winning a case (4) play a role in deciding whether to progress prosecution[157].

132. The Police Service is the lead agency with respect to crimes against native species, and takes decisions on enforcement action on the basis of guidance prepared by the Partnership Against Wildlife Crime (PAW)[158]. The RSPB normally advises the Police Service that all offences where sufficient evidence exists should be referred to the CPS for prosecution.

133. The fact that regulatory authorities may decide not to prosecute offenders can lead to tensions with NGOs. For example, in 1997, Friends of the Earth threatened to privately prosecute the Environment Agency regarding its decision not to prosecute Milford Haven Port Authority for its role in the "Sea Empress" disaster. In the event, the EA progressed a criminal prosecution against the Port Authority, for which a fine of £4,000,000 and costs of £825,000 were initially imposed.

134. The EJP did not ask respondents whether they were satisfied with the regulatory bodies' approach to prosecution, but three NGOs expressed disquiet about the approach taken by the Environment Agency on occasion. Concern was expressed by the Angling Conservation Association, which annually undertakes some 30-40 private prosecutions, and would like the EA to take a more pro-active approach to prosecution. Secondly, Greenpeace was critical of the EA's stance on Mixed Oxide (MOX) fuel assemblies, which resulted in a civil challenge in 2002[159]. Most recently, Friends of the Earth criticised the EA on its stance over the "ghost fleet" ships bound for Hartlepool in late 2003.

157 Appendix 9, Survey Analysis, question 9

158 DETR (2001) *Wildlife Crime: Cautioning Offenders.*

159 In July 2002, Greenpeace applied to Judicially Review the Environment Agency's decision that Mixed Oxide ("MOX") fuel assemblies did not constitute radioactive waste and the Radioactive Waste Regulations 1993 did not apply to it

CASE STUDY

The Environment Agency and the US "ghost fleet" ships

Thirteen "ghost ships" ships set to be exported to the UK in 2003 were part of an ageing fleet of 150 naval vessels moored on the James River in Virginia, USA, for decades. According to US Government agency assessments, the fabric of the ships include hundreds of tonnes of polychlorinated biphenyls (PCBs) and asbestos, as well as over 500,000 gallons of heavy fuel, diesel oil and oily water.

The ships were to be scrapped adjacent to sensitive wildlife habitats protected under EU and international law. Seal Sands, a Site of Special Scientific Interest (SSSI), attracts more than 20,000 birds, with important concentrations of knot and redshank. Nearby mudflats provide winter feeding grounds for dunlin, oyster catcher, ringed plover, curlew, bar-tailed godwit, grey plover and turnstone.

On 30th July 2003, UK breaker Able UK applied for a modification to its waste management licence in order to allow it to deal with the Ghost Fleet ships. The Environment Agency was therefore required to carry out a screening exercise under the Conservation (Natural Habitat, &c.) Regulations (and/or the EC Habitats Directive) in order to determine whether an appropriate assessment was required.

The EA's initial assessment only considered the environmental implications of increasing the amount of waste to be managed at the site from 20,000 to 70,000 tonnes. Friends of the Earth wrote to the EA as soon as it became aware of that decision - advising it that it had acted unlawfully in failing to take into account the various other aspects of the Ghost Ships proposal. In particular, the 'in combination' effects of, for example, importing the ships, constructing a rock filled bund or coffer dam, deconstructing the same, scrapping ships and various other aspects. Not only was this in contravention of the Habitats Regulations and the EC Habitats Directive, it was also clearly contrary to their detailed internal guidance on implementing the Regulations.

Nearly one month later (by which time the first four of the ships left the US for the UK) the EA accepted that Friends of the Earth were correct and proceeded to take the decision anew on the basis of their legal advice.

However, when the EA repeated the screening exercise for the second time, FoE contends that it again acted unlawfully. The screening exercise was conducted on the basis of an assumed series of mitigation measures that were, variously, unproven, untested, unenforceable and/or unreal. For example, one of the mitigation measures was the existence of conditions set out in a planning permission which Friends of the Earth had advised was likely to have lapsed and which the local authority eventually ruled had, as a matter of law and fact, lapsed. It was principally on that basis that the EA accepted that its decision could not stand and on which it decided not to contest Friends of the Earth's application for judicial review.

Criminal Law

135. The Environment Agency's general approach to prosecution was discussed in "*Sanctions for Pollution: Do we have the right regime*", in which Ogus and Abbot concluded "*The enforcement policy of the EA reveals a cautious approach to the prosecution of criminal offences, often because of the problems of securing a conviction and an even greater reluctance to suspend or revoke a licence, except where this is deemed necessary to prevent further environmental harm…*"[160]. The EA provided a robust response to this article[161] and, when questioned about this by the EJP, referred to a number of cases in which an expansionist view to prosecution has been taken (see paragraphs 138-139 below) and the introduction of various safeguards to ensure the most serious pollution incidents are now routinely prosecuted (see paragraphs 172-173 below).

136. The Herpetological Conservation Trust finds the Police Service and the CPS do not exercise their powers to prosecute as fully as they should. HCT is concerned that the CPS "*has decided that pursuing the loss of a few reptiles is not in the public interest, and/or that they do not have the necessary % chance of a successful prosecution*".

CASE STUDY

Redbridge Pit, Dorset

Redbridge Pit is the most Western UK site for the smooth snake. In 2003, HCT reported three separate and ongoing damaging activities occurring on the estate to the Police: tipping of waste materials; construction of a military style assault course; and extensive use of its sandy slopes for 4-WD drive hill climbing. However, while accepting that fly-tipping and vehicle usage would be capable of giving rise to offences under the WCA 1981[162], the CPS believed the difficulty of creating an evidential link between the activities and the landowner meant there was not a realistic prospect of conviction. Furthermore, the CPS confirmed that it was not aware of any successful prosecutions against landowners or companies (as opposed to individuals) for offences under the Act, due to the difficulty of proving specific responsibility on the part of a company/ organisation owning the land towards managing the events on it. While recognising the evidential problems inherent within this type of offence, HCT's concern arises as much from the reluctance to progress enforcement action in the absence of a successful prosecution (a hurdle which, it points out, is rather "chicken and egg" since the CPS appear to be looking for legal precedence within their prior assessment).

160 Ogus, A and Abbot, C (2002) *Sanctions for Pollution: Do we have the right regime* Journal of Environmental Law, Volume 14/3

161 Navarro, R and Stott, D. (2002) *A Brief Comment: Sanctions for Pollution.* JEL Vol 14/3

162 Section 9(4)(a) and 9(4)(b) as amended by Schedule 12 of the CroW Act 2000 which imported the concept of reckless damage or disturbance

137. Devon and Cornwall Constabulary also reports the CPS has little experience of wildlife crime and, as a result, sometimes takes a lay view of such offences. The Constabulary mentioned incidents in which the CPS: (1) failed to grasp the significance of issues and/or treat wildlife cases seriously; (2) allowed firearms offences to run out of time due to inadequate attention to the file, and; (3) withdrew cases concerning offences under Section 18 WCA 1981 because it did not understand their implications. Participants in the Criminal Law working group at the EJP Workshop in October 2003 note the level of experience and interest in environmental and wildlife issues within the CPS varies across the regions. Though citing some examples of good practice, the general consensus was one of concern over the capabilities of an already overburdened body.

138. Tensions between enforcement agencies and NGOs arise partly because of the differing parameters and perspectives the organisations are operating within. Enforcement agencies tend to pursue prosecutions they are advised will be successful. Firstly, because they are mindful that enforcement action is funded from the public purse and secondly, because when publicised, they are more likely to represent an effective deterrent to would-be offenders. By way of contrast, NGOs see the advantage in prosecuting every, or at least the large majority of, offences because they either result in a successful conviction or highlight the need to improve the law. It may be difficult to reconcile these differing objectives, but NGOs urge the regulatory authorities to exercise their powers as widely as possible. In this respect, the EA itself highlighted *R v Hertfordshire County Council, ex parte (1) Green Environmental Industries Ltd (2) John Michael Moynihan*[163], in which it supported the County Council in defending a Judicial Review issued by Green Environmental Ltd and its sole director in respect of a summons for failing to provide information after being served with a statutory notice. The defendant lost at Divisional Court, Court of Appeal and House of Lords. The EA also subsequently prosecuted Moynihan in June 1996 for unlawfully depositing the waste subject of the s.71 Notice, whereupon he was convicted and sent to prison for 18 months.

139. Similarly, in *Environment Agency v Empress Car Co (Abertillary) Ltd*[164], the EA prosecuted a company for causing pollution which had stemmed from the company's operations - even though a third party may have been responsible for the escape of the pollutant - thus clarifying the extent of strict liability. In the same vein, a number of respondents welcomed EN's resolution to identify "test cases" demonstrating the effectiveness of powers introduced through the CroW Act 2000 (see paragraph 149 below).

163
(2000) 1 All ER 773

164
(1998) 1 All ER 481

140. WWF believes that an expansionist, yet robust, approach to prosecution ensures that, collectively, the enforcement agencies and the NGOs send out a strong message to would-be offenders that they will be prosecuted, and maximises political opportunities when they arise. Leigh, Day & Co suggests the enforcement agencies should be prepared to accept a higher failure rate as the reasonable price to pay for a more wide-ranging, and longer-term, prosecution policy. This is perhaps best illustrated by the series of unsuccessful prosecutions regarding damage to SSSIs progressed in the 1980s and 1990s including "Alverstone Marshes" (*Southern Water Authority v Nature Conservancy Council*[165]), in which the House of Lords referred to the WCA 1981 as "*toothless*". WWF points out that a number of successful prosecutions in this period would not have persuaded the Government that comprehensive legislation in the form of the CroW Act 2000 was necessary.

3.2.3 Alternatives to prosecution

141. Enforcement agencies have a range of enforcement measures in their "toolkits". The Environment Agency uses enforcement notices, warning letters and formal cautions, often preceded by threat of revocation or suspension. Data supplied by the EA shows that, of the total number of enforcement measures issued between 1999-2002, it issued between 3-45% enforcement notices, and 11-35% formal cautions. Generally, the EA issued a lower % of enforcement notices than prosecutions and a much lower % of cautions than prosecutions between 1999 and 2002[166]. The CIEH notes the statutory notice system provides an alternative to immediate prosecution, giving those responsible for the offence an opportunity to desist or put it right. Alternatives then include "do nothing", work in default, formal cautions and some more unusual legal remedies. CIEH surveys in 1997/8, 2000/01 and 2001/02 show fairly consistent compliance rates with Abatement Notices of 79%, 68% and 70% respectively.

142. The HSE can issue advice, serve improvement and prohibition notices, withdraw approvals and vary licence conditions or exemptions. It can also hold employers and others publicly accountable for serious breaches by means of prosecution. In 2001/2002, the HSE issued 6,667 improvement notices and 4,342 prohibition notices (including 117 deferred prohibition notices and 4,225 immediate prohibition notices).

143. The DWI will consider formally cautioning a water company (provided the water company admits to the offence) and has done so on 18 occasions since 1995.

165 3 All ER 481

166 Appendix 5, figures 2.25-2.28

However, prosecution is a relatively rare step and DWI's more usual mechanism for improving drinking water quality is the enforcement process following a non-trivial breach of water quality standard or any other enforceable regulatory duty. Since 1990, enforcement action has been considered on almost 3,000 occasions. The DWI reports that the programmes of work, carried out under legally binding undertakings that water companies offer when enforcement action is considered, have resulted in significant and measured year on year improvements in drinking water quality.

144. EN also has a range of enforcement options, and believes they can be more effective than prosecution for minor offences because of the need to maintain an "in perpetuity" relationship with landowners and occupiers. These include solicitor's letters to secure undertakings that certain works will cease or to secure voluntary restoration and provide warnings. Section 51 authorisations[167] allow staff (or "any person") to enter SSSI land for specific purposes, where the owner or occupier has refused permission. Regulation 90 authorisations[168] serve a similar purpose to s.51 authorisations, but relate to land covered by a Special Nature Conservation Order (SNCO). Possession orders can be taken to remove travellers from National Nature Reserves and injunctions may be taken to address problems on specific sites. EN reports that between 2001-September 2002, it issued 34 solicitor's letters, 98 new (and 47 renewal) Section 51 authorisations, 19 regulation 90 orders, 2 possession orders and 5 injunctions.

145. Finally, the RSPB reports that minor offences, or offences involving commoner species, are occasionally recommended to the Police Service for caution or warning rather than prosecution. The Police will normally follow the cautioning guidance provided by the PAW[169] if other criteria, such as the offender admitting the offence, are also met.

3.3 Barriers to prosecution

3.3.1 Statutory powers

146. Whilst most enforcement agencies concerned with environmental crime felt statutorily equipped to fulfil their duties, some identified provisions that would improve their effectiveness. For example, the Environment Agency stated that its statutory powers could usefully be augmented by:

- the power to stop people/vehicles to request names and addresses;
- the power to require suspected offenders to take part in interviews;
- the power to serve notices with immediate "stop" provisions without the need to obtain injunctions or provide time to comply; and
- clearer legislation with regard to flood defence enforcement.

167 S.51 WCA 1981 as substituted by s.80 CRoW Act 2000

168 The Conservation (Natural Habitats, &c) Regulations 1994

169 DETR (2001) *Wildlife Crime: Cautioning Offenders.*

The EA also highlighted the benefits of the following amendments to legislation/guidance:

- fly tipping[170] convictions become "recordable" offences so that they appear in Home Office crime statistics and allow greater intervention by the police at EA request;
- fly tipping[171] offences become arrestable either by a constable or a certified officer of the EA;
- developers be required to produce a written "site waste management plan" (either through planning law or guidance) identifying the volume and type of material to be demolished and excavated and demonstrating how off-site disposal will be minimised and managed;
- the extension of the Duty of Care provisions of the EPA 1990[172] to developers (and others further up the construction and demolition chain). Such obligations should not be discharged by simply putting the waste from a development onto a registered waste carriers truck;
- an amendment to the Control of Pollution (Amendment) Act 1989 to require waste carriers to register their vehicles (with a capacity over 5 tonnes) with the EA and for such registered vehicles to carry appropriate identification;
- amendments to the legislation to require Carrier Registration documentation to be displayed on a vehicle involved in the transfer of waste;
- a Duty of Care transfer note and written description of waste to accompany waste in transit;
- the introduction of fixed penalty fines for the failure to display the carrier registration details or produce on request the transfer note/written description;
- the development of an industry mutual fund scheme (involving Government and tyre manufacturers) to provide for clear up of fly tipped tyres funded through levy on new tyres; and
- a requirement for producers of waste tyres to produce a written "waste management plan" to demonstrate how off-site disposal of wastes will be managed.

147. The CIEH reported no demand for additional powers of prosecution - indeed, quite the opposite. The wait for Court time can be a disadvantage and, as such, authorities would prefer to see the option of fixed penalties (such as the Noise Act offers) extended as an alternative to prosecution in appropriate circumstances.

170 Under sections 33 and 34 Environmental Protection Act 1990

171 Under sections 33 EPA 1990 and s1(1) Control of Pollution (Amendment) Act 1989

172 Section 34

148. The protection of SSSIs was much improved by the passage of the Countryside and Rights of Way Act (CroW) 2000. Up until then, the statutory conservation agencies had to work within the confines of the Wildlife and Countryside Act 1981, which was widely recognised as "*inadequate*"[173]. The CroW Act 2000 created a new statutory right of access to mountain, moor, heath, down and registered common land and increased the protection afforded to SSSIs. EN can now refuse consent for damaging activities and have new powers to combat neglect. There are increased penalties for deliberate damage to SSSIs and a new power to order restoration. The Act also placed a duty on public bodies to further the conservation and enhancement of SSSIs and introduced improved powers to act against third party damage. The JNCC reports that the new powers "*provide a whole suite of new measures to protect and manage SSSIs"* and that the *"processes and guidance produced to apply these provisions are robust*".

149. EN brought the first successful prosecution under these new provisions for third party damage to Sutton Lane Meadows SSSI in Wiltshire in February 2003[174]. The Court also made a restoration order to make the offender restore the SSSI to its former condition prior to the damage occurring. Similarly, in December 2003 EN also brought the first successful prosecution for damage caused by an occupier of an SSSI[175]. In September 2002, Cornish Goldsmiths allowed clearance work in preparation for a miniature railway on part of the West Cornwall Bryophytes SSSI, which resulted in the destruction of rare mosses and liverworts. The company was fined £3,000, ordered to pay costs of £10,000 and carry out restoration works estimated by EN to cost around £2,000.

150. EN now finds its powers to prosecute broadly adequate, although a few difficulties remain, including:

- many offences are committed by third parties. EN officers are unable to stop people/vehicles and request names and addresses, which sometimes hinders the investigation and detection process;
- EN investigators can also only request that suspected offenders take part in interviews (PACE 1984) – again this can hinder the investigation process; and
- EN does not have a formal and immediate power to require restoration following an offence being committed, but where it might not be in the public interest to bring a prosecution.

151. A number of NGOs are keen to establish improvements in relation to powers regulating the marine environment. Section 36 of the Wildlife and Countryside Act 1981 empowers the Secretaries of State to establish statutory Marine Nature Reserves (MNR) to conserve marine flora and fauna and geological and physiographical features of interest.

173 Joint Nature Conservation Committee (JNCC), Pers Comm.

174 See www.english-nature.org.uk/news/story

175 Under S.28P(1) of the Wildlife and Countryside Act 1981 (as substituted by the Countryside and Rights of Way Act 2000)

The MNR arrangements are, however, based upon the "voluntary" approach and are thus entirely dependent on securing the co-operation of all the local interests concerned, e.g. fishermen, divers, district and unitary authorities – to agree the detailed provisions for protecting a site. Furthermore, provisions within the WCA 1981 developed in a piecemeal fashion and were primarily targeted at crimes against terrestrial wildlife. As a result there have been no prosecutions for offences against marine wildlife since its passage in 1981[176].

152. WWF points out that below low water, there is no equivalent to the Town and Country Planning system of development control that brings together regulation over the wide range of activities in a common framework. The management and consenting regimes for activities that are potentially damaging to the marine environment are largely sectoral, and environmental considerations are incidental to the main purposes and powers of the bodies that operate them.

153. The existing statutory structure is extremely complex. In the 1990s, a myriad of policies came into effect in response to events and international obligations including the Water Resources Act 1991, the Water Industry Act 1991, the Transport and Works Act 1992, various Merchant Shipping regulations, offshore regulations and the Sea Fisheries (Wildlife Conservation) Act 1992. All of these place varying degrees of environmental responsibility on relevant bodies to take account of nature conservation when carrying out their functions, however, in the absence of an overarching marine policy framework, these responsibilities may be overlooked or poorly co-ordinated. Additionally, much of the policy and regulation governing the marine environment has been generated by international or European obligations including EC Directives on Environmental Assessment, Strategic Environmental Assessment, Wild Birds and Habitats and Species, the latter of which has been central to the establishment of the Natura 2000 network of protected areas across the EU. Up until recently, the Government believed the need to identify and designate Special Areas of Conservation (SAC) did not extend beyond twelve nautical miles, however, in *R v Secretary of State for Trade & Industry & Ors, ex parte Greenpeace Ltd*[177] the High Court held that the EC Habitats Directive could only achieve its aims if it extended beyond territorial waters. In late 2003, DEFRA consulted the public on proposals to extend the Regulations offshore.

154. However, this is only one piece of an intricate jigsaw. The UK Government's Interim Report on a Review of Marine Nature Conservation (RMNC)[178] revealed a widespread view that there was a need to revise and reform the present arrangements. WWF believes there is a need for a review of existing legislation and policies and that the solution is to produce overarching legislation – a UK Marine Act.

176 Devon and Cornwall Constabulary, Pers Comm.

177 (2000) Env LR 221

178 See http://jncc.gov.uk/marine/marine_habitat/survey/mncr.htm

WWF believes that anything less is unlikely to provide a proper framework for the necessary integrated and strategic approach to the management of the marine environment as a complete ecosystem.

155. The Countryside and Rights of Way Act 2000 introduced a number of important amendments to Part I of the WCA 1981 (which concerns the protection of species), including six months custodial sentences. For example, in the year after the CroW Act 2000 came into effect:

- Northumbria Police claimed the first search warrant and arrest with a suspect arrested for possession of a goshawk on the day the CroW Act 2000 came into effect;
- Norfolk Police used Section 18 of PACE to search 3 addresses after four men were arrested for taking little tern eggs;
- Merseyside Police made the first arrest for disturbance of a bat roost; and
- Northumbria Police secured its first prison sentence of four months for an egg collector.

156. While welcoming these amendments, some respondents remain concerned about species protection. In general, legislation protecting species listed on the Schedules of the WCA 1981 has evolved in a piecemeal fashion and, as a result, some of it is poorly worded. For example, Devon and Cornwall Constabulary notes that Section 9 of the WCA 1981 requires the protection of areas important for animals listed on Schedule 5, but defining areas important for resting or shelter for cetaceans and basking sharks can be very problematic.

157. A number of NGOs do not find Part I of the WCA 1981 a very useful tool for protecting invertebrate populations. This has led to the formation of an Invertebrate Link "Task Force" to consider how Part I of the WCA 1981 might be amended to protect populations of such species and their habitats. The group is presently considering whether a revised Part I should provide "blanket" protection measures for invertebrates (such as currently applies to uprooting any wild plant without authorisation) or whether UK law should re-enforce other countries' laws where the species taken are protected by legislation to which the UK is not a party (i.e. non-CITES and non-EU). Buglife and Butterfly Conservation have also been discussing the role and implications of the term "reckless" in s.9 of the Act, as careful thought needs to be given to its relevance and usefulness with respect to species protection measures under Part I of the Act, and not be framed to suit vertebrates – often already on protected sites.

158. There are a number of other shortfalls remaining in the legislative framework for species protection. An analysis of data provided by the Home Office relating to various wildlife acts[179] shows a very low conviction rate for offences under the Protection of Badgers Act 1992[180]. North Wales Police explained that the enforcement of this Act often depends upon offenders being caught in the act of committing offences. Improving the success rate therefore turns on granting the Police powers of entry onto land, arrest, and search warrants.

159. The absence of a specific power of arrest for some wildlife offences is a significant shortfall in Police powers. HCT cited a case at Branksome (Poole), where an Inspector had decided that the lower half of a single coastal development plot should be left natural for its three protected lizards and their habitat. The house was built, but the owner immediately set-to landscaping the whole plot. HCT discovered the work and called the Police, who threatened to arrest the gardener unless he stopped. The landowner correctly challenged the Police's power of arrest, and duly completed his landscaping.

160. The RSPB report that another constraint on the Police is the Regulation of Investigatory Powers Act (RIPA) 2000 which governs the circumstances in which the statutory enforcement authorities can undertake surveillance, what permissions are required etc. It exists to safeguard the authorities from accusations, such as an invasion of privacy, under Human Rights legislation. The problem is the Police can only obtain permission for surveillance with respect to serious crime, and wildlife crime is not classified as serious crime, which makes the investigation of wildlife offences impossible.

161. Finally, species protection also often requires amendments to other pieces of legislation and longer-term educational programmes. For example, a recent report by the Bat Conservation Trust and the RSPB shows that 67% of offences against bats were committed within the building trade, highlighting the need to target educational resources towards this industry and the planning process to ensure better compliance with legislation[181]. For these reasons, a number of respondents identified the need for a review of species legislation – indeed the case was even made for a "special" version of the PACE 1984 covering such issues as stop, search, entry to land, arrest, warrants etc.[182] – and the promotion of educational materials to ensure that individuals are more better informed as to the environmental consequences of their actions.

179 Appendix 5, figure 5.1

180 21% convicted in 1998, 33% convicted in 1999 and 19% convicted in 2000

181 BCT and RSPB (2003) *Bat crime: Is the legislation protecting bats?*

182 Inspector Nevin Hunter, Devon and Cornwall Constabulary, Pers Comm.

3.3.2 Resources

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162. A number of respondents pointed out that the number of prosecutions in relation to the number of reported incidents is very low. The Environment Agency does not have the capacity to investigate all complaints and has to prioritise its use of resources. In England, the EA does not generally undertake "clean-up" at public expense where a responsible party can be identified and unless there is an imminent risk of pollution or danger to human health. Particular attention was drawn to the shortage of resources to address fly-tipping - which continues to rise year on year – and the lack of funds to clear up tyres dumped in the countryside, even though it is authorised to do so. Partly for these reasons, the EA is seeking the power to retain fines issued by the Courts and to establish the principle that charges for licences, permits etc. should cover the cost of bringing prosecutions against those in non-compliance, on the basis that the latter are profiting at the expense of those in compliance.

163. By way of contrast, in July 2002, the Environment Agency in Wales was awarded an additional £2 million funding to address rogue waste site operators and fly-tippers[183]. The additional funding has enabled the EA to operate specialist enforcement teams to investigate offences relating to planned, well organised and highly profitable illegal operations which not only pose risks to the environment but also undermine those companies operating within the law. The EA emphasises the very high level of profitability enjoyed by those engaged in the illegal dumping of waste. For example, a Carmarthenshire skip hire operator who illegally disposed of waste on farmland was fined £15,000 and ordered to pay costs in excess of £6,000 after being apprehended by the EA. In addition, the teams enforce duty of care offences, which place a legal responsibility on the producer of waste to ensure that it is disposed of legally.

164. Other respondents raised resources as an issue. Nearly one-third (12) of the 39 district and unitary authorities questioned by the EJP raised finance as a significant barrier to prosecution[184]. EN reports a degree of unpredictability with regard to the demands on its legal budget, but reports that thus far funding has always been found for necessary legal work.

165. Both North Wales Police and Devon and Cornwall Constabulary highlight cost as an obstacle to prosecution. One operation involving the illegal trade in endangered species is known to have cost in excess of £1,000,000, but while wildlife crime is a policing issue it is not a policing *priority*, and finance for such operations and investigations is extremely difficult to obtain. As a result, a gulf exists between the Police's legal duty and their practical ability (and resources) to deal with environmental investigations.

183
Environment Agency, Pers Comm

184
Appendix 9, Survey Analysis, question 9

The PAW reports that some Police Forces have successfully attracted sponsorship, but that more struggle to find the resources to progress investigations. Consequently, the PAW believes that some investigations may be falling by the wayside and that research to develop DNA technology is also being delayed[185].

166. A number of specialist NGOs cited resource restrictions as a reason for not pursuing enforcement action themselves, particularly as that would mean displacing activities in other areas such as site management, species recording etc. However, most also believed that enforcement action was "*not their role*"[186].

3.3.3 Evidential and other problems

167. Participants in the Criminal Law working group at the EJP Workshop in October 2003 agreed that given that the sanctions on conviction range from hefty financial penalties to imprisonment, the criminal standard of proof (beyond reasonable doubt) would, and should, remain in place. But this is not to say enforcement agencies do not encounter difficulties meeting that standard. The DWI pointed out that whilst scientific data could be used to demonstrate water containing certain bacteria was known to cause illness, it could not always demonstrate to the criminal standard of proof that the water did cause illness. This is exacerbated by the fact that there is no definition of "*water unfit for human consumption*" in statute.

168. In relation to wildlife crime, a number of respondents note a significant problem in linking a suspect to the offence[187], as most offences are committed in the countryside, during anti-social hours and often on private ground where it is rare for offences to be witnessed. For example, research conducted by the BCT and the RSPB shows that 45 of the 144 offences against bats committed in the two years studied resulted in no police action due to insufficient evidence[188]. North Wales Police also highlight the reluctance of witnesses to become involved in the legal process as a further difficulty to overcome.

169. An analysis of data supplied by the RSPB shows the largest number of offences against wild birds involved possessing or taking eggs, possessing, taking or controlling wild birds or possessing an article capable of being used in an offence[189]. The RSPB highlights the important point here is that all of the above mentioned charges relate to possession in some way. Egg collectors, finch trappers and bird of prey thieves all take something that can subsequently be found in their possession and lead to legal action. The Police also note that prosecutions are easier to achieve where there are "core crimes" involved, e.g. if drugs are discovered alongside an egg collection[190].

185 This may include a DNA test for tiger derivatives in traditional medicines, a technique to extract DNA from feather tissue rather than blood from certain birds of prey, a test for establishing parentage and relatedness amongst parrots, a test to establish the age of ivory and a test to identify shahtoosh in cloth

186 e.g. Bat Conservation Trust, Butterfly Conservation, EIA

187 e.g. English Nature, RSPB, Police Service

188 BCT and RSPB (2003) Bat Crime: *Is the legislation protecting bats?*

189 Appendix 5, figure 8.4

190 See www.defra.gov.uk/paw/bulletin

These findings are borne out by data provided by the RSPB. Table 4 (below) shows the % found guilty for various offences involving wild birds. Offences involving possessing or taking eggs and firearms offences demonstrate the highest conviction rates.

170. Finally, EN reports that proving the necessary mental element, such as "intent" or "recklessness" and satisfying the criminal burden of proof (beyond reasonable doubt) can also present difficulties with regard to prosecution.

Table 4

Data provided by the RSPB for offences against wild birds – conviction rates [191]

Offence	% Guilty
Possessing or taking eggs	86.1%
Destroying a nest or eggs or disturbing nesting birds	85%
Possessing, taking or controlling a wild bird	80.9%
Trading in wild birds	68.4%
Causing birds suffering or injury	76%
Killing, attempting to kill or possessing a dead wild bird	78.8%
Possessing an article capable of being used in a offence	73.4%
Attempting to commit an offence	64.3%
Fire arms offences	100%
Misuse of pesticides	64.3%
Other	76.7%
Total	**78.3%**

3.4 Handling of environmental cases

171. An analysis of data provided by respondents to the EJP showed average conviction rates of between 66% and 100%[192]. Generally, the conviction rates associated with "environmental offences" were higher than those associated with "wildlife offences". Table 5 (below) summarises the conviction rates achieved by organisations concerned with environmental offences[193].

191 Appendix 5, figure 8.4

192 Appendix 5, Conclusion

193 Appendix 5, Conclusion

Table 5

Conviction rates demonstrated by respondents to the EJP

Organisation	Conviction Rate
Environment Agency (1999-2002)	
Waste	96%
Water Quality	98%
Water Resources	98%
Radio Active Substances	100%
Fisheries (non-standard offences)	90%
Process Industry Regulation	100%
Flood Defence	100%
Navigation	96%
Health and Safety Executive (2001/02)	84% [194]
Drinking Water Inspectorate (1995-2001)	97%
CIEH (1998/9-2001/02)	
Domestic Noise Nuisance	80% [195]
Home Office (1997-2001)	
Killing/taking/sale of wildlife and their products	66%

172. The 90-100%, conviction rates for offences prosecuted by the Environment Agency are high[196]. The EA believes there are a number of reasons why this may be so, including enhanced training of its officers (leading to better evidence) and lawyer involvement in the early stages of investigations to provide advice on admissibility and evidential issues. Detailed licences for radioactive substances and process industry regulation enable prosecution to be undertaken for most serious regulatory breaches, and there is strict liability with regard to the majority of environmental offences. Furthermore, due to the relatively low number of crimes of this nature encountered by the Courts[197], the EA has made efforts to educate Magistrates – and, as a result, believes that there is a growing understanding of environmental concepts such as the "precautionary principle", and the "polluter pays". Reference was made to training undertaken by the Magistrates' Association and the contribution made by "*Costing the Earth – Guidance for Sentencers*" [198]. However, in this respect the EA distinguishes between the Magistrates' and Crown Courts, noting that Crown Court judges encounter even fewer cases, because of enhanced statutory maxima in the Magistrates' Courts, which tends to keep cases in the Magistrates' Courts. Furthermore, the EA notes that judges routinely deal with serious criminal offences of a very different nature and have not enjoyed environmental training – which may make it difficult for them to sentence such offences.

194 Taken from Health and Safety Executive. *Health and Safety Offences and Penalties 2001/2002*. HSE

195 CIEH, Pers. Comm.

196 ENDs Report 346 (November) 2003, pp.9-10 gives the Environment Agency's average prosecution success rate for 2002/3 as 97.9%, with only 15 acquittals

197 There are 28,000 Magistrates and the Agency brings 700-800 cases per year

198 Magistrates Association and Environmental Law Foundation (2002) *Costing the Earth – Information for Sentencers*. ELF: London

Consequently, the EA is concerned that the Judicial Studies Board (within the Department for Constitutional Affairs), which is responsible for the training of judges, is not addressing environmental matters.

173. When questioned about the reasons behind the relatively high conviction rates, the EA also referred to the introduction of its Enforcement and Prosecution Policy and functional guidelines in 1999, which it believes have introduced a greater focus and priority on enforcement – and better results. Furthermore, the EA now audits all Category 1 and 2 offences (the most serious) to establish why they are not prosecuted and reports that this has lead to a significant improvement in the last 2-3 years.

174. The CIEH finds the Courts generally, and perhaps the Magistrates' Courts in particular, have an "*inevitably lay view of environmental issues, which reflects the communities they serve. That is not inappropriate even if it is not always scientifically correct and it is not to imply that they do not care about the environment and damage to it*". The CIEH recognises this may place a small additional burden on witnesses and advocates.

175. Eleven of the 39 district and unitary authorities questioned by the EJP do not find the Magistrates'/Crown Courts understand environmental issues, although seven made a distinction between complex cases and the more straightforward cases in which layman's terms are used (e.g. noise). Any lack of understanding with respect to the former is exacerbated by the small number of cases encountered, and the complexity or volume of material that may need to be assimilated by the Courts. The ERM study found that in one of the Court areas researched, only 5 to 6 of the 3,445 cases heard per year are likely to be environmental cases, which could fall to be heard by any of the 149 Magistrates (or 3 person lay bench)[199]. Six of the 39 authorities questioned by the EJP believe judicial training or some form of specialist expertise is needed, although seven perceived an improvement in the situation as a result of *Costing the Earth* and associated training[200]. Barrister Daniel Owen[201] suggests it may be helpful for the Courts to have access to environmental advisors, who answer to the Court rather than the prosecution or the defence, and assist in interpreting both parties' evidence on environmental impact.

176. If environmental crimes are comparatively rare, then offences involving wildlife are even scarcer. Magistrates routinely encounter only one or two cases a year. Perhaps partly because of this, the conviction rates for wildlife offences are generally lower (66%), although this may also reflect the statutory, resource and evidential limitations outlined above. While two EJP respondents find Magistrates regard these offences as serious[202], others, such as Andrew Wiseman[203] report their lack of understanding of environmental issues to be "*very worrying*". Both the RSPCA and Devon and Cornwall Constabulary note the sentences imposed by the Magistrates vary from Court to Court, and do not necessarily bear any reflection on the seriousness of the case.

199 Dupont, C and Zakkour, Dr. P (2003) *Trends in Environmental Sentencing in England and Wales.* Environmental Resources Management Ltd (ERM)

200 Appendix 9, Survey Analysis, question 8

201 Fenners Chambers, Cambridge

202 e.g. RSPB and English Nature, Pers. Comm.

203 Trowers Hamlins Solicitors

Criminal Law

177. Many respondents are confident that the *Guidance for sentencers* will significantly help to address such inconsistencies. Reassuringly, respondents did not raise concerns about inherent bias or scepticism in relation to environmental matters within the judiciary. EN finds the views of Magistrates are proportionate with society's view of the environment and, while they may occasionally struggle with the issues, they generally provide a "*level playing field*" for environmental justice.

178. Participants in the Criminal Law working group[204] noted the Crown Court appears to lack interest and conviction in environmental issues. This was felt to be due to a lack of relevant education, training and experience and that issues such as fly-tipping lack the "glamour" of Grievous Bodily Harm and, accordingly, do not attract the same degree of respect. This observation is borne out by the findings of the ERM study, which found a general decrease in the severity of sanctions in the Crown Courts, with a sharp decrease (47%) in the average size of fines between 1999/2000 (about £8,500 during the two years) and 2001/2002 (with an average fine of about £4,600)[205]. While accepting this may be partly due to the number and nature of cases arising in the Crown Court in any one year, ERM also notes the number of offences where the Crown Court awarded costs against the defendant tended to decrease between 1999 and 2002 (81% to 42%), while it remained fairly constant for the Magistrates' Courts (at around 72% to 74%). ERM's findings are supported by those of Capacity Global. The Project interviewed a number of Judges and Magistrates, who conceded that environmental cases present difficulties, both in the nature of the cases and the ways in which such cases were presented to the Courts[206].

179. Finally, workshop participants were interested to note the Magistrates' Association for London is considering the feasibility of transferring all non-CPS prosecutions to one dedicated location – in effect forming a specialist environmental court building out of administrative expediency. This is favoured by the Environment Agency, which also favours the designation of specialist Magistrates to hear environmental cases.

204 EJP workshop, October 2003

205 Dupont, C and Zakkour, Dr. P (2003) *Trends in Environmental Sentencing in England and Wales.* Environmental Resources Management Ltd (ERM)

206 Adebowale, M (2003) *Using the Law: Barriers and Opportunities for Environmental Justice.* Capacity Global

Cleaning up from the Sea Empress Oil Spill, 18 February 1996, West Angle Bay, UK. © *WWF-Canon/ Paul Glendell*

3.5 Penalties

3.5.1 Fines

180. Our analysis shows that fines for environmental and wildlife offences vary significantly, and are rarely commensurate with the level of environmental damage caused. The case of *Environment Agency v Milford Haven Port Authority* aptly illustrates the latter point. In 1999, Cardiff Crown Court imposed a fine of £4 million (plus £825,000 costs) on Milford Haven Port Authority for pollution caused when 72,000 tonnes of crude oil spilled from the "Sea Empress" tanker outside Milford Haven, damaging 38 Sites of Special Scientific Interest (SSSI) and killing thousands of seabirds[207]. In 2000, the Court of Appeal reduced this fine to just £750,000 on the grounds that the fine should not "*cripple the port authority's business and blight the economy of Pembrokeshire*"[208]. By way of contrast, the Environment Agency[209] estimated the costs of clean-up and salvage to be between £49 and £58 million, and the effects on tourism in Pembrokeshire were calculated at between £20-28 million during 1996 alone[210]. Such a fine cannot, in any sense, be regarded as proportionate to the environmental damage caused.

181. Data supplied by the EA indicates shows the average fine for offences varies between £277 (fisheries (non-standard offences)) and £20,463 (process industry regulation)[211]. Data supplied by the HSE shows that the average fine varies between £5,274 (1996/7) and £8,284 (2001/02)[212]. Similarly, the DWI notes that prosecutions in relation to drinking water are relatively rare, and because Magistrates have little experience in this field, there has tended to be a fairly wide differential in the levels of fines imposed.

182. EJP Respondents also perceived a degree of variation in the fines imposed. Ashurst Morris Crisp Solicitors note the penalties for criminal offences are "*not consistent nor proportionate*". Barrister Fiona Darroch[213] does not believe the courts impose penalties that are either a deterrent or appropriate in view of the environmental damage caused. Whilst recognising that sentencing judges cannot always be expected to understand the full impact of a complex offence, Darroch believes the fines should be more closely aligned to reflect the true cost of the damage caused. This cost should be comprehensively and professionally assessed as part of the litigation process. Although practitioners representing corporate bodies perceive an increase in the fines imposed, one barrister notes "*there are no doubt a number of cases where the gravity of the case has not resulted in a fine of significant impact*". This view was endorsed by barrister William Edis[214], who notes the penalties imposed are "*an inadequate reflection of corporate culpability*".

207 (1999) 1 Lloyd's Rep 673

208 (2000)Env LR 632

209 See http://www.environment-agency.gov.uk/regions/wales/issueswales

210 Welsh Economy Research Unit, Cardiff Business School and Welsh Institute of Rural Affairs Studies. *The Economic Impact of the Sea Empress Spillage*. Welsh Economic Review

211 Appendix 5, figure 2.5

212 Appendix 5, figure 4.1

213 10-11 Gray's Inn Square

214 1, Crown Office Row

183. We note that ERM's study on environmental sentencing[215] also concludes there is a lack of consistency in environmental sentencing. Disparities were identified geographically, depending on the type of Courts (Magistrates' versus Crown Courts) and the type of offence. For example, the study found significant regional variations in the number of offences and the level of penalties, with the regions with the highest number of prosecutions being the ones with the lowest average penalties.

184. However, we accept that it is not always appropriate to make comparisons between average fines - as they may vary for valid reasons. Fines take into account many more factors than culpability and environmental impact including, in particular, the defendant's ability to pay. For example, the Environment Agency reports the average fine for waste offences is in the region of £600, whereas the average fine for water related offences is £6,485 because prosecutions involving water quality are often progressed against corporate offenders. Table 6 (below) shows the average fines for prosecutions progressed by the EA between 1999-2002. It can be seen that the fines for fisheries and navigation are much lower than those for offences relating to process industry regulation and radioactive substance regulation, reflecting the fact that they are generally imposed on individuals rather than corporate bodies. Data for 2002/3 shows that convictions for Integrated Pollution Control (IPC) and radioactive substance regulation continue to attract the highest fines (£27,100 and £16,500 respectively). However, in real terms the average fine per successful waste prosecution in 2002/2003 was, at £2,873, scarcely above the £2,534 imposed in 1999/2000 - whereas fines relating to water pollution showed a somewhat greater increase from £6,219 to £7,942 over the same period[216].

Table 6

Average fines for prosecutions progressed by the Environment Agency (1999-2002)[217]

Offence	Average Fine (£)
Water resources	2,180.19
Radioactive substance regulation	9,621.25
Process industry regulation	20,462.96
Flood defence	1,542.86
Navigation	371.11
Fisheries (non-standard offences)	277.33
Waste	2,826.76
Water quality	6,233.97
All	**4,208.99**

215 Dupont, C and Zakkour, Dr. P (2003) *Trends in Environmental Sentencing in England and Wales.* Environmental Resources Management Ltd (ERM)

216 ENDS Report 346 (November) 2003, pp. 9-10

217 Appendix 5, figure 2.5

185. While it may not always appropriate to make comparisons between average fines, it is appropriate to ask whether the levels of fine are, generally, an effective deterrent against environmental and wildlife crime. The Courts now have a number of tools to assist them in setting appropriate fines for corporate offenders. In May 2001, the Magistrates' Association published "*Fining of Companies for Environmental and Health and Safety Offences*", which provides Magistrates with guidance on the relevant sentencing options. These Guidelines highlight the importance of cases such as *R v F Howe and Son (Engineers) Ltd* [218] and *R v Friskies Petcare UK Ltd* [219], in which the Court of Appeal gave important guidance on the sentencing of companies for offences relating to the environment and public health. The main points of *Howe* are that:

- fines on companies need to be large enough to make an impact on shareholders – past fining levels were far too low;
- a company is presumed to be able to pay any fine the Court is minded to impose unless financial information to the contrary is available to the court before the hearing; and
- a deliberate breach of the legislation by a company or an individual with a view to profit seriously aggravates the offence.

186. While the HSE welcome *Howe* as an important step forward, it is perhaps unfortunate that the Court of Appeal did not use *Environment Agency v Milford Haven Port Authority* [220] as an opportunity to provide more prescriptive guidance on how the Courts should assess financial penalties. The EA had hoped the Court of Appeal would address precisely where the level of fine should be pitched, i.e. on profitability or turnover - and what would be a reasonable bracket of financial penalty for the Court to consider. Although this has been done for "mainstream crime", *Howe* did not go beyond the sentencing of cases on an individual basis to establish any sort of tariff. The EA believes that this has left Magistrates somewhat at a loss as to the correct entry points into the sentencing matrix[221].

187. Furthermore, two recent cases reinforce the case for guidelines (rather than guidance). In *R v Yorkshire Water Services Ltd*[222], the Court of Appeal found that a fine of £119,000 for committing four breaches of s.70 Water Industry Act 1991 was too high and substituted it with a total fine of £80,000. In so doing, the Court set out a number of considerations the sentencing Court ought to have in mind. These included: (a) the degree of culpability involved in the commission of such offences of relatively strict though not absolute liability; (b) the damage done in a spatial and temporal ambit and its effects; (c) the offender's previous record, including failure to heed warnings; (d) that a balance had to be struck between a fitting penalty and the effect of that penalty on an already underfunded organisation; (e) the offender's attitude and performance after the events, including the plea; and (f) that it should determine for any one incident rather than add up the manifestations of that incident as represented by the Courts in that indictment.

218 [1999] 2 All ER

219 (2000) 2 CAR(S) 401

220 (2000) 2 Cr App R(S) 423

221 Navarro, R and Stott, D. (2002) *A Brief Comment: Sanctions for Pollution.* JEL Vol 14/3 and EA, Pers Comm.

222 (2002) EnvLR 18

188. Similarly, in *R v Anglian Water Services Ltd sub nom Hart v Anglian Water Services Ltd*[223] (in which the EA appeared as an interested party and sought to persuade the Court of Appeal to provide tariff guidance), the Court of Appeal held that a fine of £200,000 had been "manifestly excessive" and reduced it to £60,000. Unfortunately, the Court of Appeal also declined to give tariff guidance on the basis that cases must be sentenced on a case-by-case basis. The EA now believes it is unlikely that any tariffs or sentencing guidelines will be forthcoming and, accordingly, sentencing will be dependant very much on the expertise of the sentencing judge or bench.

189. Whilst reporting that total fines imposed in prosecutions are rising[224], the EA believes the fines in environmental cases remain "*too low*" and should routinely include the costs of clean-up and restoration. This is borne out by the conclusions of "*Spotlight on business environmental performance 2002*"[225] which reports that although fines for environmental offences are increasing, they are still not high enough to encourage some companies to respect the environment. In order to address this, the EA would wish to see turnover and profitability being taken into account when fines against companies are levied. However, the EA also points out that financial liability does not always end with a fine. A company may have to improve its practice around the country to ensure future compliance – and incur costs of a much higher order of magnitude. In one case, a manufacturer of domestic fridges breached its duty of care and was fined £2,000 – but had to spend in excess of £250,000 to ensure future compliance.

190. The DWI reports that the passage of the Water Act 2003 increased the fine on summary conviction for supplying water unfit for human purposes from £5,000 to £20,000[226], which has brought the penalty for this offence in line with other environmental offences.

191. Our survey of 39 district and unitary authorities found that, generally, respondents were unsatisfied with the level of fines imposed given the statutory maxima[227]. Ten authorities reported the fines were "low, poor or insignificant" and another four were "very unsatisfied". In fact, of the 39 approached, only 4 were "satisfied" with the current level of fines. Five authorities noted that fines are often lowered as ability to pay is considered or if it is a first offence, and two noted that the fine may be reduced on appeal. A number of authorities also noted a variable fine rate with respect to commercial or domestic cases. The same survey revealed that roughly half (20) of those sampled do not perceive there to be any correlation between the levels of fine imposed and the nature of the offence/environmental damage caused.

223 TLR 18/08/2003

224 The Thames Region of the EA reports that the total fines imposed in prosecutions completed in 2001/2 amounted to £366,348.00. This rose substantially in 2002/3 to £727,930.00 (an increase of almost 100%). Within this, water quality prosecutions recorded an increase in fines of 139% and waste prosecutions an increase of 275%

225 *Spotlight on business environmental performance* 2002 shows the average fine per company prosecution in 2002 was £8,744 – 36% higher than in 2001

226 S.61(1) Water Act 203 (ISBN 0 10 543703 4)

227 Appendix 9, Survey Analysis, question 4

192. Our findings are also borne out by the results of the ERM study, which notes that although there was a general increase in the average level of fines in the Magistrates' Courts between 1999 and 2002 (rising from £1,979 to £2,730), the average fine still stays well below the maximum Magistrates can impose (generally up to £20,000)[228], notwithstanding the DCA encouraging Magistrates to apply the maximum fine where appropriate.

193. Any person carrying out, without reasonable excuse, an operation which damages the special features of an SSSI is liable to a fine of up to £20,000 on summary conviction or an unlimited amount on conviction on indictment. The Courts are also empowered to make an order requiring that person to take certain actions to restore the land to its former condition. Failure to comply with such an order may be punishable by a fine of up to £5,000 and a further fine of up to £100 per day for as long as the offence continues. Despite this, EN highlight the particular difficulty in relation to habitats, which are often valued purely on their monetary value of the land itself, not the broader value that they have to society in general. EN believes that, in general, whilst the Courts take wildlife offences seriously, the fines remain relatively low.

194. An analysis of the RSPB's Spreadsheet of Wild Bird Offenders indicates the average fines for offences against birds vary from £30 (possessing an article capable of being used in an offence) to £1,800 (trading in wild birds)[229]. The RSPB explained that the wide range in fines reflect the different offences included within the data. First, there are two levels of protection afforded to wild birds under the WCA 1981[230], namely ordinary protection for commoner species and special protection for rarer species. Offences involving ordinarily protected species are punishable by level 3 fines while offences involving specially protected species can attract a level 5 fine. Offences involving trading in wild birds include prosecutions under COTES and possibly CEMA. Such charges are few in number, but can result in much higher penalties due to the importance of the species concerned and the higher maximum penalties.

195. TRAFFIC supplied the EJP with a table of successful prosecutions reported by the Police, HM Customs & Excise and DEFRA under COTES and CEMA (wildlife trade offences). This showed that the majority of penalties imposed were fines and costs of between £1 and £500 (41%). The next highest category was fines and costs above £500 (35%). Custodial sentences were only imposed in 20% of cases. In general, TRAFFIC reports that the fiscal value of wildlife is entirely subjective, and judges base it on what they view society's values of the environment are.

228 Dupont, C and Zakkour, Dr. P (2003) *Trends in Environmental Sentencing in England and Wales.* Environmental Resources Management Ltd (ERM)

229 Appendix 5, figure 8.5

230 Now amended by the CroW Act 2000

3.5.2 Proportionality

196. Respondents report the majority of cases do not result in sentences that provide an appropriate deterrent to offenders, or take account of the full range of sentencing options available. Our survey of district and unitary authorities revealed that 28 of the 39 sampled do not believe the current level of fines act as a deterrent to would-be offenders[231]. This is thought to be because it is cheaper to offend (3) or that other measures (e.g. fixed penalties or the threat of eviction) are a more effective deterrent (5).

197. In relation to wildlife crime, a report by the Bat Conservation Trust and the RSPB refers to a case in which a property developer pleaded guilty to damaging a roost site for Natterer's bats contrary to Section 39(1)(d) of The Conservation (Natural Habitats, &c.) Regulations 1994. The developer was fined £500 and ordered to pay £100 costs. The NGOs were disappointed with the fine on the basis that it did not reflect the environmental damage caused and was unlikely to deter those who may choose to disregard bat legislation in other building projects[232].

198. Similarly, the RSPCA believes the level of penalties imposed by the courts has little correlation with the environmental impact caused by the offence.

CASE STUDY

Smuggling of finches

In 1998, a Maltese national was found to be in possession of 800 British finches, which bore all the signs of having been recently taken from the wild. He was in the process of placing illegal rings on the birds in an attempt to pass them off as captive bred, so that they could be exported to Malta for sale in pet shops and open-air markets. A greenfinch caught in the wild would be worth around £2 in the UK, but can be sold as a captive-bred specimen for £6-8 in Malta. Using various contacts, the individual's travel record was checked and it was estimated that during the previous 12 months, he had been responsible for exporting in excess of 25,000 birds – which means he stood to make a clear profit well in excess of £100,000.

231 Appendix 9, Survey Analysis, question 7

232 BCT and RSPB (2003) *Bat Crime: Is the legislation protecting bats?*

Police raid on Get Stuffed
© Andy Fisher, WWF-UK

199. WWF notes the penalties associated with wildlife trade offences often bear little or no relation to the profit to be made by those committing the offences. For example, highly lucrative "shatoosh" shawls, made from the fine hair of slaughtered Tibetan antelope can retail for up to £15,000, black market rhino horn can retail for up to £30,000 a kilo, and a pair of Lear's macaws is worth up to £50,000 on the black market. WWF believes that when considering the seriousness of these offences, the judiciary should first take into account the ecological impact of the offence and the impact on the sustainability of the species. When endangered species are involved it will often be the case that the case is more appropriately tried/sentenced in the Crown Court. In line with *R v Howe*, the level of fine should reflect any economic gain from the offence.

200. The average fine per case in relation to health and safety offences in 2001/2002 was 39% higher than in previous years. The HSE feels that while there is still some way to go "*we hope that this is a step towards fines which are truly proportionate to seriousness and which better reflect huge variations in the "wealth" of organisations*"[233]. Many respondents believe a similar line of reasoning should be applied with respect to sentencing in environmental cases.

201. Finally, participants in the EJP workshop group on Criminal Law at the EJP Workshop in October 2003 were also concerned about the current climate of the prosecution making no comment, beyond a brief sketch of the facts, post-conviction for sentencing purposes. It was felt that this has resulted from the culture that has arisen post the Human Rights Act. The group felt that while it is right the prosecution is mindful of submissions made post-conviction, to make none can result in the sentence not reflecting the severity of the offence. The Environment Agency now supplies its prosecutors with a bundle of information to include costs (both investigative and legal) in addition to the environmental costs of any given offence. Defence advocates present agreed that very often, the limited post-conviction role of the prosecuting body provides a huge tactical advantage to defence mitigation.

3.5.3 Custodial sentences

202. Respondents note that higher fines alone are not a sufficiently effective deterrent to would-be criminals, but the issue is rather more complicated than it first appears. The Environment Agency finds higher fines represent an effective deterrent to individuals, who tend not to repeat offend for fear of larger fines. This would also seem to hold true for wildlife crime. The RSPB reports that sentences of up to five months have been awarded on at least five occasions for egg collectors since 2000 and the number of reported nest robberies has fallen dramatically since then.

233
Health and Safety Executive (2002) *Health and Safety Offences and Penalties 2001/2002*. HSE

However, the EA does not perceive a general deterrence in the fines imposed on other operators, possibly because savings of significant amounts of money can be involved in some of these offences. Generally, sentencing is not sending out stark messages to determined offenders. Similarly, the RSPB and TRAFFIC are aware of a number of egg collectors and individuals involved in bird crime who repeatedly offend despite having received substantial fines. Thus, it seems higher fines may deter one-off individual offenders from re-offending, but may not be sufficient to deter persistent individual or corporate offenders.

203. Our data shows that custodial sentences are presently a rarity for regulatory offences and represent a very low % of general criminal sentences2[234]. Table 7 indicates the proportion of custodial sentences awarded for a number of environmental and wildlife offences. This finding is supported by the ERM study[235], which concludes that there is a very limited use of custodial sentences across all the regions (the average for England and Wales being 1.2%).

204. When questioned about the very small number of custodial sentences imposed, the EA pointed out that they are only imposed where the case is sufficiently serious to warrant it. Another factor is that many of the environmental offences it prosecutes are committed by companies.

205. Conversely, the data confirms there has been a growing recognition of the nature and impact of wildlife trade offences within the higher judiciary. For example, in *R v Sissen*[236], a case involving the illegal import into the EC of one of the most endangered birds in the world, the Lear's macaw (only 150 birds remain in the wild), the defendant was imprisoned for 30 months. Of as much interest as the jail term is the comment of Mr Justice Ousley who stated that: *"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 the gravity and the need for deterrence"*.

234
We note that Environment Agency data for 2002/3 shows prison sentences were awarded on six occasions, all for waste offences, with five being in the Midlands ENDS Report 346 (November) 2003, pp 9-10

235
Dupont, C and Zakkour, Dr. P (2003) *Trends in Environmental Sentencing in England and Wales.* Environmental Resources Management Ltd (ERM)

236
(2000) All ER (D) 2193

Table 7

Proportion of custodial sentences imposed in relation to various environmental and wildlife offences

Data source	type of Offence provided	Custodial Sentences (as % of total penalties
Environment Agency (1999-2002)	Waste[237]	1.83%
TRAFFIC/WWF[239] (between 1987-2002)	*Trade in:* Birds and bird eggs Reptiles, spiders & amphibians Plants Artifacts Mixture	 19.1% 8.3% 20% 14.3% 50%

206. Respondents welcome the judiciary's approach in this regard, but the RSPB believes the use of custodial sentences should also be considered more routinely for those committing serious and persistent crimes against native species. Graham Elliott observes "*apprehending collectors is comparatively easy but catching those responsible for killing birds of prey is far more difficult. At the moment, those responsible still believe they cannot be caught, and even if they were would still most probably receive a fixed penalty on conviction. Until one or two are convicted and awarded a custodial sentence, financial penalties alone are unlikely to change the situation*".

207. North Wales Police highlight the need to ensure tougher penalties and custodial sentences are addressed consistently across the UK. In this respect, the "*Guidance for sentencers* should be adapted, if necessary, for use in the Crown Court and other UK jurisdictions. Furthermore, the guidelines should be revised to incorporate other, perhaps less frequently encountered, but nonetheless important areas of environmental crime, such as offences under s.70 Water Act 1991[239] and "bread and butter" issues dealt with by the RSPCA and the Police Service on a daily basis[240].

208. Finally, WWF was pleased to report that the Criminal Justice Act 2003 has increased the maximum possible custodial sentences for offences under the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (COTES) from two to five years[241]. This will make such offences "arrestable offences" under s.24 PACE 1984 and give the police additional powers, e.g. the power to enter and search premises without a warrant that are owned or occupied by a person under arrest for such an offence[242].

237 Extrapolated from Appendix 5, Figure 2.4

238 Appendix 5, figure 7.22

239 DWI, Pers Comm.

240 RSPCA, Pers. Comm.

241 See S.307(2) Criminal Justice Act 2003 (ISBN 0 10 544403 0)

242 S. 18 PACE 1984

Similarly, it will also grant the police the powers to take fingerprints, obtain DNA samples, compel suspects to be interviewed and, where appropriate, bail suspects to court with conditions.

3.5.4 Other penalties

209. Respondents raised a number of other penalties that can be used alongside, or instead of, prosecution. In relation to companies, the EA highlighted the effectiveness of conditional discharges or deferred sentences, whereby companies are put "on probation" for a period of time. This can be an effective penalty in relation to corporate offenders, particularly for offences where the actual environmental impact may be low but the operational failure high. In such situations, during the period of the discharge the convicted company is very much at risk in relation to any repeated breach. It would then fall to be sentenced for the new breach and the original offence. This, in practice, has meant that companies will work very positively with the EA to improve their operating practices and environmental performance to prevent repetition.

210. The EA also takes action against officers of a company, including directors, managers and the company secretary. At least seven directors were personally fined in 2002 and in appropriate cases it will also consider seeking disqualification of directors under the Companies Act. The EA points out that action in this area is not, however, without difficulty. Company directors have a habit of "skipping off" and evidential problems, winding up of companies and disclaimers in relation to property can make it problematic. In this respect, the EA suggests that consideration could be given to an environmental "fit and proper person test" for company directors, in which individuals have to demonstrate a "clean" environmental record before being allowed to fulfil such a role.

211. With regard to waste, and especially fly-tipping, the EA notes that Community Service Orders (of up to 180 hours) can be effective. More stringent enforcement practices e.g. the seizing of vehicles may also address this problem.

212. However, while many respondents referred to the efficacy of such measures, the ERM study concludes that they are used very infrequently[243]. The study found that Community Service Orders, conditional/absolute discharges, compensation etc. represent only 4.9 to 8% of the penalties imposed in the Crown and Magistrates' Courts respectively. The EJP understands that Magistrates are required to limit Community Service Orders to "serious cases" (undefined), in that they are costly to administer and in some cases health and safety issues are involved. Furthermore, they are, of course, only applicable to individuals and not companies.

243 Dupont, C and Zakkour, Dr. P (2003) *Trends in Environmental Sentencing in England and Wales.* Environmental Resources Management Ltd (ERM)

213. Finally, a number of respondents highlight the positive contribution that adverse publicity can make. The DWI reports that its cases often attract adverse publicity for offending water companies and that this probably provides as effective a deterrent as the actual fine. Similarly, the EA finds the attention attracted by prosecution can be embarrassing to companies and would favour a requirement that successful prosecutions be recorded in the annual reports of companies. Conversely, the CIEH reports that district and unitary authorities generally make little use of press releases, but recognise their role in deterring would-be offenders.

3.5.5 Civil Environmental Penalties

214. A recent report by UCL examined the potential use of environmental civil penalties[244] and concluded that penalties in the form of a discretionary monetary sum imposed flexibly under the civil law could make a significant contribution to improving compliance in many areas of environmental regulation. It suggested that such penalties can be adjusted to allow the regulator to recover the financial costs of damage caused to the environment, without requiring the full administrative and procedural burden of raising criminal prosecutions or applying the moral condemnation more appropriate for the most serious offences. The report pointed out that civil penalties are already used in this country for less serious regulatory breaches under tax, company and pensions law. The EA has given the prospect of it being able to impose civil penalties a cautious welcome, provided that there are clear criteria regarding their use.

3.6 Costs

215. The Environment Agency always seeks to recover the costs of investigation and court proceedings, and reports that it is frequently awarded the full costs claimed. Standard costs are low, in the region of £1-2,000 (subject to means) because the investigation is conducted "in house" - although the EA did point out that in larger cases the costs can total hundreds of thousands of pounds. Thames Region reports that costs amounting to £141,580.99 were ordered to be paid by defendants in 2001/2, rising to £162,207.96 in 2002/3. EA data for 2002/3 shows that the average costs awarded by the Courts dropped by 25%. As the average fine per successful prosecution increased by only 1% in the same period, the average offender was left £382 better off in 2002/3 than 2001/2[245].

216. The costs of investigating and bringing a prosecution are often a handicap for prosecuting bodies without in-house expertise. For example, the average costs for English Nature investigating and bringing a case are £15,000 – but any award of costs is paid into central Treasury funds.

244 See Woods, M and Macrory, R (2003) *Environmental Civil Penalties – A More Proportionate Response to Regulatory Breach*. UCL

245 ENDs Report 346 (November) 2003, pp 9-10

217. The CIEH also reports that only a proportion of the costs incurred are generally awarded to successful authorities – which does little to encourage their enforcement functions. This view is supported by our survey of district and unitary authorities, which revealed that only five routinely recovered all of their costs. Seventeen routinely recover only a proportion of the costs incurred.

218. With respect to corporate offenders, the *Fining of Companies for Environmental Health and Safety Offences*[246] provides that the order for costs should not be disproportionate to the fine imposed. The Court should set the fine first, then consider awarding compensation, and then determine the costs. If the total sum exceeds the defendant's means, the order for costs should be reduced rather than the fine. The importance of this approach in practice was endorsed by a representative from the Magistrates' Association present in the Criminal Law working group of the EJP Workshop in October 2003.

219. With respect to wildlife trade offences, the *Magistrates' Court Sentencing Guidelines 2002* recommend the prosecuting authority should be awarded reasonable costs reflecting the costs of the investigation, file preparation and presentation. The Court of Appeal set out principles in *R v Associated Octel Ltd*[247], which were approved and reviewed in *R v Northallerton Magistrates' Court, ex parte Dove* [248], which determined that costs should not be seen as disproportionate to the fine.

3.7 Miscellaneous matters

3.7.1 Recording of wildlife crime

220. Although the PAW reports there is anecdotal evidence that wildlife crime is increasing[249], there is little hard evidence to back this up. There is no central record of reports of wildlife offences, nor any comprehensive information about how many reports lead to action by the enforcement authorities, and subsequent prosecution. In fact, the Police Service reports that wildlife offences do not have to be recorded as crimes, to the extent that only a few forces could supply data showing the extent of the issue. This makes it difficult for enforcers to prioritise their efforts where they are most needed, assess the extent to which their activities are making an impact on wildlife crime and, in turn, pass information back to the relevant scientists, policy makers and enforcement bodies responsible for setting targets and priorities. In this respect, we note that the Environment Agency was one of many respondents seeking a national database of environmental prosecutions and outcomes.

246 Magistrates' Association 2001

247 (1997) 1 Cr App R (S) 435

248 (2000) 1 Cr App R (S) 136

249 See www.defra.goc.uk/paw

221. In April 2002, PAW launched the National Wildlife Crime Intelligence Unit (NWCIU) as the national focal point for wildlife crime related intelligence. The priorities identified by the Unit are the illegal trade in caviar, birds of prey and parrots, reptiles, illegal trading of traditional East Asian medicines and the illegal trade in derivatives such as ivory and shahtoosh. The Unit also welcomes information about issues such as badger baiting and other bird crime. WWF suggest that one possibility could be that the National Wildlife Crime Intelligence Unit (NWCIU) could be funded to establish and maintain a central record of wildlife offences, including not only convictions but all recorded incidents. In order to facilitate this, wildlife offences should be "notifiable" offences.

3.7.2 Awareness

222. WWF and TRAFFIC point out there is a range of materials available about the impacts of wildlife crime and what individuals can do to help prevent it[250]. However, these materials – and other information about environmental crime - need to be promoted more widely within the judiciary, practitioners, and voluntary organisations. In this respect, we note that Capacity Global recommends the establishment of an environmental advice agency similar to the Environmental Defenders Office in Australia, which is able to offer legal advice and possible representation to the general public[251]. The Report notes that such an agency would need to be highly visible and accessible to the public and target, in particular, socially and economically excluded areas. Capacity Global believes that the agency should provide outreach information that is easily understood and written in written format and over the web.

Please see the Executive Summary for the Conclusions and Recommendations of the Criminal Section of the Report.

Stuffed tiger
© John Cobb, WWF-UK

250
For example, the PAW has produced a number of leaflets in English and Welsh about wildlife crime and a video promoting its work is nearing completion. Several NGOs including TRAFFIC, RSPB and WWF-UK also produce leaflets and materials

251
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I - References

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2 - Glossary

APIL	Association of Personal Injury Lawyers
BC	Butterfly Conservation
BTO	British Trust for Ornithology
CFI	Court of First Instance
CIEH	Chartered Institute of Environmental Health
CITES	Convention on the International Trade in Endangered Species of Wild Fauna and Flora
COTES	Control of Trade in Endangered Species (Enforcement) Regulations 1997
CLS	Community Legal Services
CNP	Council for National Parks
CPR	Civil Procedure Rules
CPS	Crown Prosecution Service
CPRE	Council for the Protection of Rural England
CroW	Countryside and Rights of Way Act 2000
CWESO	Customs Wildlife and Endangered Species Officer
DCA	Department for Constitutional Affairs (formerly the Lord Chancellor's Department)
DEFRA	Department for Environment, Food and Rural Affairs (formerly Department for the Environment, Transport and the Regions (DETR)
DNN	Domestic Noise Nuisance
DWI	Drinking Water Inspectorate
EA	Environment Agency
ECJ	European Court of Justice
EIA	Environmental Investigations Agency
EIA	Environmental Impact Assessment
EJP	Environmental Justice Project
ELF	Environmental Law Foundation
ELR	Environmental Law Reports
ENDs	Environmental Data Services Report
EN	English Nature
EPA	Environmental Protection Act 1990
FOE	Friends of the Earth
GMO	Genetically Modified Organism
HCT	Herpetological Conservation Trust
HMCE	Her Majesty's Customs and Excise
HSE	Health and Safety Executive
JEL	Journal of Environmental Law
JNCC	Joint Nature Conservation Committee
JR	Judicial Review

2 - Glossary

LSC	Legal Services Commission
MCS	Marine Conservation Society
MNR	Marine Nature Reserve
NGO	Non-Governmental Organisation
NWCIU	National Wildlife Crime Intelligence Unit
PACE	Police and Criminal Evidence Act 1984
PAW	Partnership Against Wildlife Crime
PWLO	Police Wildlife Liaison Officer
RIPA	Regulation of Investigatory Powers Act 2000
RMNC	Review of Marine Nature Conservation
RSPB	Royal Society for the Protection of Birds
RSPCA	Royal Society for the Protection of Animals
SAC	Special Area of Conservation (under the EC Habitats Directive)
SCA	Supreme Court Act 1981
SNCO	Special Nature Conservation Order
SPA	Special Protection Area (under the EC Birds Directive)
SSSI	Site of Special Scientific Interest
TCPA	Town and Country Planning Association
TWTs	The Wildlife Trusts
UCL	University College London
WCA	Wildlife and Countryside Act 1981
WWT	Wildfowl and Wetlands Trust

3 - Respondents to the Civil Law Questionnaire

Solicitors

	Ashurst Morris Crisp
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John Blakesley	Gamlins Solicitors
Richard Buxton	Richard Buxton Environmental & Public Law
Alan Care	Co-ordinator Association of Personal Injury Lawyers (APIL) Environment Special Interest Group
Maria Cull	Herbert Smith
John Dunkley	EarthRights Solicitors
Peter Harvey	Veale Wasbrough Lawyers
Nicholas Holmes	Alexander Harris Solicitors
	Irwin Mitchell Solicitors
Michael Orlick	Lodders Solicitors
Fatema Patwa	Patwa Solicitors
Penny Simpson	DLA
Richard Stein	Leigh, Day & Co Solicitors
Neil Stockdale	Hugh James Solicitors
Marc P. Weingarten	Greitzer and Locks Attorneys at Law, Pennsylvania
Andrew Wiseman	Trowers Hamlins

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Lord Dan Brennan QC	Matrix Chambers
Kate Cook	Matrix Chambers
Counsel	39 Essex Street
Counsel	2 Harcourt Buildings
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Martin Edwards	39 Essex Street
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Michael Fordham	Blackstone Chambers
David Forsdick	Landmark Chambers
Ben Jaffey	Blackstone Chambers
Kate Markus	Doughty Street Chambers
Daniel Owen	Fenners Chambers
Charles Pugh	Old Square Chambers

3 - Respondents to the Civil Law Questionnaire

Philippe Sands QC	Matrix Chambers
Maurice Sheridan	Matrix Chambers
Deborah Tripley	Fenners Chambers
David Wolfe	Matrix Chambers

Non Governmental Organisations (substantive views = *)

Angling Conservation Association
Bat Conservation Trust
Buglife – The Invertebrate Conservation Trust
Butterfly Conservation
Council for National Parks
Council for the Protection of Rural England
Environmental Investigations Agency
Friends of the Earth*
Greenpeace*
Herpetological Conservation Trust
Marine Conservation Society
Plantlife
Royal Society for the Protection of Birds*
Wildfowl and Wetlands Trust*
Woodland Trust
WWF-UK*

4 - Environmental Justice Project Report NGO Questionnaire

(Note - we are interested in legal actions relating to the environment. That is not always easy to define. Using the Environmental Information Regulations 2002 as being the best guide we define that for these purposes as being actions relating to the direct and indirect effects on human beings, fauna, flora, cultural sites and built structures, soil, water, air atmosphere, climate, the land, landscape, natural sites, biological diversity, energy, noise, radiation, waste, material assets and the cultural heritage).

1. Does your organisation pursue legal actions[1]? If so, please proceed to question 2.

If not, please weight the following reasons for this – and expand if you are able):

Do not understand how the legal system works .....
It is too expensive .....
It is too risky .....
Do not think it is the most effective mechanism .....
Other .....(100%)

Comments:
.....
.....
.....
.....
.....

	90	91	92	93	94	95	96	97	98	99	00	01	02	03
JR														
SN														
SA														
CC														
NC														
PDC														
EC														

2. How many legal actions has your organisation initiated since 1990?

JR = Judicial Review, SN = Statutory Nuisance, SA =Statutory Appeal, C = Compensation Claims, C = Nuisance Claims, PDC = Property Damage Claims, C = European Courts

1 A legal action is defined as any case going through the courts including judicial review, nuisance claims, statutory appeals, compensation claims etc.

4 - Environmental Justice Project Report NGO Questionnaire

3. In terms of Judicial Review, how has your organisation fared since 1990?

At First Instance	No. Cases Heard	Won .....
At High Court	No. Cases Heard	Won .....
At Court of Appeal	No. Cases Heard	Won .....
At House of Lords	No. Cases Heard	Won .....

Comments (please indicate which Court you are referring to):

.....
.....
.....
.....

4. In general, how satisfied are you with the current rules on *Locus standi* in the English Courts? Delete as appropriate:

Very Satisfied Quite Satisfied Not Satisfied

Comments (please indicate which Court you are referring to):

.....
.....
.....

5. In general, how satisfied are you with the Courts understanding of environmental issues? Delete as appropriate:

Very Satisfied Quite Satisfied Not Satisfied

Comments (please indicate which Court you are referring to)

.....
.....
.....

6. In general, how satisfied are you with the penalties imposed by the Courts? Delete as appropriate:

Very satisfied Quite satisfied Not Satisfied

Comments (please indicate which Court you are referring to):

.....
.....
.....

4 - Environmental Justice Project Report NGO Questionnaire

7. In general, how satisfied are you with the rules and procedures on costs? Delete as appropriate:

Very Satisfied Quite Satisfied Not Satisfied

Comments (please indicate which Court you are referring to):

.....
.....
.....

8. Do you think the current judicial system provides adequate environmental protection? If not, what are the barriers to environmental justice in England?

.....
.....
.....

9. What improvements to the current judicial system would you like to see considered?

.....
.....
.....

Thank you for your time.

4 - Environmental Justice Project Report NGO Questionnaire

Environmental Justice Project

(Please complete one form for each legal action of significance)

1. Title and date of legal action

.....

2. Nature of action (brief)

.....
.....
.....

3. Outcome

.....
.....
.....

4. Comments

(e.g. limitations or benefits experienced by the case as a result of the present judicial system, or any other issues of significance raised by the case):

.....
.....
.....
.....
.....
.....
.....
.....
.....

4 - Environmental Justice Project Report Practitioners' Questionnaire

Environmental Justice Project

Practitioners' Questionnaire

1. Approximately how many environmental legal actions have you been instructed on since 1990 in the following discrete areas?

	90	91	92	93	94	95	96	97	98	99	00	01	02	03
JR														
SN														
SA														
CC														
NC														
PDC														
EC														

JR = Judicial Review SN = Statutory Nuisance SA =Statutory Appeal PIC = Personal Injury Compensation Claims PDC = Property Damage Claims HR = Human Rights EC = European Courts

2. What is the breakdown of your client base on environmental cases?

Individuals with legal aid ……..
Individuals with private funding ……..
Individuals with insurance funding ……
Community/residents groups ……..
Environmental NGOs ……..
A combination of the above ……..
Other …….. (total = 100%)

JUDICIAL REVIEW CASES

3. In terms of Judicial Review, how have your clients fared since 1990?

At First Instance No. Cases Heard ……. Won …….
At High Court No. Cases Heard ……. Won …….
At Court of Appeal No. Cases Heard ……. Won …….
At House of Lords No. Cases Heard ……. Won …….

Comments (please indicate which Court(s) you are referring to):

……
……
……

4 - Environmental Justice Project Report Practitioners' Questionnaire

4. In general, how satisfied are you with the current rules on *Locus standi* operating in the Courts? Delete as appropriate:

Very Satisfied Quite Satisfied Not Satisfied

Comments (please indicate which Court(s) you are referring to):

.....
.....
.....

5. In general, how satisfied are you with the Courts understanding of environmental issues? Delete as appropriate:

Very Satisfied Quite Satisfied Not Satisfied

Comments (please indicate which Court(s) you are referring to)

.....
.....
.....

6. In general, how satisfied are you with the penalties imposed by the Courts? Delete as appropriate:

Very satisfied Quite satisfied Not Satisfied

Comments (please indicate which Court(s) you are referring to):

.....
.....
.....

7. In general, how satisfied are you with the rules and procedures on costs? Delete as appropriate:

Very Satisfied Quite Satisfied Not Satisfied

Comments (please indicate which Court(s) you are referring to):

.....
.....
.....

4 - Environmental Justice Project Report Practitioners' Questionnaire

8. Do you think the judicial system provides adequate environmental protection? If not, what are the main barriers to environmental justice in England?

.....
.....
.....

9. What improvements to the current system would you like to see considered?

.....
.....
.....

OTHER ENVIRONMENTAL CLAIMS

10. In terms of non-Judicial Review, how have your clients fared since 1990?

At County Court	No. Cases Heard	.....	Won/Lost.....
At High Court	No. Cases Heard	.....	Won/Lost.....
At Court of Appeal	No. Cases Heard	.....	Won/Lost.....
At House of Lords	No. Cases Heard	.....	Won/Lost.....

Comments (please indicate which Court(s) you are referring to):

.....
.....
.....

11. In general, how satisfied are you with the Courts understanding of environmental issues? Delete as appropriate:

Very Satisfied Quite Satisfied Not Satisfied

Comments (please indicate which Court(s) you are referring to)

.....
.....
.....

4 - Environmental Justice Project Report Practitioners' Questionnaire

12. In general, how satisfied are you with the Courts handling of environmental claims? Delete as appropriate:

Very satisfied Quite satisfied Not Satisfied
Comments (please indicate which Court(s) you are referring to):

.....
.....
.....

13. In general, how satisfied are you with the issue of costs in relation to these claims? Delete as appropriate:

Very Satisfied Quite Satisfied Not Satisfied

Comments (please indicate which Court(s) you are referring to):

.....
.....
.....

14. Do you think the judicial system provides adequate environmental protection? If not, what are the main barriers to environmental justice in England?

.....
.....
.....

15. What improvements to the current system would you like to see considered?

.....
.....
.....

Thank you for your time

5 - Rebecca Mant and Klim McPherson, formerly of Bristol University

Contents

Introduction

The Environmental Justice Project supplied Bristol University with a number of datasets representing a considerable variety of different data sources over recent periods. For the most part, the data was organised by region (of which there were several discordant definitions) and calendar period. This report provides an analysis of change by period and region.

The statistical methods used are standard tests of heterogeneity (i.e. systematic differences) and of trend. Broadly speaking, chi-squared tests investigate systematic differences in proportions and regression techniques of trends (often with time). Basically, the idea is to estimate the size of the effects and their likely confidence bands (95% confidence intervals) and to test for the extent to which such differences can be explained by random variation – as opposed to systematic effects.

5 - Rebecca Mant and Klim McPherson, formerly of Bristol University

1. Home Office

Defendants proceeded against for various Environmental Offences

Data described
Number of defendants proceeded against at the Magistrates' Courts for various environmental offences (divided by Act and section of Act).

Data analysed
A table of the data was produced (Figure 1.1) and the Pearson's correlation calculated to detect time trends in the data. The significance of the correlation values has been given to show how much the data resembles a straight line and the slope of each significant straight line has been calculated. The total number of environmental offences under each Act, and the correlation, was also calculated.

Figure 1.1 Defendants proceeded against at the Magistrates' Courts for various Environmental Offences in England and Wales 1997 – 2001

Statute	Offence description	1997	1998	1999	2000 [2]	2001	correlation	Significance	Slope
Wildlife and Countryside Act 1981									
Sec 1	Protection of wild birds	36	29	28	23	22	-0.961	**	-3.23
Sec 1	Protection of nests and eggs of wild birds	24	19	14	10	31	0.457	NS	
Sec 3	Illegal entry into bird sanctuaries	-	-	-	-	1			
Sec 3	Protection of wild birds in sanctuaries	-	-	-	-	-			
Sec 3	Protection of the nests and eggs of wild birds in sanctuaries	-	-	-	-	-			
Sec 5	Prohibition of certain methods of killing or taking wild birds	8	3	7	5	2	-0.663	NS	
Sec 6	Sale etc. of live or dead wild birds, eggs etc	2	3	2	4	1	-0.717	NS	
Sec 7	Registration etc. of certain captive birds	2	-	2	2	-			
All	**72**	**54**	**53**	**44**	**57**	**-0.552**	**NS**		
Abandonment of Animals Act 1960									
Sec 1	The abandonment of animals	26	36	17	26	25	-0.301	NS	

5 - Rebecca Mant and Klim McPherson, formerly of Bristol University

Statute	Offence description	1997	1998	1999	2000 [2]	2001	correlation	Significance	Slope
Game Act 1831									
Sec 4*	Dealer or other person having game in possession out of season	3	17	6	2	1	-0.390	NS	
Sec 3, Sec 12, 23 & 24	Laying poison to destroy or injure game, Killing game illegally Taking or destroying the eggs of game, wild fowl etc, or having eggs so taken in possession	21	20	25	9	7	-0.744	NS	
Sec 25	Sale of game by persons not licensed to kill or sell game	-	-	-	-	-			
Sec 27*	Private individuals etc buying game from persons not licensed as dealers.	-	-	-	2	-			
Sec 28	Dealer buying game from unlicensed person	-	-	-	-	-			
Sec 30 to Sec 32**	Day poaching	230	321	300	242	217	-0.305	NS	
All	**254**	**358**	**331**	**255**	**225**	**-0.386**	**NS**		
Poaching Prevention Act 1862									
Sec 2	Coming from land in possession of game which has been unlawfully obtained or with gun or net	18	17	13	5	6	-0.985	***	-3.14
Control of Pollution Act 1974									
Sec 60	Control of noise on construction sites	29	35	32	32	33	0.410	NS	
Sec 61	Applicant failing to obtain consent etc., to work on construction site, to or to bring to the notice of other person	3	1	1	-	1	-0.683	NS	
Sec 62	Operation of a loud speaker in a street	34	32	69	13	5	-0.409	NS	
Sec 93	Fail to comply with a notice; or fail to furnish information or furnish false information	4	3	-	-	-	-1.000	***	-1.00
All	**70**	**71**	**102**	**45**	**39**	**-0.474**	**NS**		

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Statute	Offence description	1997	1998	1999	2000 [2]	2001	correlation	Significance	Slope
Environment Act 1995									
Sec.110(2) (a)	Failing to comply with any requirements of Sec.108 which specifies the powers of enforcing authorities and persons authorised by them	2	4	-	4	3	0.240	NS	
Sec.110(2) (b)	Fail or refuse to provide facilities, assistance, information or to permit any inspection reasonably required by an authorised person in the execution of his powers or duties under Sec.108	-	3	-	-	2	-1.000	***	-0.33
Sec.110(2) (c)	Preventing any person appearing before or from answering any question put by an authorised person under Sec.108(4)	1	5	-	1	-	1.000	***	4.00
Sec.110(4) (a)	Obstructing an authorized person in the execution of his powers under Sec.109	-	-	-	2	1			
Sec.110(4) (b)	Obstructing an authorized person in the execution of his powers	2	2	1	-	1	-0.845	**	-0.29
All	**5**	**14**	**1**	**7**	**7**	**-0.117**	**NS**		
Clean Air Act 1993									
	Offences relating to public health as caused by air pollution	43	52	35	19	17	-0.882	**	-7.69
Sec 33	Cable burning	1	-	3	5	3	0.866	**	0.50
All	**44**	**52**	**38**	**24**	**20**	**-0.883**	**	**-7.03**	
Total		**890**	**1,099**	**1,042**	**757**	**707**	**-0.590**	**NS**	

* as amended by the Game Act 1970
** as amended by the Criminal Justice & Public Order Act 1994, Sec.168 Sch.9 (1)
*** as amended by Environment Act 1995 Sch.19 paragraph 1(3)

Overall, there has not been a significant linear trend in the number of cases bought over all offences. There has, however, been a significant downward trend for the number of cases progressed under the Clean Air Act 1993.

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2. Environment Agency

Data described and evaluated

Statistics from the National Enforcement Database (NED) showing prosecutions, cautions and enforcement notices per region for offences relating to: waste, water quality, water, resources, radioactive substances, fisheries, process industry regulation, flood defence and navigation (1999 – 2000). Unfortunately, the boundaries in the NED do not coincide with the LCD/DEFRA dataset as the boundaries correspond to Environment Agency administrative areas, which reflect river catchments.

Data analysed

The number of prosecutions varies greatly between offences as shown in Figure 2.1. There were small numbers of defendants for all offences except waste and water quality. There were a much larger number of fisheries offences in 2002 than in other years (35 compared to 3). There were a higher number of process industry regulation offences in the Midlands and North West than the South West and Southern regions (51 and 54 compared to 1 and 6 over all years). The North East is the only region with no water resources actions over the whole four years.

Figure 2.1[1] Number of Actions for each Offence by Year and Region

Process Industry Regulation

Region	Year 1999	2000	2001	2002
Southern	0	0	1	0
South West	1	4	1	0
Thames	1	5	7	5
Anglian	3	4	4	2
Midlands	13	11	12	15
North East	6	4	8	5
North West	18	14	13	9
Welsh	9	7	5	0
All Areas	51	49	51	36

Radio Active Substances Regulation

Region	Year 1999	2000	2001	2002
Southern	1	0	1	0
South West	1	3	1	1
Thames	0	2	54[1]	5
Anglian	1	1	3	0
Midlands	3	4	5	2
North East	2	2	5	3
North West	1	5	2	3
Welsh	1	0	1	0
All Areas	10	17	72	14

1 We understand that the correct figure for radioactive substance regulation in the Thames region in 2001 is 7, rather than 54. An amendment to the total number of actions for each offence has been made in Table 2 of the Project Report

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Waste

Region	Year 1999	2000	2001	2002
Southern	30	79	88	64
South West	63	80	82	102
Thames	59	99	63	130
Anglian	51	63	56	64
Midlands	185	142	242	226
North East	163	143	123	97
North West	158	151	144	175
Welsh	86	114	165	150
All Areas	795	871	963	1008

Water Quality

Region	Year 1999	2000	2001	2002
Southern	37	43	41	34
South West	62	93	53	69
Thames	42	41	22	39
Anglian	89	49	38	39
Midlands	36	46	60	78
North East	33	41	33	26
North West	64	52	61	59
Welsh	69	85	84	64
All Areas	432	450	392	408

Water Resources

Region	Year 1999	2000	2001	2002
Southern	2	7	2	0
South West	0	1	3	1
Thames	3	14	3	2
Anglian	3	5	1	0
Midlands	3	8	9	5
North East	0	0	0	0
North West	4	12	5	4
Welsh	0	5	6	11
All Areas	15	52	29	23

All Offences

Region	Year 1999	2000	2001	2002
Southern	70	129	133	102
South West	127	181	142	175
Thames	110	170	160	203
Anglian	147	122	102	105
Midlands	242	211	328	333
North East	204	191	169	144
North West	250	235	226	251
Welsh	165	212	261	226
All Areas	1315	1451	1521	1539

Flood Defences

Region	Year 1999	2000	2001	2002
South West	0	0	2	0
Thames	1	1	1	0
Midlands	2	0	0	0
North West	5	1	1	1
Welsh	0	1	0	1
All	8	3	4	1

Fisheries

Region	Year 1999	2000	2001	2002
Southern	0	0	0	4
South West	0	0	0	2
Thames	1	2	3	8
Midlands	0	0	0	7
North East	0	1	0	13
Welsh	0	0	0	1
All	**1**	**3**	**3**	**35**

Navigation

Region	Year 1999	2000	2001	2002
Thames	3	6	7	14
All	3	6	7	1

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Enforcement measures undertaken by the Agency include prosecutions, cautions and enforcement notices. Figure 2.2 shows the percentage of the total number of actions each measure represents within each offence, and shows a large degree of variation in the percentage of different types of actions for different offences.

Figure 2.2

		Type of Action		
Offence	**No of Actions**	**Pros.**	**Cautions**	**Enf. Notices**
Offence	No of Actions	Pros.	Cautions	Enf. Notices
Waste	3637	48%	17%	34%
Water Quality	1682	54%	36%	10%
Process Industry Regulation	187	14%	11%	75%
Water Resources	119	45%	48%	8%
Radio Active Substances Regulation	113	35%	22%	42%
Fisheries	42	71%	29%	0%
Navigation	30	90%	0%	10%
Flood defences	16	44%	56%	0%
All	5826	49%	23%	28%

The percentages were broken down by year over all regions for the offences listed below (Figure 2.22). This shows the percentage of different actions has varied over time, although there appear to be no linear trends.

Figure 2.22 % of Prosecutions, Cautions and Enforcement Notices for all Regions

Year	No. of Actions	% Pros.	% Cautions	% Enf. Notices
Fisheries				
1999	1	100%	0%	0%
2000	3	100%	0%	0%
2001	3	67%	33%	0%
2002	35	69%	31%	0%
Navigation				
1999	3	100%	0%	0%
2000	6	100%	0%	0%
2001	7	57%	0%	43%
2002	14	100%	0%	0%
Process Industry Regulation				
1999	51	12%	10%	78%
2000	49	24%	16%	59%
2001	51	12%	8%	80%
2002	36	8%	8%	83%

Year	No. of Actions	% Pros.	% Cautions	% Enf. Notices
Flood Defences				
1999	8	50%	50%	0%
2000	3	33%	67%	0%
2001	4	50%	50%	0%
2002	1	0%	100%	0%
Water Resources				
1999	15	67%	13%	20%
2000	52	40%	52%	8%
2001	29	34%	59%	7%
2002	23	52%	48%	0%
Radioactive Substance Regulation				
1999	10	30%	20%	50%
2000	17	18%	18%	65%
2001	72	46%	14%	40%
2002	14	7%	71%	21%

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The percentage of prosecutions was also broken down by region and year for waste, water quality and all offences (Figure 2.23), as there was more data pertaining to these offences. This shows that there were a higher percentage of prosecutions in the Southern region compared to other regions, but that this percentage seems to be decreasing.

Figure 2.23 % of Actions that are Prosecutions

Waste

Region	Year 1999	2000	2001	2002
Southern	77%	71%	63%	66%
South West	27%	24%	49%	40%
Thames	61%	49%	65%	68%
Anglian	41%	60%	50%	63%
Midlands	44%	40%	34%	34%
North East	46%	55%	58%	60%
North West	29%	53%	51%	59%
Welsh	27%	48%	54%	45%
All regions	41%	50%	50%	51%

Water Quality

Region	Year 1999	2000	2001	2002
Southern	81%	67%	61%	62%
South West	42%	40%	64%	49%
Thames	69%	63%	68%	64%
Anglian	34%	47%	61%	74%
Midlands	67%	67%	47%	46%
North East	45%	49%	73%	62%
North West	52%	38%	56%	51%
Welsh	52%	55%	55%	55%
All regions	52%	52%	58%	55%

All

Region	Year 1999	2000	2001	2002
Southern	79%	68%	62%	66%
South West	35%	31%	54%	45%
Thames	64%	50%	55%	65%
Anglian	36%	53%	52%	66%
Midlands	46%	46%	36%	37%
North East	46%	54%	58%	56%
North West	34%	47%	50%	55%
Welsh	37%	50%	52%	48%
All regions	43%	49%	50%	52%

The Pearson correlation coefficients were calculated to detect any time trends in the data (Figure 2.24). Overall, the data shows a significant upward trend over the years. However, within this, there is a significant downward trend for all offences in the Midlands. The data for water quality in the Anglian Region shows a perfect correlation.

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Figure 2.24 Pearson Correlation of % Prosecutions by Year

Waste Offences		
Region	**Correlation**	**Significance[a]**
Southern	-0.862	NS
South West	0.716	NS
Thames	0.572	NS
Anglian	0.703	NS
Midlands	-0.955	*
North East	0.947	*
North West	0.864	NS
Wales	0.654	NS
All regions	0.846	NS

Water Quality Offences		
Region	**Correlation**	**Significance[a]**
Southern	-0.894	*
South West	0.543	NS
Thames	-0.458	NS
Anglian	1.00	***
Midlands	-0.892	*
North East	0.746	NS
North West	0.262	NS
Welsh	0.648	NS
All regions	0.713	NS

All		
Region	**Correlation**	**Significance[a]**
Southern	-0.809	NS
South West	0.664	NS
Thames	0.165	NS
Anglian	0.931	*
Midlands	-0.875	*
North East	0.847	NS
North West	0.940	*
Welsh	0.698	NS
All regions	0.930	*

(a NS – Not significant, * - p<0.05, ** - p<0.01, ***- p<0.001)

The percentage of actions that were cautions for all regions and area for waste, water quality and all offences was also calculated (Figure 2.25). There were generally a much lower percentage of cautions than prosecutions.

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Figure 2.25 % of Actions that are Cautions

Water Quality

Region	Year 1999	2000	2001	2002
Southern	16%	30%	37%	38%
South West	53%	42%	30%	36%
Thames	24%	24%	27%	36%
Anglian	16%	47%	37%	26%
Midlands	28%	17%	27%	29%
North East	45%	41%	21%	38%
North West	45%	52%	44%	46%
Welsh	46%	41%	39%	44%
All	34%	38%	34%	37%

Waste

Region	Year 1999	2000	2001	2002
Southern	20%	14%	15%	16%
South West	14%	25%	26%	31%
Thames	2%	9%	22%	15%
Anglian	24%	29%	18%	22%
Midlands	9%	13%	13%	23%
North East	20%	17%	16%	27%
North West	15%	17%	13%	10%
Welsh	10%	13%	23%	31%
All	14%	16%	17%	22%

All

Region	Year 1999	2000	2001	2002
Southern	19%	22%	21%	23%
South West	34%	35%	29%	33%
Thames	11%	17%	18%	20%
Anglian	19%	34%	25%	23%
Midlands	11%	13%	16%	24%
North East	24%	23%	17%	32%
North West	24%	27%	23%	21%
Welsh	25%	26%	29%	35%
All	21%	24%	22%	26%

The Pearson correlation coefficient has again been calculated to test for time trends within the data (Figure 2.26). There is no significant time trend overall for all offences and regions. Also, there is a significant upward trend for waste offences in all regions.

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Figure 2.26

Waste Offences		
Waste Offences	**Correlation Coefficient**	**Significance[a]**
Southern	-0.586	NS
South West	0.94	*
Thames	0.798	NS
Anglian	-0.456	NS
Midlands	0.903	*
North East	0.506	NS
North West	-0.857	NS
Welsh	0.978	**
All	0.964	**

Water Quality Offences		
Water Quality Offences	**Correlation Coefficient**	**Significance[a]**
Southern	0.934	*
South West	-0.826	NS
Thames	0.906	*
Anglian	0.187	NS
Midlands	0.343	NS
North East	-0.498	NS
North West	-0.235	NS
Welsh	-0.409	NS
All	0.187	NS

All		
All Offences	**Correlation Coefficient**	**Significance[a]**
Southern	0.852	NS
South West	-0.398	NS
Thames	0.935	*
Anglian	0.049	NS
Miidlands	0.957	*
North East	0.411	NS
North West	-0.681	NS
Welsh	0.931	*
All	0.743	NS

(a NS – Not significant, * - $p<0.05$, ** - $p<0.01$)

The percentage of enforcement notices for each region and year for waste, water quality and all offences has been calculated (Figure 2.27). There were a particularly low percentage of enforcement notices for water quality offences, especially in Southern region. Generally, there was a lower percentage of enforcement notices than prosecutions, and a similar or slightly higher percentage of enforcement notices than cautions for waste and all offences.

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Figure 2.27 % of Actions that are Enforcement Notices

Water Quality				
	Year			
Region	1999	2000	2001	2002
Southern	3%	2%	2%	0%
South West	5%	18%	6%	14%
Thames	7%	12%	5%	0%
Anglian	51%	6%	3%	0%
Midlands	6%	15%	27%	24%
North East	9%	10%	6%	0%
North West	3%	10%	0%	3%
Welsh	1%	4%	6%	2%
All	14%	10%	7%	8%

Waste				
	Year			
Region	1999	2000	2001	2002
Southern	3%	15%	23%	19%
South West	59%	51%	26%	28%
Thames	37%	41%	13%	17%
Anglian	35%	11%	32%	16%
Midlands	47%	47%	53%	44%
North East	34%	28%	26%	13%
North West	56%	30%	36%	31%
Welsh	63%	39%	23%	24%
All	46%	34%	33%	27%

All				
	Year			
Region	1999	2000	2001	2002
Southern	3%	10%	17%	12%
South West	31%	34%	18%	22%
Thames	25%	33%	27%	15%
Anglian	45%	12%	23%	11%
Miidlands	43%	40%	48%	39%
North East	31%	23%	25%	12%
North West	42%	26%	27%	25%
Welsh	38%	25%	18%	16%
All	36%	27%	28%	22%

Again, the Pearson correlation coefficient was calculated to test for time trends (Figure 2.28 below). This shows that there has been a significant decrease in the percentage of enforcement notices for all offences and waste and water quality offences in all areas. However, there has been a significant increase in the percentage of enforcement notices for water quality offences in the Midlands.

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Figure 2.28

Waste Offences		
Region	**Correlation**	**Significance[a]**
Southern	0.830	NS
South West	-0.913	*
Thames	-0.807	NS
Anglian	-0.410	NS
Midlands	-0.115	NS
North East	-0.948	*
North West	-0.748	NS
Welsh	-0.918	*
All	-0.946	*

Water Quality Offences		
Region	**Correlation**	**Significance[a]**
Southern	-0.823	NS
South West	0.319	NS
Thames	-0.737	NS
Anglian	-0.836	NS
Midlands	0.910	*
North East	-0.898	*
North West	-0.283	NS
Welsh	0.169	NS
All	-0.903	*

All		
Region	**Correlation**	**Significance[a]**
Southern	0.736	NS
South West	-0.734	NS
Thames	-0.651	NS
Anglian	-0.747	NS
Midlands	-0.084	NS
North East	-0.898	*
North West	-0.793	NS
Welsh	-0.942	*
All	-0.907	*

(a NS – not significant, * p<0.05)

A prosecution can result in a not guilty verdict or a guilty verdict (and subsequent fine and/or custodial sentence). The percentage of people with at least one guilty verdict was calculated for all offences over all regions and years (Figure 2.3). This shows that there is a very high conviction rate. The lowest conviction rate was for offences concerning fisheries.

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Figure 2.3

Offence	Percentage
Fisheries	90%
Flood Defence	100%
Navigation	96%
Process industry regulation	100%
Radioactive substance regulation	100%
Water resources	98%
Water quality	98%
Waste	96%
All offences	97%

The conviction rates were calculated by year and area for the offences shown below (Figure 2.32). There was a 100% conviction rate in South West in all years for all offences. There appears to be no linear trend in the conviction rates over time for all regions.

Figure 2.32 % Convicted (to nearest whole number)

Water Quality

	Year			
Region	1999	2000	2001	2002
Southern	100%	95%	95%	98%
South West	100%	100%	100%	100%
Thames	100%	98%	98%	95%
Anglian	95%	100%	96%	90%
Midlands	100%	95%	96%	96%
North East	99%	95%	92%	90%
North West	98%	91%	99%	99%
Welsh	100%	87%	96%	100%
All	99%	94%	96%	96%

Waste

	Year			
Region	1999	2000	2001	2002
Southern	100%	100%	100%	100%
South West	100%	100%	100%	100%
Thames	100%	100%	100%	96%
Anglian	100%	91%	100%	100%
Midlands	88%	81%	100%	100%
North East	100%	100%	88%	100%
North West	97%	100%	100%	100%
Welsh	100%	96%	100%	100%
All	98%	96%	99%	100%

All

	Year			
Region	1999	2000	2001	2002
Southern	100%	97%	96%	99%
South West	100%	100%	100%	100%
Thames	99%	99%	99%	95%
Anglian	98%	97%	98%	94%
Midlands	96%	91%	97%	97%
North East	99%	96%	99%	93%
North West	98%	94%	91%	99%
Welsh	99%	91%	97%	100%
All	98%	95%	97%	97%

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Figure 2.4 shows the number of custodial sentences awarded by region and year. There were 32 custodial sentences imposed from a total 1,748 prosecutions, all of which were for waste offences.

Figure 2.4

Custodial Sentences

Region	year: 1999	2000	2001	2002	All years
Southern	0	0	0	0	0
South West	0	0	0	0	0
Thames	0	2	0	0	2
Anglian	2	1	0	1	4
Midlands	0	1	1	4	6
North East	0	0	8	0	8
North West	2	7	0	0	9
Welsh	1	0	2	0	3
All regions	5	11	11	5	32

The average fine for each offence was also calculated (Figure 2.5). This value varies greatly between offences. The largest average fine was for process industry regulation offences, possibly because these offences are more likely to be carried out by large corporations. The smallest fines are for offences involving navigation and fisheries.

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Figure 2.5

Offence	Average Fine (£)
Water resources	2180.19
Radioactive substance regulation	9621.25
Process industry regulation	20462.96
Flood Defence	1542.86
Navigation	371.11
Fisheries	277.33
Waste	2826.76
Water quality	6233.97
All	4208.99

The average fines for waste, water quality and all offences were broken down by area and year (Figure 2.52).

Figure 2.52 Average Fines (£)

Water Quality

	Year				
Region	1999	2000	2001	2002	All
Southern	1795.22	1514.13	2230.77	2656.10	2049.05
South West	997.06	3008.42	1248.35	2534.39	1947.06
Thames	1377.78	7128.23	1620.00	3728.27	3463.57
Anglian	1787.50	3473.68	3429.63	6838.89	3882.43
Midlands	2161.11	6000.83	3112.09	4569.55	3960.90
North East	3015.07	2042.57	1332.83	2983.46	2343.48
North West	2672.27	2969.93	3312.85	3132.84	3021.97
Welsh	700.00	2459.90	2520.41	2102.31	1945.66
All	1813.25	3574.71	2350.87	3568.23	2826.76

Waste

	Year				
Region	1999	2000	2001	2002	All
Southern	7161.50	4215.52	4078.00	4075.24	4882.56
South West	1434.81	2156.76	3386.76	5325.00	3075.83
Thames	8970.69	8325.00	10340.00	9170.25	9201.48
Anglian	4923.33	16821.43	10339.13	15325.86	11852.44
Midlands	2688.10	7680.00	3989.29	5908.33	5066.43
North East	4646.67	4120.00	5997.62	5156.25	4980.13
North West	5921.88	3955.00	5151.47	13630.00	7164.59
Welsh	2427.78	3616.67	4604.35	3944.29	3648.27
All	4771.84	6361.30	5985.83	7816.90	6233.97

All

	Year				
Region	1999	2000	2001	2002	All
Southern	4820.64	2419.99	2776.58	2957.58	3243.70
South West	1323.98	2445.71	2849.79	3688.59	2577.02
Thames	4582.39	6988.75	4188.91	5117.77	5219.45
Anglian	3610.58	7778.57	7315.38	10625.38	7332.48
Midlands	2342.59	6703.88	3853.96	4772.18	4418.15
North East	3345.82	4207.58	2691.96	3176.53	3355.47
North West	3905.51	3665.43	4114.96	5448.16	4283.52
Welsh	3823.47	2951.30	3379.96	2813.81	3242.13
All	3469.37	4645.15	3896.44	4825.00	4208.99

The correlation coefficients for the data were calculated to test for any time trends in the average fines (Figure 2.53). The results show that there is no significant trend over all the offences and regions. There was a significant increase for waste offences in all regions.

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Figure 2.53 Pearson Correlation Coefficient

Waste Offences			
Region	Correlation	Significance[a]	Slope
Southern	0.851	NS	
South West	0.377	NS	
Thames	0.075	NS	
Anglian	0.920	*	1511.01
Midlands	0.333	NS	
North East	-0.128	NS	
North West	0.819	NS	
Welsh	0.648	NS	
All regions	0.588	NS	

Water Quality Offences			
Region	Correlation	Significance[a]	Slope
Southern	-0.798	NS	
South West	0.978	**	1290.06
Thames	0.402	NS	
Anglian	0.593	NS	
Midlands	0.352	NS	
North East	0.550	NS	
North West	0.716	NS	
Welsh	0.784	NS	
All regions	0.901	*	875.97

All			
Region	Correlation	Significance[a]	Slope
Southern	-0.629	NS	
South West	0.985	**	749.79
Thames	-0.124	NS	
Anglian	0.922	*	2058.12
Midlands	0.314	NS	
North East	-0.413	NS	
North West	0.822	NS	
Welsh	-0.735	NS	
All regions	0.673	NS	

(a NS – not significant, * p<0.05, ** - p<0.01)

3. Drinking Water Inspectorate

Data described and evaluated

Prosecutions showing: date of incident; date of court case; company; court; incident; offence; potential number of consumers affected; outcome; and costs (from 1993 – 2000). The data was grouped into regions. Only one of all the cases listed had a not guilty verdict and it was not included in the calculations.

Data analysed

A table showing the number of cases in each year and region was produced (Figure 3.1).

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Figure 3.1 Number of Cases by Year and Area

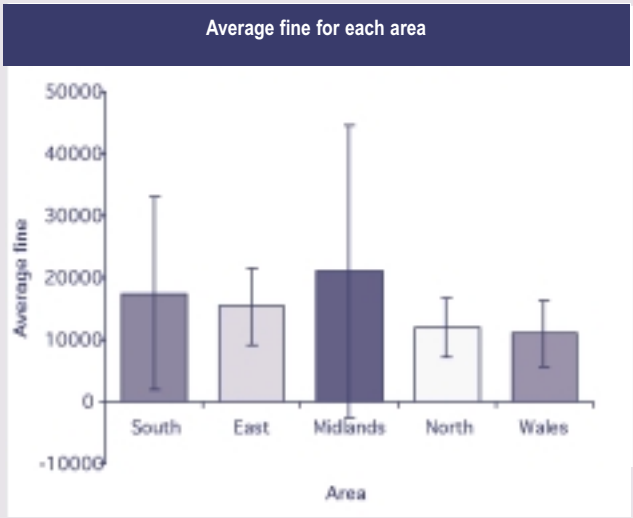
Year	South	East	Area Midlands	North	Wales	All
1995	0	0	1	0	1	2
1996	1	0	0	0	0	1
1997	NG	0	0	0	3	3
1998	2	0	1	3	3	9
1999	4	2	1	2	0	9
2000	1	0	0	4	0	5
2001	1	1	0	0	1	3
All	9	3	3	9	8	32

(NG – not guilty)

The average fine for each region over the seven years was calculated and a graph produced (Figure 3.2). Error bars have been put on the graph to show the 95% confidence limits of the averages. As the graph shows, there are large variations in the average fine between the regions. However, the graph also shows that the means are not very reliable (by the large error bars). The areas inside the error bars overlap for most of the regions suggesting there is not a large degree of significant variation in the fines between regions.

Figure 3.2 Table and Graph of Average Fine per Area

Region	Average fine
South	17444
East	15333
Midlands	21000
North	12042
Wales	11000



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The average fine for each year was also calculated and a graph with error bars produced (Figure 3.3, graph not shown). This data also shows large variations. There was a particularly large average fine for 1996, however, this is made up of just one fine and so trends (or an error bar) cannot be drawn from it. The other years show less variation and they each have quite large error bars that overlap between years. This shows that there are no time trends in the data.

Year	Average fine
1995	23000
1996	80000
1997	6500
1998	10944
1999	9222
2000	15813
2001	15000

Figure 3.3 Table of Average Fine per Year

4. Health and Safety Executive

Data described and evaluated
Number of convictions and average fine by Court and by regulation (2001/2002), number of convictions and average fine by Court and by statutory provision (2001/2002) and average fine for Health and Safety offences (1997/8 – 2001/2). The data was analysed by year for all regulations and statutory provisions.

Data analysed
The conviction rate was calculated and a table of the conviction rate and average fine produced (Figure 4.1).

Figure 4.1

Year	Total Offences prosecuted	Of Which, offences leading to conviction	% Convictions	Average penalty per conviction (£)
1997/98	1627	1284	79%	4,694
1998/99	1759	1512	86%	4,861
1999/00	2115	1616	76%	6,820
2000/01	1973	1490	76%	6,226
2001/02	2035	1494	73%	8,284

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A graph showing the total number prosecuted each year has been produced and the correlation of the data calculated (Figure 4.2). There is no statistically significant correlation between the number of prosecutions and year. However, the coefficient value was only just below the significant level.

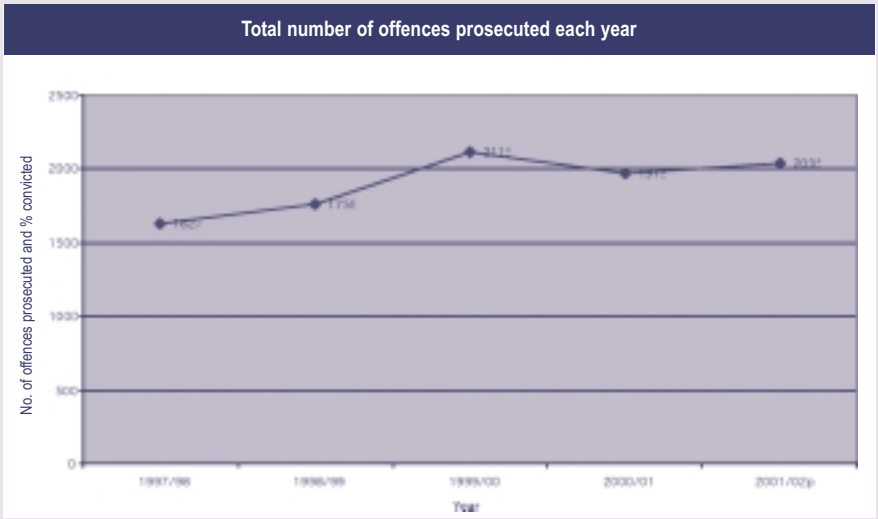

Figure 4.2

Year and number of prosecutions	
Pearson correlation coefficient	**Significance**
0.804	Not significant

A graph of the percentage convicted each year was produced (Figure 4.3) and the correlation of the data calculated. This shows that there is also no significant correlation between the year and the conviction rate.

Figure 4.3

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Year and % Convicted	
Pearson correlation coefficient	Significance
0.700	Not significant

A graph of the average fine was also produced (figure 4.4) and the correlation calculated. There is a significant upward correlation with a slope of 854.5. This is an average increase of 17% a year.

Figure 4.4

Figure 4.4		
Pearson correlation coefficient	Significance	Slope
0.912	P<0.05	854.5

5. Home Office

Prosecutions under various Wildlife Acts

Data described and evaluated
Number of defendants proceeded against at the Magistrates Courts and convicted at all Courts under various Wildlife Acts by region in England and Wales (1998 – 2000).

Data analysed
Conviction rates were calculated and the data aggregated for the whole of England and Wales (as the number convicted was small). Figure 5.1 shows the number proceeded against, number convicted and the percentage convicted per year by Act. The data shows that there was a very low conviction rate for offences against the Protection of Badgers Act 1992.

Figure 5.1

Number of defendants proceeded against at the Magistrates Courts and convicted at all Courts under various Wildlife Acts by region (England and Wales)

Wild Mammals Protection Act 1996			
	Year: 1998	1999	2000
Proceeded against	8	—	5
Convicted	7	—	4
% Convicted	88%	—	80%

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Wildlife and Countryside Act 1981			
	Year: 1998	1999	2000
Proceeded against	71	166	97
Convicted	45	121	80
% Convicted	63%	73%	82%

Protection of Badgers Act 1992			
	Year: 1998	1999	2000
Proceeded against	19	30	21
Convicted	4	10	4
% Convicted	21%	33%	19%

6. English Nature

Prosecutions brought by English Nature

Data described and evaluated
Prosecutions undertaken by English Nature under Sections 28 and 29 of the Wildlife and Countryside Act 1981 and Regulation 23 of the Conservation (Natural Habitats &c.) Regulations 1994 by: date of offence; name of SSSI; County; nature of operation; and outcome (1981 – to date).

Data analysed
The data has been grouped by area, year and type of offence (figure 6.1)

Figure 6.1 Prosecutions brought by English Nature resulting in Guilty Verdicts

	Area			Total
Year	South	Midlands	North	
93-95	Ploughing			1
96-98		Harmful application Drainage	Other	3
99-01	Erecting fencing Vehicle x7 Other x2		Harmful application	11
02	Vehicle Other			2

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Offences

Ploughing	Ploughing of grassland
Harmful Application	Application of – lime, herbicide, or nitrogen based fertiliser
Drainage	Drainage works
Erecting fencing	Erecting a fence
Vehicle	Motorcycling or Quad biking
Other	Unconsented work, bait digging, unauthorised activity or excavation of pond

Other EN data

Data described and evaluated
English Nature also provided a table summarising previous and likely public inquiry involvement (August 2001 to date).

7. TRAFFIC and WWF

CITES prosecutions

Data described and evaluated
Successful prosecutions under the CEMA 1979 and COTES Regulations 1997. This data has been analysed in terms of the type of organism involved, Act/Regulation, protection status and time period.

Data analysed
A table showing the total number of actions for each time period and species was produced (Figure 7.1). It shows that most of the actions involve birds or bird eggs and that the least actions involve plants. Also, there was an increase in actions over the years. The Pearson correlation coefficient was calculated for the number of actions by year (Figure 7.12). This shows that there was a significant increase - but this only relates to just over one case a year.

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Figure 7.1

Species Group	Number of Actions
Birds and bird eggs	47
Reptiles, spiders and amphibians	12
Plants	5
Artifacts	14
Mixture	8
Total	86

Period	Number of actions
1987-1990	15
1991-1994	18
1995-1998	21
1999-2002	32
Total	86

Figure 7.12 Pearson Correlation Coefficient for the number of actions by period

Figure 4.4		
correlation coefficient	Significance	Slope
0.940	p<0.05	1.35

A table of the percentage of actions within each species group by time period was also produced (Figure 7.13). This shows that a large proportion of the cases involve birds or bird eggs, and that the proportion has increased from 47% in 1987-90 to 63% in 1999-2002.

Figure 7.13 Percentage of actions in each species group

Period	Species Group					
Period	Birds and bird eggs	Reptiles, spiders and amphibians	Plants	Artifacts	Mixture	Total
1987-1990	46.7%	26.7%	13.3%		13.3%	100%
1991-1994	50.0%	27.8%	5.6%	16.7%		100%
1995-1998	52.4%	4.8%	4.8%	33.3%	4.8%	100%
1999-2002	62.5%	6.3%	3.1%	12.5%	15.6%	100%
Total	54.7%	14.0%	5.8%	16.3%	9.3%	100%

A table showing the number of cases resulting in each penalty group and the proportion of all penalties that each penalty group involves was also produced (Figure 7.2). This shows that the majority of penalties imposed were fines and costs of between £1 and 500 (41%).

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Figure 7.2

Penalty Group	Number	Percentage of all Penalties
None	1	1%
Fines and Costs equalling £1 – 500	35	41%
Fines and Costs above £500	30	35%
Prison Sentence	17	20%
Other	3	3%
Total	86	100%

Tables of the percentage of people in each penalty group by species involved (Figure 7.22) and time period (Figure 7.23) were also produced. These show the largest percentage of custodial sentences were imposed for offences involving a mixture of species and/or artefacts. There appears to be no relationship between the penalty group and time or species as both gave chi squared values of above 0.05. However, as there were few offences each period it is hard to draw a meaningful conclusion.

Figure 7.22

Species Group	Penalty Group					
	None	Fines and Costs equaling £1 - 500	Fines and Costs above £500	Prison Sentence	Other	Total
Birds and bird eggs	2.1%	42.6%	34.0%	19.1%	2.1%	100%
Reptiles, spiders and amphibians		25.0%	50.0%	8.3%	16.7%	100%
Plants		80.0%		20.0%		100%
Artifacts		42.9%	42.9%	14.3%		100%
Mixture		25.0%	25.0%	50.0%		100%
Total	1.2%	40.7%	34.9%	19.8%	3.5%	100%

Figure 7.23

Period	Penalty Group					
	None	Fines and Costs equaling £1 - 500	Fines and Costs above £500	Prison Sentence	Other	Total
1987-1990		26.7%	46.7%	26.7%		100%
1991-1994		44.4%	44.4%		11.1%	100%
1995-1998		42.9%	23.8%	33.3%		100%
1999-2002	3.1%	43.8%	31.3%	18.8%	3.1%	100%
Total	1.2%	40.7%	34.9%	19.8%	3.5%	100%

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Pearson Chi-Square Tests

Pearson Chi-Square Tests			
% within each penalty group by:	Value	df	Asymp. Sig. (2-sided)
Species [a]	18.893	16	.274
Period [b]	18.796	21	.598

a - 21 cells (84.0%) have expected count less than 5. The minimum expected count is .06.

b - 28 cells (87.5%) have expected count less than 5. The minimum expected count is .17.

The actions covered by the data fall under COTES and CEMA. The different punishments imposed under the Regulations and the Act (and sections of the Act) was calculated and a table of the percentage of guilty within each punishment group produced (Figure 7.3). This shows that there were a higher percentage of custodial sentences for prosecutions under section 170 of CEMA than other offences.

Figure 7.3 Percentage within each penalty group by Act

Act/Offence	Penalty Group					
	Total number of successful prosecutions	None	Fines and Costs Equaling £1 – 500	Fines and Costs above £500	Prison Sentence	Other
Customs and Excise Management Act 1979 section 170	26	0%	19%	46%	27%	8%
Customs and Excise Management Act 1979 – Other	5	0%	40%	40%	20%	0%
COTES section 3(1)	23	0%	57%	26%	17%	0%
COTES regulation 8(1)(2)	25	4%	52%	32%	8%	4%
COTES regulation 8(1)	5	0%	40%	40%	20%	0%
COTES and Customs and Excise Management Act 1797	1	0%	0%	0%	100%	0%
Total	85	1%	41%	35%	19%	4%

The chi-squared value for Act by punishment group was calculated to see whether the Act/Regulations affect the number within each punishment group (Figure 7.32). This gave a value of more than 0.05 suggesting that the Act/Regulation does not affect the punishment group. However, there are small numbers involved (80% of the cells had an expected count of less than 5), which means that the chi-squared value is not absolutely reliable.

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Figure 7.32 Chi-Square Tests

Chi-Square Tests			
	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	22.249	24	.564

a - 28 cells (80.0%) have expected count less than 5. The minimum expected count is .01.

The species involved receive differing levels of protection under the Act/Regulations. They are listed as either CITES Appendix II or I, which, in the European Union, equals a listing on Annex A or B. Annex A lists rarer species, so one would expect offences involving these animals to have greater penalties. A table of the percentage within each penalty group by protection status was produced (Figure 7.4). A chi-squared value for protection status by penalty group has been carried out to test whether the Annex listing has a significant affect on punishment. The results gave a value of more than 0.05 suggesting that there is no significant relationship between protection status and punishment. However, there was a smaller percentage of prison sentences given out in cases involving Annex B species (8%) compared to Annex A and A/B species (33.3% and 34.6%).

Figure 7.4

		Penalty Group					
Protection Status	Number of successful prosecutions	None	Fines and Costs Equaling £1 – 500	Fines and Costs above £500	Prison Sentence	Other	Total
Appendix I	24		29.2%	37.5%	33.3%		100%
Appendix I/II	11		27.3%	36.4%	36.4%		100%
Appendix II	50	2.0%	50.0%	34.0%	8.0%	6.0%	100%
Total	85	1.2%	41.2%	35.3%	18.8%	3.5%	100%

Chi-Square Tests

Chi-Square Tests			
	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	12.757	8	.120

a - 10 cells (66.7%) have expected count less than 5. The minimum expected count is 0.13.

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Other TRAFFIC data

Data described
Data showing the outcome of COTES offences where no prosecution took place was also provided.

Data analysed
A table of the outcome of COTES offences for each time period is given below (figure 7.5).

Figure 7.5

Period	Outcome			
Period	Cautioned	Formal warning	Verbal warning	Total
1987-1990	2	2	1	5
1991-1994	10			10
1995-1998	17	2	3	22
1999-2002	7		1	8
Total	36	4	5	45

Data described
Data showing the outcomes of CEMA offences where no prosecution took place was also provided.

Data analysed
A table of the outcome of CEMA offences each time period is given below (Figure 7.6).

Figure 7.6

Period	Outcome					
Period	**Seized**	**Fine and or costs**	**Seized and fine or costs**	**Seized and cautioned**	**Other**	**Total**
1987-1990	7	1		1	1	10
1991-1994	2	2		1		5
1995-1998	4		1		4	9
1999-2002	1	1	1		1	4
Total	14	4	2	2	6	28

5 - Rebecca Mant and Klim McPherson, formerly of Bristol University

8. RSPB

Data described and evaluated
Spreadsheet of wild bird offenders showing: date of offence; Section and Act concerned; counts; prosecutor; Court; Constabulary; surname; outcome (fine or punishment); and details of offence (1998 – 2002). The information was analysed by year, region and type of offence.

Data analysed
A table of prosecutions per million population across the regions was produced (Figure 8.1). This shows there are large variations in this data.

Figure 8.1

Area	Prosecutions per million population
South	5.26
London	1.12
East	13.36
Midlands	8.37
North	11.76
Wales	18.95

Prosecutions can result in a guilty or not guilty verdict. A table of the percentage guilty by year and area was produced (Figure 8.2). This shows that there was a particularly low conviction rate in 2000 compared to other years. The Midlands showed the highest conviction rate and London showed the lowest. However, there were very few convictions for London so the conviction rate cannot be easily compared (there were only 5 cases altogether over the 5 years).

Figure 8.2 Percentage Guilty by Area and Year

Area	1998	1999	2000	2001	2002	All
South	72.2%	82.1%	61.1%	100.0%	100.0%	75.0%
London		100.0%	66.7%		66.7%	62.5%
East	77.8%	92.9%	46.2%	57.9%	94.1%	73.6%
Midlands	100.0%	85.7%	66.7%	92.0%	100.0%	89.9%
North	76.9%	66.7%	58.6%	75.5%	96.2%	74.9%
Wales	88.9%		58.3%	90.0%	93.3%	83.6%
Total	82.0%	80.2%	58.6%	77.1%	94.7%	78.2%

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Pearson chi-squared values for tables of year and area by outcome were calculated (Figure 8.22). The results for year by outcome give an end value below 0.05 and the results for area by outcome give an end value of marginally above 0.05. This shows that the data for outcome by year is significantly different from the expected, but that the data for outcome by area is not significantly different (but only just). There is, therefore, a significant relationship between year and outcome but not between area and outcome. The chi-square test for linear trend was also calculated for a table of year by outcome. This does not give a significant value, which indicates there is no significant linear trend in the data.

Figure 8.22 Pearson Chi-Square Tests

Pearson Chi-Square Tests				
		Value	df	Asymp. Sig. (2-sided)
Outcome by area [b]	Pearson Chi-Square	10.812	5	.055
Outcome by year [a]	Pearson Chi-Square	33.057	4	.000

a 0 cells (.0%) have expected count less than 5. The minimum expected count is 16.51

b 1 cells (8.3%) have expected count less than 5. The minimum expected count is 1.75.

Cases of this nature can be prosecuted by more than one organisation/body. A table of the number of cases proceeded against and the percentage found guilty for each prosecutor was produced (Figure 8.3) and the chi-squared value of the outcome by prosecutor calculated (Figure 8.32). The chi-squared value is less than 0.05 showing that the prosecutor has a significant affect on the outcome. The majority of cases are prosecuted by the Crown Prosecution Service (CPS) or the RSPCA. The RSPCA has a higher percentage of guilty verdicts than the CPS but prosecutes a smaller number of cases.

Figure 8.3 Table showing % found Guilty by Prosecutor

Prosecutor	Number of cases proceeded against	Percentage found guilty
CPS	331	77.0%
RSPCA	101	86.1%
CPS/MAFF	4	75.0%
HMCE	9	66.7%
RSPCA/CPS	6	33.3%
Total	451	78.3%

x

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Figure 8.32

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	11.833	4	.019

a 5 cells (50.0%) have expected count less than 5. The minimum expected count is 0.87.

The protection of wild birds encompasses a number of offences. Figure 8.4 shows the number of people prosecuted and the percentage found guilty for each offence. The table shows that the largest number of offences involves possessing or taking eggs, possessing, taking or controlling wild birds or possessing an article capable of being used in an offence.

Figure 8.4 Number prosecuted and % found Guilty by Offence

Offences	Number prosecuted	Percentage Guilty
Possessing or taking eggs	79	86.1%
Destroying a nest or eggs or disturbing a nesting birds	20	85.0%
Possessing, taking or controlling a wild bird	89	80.9%
Trading in wild birds	38	68.4%
Causing birds suffering or injury	25	76.0%
Killing, attempting to kill or possessing a dead wild bird	52	78.8%
Possessing article capable of being used in an offence	79	73.4%
Attempting to commit an offence	14	64.3%
Fire arms offences	11	100.0%
Misuse of pesticides	14	64.3%
Other	30	76.7%
Total	451	78.3%

A chi-squared value has been calculated for the outcome by offence (Figure 8.42). This gives a value of more than 0.05, which suggests the type of offence committed does not affect the chances of a guilty verdict.

Figure 8.42

	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	13.390	10	.203

a 4 cells (18.2%) have expected count less than 5. The minimum expected count is 2.39.

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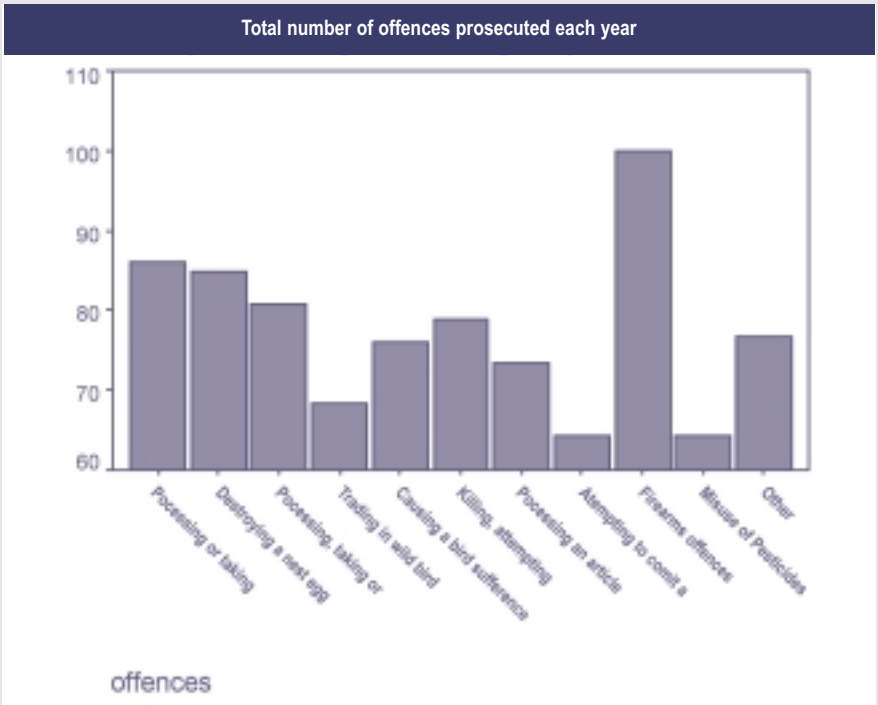
A graph of the percentage found guilty for each offence was produced (Figure 8.43). This visualizes the differences in the conviction rate between offences.



A number of different punishments can be awarded when suspects are convicted. The percentage of cases within each punishment group by year was produced (Figure 8.4). This table shows that the percentage of people receiving different punishments varied throughout the years, but that there were no obvious time trends.

Figure 8.44

Year	Punishment						Total
	No penalty or no specific penalty	Fine £1-500	Fine £500+	Conditional Discharge	Prison Sentence	Other	
1998	11.0%	57.3%	18.3%	13.4%			100.0%
1999	3.0%	58.2%	20.9%	14.9%	3.0%		100.0%
2000	9.8%	49.0%	11.8%	23.5%	5.9%		100.0%
2001	7.4%	33.3%	11.1%	7.4%	16.0%	24.7%	100.0%
2002	23.6%	25.0%	4.2%	13.9%	15.3%	18.1%	100.0%
Total	11.0%	44.2%	13.3%	13.9%	8.2%	9.3%	100.0%

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The average fine for different offences and years are shown below (Figure 8.5). The average fines varied from £1800 to £35, however, the averages within years and offence groups were produced from little data so they are not necessarily representative. The average fines for all offences by year and all years by offences were all between £100 and £600. This shows relatively little variation. The largest variation of fines within an offence is for trading in wild birds.

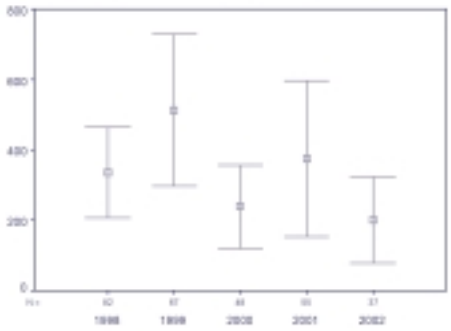
Figure 8.5 Average fine for each Offence (£) by Year

Offence	Year					
	1998	1999	2000	2001	2002	All
Possessing or taking eggs	592.33	1175.45	255.56	280.00	210.00	571
Destroying a nest, eggs or disturbing a nesting bird	360.00	110.00	400.00	1032.50		459
Possessing, taking or controlling a wild bird	513.89	300.00	159.00	227.78	121.43	297
Trading in wild birds	75.00	633.33	40.00	1080.00	1800.00	533
Causing a bird suffering	283.33	256.25	300.00	250.00	250.00	266
Killing, attempting to kill or possessing a dead wild bird	100.00	1225.00	398.75	466.36	112.00	397
Possessing an article capable of being used in an offence	207.69	254.09	247.14	30.00	80.00	179
Attempting to commit an offence	175.00	125.00		50.00	80.00	116
Fire arms offences	150.00	1166.67		125.00	40.00	439
Misuse of pesticides		500.00	650.00		51.67	162
Other	198.89	35.00		150.00	466.67	205
All offences	334.45	511.64	238.65	374.36	189.44	

The 95% confidence limits of the average fine for all offences by year was calculated and a graph showing the confidence limits as error bars produced (Figure 8.52). This graph shows that even though there is variation in the average fine for each year, the error bars overlap, which shows that there is not significant difference in the average fines.

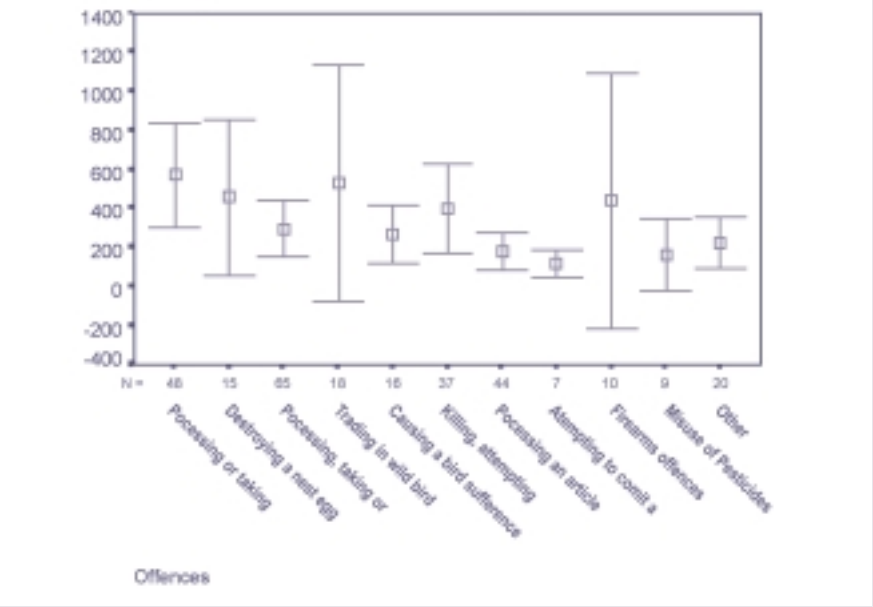
Figure 8.52

Average fine and 95% confidence limits for each year



5 - Rebecca Mant and Klim McPherson, formerly of Bristol University

Average fine and 95% confidence limits



9. RSPCA

Data described and evaluated

Convictions obtained by the RSPCA (1997 – 2001), mostly under the Wildlife and Countryside Act 1981. There was a sharp increase in the number of convictions under the Protection of Animals Act 1911 in 2001. Also, there were large numbers of convictions in 1999 and 1997 under the Badgers Act 1992 when compared to other years.

10. European Court of Justice

Data described and evaluated

Statistical information including Judgments, Opinions and Orders. Unfortunately, the data was not broken down by county and type of case. However, information on the number of environmental actions brought to the EC each year was abstracted. This information covers the whole of Europe and includes parenthetic numbers that are not explained.

Data analysed

Table of the cases brought to the Court of Justice about the Environment and Consumer Affairs (Figure 10).

5 - Rebecca Mant and Klim McPherson, formerly of Bristol University

Figure 10

	Cases Decided			New Cases			
Year	Judgement	Orders	Total	Direct action	References for a preliminary ruling	Appeals	Total
1997	8 (11)		8 (11)	34	8		42
1998	26 (27)		26 (27)	10	20		30
1999	21 (23)		23 (23)	34	7		41
2000	16 (17)	1 (1)	17 (18)	33	13	11	57
2001	20 (21)	10 (10)	30 (31)	49	5	1	55

11. Ports Authorities

Data described and evaluated
Port of London Authority prosecutions for oil pollution by: date of incident; company; quantity of oil released; fine; and costs (1998 – 2000).

12. Environmental Law Foundation

Data described and evaluated
Table showing outline review of advice and referral service for type of cases including: land use; noise; air pollution; conservation; waste; traffic and roads; contaminated land; trees; public rights of way; water pollution; odours; raw sewage; environmental contract; environmental health; oil pollution; fish farming; telecommunications masts; quarry/mining; and village green applications (1997 – 2001).

13. Convictions involving nuclear energy companies

Data described and evaluated
Data on six prosecutions ranging from an employee falling 2.86m, to a failure to ensure employee safety in connection with the silver recovery process. This appears to be a large range of different offences. All of the prosecutions resulted in the defendant being convicted of at least one offence and data and penalty are given.

Data analysed
A Table showing year, company, area, act and penalty is provided (Figure 11).

5 - Rebecca Mant and Klim McPherson, formerly of Bristol University

Figure 11

Year	Company	Area	Act	Penalty (£)
1999	British Energy	Somerset	HSW	30,000
2000	BNFL	Wales	HSW	18,000
2000	BNFL	Cumbria	HSW & IRR	24,000
2000	BNFL	Cumbria	HSW & IRR	15,000
2000	UKAEA	Oxfordshire	HWS	4,000
2000	AEA Technology plc	Oxfordshire	HWS	4,000

14. Conclusion

A wide range of data covering a range of offences has been analysed. However, it is difficult to compare the information between data sets because they cover different time ranges and areas and record different factors. The conviction rates from the various data sets are given below.

Data source	Offences	No. of defendants	No. of defendants	% of defendents convicted
LCD/DEFRA-Environment Agency	Litter	1936	1444	75%
	Statutory Nuisance	9696	3168	33%
	Waste	63	40	63%
Environment Agency-National Enforcement Database	Waste	1748	1682	96%
	Water quality	911	893	98%
	Water resources	53	52	98%
	Radioactive substances	40	40	100%
	Fisheries	30	27	90%
	Process Industry Regulation	27	27	100%
	Flood defence	7	7	100%
	Navigation	27	26	96%
English Nature /Home Office	Killing/taking/sale of wildlife and their products	417	275	66%
Drinking Water Inspectorate	Water Quality	33	32	97%

6 - Generic Questionnaire for Regulatory Authorities

1. How do you decide whether or not to bring a prosecution?

   .....
   .....
   .....

2. What would be the alternatives to a prosecution and how often are they used - and why?

   .....
   .....
   .....

3. Do you consider your powers adequate to be able to prosecute?

   .....
   .....
   .....

4. Do you have sufficient resources to enable you to progress prosecutions?

   .....
   .....
   .....

5. Do you feel the fines/penalties imposed adequately reflect the level of environmental “damage” caused in the short, medium and long term? If not, why not?

   .....
   .....
   .....

6. Do you feel the fines/penalties are effective as a deterrent to would-be offenders?

   .....
   .....
   .....

6 - Generic Questionnaire for Regulatory Authorities

7. Do you feel the courts understand environmental issues and treat them seriously enough? If not, what implications does this have for your organisation and what do you think could be done to address the problem?

.....
.....
.....

8. Are there any other points you would like to add about the findings of the report or environmental justice in England?

.....
.....
.....

7 - Organisations and Respondents

Organisations providing data about criminal environmental prosecutions

Chartered Institute of Environmental Health
Department for Constitutional Affairs (former Lord Chancellor's Department)
District and unitary authorities as listed in Appendix 9
Drinking Water Inspectorate
English Nature
Environment Agency
Health & Safety Inspectorate
Home Office
Nuclear Inspectorate
Ports Authority
Royal Society for the Protection of Animals
Royal Society for the Protection of Birds
TRAFFIC International

Respondents to the criminal law questionnaire

Chartered Institute of Environmental Health
Devon and Cornwall Police Constabulary
Drinking Water Inspectorate
English Nature
Environment Agency
Health & Safety Executive
Joint Nature Conservation Committee
North Wales Police
Royal Society for the Protection of Animals
Royal Society for the Protection of Birds
TRAFFIC International

Respondents to the civil law questionnaire raising views in relation to criminal law

Angling Conservation Association
Bat Conservation Trust
Buglife – The Invertebrate Conservation Trust
Butterfly Conservation
Environmental Investigations Agency
Herpetological Conservation Trust
Marine Conservation Society
Plantlife
Fiona Darroch, Counsel
William Edis, Counsel
Daniel Owen, Counsel
Maurice Sheridan, Counsel

8 - Tables of offences within the scope of the EJP

Data Source	Environmental Offence(s)	Relevant Statutes
DCA/DEFRA	Waste Litter Statutory Nuisance Obstructing the Process of Justice Other	Environmental Protection Act 1990: Sec 23 (1)(a), (1)(h), (1)(i), (1)(j) and (1)(l) Sec 33 (6), (8) and (9) Sec 34 Sec 38 (10) and (11) Sec 44 Sec 57 Sec 59 Sec 60 Sec 62 Sec 63 Sec 70 Sec 80 Sec 82 Sec 87 Sec 91 & 92 Sec 94 Sec 110 (2)(a) Sec 118 (1)(a)(b), (1)(e) and (1)(f) Sec 140 Sec 141 Sec 142
Environment Agency	Waste Water quality Water resources Radio-active substances Fisheries Process Industry Regulation Flood Defence Navigation	Part I EPA 1990; SI 1991/472 (as amended) (IPC) Part II EPA (England and Wales) Environmental Protection (Duty of Care) Regulations 1991 (SI1991/2839)(England and Wales) Part IIA EPA (England and Wales) Contaminated Land (England) Regulations 2000 PPC (England and Wales) Regulations 2000; SI 2000/1973 Water Resources Act 1991 (as amended) SI 1989/2286 and 1992/337 the Surface Waters (Dangerous Substances)(Classification) Regulations and 1990 and 1993 Directions for List 1 Substances. SI 1991/1597: Bathing Waters (Classification) 1997 Regulations and 1991 Direction SI 1997.1331 Surface Waters (Fishlife)(Classification) Regulations and 1997 Direction SI 1997/1332 Surface Waters (Shellfish) (Classification) Regulations and 1997 Direction SI 1996/972 Special Waste Regulations 1996 (England and Wales) SI 1999/1361 & SI 1999/3447 Producer Responsibility Obligations (Packaging 3447) Regulations 1999 SI 1989/317: Clean Air; The Air Quality Standards Regulations 1989 SI 1997/3043: Environmental Protection, The Air Quality Regulations 1997

8 - Tables of offences within the scope of the EJP

Data Source	Environmental Offence(s)	Relevant Statutes
English Nature	Destruction and damage to SSSIs Killing/taking/sale of wildlife and their products	SI 1994/2716 Conservation (Natural Habitats, &c) Regulations 1994
		SI 2000/192 Conservation (Natural Habitats &c.) (Amendment) (England) Regulations
		SI 1999/743 Control of Major Accident Hazard Regulations 1999 (COMAH)
		Control of Pollution (Oil Storage)(England) Regulations 2001
		Control of Pollution Act 1974
		Environment Act 1995
		Control of Pesticides Regulations 1986 (as amended)
		Control of Substances Hazardous to Health Regulations 1999
		Waste Management Licensing Regulations 1994
		Clean Air Act 1993
		Air Quality (England) Regulations 2000 (SI 2000/928)
		Radioactive Substances Act 1993
		Materials and Articles with Food Regulations 1987 (SI No. 1523)
TRAFFIC/WWF	International trafficking and sale of wildlife and their products	
		Wildlife & Countryside Act 1981
		Countryside and Rights of Way Act 2000
		Wild Mammals Protection Act 1996
		Protection of Badgers Act 1992
		Wildlife and Countryside Act 1981
Health and Safety Executive	Health and Safety offences	
		Section 3(1) COTES referring to Article 2(a) or 3(1) of the Principle Regulation of Council Regulation (EC) No. 3626/82
		Regulation 8(1)(2) COTES referring to EU Wildlife Trade Regulations Article 8 (App I) or 4 (App II)
		Customs and Excise Management Act 1979 (CEMA), Sections 68, 170 and 174.
		Statutory provisions
		Employers Liability (Compulsory Insurance) 1971
		Factories Act
		Gas Act 1972
		Health and Safety etc. Act 1974
		Regulations
		Construction (Health and Welfare)
		Employers Liability (Compulsory Insurance) 1971
		Highly Flammable Liquids & Liquefied Petroleum Gases
		Health and Safety (First Aid)
		Asbestos (Licensing)
		RIDDOR 1985
		Control of Pesticides 1986
		Control of Asbestos at Work
		Docks

8 - Tables of offences within the scope of the EJP

Data Source	Environmental Offence(s)	Relevant Statutes
Health and Safety Executive	Health and Safety offences	Control of Asbestos at Work
		Docks
		Electricity at Work
		Pressure Systems 1989
		Manual Handling at Work
		Cooling Towers
		PUWER 1992
		PPE at Work
		Workplace (Health, Safety and Welfare)
		Asbestos at Work
		Supply Machinery
		Gas (Installations and Use) 1994
		Construction (Design and Management)
		RIDDOR 1995
		Construction (Health, Safety and Welfare)
		Confined Spaces 1997
		Control of Lead
		PUWER 1998
		Lifting Operations and Lifting Equipment 1998
		Gas (Installations and Use) 1998
		COSHH 1999
		Management of Health and Safety at Work
		Pressure Systems 2000
RSPB	Killing, taking and sale of wild birds	Criminal Damage Act 1971
		Customs and Excise Management Act 1979
		COTES 1985
		COTES 1997
		Food and Environment Protection Act 1985
		Pests Act 1954
		Protection of Animals Act 1911
		Wildlife and Countryside Act 1981
		Firearms Act (various)
		Theft Act
		Bail Act
		Abandonment of Animals Act
		Police Act 1964
		Game Act
		Magistrates Court Act
Drinking Water Inspectorate	Water quality	Section 70 Water Industry Act 1991
		Water Supply (Water Quality) Regulations 1989 (Reg 28 (3))
		Regulations relating to Cryptosporidium
Environmental Health Officers (LAs)	Noise	Part I Environmental Protection Act 1990
	Prescribed processes	Part III Environmental Protection Act 1990

9 - District and Unitary Authorities responding to the EJP

Birmingham City Council	(Centres with Industry B)
Sandwell Metropolitan Borough Council	(Centres with Industry B)
Stoke-on-Trent City Council	(Industrial Hinterlands A)
Walsall Metropolitan Borough Council	(Centres with Industry A)
Liverpool City Council	(Regional Centres A)
Sefton Metropolitan Borough Council	(Industrial Hinterlands A)
Manchester City Council	(Centres with Industry B)
Salford Metropolitan Borough Council	(Regional Centres A)
City of Bradford	(Centres with Industry A)
London Borough of Greenwich	(London suburbs B)
London Borough of Newham	(London cosmopolitan B)
London Borough of Redbridge	(London Suburbs A)
Caradon District Council	(Coastal & Countryside A)
South Gloucestershire District Council	(Prospering smaller towns C)
Test Valley Borough Council	(Prospering Southern England A)
Weymouth and Portland Borough Council	(Coastal & Countryside B)
Swale Borough Council	(Manufacturing towns A)
Aylesbury Vale District Council	(Prospering Southern England A)
Mid-Suffolk District Council	(Prospering smaller towns C)
Powys County Council	(Coastal & Countryside A)
Cardiff County Council	(Regional Centres A)
North Lincolnshire Council	(Manufacturing towns A)
Luton Borough Council	(London suburbs A)
Sunderland City Council	(Industrial Hinterlands A)
London Borough of Bromley Council	(Thriving London Periphery B)
London Borough of Camden	(London Centre A)
Bath and North East Somerset Council	(Prospering smaller towns A)
Tewkesbury Borough Council	(Prospering smaller towns B)
Bedford Borough Council	(New and growing towns A)
North Tyneside Council	(Industrial Hinterlands B)
London Borough of Tower Hamlets	(London Centre B)
London Borough of Lewisham	(London Cosmopolitan A)
Cambridge City Council	(Thriving London Periphery A)
South Northamptonshire District Council	(Prospering smaller towns C)
Isle of Wight Council	(Coastal and Countryside B)
Gedling Borough Council	(Prospering smaller towns A)
London Borough of Brent	(London Cosmopolitan B)
London Borough of Enfield	(London Suburbs B)
Reading Borough Council	(Thriving London Periphery B)
Oxford City Council	(Thriving London Periphery A)
London Borough of Westminster	(London Centre A)
London Borough of Haringey	(London Cosmopolitan A)
Wealden District Council	(Prospering smaller towns B)
Eden District Council	(Coastal and Countryside A)
Lancaster City Council	(Regional Centre A)
East Riding of Yorkshire Council	
Stockton-on-Tees Borough Council	(Manufacturing towns A)

9 - District and Unitary Authorities responding to the EJP

Chesterfield Borough Council	(Manufacturing Towns A)
Hyndburn Borough Council	(Centres with Industry A)
Derwentside District Council	(Industrial Hinterlands A)
North Kesteven District Council	(Prospering smaller towns B)
Waveney District Council	(Coastal and Countryside B)
Forest Heath District Council	(New and Growing Towns A)
Ipswich Borough Council	(New and Growing Towns A)

Note: Local authorities selected on the basis of (sub-group level) cluster analysis used in the 2001 Area Classification of local authorities by the Office of National Statistics following the 2001 census. This analysis was undertaken using 42 variables grouped in the following six domains:

Demographic
Household composition
Housing
Socio-economic
Employment
Industry

Map showing Distribution of District and Unitary Authorities Sampled by the EJP

9 - District and Unitary Authorities responding to the EJP

Map showing location of District and Unitary Authorities in London sampled by the EJP

District and Unitary Authority Survey Analysis

All figures quoted refer to the number of Local Authorities reporting the particular statistic (type of offence, fine level, viewpoint etc)
Sample size: 39 Authorities

1. Do you have a written prosecution policy? If not, how do you decide whether to bring a prosecution or not?

All Authorities surveyed have specific enforcement policies derived from the Enforcement Concordat. Two have, or are working on, prosecution policies in addition.

2 Have you brought any cases to the Magistrates or Crown courts over the last five years? If so, please provide details.

0 cases:	1
<10:	9
10-50:	11
50-100:	2
>100:	2
Per year <50:	3
Handful/small no.:	5
Yes/many:	6

9 - District and Unitary Authorities responding to the EJP

3. What was the nature of the cases taken?

Noise offences:	30
Dog-fouling or straying offences:	13
Food safety and hygiene:	9
Black smoke:	4
Rubbish offences:	4
Pollution:	3
Housing:	3
Health and safety:	3
Odour offences:	3
Drainage:	2
Animal welfare:	2
Fly-tipping:	2

(Other offences reported: buskers, bonfires, trading standards, dangerous dogs and low-level criminal behaviour)

The most common type of offence brought to court is Statutory nuisance (25). Also reported were appeals against, and non-compliance with, Abatement Notices (4 each). Other types of offences brought to court include non-payment of fines (2), licensing/authorisation offences (3), prosecutions for repeat offenders (1), and bill payment for remedial action carried out by the Authority (1). Most offences were committed under the EPA 1990, although use of a local by-law, the Dog Fouling Act and the Health and Safety at Work Act were also reported. Only 2 Authorities reported using the Crown Court, all others used only the Magistrates Court.

4. What was the outcome (e.g. level of fines?)

Generally, respondents were unsatisfied with the level of fines imposed given the statutory maxima: 10 said they were “low/poor/insignificant”, 4 were “very unsatisfied” while only 3 were “satisfied”. Two reported recent improvements due to training of Magistrates. Losing a case (absolute discharge) was an unusual outcome (2). Fines are often lowered as ability to pay is considered (5) or if it is a first offence, or it may be reduced on Appeal (2). Fine level can be variable - especially with respect to commercial and domestic cases (4). A conditional discharge is sometimes the outcome (1).

< £50:	2
£50-£100:	7
£100-£500:	9
£1000-£5000:	9
>£5000:	3

9 - District and Unitary Authorities responding to the EJP

5. Was there any correlation between the level of fine imposed and the nature of the offence/environmental damage caused?

No:	16
No - as circumstances (ability to pay) affect fine level:	4
Yes sometimes/perhaps:	8
Yes in domestic cases, not in commercial cases:	1
Yes:	7
Cannot comment:	2

6. Did you recover your full costs?

Yes:	5
Sometimes:	10
Proportion/contribution only (though may be total of amount requested):	17
Yes in commercial cases, not in domestic cases:	4
Recently improved:	3
Try to but guilty party defaults on payments:	1
Full costs calculated but request downsized as may be offset by reduced fine level:	1

7. Do you think the current level of fines act as a deterrent to would-be offenders?

No – in theory only:	16
No – certainty of penalty is better deterrent:	1
No – cheaper to offend:	3
No – as fines not paid:	1
No – as factors e.g. ability to pay lower fine:	2
No – other measures e.g. fixed penalties/eviction threat more effective deterrent, hence LA resources an issue:	5
Yes – to domestic offenders and companies only:	2
Yes – to commercial offenders only:	2
Yes – due to associated bad press:	1
Yes:	4
Depends on the individual:	2

9 - District and Unitary Authorities responding to the EJP

8. Do you think the Magistrates/Crown courts understand environmental issues?

No:	11
No – due to insufficient number of cases and considered trivial:	3
Depends on Magistrates:	2
Training/independent expertise needed:	6
Recently improved due to 'Costing the Earth'/increased concern/greater no. of cases educating bench:	4
Recently improved due to training or presentations:	3
Yes – with layman's terms in simple cases (e.g. noise):	7
Presence of complainant in court increases understanding of issues:	1
Lack of technical or environmental understanding not an issue:	3
Complexity not an issue: more the volume of information presented:	1
Cannot comment:	2

9. What are the main barriers, if any, to bringing a prosecution?

Time:	20
Finance (incl. costs if win and Appeal follows):	12
Staff:	8
Central government budget cuts and conflict within LA due to low priority of enforcement of regulatory services:	2
Beurocracy/complex legislation:	2
Imposed targets influencing prosecution rate:	1
Collecting sufficient evidence:	6
Likelihood of winning / LA's legal team's views (best chance with sustained persistent breach of notice – anything less not taken):	4
Poor quality of LA solicitors:	1
Barriers on complainant (fear of reprisals/ trauma of court appearance):	2
Unable to meet formal time limits after failure of informal measures:	2
PACE/HRA:	2
Potential publicity/public interest:	2
If prosecution warranted according to enforcement policy, barriers immaterial:	7
Resources limiting prosecution NOT seen as detrimental as is a last resort:	1

10. Are you aware of any individuals acting in their own capacity, for example in relation to statutory nuisance?

NB: Advice and information about pursuing a case under Section 82 of the EPA is always provided.

Unaware:	4
None taken:	15
Few (after not achieving desired result or Authority unable to establish statutory nuisance etc):	9
Council housing cases against Authority (Due to absence of HSE equivalent for Authorities' housing responsibilities, such cases can only be taken under Section 82):	2
Not pursued due to fear of legal process / costs – no legal aid /seen as Authorities' job to prosecute /Authority could be called in defence:	12
Not pursued due to unable to comply with Court instructions (e.g. time limits):	1
More before MATRON (automated device for covert surveillance) used to collect evidence:	1

December 2003