

LAW AND JUSTICE

A Study on the use of Administrative  
Sanctions for Environmental Offences in  
other comparable countries and assessment  
of their possible use in Ireland

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A Study on the use of Administrative Sanctions for Environmental  
Offences in other comparable countries  
and assessment of their possible use in Ireland

Prepared for the Office of Environmental Enforcement,  
Environmental Protection Agency, Ireland

By

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## Disclaimer

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The Office of Environmental Enforcement (OEE) is an Office within the EPA dedicated to the implementation and enforcement of environmental legislation in Ireland. This report is intended as a contribution to the necessary debate on the protection of the environment

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## Preface

The Office of Environmental Enforcement (OEE) is an Office within the EPA dedicated to the implementation and enforcement of environmental legislation in Ireland. The core objectives of the Office of Environmental Enforcement are to bring about improved compliance with environmental legislation in Ireland and to ensure that those who flout environmental law and cause environmental pollution as a result of their actions are held to account. The Office of Environmental Enforcement delivers enhanced enforcement in two ways. It is directly responsible for enforcing EPA licences, to waste, industrial and other activities. It also supervises the environmental protection activities of local authorities, through auditing their performance, providing advice and guidance, and, in appropriate cases, giving binding directions. The EPA takes prosecutions at District Court level and also prepares files for the DPP in order to progress cases in the higher courts. While prosecution is considered to be an effective enforcement action in many cases, it may be less effective against licences with little in the way of shareholder interest. As has been found in a recent UK study on environmental civil penalties, the pursuit of a criminal prosecution is frequently difficult and time-consuming mainly because criminal law entails particular procedural safeguards and outcomes, which can seem inappropriate and heavy handed where the harm caused is not truly “criminal” in intent.

There has been some recent public discussion on the use of administrative sanctions as part of the enforcement policy that could be adopted by enforcement authorities. It has been pointed out that a number of common law countries (including the UK, states in Canada and in Australia) are using these sanctions in addition to prosecution. An IMPEL review carried out in 2000 showed that several Member States use some form of administrative fine for environmental breaches. The report indicated that some Member States had found administrative sanctions were as effective as criminal sanctions.

Fines and administrative sanctions are being used by enforcement authorities in other sectors in Ireland for example, for minor offences such as littering, driving offences. There is provision under the Health and Safety Act, 2005 for use of fines for minor health and safety breaches. Farmers may also be subject to fines for non-compliance with the code of good farming practice under the EU Farm Payments regulations. In the light of this the OEE commissioned a study on civil/administrative

enforcement sanctions relevant specifically to environmental protection and the control of pollution legislation used by the EPA and local authorities.

The overall objective was to assess whether the introduction of administrative sanctions for environmental pollution offences in the Republic of Ireland would be in the interests of the main stakeholders (i.e. relevant government departments, the business community, the general public) and the environment. The specific aims of the study were as follows:

1. Examine the EPA and local authority environmental enforcement regime in Ireland and identify situations and circumstances where administrative or other sanctions could be used successfully. Present the result of this examination in a tabular form to clearly show the areas where administrative sanctions could be considered.
2. Review, select and summarise the recent relevant literature on the use of administrative sanctions in other common law jurisdictions in particular (e.g. the UK, Canada, Australia and New Zealand). Carry out an assessment of the effectiveness of such administrative and extra-judicial sanctions in comparable countries in terms of meeting the desired environmental outcome of enforcement authorities and document the benefits of this approach. Establish if fines and other administrative sanctions have a deterrent effect and to compare this to the deterrent effect of a criminal prosecution.
3. Identify any obstacles or legal impediments and legislative constraints that could be a barrier to possible implementation of extrajudicial/administrative sanctions for environmental offences in Ireland.
4. Identify specific environmental offences or categories of offences where the use of administrative sanctions would be appropriate.
5. Develop a “road map” to show how such sanctions could be implemented.
6. Make recommendations on the application of administrative sanctions by the EPA and local authorities.
7. Review the question of the need for an appeal mechanism for the resolution of disputes related to administrative sanctions and make a recommendation on a suitable approach to this issue.

## 1. Introduction/Scope of Study

- 1.1. The purpose of this EPA Study was to review the use of administrative sanctions for environmental offences in comparable countries, and to assess whether the introduction of some or all of these sanctions for environmental offences in Ireland would be in the interests of the main stakeholders and the environment.
- 1.2. A&L Goodbody and the ERM Environmental Consultancy (“the Consortium”) won the tender to undertake the above Study, and worked closely over a six month period with the EPA and the Steering Committee. That Committee comprised of representatives from the Attorney General’s Office, the Department of the Environment and IBEC. This report is intended as a contribution to the necessary debate on the protection of the environment.
- 1.3. In consultation with the EPA, the Consortium determined at the outset that it was necessary firstly to identify the key comparator countries and secondly, to clearly define what is meant by “administrative sanctions”.
- 1.4. It was subsequently recommended to and accepted by the EPA that the UK, USA, Germany and Australia should be reviewed for the purposes of the comparative study. In the Consortium’s view, these countries provide a suitably broad spectrum of different approaches, ranging from the higher value, comprehensive application model of civil penalties used in the US, to the lower value minor offence administrative penalties used in Germany. Drawing on the experience of Germany, as an additional EU jurisdiction to the UK, was also in the consortium’s view advisable, given the significant influence of EU environmental law in Ireland. In addition, administrative law offences are much more firmly established in Germany than in the UK. It was of assistance that the chosen jurisdictions (save for Germany) are common law jurisdictions i.e. they have the same legal system as Ireland.
- 1.5. A&L Goodbody subsequently commissioned Stephenson Harwood, a London based Law Firm, to undertake the comparative study of the four countries. Michael Woods, Partner and Head of the Environment Group at Stephenson Harwood who lead the study, has extensive experience in this area and was co-author of “Environmental Civil Penalties - A More Proportionate Response to Regulatory Breach”.
- 1.6. Relative to the meaning of “administrative sanction”, A&L Goodbody undertook a review of the recent relevant literature on administrative sanctions in the four comparator countries, and noted that different models of administrative and civil sanctions are used depending on the particular jurisdiction. The terms “administrative sanction” and “civil penalty” are used interchangeably in the literature, and often mis-used. Generally speaking, a civil penalty is one imposed by the Courts applying civil rather than criminal court processes. They are often financial in nature and closely resemble fines and other punishments imposed on criminal offenders. The process by which these penalties are imposed are not criminal. Administrative sanctions are broadly understood as being sanctions imposed by the Regulator without intervention by a Court or Tribunal.
- 1.7. This study reviewed all non-criminal sanctions (i.e. both civil and administrative sanctions) in the four jurisdictions.

## 2. Executive Summary

2.1. As is apparent from the Consortium's review (detailed, task by task, in the next section of this Report), Ireland already has a number of non-criminal sanctions available to regulators by virtue of existing environmental legislation. In addition, regulators use some sanctions without any formal statutory basis e.g. warning letters, the "name and shame" process, and verbal warnings. In total, Ireland has access already to 11 of the 20 non-criminal sanctions identified in this study.

2.2. There are 9 non-criminal sanctions that Ireland either does not have, or does not have a legislative basis for, and these are set out in Table 1. They are: enforcement undertaking, warning letter, fixed penalties, variable and discretionary penalties, civil penalties, monetary benefits penalty order, environmental services order, compensation order and name and shame.

2.3. In relation to these 9 sanctions, the Consortium identified potential legal impediments and legislative constraints that could be a barrier to use those sanctions for environmental offences in Ireland. The study found that in relation to the potential introduction of any or all of the nine sanctions, new legislation will be necessary for the most part, and Regulatory Impact Assessment (RIA) should be considered. By conducting a RIA a number of options are likely to arise. For example, the identification of costs, benefits and impacts, impacts on national competitiveness, impacts on socially excluded or vulnerable groups and whether the proposed will involve a significant compliance burden.

2.4. Certain constitutional and human rights issues will need to be addressed in the implementation of any of those sanctions.

2.5. The study also identifies in Chapter 6 below, specific offences where the use of any of the 9 administrative and civil sanctions would be appropriate and also provides practical examples of how each of these sanctions could work in practice.

2.6. An assessment of the need for an appeals mechanism relative to the introduction of any of the 9 sanctions has also been included in this study. Our findings show that not all administrative sanctions would require an appeals mechanism, but the more serious penalties would warrant such a system of appeal.

2.7. Finally, in terms of the comparative analysis, the study highlights that the experience of the US, Germany and Australia is that there are tangible benefits in allowing regulators and the courts to pursue a pragmatic and flexible approach to environmental enforcement through utilisation of a sufficiently comprehensive range of sanctions. Whilst different specific models of sanction are employed by each jurisdiction, the merits of having access to a full "suite" of sanctions allows the regulators to better match their response to the realities of enforcement, including the inevitable constraints which result from limited resources. This has not yet been achieved in some jurisdictions, notably the UK, where there are fewer alternatives to criminal prosecution. Administrative and/or civil sanctions are also seen as a suitable means of increasing the ability of the regulator or the court to take account of the practical circumstances surrounding the regulatory breach, including the actual cost of the damage caused to the environment.

In addition to providing a sufficiently broad range of measures, it is apparent that regulators should be encouraged to make optimal use of existing environmental sanctions, as well as regulatory tools available in other more general legislation (e.g. under the Proceeds of Crime Act in the UK).

There does though remain a lack of firm data on whether the use of such administrative sanctions in the different jurisdictions actually secures real environmental benefits 'on the ground'. This should perhaps be considered as one element of the general uncertainty in the setting of a 'regulatory benchmark' for environmental compliance in the context of competing economic and political policies.

Nevertheless, it is clear from the comparative analysis that there is a trend in countries such as those covered in this report towards the implementation of a more sophisticated and flexible model of environmental enforcement which makes the goal of improved compliance more viable.

**Table 1. Non-Criminal Sanctions which are not available in Ireland**

	Potential Sanction	Where it could be useful	Our preliminary recommendation
<b>1</b>	Enforcement undertaking	Could be useful for non-licensed facilities where pollution occurs,	Used effectively in Australia.
<b>2</b>	Warning letter	Could be useful further intermediate step prior to a formal statutory notice	We understand this is effectively used informally by the EPA and local authorities and has proved successful. Recommend it is put on a formal footing.
<b>3</b>	Fixed penalties	Could be used for minor offences. (On the spot fines are already provided for here under the Litter Pollution legislation, Pension legislation, Pension legislation and Health & Safety legislation).	Yes. Involvement by financial divisions within companies could be a useful deterrent.
<b>4</b>	Variable and discretionary penalties	Could be used for slightly more serious regulatory offences than fixed penalties.	Giving such increased powers to Regulator can be complex from a legal point of view.
<b>5</b>	Civil penalty	For deliberate regulatory offences such as fly tipping as well as for more serious offences which are unintentional breaches of licence conditions e.g. for industrial processes.	If there is a concern that criminal sanctions are not performing the role that they are meant to, and if there are practical difficulties and public perception issues, then civil sanctions may enhance system and provide more flexibility.
<b>6</b>	Environmental Services Order	Could be used as part of an environmental settlement with the regulator for serious regulatory offences. Often used in conjunctions with name and shame orders.	Yes as above.
<b>7</b>	Monetary benefits penalty order	Normally supplemented to civil penalties order where profit can be identified.	Yes as above.
<b>8</b>	Compensation Order	Used in conjunction with penalty orders where there has been damage to the environment that needs to be remedied.	Yes as above.
<b>9</b>	Name and Shame	This is informally used by the EPA and on an ad hoc basis by the Local Authority.	Yes as above.



### 3. Task 1

Examine the EPA and local authority environmental enforcement regime in Ireland and identify situations and circumstances where administrative or other sanctions could be used successfully. Present the result of this examination in a tabular form to clearly show the areas where administrative sanctions could be considered.

- 3.1. The Consortium delivered a presentation to the EPA and the Steering Committee on Friday, 28 September 2007 in relation to Task 1. This presentation is set out below (Table 2) and refers to the 20 civil and administrative sanctions currently available in the four comparable jurisdictions.
- 3.2. The presentation demonstrated how some of the identified, potential, administrative sanctions are currently available in Ireland for environmental offences, e.g. mandatory audits, enforcement notices and clean up orders. Some civil sanctions are also used e.g. injunctions and cost orders. Furthermore, there are a number of non-criminal sanctions available to regulators by virtue of existing legislation; for example, "warning letters" are available under the Planning and Development Act, 2000.
- 3.3. In addition, regulators use some sanctions without any formal statutory basis e.g., the "name and shame" process, warning letters and verbal warnings. Regarding the suspension or revocation of licences, this sanction is available to a limited extent. In total, Ireland has access already to 11 of the 20 non-criminal sanctions the consortium identified. There are 9 non-criminal sanctions that Ireland does not have, or does not have a legislative basis for, relative to environmental offences.

Table 2. Civil and Administrative Sanctions available in comparable jurisdictions

Sanction	Description	UK	Australia	USA	Germany	Ireland
<b>Civil Administrative</b> Persuasion / verbal caution	Informal warning, advice or support from the regulator to the offender.	Used extensively.	Authority may convene a conference.	Warnings rarely issued without prior consultation.	Used extensively.	Informally used. Sanction available in Ireland.
Information Notice	To provide records, documents or evidence regarding a suspected / actual regulatory breach.	Used regularly.	Sanction available to Authority.	Used regularly, often when applying for permits.	Used effectively.	Sanction available in Ireland.
Mandatory Environmental Audit	Where the regulator compels a company to carry out an audit of its activities.	No general statutory provision, but often a condition of issuing a permit.	Sanction available.	Used in lieu of other penalties and fines.	Effectively used.	Sanction available in Ireland.
Enforcement Undertakings / Agreement	Where the offender provides written undertakings to the regulator to remedy the harm done in a certain way and by a certain time and can be enforceable in court.	No equivalent sanction in the UK.	Used effectively.	No equivalent sanction in the USA.	No equivalent sanction in Germany.	No equivalent sanction in Ireland.
Warning Letter	Notification of a regulatory breach without taking further immediate action.	Commonly used in this jurisdiction.	Issued to advise an occupier of non-compliance with an Agreement Notice.	Rarely issued without taking further immediate action.	Effectively used.	Sanction available in Ireland under the Planning and Development Act 2000.
Fixed Administrative Financial Penalty	Payment of a specified monetary amount by the offender to discharge or compensate for the breach.	Typically used to deal with minor offences.	Used in relation to waste discharges in excess of permitted amounts.	Permits may stipulate surcharges for discharges in excess of permitted amounts.	Utilised successfully under the relevant Regulations.	No equivalent sanction in Ireland.

Table 2. Civil and Administrative Sanctions available in comparable jurisdictions (Continued)

Sanction	Description	UK	Australia	USA	Germany	Ireland
Variable & Discretionary Administrative Penalties	Payment of a variable amount to be determined at the discretion of the regulator to discharge or compensate for the breach.	No equivalent sanction in the UK.	No equivalent sanction in Australia.	No equivalent sanction in the USA.	No equivalent sanction in Germany.	No equivalent sanction in Ireland.
Enforcement Notice, Order or Direction	Served where a breach of regulatory consent, licence or legislation has occurred and specifies steps to rectify the breach and timescale.	Issued effectively under specific legislation.	Used in limited circumstances.	Used very commonly.	Effectively used.	Sanction available in Ireland.
Clean Up / Pollution Notice or Order	Requires the offender to take specific action (e.g. to remedy any environmental harm or to prevent or mitigate further harm).	Environmental regulators frequently issue these types of sanctions.	Used quite extensively in this jurisdiction.	Several programs implemented to remedy known environmental harm.	The EU "Polluter Pays Principle" is applied in Germany and is effectively enforced.	Sanction available in Ireland.
Regulator Step-In and Recovery of Costs Order	Where the offender has failed to take corrective measures, the regulator can step-in and remedy the breach itself and recover its costs from the offender.	Used very extensively by the environmental regulators.	Sanction available to the Authority.	Joint and several liability for clean up costs are applied to the offending party.	Authorities typically avoid taking direct action.	Sanction available in Ireland.
Financial Security	Retention of security lodged as a condition of permits, licences or approvals or remediate any harm caused by a breach.	No equivalent sanction in the UK.	Utilised in this jurisdiction.	Required under Federal Hazardous Waste Rules.	No equivalent sanction in Germany.	Sanction available in Ireland.

Table 2. Civil and Administrative Sanctions available in comparable jurisdictions (Continued)

Sanction	Description	UK	Australia	USA	Germany	Ireland
Licence Amendment, Suspension or Revocation	Where the regulator revokes, amends or suspends all or parts of a licence or disqualifies or debars the offender from contracting with government agencies.	Under utilised. Suspension/Revocation only used in the event of very serious cases of non-compliance.	Used successfully.	This sanction is rarely (if ever) implemented.	Very rarely enforced in practice.	Sanction available to a limited extent in Ireland.
Entry Powers	Powers of the Authority and authorised officers to enter premises and may do any act that is deemed necessary.	No known sanction.	Used successfully.	No known sanction.	No known sanction.	Sanction available in Ireland.
Civil Judicial						
Civil Penalty	A civil monetary penalty.	Available in limited circumstances but are seldom used	Used extensively.	Frequently issued by regulatory agencies.	Sanction is available in Germany but it is under utilised.	No equivalent sanction in Ireland.
Publicity Order / Name and Shame by Regulator	Publicity by the regulator or offending company of the offence, the environmental/other consequences and the penalties/other orders imposed.	No equivalent statutory sanction in the UK.	Used extensively.	Utilised in this jurisdiction.	No equivalent sanction in this jurisdiction.	In general, used by regulators informally.

Table 2. Civil and Administrative Sanctions available in comparable jurisdictions (Continued)

Sanction	Description	UK	Australia	USA	Germany	Ireland
Environmental Services Order	Requires the offender to carry out a specified project for restoration /enhancement of the environment in a public place or for public benefit. Normally used in conjunction with Publicity Orders.	No equivalent civil sanction in the UK.	Used successfully.	Used successfully.	No equivalent sanction in Germany.	No equivalent sanction in Ireland.
Monetary Benefits Penalty Order	Made on its own or as part of a Civil Penalty whenever the regulator can quantify the benefit obtained and the offender has sufficient funds to pay all or a significant proportion of the benefit obtained	No equivalent sanction in the UK.	No such sanction known.	Entities are routinely required to pay such penalties.	Sanction is under utilised.	No equivalent sanction in Ireland.
Compensation Order	To compensate either the regulator or a third party for costs or expenses incurred in taking action to deal with damage to the environment resulting from the offence. This order can be made on its own or as part of a Civil Penalty.	No equivalent sanction in the UK.	Cleanup costs may be recovered from the offending party.	Sanction applied successfully in the US.	Authorities typically avoid taking direct action.	No equivalent sanction in Ireland.
Costs Order	To pay all, or part of, the costs of proceedings.	Almost always utilised.	The Court can only use this sanction in limited circumstances.	Sanction applied successfully in the US.	Effectively used.	Sanction available in Ireland.
Injunction		Injunctions can be sought.	Available to the Authority through the Supreme Court.	Sanction available in this jurisdiction.	Sanction is available in Germany but it is under-utilised.	Sanction available in Ireland.

## 4. Task 2

Review, select and summarise the recent relevant literature on the use of administrative sanctions in other common law jurisdictions in particular (e.g. the UK, Canada, Australia and New Zealand). Carry out an assessment of the effectiveness of such administrative and extra judicial sanctions in comparable countries in terms of meeting the desired environmental outcome of enforcement authorities and document the benefits of this approach. Establish if fines and other administrative sanctions have a deterrent effect and compare this to the deterrent effect of a criminal prosecution.

- 4.1. A&L Goodbody reviewed the recent relevant literature of Australia, the UK, Germany and America. A list of the articles reviewed, and a summary of a selection of those articles, is attached at Appendix 1 (b).
- 4.2. The Consortium commissioned Stephenson Harwood Solicitors (UK) to undertake a comparative analysis of the use of civil, administrative and criminal sanctions in the four main jurisdictions, namely the United Kingdom, Germany, Australia and the United States of America. Their Comprehensive Report is attached at Appendix 1 (a).
- 4.3. The Key Findings of the Stephenson Harwood Report are as follows:
  - 4.3.1. In the U.K. there are some alternatives to criminal prosecution. Administrative sanctions are relied on heavily by Environmental Regulators in England, particularly those that are more informal in nature. The key issue in the U.K., however, is the absence of a varied administrative and civil regime in order to achieve optimum compliance. As a result there is now an over reliance on the threat of criminal prosecution which has meant that the deterrent effect of criminal sanctions is somewhat reduced due to relatively low fines being imposed by the Court and the reduction of penalties imposed by lower Courts on appeal. It is felt that if the criminal system was reserved for serious breaches and a comprehensive civil and administrative sanction regime was introduced to negotiate penalties and deal with less serious environmental breaches, this would be far better for full environmental compliance.
  - 4.3.2. In Germany, criminal proceedings and

prosecutions only play a minor role in environmental protection because of the wide use of administrative sanctions. The criminal system only attaches criminal liability to an individual and not to a company and therefore administrative and civil sanctions were introduced to ensure compliance among large organisations and companies. Administrative sanctions have been very effective in achieving environmental compliance mainly because of their flexibility and wide reaching approach.

- 4.3.3. In Australia there is a common law system and the Stephenson Harwood Report identified New South Wales as the main study because there is a well established enforcement regime in that State.

The Report confirms that there is very broad range of administrative and civil sanctions available in New South Wales. These sanctions were introduced in 1999 because it became apparent that the criminal law alone was unable to adequately deal with the varied nature of the environmental breaches and that a wide variety of sentencing options were required in order to introduce flexibility.

Administrative and civil sanctions have proved to be very effective in Australia. Civil penalties, however, have only been available in South Australia and therefore their effectiveness is still relatively untested.

The deterrent of civil and administrative sanctions on criminal prosecutions is difficult to ascertain but prosecutions have decreased. Experience has shown that Licence Revocation, Environmental Service Orders and Publicity Orders in many cases appear to be a greater deterrent in Australia than the imposition of a criminal fine. The greater use of civil penalties is needed however to further strengthen environmental enforcement in Australia.

- 4.3.4. In the U.S. there is a Federal and State Law system. Criminal sanctions are available for environmental violations as well as administrative and civil/judicial sanctions. However, criminal prosecutions are rare in the U.S. The Stephenson Harwood Report advises that

administrative sanctions are widely used in the U.S. but their effectiveness is mixed. Civil sanctions are also used widely and their use has been much increased in 2006/2007.

However, there has been criticism of the use of administrative and civil sanctions in the U.S. and commentators have said that the EPA in the U.S. have become more lax through their use instead of the use of criminal sanctions and it has emboldened polluters to break Federal Law. The number of criminal cases brought by the EPA is down sharply compared to the late 90's and regulators are seeking more settlements and plea bargains that require pollution reductions through new equipment purchases. There has also been a decline in EPA resources for pursuing environmental wrong-doing and there are many areas where data is not available to assess the state of the environment. These criticisms clearly show that there is still room for improvement in the enforcement compliance regime.

## 5. Task 3

Identify any obstacles or legal impediments and legislative constraints that could be a barrier to possible implementation of extra judicial/administrative sanctions for environmental offences.

### 5.1. Executive Summary

- 5.1.1. There are a number of issues under the European Convention of Human Rights that could be raised by an individual/corporation where civil administrative sanctions are imposed for breaches of environmental law. For example, in terms of financial penalties, smaller firms may not have the means to pay a fixed penalty/fine. Professor Macrory in his report refers to the “spill over” effect, whereby a company could pass on the financial cost to third parties such as shareholders, employees, creditors and customers, and direct responsibility away from company management. Shareholders who subsequently experience losses resulting from financial penalties, through devaluation in their value of shares and reduced dividends, could potentially argue that their right to earn a livelihood has been attacked.
- 5.1.2. Fines could potentially be deemed discriminatory and inflict an unequal impact upon small businesses whose operations are generally more vulnerable to monetary penalties.
- 5.1.3. The reliance on fining in the sanctioning of a business could also be perceived as representing discriminatory and unfair practice against individual offenders, who arguably face far more serious sentences (such as imprisonment).
- 5.1.4. Finally, while a number of administrative and civil sanctions are effective at deterrence, there are certain administrative sanctions, for example, a publicity order, that may have ramifications for a corporation's reputation, for example, if it had been imposed without just cause. This could be challenged on the basis of one's right to a good name.

### 5.2. Ireland and the Constitution

- 5.2.1. Ireland is a common law jurisdiction with a written constitution which contains a Bill of Rights. It is a member of the European Union and is bound by European Union legislation and the decisions of the European Court of Justice. The European Convention of Human Rights Act, 2003 gives effect to the European Convention of Human Rights (“the Convention”) in Irish law.
- 5.2.2. The position in Ireland regarding civil and administrative sanctions is similar to that of the UK, i.e. non compliance in the regulatory field has resulted in heavy reliance being placed on strict liability offences, and Ireland (like the UK) has yet to develop and implement a comprehensive civil and administrative regime. However, the implementation of any new civil and administrative sanctions regime must consider and address certain potential issues under the Irish Constitution and the Convention. Set out below are a sample of some of those potential issues. Specific issues of concern will depend on what sanctions (if any) are adopted in Ireland.
- 5.2.3. Firstly, Article 40.1 of the Irish Constitution states: “All citizens as human persons shall be equal before the law”. Any implementation of administrative and civil sanctions in Ireland needs to adhere to Article 40.1. For example, if excessive monetary penalties are imposed unjustly on certain sectors of the business community, there may be grounds for discrimination action to be cited under the Constitution. Secondly, Article 40.3.2 states, “The State shall in particular by its laws protect as best it may from unjust attack and in the case of injustice done, vindicate the life, person, good name and property rights of every citizen”. Any Name and Shame Orders imposed by the Court could be challenged on the basis of one's right to a good name, if necessary and fair procedures are not adopted. Thirdly, Article 34.1 states: “Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall



be administered in public". Any quasi-judicial role exercised by the regulator (i.e. imposition of variable monetary penalties), if not implemented with due and fair process, could be subject to attack under this provision.

### 5.3. The UK and the Convention

5.3.1. The UK has implemented the Convention by virtue of the Human Rights Act 1998 ("the HRA"). Under section 2(1) of the HRA, the UK Courts and Tribunals must now take account of the case law of the European Court of Human Rights ("the ECHR") when determining an issue regarding a Convention right. Article 6 of the Convention states:

*"In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".*

Article 6(2) and 6(3) of the Convention confirms that everyone "charged with a criminal offence" shall have the benefit of the presumption of innocence and certain other "minimum rights", including to be informed promptly of the charge; to adequate time and facilities to prepare a defence; to have legal assistance; to examine witnesses; and to have an interpreter if necessary. If a procedure is classified as criminal by the ECHR, then the provisions of Article 6(2) covering the presumption of innocence and Article 6(3) covering the further minimum rights must be given effect, whatever the categorisation of the procedure in national law. In the case of *Engel v Netherlands* the ECHR established three criteria for determining whether a particular procedure was criminal in effect even if not in name, based on:

- the classification of the proceedings in domestic law;
- the nature of the offence; and
- the nature and degree of the severity of the penalty that the person concerned risked incurring.

5.3.2. The leading UK case relating to the status of the civil penalties under Article 6 of the Convention is *Han and Another v Commissioners of Customs & Excise*, which was decided by the Court of Appeal in July 2001. This involved three similar appeals relating to the dishonest evasion of the Value Added Tax under the Value Added Tax legislation in the UK and in particular a decision of the VAT and Duties Tribunal that the civil penalties applied under the legislation amounted to "criminal charges" within the meaning of Article 6 of the Convention.

5.3.3. The Court of Appeal followed the ECHR case law by applying the three Engel criteria. The Commissioners of Customs & Excise argued that the penalties had been classified as "civil"; however, the court noted that this "civil" classification did not represent a comprehensive decision to decriminalise the dishonest evasion of VAT, given that the alternative provisions still existed to take criminal proceedings for the same regulatory breaches.

5.3.4. It is now established by the European Court of Human Rights that the following criteria must be followed in determining whether or not proceedings should be labelled as criminal or civil. The proceedings are to be regarded as criminal if they are (a) brought by a civil authority and either (b) have a requirement to show some kind of culpability (wilful or neglectful) or (c) have the potential for severe consequences such as imprisonment. The emphasis is on the true nature of the proceedings rather than their form.

## 6. Task 4

Specific Offences Or Categories Of Offences Where The Use Of Administrative Civil Sanctions Would Be Appropriate

- 6.1. In order to assess the specific offences where administrative and civil sanctions would be appropriate, ERM examined the four comparator countries chosen for the study in the context of the nine sanctions identified in Task 1.
- 6.2. Each jurisdiction was examined to identify the type of offence that is applicable to each of the nine sanctions. In Task 6 (dealt with later on in this Report) practical examples are provided of the offences and how they may be applied in Ireland.
- 6.3. In this chapter, we look at each of the 9 civil sanctions not currently used in Ireland and review their use in comparator countries.

### 6.4. Enforcement Undertaking

This sanction occurs where the offender provides written undertakings to the regulator to remedy the harm done in a certain way and by certain time and can be enforceable in court.

#### *United States (US)*

This sanction is not available in the US on a statutory basis.

#### *Australia*

The local regulator may provide a notice in writing to any person or industry (except those that are a party to an Industry Reduction Agreement) to submit a draft agreement consistent with current policy/regulations and within a specified time period. Failure to comply is an offence and the penalty is 600 penalty units (\$66,072).

This sanction is used to assist companies neutralize their impact on the environment in a sustainable manner and to allow the company and the regulator share information on the practical implementation of remedial programmes.

#### *United Kingdom (UK)*

This sanction is not available in the UK on a statutory.

#### *Germany*

As with Australia, this sanction assists the regulator and a company to agree a course of action to neutralise the impact the company has on the environment. The agreement includes an action plan submitted by the company and monitored by the regulator. In some cases the regulator will issue a new permit to incorporate the previous non compliance.

### 6.5. Warning Letter

This sanction involves issuing a notification of a regulatory breach without taking further immediate action.

#### *US*

This sanction is not available in the US on a statutory basis.

#### *Australia*

In Australia, a regulator can issue a Breach of Agreement Notice to advise an Occupier of non-compliance. The Notice must be in writing, must specify the breach and must notify the date prior to which the breach must be rectified (which must be at least 3 months from the issue date). Non-compliance with a Notice is 600 penalty units (\$66,072).

A regulator can also issue Pollution Abatement Notices (PAN) which are issued for minor pollution offences. These can range from minor pollution incidents in controlled waters, to smoky vehicle emissions.

In 2000–01 almost 4,500 warning letters were issued under the smoky vehicle program by the Victoria EPA, and over 250 penalty infringement notices were served.

#### *UK*

This sanction is not available in the UK on a statutory basis.

#### *Germany*

Warning letters are typically used by the regulators in cases of overdue inspections and monitoring. They contain an ultimatum for completing the requested action or else penalties will be imposed. In general it could be stated that warning letters are used in cases of known overdue inspections or monitoring reports. Very often, prior to a warning letter being issued, a letter is provided to the sites requesting relevant

documents which the regulator has not received. Where no documents are provided to the regulator within the specified time frame, a letter will be issued to the site giving a deadline for performing the outstanding inspection or monitoring.

A warning letter is also used in some cases, after a site visit by the regulator, requesting documentation of inspections, monitoring, adequate waste disposal, or also documentation of internal inspection (e.g. of an oil/water separator, self-monitoring of a waste water treatment plant, etc.) which was not available during the site visit. A date is normally fixed in the letter for providing such outstanding documentation.

In addition, warning letters are used in cases of known exceedances (e.g. of one air emission parameter) including a due date for solving the known non-compliance issue.

## 6.6. Fixed Penalties

This sanction involves payment of a specified monetary amount by the offender to discharge or compensate for a breach.

### *US*

Under the Clean Water Act, a type of fixed penalty is often incorporated into industrial sewage discharge permits, where an industrial user is discharging untreated or partially treated wastewater into a USEPA - permitted municipal collection and treatment system (commonly called Publicly Owned Treatment Works (POTWs) in the U.S.). The industrial user will pay a monthly surcharge for discharging excess pollutants, over and above what is allowed in the user permit, into the municipal system.

The surcharged pollutants are typically BOD, COD, or TSS. There would be a fixed charge per pound of pollutant over the permit limit. In most cases, this is not considered technically a violation. It is a way for the municipality to recover the costs of treatment based on loading and/or to generate additional revenues.

Under each of the major US federal environmental laws, there are generally fixed penalties for violations, established under the Statute. The laws are:

- 6.6.1. The Clean Air Act (Air emissions and CFC's)
- 6.6.2. The Resource Conservation Act (Solid and Hazardous Waste)
- 6.6.3. The Clean Water Act (Wastewater and Stormwater)
- 6.6.4. The Toxic Substances Control Act (Chemical Manufacture, Asbestos, PCBs, Lead)
- 6.6.5. The Safe Drinking Water Act (Drinking Water)
- 6.6.6. The Comprehensive Environmental Response Compensation and Liability Act (Superfund)
- 6.6.7. The Emergency Planning and Community Right to Know Act (Community Right to Know)
- 6.6.8. Oil Pollution Act (Large Volume Oil Storage and Transport)
- 6.6.9. Federal Insecticide, Fungicide and Rodenticide Act (Pesticides)

### *Australia*

In Australia, licences have limits for emitting/discharging pollutants and these limits are not to be exceeded. Where exceedances occur, a fee of up to 42,000 units (\$462,840) is payable for each element of the environment being discharged to i.e. atmosphere, land and water. However, a party may be exempt from the fee if the relevant Government Minister confirms they are not-for-profit, public or a charity.

During the 2002-2003 period, infringement notices were issued by Victoria EPA as follows: 100 relating to industry, 5 relating to waste transport, 371 relating to motor vehicles and 13,722 for littering.

### *UK*

Fixed administrative financial penalties are a relatively recent tool in the UK. The penalty is a fixed amount of money as set under primary or secondary of legislation. The amount of money to be paid can be varied by subsequent Order and there is usually a mechanism under the law to allow for lesser amounts of money to be paid for prompt payment.

### Germany

A specific monetary amount can be specified in a "Bußgeldbescheid" (fine) in accordance with the Ordnungswidrigkeitengesetz (Administrative Offence Act). The defending company can file an objection against such a fine. For example, beginning this year in 2008, there will be a fine for up to ?15,000 for buildings that do not have an "Energy Pass".

Fixed penalties of up to €50,000 can be imposed on the offender by the regulator without a court decision.

In accordance with the relevant regulations associated with the breach, fixed penalties will be set by the authorities for not performing requested inspections of relevant environmental equipment, or not performing requested monitoring by required deadlines.

Fixed penalties are also available to an authority when it becomes aware of a company having operated in the past without the required permit, on the understanding that the company had known the permitting requirements applicable to their business / site.

A fixed penalty can be applied relative to any spills, explosions, waste or wastewater disposals.

### 6.7. Variable Penalties

This sanction is a payment of a variable amount, to be determined at the discretion of the regulator, to discharge or compensate for a breach. This sanction is not used on a statutory basis by any of the four jurisdictions. However, it should be noted that all jurisdictions apply a form of fixed sum penalty which can be varied by the regulator depending on the case circumstances.

### 6.8. Civil Penalty

This sanction is a civil monetary penalty.

#### US

Civil penalties are used extensively in the US. Civil enforcement actions can be administrative or judicial. Administrative actions are a form of action brought before an Agency decision-maker, rather than a federal court judge. In judicial actions, EPA is represented by the Department of Justice. The EPA Office of Enforcement and Compliance Assistance (OECA) brings administrative and judicial actions that

are usually resolved by settlements, which often can require polluters to:

1. Pay penalties.
2. Implement, repair, and upgrade pollution control technologies.
3. Correct compliance problems.
4. Clean up waste and/or take action to reduce pollution and prevent problems from recurring.

The US EPA has models that estimate the economic benefits gained by a violator for not being in compliance with any particular rule or regulation. The enforcement economic models are used to analyze the financial aspects of enforcement actions. Five models are currently available:

1. ABEL - Evaluates a corporation's or partnership's ability to afford compliance costs, cleanup costs or civil penalties.
2. BEN - Calculates a violator's economic savings from delaying or avoiding pollution control expenditures.
3. PROJECT - Calculates the real cost to a defendant of a proposed supplemental environmental project. (This model can also assist any regulatee in determining if and when a pollution prevention project will break even.)
4. INDIPAY - Evaluates an individual's ability to afford compliance costs, cleanup costs or civil penalties.
5. MUNIPAY - Evaluates a municipality's or regional utility's ability to afford compliance costs, cleanup costs or civil penalties.

In 2006 the USEPA reported collecting over \$100,000,000 in civil environmental fines.

In addition, the USEPA reported that the individual states collected an additional \$100,000,000 in civil environmental fines, and an additional approximately \$100,000,000 was spent by companies pursuant to compliance with supplemental environmental projects (SEP's)

### **Australia**

Exceeding an emissions discharge permit is an indictable offence and the maximum penalty is 2400 penalty units (\$264,288).

Contravention of any condition to which an approval is subject is an indictable offence. Maximum penalty is 2400 penalty units (\$264,288) and 1200 (\$132,144) penalty units for a continuing offence.

Disposing of industrial waste at a site not licensed to accept the waste or without the knowledge of a licensed facility is an indictable offence. A maximum penalty of 5000 penalty units (\$550,600) and 2500 penalty units (\$275,300) is applied for each day of a continuing offence.

Contravening a discharge ceasing order is an offence and subject to 300 penalty units (\$33,036).

Any person who intentionally commits an offence is subject to a penalty of not more than 5000 penalty units (\$550,600) and in the case of continuing offences, a daily penalty of not more than 2500 penalty units (\$275,300).

### **UK**

This sanction is not available in the UK.

### **Germany**

Civil penalties are broken into many components including:

#### **6.8.1. General Information**

In general, polluting air, water or soil is also liable to prosecution. When negligence is also proven, there may be a sentence of up to three years or a fine. However, in Germany remediation is always the preferred option and where possible will be used instead of a civil penalty or compensation payment.

The unauthorized operation of a nuclear facility or a facility which uses nuclear fuel is subject to a fine or up to five years imprisonment. When the non-compliance is significant or where deliberate acts are proven, imprisonment from 6 months to 10 years can result.

Endangering protected species is also an environmental crime which is punishable by up to five years in prison or a fine.

#### **(1) Air**

The regulators have the administrative power to enforce compliance with the Federal Clean Air Act and issue fines up to €50,000 (§ 62 III BImSchG).

#### **(2) Water**

The regulators have the administrative power to enforce compliance with the Federal Water Resources Management Act, and to issue fines of up to €50,000 (§ 41 II WHG).

#### **(3) Waste**

A fine of up to €50,000 can be issued for collecting or transporting waste without a Permit.

### **6.9. Environmental Services Order**

This sanction requires the offender to carry out a specified project for restoration/enhancement of the environment in a public place or for public benefit. This sanction is normally used in conjunction with Publicity Orders.

### **US**

These sanctions are used extensively in the US and are often classified as Supplementary Environmental Projects (SEPs). In many civil penalty settlements, SEPs are environmentally beneficial actions that a violator agrees to perform as part of an enforcement settlement. This is taken typically in lieu of paying a part of the established monetary penalty.

SEPs can include purchasing and dedicating undeveloped land, establishing an internal environmental audit program, or implementing an environmental management system.

Companies are almost always willing to agree to a restoration project in lieu of a part of the fine, as opposed to paying the full fine to the USEPA. Companies also often use the SEP as a public relations tool.

An USEPA document entitled "Beyond Compliance: SEP" further detailing SEPs is provided in Appendix 4(a).

### **Australia**

In Australia, this sanction can be used in addition to, or instead of, a penalty. A court may order a specified project to be carried out for the restoration or enhancement of the environment in a public place or for the public benefit (even if the project is unrelated to the offence).

This Order has been used to penalise pollution incidents by requiring the defendant to fund community education of pollution impacts, supply support (financial and labour) to community environmental projects, support environmental research projects and clean up/restore local areas.

In some circumstances, the company may be required to provide proof of payment to the court that the money had been paid within a specified timeframe of conviction. The defendant must also refer to the proceedings when making payment so as not to disguise they money as a good will donation.

### **UK**

This sanction is not available in the UK.

### **Germany**

This sanction is not available in Germany.

## **6.10. Monetary Benefits Penalty Order**

This sanction can be applied as part of a Civil Penalty or on its own wherever the regulator can quantify a benefit obtained by an offender, as a result of the non compliance and the offender has sufficient funds to pay all, or a significant proportion, of the benefit obtained.

### **US**

Every civil penalty in the US has two components - the economic benefits component, and the punitive component. The punitive component, which usually dwarfs the economic benefit component in monetary value, is the punishment for being a violator. The USEPA will often negotiate the punitive component downward but will almost always hold fast on the economic benefit component.

As referred to previously the USEPA have models that estimate the economic benefits gained by a violator for not being in compliance with any particular rule or regulation. These enforcement economic models are used to analyze the financial aspects of

enforcement actions. The USEPA uses the BEN model to determine Monetary Benefits Penalty Orders. This model calculates a violator's economic savings from delaying or avoiding pollution control expenditures. Explanations of the calculation of this sanction are detailed in Appendix 4(b).

### **Australia**

This sanction is not available in Australia.

### **UK**

This sanction is not available in the UK.

### **Germany**

This sanction applies in Germany if a company is "enriched" by a breach of any Regulation, (i.e. if it experiences any financial gain) and the "enrichment without cause" section of the German Civil Law (Bereicherungsrecht) can be applied. Penalties can be imposed to eliminate any financial gain.

Unjustified enrichment or advantage gained from an environmental offence is charged to the offender. This, however, is not the regulator's but the court's decision, against a person and not the violating company.

## **6.11. Compensation Order**

This sanction is applied to compensate either the regulator or a third party for costs or expenses incurred in taking action to deal with damage to the environment resulting from the offence. This order can be made by the Regulator on its own or as part of a Civil Penalty.

### **US**

This sanction is used extensively by the USEPA and the individual states to recoup costs associated with offences from the offender.

### **Australia**

A cleanup may be conducted by the regulator if any element of the environment is polluted or an environmental hazard occurs. The costs of the clean up and the legal costs can be recovered from any person who caused or permitted the pollution or hazard.

**UK**

This sanction is not available in the UK.

**Germany**

Following a fixed penalty by the regulator compensation claims from third parties are easily won and must be executed.

It is difficult in Germany to prove that personal injury or damage has been caused by an environmental breach. These injuries and health costs are covered by health insurance. The insurance companies will normally recover costs from the offender. Also fire brigade, police and the community will attempt to recover costs from the offender.

**UK**

This sanction is not available in the UK.

**Germany**

This sanction is not available in Germany.

### 6.12. Name And Shame

This sanction requires an offender to publish details of an offence in a public manner. A regulator can also publish the information.

**US**

Information regarding fines and other violations is always readily available for public review in the US. Each year the USEPA publishes an Accomplishments Report, which discusses the details surrounding every enforcement action.

Often trade publications, newspapers, and various internet sites will publish information related to environmental fines, penalties, and other consequences. Although companies hate any bad publicity, it is unclear how effective "name and shame" really is in the US. Historically it is noted that environmental offenders may also have received "green" accolades which are also published.

**Australia**

An occupier may be required to publish results of an environmental audit in the manner specified by the regulator. The regulator cannot require the person to publish any information that is of a confidential or commercially sensitive nature.

A court may specify that a guilty person must publicise an offence or any environmental or other consequence arising from the offence and any impose penalties.

The Court may specify that the guilty person must notify one or more persons or group of persons such as through an offending company's annual report.

## 7. Task 5

Develop a “road map” to show how such sanctions could be implemented and provide a plan for the workshop for relevant stakeholders.

### 7.1. Legal Implementation

7.1.1. In Ireland, legislation may be divided into two categories: primary legislation and secondary legislation. Primary legislation consists of the statutes enacted by the Oireachtas. Secondary legislation consists of statutory instruments, bye-laws and similar rules made under the authority of parent legislation.

#### Existing Legislation

7.1.2. Any new civil and administrative sanctions proposed may have the ability to be implemented in Ireland through existing legislation and this would need to be considered by the Legislature in the first instance. For example, the Environmental Protection Agency Act, 1992 (as amended), and the Waste Management Act, 1996 (as amended), provide that the Minister may make regulations for the purpose of enabling any provision of that said legislation to have full effect.

#### New Legislation

7.1.3. If existing legislation cannot accommodate any new proposal for civil and administrative sanctions, then primary legislation will be necessary. Secondary legislation may also be required, if further detail is to be subsequently provided. For example, The Litter Pollution Act of 1997 explicitly outlines the power of the litter warden or a member of the Gardai to issue on the spot fines under section 28(1) of the Act. Secondary legislation was subsequently introduced to increase the amount of the fine.

#### Regulatory Impact Assessment

7.1.4. In any proposed implementation of additional administrative and for civil sanctions, Regulatory Impact Assessment (RIA) should be

considered. RIA has been described by the Irish Government as a “Tool used to assess the likely effects of a proposed new regulation”. It is designed to clarify relevant factors for decision makers by using a comprehensive and systematic compilation of information. It is intended that this should encourage policy makers to make balanced decisions when they consider legislative action against the wider economic goals. Ireland participated in the Organization for Economic Co-operation and Development’s (OECD) regulatory reform peer review programme in 2001. From this, emerged the White Paper “Regulating Better” which was issued by the Taoiseach’s office. This White Paper set out six principles of good regulation namely necessity, effectiveness proportionality, transparency, accountability and consistency. In addition, the European Union High Level Consultative Group on Regulatory Quality (Mandlekern Group) recommended that RIA should be introduced generally within the EU.

7.1.5. By conducting an RIA, a number of options are likely to arise. For example, the identification of costs, benefits and impacts, impacts on national competitiveness, impacts on the socially excluded or vulnerable groups and whether the proposal will involve a significant compliance burden. The Steering Committee at its meeting in November 2007 also emphasised that the cost factor is a very important consideration for the introduction of any new legislation, and Consortium noted this.

#### Guidelines

7.1.6. Clear guidelines and coherent policies should be published in the roll-out of any new civil and administrative sanction regime. The Hampton Report highlights that businesses are very concerned about the cumulative burden of regulation. In particular, businesses spoke of multiple inspections and overlapping data requirements. Moreover, that Report states that regulators are often failing to communicate their requirements simply and effectively to business. According to the Small Business Research Trust, 50 per cent of small businesses which try to find advice on



regulation are unsuccessful in locating it. The Environmental Agency in the UK published a report recently which stated that 40% of businesses said that they wanted more guidance from regulators on their duties and the law. Guidelines also have the benefit of providing consistency and transparency in any new system. This would be particularly important if local authorities, in addition to the EPA, are to use such sanctions.

## Training

7.1.7. The introduction of training of regulators in relation to the roll out of any new proposed sanctions is also important to ensure consistency amongst and between local authorities and the EPA. Furthermore, a number of commentators have supported the idea of having an EU wide exchange of best practice in relation to the implementation of legislation common to a number of member states. There has been some debate on establishing an EU community training programme for local authorities and this may prove useful relative to implementation of the administrative sanction regime.

## Implementation in Practice

The “road map” below demonstrates how any introduction of the identified 9 sanctions could impact on the day to day activities of the regulator and also identifies possible impediments that may impact on the practical implementation and success of each penalty.

### 7.2. Enforcement Undertakings

- 7.2.1. In order to implement this sanction the regulator must enter into a legally binding agreement with the violator. The agreement will require drafting and is likely to involve negotiation between the violator and the regulator. All of these procedures will draw on the time and resources of the regulator.
- 7.2.2. Also, the regulator will be required to monitor the progress of the agreement and to assess whether the objectives of the agreement have

been met by the violator. This will again draw on the time and resources of the regulator.

- 7.2.3. Disputes may arise over interpretation of the agreement’s objectives and as to whether these objectives have been achieved. Again the regulator will be involved in negotiations and discussions with the violator to reach a satisfactory conclusion. However, should a conclusion not be reached there is the potential of a dispute requiring legal settlement.

### 7.3. Warning Letters

- 7.3.1. As indicated previously warning letters are currently issued by the regulator informally and have proven to be a very effective tool. However, they do not currently have a statutory basis in Ireland.
- 7.3.2. One option for the regulators to consider is to make these official documents, with set templates for particular instances or offences. The letter would indicate the violation, the time by which the violation should be remedied and a fine system should the violation not be remedied within the set timeframe.
- 7.3.3. A database could be established to record and monitor the issuing of warning letters. This would indicate to the regulator (and the public) the status of the issue and whether compliance has been achieved within the agreed timeframe.

### 7.4. Fixed Penalties

- 7.4.1. This sanction involves payment of a specified monetary amount by the offender to discharge or compensate for a breach. The initial step in this process is to assess an appropriate charge for each specific offence where fixed penalties are to be applied.
- 7.4.2. In order for a fair assessment of the appropriate charges it may be necessary to consult with Irish industry, the sector most likely to be impacted by their introduction. This will have the advantage of involving industry in the process and obtaining

agreement to the introduction and scope of fixed penalties.

7.4.3. The introduction of fixed penalties should be clear and concise to allow the violator understand why the penalty has been applied and the amount of the penalty. The penalties should also allow some discretion to the regulator to account for the significance of the impact and the cooperation of the violator. The penalty needs to be proportional to the non-compliance and the ability of the activity to pay.

7.4.4. An appeal mechanism might be considered which allows the violator bring the matter to a higher authority if disagreements arise over the level and type of penalty imposed. (This is dealt with in more detail in Task 7 of the Study).

## 7.5. Variable Penalties

7.5.1. This sanction would require a similar system to the fixed penalty system. The penalties will however be variable in nature and not be as defined as the fixed penalties. This will require more discretion on behalf of the regulator and as a result a greater emphasis would be placed on the negotiation of the penalty and the discretion of the regulator.

7.5.2. These types of penalties may lead to more disputes and appeals due to the variable nature of the penalties.

## 7.6. Civil Penalty

7.6.1. As previously stated civil penalties are generally applied to more significant environmental offences and a more robust system is required for applying the penalties.

7.6.2. A civil penalty could be determined by clear and transparent models similar to those used in the US. This will allow the violator to have confidence in the issuing of the penalty and its amount.

7.6.3. The penalty should be representative of the impact of the violation and the cooperation of the violator. A review or appeals mechanism

should also be in place to allow the violator petition a higher authority.

7.6.4. Implementation of civil penalties would require a clear structure within the EPA and other regulators. This structure would require training in the assessment of the impacts where civil penalties would apply and the determination of impartial penalties. An appeals body would need to be considered. (See Chapter 9 for a more detailed assessment on appeals mechanism).

## 7.7. Environmental Service Order

7.7.1. This sanction works in conjunction with civil penalties and the process of implementing these sanctions would be the same.

7.7.2. These sanctions would however require some degree of monitoring by the regulator as they involve public projects such as restoration works. The regulator would be required to check on the progress of the project and to ensure the penalised party has fully satisfied the terms of the order.

## 7.8. Monetary Benefits Penalty Order

7.8.1. As stated previously this penalty can prove difficult to determine. In general, the Irish regulator would be required to prove a benefit was obtained by a violator. This would require economic analysis of a violation and particular expertise.

7.8.2. As the penalty may be seen as arbitrary it is likely to lead to many challenges and appeals. This may lead to a protracted and expensive process with no discernible gain.

## 7.9. Compensation Order

7.9.1. The EPA currently seeks, and is generally granted, compensation for costs incurred during enforcement proceedings. This is also likely to occur in civil penalty cases.

## 7.10. Name and Shame

- 7.10.1. As previously stated the EPA currently issues information on enforcement prosecutions. This is currently done on the EPA website.
  
- 7.10.2. This name and shame policy could be extended to require the violator make public prosecutions. The policy could require the violator to take out advertisements in newspapers or other publications detailing the infringement committed, the fine imposed and the remedial actions undertaken. The policy could also be expanded to require the violator include the details of an infringement in its annual reports or reports to stock markets.
  
- 7.10.3. The expansion of this penalty to incorporate the above extensions would not require major changes to the existing operations. Templates could be drawn up for different violations detailing the required information to be completed by the violator. This could then be checked by the regulator and agreed prior to publication.

## 8. Task 6

Give Practical Examples Of How Each Sanction Would Work In Practise And Address Practical Issues Such As The Methods For Imposition And Collection Of Fines, Penalties Or Other Sanctions.

### 8.1. Enforcement Undertaking

This sanction occurs where the offender provides written undertakings to the regulator to remedy the harm done in a certain way and by a certain time and can be enforceable in court.

#### *United States (US)*

This sanction is not available in the US.

#### *Australia*

The Victorian EPA agreed a four way covenant with a glass manufacturer Pilkington, Sustainability Victoria and the Australian Industry Group to help the company substantially cut the environmental impact of its operations over a four year period.

City West Water Limited and EPA Victoria entered their second Sustainability Covenant on 26 March 2007. This Covenant is a voluntary statutory agreement between the organisations, to work together, until 30 June 2008, to assist City West Water to become greenhouse gas neutral, with a primary focus on waste hierarchy principles and to share information on the implementation of greenhouse gas neutral programs.

#### *United Kingdom (UK)*

This sanction is not available in the UK.

#### *Germany*

An offender disclosed a breach of VOC emission limits to the regulator. A written action plan was then submitted to the regulator. This was accepted and monitored by the regulator. A subsequent permit was issued by the regulator allowing the operator to remain in compliance.

#### *Ireland*

The EPA currently requires licencees to reduce the environmental impact of their facility by requiring the licensee to submit an improvement programme. However, should the improvement programme not be implemented, the EPA are currently required to take

criminal prosecutions. The EPA issue Section Notices under the Air and Water Pollution Acts requiring facilities to undertake remedial actions. This can include for example the facility installing a waste water treatment plant or air abatement technology.

This could be extended to non-licensed facilities where pollution incidents occur. For example, an agreement could be made to remediate a pollution incident to agreed site specific limits.

### 8.2. Warning Letter

This sanction involves issuing a notification of a regulatory breach without taking further immediate action.

#### *US*

This sanction is not available in the US on a statutory basis.

#### *Australia*

EPA Victoria issued a Minor Works Pollution Abatement Notice (MWPAN) to ensure a Piggery operates in a more sustainable way in the future.

EPA Victoria issued a Pollution Abatement Notice (PAN) in September 2005 to ensure a site was secure because of friable asbestos on site. The EPA revoked the PAN in August 2007 following the removal of hazardous friable asbestos material from the site.

EPA will send a letter to the owner of a reported smoky vehicle advising them that their vehicle has been reported as emitting smoke and may need repairs. The letter also says that, if the vehicle is observed emitting smoke by an EPA or police officer, the owner may be fined. Fines are \$500 for an individual and \$1000 for a company. In 2000–01 almost 4 500 warning letters were issued under the smoky vehicle program and over 250 penalty infringement notices served.

A company has been fined for allowing litter to be blown from its landfill site. EPA had warned the company on several occasions about litter being blown onto adjoining properties from its landfills in the South East of Melbourne.

## **UK**

This sanction is not available in the UK on a statutory basis.

### **Germany**

Warning letters are typically used by the authorities in the following cases:

8.2.1. Overdue UST- or AST- inspections which are subject to regular inspection requirements;

8.2.2. Overdue air emission monitoring (of heating burners or other significant air emission sources which are subject to regular monitoring requirements); and

8.2.3. Overdue wastewater monitoring.

### **Ireland**

Warning letters are currently issued by the regulator and have proven to be a very effective tool. They are not issued on a statutory basis.

## **8.3. Fixed Penalties**

This sanction involves payment of a specified monetary amount by the offender to discharge or compensate for a breach.

### **US**

In general, each statute allows for a fine of up to \$25,000/day for each violation. The statutes do not distinguish among violations. So, in theory, one could pay the maximum amount for not conducting a required weekly inspection or for discharging toxic pollutants into a stream without a permit.

In practice however, the maximum allowable fine is always negotiated downward based on several factors e.g. impact of the non-compliance on the environment, the means of discovery (self-disclosed or otherwise) or cooperation of the violator.

### **Australia**

EPA Victoria recently fined Cargill \$5506 for breaching its licence following an odour incident which saw EPA receive 9 reports from the public in a four hour period on the Fathers Day weekend.

EPA Victoria in 2007 issued 7,250 fines for litter thrown from motor vehicles, an increase of 18% from the same time the previous year, all of which

resulted from reports by the public to EPA Victoria's Litter Report Line. The 'on-the-spot' fine is AUD\$220. Anyone can report people who litter from cars to the Environment Protection Authority Victoria (EPA Victoria) on their Litter Report Line

MCM Chemical Handling failed to pay a \$5000 Penalty Infringement Notice for failing to immediately contain a liquid/chemical spill. The charge of failing to comply with a condition of a Pollution Abatement Notice was laid, but the charges were dropped when the \$5000 was paid.

Captain Dimitrios Paraskevopoulos was not convicted but fined \$5000 for discharging oil from a ship in State waters.

Sea Elf Maritime Inc (a company registered in Liberia) was convicted and fined \$5000 for discharging oil from a ship in State waters.

Four people who did not pay their litter fines, based on declarations that they did not commit the offence, were ordered to pay the original fine in addition to extra costs.

Collex Pty Ltd fined \$5000 for not complying with licence conditions

Goulburn Valley Region Water Authority fined \$5000 for causing an environmental hazard

SPC Ardmona fined \$5000 for unlicensed discharge of waste

Tasman Group fined \$5000 for breaching abatement notice

### **UK**

Under the Clean Neighbourhoods and Environment Act 2005, Section 10, an authorised officer of a local authority can issue a fixed penalty notice in respect of an offence of abandoning a vehicle. The sum of the penalty is set at UK£200, but can be varied by Order under the Act. Local authorities may allow a lesser amount to be paid within a set (usually shorter) period of time.

Part 3 of the Clean Neighbourhoods and Environment Act 2005, makes it an offence to drop litter anywhere in the open air in the area of a principal litter

authority (Section 18 of the Act). Section 19 of the Act provides that an authorised officer of a litter authority may give a person, who he has reason to believe has committed a littering offence, a fixed penalty notice. Litter authorities can specify the amount of the fixed penalty, but the level of the penalty is set by default to UK£75 if the litter authority does not exercise its right under the Act. Litter authorities may allow a lesser amount to be paid within a set (usually shorter) period of time. Section 20 of the Act allows litter authorities issue a litter clearing notice requiring any occupier of relevant land within an area designated a litter control area under the Environmental Protection Act 1990. Fixed penalty notices for littering range from UK£50 in Perth and Kinross District Council's to UK£75 in Cardiff County Council. Cardiff County Council has issued 3266 fixed penalty notices since 2002 for littering offences. Middlesbrough Council can take action by serving a "street litter control notice" on person(s) running premises associated with large amounts of litter on the street, such as take-away outlets and shops selling food and drink. The notice allows Middlesbrough Council to set rules for keeping all land within 100 metres of the front of the premises free of litter. It is an offence to fail to comply with a street litter control notice, and the maximum fine is £2,500 in Court. Prosecution can be avoided by paying a fixed penalty of £110, falling to £60 if paid within 10 days.

Under Section 82 of the Clean Neighbourhoods and Environment Act 2005, an authorised officer of a local authority can give a person, whom he believes has committed an offence under the Act, a fixed penalty notice, of UK£100 for exceedances of specified noise limits from a dwelling at night (default level of the fine if the local authority does not set its own fine level) or UK£500 for exceedances of specified noise levels from licensed premises. This level is set in the Act and local authorities have no power to set an alternative.

#### **Germany**

An example of a fixed penalty occurred when, during an inspection, an offender was found using solvents for cleaning, which were not permitted. The regulator requested a comprehensive report about the amount of solvents used, the reasons solvents were used and the background for the breach. There was no penalty against the company, but a prosecution of the

responsible production manager, who had to pay one month's salary.

#### **Ireland**

Fixed penalties could be applied to breaches of IPPC licence limits and similar infringements. A set, clear and transparent scale of penalties should be determined and agreed prior to any actions being taken.

As with other countries, such as the US and Australia, some discretion should be available to the regulator for cooperation of the violator and the impact of the non-compliance. The violator should also be given ample opportunity to represent the reasons for the non-compliance to the regulator.

### **8.4. Variable Penalties**

This sanction is a payment of a variable amount, to be determined at the discretion of the regulator, to discharge or compensate for a breach. This sanction is not used on a statutory basis by any of the jurisdictions in the study.

### **8.5. Civil Penalty**

This sanction is a civil monetary penalty.

#### **US**

In October 2007, one of the US's largest power generators, American Electric Power (AEP), as part of a settlement was fined \$15 million in civil penalties following pollution of parkland and waterways. Filed in federal court, the agreement settles a lawsuit against AEP brought by eight states, a dozen environmental groups and the USEPA in 1999. They accused the energy company of rebuilding coal-fired power plants without installing pollution controls as required under the Clean Air Act.

A more comprehensive list of civil penalties is also included in Appendix 5 of this study entitled US Civil Penalty Examples (Extract from US EPA 2004-2007).

#### **Australia**

EPA Victoria fined a sport company \$5,372 and issued them with a Penalty Infringement Notice (PIN), following dumping of paint waste on the banks of a rural waterway last year.

Iron Horse Enterprises stored prescribed industrial waste (asbestos) without a licence. Convicted and fined \$4,000 plus costs of \$3,635.

Tollman Pty Ltd convicted and fined \$8,000 plus ordered to pay \$10,000 in costs, for permitting an environmental hazard

One individual convicted, fined and ordered to pay costs for owning a smoky vehicle in contravention s43 of the Environment Protection Act 1970.

Three individuals convicted, fined and ordered to pay costs for driving a noisy vehicle in contravention of s48B(1) of the Environment Protection Act 1970.

#### **UK**

This sanction is not available in the UK.

#### **Ireland**

Civil penalties are generally applied to more significant environmental offences and as a result the system for applying the penalties needs to be more robust. Civil penalties could be applied in Ireland against illegal dumping activities, major pollution incidents or operation of a facility without an appropriate licence.

Some concern was raised by the Steering Committee at the Stakeholder meeting in November 2007 regarding the determination of civil penalties, the objectivity of regulators and the appeals process. As previously advised, all of these concerns would need to be openly addressed to allow for the successful implementation of civil penalties and avoid ongoing potential challenges to the authority of the regulators.

### **8.6. Environmental Services Order**

This sanction requires the offender to carry out a specified project for restoration/enhancement of the environment in a public place or for public benefit. This sanction is normally used in conjunction with Publicity Orders.

#### **US**

As part of the AEP case mentioned earlier in this Chapter, AEP agreed to end a years-long federal law suit by investing \$4.6 billion to reduce pollution that has eaten away at Northeast mountain ranges and national landmarks. The USEPA called it "the single

largest environmental enforcement settlement in history by several measures".

AEP were fined \$60 million in cleanup and mitigation costs to help heal parkland and waterways that have been hurt by the pollution.

By contrast, Exxon Mobil Corp. estimates it has paid \$3.5 billion in cleanup costs, government settlements, fines and compensation for the 1989 Exxon Valdez oil spill.

Further examples of SEPs are already provided in Appendix 4(b) – SEP Background Information and Examples.

#### **Australia**

Ancor Packaging Australia convicted of polluting waters making it potentially/harmful to wildlife. Ordered to pay \$60,000 to Help for Wildlife Inc. and provide proof of payment to the court that the money had been paid within 40 days of conviction. The defendant must refer to the proceedings when making payment so as not to disguise the money as a good will donation.

Nylex Corporation who were charged with polluting waters making them detrimental to beneficial use at Mentone were, without conviction, ordered to carry out a specific project for the public benefit by paying \$50,000 to Melbourne Water within 60 days of court order. The money was used for the revegetation of Lower Mordialloc Creek.

William John le Messurier was charged but without conviction, ordered to pay \$5000 to Merri Creek Management Committee Incorporated for contravening conditions of a licence.

Shell Refining (Australia) was convicted after pleading guilty of two counts of water pollution caused by oil spills and was ordered to pay \$75,000 to fund a local environment project which will involve creek bed stabilisation, revegetation and sediment removal works.

Toll Transport (and subsequently the employee involved – Andrew David Lawson) were charged with polluting waters by making them harmful to fish or other aquatic life but without conviction, were ordered to pay \$10,000 to the City of Yarra. In

addition, Toll was to establish a community environmental educational resource centre to be located at Aplington Primary School involving \$30,000 for a mobile classroom, \$15,000 for development of educational materials, \$5000 to purchase equipment for the Water Watch program, and \$7500 to retrofit the school's guttering to enable rainwater irrigation.

#### **UK**

This sanction is not available in the UK.

#### **Germany**

This sanction is not available in Germany.

#### **Ireland**

Environmental services orders are generally made in conjunction with civil penalties. As a result these sanctions would require a similar transparent and robust structure and approach with an appeals/review mechanism in place.

An example of how this sanction could be applied is when a violator is required to support environmental improvement projects in their areas, assist local environmental groups with funding or manpower or provide environmental awareness training to the public.

### **8.7. Monetary Benefits Penalty Order**

This sanction can be applied as part of a Civil Penalty or on its own whenever the regulator can quantify a benefit is obtained by an offender and the offender has sufficient funds to pay all or a significant proportion of the benefit obtained.

#### **US**

The USEPA have a model for determining benefits obtained by an offender. The model BEN calculates a violator's economic savings from delaying or avoiding pollution control expenditures.

However, determining benefit can be complicated as can be seen by the case of Central Heating and Power Plant at Appendix 5(b).

#### **Australia**

No examples were available from Australia.

#### **UK**

A recent case in Northern Ireland in respect of a Clogher farmer convicted on two counts of keeping and disposing of illegal waste. However, this was part of a criminal confiscation investigation and not a civil sanction.

#### **Germany**

No examples were available from Germany.

#### **Ireland**

Potential cases where this sanction could be applied in Ireland occur when a violator profits from illegally dumping waste.

### **8.8. Compensation Order**

This sanction is applied to compensate either the regulator or a third party for costs or expenses incurred in taking action to deal with damage to the environment resulting from the offence. This order can be made on its own or as part of a Civil Penalty.

#### **US**

Both AEP and Exxon Mobil Corp. were ordered to pay compensation in the two previously mentioned cases.

#### **Australia**

A ship that spilt oil in Bass Strait was ordered to pay \$60,578 in clean up and legal costs.

Coliban Region Water Authority appeared in the Bendigo Magistrates' Court and pleaded guilty to three charges of permitting an environmental hazard relating to 3 separate sewage spills. The water authority was also ordered to pay EPA's costs of \$8,421 plus other fines.

Iron Horse Enterprises stored prescribed industrial waste (asbestos) without a licence. Convicted and ordered to pay costs of \$3635 in addition to a fine.

Nylex Corporation who were charged with polluting waters making them detrimental to beneficial use at Mentone were, without conviction, ordered to pay costs of \$29,916.43 in addition to a publicity order and environmental benefit order.



Vilo Assets Management convicted of permitting an environmental hazard at Laverton North and ordered to pay for damages caused to personal property. This is in addition to a public benefit order, publicity order in newspaper and Annual report of company, and costs of \$18,400

Shell Refining (Australia) was convicted after pleading guilty of two counts of water pollution caused by oil spills and was ordered to pay the EPA's costs of \$60,000.

**UK**

This sanction is not available in the UK.

**Germany**

No examples were available from Germany.

**Ireland**

Currently the EPA seeks compensation for costs incurred during enforcement proceedings and these are generally granted. Consideration now to putting this on a formal footing.

**8.9. Name And Shame**

This sanction occurs when an offender is required to publish details of an offence in a public manner. A regulator can also publish the information.

**US**

A list of environmental enforcements undertaken by the USEPA is readily available on their website and examples of these are attached in Appendix 5(a) – US Civil Penalty Examples.

**Australia**

Ancor Packaging Australia was convicted of polluting waters making it potentially/harmful to wildlife. They were ordered to publish a notice according to the court's specifications within 30 days of the conviction being handed down.. The notice must contain the defendant's logo, be a minimum size of 12cm by 3 columns and be publicised during the early general news in 5 specific papers (largest 5 circulation in Victoria).

The owner of a ship who was convicted of three environmental charges including two relating to pollution of land and one for discharge of oil from a ship, was ordered to publish a notice that must contain the defendant's logo, be a minimum size of

12cm by 3 columns, have a continuous black border surrounding the notice and be publicised during the early general news in 5 specific papers (largest 5 circulation in Victoria)

Nylex Corporation who were charged with polluting waters making them detrimental to beneficial use at Mentone were, without conviction, ordered to place a notice under specific conditions in State newspapers. In addition, the Corporation was ordered to notify its shareholders of the offence, its consequences, the penalty and orders imposed by the Court by publishing a notice in the Annual Report following specifications ordered by the Court.

**UK**

This sanction is not available in the UK.

**Germany**

This sanction is not available in Germany.

**Ireland**

The Irish EPA currently issues information on enforcement prosecutions. This could be extended to require the violator publish an agreed notice as part of a civil penalty. It also could be extended on a formal footing for Local Authorities and the EPA to ensure consistency.

## 9. Task 7

Review the question of the need for an appeal mechanism for the resolution of disputes related to administrative and civil sanctions and make a recommendation on a suitable approach to this issue.

In considering this issue the Consortium felt it would be useful to look at the experience of some of the other jurisdictions/comparator countries i.e. Australia and the UK.

### 9.1. The UK Position

9.1.1. The UK, like Ireland has no civil sanction regime in place. One of the leading experts in the UK in this field is Professor Macrory who states:

“Having access to an effective and quick appeal route is an absolute necessity when referring to administrative financial penalties”

Macrory advocates a two tier approach:

- (1) internal review by the same body; and
- (2) a right to appeal to an independent administrative tribunal

Having access to an internal review process would give the regulated industry the opportunity to question the regulator’s decision and present any information that the regulator may not have had access to at the time the sanction was originally imposed. If the member of the regulated community is not satisfied with the outcome of the internal review, an appeal of that decision could be taken forward to the Regulatory Tribunal. Macrory believes that an appeal mechanism is necessary to hold the regulator responsible for the imposition of administrative and civil sanctions. Moreover, he believes the appeal mechanism for administrative sanctions should not be in a criminal Court and should be separate to the criminal regime.

9.1.2. Macrory espouses that there are advantages to a separate tribunal (as opposed to a Court) for appealing

administrative sanctions. Firstly, the tribunal could be composed of members with both legal and specialist expertise in the subject matter, providing the tribunal with a fuller understanding of the issues. Additionally, a tribunal would not consider regulatory cases alongside cases of conventional crime which constitute the main workload for the criminal courts. A Regulatory Tribunal would be a flexible and accessible appeal mechanism, and would continue to provide sufficient procedural safeguards necessary to protect the needs of the regulated community.

### 9.2. The Australian Position

The Australian Law Reform Commission (ALRC) recently carried out a review on their appeal process relative to administrative and civil sanctions in Australia. Civil penalties are imposed using formal court proceedings and appeals are provided for by legislation in Australia currently. This avenue of appeal generally involves a Court sitting in its appellate jurisdiction. The Court is also involved in the approval of certain agreed penalties between the regulator and the business. The Court is also involved in the enforcement of negotiated settlements between the regulator and certain parties.

9.2.1. There is provision for internal reviews in the Australian regime also. An internal review is the reconsideration of a decision within the same agency by a person other than the original decision maker. There is also an external merits review, which is a two tier process commencing with the internal review and then if the party is still dissatisfied they have the option of going to an independent tribunal. The external merits review means the reconsideration of the merits of a decision by a Court or other independent tribunal specifically constituted for the purposes of reviewing decisions. Judicial review is concerned only with whether the decision made by the original decision maker was properly within the legal limits of the relevant power.

9.2.2. The ALRC report refers to studies of the internal review procedure and their advantages and disadvantages. The disadvantages are as follows:

(1) It can act as a barrier introducing lengthy delays and deterring members of the regulatory community from reaching a genuinely independent review body;

(2) It can lead to inconsistent treatment of members of the regulatory community in different geographic areas or regions.

However, it is also:

(1) a quick and easily accessible form of review which can efficiently satisfy large numbers of people who might otherwise;

(2) not take up external review rights (because of perceived barriers); or

(3) a useful quality control mechanism, wholly 'owned' by an agency, with the best chance of feeding back and influencing primary decision making.

9.2.3. One issue that the ALRC had to consider was whether a appeal and review mechanisms should be an essential component of all federal penalty processes. A number of commentators in Australia have reservations about the provision of appeal and review mechanisms in regulatory arrangements, and have noted that:

(1) appeal mechanisms may increase delays and costs;

(2) to allow government-instituted appeals might expose regulators to political interference and undermine their authority;

(3) a divergence between policies adopted at first instance and on appeal may be produced and lead to confusion;

(4) an appeal and review procedure may not always provide a second opportunity for a fair

decision. It may offer an avenue to the 'real' decision maker that is delayed by a kind of mock examination before the first-instance body. This is especially the case where appeals proliferate.

9.2.4. Despite these disadvantages, the ALRC found that the public interest in regulator's acting in a consistent, fair and transparent manner demands that the regulator's be accountable for their decisions through the provision of systems of appeal and review. The ALRC acknowledges that all three forms of review – internal review, external merits review and judicial review – may not be necessary or appropriate in all situations. In relation to decisions to impose quasi-penalties that have the potential to directly adversely affect the person on whom the penalty is imposed, as a general principle all three forms of review should be available.

9.2.5. Taking into account the support expressed for this proposal and the absence of any specific opposing views, the ALRC concludes that as a general principle, and subject to express exclusion from a particular penalty scheme, accountability requires that avenues of review be available in all administrative and quasi-penalty schemes and therefore the ALRC recommends that all penalty schemes provide avenues of internal review, external merits review and judicial review, unless one or more of these avenues is clearly inappropriate.

### 9.3. The Current Position in Ireland

Administrative sanctions (namely "on the spot" fines) have been introduced in Ireland under the following legislation: Social Welfare and Pensions Act, 2007, Section 3 of Part 2; Safety Health and Welfare at Work Act, 2005, Section 79(1); and the Litter Pollution Act 1997, Section 28. There is no currently appeals mechanism in place relative to those administrative sanctions under the relevant legislation.

## 10. Conclusion

Ireland has a number of non-criminal sanctions available to regulators by virtue of existing environmental legislation. In addition, Regulators use some sanctions without any formal statutory basis, for example warning letters, the name and share process and verbal warnings. In total Ireland has access already to 11 of 20 non-criminal sanctions identified in this study.

### 10.1. There are 9 non-criminal sanctions that Ireland does not have or does not have a legislative basis for and these are:

- Enforcement Undertakings
- Warning Letters
- Fixed Penalties
- Variable and Discretionary Penalties
- Civil Penalties
- Monetary Penalty Orders
- Environmental Services Orders
- Compensation Orders
- Name and Shame

10.2. It is submitted that criminal sanctions in Ireland do not appear to be working as effectively as they should be and there are practical difficulties and public perception issues in this regard.

Civil penalties/administrative penalties may have a role in these circumstances and in particular where there are currently low fines for minor offences and potential large fines for serious indictable offences but few penalties for those offences that fall between the two. Where administrative and civil sanctions have in fact been used in the past in Ireland they have proven to be very effective and taken seriously by a lot of companies.

10.3. In addition, the experience for the most part of the four countries identified in our Comparative Study, namely the U.K., U.S., Germany and Australia is that there are tangible benefits in allowing Regulators and the Courts to pursue a pragmatic and flexible approach to environmental enforcement through the utilization of a sufficiently comprehensive range of sanctions, namely criminal, civil and judicial sanctions.

## Appendix 1 (a).

### Comparative Analysis of Administrative & Civil Sanctions in other Jurisdictions

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"All information provided is of a general nature and is not intended to address the circumstances of any particular individual or entity. This appendix is based on original work by Stephenson Harwood on behalf of the EPA during 2007 and is not intended to be current with 2009 regulations.

No one should act upon such information without appropriate professional advice."

This comparative analysis report has been prepared by members of the Environment Group at international law firm Stephenson Harwood. The team comprised Michael Woods, Partner and Head of the Environment Group; Hayley Olsson, Associate; Anita Kasseean, Associate; and Seán Ó hIarnáin, Trainee Solicitor.

The kind assistance of the following bodies is also acknowledged: Environmental Resources Management, South Australian Environment Protection Authority, Western Australian Environment Protection Authority and New South Wales Environment Protection Authority, with particular thanks to Walter Mugdan, US Environment Protection Authority.

## 1. OVERVIEW

### 1.1. Outline of the Report

The report provides a comparative analysis of the use of civil, administrative and criminal sanctions in four main jurisdictions: 1) the United Kingdom; 2) Germany; 3) Australia; and 4) the United States of America. Specifically, the report answers the following questions for each jurisdiction:

#### 1. Outline of the Legal Regime

Summarise very briefly the environmental enforcement regime in these jurisdictions i.e. the main enforcement bodies, the main pieces of legislation and generally how the criminal enforcement system works.

#### 2. Availability of Administrative and Civil Sanctions

Advise on what administrative and civil sanctions (if any) including civil penalties have been introduced in each of those jurisdictions and where possible provide details of which offences.

#### 3. Reason for introducing Administrative and Civil Sanctions/Impetus for change

Why administrative and civil sanctions were introduced in each jurisdiction.

#### 4. Effectiveness of the Administrative and Civil Sanctions

Advise on the effectiveness of such administrative and civil sanctions including civil penalties in each jurisdiction in terms of the desired environmental outcome of the enforcement authorities in those jurisdictions.

## 5. Deterrence effect of Administrative and Civil Sanctions compared with Criminal Sanctions

Comment on whether administrative and civil sanctions have a deterrent effect and compare those to the deterrent effect of the criminal prosecution in each of those jurisdictions.

### 1.2. Key Terms

There is no international consensus on the terminology used to describe administrative and judicial type sanctions. Therefore, for the purposes of this report, we have adopted the following definitions of key terms.

**Administrative sanctions** are those measures which regulatory bodies have available to them to enforce environmental law without having to resort to criminal or civil court proceedings, although in many instances they will be a precursor to court proceedings. Such sanctions include warning letters, fixed administrative penalties and clean-up notices.

**Judicial sanctions** are those remedies which a court has available to it in civil proceedings to enforce environmental law. Such sanctions include injunctions, publicity orders and environmental services orders.

**Criminal sanctions** are those penal sanctions which a criminal court has available to it where an offender has been successfully prosecuted. Such sanctions include fines and imprisonment.

**Civil penalties** can be seen as a hybrid type of sanction. They are a civil 'fine' intended to compensate for the environmental harm done as well as punish the wrongful conduct of the offender. Civil penalties are available in two main forms: administrative civil penalties (also known as negotiated civil penalties) and judicial civil penalties. Administrative civil penalties enable the regulator to negotiate the amount of the civil penalty with the offender. Judicial civil penalties enable the court to determine civil penalties on the basis of the lower civil standard "balance of probabilities" rather than the criminal standard "beyond reasonable doubt".

### 1.3. Summary of the Comparative Analysis

The comparative analysis indicates there are tangible benefits in allowing regulators and the courts to pursue a pragmatic and flexible approach to environmental enforcement through utilisation of a sufficiently comprehensive range of sanctions.

Whilst different specific models of sanction are employed by each jurisdiction, the merits of having access to a full 'suite' of sanctions allows the regulators to better match their response to the realities of enforcement, including the inevitable constraints which result from limited resources and evidential standards. This however has not yet been achieved in some jurisdictions, notably the UK, where there are fewer alternatives to criminal prosecution.

Administrative and/or civil sanctions are also seen as a suitable means of increasing the ability of the regulator or the court to take account of the practical circumstances surrounding the regulatory breach, including the actual cost of the damage caused to the environment.

In addition to providing a sufficiently broad range of measures, it is apparent that regulators should be encouraged to make optimal use of existing environmental sanctions, as well as regulatory tools available in other more general legislation (e.g. under the Proceeds of Crimes Act in the UK).

There does though remain a lack of firm data on whether the use of such administrative sanctions in the different jurisdictions actually secures real environmental benefits 'on the ground'. This should perhaps be considered as one element of the general uncertainty in setting a 'regulatory benchmark' for environmental compliance in the context of competing economic and political policies.

Nevertheless, it is clear from our analysis that there is a trend in countries such as those covered in this report towards the implementation of a more sophisticated and flexible model of environmental enforcement which makes the goal of improved compliance more viable.

## 2. UNITED KINGDOM

### 2.1. Outline of the Legal Regime

#### Introduction

The United Kingdom is comprised of three distinct legal systems: English law, Northern Ireland law and Scots law. English law, which applies in England and Wales and Northern Ireland law, which applies in Northern Ireland, are based on common-law principles. Scots law, which applies in Scotland, is a pluralistic system based on civil-law principles, with common law elements. For the purposes of this report we have focused on English law.

English law applies a similar system to Northern Ireland, Australia and the US in relation to the separation of powers between the executive, judiciary and legislature bodies. The constitution, which is not codified, governs the legal framework and consists mostly of written sources, including statutes, judge made case law, and international treaties. The British Parliament can undertake "constitutional reform" simply by passing Acts of Parliament.

Being a member of the European Union, England and Wales are required to implement Council Regulations immediately and Directives in accordance with the timetable given.

#### Environmental Law Regime

The Department of Environment, Food and Rural Affairs (Defra) has primary responsibility for environmental policies and legislation, although other government departments also have environmental responsibilities (e.g. the Department of Trade and Industry on electrical waste). Defra also represents the UK at the EU Agriculture and Fisheries Council and at the EU Environment Council as well as in other international negotiations on sustainable development and climate change.

While most environmental offences are set out in statute law, individuals can bring an action when their private rights have been affected, for example, when emissions from a factory damage nearby housing or privately owned land. In these circumstances the private individual may bring a tortious claim for, inter alia, nuisance and

trespass which can result in the environment being protected or remediated, albeit indirectly.

### Key Environmental Legislation

Key legislation in England includes:

- Environmental Protection Act 1990;
- Wildlife and Countryside Act 1981;
- Town and Country Planning Act 1990;
- Planning (Hazardous Substances) Act 1990;
- Pollution Prevention and Control (England and Wales) Regulations 2000;
- Water Resources Act 1991; and
- Water Industry Act 1991.

### Main Regulators

The regulation and enforcement of environmental issues is divided between the Environment Agency (EA) and local authorities. In almost all cases operators of industrial plant will require different approvals from both regulators before they can begin operations.

In practice the EA is the lead body for protection of the environment and is responsible for licensing, compliance and enforcement in respect of the most hazardous activities. For example, it regulates major manufacturing, mining, industrial and agricultural activities under the Integrated Pollution Prevention and Control (IPPC) regime as well as discharges of sewage, effluent and contaminated run-off to soakaway, surface water or groundwater sources.

Local authorities tend to regulate less harmful activities including statutory nuisances, littering and parts of the IPC/IPPC regime relating to air pollution. Trade effluent discharge consents are required from the relevant sewerage undertaker for discharges to the public sewer.

Other key environmental regulatory bodies include Natural England, the Health and Safety Commission and the Food Standards Agency.

### The Courts

There is no specialist court or tribunal in relation to environmental matters in England. Most environmental offences are dealt with summarily in the Magistrates' Court where offences tend to carry a maximum penalty of £20,000 and/or a term of imprisonment. On indictment, the

offences may be punishable by an unlimited fine and imprisonment of up to five years.

The court system is headed by the Supreme Court of England and Wales, consisting of the Court of Appeal, the High Court of Justice (for civil cases) and the Crown Court (for criminal cases). The ultimate body of appeal is the House of Lords which has jurisdiction on both civil and criminal matters.

Being a member of the EU, reference can be made to the European Courts in appropriate circumstances. The European Courts may take enforcement action against the Government if it is in breach of EU law or if a Directive has not been properly transposed into English law.

### Criminal Enforcement of Environmental Law

Due to the absence of a developed system of civil penalties, criminal enforcement is often the sole option for environmental regulators in relation to breaches of environmental law. The criminal law is applied to individuals and corporations and personal liability may also extend to individual directors or officers in certain circumstances.

There are currently a very large number of environmental criminal offences in the UK ranging from breaches of PPC permits through to the illegal trade of endangered species and illegal water abstractions. The burden of proof generally lies on the prosecutor and strict liability is the main approach to enforcement. Strict liability offences do not require proof of mens rea, the prosecutor only needs to prove that the breach has occurred. Commentators have suggested that there is an over-reliance on strict liability offences which is leading to indignation and in certain circumstances the trivialisation of the offence as akin to a business overhead because guilt is presumed.

## 2.2. Availability of Administrative and Civil Sanctions

Table 1 shows the administrative and civil sanctions that have been introduced in England. While the EA does have alternatives to criminal prosecution it often has to rely on the threat of criminal prosecution if these prove ineffective. Therefore, the EA relies heavily on more informal administrative mechanisms such as verbal



cautions, discussions and warning letters, with enforcement notices and licence suspensions reserved for more serious breaches. The EA uses a primarily compliance-based model of enforcement and establishing good ongoing relationships with organisations is essential to the success of this model.

### 2.3. Effectiveness of the Administrative and Civil Sanctions

Table 1 provides an overview of the effectiveness of administrative and civil sanctions under English law. As previously discussed, administrative sanctions are relied on heavily by environmental regulators in England, particularly those that are more informal in nature, and are generally considered by the regulators to be reasonably effective.

A key issue in relation to the efficiency of the current system is the absence of a varied administrative and civil penalty regime. For example, it is not possible for the courts to impose a variable fine upon a corporation to properly match the environmental damage caused or to fully take into account of any illicit profits obtained through a breach. Instead the Magistrates' courts are bound by fixed maximum financial penalties which are perhaps better suited to the type of criminal offences (such as burglary and assault) which the Magistrates hear on a daily basis.

### 2.4. Impetus for introducing further Administrative and Civil Sanctions

The EA has called for a broader range of enforcement tools to be introduced in the UK. This is supported by a number of recent reports including the report prepared for Defra by Michael Woods and Professor Macrory in 2003, *Environmental Civil Penalties - A More Proportionate Response to Regulatory Breach* and the report prepared for the UK cabinet Office by Professor Macrory in 2006 *Regulatory Justice: Making Sanctions Effective*.

These reports indicate that the current system does not provide the flexibility, fairness or moral accuracy required to achieve optimal compliance and therefore, they recommend the adoption of a civil penalties regime and a

broader enforcement 'toolbox' in the UK which would complement, rather than replace, the existing regime.

Although the recommendations have been broadly accepted, the UK Government is yet to adopt legislation, policies and procedures to implement them.

### 2.5. Deterrence effect of Administrative and Civil Sanctions compared with Criminal Sanctions

The apparent deficiency in the availability of administrative and civil sanctions, (particularly civil penalties), in the UK appears to have resulted in an over reliance on the threat of criminal enforcement. Commentators have suggested that this is undermining the concept of criminality and trivialising criminal cases in situations where non-criminal sanctions would have provided a more proportionate means of addressing the moral culpability of the offender and the financial penalty imposed. For example, defence lawyers have been able to gain the sympathy of the courts, particularly in relation to strict liability offences, by citing unfortunate circumstances, the intervention of third parties and the right to make a living. In addition, the lack of a specialist court or tribunal in the UK with environmentally trained judges may have exacerbated the position.

The deterrence effect of criminal sanctions has been somewhat reduced in the UK due to relatively low penalties being imposed by the courts and the reduction of penalties imposed by lower courts on appeal. For example, in a recent decision, the Court of Appeal (Criminal Division) in *R v Cemex Cement Ltd* [2007] All ER (D) 281 (Jul) significantly reduced the fine imposed by the Rugby Magistrates Court from £400,000 to £50,000. In this case, a large amount of potentially hazardous dust was released from a kiln, which had not been properly maintained, in breach of its PPC permit. Cemex continued to operate the kiln despite knowing that the equipment was faulty. The original penalty was found to be disproportionate to the offence given there were no fatalities or actual damage to health. The EA was disappointed with the decision given the gravity of the environmental impact. Previously, in *R v Milford Haven Port Authority* [2000] All ER (D) 312

(Feb), the Court of Appeal (Criminal Division) reduced the fine ordered by the Crown Court from £4 million to £850,000. In this case, the tanker "Sea Empress" grounded on the Mid-Channel rocks causing widespread oil pollution in Milford Haven and to the coastal waters on all sides. It was among the largest oil spills ever recorded. The accident was caused by a serious navigational error by the pilot (employed by the Port Authority) who was guiding the vessel into the port. The sentence was reduced by the Court of Appeal after taking into account the financial position of the Port Authority and the amount of costs already expended by it in the clean-up.

Given the dependence of administrative sanctions on the threat of more serious criminal sanctions it follows that the effectiveness of such sanctions is also likely to suffer where the deterrent effect of criminal enforcement is diminished.

Therefore, it appears that the criminal enforcement regime is not performing the function that may be expected of it, which is in turn leading to difficulties in the environmental enforcement regime as a whole. It has been suggested that the deterrence effect of criminal sanctions would improve if the criminal system was reserved for serious breaches and additional sanctions, including civil penalties, were introduced which enable the regulator to negotiate penalties and deal more readily with less serious breaches.

Nonetheless, in 2006, the EA's Spotlight Report stated that serious environmental offences were at a record low level, falling 17% since the previous year and that prosecutions by it against companies for environmental offences resulted in fines of over £3.5 million (an increase of almost £1 million compared with 2005). The highest penalty was imposed on Thames Water Utilities Ltd in the sum of £191,600 for polluting water in breach of consent. The EA successfully prosecuted 380 individuals including 29 company directors in 2006. Twenty three community service orders were made, one compensation order and 13 custodial sentences (including 3 suspended sentences).

The EA have recently made use of non-specific environmental legislation to punish environmental offences. In March 2007, a Bradford man was jailed for a string of waste offences and had his assets frozen by the Assets Recovery Agency (ARA). The individual had been running demolition business who were paid to dispose of construction waste but had subsequently dumped the waste (which included asbestos) illegally. He was sentenced to 16 months in prison and the EA then referred the matter to the ARA which used its powers under the Proceeds of Crime Act 2002 to seek civil recovery of the proceeds of the unlawful activity. The EA has promised to continue this policy in the future.

## 2.6. Conclusions

The UK is yet to develop and implement a comprehensive civil and administrative regime and therefore remains dependent on criminal law to enforce serious environmental offences. This has caused difficulties because of the threshold of evidence required for criminal offences (where it is not a strict liability offence) and the lack of resources available to the EA to complete this task. Nonetheless, according to the EA's most recent spotlight report, serious environmental offences fell by 17% in 2006 compared to 2005 and a record level of fines were set of £3.5 million. The EA has recently availed of non-environmental specific legislation to punish environmental offenders, including referring waste offences to the Assets Recovery Agency. However, despite these recent improvements the regulators do not yet have a sufficiently broad suite of sanctions available and therefore are not always able to match the seriousness of the offence with an appropriate sanction.

## 3. GERMANY

### 3.1. Outline of the Legal Regime

#### Introduction

Germany is a federal republic with 16 states (Bundeslander). There are three levels of government and administration, each of which acts independently of the others: federal (national) level, state level and local (municipal) level. Environmental law in Germany is based

upon three main principles: the "precautionary principle" (Vorsorgeprinzip), the "polluter pays" principle (Verursacherprinzip) and the "co-operation principle" (Kooperationsprinzip).

### Environmental Law Regime

The German legal system is based on the civil law tradition (statute). Common law does not exist in Germany. Currently, there is no codification of German environmental laws.

The constitution of Germany (Grundgesetz) is often referred to as the Basic Law. Article 20a of the Basic Law, which is mirrored in the constitutions in most of the 16 states, is a guiding principle for all state organs: "The state, aware of its responsibility for present and future generations, shall protect the natural sources of life within the framework of the constitutional order through the legislature and in accordance with the law and the principles of justice, the executive and the judiciary. "The organs of state are therefore legally bound to protect the environment for future generations, and when weighing up environmental protection against other social interest, the environment must be given greater consideration.

Environmental liabilities are primarily assigned under public law. Public liability is laid down in various statutes, ordinances and administrative regulations. A civil code also exists which regulates the legal relationship between individuals. The civil code does not protect the environment per se; instead it relies on the rights of a private party being impaired (e.g. s.823(1) and s.906).

Like the UK, as a member of the European Union, Germany must incorporate EU law into its legal system.

### Key Environmental Legislation

The following legislation represents a sample of the environmental legislation:

- Environmental Liability Act 1990;
- Federal Immission Control Act 1990;
- Federal Water Act 1957;
- Chemicals Act 2002;

- Closed Substance Cycle and Waste Management Act 1996;
- Federal Soil Protection Act 1998;
- Atomic Energy Act 1959; and
- Environmental Information Act 2004.

Discussions are currently at an advanced stage in Germany to create a codebook of environmental law which would regularise environmental definitions and procedures.

### Main Regulators

There is no central environmental authority with environmental responsibilities; the key environmental laws are regulated by federal acts but the administering and enforcement of environmental law is mainly the task of the individual states and the local authorities whose powers are set out in the respective environmental statutes (e.g. Federal Water Act) and are supplemented by provisions in the Law on Administrative Proceedings (Verwaltungsverfahrensgesetz). For example, the competent authority at the state or lower level licence the construction and operation of industrial plants, power plants, landfills, sewage treatment plants, the transport of hazardous waste and surface waters. They also inspect the relevant plants and punish any infringements.

The Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit) is the government body responsible for defining Germany's national environment policy and is the supreme body for the enforcement of environmental law. The ministry is responsible for three federal agencies, the most important of which is the Federal Environmental Agency (Umweltbundesamt), which provides the scientific basis for German environmental policy and which carries out research, planning and other administrative tasks as assigned to it by the Federal Ministry in order to protect the environment.

### The Courts

The judicial structure consists of both federal and state courts. The Organization of the Courts Act (Gerichtsverfassungsgesetz) is the principal piece of legislation for the courts. The main duty of the

Federal courts (Bundesgerichte) is to act as the final appeals court for the state courts and to ensure the uniform interpretation and development of law in Germany. The courts of first instance handle state law questions. There are also specialized courts: administrative, labour, social and finance. However, no specialist court currently exists for the environment.

#### **The Federal Constitutional Court**

(Bundesverfassungsgericht) has jurisdiction over constitutional disputes between states and the Federal government and over disputes among the Federal Constitutional organs in matters of basic rights. This court also has jurisdiction over disputes concerning constitutionality of laws.

Both administrative and criminal courts can impose administrative sanctions.

#### **Criminal Enforcement of Environmental Law**

In 1980 most regulations dealing with criminal offences were transferred into the Criminal Code (Strafgesetzbuch). Most environmental offences are set out at s324 to s330d of that Code.

Criminal law is federal law.

Criminal proceedings only play a minor role in environmental protection because of the wide use of administrative sanctions. If an environmental crime is suspected, the public prosecutor will bring the criminal prosecution rather than the regulatory agency. The public prosecutor has discretion whether or not to bring criminal proceedings.

There is no provision in the German legal system to bring criminal prosecutions against corporate entities. The few criminal prosecutions for regulatory environmental offences are always brought against the individual or manager who has the mens rea behind the violation which historically has been difficult to prove.

The criminal courts are also used as the appeals mechanism of the administrative system.

### **3.2. Availability of Administrative and Civil Sanctions**

Table 2 shows which administrative and civil sanctions have been introduced in Germany.

Germany uses a combination of civil and criminal law to combat and punish environmental offences. Generally, criminal law is only used for the most serious of offences because causation and personal liability are difficult to prove. In practice, Germany relies on a wide range of administrative sanctions as a punishment or deterrent.

The German system of administrative offences was introduced in 1949 and a legislative framework for them was established in 1952, the current version of which is the Act Administrative Regulatory Offences of 1968 (Gesetz Über Ordnungswidrigkeiten). This Act has led to large number of cases being removed from the criminal jurisdiction and the criminal courts into the administrative jurisdiction.

### **3.3. Reason for the introduction of Administrative and Civil Sanctions**

German criminal law only applies to natural persons rather than legal persons. Because the principle of individual responsibility is firmly entrenched in German law it resulted in corporations escaping liability for criminal prosecutions while at the same time serious difficulties remained in bringing successful prosecutions against corporate individuals. It was primarily for this reason that the Administrative Regulatory Offences Act was introduced in Germany which now serves as the mainstay of corporate regulation, particularly in environmental and antitrust law matters.

The administrative sanctions apply to legal persons and, unlike the criminal law system, does not require fault. Instead they refer to 'objectionable' behaviour which is effectively strict. Procedures such as the rules of evidence are relaxed and allow regulators to more easily impose a sanction for violations of the law and regulations which, while worthy of a penalty, are not sufficiently serious to warrant a criminal prosecution.

### **3.4. Effectiveness of the Administrative and Civil Sanctions**

Table 2 provides an overview of the effectiveness of administrative and judicial sanctions in Germany.

Administrative sanctions are used widely within Germany as part of the enforcement regime and they have been very effective in achieving environmental compliance. The principle of co-operation is essential to the success of the regime and results in the regulators establishing good relationships with organisations. For example, German regulators normally, provided the breach is not too serious, hold discussions with organisations if a breach has occurred before issuing enforcement notices or otherwise.

The fact that fault is not required for administrative sanctions and that regulators have powers to confiscate assets or proceeds, even if the organisation is not proven guilty, has ensured the effectiveness of the administrative sanctions because organisations are more likely to be environmentally compliant in light of their susceptibility to action by the regulators. German corporations cannot be held criminally liable but they are nonetheless liable for criminal offences under the administrative law.

The administrative sanctions in Germany are varied enough and flexible enough to allow the regulators to choose an appropriate action for most environmental offences. For example, if a serious breach does occur, fines can be set at a level to recover any illicit profits received by an offender due to the environmental breach. Similarly, if a fine is not appropriate, the regulators can suspend a licence or refer the matter to the public prosecutor for criminal prosecution.

Environmental crimes have been decreasing each year in Germany and the imposition of prison sentences is rare. The illegal handling of hazardous waste, water and soil pollution continue to be the most widely reported environmental offences. While it is impossible to be specific on this matter, it is believed that the introduction and widespread application of the administrative and civil sanctions has been a key reason for the decline.

### 3.5. Deterrence effect of Administrative and Civil Sanctions compared with Criminal Sanctions

The German system of administrative and civil sanctions appears to have improved the protection of the German environment. Without such sanctions Germany would be reliant upon criminal law which does not apply to companies and is dependent on the regulators referring the matter to the public prosecutor who in turn has discretion whether to commence criminal proceedings based on the strength of evidence and likelihood of successful prosecution. The criminal system in isolation is not an effective deterrent for large companies who carry out harmful actions in the belief that insufficient evidence will exist to ensure that individuals will be successfully prosecuted or that insufficient evidence will exist to attract a large financial penalty.

Under the civil and administrative system, however, large corporations face the possibility of a fine which can take into account any illicit profits they have earned via their breach and therefore any economic motivation for committing an environmental breach is removed. The development of a name and shame policy under the German system would further improve this area.

Overall, the effective deterrence of the German civil and administrative system is due to its flexibility and wide reaching approach. German corporations and individuals are potentially liable under the civil and administrative system at any point, even if they are not at fault. For example a permit defence does not apply in Germany if those permitted operations lead to environmental damage occurring. This can be contrasted with the criminal system where (subject to minor exceptions involving strict liability) mens rea is a key element and is difficult to prove.

### 3.6. Conclusion

Germany has a well established regime of administrative and civil sanctions which have proven to be successful. The regulators are always bound by the principle of co-operation and therefore they do not impose sanctions unless necessary, preferring instead to discuss methods of improvement with the offender.

However, where necessary, the regulators have a wide range of sanctions at their disposal from which they can choose appropriately to match individual offences, including the most serious offences.

The mere existence of such sanctions and the fact that they apply to corporations (unlike criminal law) may be a reason for the continuing rise in German companies adoption of Environmental Management Systems such as the EC's Eco-Management and Auditing Scheme (EMAS). The EMAS system is voluntary but assists in lowering the number of environmental offences because in order to achieve EMAS registration an organisation must conduct an environmental review of its activities which involves identifying its environmental goals, its impacts on the environment and seeking measures to introduce training and a structured documentation system. The supervising authority reviews whether the organisation has complied with environmental regulations. Once registered, the organisation can use the EMAS certification logo and avail of favourable treatment from the regulators on a number of issues.

Finally, as part of their efforts to ensure compliance with environmental regulations, German companies have invested heavily in environmental technologies. However, rather than being a business cost, German companies have benefited from their investment by selling those technologies abroad. German companies lead the field in Europe in the number of patent applications for innovative environmental technologies.

## 4. AUSTRALIA

### 4.1. Outline of the Legal Regime

#### Introduction

Australia is a common law jurisdiction, based on a federal system of government with separation of power between the judicial, executive and legislative arms of Government. The powers of the Commonwealth are specifically defined in a written Constitution, and the residual powers remain with the States. There is no specific power for the Commonwealth to legislate in

relation to environmental matters. Therefore, environmental regulation at the federal level is confined to prescribed matters of national environmental significance and matters involving the Commonwealth and/or Commonwealth bodies.

#### Environmental Law Regime

Each of the Australian States and Territories<sup>1</sup> has legislation regulating a broad range of environmental matters such as pollution, environmental licensing, natural resources, greenhouse gas emissions and biodiversity. The environmental laws generally reflect the polluter pays principle and the principle of ecologically sustainable development.

New South Wales has been chosen as the primary case study for the purposes of this report as it has a well established environmental enforcement regime and a specialist environmental court. Examples from other Australian jurisdictions have been provided in the report where appropriate.

#### New South Wales - Key Environmental Legislation

The Minister for Climate Change, Environment and Water is responsible for administering the following key pieces of environmental legislation in New South Wales:

- Protection of the Environment Operations Act 1997 (POEO Act);
- Threatened Species Conservation Act 1995;
- Contaminated Land Management Act 1997 (CLM Act);
- Environmentally Hazardous Chemicals Act 1985;
- National Parks and Wildlife Act 1974;
- Soil Conservation Act 1938; and
- Native Vegetation Act 2003.

#### New South Wales - Main Regulators

The Environment Protection Authority (EPA), which is part of the Department of Environment and Climate Change, is the main regulator of environmental law in New South Wales.

<sup>1</sup>New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, Northern Territory and the Australian Capital Territory

The EPA is responsible for administering the POEO Act which deals with such matters as environment protection notices, environmental audits, civil enforcement and environment protection offences.

Other key environmental regulatory bodies include local sewerage authorities and local councils in relation to trade waste matters and the National Parks and Wildlife Service in relation to conservation matters.

#### **New South Wales - The Courts**

Most environmental, development and planning disputes in New South Wales are heard by the Land and Environment Court of New South Wales (LEC). Generally, less serious environmental matters are heard by the Local Courts.

The LEC is a specialist Court of Superior record with equivalent status to the Supreme Court of New South Wales. Appeals from the Land and Environment Court are made to the New South Wales Court of Appeal or in the case of criminal matters to the New South Wales Court of Criminal Appeal. Appeals from the New South Wales Appellate Courts can be made to the High Court of Australia.

Disputes in the LEC are divided into the following seven classes:

1. Class 1 - Environmental, planning and protection merits appeals;
2. Class 2 - Local Government and miscellaneous merits appeals;
3. Class 3 - Land tenure, valuation, rating and compensation merits appeals;
4. Class 4 - Judicial review proceedings involving civil enforcement of environmental, planning and protection matters;
5. Class 5 - Criminal enforcement of environmental, planning and protection matters;
6. Class 6 - Appeals by defendants from convictions relating to environmental offences determined in the Local Court;
7. Class 7 - Other appeals by defendants relating to environmental offences.

#### **New South Wales: Criminal Enforcement of Environmental Law**

Criminal enforcement of environmental law in New South Wales is based on a three-tier system. Tier one offences are the most serious offences attracting penalties of up to \$5 million and 7 years gaol. They require proof of wilfulness or negligence and harm, or likely harm, to the environment. Examples include large-scale waste disposal and emission of ozone depleting substances.

Tier two offences are strict liability offences with limited defences. They include water, air, land and noise pollution offences. The maximum penalty for tier two offences is \$1 million with further penalties for continuing offences.

Tier three offences are absolute liability offences. They are those tier two offences which can be dealt with by way of penalty notice. Examples include littering and noise offences. When a breach of the legislation occurs, the EPA has a number of options available to it including prosecution, administrative penalties and warning letters. In addition, a number of creative sanctions are available to the Court in the event of a prosecution, such as publication orders and environmental service orders.

Prosecution is discretionary and therefore not every potential liability will result in criminal prosecution by the EPA. However, the EPA is keen to make clear that prosecution will be used as part of its overall strategy and is not to be considered as a tool of last resort.

The EPA's Prosecution Guidelines set out a range of factors which the EPA will consider when deciding whether or not to prosecute in a particular case. For example, it will consider the seriousness of the offence, the harm to the environment, the degree of culpability of the alleged offender, the availability and efficacy of any alternatives to prosecution and any precedent which may be set by not instituting proceedings.

#### **4.2. Availability of Administrative and Civil Sanctions**

Table 3 demonstrates the very broad range of administrative and judicial sanctions that are

available in New South Wales and other Australian jurisdictions. They include warning letters, enforcement undertakings, monetary benefit penalty orders and civil penalties.

However, civil penalties have only been introduced in the Commonwealth and more recently in South Australia.

#### 4.3. Reason for the introduction of Administrative and Civil Sanctions

Prior to 1 July 1999, sentencing options for environmental offences in New South Wales were limited to imprisonment, fines, clean up orders and compensation orders. This meant that the most likely outcome for a successful prosecution was the imposition of a fine which was not always commensurate with the seriousness of the offence.

Therefore, it became apparent that the criminal law alone was unable to adequately deal with the varied nature of environmental breaches and that a wider variety of sentencing options was required in order to introduce flexibility. The result was the introduction of a broad range of new administrative and civil sanctions in the POEO Act which commenced in 1999.

The impetus for change was driven not only by the regulators and commentators, but also by the 1995 Australian Law Reform Commission Report - Principled Regulation: Federal and Administrative Penalties in Australia. The report calls for more transparent, consistent and 'principled regulation' and recommended the adoption civil and administrative penalties more widely in Australia.

#### 4.4. Effectiveness of the Administrative and Civil Sanctions

Table 3 provides an overview of the effectiveness of administrative and civil sanctions in Australia.

##### Administrative Sanctions

Administrative sanctions are an integral part of the enforcement regime in Australia. Compliance with informal sanctions such as a verbal caution is usually very high as most organisations recognise the importance of developing a good ongoing relationship with the regulator. Most

organisations provide a prompt response to any requests for information or formal warning letters received from the regulator.

Environmental audits are an effective tool for monitoring compliance. They are forward looking, in the sense that they can prevent environmental harm through detecting potential breaches, as well as retrospective in the sense that they can detect actual breaches of the legislation. Good environmental performers will regularly conduct internal audits to minimise the risk of breach as well as to ensure they are prepared for any unannounced mandatory environmental audit undertaken by the regulator.

The culture of encouraging an ongoing dialogue with the regulator has, in some cases, lead to voluntary agreements being entered into between organisations and the regulator in lieu of enforcement action. Enforceable undertakings are also available in New South Wales and Victoria. However, they have only been introduced relatively recently and therefore very few undertakings have yet been made.

Fixed penalties are a very effective administrative sanction for dealing with one-off relatively minor environmental offences such as littering. The administrative cost of serving the notices is low and most penalty notices are paid rather than challenged since the fines are small and no criminal conviction is recorded. Penalties increase significantly if a challenge is unsuccessful and offenders also risk adverse publicity associated with a formal conviction.

In contrast to the US, administrative civil penalties are relatively new and untested in Australia. They are only available in South Australia and were only introduced there in July 2006. At present, the SA EPA has only offered the option of a negotiated civil penalty to one company. This matter is currently subject to negotiations and is expected to be finalised shortly. Once the penalty has been agreed details will be available on the public register through the SA EPA.

In relation to step-in rights, in practice it is only in an emergency or situations where the



offender cannot be immediately identified that the public authority will either voluntarily or under the direction of the EPA step in and clean-up the pollution. In most cases, the regulator will require the polluter to undertake the clean-up work.

The ability of the regulator to suspend or revoke licences is extremely powerful due to the economic impacts on the company which may be more severe than criminal prosecution. In NSW, a number of licences have been made revoked although few have been suspended. Nevertheless, even the threat of revocation or suspension is an effective sanction since it encourages compliance in order to avoid realisation of the threat. Financial assurances are also available in NSW and Victoria as a condition of a licence. They are very effective in encouraging compliance with licence conditions.

#### Civil Sanctions

As previously mentioned, the legislature has introduced a range of sanctions in NSW in order to extend the range of penalties that can be ordered by the Court beyond imprisonment and fines.

Civil sanctions can be grouped into two main categories:

- 1, those that are aimed at restoration, reparation, prevention and rehabilitation (e.g. clean up orders, compensation orders, investigation cost orders, environmental audit orders, environmental service orders, and training courses); and
2. those that are aimed at punishing or deterring offenders (e.g. civil penalties, monetary benefit penalty orders, custodial sentences, and publication orders).

Where possible, the EPA will seek restoration orders that are aimed at renewing a degraded, damaged or destroyed area. For example, in *Ku-Ring-Gai Municipal Council v Gumland Property Holdings Pty Limited* [2001] NSWLEC39, the defendant was fined \$8,000 and ordered to plant new trees and vegetation in accordance with a landscape revegetation plan for breach of a tree preservation order. The LEC also made a restoration order in *Environment*

*Protection Authority v Keogh* (1998) NSWLEC 225, where the defendant, was ordered to remove illegally dumped waste and obtain receipts its proper disposal.

Compensation orders are used by the Courts in appropriate situations and are effective at achieving reparation. For example, in *Environment Protection Authority v Obaid* [2005] NSWLEC 171, a tenant was found guilty of illegally disposing of waste tyres at the premises which it leased. In that case the LEC ordered the tenant to reimburse the landlord for the cost it incurred in removing the tyres.

Environmental service orders are intended to achieve retribution as well as restoration. For example in *Environment Protection Authority v Yolarno Pty Ltd* [2004] NSWLEC 765, the offender was ordered to undertake a project that restored the bed and banks of a creek. Interestingly, such orders have been popular with defendants who have in many instances volunteered undertaking a specific environmental project. However, the LEC has been reluctant to make an order where the proposed environmental project is difficult to administer and may require approval before it can be carried out.

In *Environment Protection Authority v Byron Shire Council*, a water treatment plant malfunctioned causing water pollution that killed fish in a nearby creek. The Council was keen for ratepayers to see that any penalty imposed by the court was, at the very least, going towards a beneficial project rather than the Government's pocket. As a result the Council approached the EPA with a project proposing to remove contaminated sediments from the creek. The Department of Fisheries however were not in favour of the proposal and instead suggested other environmental projects including works on a weir to enable fish to travel upstream. Given the uncertainty of obtaining approval for the proposed sediment removal project, the Court declined to make an environmental service order in this case.

Since that decision, the EPA will usually seek an order which gives the defendant liberty to apply

to the court to review the order where there is doubt that the project can be completed. Alternatively, the court can make an order which requires the defendant to pay a specified sum to an environmental trust or a specific organisation for the purposes of an environmental project.

Civil penalty orders are only available in South Australia and the Commonwealth. The first successful civil prosecution was made against Mr Greentree in 2004 pursuant to the Commonwealth EPBC Act. The Federal Court in *Environment and Heritage v Greentree (No 3) [2004]* (Gwydir Wetland case) ordered a \$450,000 civil penalty against Mr Greentree for illegally clearing and ploughing a wetland of national environmental significance. In calculating the civil penalty, the Court considered the deliberate acts of contravention by Mr Greentree and the need for the penalty to act as a deterrent for similar activities. No civil penalty orders have yet been made by the South Australian Courts.

Monetary benefit penalty orders have potential to be an extremely effective deterrent. However, none have yet been imposed. Publicity orders on the other hand have been extremely prevalent at the LEC with judges frequently ordering an offender to publish the details of its offence, the extent of any harm and the penalties imposed in publications that would be most damaging to the defendant's reputation. For example, Incitec Ltd was fined \$90,000 and ordered to publicise the details of breaching its licence conditions in the *Financial Review* and in the company's annual report which would be read by its shareholders. Australian Pacific Oil Co. was ordered to publicise the details of its offence of unlawfully transporting and depositing of waste in the *Waste Management and Environment Journal*. The LEC has also ordered companies to provide details of the offence to those people who were affected by it.

In most cases the LEC will make a number orders which are aimed at achieving restoration and prevention as well as retribution and deterrence. For example, in 2004 Warringah Golf Club Ltd was successfully prosecuted by the EPA for breach of section 116 of the POEO which is a tier one offence. An employee of the Club negligently

caused a poisonous substance to be washed into a drain, which led to a nearby creek. Approximately 10,000 fish, numerous ducks, geese and other wildlife were killed as a result of the water pollution. Two local councils were involved in the clean-up. The Club was fined a monetary penalty of \$250,000, as well as being ordered to pay the local councils' clean-up and investigation costs in the sum of \$50,500, carry out works to prevent a reoccurrence of the offence (including construction of a wash bay with appropriate bunding and the necessary approvals), publicise the offence in the Warringah Golf Club newsletter and pay the prosecutor's costs in the agreed sum of \$190,000.

Civil sanctions are particularly effective where criminal sanctions are inadequate. For example, courts are reluctant to impose a fine on an offender who does not have the financial means to pay. In such circumstances, an environmental services order may be a more suitable punishment. In the matter of *EPA v Craig Rue Coggins*, Mr Coggins was ordered to perform 250 hours of community service and pay \$1,236 to Warringah Council in clean up costs for negligently causing the escape of a substance in a manner that harmed the environment.

#### 4.5. Deterrence effect of Administrative and Civil Sanctions compared with Criminal Sanctions

It is impossible to say whether or not particular sanctions have a deterrence effect in practice. However, general observations can be made about the apparent deterrence effect of administrative and civil sanctions as compared with criminal sanctions.

Despite having a specialist Court and the EPA having relatively robust powers, the number of prosecutions brought for tier one and tier two offences in NSW decreased during the period 2003 to 2006.<sup>2</sup> The reason for this decrease is not known and could be the result of a number of factors such as the use of more creative sanctions, procedural difficulties in meeting the evidentiary burden etc.

Compared with the US, the penalties imposed by Australian courts for environmental offences are

quite low. This is despite the fact that relatively high maximum penalties are available under environmental legislation.

In order for sentencing to be effective, it is essential that the magnitude of the penalty is significantly greater than the cost saved through non-compliance. In other words, the penalty must be substantial enough that it is not perceived as a fee for illegal activity. Otherwise, not only is the deterrence value of the penalty lost but the integrity of the whole environmental enforcement regime is undermined.

In light of the relatively low penalties imposed in Australia and the rare cases of imprisonment for environmental crime, it appears that criminal sanctions are not a major deterrent for potential offenders.

A number of administrative and civil sanctions on the other hand appear to be extremely effective at deterrence. Publicity orders are an excellent example of a creative civil sanction aimed at achieving both retribution and deterrence. The imposition of a fine may not have a significant impact on a large corporation, particularly if the fine is less than the cost of non-compliance. In contrast, a publicity order may have major ramifications for the corporation's reputation and therefore is often a much greater punishment for corporate crime than a monetary penalty. The fact that publicity orders are frequently resisted by offenders is another indication that they are a successful deterrent. In addition to achieving deterrence, publicity orders raise community awareness, hold the offender accountable for the offence and increase the criminal stigma associated with the offence.

Therefore, the deterrence effect of civil and administrative sanctions when compared with criminal sanctions is difficult to ascertain and will vary depending on the facts and circumstances of the offence and the characteristic of the offender. However, it would appear that unless criminal sanctions are significantly increased they do not have as great a deterrence effect as some of the civil sanctions as well as some of the administrative sanctions such as licence revocation.

#### 4.6. Conclusion

Australia has a comprehensive enforcement regime comprising a wide variety of administrative and civil sanctions. However, many of the sanctions have only been introduced during the last 10 years and as such it has not yet made full use of all available sanctions. Civil penalties for example have only recently been adopted in South Australia and only one civil penalty has been imposed by the Federal Court pursuant to Commonwealth legislation. Therefore, the effectiveness of civil penalties in Australia is relatively untested.

Environmental compliance is generally achieved through a co-operative approach with the regulator which is encouraged by the threat of criminal and civil sanctions in the event of continued non-compliance. Compared with the US however, criminal penalties for environmental crimes in Australia are relatively low. As a result, criminal sanctions appear to be becoming less of a deterrent than many of the new, more creative sanctions.

Civil and administrative sanctions complement, rather than replace, criminal sanctions in Australia by providing regulators and the courts with a range of sanctions from which they can choose. In particular, the Australian experience has shown the effectiveness of sanctions such as licence revocation, environmental service orders and publicity orders which in many cases appear to be a greater deterrent than the imposition of a fine. Greater use of existing sanctions, such as civil penalties and an increase in the amount of penalties imposed is needed in the future to further strengthen the environmental enforcement regime in Australia.

## 5. UNITED STATES OF AMERICA

### 5.1. Outline of the Legal Regime

#### Introduction

The United States of America (US) is a republic with a legal system that is divided between federal and state law. Its laws are derived from four sources: constitutional law, administrative law, statutory law, and common law. The most important source of law is the US Constitution

(Constitution) and all other law falls under, and is subordinate to this.

Federal law in the United States originates with the Constitution, which gives Congress power to enact statutes for certain limited purposes, such as regulating commerce.

All fifty American states are separate sovereigns with their own state constitutions and governments. They have power to make laws covering anything not pre-empted by the federal Constitution, federal statutes, or international treaties ratified by the federal Senate. All states have somewhat similar laws however in relation to "higher crimes" (such as murder and rape) although penalties for these crimes may vary from state to state. States also have delegated lawmaking powers to thousands of agencies, townships, counties, cities, and special districts. Thus, at any given time, attention must be paid to the rules and regulations of several dozen different agencies at the federal, state, and local levels.

### **Environmental Law Regime**

The US Constitution does not directly address environmental protection but it does authorise Congress to regulate interstate commerce. This in turn gives power to federal government to enact pollution control laws and measures to protect the environment. Although states retain substantial independence to issue environmental laws, federal environmental laws take precedence. Some federal environmental statutes however create national minimum standards, delegating primary implementation to states.

The basis of environmental law in the US is contained in the National Environment Policy Act 1969 (NEPA). It forms the basic national charter for protection of the environment and establishes policy, sets goals and provides means for carrying out the policy. Specific environmental policy is contained in a series of statutes, of which the key ones are listed in the next section. Some general environmentally related rights and responsibilities are also found in the common law (primarily relating to nuisance or tort) and may apply where no statutory obligation exists.

### **Key Environmental Legislation**

The key pieces of environmental legislation in the US are:

- National Environmental Policy Act 1969;
- The Clean Air Act 1970;
- The Clean Water Act 1977;
- Comprehensive Environmental Response, Compensation, and Liability Act 1980;
- The Endangered Species Act 1973;
- The Oil Pollution Act of 1990;
- The Pollution Prevention Act 1990;
- The Resource Conservation and Recovery Act 1976; and
- The Superfund Amendments and Reauthorization Act 1986.

### **Main Regulators**

Most environmental responsibilities at federal level fall on the Environmental Protection Agency (USEPA), the Department of Justice, the Department of the Interior and the Council on Environmental Quality. More narrow environmental responsibilities can be found in virtually every other government agency.

The USEPA is the lead agency for setting and implementing most federal environmental protection laws, standards and programs in the US. It has ten regional offices throughout the US and each is divided along program areas (air, water, waste, and toxics). The regions have primary responsibility for implementing federal environmental laws and are responsible for permitting, enforcement, and monitoring state programs which implement those federal laws.

The US Department of Justice enforces federal civil and criminal environmental laws at a judicial level through its Environment and Natural Resources Division (ENRD). USEPA is one of the main federal agencies the Division represents. There are two divisions within ENRD which deal with civil judicial matters; the "Environmental Enforcement Section" and the "Environmental Defense Section". The Environmental Enforcement Section is responsible for bringing civil judicial actions under most federal laws enacted to protect public health and the environment from the adverse effects of pollution. The Environmental Defense Section (EDS) prosecutes and defends a broader range of

civil environmental claims involving the US, and periodically provides legal counsel on compliance matters to agencies in the federal government.

### The Courts

There are no specialist environmental courts in the US. Civil judicial and criminal environmental actions are decided through the normal channels of the US court system.

At federal level, the judiciary is hierarchical. The highest court in the US is the United States Supreme Court, whose decision is final. The Supreme Court has limited original jurisdiction, hearing most of its cases on appeal. The Circuit Courts of Appeals are the level of courts immediately below the Supreme Court. The Circuit Courts hear appeals from the District Courts, the lowest level of federal courts. The Congress has also established several courts that address special types of cases. Cases from these courts are appealed to the U.S. Court of Appeals for the Federal Circuit. These include the U.S. Court of Federal Claims and the U.S. Court of International Trade.

All state judiciaries are also hierarchical. State systems are made up of a Supreme Court (sometimes with a different name), usually an intermediate appellate court, and a series of lower courts or trial courts, sometimes including specialized courts. State judiciaries interpret state laws and apply them in specific disputes relating to state law; they determine whether a state crime has been committed; they evaluate the constitutionality of state laws under the state constitution; and they review the legality of state administrative rules under state statutes.

### Criminal Enforcement of Environmental Law

There are two possible routes to a criminal sanction for environmental violations. One is through the conventional criminal codes. Another consists of acts that are specifically made punishable through the various environmental statutes.

In general, a "knowing", "wilful" or "intentional" violation, especially one that has serious consequences, is typically subject to criminal

enforcement. In a criminal prosecution, the government is the plaintiff and must prove its allegations against the defendant 'beyond a reasonable doubt'. This differs from civil judicial claims where the plaintiff must merely prove her case by 'a preponderance of the evidence'.

The criminal system utilises fines and imprisonment rather than damages or restitution as sanctions for breaching environmental laws or regulations. It focuses more on immorality and the offender's state of mind and serves a much broader range of functions than civil penalties as it can seek retribution, social condemnation, specific deterrence, general deterrence, protection of third parties, and payment of compensation or reparation.

At a regulatory level, the Office of Criminal Enforcement, Forensics, and Training (OCEFT) at USEPA investigates violations of federal environmental laws and associated crimes by corporations and small businesses. The OCEFT Homeland Security Division provides criminal investigative support to other law enforcement agencies. USEPA Special Agents also have statutory authority to conduct investigations, make arrests for any federal crime and execute and serve any warrant. OCEFT works closely with the Department of Justice to take legal action in federal courts to bring polluters into compliance. The Environmental Crimes Section of ENRD at the Department of Justice is responsible for prosecuting individuals and corporations. Finally, individual states are also entitled to pursue criminal action against a person or company, depending on the nature and severity of the violation.

## 5.2. Availability of Administrative and Civil Sanctions

Table 4 shows which administrative and judicial sanctions are used in the US. The USEPA uses four main tools for improving and maintaining compliance: compliance assistance, incentives, monitoring and enforcement. The courts also have a wide range of sanctions at their disposal, from various types of monetary orders, publicity, cleanup projects to injunctions. Mention should also be made of Alternative Dispute Resolution which, even though not within the scope of this

report, is strongly supported by the USEPA to deal with disputes and potential conflicts.

**5.3. Reason for the introduction of Administrative and Civil Sanctions**

There is no specific information available as to why administrative and civil sanctions were introduced in the US. The passage of environmental laws evolved as environmental problems became evident. As industry developed along the rivers and lakes, it used vast amounts of water for its process. Water pollution became evident as urban centers grew and as a result, water regulations were strengthened. Ways were then found to discharge the pollutants to the air either directly or via the evaporation of contaminated wastewater. These practices along with the air pollution associated with urban areas became evident in the 1950s and 1960s. Air pollution regulations were strengthened during the same period as the water pollution regulations. Scenic Hudson Preservation Conference v. Federal Power Commission has been widely recognized as one of the earliest environmental cases; it was decided in 1965. The case has been described as giving birth to environmental litigation and helping create the legal doctrine of standing to bring environmental claims. The Scenic Hudson case also is said to have helped inspire the passage of NEPA. Waste products then were placed in lagoons or buried underground but eventually contaminants were transported in the subsurface to areas where they were now evident. As contaminated waste sites were found and people complained of health effects, these land disposal problems became evident. As such, regulations governing land disposal were passed in the late 1970s and 1980s.

**5.4. Effectiveness of Administrative and Civil Sanctions**

Table 4 provides an overview of the effectiveness of administrative and judicial sanctions in the US.

**Administrative Sanctions**

Administrative sanctions form a crucial part of the environmental enforcement regime in the US, but there has recently been a mixed bag of results as far as their effectiveness is concerned.

The USEPA uses a variety of tools to achieve compliance, from providing information and informal advice to thousands of regulated entities to workshops and on-site visits. The USEPA uses inspections, investigations, and enforcement actions to identify egregious violations and return violators to compliance as quickly as possible, greatly reducing impacts on sensitive areas. To increase compliance and improve environmental management practices, the USEPA encourages facilities to identify, disclose, and correct violations through incentives such as reduced or eliminated penalties. The USEPA regularly issues Administrative Compliance Orders to compel compliance as well as impose a monetary penalty, measures which are less time-consuming and resource intensive.

On the whole, administrative sanctions have proved to be effective as USEPA reduced, treated, or eliminated 890 million pounds of pollution through enforcement actions in FY 2006, an increase of 97.78% over its performance target of 450 million pounds for that year.

The number of fixed administrative penalty orders issued in FY 2006 has been the highest total ever and the number of facilities and companies resolving voluntary disclosures has been the highest in the past five fiscal years. USEPA monetary penalties are also among the most effective deterrents to future violations and can eliminate the economic benefit which may accrue to a violator as a result of his non-compliance. In FY 2006, USEPA reached a significant settlement with DuPont for violations under the Toxic Substances Control Act when DuPont agreed to pay a \$10.25million penalty. This was the largest civil administrative penalty the USEPA has ever obtained under a federal environmental statute. Financial Security sanctions are also successful in reducing litigation and administrative costs when violations occur.

The USEPA successfully uses a combination of administrative sanctions in practice. In 2006, an engine manufacturing company paid a civil fine of US\$25m and conducted Supplemental Environmental Projects costing US\$35m for emitting excess noxious emissions.

There are other indicators however which suggest that some administrative sanctions have not been as successful as it may seem. In FY 2006, the USEPA failed to meet its performance target for the pounds of pollutants reduced as a result of audits because fewer facilities reporting large pollutant reductions chose to participate in this voluntary compliance incentive program. The USEPA also missed its performance target for complying actions taken during on-site inspections and evaluations. This was due to the fact that not all deficiencies were able to be corrected immediately. The number of pounds of pollution estimated to be reduced, treated or eliminated as a result of concluded enforcement actions by the USEPA also went down in FY 2006 (890m pounds) compared to 1,100m pounds in 2005.

USEPA also faces significant challenges in holding businesses responsible for their environmental cleanup obligations. These challenges often stem from the differing goals of environmental laws, which hold polluting businesses liable for cleanup costs and other laws which, in some cases, allow businesses to limit or avoid responsibility for these liabilities. Businesses can legally organize or restructure in ways that can limit their future expenditures for cleanups. While many such actions are legal, transferring assets to limit liability may be prohibited under certain circumstances. Such cases, however, are difficult for EPA to identify and for the US Department of Justice to prosecute successfully.

### Judicial Sanctions

In practice, most USEPA enforcement cases are settled before trial or hearing. It is difficult to identify why this is so but could possibly be because civil lawsuits are more cumbersome than formal administrative enforcement proceedings. All settlements by the USEPA however include a binding obligation on the violator to come into compliance, so its effectiveness per se, is not diminished.

Of the cases that do reach trial or a hearing, judicial sanctions can carry greater weight since the courts can enforce their own orders more effectively than the USEPA. There has been a substantial increase in the number of

concluded civil judicial cases in FY 2006 compared to FY 2005. The number of civil judicial referrals has also been the highest in the past five fiscal years, indicating that the effectiveness of such sanctions is being increasingly recognised and thus used. In fiscal year 2006, ENRD secured more than USE\$3.7 billion in corrective measures through court orders and settlements. It achieved five consent decrees with large petroleum refiners, resulting in over US\$2 billion in new pollution controls. Through the settlements, the division brought enforcement actions against 80 refineries that make up approximately 77% of the refining capacity of the US, thereby reducing air pollutants by more than 315,000 tons per year. In FY2006, the Office of Enforcement and Compliance Assurance's (OECA) civil enforcement and cleanup enforcement programs concluded a total of 173 judicial cases. The OECA referred 286 civil cases to the U.S Department of Justice, the highest total in five years.

As with the use of Administrative sanctions by the USEPA, courts in the US also combine judicial sanctions to achieve a desired result. For example, in June 2006, the Environment and Natural Resources Division successfully litigated civil claims under the Clean Air Act. Minnkota Power Cooperative entered into a Consent Decree to install pollution control measures estimated to cost over \$100 million, and along with another company, pay a civil penalty of \$850,000 and spend at least \$5 million on environmentally beneficial wind turbine projects.

Citizen suits against a regulatory agency or a regulated entity have also proved to be a powerful tool, allowing individual citizens and non-governmental organisations to augment government enforcement resources. These suits also fill a void where the government is disinclined to pursue a violator (perhaps for political reasons) as well as provide a potential instrument to compel officials to do what Congress intended they do.

The effectiveness of some judicial sanctions however is sometimes reduced if they are negotiated down, as in the case judicial civil penalties where

the maximum potential amount as laid down in statutes are reduced through negotiations in Administrative Orders and Consent Decrees.

#### 5.5. Deterrence effect of Administrative and Civil Sanctions compared with Criminal Sanctions

It is very difficult to assess either general or specific deterrence for either USEPA or law enforcement in general. With the USEPA still struggling to determine the right way to measure the impact of its efforts, specific data on this question is not available in the public domain.

In any regulatory situation some people will comply voluntarily, some will not comply, and some will comply only if they see that others receive a sanction for non-compliance. This phenomenon - that people will change their behaviour to avoid a sanction is one way of defining what "deterrence" is. Enforcement deters detected violators from violating again, and it deters other potential violators by sending a message that they too may experience adverse consequences for non-compliance.

Criminal provisions have always been a part of most US environmental laws but criminal prosecution in the past has been rare. A conscious policy decision is taken at federal and state levels, based on the availability of alternative procedures for civil judicial and administrative enforcement, to reserve criminal sanctions for the most serious cases involving deliberate intent, criminal negligence or some form of corruption. In civil judicial cases the government is the plaintiff and its burden of proof is the easier 'preponderance of evidence' standard of a civil case as opposed to the far heavier 'beyond a reasonable doubt' burden of a criminal case.

When used however, prosecutors can charge individuals, as well as the facility and corporation, with environmental crimes. Indictments against culpable corporate executives provide significant deterrence, which is one of the primary goals of criminal enforcement. Senior decision-makers for the regulated community will think twice about deliberately breaking the law if they understand that they face incarceration, rather than only

corporate fines, for their criminal conduct. USEPA criminal enforcement of environmental Laws is currently measured to be "adequate" by the White House. The government currently state however that, in relation to criminal enforcement, USEPA needs to set more ambitious goals, achieve better results, improve accountability or strengthen its management practices.

Statistics on the use of criminal sanctions indicate that their significance has recently increased. During FY 2006, OECA's Criminal Enforcement Program increased its number of national enforcement priority investigations almost five-fold by opening 24 cases (up from five in 2005). 305 environmental crime cases were initiated with 278 defendants charged. Following the longest environmental crimes trial (seven months) since the criminal environmental enforcement program was established in 1982, the Atlantic States Cast Iron Pipe Company and four individual defendants were found guilty of numerous violations. As a result of all of the criminal sanctions assessed in FY 2006, defendants will serve a total of 154 years in jail and pay almost \$43 million in fines, as well as an additional \$29 million in environmental projects. All of this has resulted in a reduction of 17 million pounds of pollutants in 2006.

On the whole however, the number of criminal cases initiated by the OCEA's Criminal Enforcement Program has steadily declined since 1998, along with the number of defendants charged, sentences imposed and amount of fines and restitution. The statistics however must be interpreted with caution as the decline may not necessarily mean that criminal sanctions are having less of a deterrent effect and hence are not being used as often. The strategy of the USEPA's criminal enforcement program is to pursue more "high impact" cases which have greater environmental and public health significance and a deterrent impact on illegal corporate and individual behaviour. The decline in total jail time for FY2006 in particular has been due to Supreme Court decisions making the Sentencing Guidelines discretionary rather than mandatory.



Based on the figures available for enforcement alone therefore, it seems that currently, the deterrence effect of criminal sanctions may not be as great as that of civil sanctions given that traditionally, administrative and civil judicial sanctions are more commonly used to enforce environmental laws and standards.

## 5.6. Conclusions

The US has a sophisticated enforcement regime which is very reliant on the use of administrative and civil sanctions, and where appropriate, criminal sanctions. What began in the late 1960s as a heroic effort by an incipient environmental movement to conserve dwindling natural resources has been transformed over more than three decades into an extraordinarily complex, diverse, and often controversial array of environmental policies.

The wide range of civil and criminal sanctions available has given regulators and courts much flexibility in ensuring compliance with environmental laws and can be argued to have had considerable deterrence effect. Administrative and civil enforcement actions have been particularly successful recently in reducing the amount of pollution produced.

The use of computer modelling and SEPs has also allowed the effective recovery of the financial advantages gained from non-compliance, even if the sums imposed in the more serious cases may seem somewhat unpalatable in the context of current UK environmental regulation.

The environmental regime in the US however is not perfect. Critics of the USEPA say it has become more lax through use of administrative and civil sanctions instead of criminal sanctions and has emboldened polluters to break federal laws. The number of criminal cases brought by the USEPA is down sharply compared to the late 1990s and regulators are seeking more settlements and plea bargains that require pollution reductions through new equipment purchases. There has also been a decline in USEPA resources for pursuing environmental wrongdoing and there are many areas where data is not available to assess the state of the

environment. These criticisms clearly show that there is still room for improvement.

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Table 1. Availability and Effectiveness of Sanctions in the United Kingdom

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
<b>Admission Sanctions</b>			
Persuasion/verbal caution	Informal warning, advice or support from the regulator to the offender	✓	Environmental regulators rely heavily on informal discussions with individuals/businesses to achieve voluntary compliance. This approach is dependent upon developing a pragmatic relationship with the individual/business regulated. For example the EA frequently offers advice, provides information and sometimes issues verbal cautions. Given the limited use of civil and administrative sanctions and the dearth of more creative sanctions, criminal sanctions may be the only real alternative in the event of non-compliance.
<b>Information Notice</b>	To provide records, documents or evidence regarding a suspected/actual regulatory breach.	✓	Environmental regulators have broad powers to obtain information. These powers are used regularly in connection with permit applications and investigations and are considered to be very effective. For example, the power to require any person who is believed to be able to give information relevant to any examination or investigation to answer such questions as the regulator thinks fit and to sign a declaration: s 108 of the Environment Act 1995. Powers to search premises and interview persons are also available for criminal offences pursuant to the Police and Criminal Evidence Act.
<b>Mandatory Environmental Audit</b>	Where the regulator compels a company to carry out an audit of its activities.	✗	While there is no legislative provision for environmental audits as such, environmental regulators may in effect require audits to be undertaken in certain circumstances (e.g. when surrendering permits). The EA requires a type of audit process when assessing the risk of an operator's activities. The assessment process is known as Environment Protection Operator and Pollution Risk Appraisal (OPRA). The more hazardous the pollution emitted by the operator's activities, the more stringent processes the operator needs to put in place. In addition, the EA has introduced a scheme known as Operator Monitoring Assessment which enables it to undertake audits to monitor the self-monitoring arrangements of certain operators.
<b>Enforcement Undertakings/Agreement</b>	Where the offender provides written undertakings to the regulator to remedy the harm done in a certain way and by a certain time and can be enforceable in court.	✓	There is limited use of such sanctions in the UK. For example, Climate Change Agreements have been entered into, as well as enforceable planning agreements which often secure environmental benefits.

Table 1. Availability and Effectiveness of Sanctions in the United Kingdom

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Warning Letter	Notification of a regulatory breach without taking further immediate action.	✓	<p>Environmental regulators commonly issue formal letters to warn individuals and businesses of potential non-compliances or the steps they can take to remedy actual non-compliances. Warning letters are most effective when they can be backed up by more serious sanctions in the event that the warning letter is ignored. The warning will be recorded and may be referred to in any subsequent proceedings.</p> <p>Environmental regulators can also issue 'simple cautions' (previously known as formal cautions) as an alternative to prosecution where the offender makes a clear and reliable admission of guilt and understands the significance of accepting a caution or where possible appropriate remedial action to rectify the offence has occurred.</p>
Fixed Administrative Financial Penalty	Payment of a specified monetary amount by the offender to discharge or compensate for the breach.	✓	<p>Fixed penalty notices have been relatively recently introduced (eg under the Clean Neighbourhoods and Environment Act 2005) and are typically used to deal with minor offences where a small financial penalty is generally an effective deterrent<sup>1</sup> punishment. For example littering (fixed penalties set by local authority usually £50-£80) and noise (fixed penalty of £75-£110 from dwellings and £500 from licensed premises). In contrast, more serious offences such as large-scale fly-tipping are normally pursued by way of prosecution due to the severity of the impact on the environment. Failure to pay a fixed penalty can result in prosecution in the Magistrates Court with fines of up to £5,000 (depending on the offence).</p>
Administrative Civil Penalty	Payment of a variable amount to be determined through negotiations with the alleged offender to discharge or compensate for the breach.	✗	<p>There is no equivalent sanction in the UK.</p>
Enforcement Notice, Order or Direction	Served where a breach of regulatory consent, licence or legislation has occurred and specifies steps to rectify the breach and timescale.	✓	<p>The EA has power to issue enforcements notices under specific legislation (e.g. notice to remove illegal waste under s59 of the Environmental Protection Act 1990). While such notices are effective in remedying the specific non-compliance contemplated by the legislation, there is no general stop work notice which can be issued immediately by the regulator to prevent a serious risk of environmental damage.</p>

Table 1. Availability and Effectiveness of Sanctions in the United Kingdom

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Clean Up / Pollution Notice or Order	Requires the offender to take specific action (e.g. to remedy any environmental harm or to prevent or mitigate further harm).	✓	Environmental regulators frequently issue these types of sanctions. For example remediation notices are issued by the relevant local authority or the EA requiring the remediation of contaminated land (Environmental Protection Act 1990 s 78E) and works notices are issued by the EA to prevent or remedy water pollution (Water Resources Act 199 1 s 16 1 A). However, it is often difficult for the regulator to determine who the notice should be issued to.
Regulator Step-In and Recovery of Costs Order	Where the offender has failed to take corrective measures, the regulator can step-in and remedy the breach itself and recover its costs from the offender.	✓	Environmental regulators often seek to recover the costs of investigation from the offender. The EA has the power to undertake remediation work and to later recoup that money from the appropriate person (Environmental Protection Act 1990 Part IIA). However, the EA is only likely to step-in where there is a full scale emergency with a serious threat to the environment and human health. If possible, the EA will send out a letter to the relevant persons before undertaking such work warning them that they will later seek to recover their costs.
Financial Security	Retention of security lodged as a condition of permits, licences or approvals to remediate any harm caused by a breach.	✓	There is limited use of this sanction, for example in relation to landfill permits to facilitate restoration.
Licence amendment, suspension or revocation	Where the regulator revokes, amends or suspends all or parts of a licence or disqualifies or debars the offender from contracting with government agencies.	✓	The EA has power to issue notices to vary the terms and conditions of any permit granted. It also has power to suspend and revoke permits. However given the serious impact of sanctions on business it will only suspend or revoke permits in the event of very serious cases of non-compliance. The EA considers this sanction to be a very good deterrent.
<b>Judicial Sanctions</b>			
Judicial Civil Penalty	Civil monetary penalty awarded by the Court on the basis of the civil standard " on the balance of probabilities "	✗	There is no formal comprehensive civil penalty regime for environmental offences in the UK. Civil penalties are available in limited circumstances (e.g. civil penalties for failing to account for carbon emissions under the EU Emissions Trading Scheme), but are seldom used.

Table 1. Availability and Effectiveness of Sanctions in the United Kingdom

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Publicity Order/Name and Shame by Regulator	An order requiring publicity by the regulator or the offending company of the offence, the environmental/other consequences and the penalties/other orders imposed.	✗	There is no equivalent statutory sanction in the UK. However, the Environment Agency informally employs adverse publicity measures. For example, through publishing an annual 'Spotlight on Business Report' highlighting good and bad regulatory performance. It also issues press releases on an informal basis which 'name and shame' companies who have been penalised for breaches.
Environmental Services Order	Requires the offender to carry out a specified project for restoration/enhancement of the environment in a public place or for public benefit. Normally used in conjunction with Publicity Orders.	✗	There is no equivalent civil sanction in the UK. Although, in criminal proceedings, community orders imposing an unpaid work requirement can be made under section 177 of the Criminal Justice Act 2003 requiring an offender to undertake an environmental restoration/enhancement project. However, such orders are infrequently made in respect of environmental offences.
Monetary Benefits Penalty Order	Made on its own or as part of a Civil Penalty whenever the regulator can quantify the benefit obtained and the offender has sufficient funds to pay all or a significant proportion of the benefit obtained.	✗	There is no equivalent sanction in the UK. However, it is illegal to profit from the commission of a crime and therefore liabilities will arise under the Proceeds of Crime Act 2002. In particular, the EA has advised that when defendants have profited by more than £5,000 for the commission of an environmental crime, it will refer the matter to the Assets Recovery Agency who has power to freeze assets.
Compensation Order	To compensate either the regulator or a third party for the costs or expenses incurred in taking action to deal with damage to the environment resulting from the offence. This order can be made on its own or as part of a Civil Penalty.	✓	Compensation orders are available in the UK (for example under section 35A of the EPA Act and section 130(1) of the Powers of Criminal Courts (Sentencing) Act 2000). However, they are rarely used. In 2006, only one compensation order was made by a court.
Costs Order	To pay all, or part of, the costs of proceedings.	✓	Environmental regulators will almost always seek to recover their legal and other costs relating to proceedings from the offender.
Injunction	An order for the company to refrain from engaging in the activity(ies) causing environmental harm.	✓	Injunctions can be sought by the EA or other regulators. However, they often cannot be issued immediately and usually result in delays of at least hours. Therefore, they are not always effective in practice.

Table 2. Availability and Effectiveness of Sanctions in Germany

Civil Sanction	Description	Germany	Effectiveness - Are these sanctions effective in practice?
Admission Sanctions			
Persuasion/verbal caution	Informal warning, advice or support from the regulator to the offender	✓	<p>The principle of co-operation is a key principle of German environmental law and for this reason environmental regulators rely heavily on informal discussions with individuals/businesses to achieve voluntary compliance, before taking more stringent action. The regulators have discretionary power in many cases but when exercising their discretion they are bound by principles of proportionality and an obligation for fair treatment.</p> <p>The regulators' approach is dependent upon developing a pragmatic relationship with the individual/business regulated. For example the regulators frequently offer advice, provide information and sometimes issues verbal cautions.</p> <p><b>Example:</b> The environmental office of the town Wiesbaden consults operators and tries to work out an action programme together with the operator if there are areas of non-compliance. This has proved to be more effective than a formal administrative sanction.</p>
Information Notice	To provide records, documents or evidence regarding a suspected/actual regulatory breach.	✓	<p>The regulators have broad powers to obtain information. These powers are used regularly in connection with permit applications and in relation to investigations.</p> <p>Because self monitoring is required for many operators (e.g. under the Federal Water Act and for operators of waste disposal installations) any necessary documentation required by the regulators in the event of a suspected breach is normally easily available.</p> <p><b>Example:</b> Pursuant to Art. 58b of the Federal Immission Control Act, a hazardous incident officer at the company monitors all suspected breaches and keeps a record of any possible breaches for a period of five years. The officer also has power to carry out a technical examination of the plant.</p> <p><b>Inspections</b></p> <p>The regulators have powers to carry out inspection of plants without prior notice to the operator. The regulators must be given access to the premises and they may take samples of water, waste water and waste and analyse them in a laboratory. The operator must give information and assist in the investigation e.g. by providing necessary equipment (Art 2 Federal Water Act).</p>

Table 2. Availability and Effectiveness of Sanctions in Germany

Civil Sanction	Description	Germany	Effectiveness - Are these sanctions effective in practice?
Mandatory Environmental Audit	Where the regulator compels a company to carry out an audit of its activities.	✓	<p>Certain industrial and infrastructure projects, such as power stations, chemical plants, waste management facilities and airports cannot obtain a permit without an environmental impact assessment (EIA). The authority evaluates the likely environmental effects of the project based on comprehensive information that has to be provided by the applicant. The information is passed to every authority concerned with the project and the authority must produce a report on the project's effects.</p> <p>Certain legislation (e.g. article 28 of the Federal Immission Control Act) allows regulators to issue an order to a company to self-monitor even if no harmful effect is suspected. However, in practice, the regulators will only require an environmental audit when the regulations have been amended or when a breach is suspected.</p> <p><b>EMAS</b></p> <p>The existence of the Eco-Management and Auditing Scheme in Germany has led to a growing number of companies implementing an internal auditing system to monitor the company's effect on the environment which has in turn led to less environmental breaches due to the effective systems they have in place, thereby reducing the need for the regulators to take action.</p>
Enforcement Undertakings/Agreement	Where the offender provides written undertakings to the regulator to remedy the harm done in a certain way and by a certain time and can be enforceable in court.	✗	<p>However, a relevant situation does exist in Germany in relation to offset agreements (Art 17 Federal Immission Control Act). In a normal non-compliance situation the regulators have wide powers, including the issuing of orders for remediation or the closing of the facility. The relevant regulator may dispense with these orders if the operator submits an improvement plan for other installations which provides for a more extensive reduction of the emission load than would be attainable through the regulator's orders.</p> <p>However, such offset agreements are rarely used in practice because the immission levels are rarely exceeded at German plants.</p>
Warning Letter	Notification of a regulatory breach without taking further immediate action.	✓	<p>Warning letters are widely used in practice.</p> <p>As mentioned above, the co-operation principle is one of the 3 main principles in Germany. Therefore it is rare that a regulator will issue a formal order before holding discussions and issuing a warning letter. In most circumstances, the regulators consult with the operators in order to remedy the breach.</p> <p>If a warning letter is issued, it will set out a deadline and/or steps required for complying with obligations.</p>



Table 2. Availability and Effectiveness of Sanctions in Germany

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Fixed Administrative Financial Penalty	Payment of a specified monetary amount by the offender to discharge or compensate for the breach.	✓	<p>A specific fine is often set out in the regulations. However it is more common to have a scale on which fines may be charged, which allows a wider discretion to the regulators.</p> <p>Administrative fines are used regularly if there has been a violation of a permit. Failure to pay a fine set by an administrator can result in coercive detention in order to ensure the payment is made. This detention is different from imprisonment. There is always a right of appeal to an administrative tribunal against a decision of the environmental regulators.</p>
Administrative Civil Penalty	Payment of a variable amount to be determined through negotiations with the alleged offender to discharge or compensate for the breach.	✓	<p>This is more common than fixed fines since there is normally a scale on which fines may be charged.</p> <p>The regulators have power to set fees at a level which takes into account any illicit benefits obtained by the company due to its breach.</p> <p>If a regulator issues an enforceable order which is not complied with, the regulators may impose an administrative fine of up to €500,000 (in practice the fines are much smaller). This fine can be enforced without a court decision. If the fine is not effective, the regulators can ask the public prosecutor to bring criminal proceedings.</p>
Enforcement Notice, Order or Direction	Served where a breach of regulatory consent, licence or legislation has occurred and specifies steps to rectify the breach and timescale.	✓	<p>The regulators regularly use their power to issue enforcement notices. A timeline is normally set out for carrying out the specified operation, failing which there will be further consequences, normally a fine payable to the regulators.</p> <p>An order may not be disproportionate i.e. where the expense caused by fulfilling the order is out of proportion with the goal which the order is intended to obtain.</p>
Clean Up / Pollution Notice or Order	Requires the offender to take specific action (e.g. to remedy any environmental harm or to prevent or mitigate further harm).	✓	<p>The polluter pays principle is widely applied in Germany. The regulators have power to order the polluter to remove any waste/pollutant where there is an imminent danger to human health or the environment.</p> <p>The Environmental Liability Act imposes strict liability on owners of specific facilities listed in annex 1 if damage occurs. A permit defence does not apply. Section 16 states that costs for restoring nature or scenery may be claimed if private rights have been affected.</p>

Table 2. Availability and Effectiveness of Sanctions in Germany

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Regulator Step-In and Recovery of Costs Order	Where the offender has failed to take corrective measures, the regulator can step-in and remedy the breach itself and recover its costs from the offender.	✓	Environmental regulators will almost always seek to recover the costs of investigation from the offender.  The regulators have the power to undertake remediation work and to later recoup that money from the appropriate person. However the regulators, to avoid possible costs exposure, are normally reluctant to carry out remediation work themselves unless they are certain they can apportion liability to the plant operator etc.
Financial Security	Retention of security lodged as a condition of permits, licences or approvals to remediate any harm caused by a breach.	✗	There is no equivalent sanction in Germany.
Licence amendment, suspension or revocation	Where the regulator revokes, amends or suspends all or parts of a licence or disqualifies or debars the offender from contracting with government agencies.	✓	If an order or regulation has not been complied with, the regulators have power to issue notices to vary the terms and conditions of any permit granted. They also have powers to suspend and revoke permits, including an order that facility should be shut down. The decision is left to the discretion of the regulators. However given the impact of such sanctions on business, and because the regulators must respect the principle of proportionality, they will only suspend or revoke permits in the event of very serious cases of non-compliance.  If an order for interdiction is made by the regulators, it will continue until the relevant requirements have been complied with.
<b>Judicial Sanctions</b>			
Judicial Civil Penalty	Civil monetary penalty awarded by the Court on the basis of the civil standard "on the balance of probabilities"	✓	Civil penalties have been in use in Germany for many years and are often used for environmental offences, particularly for the less serious environmental offences.  The regulators have powers to issue fines of up to €500,000 for negligent breaches of legislation or orders or €1 million if the criminal offence was intentional.  Under the criminal code, prison sentences can be imposed up to 5 years for serious environmental offences.  Compensation may also be ordered as part of a judicial order.

Table 2. Availability and Effectiveness of Sanctions in Germany

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Publicity Order/Name and Shame by Regulator	An order requiring publicity by the regulator or the offending company of the offence, the environmental/other consequences and the penalties/other orders imposed.	✗	There is no equivalent statutory sanction in Germany.
Environmental Services Order	Requires the offender to carry out a specified project for restoration/ enhancement of the environment in a public place or for public benefit. Normally used in conjunction with Publicity Orders.	✗	There is no equivalent civil sanction in Germany. However, it is possible for criminal proceedings to be discontinued if the offender pays money to a charity or an environmental organisation. However, such orders are infrequently used in practice.
Monetary Benefits Penalty Order	Made on its own or as part of a Civil Penalty whenever the regulator can quantify the benefit obtained and the offender has sufficient funds to pay all or a significant proportion of the benefit obtained.	✓	Because of the unique wording 'enrichment without cause' appearing in German law (Bereicherungsrecht), the regulators can set a fine at a level which takes into account any benefit or illicit profits obtained by the offender through its breach. It is rarely used however. In criminal proceedings, the fine can be based on the yearly income of the offender.
Compensation Order	To compensate either the regulator or a third party for the costs or expenses incurred in taking action to deal with damage to the environment resulting from the offence. This order can be made on its own or as part of a Civil Penalty.	✓	If the regulators are required to carry out operations to remedy environmental damage they are entitled to retrieve that money from any person who caused or permitted the damage. In practice, the regulators usually only take direct action when they are certain they can apportion liability to a specific offender(s).
Costs Order	To pay all, or part of, the costs of proceedings.	✓	The regulators will almost always seek to recover their costs from the offender in any proceedings. In civil proceedings, the costs are often shared, whereas in criminal proceedings the guilty party (as part of the sentencing) is normally required to pay for the costs. Therefore, they are not always effective in practice.

Table 2. Availability and Effectiveness of Sanctions in Germany

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Injunction	An order for the company to refrain from engaging in the activity(ies) causing environmental harm.	✓	<p>Injunctions can be sought by the regulators or other parties regardless of whether proceedings have commenced. The injunction would be issued by the courts.</p> <p>However, the level of urgency required is very high (i.e. immediate danger to human health or the environment) and is therefore not widely used in practice.</p>

Table 3. Availability and Effectiveness of Sanctions in Australia

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
<b>Admission Sanctions</b>			
<b>Persuasion/verbal caution</b>	Informal warning, advice or support from the regulator to the offender	✓	<p>As a general rule, regulators will not prosecute every potential breach of environmental law. The decision to prosecute or take other action is discretionary.</p> <p>In NSW the EPA frequently provides advice in relation to compliance and in some circumstances (for example - a small-medium business) will issue an informal verbal warning. Compliance levels are usually high.</p> <p>In Victoria, the EPA may convene a conference for resolution of a matter between all/any interested parties.</p>
<b>Information Notice</b>	To provide records, documents or evidence regarding a suspected/actual regulatory breach.	✓	Regulators in all Australian jurisdictions have very broad investigative powers (e.g. to require information, to produce records, to enter and search premises, to seize documents and to interview persons). These powers are fundamental to the ability of the regulator to properly investigate actual and potential breaches of environmental law.
<b>Mandatory Environmental Audit</b>	Where the regulator compels a company to carry out an audit of its activities.	✓	<p>In NSW, environmental protection licences may contain a condition requiring compliance with a mandatory environmental audit program (s67 POEO Act). However, conditions can only be imposed if the EPA reasonably suspects a breach has caused, or is likely to cause, harm to the environment (s175 POEO Act). In practice, it is extremely rare for such a condition to be imposed.</p> <p>Despite infrequent use in NSW, the EPA believes that the power to require audits is a good tool to have available. It is an effective incentive for organisations to regularly undertake voluntary audits, particularly since organisations that undertake voluntary audits receive certain statutory protection from prosecution.</p> <p>In Victoria, the regulator can require participation in studies to assess the effects of a discharge/emission and can amend an existing licence to require an environmental audit.</p>

Table 3. Availability and Effectiveness of Sanctions in Australia

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Enforcement Undertakings/Agreement	Where the offender provides written undertakings to the regulator to remedy the harm done in a certain way and by a certain time and can be enforceable in court.	✓	<p>Enforceable undertakings have only been available to the NSW EPA since 1 May 2006 (s253A POEO Act). Since then only one enforceable undertaking has been given by a company. Enforceable undertakings are also available in Victoria (s67D EP Act).</p> <p>In NSW, the EPA sometimes enters into voluntary agreements with an individual or company where it agrees not to issue an investigation or remediation order against the individual or company provided the individual or company complies with the investigation or remediation proposal in the agreement (s26 CLM Act).</p> <p>In Victoria, industry waste reduction agreements can be voluntarily entered into with the EPA. The EPA can also require any person or industry to submit a draft industry waste reduction agreement.</p>
Warning Letter	Notification of a regulatory breach without taking further immediate action.	✓	<p>Formal warning letters are frequently used by most Australian regulators as a preventative measure seeking compliance with environmental legislation.</p> <p>In NSW, it is usually the first step taken in relation to minor non-compliances.</p> <p>Like informal measures, warning letters are generally very effective in encouraging compliance.</p>
Fixed Administrative Financial Penalty	Payment of a specified monetary amount by the offender to discharge or compensate for the breach.	✓	<p>Penalty notices are a particularly effective way of dealing with minor breaches.</p> <p>For example, in NSW most penalty notices are infringements for littering from motor vehicles. The notices impose a fine which can either be paid or defended in Court.</p> <p>The number of penalty notices issued by the EPA and local government officers in NSW increased between the periods 2002-2005 but has recently decreased. It is unknown whether this decrease is due to increased compliance, reduced policing or other factors.</p> <p>In the case of large organisations, it is not usually the amount of the fine that encourages compliance but rather the public relations hit for non-compliance.</p>

Table 3. Availability and Effectiveness of Sanctions in Australia

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Administrative Civil Penalty	Payment of a variable amount to be determined through negotiations with the alleged offender to discharge or compensate for the breach.	✓	<p>Since 1 July 2006, the South Australian EPA is empowered to negotiate a civil penalty direct with the alleged offender as an alternative to criminal prosecution (s104A Environment Protection Act 1993). The EPA has developed a Civil Penalties Calculations Policy to establish how the EPA will determine the appropriate amount of the negotiated penalty. To date, the penalty has only been offered to one company in relation to which negotiations are continuing.</p> <p>The Western Australian Government is considering introducing a similar negotiated penalty regime. However, the WA EPA has advised that the civil penalty regime may not be included in the next round of amendments to the Environmental Protection Act. Instead, the Government is considering extending the existing system of modified penalty notices to certain tier one offences. Modified penalty notices are a type of civil penalty issued under section 99A of the Environmental Protection Act WA.</p>
Enforcement Notice, Order or Direction	Served where a breach of regulatory consent, licence or legislation has occurred and specifies steps to rectify the breach and timescale.	✓	<p>In NSW, the EPA or other appropriate authority can issue a prevention notice requiring certain action to be taken if it reasonably suspects that any activity has been or is being carried out in an environmentally unsatisfactory manner. Over the last five years, 35 prevention notices have been issued by the EPA. 3</p> <p>In NSW, prohibition notices can be issued by the Minister directing that an activity cease for the period specified in the notice (s101 POEO Act). No such notices have ever been issued. The EPA believes this is because there are other regulatory tools available such as licence conditions, prevention notices etc.</p>
Clean Up / Pollution Notice or Order	Requires the offender to take specific action (e.g. to remedy any environmental harm or to prevent or mitigate further harm).	✓	<p>In NSW, the EPA or other appropriate authority has the power to issue clean up notices in the event of a pollution incident (s91 POEO Act). The EPA has issued 168 clean up notices over the last 5 years which have been very effective. Failure to comply with a clean-up notice without reasonable excuse is an offence under the POEO Act.</p> <p>Clean up directions can also be made orally, although this power is rarely used and is generally reserved for emergency situations (s93 POEO Act).</p> <p>The NSW EPA also has broad powers under the CLM Act to declare an investigation site and order an investigation and declare a remediation site and order remediation to take place. Again, the threat of sanction tends to encourage compliance through entering into voluntary remediation agreements with the regulator.</p>

Table 3. Availability and Effectiveness of Sanctions in Australia

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
<p><b>Regulator Step-In and Recovery of Costs Order</b></p>	<p>Where the offender has failed to take corrective measures, the regulator can step-in and remedy the breach itself and recover its costs from the offender.</p>	<p>✓</p>	<p>In NSW, public authorities can voluntarily or under the direction of the EPA take such clean-up action as considered necessary to respond to a pollution incident (s92 POEO Act).</p> <p>The NSW EPA is not aware of ever using its power to direct a public authority to take clean-up action. This is because in most situations the polluter or occupier of the site is required to undertake the clean-up itself or the public authority has voluntarily undertaken the work itself. E.g. EPA v Warringah Golf Club Ltd.</p> <p>The public authority can recover all or any reasonable costs and expenses incurred in connection with the clean-up action (s104(2) POEO Act) and where possible, the authority will seek to recover these costs in most cases.</p> <p>Under the CLM Act, if a person fails to comply with an investigation or remediation order, the EPA can step-in and undertake the work itself or direct a public authority to do so (s30 CLM Act). Associated costs can be recovered under the Act (ss 34 and 35 CLM Act).</p>
<p><b>Financial Security</b></p>	<p>Retention of security lodged as a condition of permits, licences or approvals to remediate any harm caused by a breach.</p>	<p>✓</p>	<p>In NSW, the EPA can require the provision of financial assurances as a condition of an environment protection licence including the conditions of the suspension, revocation or surrender of a licence (s70 POEO Act). This is an effective measure in ensuring compliance with conditions. The EPA currently holds around 40 financial assurances and has advised they are on the increase.</p> <p>Similar provisions also exist in Victoria to enable financial assurances as a special condition on licences, pollution abatement notices and conditions on waste transport permits (ss 21, 31A and 53F EP Act).</p>
<p><b>Licence amendment, suspension or revocation</b></p>	<p>Where the regulator revokes, amends or suspends all or parts of a licence or disqualifies or debars the offender from contracting with government agencies.</p>	<p>✓</p>	<p>In NSW, the EPA will only suspend or revoke licences or in the event of a serious violation of the conditions of the licence (s79 POEO Act). This is an extremely effective deterrent as failure to hold a licence typically requires the licence-holder to cease operating its business. The EPA can also vary conditions (s58 POEO Act).</p> <p>In NSW, licence revocations are more common than licence suspensions. For example over the last five years only 7 licences were suspended<sup>4</sup> by the EPA; while over the same period 79 licences were revoked by the EPA.<sup>5</sup></p> <p>In Victoria, the regulator may amend works approvals and revoke or amend research and development approvals through written notice.</p>



Table 3. Availability and Effectiveness of Sanctions in Australia

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
<p><b>Civil Sanctions</b></p> <p><b>Judicial Civil Penalty</b></p>	<p>Civil monetary penalty awarded by the Court on the basis of the civil standard "on the balance of probabilities"</p>	<p>✓</p>	<p>Civil penalties are used by the Commonwealth pursuant to the Environment Protection and Biodiversity Conservation Act 1999 in relation to contraventions of provisions concerning matters of national significance (such as Ramsar wetlands and listed protected species). The maximum penalty that can be imposed by the Federal Court is \$550,000 for an individual and \$5.5million for a body corporate.</p> <p>South Australia has recently adopted a civil penalty regime which enables the regulator to negotiate civil penalties with an offender and the Court can also make a civil penalty order where it satisfied the offence has been committed on the balance of probabilities (s104A of the Environment Protection Act 1993). To date, no such orders have yet been made.</p> <p>Western Australia is also considering introducing a judicial civil penalty regime. However, it is unclear at this stage whether or not the proposal will be adopted. There is no equivalent civil penalty regime in NSW.</p>
<p><b>Publicity Order/Name and Shame by Regulator</b></p>	<p>An order requiring publicity by the regulator or the offending company of the offence, the environmental/other consequences and the penalties/other orders imposed.</p>	<p>✓</p>	<p>The LEC and Local Courts have made more than 20 publication orders typically against corporate offenders requiring them to publish details of their offence (including its environmental and other consequences) and the orders made by the court (s250(1)(a) and (b) POEO Act).</p> <p>In practice, the EPA will propose suitable wording and the appropriate media for publication. Such orders are extremely effective in respect of corporate crime, since damage to reputation often has a much greater impact on business than mere payment of a fine. For this reason, publication orders are usually the subject of considerable resistance from defendants.</p>
<p><b>Environmental Services Order</b></p>	<p>Requires the offender to carry out a specified project for restoration/enhancement of the environment in a public place or for public benefit. Normally used in conjunction with Publicity Orders.</p>	<p>✓</p>	<p>In NSW, the LEC has the power to make environmental service orders (s 250(1) (c) POEO Act). Such orders are effective at changing the offender's attitude to environmental harm through awareness and have the added benefit of restoring the environment. The LEC will only make such an order where a suitable project can be identified within the locality of the offence.</p> <p>In NSW, the LEC can also order the offender to pay a specified amount to an environmental trust or a specific organisation for the purposes of an environmental project (s 250(1) (e) POEO Act).</p>

continued overleaf

Table 3. Availability and Effectiveness of Sanctions in Australia

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
<p><b>Monetary Benefits Penalty Order</b></p>	<p>Made on its own or as part of a Civil Penalty whenever the regulator can quantify the benefit obtained and the offender has sufficient funds to pay all or a significant proportion of the benefit obtained.</p>	<p>✓</p>	<p>More than 50 environmental service orders have been made in NSW under section 250(1) (c) or (e). According to the EPA, such orders are becoming increasingly popular with defendants and may even overtake fines as being the typical penalty awarded. In most cases where an order has been made it is the result of an offer by the defendant to undertake a specified project.</p> <p>The LEC is empowered to make a monetary benefit penalty order requiring the offender to pay a sum up to the amount of the monetary, financial or economic benefit derived from the offence (s 249 POEO Act). However, no such orders have yet been made. There is no maximum amount prescribed for this sanction and in practice it is often difficult to quantify the benefit that has been obtained.</p>
<p><b>Compensation Order</b></p>	<p>To compensate either the regulator or a third party for the costs or expenses incurred in taking action to deal with damage to the environment resulting from the offence. This order can be made on its own or as part of a Civil Penalty.</p>	<p>✓</p>	<p>In NSW, if steps to clean up the environment have not been taken by the time the proceedings reach court, and it is still practical to do so, the EPA will usually seek a restoration order requiring the offender to clean up the environment (s 245 POEO Act). Fifteen such orders have been made.</p> <p>Alternatively, where a third party has incurred clean up costs or suffered damage to property, the EPA will seek a compensation order from the Court.</p> <p>For example, the EPA frequently seeks orders that the offender pay the costs and expenses incurred by it or other public authorities in connection with preventing or making good any resulting environmental damage (ss 246-247 POEO Act) as well as for costs and expenses incurred during the investigation of the offence (s 248 POEO Act).</p> <p>Seven orders to pay investigation costs have been made by the LEC ranging from around \$700 to \$20,000 and 9 orders to pay clean up costs ranging from around \$18,000 to \$70,000. Not only is this an effective punishment, it is a practical cost recovery mechanism for the regulator.</p>
<p><b>Costs Order</b></p>	<p>To pay all, or part of, the costs of proceedings.</p>	<p>✓</p>	<p>In NSW, in the event of a successful prosecution/action the Court frequently orders the offender to pay the prosecutor's costs.</p>

Table 3. Availability and Effectiveness of Sanctions in Australia

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Injunction	An order for the company to refrain from engaging in the activity(ies) causing environmental harm.	✓	Injunctions are available in all jurisdictions. However, the evidence threshold is generally quite high and often, by the time the injunction has been granted, the environmental damage has already occurred. The NSW EPA has advised that while it is good to be able to seek an injunction, in practice they rarely do. Clean up and prevention notices tend to be an easier tool to use.
Other Sanctions	Power of the Court to make other creative orders	✓	In NSW, the LEC or a Local Court can order the offender to attend, or their employees and contractors to attend, a training or other course specified by the Court (s250(l)(f) POEO Act). They can also order the offender to establish a training course for its employees or contractors (s250(l)(g) POEO Act).  The LEC can order the offender to carry out a specified environmental audit of activities (s250(l)(d) POEO Act). It can also order the offender to provide a financial assurance to the EPA if it is ordered to carry out an environmental project (s250(l)(h) POEO Act).

Table 4. Availability and Effectiveness of Sanctions in the United States of America

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
<b>Admission Sanctions</b>			
Persuasion/verbal caution	Informal warning, advice or support from the regulator to the offender	✓	<p>This is an effective mechanism for maintaining open communication between the offender and the regulators.</p> <p>Companies may proactively seek informal advice from USEPA Compliance Assistance Centres without significant risk of facing a fine or violations. The percentage of regulated entities that reduced, treated or eliminated pollution as a result of direct USEPA compliance assistance also exceeded targets in FY 2006.</p>
Information Notice	To provide records, documents or evidence regarding a suspected/actual regulatory breach.	✓	<p>The USEPA has very broad investigative powers which include information requests, record reviews, and on-site inspections and evaluations. Through these methods, interviews can be held, records reviewed, photographs taken, samples collected and observations can be made by the USEPA. This has been effective in ensuring the regulated community maintain necessary records and provide documents and information.</p> <p>Most permits (air, water, waste etc) also require regulated entities to provide relevant documentation to the regulated agencies on request. Permits under the Clean Air Act require the holder to make regular reports on how it is tracking its emissions of pollution and the controls it is using to limit its emissions. Most permits specify document retention periods(e.g. records must be kept for five years and provided to the USEPA on request).</p> <p>There are also several programs which require proactive periodic reporting. Examples of routinely reviewed records include discharge monitoring reports under the Clean Water</p> <p>Act and Title V permit certifications under the Clean Air Act. The percentage of regulated entities taking complying actions as a result of on-site compliance inspections did not meet USEPA targets for 2006 unlike in 2005. But the number of facilities reported taking complying actions in general went from 947 in 2005 to 1234 in 2006.</p>

Table 4. Availability and Effectiveness of Sanctions in the United States of America

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Mandatory Environmental Audit	Where the regulator compels a company to carry out an audit of its activities.	✓	<p>Industries can be required to routinely monitor their own emissions and discharges and report these to the government. For example, it is a requirement that holders of a water pollution discharge permit under the National Pollutant Discharge Elimination System to file periodic Discharge Monitoring Reports with the federal or state government.</p> <p>The USEPA also has an 'Audit Policy' which provides major incentives for voluntary self-audit. Incentives to self-audit include significant penalty reductions, no routine requests for audit reports and no recommendation for criminal prosecution. The USEPA retains its discretion to collect any economic benefit that may have been realised as a result of non-compliance.</p> <p>The Audit Policy has proved to be effective. In 2005, USEPA reduced a record 1.5 million pounds worth of pollutants due to a single audit settlement. In FY 2006, the Office of Enforcement and Compliance Assurance resolved self disclosed violations for 1,475 facilities. 55 1 companies also resolved voluntary disclosures.</p>
Enforcement Undertakings/Agreement	Where the offender provides written undertakings to the regulator to remedy the harm done in a certain way and by a certain time and can be enforceable in court.	✗	<p>There is no equivalent sanction in the US.</p>
Warning Letter	Notification of a regulatory breach without taking further immediate action.	✓	<p>Written communications similar to warning letters are routinely and often (although not universally) used by the USEPA to notify an entity that there is evidence of a violation. They do not by themselves trigger enforcement action nor impose a legally enforceable compliance schedule. Such letters are typically used for minor/first-time violations and can set a time frame within which formal enforcement action will be taken and ask the offender to certify it has come into compliance. Such 'warning letters' do not intend to pursue further action if the violation is cured.</p> <p>'Notices of Violation' and 'Notices of Deficiency' on the otherhand are also issued when there is evidence of a violation but here, even if the violation is cured, the USEPA may still take further enforcement action.</p> <p>There are also informal warning mechanisms contained in legislation. 'Notice Letters' under the Superfund Program notify recipients of their potential liability to clean up a Superfund site (and not of any violation of law).</p>

Table 4. Availability and Effectiveness of Sanctions in the United States of America

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Fixed Administrative Financial Penalty	Payment of a specified monetary amount by the offender to discharge or compensate for the breach.	✓	<p>Some federal environment statutes authorise the regulator to issue an Administrative Order assessing an administrative penalty of not more than \$25,000 per day for each violation (e.g. under the Clean Air Act). Other statutes have a much higher maximum of \$125,000 per day per violation (Clean Water Act). However penalties are often negotiated down from the maximum in Consent Decrees and other Orders. In FY 2006, 4624 fixed administrative penalty orders were made, which was the highest total ever.</p> <p>Permits may stipulate surcharges for discharges in excess of permitted amounts, provided that such discharges do not violate overriding environmental quality or other relevant standards. Surcharge terms and rates would be stipulated in the Permit and are typically administered on a per gallon basis.</p>
Administrative Civil Penalty	Payment of a variable amount to be determined through negotiations with the alleged offender to discharge or compensate for the breach.	✓	<p>Most environmental statutes (Clean Air Act etc) authorise the USEPA to assess civil administrative penalties and establish penalty factors such as the size of the business; the economic impact of the penalty on the business; the violator's full compliance history and good faith efforts to comply. The USEPA also has penalty policies to help decide how large a monetary fine should be. Penalties are composed of certain components, such as: (1) the amount equal to the economic benefit of the non-compliance, and (2) an amount reflective of the gravity of the violation. The USEPA has developed computerised economic models to evaluate a violator's ability to pay and also employs penalty matrixes which specify the particular penalty amount or, more typically, an appropriate range for the fine associated with a given violation. Such matrixes are typically used for violations where there is not a well-defined cost associated with coming into compliance.</p> <p>In FY 2006, the OCEA reached a significant settlement with DuPont for violations under the Toxic Substances Control Act when DuPont agreed to pay a \$10.25million penalty. This was the largest civil administrative penalty the USEPA has ever obtained under a federal environmental statute.</p>
Enforcement Notice, Order or Direction	Served where a breach of regulatory consent, licence or legislation has occurred and specifies steps to rectify the breach and timescale.	✓	<p>Violation Notices, Consent Decrees and Administrative Orders are used often and are very effective. They detail the required regulatory timetables and specific actions that must be taken to rectify an identified breach. Consent Decrees can be very detailed in specifying exactly what actions will be required.</p>

Table 4. Availability and Effectiveness of Sanctions in the United States of America

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
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Administrative Civil Penalty	Payment of a variable amount to be determined through negotiations with the alleged offender to discharge or compensate for the breach.	✓	<p>Most environmental statutes (Clean Air Act etc) authorise the USEPA to assess civil administrative penalties and establish penalty factors such as the size of the business; the economic impact of the penalty on the business; the violator's full compliance history and good faith efforts to comply. The USEPA also has penalty policies to help decide how large a monetary fine should be. Penalties are composed of certain components, such as: (1) the amount equal to the economic benefit of the non-compliance, and (2) an amount reflective of the gravity of the violation. The USEPA has developed computerised economic models to evaluate a violator's ability to pay and also employs penalty matrixes which specify the particular penalty amount or, more typically, an appropriate range for the fine associated with a given violation. Such matrixes are typically used for violations where there is not a well-defined cost associated with coming into compliance.</p> <p>In FY 2006, the OCEA reached a significant settlement with DuPont for violations under the Toxic Substances Control Act when DuPont agreed to pay a \$10.25million penalty. This was the largest civil administrative penalty the USEPA has ever obtained under a federal environmental statute.</p>
Enforcement Notice, Order or Direction	Served where a breach of regulatory consent, licence or legislation has occurred and specifies steps to rectify the breach and timescale.	✓	<p>Violation Notices, Consent Decrees and Administrative Orders are used often and are very effective. They detail the required regulatory timetables and specific actions that must be taken to rectify an identified breach. Consent Decrees can be very detailed in specifying exactly what actions will be required.</p>

Table 4. Availability and Effectiveness of Sanctions in the United States of America

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
<b>Civil Sanctions</b>			
<b>Financial Security</b>	Retention of security lodged as a condition of permits, licences or approvals to remediate any harm caused by a breach.	✓	<p>Financial assurance is required under the Oil Pollution Act, CERCLA, the Resource Conservation and Recovery Act, and several other federal statutes. Not all enterprises regulated under these laws are subject to financial assurance requirements, but a wide variety are. In addition, many states have their own laws requiring financial assurance.</p> <p>Financial assurance requirements require assurance in the form of trust funds, surety bonds, letters of credit or insurance that adequate funds will be available when needed to undertake the necessary cleanup.</p> <p>This is an effective sanction as it reduces litigation and administrative costs, ensures that the expected costs of environmental risks appear on a firm's balance sheets and in its business calculations and guarantees that operator funds will be available in the future to internalize costs associated with their commercial operations.</p>
<b>Licence amendment, suspension or revocation</b>	Where the regulator revokes, amends or suspends all or parts of a licence or disqualifies or debars the offender from contracting with government agencies.	✓	<p>Agencies have the authority to suspend or revoke permits and debar offenders from contracting with government agencies. There is very little evidence of use of this as a sanction and it is therefore assumed these are rarely implemented in practice.</p>
<b>Judicial Sanctions</b>			
<b>Judicial Civil Penalty</b>	A civil monetary penalty in circumstances where the contravention is assessed on the civil standard of 'the preponderance of the evidence'.	✓	<p>The statutory penalty set by law provides the upper limit of the penalty amount. Civil penalties are frequently issued and federal statutes typically provide for fine amounts up to US\$25,000 per day, per violation. The penalty is typically negotiated down from the maximum potential amount in Consent decrees and Administrative Orders.</p>
<b>Publicity Order/Name and Shame by Regulator</b>	An order requiring publicity by the regulator or the offending company of the offence, the environmental/other consequences and the penalties/other orders imposed	✓	<p>The USEPA does publicise offences, but not by making any Order as such. Information on fines and other violations are published annually by the USEPA in a series of "Accomplishment Reports". Its website is also updated regularly with "breaking news". Trade publications, newspapers and various internet sites also publish information relating to fines, penalties and other enforcement details.</p>



Table 4. Availability and Effectiveness of Sanctions in the United States of America

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Environmental Services Order	Requires the offender to carry out a specified project for restoration/ enhancement of the environment in a public place or for public benefit. Normally used in conjunction with Publicity Orders.	✓	<p>Although there is no specific judicial or administrative sanction that can require an offender to carry out a specific project for such purpose, there are sanctions that have a similar effect.</p> <p>Administrative Compliance Orders ("ACO") are issued by the USEPA and can, amongst other things, oblige recipients to complete a series of specified actions to remedy a contaminated site. ACOs however cannot compel the recipient to undertake an environmentally desirable project that is not directly linked to remedying a problem for which the recipient is legally responsible.</p> <p>The 'Supplemental Environmental Projects' policy ("SEP") on the otherhand allows a violator to voluntarily agree to undertake an environmentally beneficial project, in addition to actions required to correct the violation(s), as part of an enforcement settlement (either through an administrative or judicial mechanism).</p> <p>Since 2001 to date, there have been 717 judicial or formal administrative settlement cases in which the offender voluntarily agreed to perform a SEP.</p> <p>In FY 2006, violators in 220 civil enforcement cases agreed to implement SEPs with an agreed value of more than \$78million.</p>
Monetary Benefits Penalty Order	Made on its own or as part of a Civil Penalty whenever the regulator can quantify the benefit obtained and the offender has sufficient funds to pay all or a significant proportion of the benefit obtained.	✓	<p>Economic benefit is a consideration when calculating a civil penalty.</p> <p>Generally, USEPA calculates the economic benefit of non-compliance using the Agency's "BEN" computer model. For most Federal facility cases, the proper evaluation of economic benefit will involve an application of the BEN Model to calculate the direct benefits of non-compliance. An additional "gravity component" is added to provide the deterrence. Such additional amount will depend on factors as the seriousness of the violation, impact on the environment and violator's cooperativeness.</p> <p>Offending entities are routinely required to pay penalties for monetary benefits incurred, even as a result of a self-audit.</p>

Table 4. Availability and Effectiveness of Sanctions in the United States of America

Civil Sanction	Description	Availability	Effectiveness - Are these sanctions effective in practice?
Compensation Order	To compensate either the regulator or a third party for the costs or expenses incurred in taking action to deal with damage to the environment resulting from the offence. This order can be made on its own or as part of a Civil Penalty.	✓	<p>These are mainly made in settlement cases. Most federal environmental legislation contain provisions for the payment of damages.</p> <p>Many of the federal environmental laws include provisions that allow members of the public to initiate a lawsuit in federal court against either government agencies at federal or state levels when they fail to take mandatory actions or facilities that violate federal environmental laws and regulations. Such lawsuits are referred to as " citizen suits " .</p> <p>Most environmental citizen-suit provisions only provide for injunctive relief and legal costs, (including attorneys' fees) for successful plaintiffs.</p>
Costs Order	To pay all, or part of, the costs of proceedings.	✓	<p>These usually form part of Consent Decrees (a judicial decree expressing a voluntary agreement between parties).</p> <p>State and federal entities may be ordered to pay for the costs of litigating environmental cases, especially in citizen suits.</p>
Injunction	An order for the company to refrain from engaging in the activity(ies) causing environmental harm.	✓	<p>The US concept of an injunction is different to the way it is described in this table. The USEPA talks of 'injunctive relief' being available as a civil judicial sanction. 'Injunctive relief' is defined as an order for the offending party to affirmatively perform or refrain from performing some action. Virtually all US environmental laws (such as the Clean Air Act and the Clean Water Act) authorise courts to impose an injunction when agencies seek relief through judicial action.</p> <p>The USEPA can also order companies to immediately cease operations that are harming the environment by not complying with a permit or authorisation. This is mainly done through an ACO.</p>

Table 5. Summary of the availability of sanctions in each jurisdiction

Civil Sanction	Description	UK	Germany	Australia	USA
<b>Admission Sanctions</b>					
Persuasion/verbal caution	Informal warning, advice or support from the regulator to the offender.	✓	✓	✓	✓
Information Notice	To provide records, documents or evidence regarding a suspected/actual regulatory breach.	✓	✓	✓	✓
Mandatory Environmental Audit	Where the regulator compels a company to carry out an audit of its activities.	✓	✓	✓	✓
Enforcement Undertakings/Agreement	Where the offender provides written undertakings to the regulator to remedy the harm done in a certain way and by a certain time and can be enforceable in court.	X	X	✓	X
Warning Letter	Notification of a regulatory breach without taking further immediate action.	✓	✓	✓	✓
Fixed Administrative Financial Penalty	Payment of a specified monetary amount by the offender to discharge or compensate for the breach.	✓	✓	✓	✓
Administrative Civil Penalty	Payment of a variable amount to be determined at the discretion of the regulator to discharge or compensate for the breach.	X	✓	✓	✓

Table 4. Availability and Effectiveness of Sanctions in the United States of America

Civil Sanction	Description	UK	Germany	Australia	USA
Enforcement Notice, Order or Direction	Served where a breach of regulatory consent, licence or legislation has occurred and specifies steps to rectify the breach and timescale.	✓	✓	✓	✓
Clean Up / Pollution Notice or Order	Requires the offender to take specific action (e.g. to remedy any environmental harm or to prevent or mitigate further harm).	✓	✓	✓	✓
Regulator Step-In and Recovery of Costs Order	Where the offender has failed to take corrective measures, the regulator can step-in and remedy the breach itself and recover its costs from the offender.	✓	✓	✓	✓
Financial Security	Retention of security lodged as a condition of permits, licences or approvals to remediate any harm caused by a breach.	X	X	✓	✓
Licence amendment, suspension or revocation	Where the regulator revokes, amends or suspends all or parts of a licence or disqualifies or debars the offender from contracting with government agencies.	✓	✓	✓	✓
<b>Judicial Sanctions</b>					
Judicial Civil Penalty	A civil monetary penalty.	X	✓	✓	✓
Publicity Order/Name and Shame by Regulator	Publicity by the regulator or offending company of the offence, the environmental/other consequences and the penalties/other orders imposed.	X	X	✓	✓

Table 4. Availability and Effectiveness of Sanctions in the United States of America

Civil Sanction	Description	UK	Germany	Australia	USA
Environmental Services Order	Requires the offender to carry out a specified project for restoration/enhancement of the environment in a public place or for public benefit. Normally used in conjunction with Publicity Orders.	X	X	✓	✓
Monetary Benefits Penalty Order	Made on its own or as part of a Civil Penalty whenever the regulator can quantify the benefit obtained and the offender has sufficient funds to pay all or a significant proportion of the benefit obtained.	X	✓	✓	✓
Compensation Order	To compensate either the regulator or a third party for costs or expenses incurred in taking action to deal with damage to the environment resulting from the offence. This order can be made on its own or as part of a Civil Penalty.	X	✓	✓	✓
Costs Order	To pay all, or part of, the costs of proceedings.	✓	✓	✓	✓
Injunction	An order for the company to refrain from engaging in the activity(ies) causing environmental harm.	✓	✓	✓	✓

## Appendix 1 (b).

List of relevant literature reviewed on four comparator countries

## Reviewed Articles

CITATION: J.P.L. 2004, Oct, 1330-1338

## UK Articles

Avadhani P., "Who's defending the environment?"

CITATION: YSG Mag. 2004, 29(Nov/Dec), 8-9

"DEFRA rapped for "lacklustre" approach to environmental crime"

CITATION: ENDS 2004, 352, 38-39

Malcolm R., "Prosecuting for environmental crime: does crime pay?"

CITATION: E.L.M. 2002, 14(5), 289-295

"Review of environmental enforcement unveiled"

CITATION: ENDS 2005, 382, 40-41

Macrory R., "Environmental Civil Penalties – A More Proportionate Response to Regulatory Breach"

"Review seeks alternatives to criminal prosecutions"

CITATION: ENDS 2006, 372, 44

Parpworth N., "Sanctioning for regulatory non-compliance in England: the consultation document."

CITATION: Env. Liability 2006, 14(4), 147-157

"Agency seeks alternatives to criminal prosecution"

CITATION: ENDS 2006, 376, 40-41

This article concerns:

Macrory R., Regulatory Justice: Making Sanctions Effective, final report.

CITATION: [http://www.cabinetoffice.gov.uk/regulation/documents/pdf/macrory\\_penalties.pdf](http://www.cabinetoffice.gov.uk/regulation/documents/pdf/macrory_penalties.pdf)

"Tribunal mooted for penalty appeals"

CITATION: ENDS 2006, 377, 37-38

"Review supports new regulatory penalties"

CITATION: ENDS 2006, 382, 40-41

Parpworth N., "Enforcement in environmental regulation: the Defra Review"

CITATION: Env. Liability 2007, 15(1), 15 – 26

This article concerns:

DEFRA REPORT: Review of Enforcement in Environmental Regulation

CITATION: <http://www.defra.gov.uk/environment/enforcement/pdf/enforcereview-report.pdf>

"Green light for penalties shake-up."

CITATION: ENDS 2006, 383, 37-38

Current topics (January).

CITATION: J.P.L. 2007, Jan, 1-5

Watson M., "The use of criminal and civil penalties to protect the environment: a comparative study.

CITATION: E.E.L.R. 2006, 15(4), 108-113

Parpworth N., "Environmental offences: utilising civil penalties"

CITATION: J.P.L. 2005, May, 560-583

This article concerns:

Woods M. and Macrory R., "A more proportionate Response to Regulatory Breach"

CITATION: Environmental Civil Penalties, Centre for Law and the Environment, University of London, 2004.

Watson M., "The enforcement of environmental law: civil or criminal penalties?"

CITATION: E.L.M. 2005, 17(1), 3-6

Kimblin R., "Penalties in Regulatory Crime"

CITATION: E.L.M. 2005, 17(4), 169-175

Watson M., "Environmental Crime in the United Kingdom"

CITATION: E.E.L.R. 2005, 14(7), 186 – 192

Kimblin R., "Reasonable practicality and pollution prevention"

CITATION: J.P.L. 2005, Nov, 1431-1432

Watson M., "Civil fines for environmental crimes?"

CITATION: J.P. 2005, 169(8), 128-130

Grekos M., "Environmental fines – all small change?"

## Australian Articles

Abbot C., "The regulatory enforcement of pollution control laws: the Australian experience"

CITATION: J. Env. L. 2005, 17(2), 161-180

Australian Law Reform Commission – Principled Regulation: Federal Civil and Administrative Penalties in Australia (ALRC 95)

SOURCE:

[www.austlii.edu.au/au/other/alrc/publications/reports/95/](http://www.austlii.edu.au/au/other/alrc/publications/reports/95/)

## US Articles

"Flexible Penalties, the US Way"

CITATION: Ends 2004, 359, 31

Payne S., "Enforcement – some comparison from the USA"

CITATION: Env Law 1995, 8(3&4), 22 – 25

INECE Secretariat Staff, "Penalties and other remedies, for environmental violations: an overview" (April 05)

[http://www.inece.org/conference/7/vol/48\\_INECEa/o20SEC RETARIAT](http://www.inece.org/conference/7/vol/48_INECEa/o20SEC RETARIAT)

Gallas, Andreas & Werner, Julia, "Transboundary Environmental Crimes: German Experiences and Approaches"

SOURCE: <http://www.isece.org/5thvol1/galas.pdf>

The Role of the Criminal and Administrative Sanctions in German Competition Law Enforcement

CITATION: <http://www.concurrences.com/abstractbulletinweb.php3?idarticle=13325>

Watson M., "The use of criminal and civil penalties to protect the environment: a comparative study."

CITATION: E.E.L.R. 2006, 15(4), 108-113

This study analyses the marked increase in the use of civil as opposed to criminal penalties in the UK for environmental protection. As environmental awareness increases, most common law and civil law jurisdictions have developed civil/administrative penalty regimes to deal with threats to the environment. However, the European Union still favours the use of criminal penalties to achieve its environmental objectives. This is evidenced in the way the European Union seeks to tackle vessel source oil pollution by requiring member states from 2007 onwards, to include

custodial sentences for this offence with financial penalties for legal persons at least €150,000 deemed to be appropriate. This is perhaps the best example of the EU promoting criminal sanctions to discourage activities which pollute the environment. These new penalties should have considerable deterrent value. The UK has traditionally relied on the threat of criminal sanctions to protect the environment. Although alternative enforcement mechanisms are provided for (i.e. warning letters, suspension/revocation of licences, injunctions, adverse publicity etc.), the efficacy of these depends largely on the perceived threat of criminal prosecution looming in the background.

Over the past decade, non-criminal sanctions have been increasingly used to protect the environment. Noise is a good example, the Noise Act 1996 permits local authorities to impose £100 fixed administrative penalties on persons who cause excessive noise in domestic premises at night. If the penalties are not paid within fourteen days, prosecutions may follow. Other examples were given of local authorities been given power to for example close noisy premises such as nightclubs and public houses. For such civil and administrative sanctions, the civil burden of proof applies i.e. there is not need to establish guilt beyond reasonable doubt. Anti-social behaviour orders (ASBOs) were given as another example of a highly flexible civil order. Again, the civil burden of proof applies. Breach of such an order can, however, lead to criminal prosecution. "Anti-social behaviour" is not defined with any degree of precision and can include activities which damage or degrade the environment.

The significance of this is that it appears that the ASBO regime will soon be extended to enable the Agency and other regulators to target environmental offenders more effectively than is currently the case.

The use of civil and administrative penalties to protect the environment in Germany was contrasted to that of the UK. The law in Germany in this area appears to be far more prescriptive and strict. In Germany, although the offender's blameworthiness is a relevant factor, sentencers are expected to attach greater significance to the objective significance of environmental violations. This is very much in contrast with the system in the UK.

Watson submits that the wider availability of civil and administrative penalties would have significant implications for environmental protection in the UK. They would be freed from the burden of proving guilt beyond



reasonable doubt in criminal courts along with other hurdles. He argues that this policy makes sense given the costs and practical difficulties associated with prosecution. The creation of new civil and administrative penalties might make the traditional emphasis on voluntary compliance difficult to justify. If they received new powers environmental regulators would presumably be expected to use them.

### Australian Articles

#### Kimblin R., "Reasonable practicality and pollution prevention"

CITATION: J.P.L. 2005, Nov, 1431 – 1432

An argument is being made for allowing a defence in the prosecution of environmental offences where it can be proved that the defendant took all reasonable precautions and exercised sufficient due diligence to avoid the commission of the offence, otherwise known as the due diligence defence. The terms of this defence can be found throughout consumer protection legislation and also Pt II of the environmental Protection Act 1990. Commentators have noted that in the process of enacting the Environmental Act 1995, attempts were made to provide a defence of due diligence for s85 offences. The Government however resisted such attempts on grounds of practicality, the difficulties involved in proving that the defendant did not act with due diligence was held as too onerous a burden to place on regulators.

Kimblin points out however that the defence is valid on the balance of probabilities. There is no burden on the prosecutors, and therefore such burdensome difficulties are unsustainable. Furthermore the defence is hard to maintain in the first instance as all the prosecutor has to do is find fault with the system or its implementation in order for the defence to fail. The third point Kimblin makes in opposition to the commentators view above is that the Courts of First Instance are extremely dubious of even a very good system of precautions and checking. As such, a flood of acquittals on the basis of the due diligence defence seems unlikely.

However, there is still a preferable alternative. The Health and Safety at Work Act 1974 offers the test of reasonable practicability in ensuring that the employee's safety is met by their employers. In contrast, causing or permitting poisonous, noxious or polluting matter to enter controlled water is an offence of strict liability. The case law in this matter has followed a strict application. The cases have tended to focus on the consequence of acts or omissions rather than the actual acts or omissions. Harm is the key,

not culpability. Despite avoiding pollution, the harm it causes and the attendant costs, the legislation does not promote a high standard of care. Section 85 of the Water Resources Act 1991 creates no duty, nor does it require assessment of risks to controlled waters.

Kimblin finds that if there were to be an amendment of s.85, a duty could be created with a defence of reasonable practicability, breach of which would be an offence. Prosecution in this regard may extend to circumstances where an undertaking fails to conduct its affairs, so far as reasonably practicable, to avoid pollution of controlled waters. Although the facts of a pollution event may still be such, that the defence is defeated.

If a change is imminent, the creation of a duty of care for controlled waters would achieve more in terms of environmental protection that a due diligence defence could offer. Furthermore harm would always be judged in light of culpability, thus providing a consistency of legal tests between areas of regulatory law.

#### Avadhani P., "Who's defending the environment?"

CITATION: YSG Mag. 2004, 29, (Nov/Dec), 8 -9

The UK signed the UN Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (The Aarhus Convention) in 1998. Art 9(3) of this convention deals with access to administrative or judicial procedures in relation to environmental matters and article 9(4) stipulates that these procedures should be fair, equitable and not prohibitively expensive.

At present the principles of the Aarhus convention can only become reality if hurdles such as costs, judicial apathy and limited scope of judicial review can be addressed effectively and quickly. The Environmental Justice Project was established by a number of bodies concerned about the lack of accurate information on environmental cases going through the courts. This project reviewed the opinions of over 50 top environmental lawyers in addition to investigating the criminal law process in environmental cases with the leading regulatory authorities.

97% of practitioners felt the current system fails to deliver environmental justice. The most significant barrier to bringing a civil case to court was costs. As most of the civil matters involve challenging a public body by way of Judicial Review, concerns regarding costs, standing, treatment of environmental issues and remedies were

expressed. Concerns about the operation of criminal law in environmental matters were present.

**Costs:**

In England and Wales, the losing party has to pay its own legal costs in addition to those of the winning party. As a result of this, the fear of bearing such a burden deters many parties from taking legitimate action. Lack of public funding in environmental cases is a problem. Lord Brennan QC felt that environmental work should not incur cost penalties of this kind as the resolution of such cases is in the public interest.

**Standing:**

In determining the standing of an environmental matter before the courts, the merits of the application, the nature of the application, the applicant's interest and the circumstances of the case will be considered. Some respondents felt however that standing in judicial review still carries some degree of uncertainty.

**Judicial Apathy:**

Two thirds of the respondents were dissatisfied with the courts understanding of the environmental issues. The report points to the need for judicial training in environmental matters to ensure an elevated understanding. Judges need to empathize more with environmental issues. Public funds need to be more readily available and a mechanism for a challenge based on the case merits needs to be established.

**Limited Scope of Judicial Review:**

As judicial review is not a merits based challenge, its strict time limitations is questioned. A mechanism for the third party to challenge the presumption that local matters are best dealt with by local authorities needs to be established.

**Unfair Criminal Justice System:**

Considered if this system provides a fair platform for environmental issues and the extent to which penalties imposed effectively deter environmental crime. In the face of minimal fines and a further reduction of such fines on appeal, environmental offenders are unlikely to be deterred. The review emphasizes the importance of conserving the environment, the current criminal offences are arguably capable of protecting the environment, but stricter regulations including the enforcement of stringent sentencing practices would bolster this effect. Recommendations were proposed to improve the current situation. These include asking judges to consider the

ecological impact of the offence and encourage the use of the maximum penalty, greater use of custodial sentences for the serious crimes and the use of adverse publicity campaigns against the offending companies.

**Remedies:**

The EJP considered a number of options to tackle the issue of access to environmental justice. This includes the establishment of an environmental tribunal or court. This is necessary as environmental law is based on complex scientific and technical issues. Structural reform of the courts, such as revising Civil Procedure Rules and incorporating principles like polluter pays and sustainable development are recommended in addition to a specialist tribunal.

The report highlights the failing of the criminal justice system in its response to environmental offences. As result the Government needs to order a review of the civil and criminal justice systems to ensure the law can ensure that the environment is protected.

**INECE Secretariat Staff, "Penalties and other remedies for environmental violations: an overview" (April 2005)**

**CITATION:**

[www.inece.org/conference/7/vol11/48\\_INECE%20SECRETARIAT%20STAFF.pdf](http://www.inece.org/conference/7/vol11/48_INECE%20SECRETARIAT%20STAFF.pdf)

This article surveys variations on the traditional remedy of money damages.

**Damages:**

A financial remedy administered with the aim of providing the plaintiff with monetary compensation equivalent to the loss resulting from the actions of the defendant

**General Damages:** Market value of the damage: difference between the market value before and after the harm.

**Consequential Damages:** Damages incurred as a direct consequence of the initial harm. Used when the full value of the loss cannot be calculated by the normal mechanisms.

**Substitution Cost:** If difference between the replacement value and the actual market value differs this is applicable. Used where the property owners has an unquantifiable sentimental value towards the property.

***Punitive of Exemplary Damages:*** Makes an example of the damages awarded. Designed to compensate the plaintiff in addition to deterring future offenders.

***Standardized Damages:*** Provided for under a statutory framework but calculated for the particular plaintiff.

***Litigation Costs:*** Allows for the reasonable recovery of attorney's fees accrued in the course of litigation.

***Adjustments for Time Differentials:*** Present value and any interest incurred are used to calculate the awardable compensation

***Adjustments for Benefits Reaped of Harms Avoided by the Plaintiff:*** Plaintiff has a responsibility to take reasonable measures to avoid damages.

#### Alternative Remedies:

***Restitutional Remedies:*** Damages that prevent unjust enrichment by making defendants give up what they wrongly obtained from the plaintiffs. These can have a punitive element when restitution exceeds both the plaintiff's losses and the defendant's gains.

***Restitution in Specie:*** Restitution in-kind, not monetary damages.

***Measurement of Defendant's Benefits:*** Measures the increased assets in hands of defendant from receipt of property.

***Market Value:*** Market value of services provided to defendant regardless of their value.

***Use value:*** Value of any benefits received by the defendant measured through market indicators or actual gains.

***Gains Realized:*** Measures the defendant's actual gains from the sale or transfer of asset received from the plaintiff.

***Savings or Profits:*** The value of savings or profits earned by the defendant's use of the assets received from the plaintiff.

#### Coercive Remedies:

Typified by an injunction. Coerces the defendant to act or not act under threat of being found in contempt of court.

***Specific Performance:*** Compels defendant to perform or not to perform a specific action ordered by the court.

***Structural Injunction:*** Used in restoration of public institutions; i.e. schools, and force compliance with relevant law.

***Provisional Injunctions:*** Temporary restraining orders ordered prior to trial to prevent or alleviate threat of an imminent emergency.

#### Declaratory Remedies:

An authoritative and reliable statement of the parties' rights with no award of damages, restitution or injunction.

#### Penalties:

##### Civil Penalties:

Fines payable to the government. Requires the administrator to calculate the economic benefit of non-compliance. Penalty burden must be at least as great as the benefit of the violation. Benefits arising as result of any cost savings through the violation must also be considered by the administrator. There are very few instances where the economic benefit of non-compliance will be mitigated.

##### Gravity Component:

Reflects the seriousness of the violation. Consideration of the following may occur:

##### Actual or Possible Harm:

Factors that help to determine if activity of defendant actually resulted or was likely to result in a violation.

- a) Toxicity of the Pollutant.
- b) Sensitivity of the Environment
- c) Overall Severity of the Environmental Harm.
- d) Length of time of the violation: assessed for each separate violation as well as the length of time that the violations occurred.

### Adjusting the Gravity Component:

There must be reasonable flexibility within the penalty assessment process to account for particular circumstances of a given situation.

The following factors promote flexibility

#### 1) Degree of wilfulness or negligence:

This can only increase the severity of the penalty, it considers:

- a) Control the offender had over the events constituting the violation.
- b) Foreseeability of events.
- c) Manner of dealing with compliance issues within the industry, i.e. appropriate control technology.
- d) Extent to which violator knew of the legal requirement

#### 2) Degree of co-operation:

Can aggravate or mitigate the penalty, based on the following sub-factors;

- a) Prompt recording of non-compliance
- b) Prompt correction of environmental problems
- c) Cooperation during pre-filing investigation

#### 3) History of non-compliance:

May only be used to raise a penalty, it considers:

- a) Similarity of violation in question to prior violations
- b) Time elapsed since prior violations
- c) Number of prior convictions
- d) Violators' response to prior violations
- e) Extent to which gravity component already increased due to repeat violations

#### 4) Environmental damage:

Where environmental damage so bad that gravity component not sufficient.

#### 5) Ability to pay:

Administrators won't assess fines beyond a company's means to pay, may adjust penalties accordingly.

#### 6) Strict liability:

Any party who contributes to a site which contains hazardous waste that is listed (i.e. toxic pollutants), can be held liable for the entire clean up cost. This is regardless of the magnitude of the company's contribution. However the smallest contributors might be able to mitigate some of the harshness of this ruling by implementing a de minimis exemption.

### Criminal Penalties:

Utilize fines of imprisonment rather than damages or restitution. Focuses more on immortality and state of mind. Criminal penalties embody moral culpability. Focuses on protecting the public from harm by punishing the guilty parties.

### Appropriateness of Civil or Criminal Penalties:

In determining whether criminal or civil penalties are appropriate, which form of punishment provides the most practical and effective means of coercing the desired behaviour will be the threshold question.

Criminal penalties serve a much broader range of functions than civil damages; i.e. it can seek social condemnation and/or protection of a third party. The standard of proof is guilt beyond reasonable doubt.

### Underlying Bases of Criminal Punishment:

Two routes for criminal sanctioning,

#### 1) conventional criminal codes or;

#### 2) Punishment of acts under various environmental statutes.

##### a) *Severity of Punishment:*

Severity not solely defined by resulting punishment, can be classified as misdemeanours prior to administering of punishment.

##### b) *Felonies:*

Requires the defendant to 'knowingly' or 'recklessly' violate the law.

##### c) *Misdemeanours:*

Require less culpability on part of defendant, prosecuted when defendant 'negligently' commits an act or omission.

### Alternatives to Civil and Criminal Penalties – U.S. and Canadian Models

Supplemental Environmental Projects in the United States  
The purpose is to encourage and obtain environmental and public health protection and improvements which may otherwise not have been obtained. Administrators may follow an evaluation process similar to the U.S. EPA, which follows a four step process:

- 1) Meets the basic definition of a supplemental environmental project. Basically improve, protect or reduce risks to public health, or environmental at large.

- 2) Ensure all legal guidelines are satisfied. The project can't be inconsistent with any provision of the underlying statutes.
- 3) Project can't use funds to satisfy obligations of a federal agency, nor spend money on projects that might circumvent limitations on federal funding.
- 4) Commitment to perform a Supplemental Environmental may mitigate the penalty assessed.

**Calculation formula:**

Final Settlement = Settlement amount – (Supplemental Environmental Project Cost x Mitigation Percentage).

**Aims of a Supplemental Environmental Project:**

**Public Health:** Diagnostic, preventative or remedial health care. Pollution Prevention: Reduce amount/toxicity of pollutant produced. Environmental Protection and Restoration: Improve land, air and water environments' effected by the violation. Assessments and audits: Examine internal operations to determine if pollution problems exist or could be improved. Environmental compliance promotion: Help other communities reduce pollution. Emergency Planning and Preparedness: Assist state or local emergency response to fulfil their duties under the emergency Planning and Community Right to Know Act.

**Environmental Protection Alternative Measures in Canada**

Canadian Environmental Act of 1999 provides alternatives to court prosecution. Measures under the Act divert the accused away from the court process. Once charged, negotiations between the accused and the AG of Canada take place instead.

The Environmental Protection Alternative Measure will contain measures that the accused must take in order to restore compliance, for example:

- Pollution prevention measures to reduce releases of toxic substances to within regulated limits.
- Better pollution control technology.
- Changes to production to ensure compliance with regulatory requirements.
- Clean-up of environmental damage.

Not every offender is eligible for an Environmental Protection Alternative Measure.

**Abbot C., "The regulatory enforcement of pollution control laws: the Australian experience"**

CITATION: J. Env. L. 2005, 17(2), 161-180

**Introduction**

This article examines the regulatory enforcement of pollution control laws in Australia, focusing on the administrative, civil and criminal sanctions available to regulators and the courts. In her introduction Carolyn Abbot contemplates that the rules in statute books alone will not minimise the environmental impact of economic entities and advocates that enforcement is a key component of any regulatory regime. The idea of a hybrid approach is introduced which neither rejects punitive regulation outright nor is absolutely committed to it. Ayres and Braithwaite, in their seminal work on responsive regulation, argue that the 'trick of successful regulation is to establish a synergy between punishment and persuasion'. Another key component of enforcement strategy is the enforcement tools available to the regulator. The 'enforcement pyramid' means most regulatory offences will be dealt with at the base of the pyramid with regulators coaxing compliance by persuasion. If unsuccessful, the regulator will move up the pyramid with each phase representing a more punitive approach. The limited range of environmental enforcement tools in the U.K. has been the subject of much criticism recently. It is thought that the level of sentencing given in courts for environmental crimes is too low and recommends the introduction of alternative sentencing powers such as adverse publicity orders and environmental service orders. There has also been support for the use of civil or administrative penalties which arguably provide a more cost effective way of dealing with serious environmental offences than the criminal law.

The paper draws on research conducted in 2004 by interviews with three regulatory authorities: the Environmental Protection Authorities (EPAs) in New South Wales (NSW), Victoria and the Department of Environment and Heritage (DEH), the Commonwealth regulator. Two representatives from the Environmental Defenders Office (EDO) were also interviewed.

**Achieving Optimal and Effective Enforcement**

An important consideration for an environmental enforcement authority is achieving optimal and effective enforcement. Most pollution is the by-product of economically desirable activities so it is necessary to balance the costs of law enforcement against the benefits of such enforcement to society. The key question is how best to introduce compliance at the lowest cost.

Kagan and Scholz identify three theories of non-compliance where the enforcement response in each case would vary: the amoral calculator- where the benefits of non compliance outweigh the expected costs or punishment, the political citizen- where compliance is dependent on their perception of reasonableness of the relevant statutory code and the organisationally incompetent entity- where non compliance is a reflection of organisational failure. If a broad range of enforcement mechanisms were available the regulator could tailor the response to the individual characteristics of the offence and the offender.

### **The Enforcement Strategies of Environmental Regulators in Australia**

In Australia regulators invariably seek cooperative relationships with industry with greater emphasis being placed on more collaborative approaches to enforcement. In Victoria two reasons were given for the trend towards compliance based strategies, first it is regarded important to retain and foster good relationships with the industry and second of all because it has been found that most incidents of non compliance are the result of human error and not as a result of economic calculation. The EPA in Victoria recognises that non regulatory measures are often effective in promoting and reduce the need for enforcement. Such measures include: education and the provision of information and advice. However it should be noted where an offence is committed, enforcement action will be taken.

### **The Availability and Use of Administrative Devices**

There are a number of administrative devices discussed in this article including: administrative notices, licence suspension and revocation, penalty infringement notices and mandatory environmental audits. Found at the base of the enforcement pyramid are administrative notices. These can be used without the interference of the court and without excessive costs where the enforcement officer has reason to believe an offence has occurred or is likely to occur. Annual reports of Australian environmental regulators will illustrate administrative notices are commonly used. For example in contrast to the 30 prosecutions brought for environmental offences in Victoria in 2002/03, 213 pollution and clean up notices were served.

Regulators also have the option of revoking or suspending licences. This is arguably a more punitive sanction and therefore is higher up the pyramid. Both the Victoria and NSW EPAs indicated that these powers were used sparingly, mostly used as threats whereby an offender will receive

notice of possible revocation or suspension.

The NSW EPA in 2002/03 issued only 5 notices which resulted in only 3 licence suspension. The picture is similar in England although there is some indication that the agency is becoming more willing to exercise the power of revocation.

Australian regulators use cost saving measures like penalty infringement notices to deal with one off breaches that can be easily remedied with monetary compensation.

The level of penalty will normally be laid down in the implementing legislation and where it is paid no criminal conviction is recorded. A recipient of a notice can elect to appear in court but this option is rarely exercised. The cost saving associated with this method means there is a higher probability of imposition thereby increasing the deterrence function. There are however some disadvantages associated with penalty infringement notices such as the lack of judicial scrutiny, the chance of innocent people paying the fine to avoid going to court and the failure to assess each case on its own merits which potentially leads to injustice. Following a detailed study of this remedy Woods concludes such a system should be introduced in the UK to deal with moderately serious breaches of environmental law.

A final measure used is mandatory environmental audits where the regulator suspects that a person has breached an Act, licence conditions or administrative orders. Environmental legislation in England and Wales does not provide for mandatory environmental audits and it would seem that the Agency does not use licence conditions to require such action. It is thought that mandatory audits would be most useful when used on regulated entities that that constantly fail to meet minimum legislative standards and have a very poor environmental record. They could also be very useful when dealing with organisational failure, the final theory advocated by Kagan and Scholz. This method provides the regulator with a comprehensive and objective analysis of whether environmental requirements are being met, improves monitoring and allows enforcement actions to be targeted at the most risky aspects of the regulated activity.

### **The Availability and Use of Criminal Sanctions**

Traditionally in both Australia and the UK reliance has been placed on the use of fines. Despite the fact that provision is made for large penalties environmental regulators argue that the fines imposed are too low and

do not reflect the seriousness of the offence. In Victoria although fines range from \$250,000 to \$1million in 2002/03 34 prosecutions led to a total fine of only \$154,000. From an economic perspective low fines are not conducive to effective punishment because they contribute to a reduction in the expected punishment, this, coupled with the cautious approach to prosecution means that the deterrent effect of this tool is limited.

In addition to imposing fines, Australian and English courts have the power to make a number of other financial orders such as ordering the costs and expenses incurred by the regulator in investigating the offence to be paid. A fundamental principle of in the sentencing process in environmental offences is that the fine should aim at recovering any financial benefit accrued by the defendant. In England it has been suggested that profits made from crimes form too little a part in decisions as to the size of the fine or sentence to be given.

#### **Alternative Sentencing Tools in Australia**

Australia has begun to embrace a more diverse range of penalties in relation to environmental offences. These include publicity orders, environmental service orders and environmental audit orders.

The use of publicity orders as a means of environmental regulation has both positive and negative contingents. On the one hand any negative publicity received by the firm can be rendered less effective by counter publicity. However Fisse and Braithwaite, in their study, found that adverse publicity was deemed to be of concern not by reason of its financial impact but because of its non-financial effects the most important of which is corporate prestige.

Environmental service orders require the offender to carry out specific projects to restore or enhance the environment for the public benefit. There are two main considerations with this sanction, firstly there must be a suitable project and secondly the offender must have the means to carry out the project.

Under an environmental audit order an offender must carry out specified audit of activities carried on by that person. The important feature of this measure is that the courts can extend the audit to activities not directly related to the offence in question, by doing this it is hoped that any potential violations will be identified and corrected.

#### **Civil Enforcement**

Most jurisdictions enable regulatory authorities to take injunctive action to restrain and compensate for the costs and effects of pollution. In contrast with criminal penalties injunctions are proactive and therefore particularly useful in preventing anticipated harm. Another advantage of injunctive relief is that a court can award an injunction on relatively short notice. It has been indicated to the author through conversations with the EPA officers and environmental law academics that regulators rarely exercise their right to seek an injunction. The reason behind this is that some administrative sanctions provide a similar role at less expense.

#### **Conclusion**

The approach to environmental enforcement in Australia is characterised by its emphasis on encouraging and coaxing compliance and there is a general unwillingness on the part of the regulators to instigate criminal proceedings where an offence has been committed. An enforcement pyramid of regulatory action is used with most enforcement action grounded at the base of the pyramid in the guise of administrative notices and orders. Powers located at the top of the pyramid such as prosecution and licence revocation are rarely used. The paper advocates the introduction of penalty infringement notices and mandatory audit in England and Wales to strengthen the regulators hand in securing compliance. The Australian model of alternative sentencing would be welcomed as a means of tackling corporate crime and the introduction of adverse publicity orders and environmental service orders would increase deterrence whilst at the same time improve the local environment.

#### **Malcolm. R., "Prosecuting for environmental crime: does crime pay?"**

**CITATION: E.L.M. 2002, 14(5) 289 - 295**

In this article, Malcolm endeavours to explore the motivation behind the low level of sentences found in many cases concerning pollution law, public health law and health and safety. One of the views amongst enforcement officers is that the prime objective is not the penalty, but the achievement of a solution to a public health problem, which has defeated all other enforcement mechanisms. Malcolm believes however, that the level of sentencing sends out messages about attitudes to crime.

Malcolm looks at the extent to which the enforcement agencies use their powers of prosecution. All the

agencies have a broad discretion to prosecute in individual cases, but that discretion she feels, may be exercised too restrictively. All enforcement agencies now have formal written enforcement policies in place, derived from the Code for Crown Prosecutions. These set down evidential tests and public interest factors as the criteria for the exercise of the discretion. Further to this, Malcolm suggests that it is also the complexities and uncertainties of litigation which are significant deterrent factors in the minds of prosecutors, at local and central government level.

Environmental crimes hold a peculiar position in the minds of the public because environmental regulation is centred in an administrative framework and hovers around the civil/criminal divide. It is often perceived that environmental crimes that do not result in a dramatic disaster or a large scale loss of life are not morally heinous. Malcolm states that even criminal lawyers distinguish offences of strict liability from offences of 'true criminality'.

Environmental crime is enforced by a number of administrative bodies that have extensive powers, which range from the purely administrative to the quasi-judicial. The powers are complex and potentially confusing. For example, if a local authority serves an enforcement notice in a statutory nuisance case, the recipient may appeal to the magistrates' court against the notice. If there is no appeal and the recipient fails to comply, the local authority can prosecute for breach of these notices.

The forum for the prosecution of environmental offences in the UK is in the Magistrates and the Crown Court. However, only a case involving a fatality or serious act of pollution would be committed for trial at the Crown Court. There is a strong argument however, for using circuit and district court judges who are specialists or have received special training in environmental matters. Malcolm believes that such a solution would be preferable to the proposal to set up a special administrative environmental court, which excludes a criminal jurisdiction. The 'Environmental Court Project: Final Report' states that, 'We are not at present convinced of the need to attach a criminal jurisdiction to the Environmental Court...Criminal Proceedings have as their goal, the punishment of offenders. The culture is quite different'. The desire is to de-criminalise acts of environmental pollution where there is no criminal intent which, according to Malcolm, is not favourable. She is of the opinion, that environmental pollution should be

treated as a criminal activity, for which punishment and deterrence through the mainstream criminal culture is the accepted route and what really needs to be changed is the cultural approach in the criminal courts to environmental pollution offences. Most environmental offences in the magistrates' courts seldom exceed £5000, even though there is a power to fine up to £20,000 and/or six months' imprisonment. In the Crown Court, where the power to fine is unlimited and/or a maximum of two years' imprisonment, £10,000 is often the top mark in sentencing.

Offences of strict liability may also have an effect on sentencing. It must be shown that the accused caused the harmful substance to enter the land, but it isn't necessary to prove that there was a guilty intent to commit this act, negligence or any foreseeable consequences. If it were any different, it would be very difficult to make any firm liable for its polluting acts. These factors however should not be permitted to allow a generally low-level of sentencing. Therefore the nature of strict liability offences means that moral culpability is not in issue as an essential element in environmental cases. However, the criminal courts are more accustomed to dealing with issues of culpability and therefore judges may view culpability as a prime factor in sentencing. It is for judges and magistrates to understand that the nature of the offence is different and that a key factor in sentencing must include the consequences of the polluting act.

There is also an availability of defences where defendants have behaved reasonably or acted with due diligence, which might suggest that these offences are less serious or excusable. A further issue which might cause the de-criminalising of environmental cases, arise in connection with the decisions as to whom to prosecute. The defendant is often a company, and a company cannot be sent to prison or suffer remedy, in the same fashion as its directors. Retribution is also not a factor. The prosecution of a company is considered to be more effective than prosecuting individuals, the aim being to protect the environment and public health.

Most liability offences impose liability on directors and officers. Section 157 of the Environmental Protection Act 1990, imposes liability on directors, the company secretary, non-exclusive directors and shadow directors and in some circumstances managers. The decision to prosecute is discretionary and should have regard to both the evidential test and relevant public interest factors such



as the stableness of the case, the age and infirmity of the offender, which are set down by the DPP.

Enforcement agencies are not bringing prosecutions in large numbers and many of the cases brought, result in guilty pleas. It is obvious that a maximum of £20,000 does not act as a big enough deterrent to a large multi-national firm and imprisonment of directors or managers normally only follows where that individual is closely linked to the management and control of the particular polluting event. One difficulty for courts is that there are no coherent guidelines for judges and magistrates to follow, when deciding the appropriate level of fine, in cases of which they have had very little experience.

Guidelines for sentencing for different offences are set by the courts themselves. The Court of Appeal in England and Wales has the power to issue such guidelines under the Crime and Disorder Act 1998. The Sentencing Advisory Panel is charged by the Home Office to encourage consistency in sentencing. The Annual Report of the Panel, for its first period of operation (1 July 1999 to 31 March 2000), contains chapters and an appendix of proposed guidelines for environmental offences. The Home Secretary required specific offences to be covered by the Panels deliberations, which should include air or water pollution. The Panel made a number of recommendations, in which they proposed that companies should be obliged to publish details of convictions in annual reports. Advice was also given on the aggravating factors that had to be taken into account in sentencing, including the extensive clean-up required and the level of fine in relation to the company operations. The Panel considered that custodial sentences should be imposed where serious damage had occurred, together with a high degree of culpability on the part of the offender. This advice was given to the Court of Appeal, which referred to it during the course of an appeal against sentence, in *R v Milford Haven Port Authority* [2000] Env LR 632. A second appeal against sentence was heard by the Court of Appeal in *R v O'Brien and Enkel* [2000] Env LR 653 where the defendant was sentenced to eight months in prison for keeping waste tyres without a licence. The Court of Appeal reduced this to a suspended sentence, on the grounds that there was no long-term effect on the environment and the store tyres were not dangerous.

The seriousness, with which environmental pollution is now viewed, is likely to result in new offences being created which will further criminalise those concerned in these matters.

Malcolm explores the positive alternatives to prosecution for environmental offences apart from the generally accepted principle that the polluter should pay. He believes that retribution needs to be matched with the practical reality of a protected environment. Economic initiatives such as taxation on leaded petrol and on waste destined for landfills, has had an effect in changing practices to prevent pollution, but they should be seen as additions not alternatives to a criminal enforcement system. Administrative penalties, as used in civil law systems, have also been put forward as a solution to the problem. However, it is questionable whether this would significantly change enforcement practices as there would be a right of appeal from such an administrative decision. But the threat of jail sentences for the mishandling of waste, the possibility of a prohibition from acting as a company director or a large fine, may have more of an intimidatory and deterrent effect.

There is a further argument laid down in favour of retaining a criminal regulatory system which is related more fundamentally to the way in which society view environmental pollution. If the main method of control is taxation or an administrative penalty on individuals who damage the environment, it may be in their best interest to pay the tax or penalty because it is more convenient or expedient. A tax might convey an attitude that society accepts that such harm may occur and that society is prepared to allow it to occur if the individual pays for the privilege.

It is evident that Malcolm strongly believes that the process of criminal enforcement of regulation must remain at the heart of a system for environmental protection. Taxation and other economic controls may play a role, but the de-criminalisation of environmental damage would ultimately send the wrong message to society in general.

**Grekos M., "Environmental fines - all small change?"**

**Citation: J.P.L. 2004, Oct, 1330 – 1338**

At the outset Grekos expresses the view that one of the goals of environmental protection should be to increase recognition of environmental crime as a threat to public safety and to encourage, support and facilitate the enforcement of environmental legislation and access to environmental justice.

Grekos examines the trends in environmental sentencing that have emerged in recent times. Conclusions drawn from an ERM report commissioned by DEFRA show that the number of environmental offences has increased steadily, with the vast majority resulting in fines as opposed to custodial sentences. The study further revealed that there has been an increase in the average fine per offence in the Magistrates Court, rising from ST£1979 in 1999 to ST£2730 in 2002. This however remains below the ST£20,000 maximum penalty for an offence. The report found that the Crown Courts were imposing more lenient sentences than previously. The average fine has dropped and similarly the number of custodial sentences handed down has reduced also.

The author sets out a number of underlying issues that are contributing to the failure to deter environmental offenders:

**1. Environmental crimes are not true crimes:**

It was noted by the Criminal Law Working Group for the Environmental Justice Project that the Crown Court lacks interest in and respect for environmental matters. The legislation does not recognise the importance of preventing environmental crime. Some offences do not fit well with the idea of a criminal prosecution and so courts are reluctant to impose a criminal fine or sentence. It is suggested that criminal provisions properly convey the moral condemnation of pollution and therefore there is a requirement to strengthen the status of environmental protection.

**2. The newness of environmental law:**

The bulk of environmental legislation has emerged in the last few decades. It also comprises a specialised area of science, and so is alien to many members of the judiciary. To deal with this training for Magistrates has been carried out under the Magistrates Association Guidelines on Sentencing (May 2001).

**3. The need for tariff guidelines and education of the judiciary**

Tariff guidelines as opposed to guidance would be helpful, this is illustrated in two leading cases- R v Yorkshire Water Service Ltd and R v Anglian Water Service Ltd. The guidance provided is still in its teething stage and it is predicted that it will take some time for the training to percolate through to the Magistrates generally. The author comments that Magistrates might only see an environmental case every seven years, the problem is lack of experience rather than a lack of education and training. There is training

provided however and the Environmental Agency provides the courts with information. Magistrates are being advised to take a hard line generally on sentencing. This training will continue and those guidelines should be expanded to include environmental offences currently not covered. The Environmental Agency has called for individual magistrates and district judges to be nominated to handle environmental cases, there would be no cost implications and the training would be limited

**4. The can't pay won't factor**

A severe problem facing the Environmental Agency is that many companies and individuals plead impecuniosity, Magistrates have to reduce fines significantly which impinges heavily on punishment and most importantly deterrence. It should be noted that regulatory activity is subject to institutional and functional limitations such as lack of time, lack of money and not having enough 'man power'. A possible solution to this problem would be to stop the practice of fining and community service. The Environmental Justice Project report came to the conclusion that the most significant problem in the criminal justice system seems to be that the penalties routinely imposed vary and do not provide a deterrent to corporate and persistent offenders.

**5. Naming and Shaming**

One step forward has been the Agency's policy on 'naming and shaming' companies that have been responsible for serious pollution. There has been an impact here. Public limited companies do not like bad publicity. Greater publicity of environmental offences raises awareness about sentences. Nonetheless it is worth noting that higher fines and more prosecutions are failing to stop multi-million businesses from committing environmental crimes. De Prez has argued that while this practice does have a deterrent effect it is only in exceptional cases and the effect is sporadic.

**6. The need for civil penalties**

In their report Wood and McCrory concluded that criminal prosecution is too rigid an approach to be used for all but the most serious offences. Even though there is merit for the introduction of these penalties more research needs to be carried out. Companies are 'sitting ducks' and do have capital, therefore a civil penalty should act as a useful deterrent. Individuals who commit such crimes may

attempt to hide what they have done, it is recommended that a penalty should be administered by the Magistrates where they are found.

### Conclusion

Not only do environmental crimes threaten social stability they also pose a threat to the survival of human beings. New developments need to be made and Magistrates need to be trained. This area has slowly seen changes but it is evident that more is needed.

### Kimblin R., "Penalties in Regulatory Crime" CITATION: E.L.M. 2005 17 (4), 169 – 175

'A regulatory crime is conduct of an undertaking which is in breach of the criminal laws enacted to protect people and the environment.' This paper reviews the guideline cases and the emerging framework of fines in the context of several recent studies of regulatory penalties. These studies call for increases in the sentencing powers.

The Court of Appeal has consistently held that a fixed tariff for certain sentences is impossible since the circumstances in which offences of this kind occur are infinitely various. This view was upheld in the case of *R v F Howe (engineering) Ltd*. Therefore it is necessary to look to the gravity of the breach and the degree of culpability as a more adequate means of assessment. Factors which are not necessarily aggravating features when assessing the culpability of a party should be considered. In particular, a distinction should be drawn between the running of risks for a profit and whether a commercial entity has profited from its offending. The sentencing Advisory Panel in the first instance advised the Court of Appeal to express the fine as a percentage of one or more of turnover, profitability and liquidity. However, it can not be considered the optimal route as it is too vague a calculation to provide a fair and reflective fine.

The usual practice at the Court of Appeal of relying on previous appeal cases to support a ground of appeal that a fine is excessive is unlikely to be followed. Guideline cases from the court arise in areas such as health, safety and environmental matters.

ERM, an environmental consultancy company carried out a survey of penalties for environmental crime.

It concluded that there was inconsistency in sentencing outcomes. For example, where fines were being imposed on Welsh defendants associated with agriculture, a sector which has suffered recent economic hardships, the fines were considerably lower than those imposed on London offenders of similar regulations. The penalty therefore reflects the defendant's average means that can vary according to the local conditions. The courts are applying the principle of 'totality'. The overall penalty is determined in consideration of all the surrounding factors.

Recent commentary questions if penalties for environmental crimes are too low. In this regard it has been suggested that proposals to introduce alternative and innovative penalties in addition to those already available to the courts should be examined. Research shows that penalties increase deterrence. The problem arises however as it is difficult to discern whether penalties should increase by a factor of 50%, 100% or more. The nature of the environmental sphere makes it particularly hard to identify the penalties which do and do not deter offenders. Very different considerations must apply to different categories of offenders. For example, the offender who does not deliberately breach regulation but does so in ignorance and the offender who is in full know of the breach and intentionally or recklessly carries on the breach should be considered in a different category of offenders when compared to the former.

Different considerations apply to each category and the impact of the conviction, rather than the fine varies. In the case of larger corporations, it might be wrong to assume that the fine is the most significant factor for the company. The impact on staff morale, effect on management, ability to trade or tender for work might offer a better means by which the penalty could be measured. Nonetheless the fine must be at a level where it can not be considered part of an expense incurred during the business cycle.

Financial gain is unquestionably an aggravating factor, but it is doubtful whether a fine should be used as a surrogate to recover the proceeds of crime. The problem becomes even more evident as no direct link can be made between an offence and means. One equation applied to any one of the numerous calculations of means, for example; turnover, gross profit, net profit and so forth, will produce a radically different outcome and impact on the defendant. What is needed is an assessment of the whole financial situation, not just a simple equation.

The Crime (sentencing) Act 200 stipulates that a fine is to be set having regard to the seriousness of the offence. The Criminal Justice Act 2003 requires that the seriousness of the offence is assessed according to the defendant's culpability as well as the level of harm actually caused or intended or which was foreseeable. The Sentencing Guidelines Council in their report entitled *Overarching Principles*; makes it clear that harm must always be judged in the light of culpability. The next major change in legislation beyond the issue of fines will be the introduction of alternative penalties. Innovative alternative penalties could arguably have as big an impact on a company as a fine. Examples include disqualification of directors, community service orders or training. Likewise the introduction of civil penalties may also be dawning. The Hampton Review recommends that administrative penalties should be introduced as an extra tool for all regulators, with a right of appeal to magistrates' court. This right of appeal should be subjected to a review two to three years after the introduction of administrative penalties to investigate if a specialist tribunal would be more appropriate to hear appeals.

In conclusion, calls for increases in penalties are widespread. Despite this, there has been little attempt to articulate the point at which the concerns about penalties would be met. If deterrence is the objective, then the whole effect of the criminal sanction needs to be understood before deterrent levels can be gauged.

## US Articles

**"Flexible penalties, the US way"**

CITATION: ENDS 2004, 359, 31

**"The US legal system is known for its swingeing fines and liberal use of imprisonment and environmental law is no exception."**

The EPA recorded that the criminal sentences received in 2002 were the second highest on record. In total, offenders received a total of 215 years in prison. Financial penalties imposed were also far in excess of anything handed out in the UK. In addition to incarceration and penalties of a financial nature, the EPA can pursue alternative routes of punishment. Administrative penalties amounted to \$26 million dollars in 2002 and judicial civil penalties amounted to \$64 in the same year. Supplemental environmental projects (SEPs) amounted to \$58 million; these were formed as part of enforcement settlements with the EPA.

Something similar to SEPs is now being considered by Whitehall, the American experience can offer precedence.

To qualify as a SEP, projects must meet several criteria.

- (1) A nexus must exist to the infringement under consideration.
- (2) Provision of environmental and public health benefits.
- (3) Benefit the afflicted community.
- (4) Achieve health and/or environmental benefits beyond those attainable under environmental law.
- (5) Community involvement should be evident in decisions concerning SEPs.

Through a recent appeal for ideas concerning SEPs the EPA received a wide variety from both private and public bodies. These include: wildlife habitat restoration projects, retrofitting of diesel engines, solar and wind energy installations etc.

Polluters can often face a combination of sanctions. For example, Murphy Oil of Wisconsin paid a civil penalty of \$5.5 million in addition to \$12 million provided for improvements towards improving harming emissions at its Superior refinery.

By the end of 2002, the 'EPA also introduced requirements relating to environmental management systems in enforcement settlements affecting over 258 facilities'. Surely this shows the US's commitment in deterring offenders from harming the environment.

## German Articles

**Gallas, Andreas and Werner, Julia "Transboundary Environmental Crimes: German Experiences and Approaches"**

SOURCE: <http://www.inece.org/5thvol1/galas.pdf>

The German legal system offers adequate criminal (in the form of the 1980 Criminal Code) and administrative sanctions to serious infringements of environmental law. The main sanctions for criminal offences are imprisonment (up to ten years), and criminal fines. Also used is confiscation of instruments and proceeds and a ban on driving or professional activity. Due to the fact that environmental crimes are often committed for economic gain it is vital that illegal profits are confiscated.

This may provide an economic incentive to comply with the law. Confiscation is possible under both administrative and criminal law. The majority of cases concern minor infringements. As a result of causation and individual responsibility being hard to prove, there are only a few serious cases recorded. Additionally cooperation between environmental authorities and the police is often slow and sometimes the professional qualification of the officer should be better. More qualification and specialization has been called for in the judiciary in particular. Presently the main problem is the reluctance of the environmental authorities to cooperate with the police forces. The success rate of the police in solving environmental cases has been falling in recent years and was at about 60% in 1997.

The large scope of administrative sanctions goes to show the reluctance of the authorities to instigate criminal proceedings and cooperate with criminal enforcement bodies. Another reason for slow cooperation might be insufficient communication structures.

Most infringements are dealt with by administrative law including orders for alteration, order for discontinuance of an operation or a ban on professional activity. It is within the discretion of the authorities whether and how to proceed. An advantage of administrative law is that the power to enforce the sanctions rests with the authorities and no prior consent is needed from the court.

Combating environmental crime on a national scale is not an easy task but the problem intensifies when the offender goes international. The legal situation becomes much more complicated when the number of jurisdictions and languages increase.

Transboundary enforcement of environmental law in Germany is limited by two factors. These are:

- German law does not provide sufficient international rules for transboundary cases (sanctions currently in place lack supporting legislation for transboundary infringements and therefore these cases must be dealt with using domestic criminal law).
- Criminal prosecution in cases of environmental offences is hindered by unclear environmental provisions and transboundary criminal prosecution is hindered by the fact that environmental law is not harmonized.

However, the biggest obstacle to efficient transboundary prosecution is the lack of administrative cooperation between environmental authorities and police forces.

It has been stated that officials and judges in particular need further training including language training. Pure internal guidelines prove less helpful whereas the exchange of personal is particularly apt to minimise both shortcomings.

**Germany: The Role of Criminal and Administrative Sanctions in Germany Competition Law enforcement.**  
CITATION: [http://www.concurrences.com/abstract\\_bulletin\\_web.php?id\\_article=13325](http://www.concurrences.com/abstract_bulletin_web.php?id_article=13325)

The legal function on administrative offences differs from that of criminal sanctions. The former primarily regulates social and economic life to guarantee a stable social and economic environment whereas the latter has the purpose to deter and retaliate in respect of certain crimes. In addition to this administrative offences do not require as high a standard of certainty as criminal sanctions and therefore allow the lawmaker to prohibit and sanction a broader range of polymorphic conducts. Although administrative offences can result in substantial fines, they do not allow for the imposition of custodial sentences like criminal law does. According to an old German tradition, legal persons cannot be punished in a criminal sense, they can only be penalised by administrative sanctions.

In Germany, the legislator has opted for the administrative offences system for anti-trust sanctions with some criminal law applicable in cases of fraud where the delinquent has intentionally acted with a view to enriching himself.

#### UK Articles

**“Green light for penalties shake-up”**  
CITATION: ENDS 2006, 383, 37-38

The main contention of this article is that only the most serious non-compliance cases should be handled by the criminal courts. Instead, the government should consider schemes for fixed and variable administrative penalties that regulators can hand down directly. Under fixed penalty schemes, penalties would be prescribed in statute and would not be in excess of £5,000. However as Professor Macrory argues, some regulators should be equipped with powers to issue variable penalties and that these penalties should not be capped.

He recognised the potential anxiety in business circles regarding these new powers and highlighted the importance of transparency in the way that penalties are administered. As a starting point, an enforcement policy should be published and all enforcement actions disclosed, including the identity of recipient.

Professor Macrory further suggests the creation of a tribunal to serve as an appeals mechanism in relation to administrative sanctions, including monetary penalties. He argues that any kind of a hybrid system, whereby magistrates hear appeals against administrative sanctions, would reintroduce many of the current arrangements' weaknesses.

Provisionally, the paper advocated use of administrative penalties under a range of regimes, including pollution prevention and control, waste management licensing, packaging waste and water discharges, abstractions and impoundments.

**Watson M., "Civil fines for environmental crimes?"**

**CITATION: J.P. 2005, 169(8), 128 – 130**

In this article the author examines the success rate of the current penalties for environmental offences in terms of their deterrent effect. Watson makes the point that the majority of offences do not lead to a prosecution, and so the incentives to break the law are far greater than the risks as a result of such a breach. The House of Commons Environmental Audit Committee has called for higher maximum sentences for breaches of environmental legislation; however the author argues that the prospect for success of increased sentences is limited.

One reason he cites for this is the difficulty in securing a successful prosecution. The prosecutor must prove that the defendant is guilty beyond a reasonable doubt. There is also a body of thinking that it is inappropriate to prosecute an environmental offender under the criminal law, as in many instances the defendant does not possess the requisite mens rea. For this reason Watson stresses the need for a simple and effective alternative to prosecution.

Civil penalties have been used widely in the USA, Australia and Germany. These generally consist of fines imposed on offenders without any application of criminal responsibility. Watson uses the example of the use of civil penalties in the United Kingdom, in the form of fines imposed by the Occupational Pensions Regulatory Authority on businesses

who fail to comply with their statutory duties as regards pension schemes. Under this legislation individual and companies who find themselves in breach may be fined up to ST£5,000 and ST£50,000 respectively.

Watson advocates the application of a similar approach to environmental law. The ability to revoke or suspend a licence is a powerful weapon to be used in environmental protection. Such a sanction can deprive a business of the ability to continue in operation within the law. There is little evidence of such sanctions being employed in environmental cases. Since the Environment Agency was established in 1996 only six waste management licences have been revoked. Watson expresses the opinion that a sanction that is often threatened but rarely used has negative, as opposed to positive, deterrent value.

The Department for the Environment, Food and Rural Affairs (Defra) has discussed the possibility of introducing civil penalties. It seems likely that the Environment Agency will eventually be given the power to impose civil fines for routine environmental offences. These will be calculated in accordance with a tariff based on corporate turnover, with fixed penalties available for individual offenders.

In conclusion, Watson looks to the example of the Environmental Protection Agency in the USA. They use civil and administrative penalties to deal with environmental offences. In only the most serious cases are criminal sanctions applied and these offenders can expect a custodial sentence. He suggests that this approach is eminently sensible and should be adopted in the United Kingdom.

**Watson M., "The use of criminal and civil penalties to protect the environment: a comparative study."**

**CITATION: E.E.L.R. 2006, 15 (4), 108 – 113**

As modern technology developed so did the number of ways in which the environment could be potentially damaged. Pollution endangered lives therefore the use of criminal law to reduce the threat to human life was not inappropriate. As new environmental issues arose, most countries developed civil/administrative penalty regimes to deal with these new threats. Support is mounting in the UK for the increased use of environmental civil penalties; the EU however favours the use of criminal penalties to achieve its environmental objectives.

The precise nature of these penalties remains uncertain. A distinction may be drawn between financial penalties imposed by regulatory bodies and non-punitive civil measures such as revocation of licences of the disqualification of company directors. It seems unlikely that civil and administrative penalties could ever become detached from criminal penalties, for those operating under the auspices of organised crime, the prospect of criminal sanctioning acts as the only form of deterrence.

While slow at the off set, environmental policy within the European Union now stands on an equal footing with economic and social policy. The union has failed to implement a directive on EU environmental legislation due to concerns regarding competence under the EC treaty. Now resolved, a directive seems imminent.

Vessel source oil pollution is an on-going problem. Most of the pollution is caused intentionally by commercial vessels. Ship-owners can make huge financial savings by degrading the environment in this manner. From 2007 a EU directive will be imposed that obliges member states to ensure 'effective, proportionate and dissuasive' penalties are established. An infringement of the directives articles will be regarded as a criminal offence, including custodial sentences. Financial penalties of up to but not exceeding €1,500,000 will be appropriate. At present this is the best example of the EU promoting criminal sanctions to discourage activities which pollute the environment.

A range of environmental mechanisms are available to UK regulators, these include; warning letters, negative publicity, injunctions, and suspension/revocation of licences but the efficacy of these rely heavily on the perceived threat of criminal prosecution. However businesses often have strong economic incentives to ignore environmental laws. An effective regulatory regime must therefore look for the most appropriate sanctions. "Penalties should be set equal to the net social cost of the crime divided by the probability of detection." The likely costs associated with illegal activities should therefore significantly outweigh the probable financial advantages.

Additionally, most magistrates' lack of experience with environmental law and issues at large does not facilitate appropriate sentencing. The House of Commons Environmental Audit Committee expressed concern that the fines imposed reflected neither the gravity of the crimes, nor did they deter or adequately punish the offenders involved. There seems to be a general

consensus that the current penalties are too low and that more offenders should be prosecuted. However, the difficulties associated with actually calculating appropriate fines are highlighted within the article.

Over the last decade, non-criminal sanctions have been increasingly called upon in the UK. For example the Noise Act of 1996 permit local authorities to impose a fine of £100 fixed administrative penalties on persons who cause excessive noise in domestic premises at night, with prosecution occurring after 14 days of non payment.

Anti social behaviour orders (ABSOs) are not precisely defined and can include activities which damage or degrade the environment but can only be imposed on natural persons and not companies. The civil burden of proof applies and not proof beyond reasonable doubt. In the article Watson predicts that the ABSO regime will soon be extended to enable the Agency and other regulators to target environmental offenders more effectively.

At present regulators have been hesitant to use existing civil penalties such as suspension or revocation of licenses. This however may change as government ministers gave official support to the cause of environmental justice reform at a conference in 2004.

Germany has a strong tradition of environmental protection being widely regarded as an environmental regulation leader. Similar to the UK, Germany use non-regulatory instruments such as eco-taxes, tradable permits, eco-labels and voluntary agreement to protect their environment. However, England distinguishes between serious offences which are triable on indictment and minor offences which are triable summarily. Germany on the other hand abolished the category of minor criminal offences as early as 1975; instead these are now regarded as administrative offences. Companies guilty of offences may receive administrative fines of up to €500,000 with such penalties attaching greater emphasis to the objective significance of environmental violations and not moral fault. This position contrasts with the position in the UK at present.

The wider availability of civil and administrative sanctions in the UK would mean that regulators would gain sanctions which would be relatively easy to impose. The burden of proving guilt beyond reasonable doubt in the criminal courts would be lifted. Due to the difficulties inherent in the process, legal action is usually avoided unless

conviction is most likely. 'The creation of new civil and administrative penalties might make traditional emphasis on voluntary compliance difficult to justify.'

#### Current topics

CITATION: (January), J.P.L. 2007, Jan, 1-5

This article discusses the role of the Environment Agency as a consultee in planning applications. For some time there has been concern over the fact that where the Agency is consulted on proposed developments in areas of flood risk, its advice has not been followed. Therefore the proposal to make the Agency a statutory consultee was implemented by the Town and Country Planning (General Development Procedure (Amendment) (No.2) (England) Order 2006.

However as pointed out this does not mean that the Agency's view will have to be followed, but the Government should publicly explain the reasons for not accepting the Agency's advice on the grounds that this would significantly improve transparency in this area. The Environment Agency agrees with this suggestion.

On the question of enforcement generally, the ultimate objective of enforcement as with all environmental regulation is the prevention or at least the limitation of harm to the environment. In the report it states that the present imposition of criminal sanctions fails to achieve most of the purposes of enforcement and therefore as well as reform of sentencing, comes out in favour of new tools for enforcement including stop notices and what it describes as "civil variable administrative penalties." These administrative penalties would be imposed by the regulators rather than the courts. These administrative penalties raise many difficult issues as to whether the criminal standard of proof should apply and whether there should be a special regulatory Tribunal set up.

The report throws out ideas and potential solutions as opposed to coming to any concrete conclusions on this matter. The issue of transparency was discussed here too as an important requirement in how regulators should choose and apply sanctions. Ultimately it was proposed that the use of administrative fines and other non-criminal penalties could resolve some cases more quickly and effectively.

#### "Review supports new regulatory penalties"

CITATION: ENDS 2006, 382, 40-41

A government review of environmental enforcement commissioned by DEFRA, has produced a number of 'early policy ideas'. These ideas are aimed at granting regulators the power to hand out administrative penalties as an alternative to pursuing the matter in the criminal courts. Such penalties could be used to secure remediation, remove economic gains from non-compliance of environmental regulation and make restitution to adversely affected communities.

Increasingly critics have come to view criminal sanctioning for environmental offences as inadequate. Prosecution has become so commonplace that criminal penalties are being trivialised. Further to this, there is a feeling that this method of enforcement is disproportionate to the crime committed, and also fails to put right the damage committed in the first instance.

In this regard the review recommends taking a more bespoke approach by introducing a regime of variable administrative penalties which the regulator could apply directly. The review presented six workshops simulating the use of administrative penalties and their workability. The regulator however retains the discretion to decide to pursue a criminal prosecution where evidence of criminal intent is apparent.

Research showed that businesses would welcome a more flexible enforcement approach provided this was done so within a transparent framework of principles. An on-line public register of penalties covering criminal sentences, administrative penalties and certain enforcement notices would assist transparency and reinforce incentives for operators to comply. In the case of the most serious environmental harm, regulators should be equipped with the power to issue 'stop notices'. This would prevent the delays which can be expected in pursuing the criminal path.

Finally, in the matter of strict liability offences, the review recommends that cases be brought to court only where defendants appear to be 'seriously culpable', otherwise administrative penalties will suffice.



**Parpworth N., "Sanctioning for regulatory non-compliance in England: the consultation document."**  
**CITATION: *Env. Liability* 2006, 14(4), 147-157**

This article provides a brief analysis of the in-depth consultation report undertaken by Professor Macrory which was entitled; *Regulatory Justice: Sanctioning in a Post – Hampton World* and was published in May 2006. The Macrory report aimed to explore some of the alternatives to the use of criminal law where there is a breach of environmental law and provide viable suggestions for the creation of a modernised and flexible system of sanctions.

The article briefly discusses each of the seven chapters of the report. Macrory's motivation for his vision stems from what he views as 'the rogue offender who deliberately flouts the law'. In his vision, he advocates the retention of the criminal system for prosecution of the truly egregious offenders, but warns of the de-stigmatisation of criminal convictions as an increasing number of industries begin to regard such convictions as an innate part of the business cycle. In order to avoid this, he proposes the provision of a richer range of sanctioning tools available to regulators which are based upon a set of six 'penalty principles'. These include sanctions allowing for the offenders change of behaviour, elimination of financial gain, appropriate consideration of the particular offender and a proportionate response to their offence which could provide for the restoration of their offence and deter them from any future non-compliance. A proposed framework under which these penalty principles might operate is also set out. Publication of the regulators enforcement policies is called for as this would provide a guideline, for the industries subject to regulation, of the circumstances in which enforcement action is likely. The current absence of such publications represents a significant gap in the current system's workings.

From the magistrates point of view, the manner in which sentencing should be handed down is equally unclear as the court only hear an environmental case once every seven years. The Magistrates' Association and Environmental Law Foundation published a sentencing document entitled; *Costing the Earth: Guidance for Sentencers*, however its impact remains strained due to the infrequency with which cases of this matter are heard. Suggestions towards resolving include specific magistrates becoming more prominent in determining certain types of regulatory offences and the development of further sentencing guidelines, paying particular attention to the principles laid down in *R v F Howe & Son (Engineers) Ltd* [1999] 2 ALL ER249.

The second chapter of the report considered by Parpworth details the evidence which was used during the creation of the consultation document. The most prominent issues arising were, the difficulty and expense involved in bringing a criminal prosecution to court and the failure of fines to reflect the actual profit generated through the environmental breach. Furthermore, research shows that regulators experienced pronounced regional variation in the level of fines imposed thus further highlighting the low level of consistency. An increase in effective intermediate sanctions could be the vehicle through which these problems might be overcome.

Chapter 3 of the Macrory report discusses the role of Monetary Administrative Penalties as an alternative to criminal prosecution. Such penalties should not be viewed as revenue generating mechanism that hold no recourse for appeal and neither should they be viewed as a replacement for the prosecution of serious breaches which warrant criminal prosecution. Rather such penalties could be viewed as an intermediary between informal persuasion of compliance and the stigmatic action of criminal prosecution. Following a comparative study of administrative and criminal enforcement process in the US and Canada, Macrory's report concluded the four core reasons why MAP's have been more successful than prosecutions. These reasons were that the sanctions were more effective when operating within a risk-based regulatory environment, lower levels of stigma were attached, and they were generally less cumbersome and were viewed as a more proportionate penalty.

The three models of monetary penalties investigated were: applied, fixed and variable. Model three was Macrory's preferred option. Under this model, where the regulatory breach is quite serious the regulator is afforded a degree of discretion as to the level of the penalty which they can impose. However, the final decision as to the monetary penalty imposed should be undertaken independently of the ground staff so as to insure the relationship between the inspector and firm is not compromised. This penalty is subject to an upper limit specified in relevant legislation. Examples of its use in the UK legal system are currently available; these include penalties imposed by the Financial Services Authority and the Office of Fair Trading. Under the model proposed a right of appeal would exist to an independent regulatory

tribunal rather than a court of law. The two main advantages cited by Macrory in using this system are that the tribunal could be composed of members with specialist expertise in the matter and also cases would not be considered alongside issues such as violence or dishonesty which Macrory believes to be entirely different in nature. Using either the courts or specialist tribunal to gather the applicable fines, the monies involved should be handled independently from the agency that imposed their collection. In doing this, utmost transparency of the system is apparent which in turn bolsters businesses confidence in the fairness of the system.

Chapter 4 concerns the greater utilisation of existing statutory notices and the potential introduction of new sanctions. The current statutory notices available include: enforcement notices, improvement notices, prohibition / suspension notices, restoration orders and clean-up orders. Yet evidence shows that while these notices exist, a number of regulators do not have a system in place to follow up the particular enforcement notices that have been served. This fundamentally undermines their value as a sanctioning tool. Professor Macrory advocates the need for a strengthened enforcement notice system whereby accurate information on the use and effectiveness of enforcement notices could be provided by the regulators. Additional sanctions available to regulators are 'enforceable undertakings'. These include provisions for compensation, reimbursement or redress to affected parties and also typically include an element to ensure an offence is not repeated. A requirement of this sanction could include service to a community. Since their introduction in Australia in 1993 they have been viewed as an effective alternative to criminal prosecution. The desired outcome of introducing such a system in the UK would be to impose a sanction which satisfies both the offender and the victim. 'Undertaking Plus' is another sanction which would be available to a regulator in the event of a more serious case of non-compliance where an enforceable undertaking is not a sufficient punishment.

In chapter 5 the concept of Restorative Justice is put forward. The emphasis in this approach lies with the remedy rather than the punishment, and will only be suited to those who can accept responsibility for their actions. The process is very inclusive and affords each stakeholder to whom harm was caused and who caused the harm; a role to play. A typical RJ process concludes with the drawing up of an agreed plan of action which is then signed by all relevant parties. Three contexts into

which the concept of RJ could fit into the present system of prosecution are:

- a) An alternative to prosecution provided all relevant stakeholders agree. If an appropriate agreement as to the outcome could not be reached, the regulator would still have the discretion to bring forward the prosecution.
- b) An alternative to the imposition of a Monetary Administrative Penalty, as above if the approach failed reversion to the original process would be acceptable.
- c) This option sees RJ being used in the criminal justice system at the pre-sentencing stage.

Any agreement reached by the stakeholders may be taken into account when sentencing the offender or alternatively RJ proceedings may form part of the sentence itself. RJ represents a means of achieving more appropriate outcomes that can be delivered under the traditional criminal justice system.

Chapter 6 of the report considers how the sanctioning options in the criminal courts may be expanded. With inspiration drawn from the Criminal Justice Act 2003, sanctions such as unpaid work requirements and 'curfew requirements' could be used as alternative sanctions to the regulators' tool kit. Further suggestions include corporate rehabilitation orders, community projects, publicity orders and so on. It is imperative however that a firm which is subject to a community project order should not be allowed to utilise the project for its own public relation purposes. Alternatively a publicity order might prove effective. Essentially, this provision would allow for the naming and shaming of the relevant offending parties by publishing a notice of their breach in relevant literature. This use of adverse publicity to potentially damage the corporate prestige of a firm has been used to good effect in Australia. Conditional cautions and mandatory audits are also considered as potential sanctions.

In conclusion, Parpworth notes that many of the sanctioning options and ideas have worked well in other jurisdictions and as result are worthy of consideration within the context of improving the system within the UK. Parpworth predicts that responses to Macrory's report will provide further impetus for reform and emphasises the importance which his final report may hold.

**Pockets of leniency:  
how EU states deal with eco – crime  
CITATION: ENDS 2007, 11.**

Environmental crime in Europe is dealt with in a very inconsistent fashion. The EU's 27 member states all have differing ways to regulate environmental crime, some of which are more effective than others, these are referred to as 'pockets of leniency'. The purpose of the environmental crime directive which has been proposed by the Commission is to enunciate the Union's concerns about environmental crime.

**Different Definitions**

The commission's proposed definition of environmental crime encompasses a wide range of offences which vary in gravity. As result EU governments are far from agreeing on what kinds of environmental offences should be classified as criminal. There are three dominant definitions of environmental crimes currently accepted in the EU.

Eco-crime is defined as any act which is intentional or likely to cause death, serious injury or serious damage to the environment.

Eco-crime is an un-authorized act, or omission, that breaches the law.

Environmental crime is regarded as any offence related to the environment. (This one is most applicable to Ireland and England.)

If there was agreement amongst member states as to what constitutes a crime, harmonisation would still be limited as some states might regard an offence as a crime but not provide for criminal sanction, i.e. Spain and Greece.

**Diverse Sanctions**

Enforcement systems and sanctions for environmental offences fluctuate across Europe. For example, in the case of illegal trade in waste, maximum fines range from €2,900 in Portugal to €12.7 million in Ireland. The same level of disparity is evident in the trade of endangered species where the maximum fine imposable in Poland is €1,293; but in the Netherlands it is €450,000. In theory Ireland has the toughest sanctions for environmental offences in Europe, companies can face fines of up to €12.7 million however in practice these fines are rarely imposed. In comparison the maximum fines imposable in England and Wales are only €74,600.

The measure of disparity is further widened as in some countries cases are taken under criminal law, while in others, civil law predominates.

**Penalties in Practice**

If the maximum penalties allowable in each of the countries were imposed, the commission's concerns would subside. However, in practice their enforcement is poor. For example, in Ireland the average fine imposed for 2005 was €2,558 or 0.02% of the maximum allowable. An unacceptable level of toleration for eco-crimes coupled with judges unfamiliarity with sentencing in such cases are cited as the reasons for such low levels of punishment. Softer approaches are often preferred such as issuing enforcement notices or official warnings. If these warnings are ignored authorities can impose stronger sanctions, including license revocation. Although this is usually an exceptional occurrence.

The diversity of national systems for dealing with environmental crime further compounds the problem of producing a viable directive. In Italy for example, there are specific environmental units dealing with relevant breaches. In contrast, France has 24 different bodies in charge of environmental protection. Each body is placed under the authority of different governmental departments. This disparity in cooperation means that adequate surveillance of environmental offences suffers.

**Surveillance**

The actual number of offences recorded around the EU also varies. In 2005, 3,600 environmental offences were recorded in Sweden, while the number recorded in England and Wales was six times greater than this. However, the actual recording of environmental cases and the prosecution of such are different things. In relation to transfrontier activities such as waste shipments, a report carried out by the EU's Impel network of pollution inspectors showed that half of the 1,100 shipments between 2004 – 2006 were illegal.

**Conclusion**

The impact that the draft directive will hold remains to be seen. While some countries already operate within its compass, other countries will have to undergo big changes.

**“Agency seeks alternatives to criminal prosecution”**

**CITATION ENDS 2006, 376, 40-41**

A review which follows on from the Hampton report of 2005 and is being lead by Professor Macrory but has yet to publish its final conclusions has been sent to the Cabinet Office by the Environmental Agency. This review details proposals for an administrative penalty regime which can offer a less costly and cumbersome alternative to criminal prosecution. While these penalties can offer a more proportionate response, the agency wants to retain the option of seeking redress through the criminal courts in appropriate circumstances. Regulator applied penalties' would allow the guilty party the option of paying the fine imposed by the environmental regulator or opting to face criminal proceedings and deal with the cost and uncertainty that such a course may hold for them. This system is favoured over one that would provide for a right of appeal and potentially create a new burden for an already hectic magistrate. The advantage with the administrative penalty is that it doesn't carry with it any criminal convictions. The penalty itself would have to be equivalent or smaller than those imposed at the courts in order to deter companies from opting for criminal prosecution. However the agency may still retain a level of discretion in imposing criminal prosecution in the case of genuine offenders worthy of such treatment.

Suggestions as to the use for the income generated through the application of administrative penalties include the funding of advice for corporate entities or beneficial community activities. The agency emphasises that such beneficial initiatives should not be used to the aid of the original offenders.

Flexible penalties present an alternative list of sentences from which the criminal courts can impose where it feels that a normal criminal sentence would not prevent a re-occurrence. For example; clean-up orders may constitute part of a wider sentence and the non-compliance of the order could result in an offence. Equally publicity orders could prove effective whereby the nature of the company's offence and the measures taken to remediate the damages are published. Ordering the companies to carry out specific tasks such as personnel training and completion of environmental improvement projects are also suggested. Conditional cautions can at present be made against individuals but not companies, such orders might contain financial requirements in addition to the undertaking of specified tasks.

Calls for the courts to follow more transparent sentencing criteria are being made as currently the magistrates have a very inconsistent approach. For example no offender should make a profit from a regulation breach and payment of any damage and restoration costs involved should be apparent in the sentence. In order to facilitate this increased level of consistency, environmental cases should be concentrated in fewer courts and heard by fewer magistrates. Creation of a specialist forum to consider environmental appeals of regulatory decisions is also welcomed. Such a tribunal could raise the more complicated questions of law but would also need to consider appeals from other regulatory areas to provide a sufficient workload.

**“Tribunal mooted for penalty appeals”**

**CITATION: ENDS 2006, 376, 40-41**

An independent Cabinet Office review carried out by Professor Richard Macrory of UCL has set out proposals to reduce reliance on criminal prosecution. (The Macrory Report) These proposals include a regulatory tribunal drawing upon the acumen of expert members. The review's fundamental aim is to increase the regulators toolkit allowing for more flexible sanctions. In doing this, Macrory hopes to establish an increased level of public confidence by raising awareness of victims needs, and providing a more transparent and balanced response to non-compliance.

Central to this balanced approach is the introduction of a system of administrative penalties. The imposition of criminal proceeding would be reserved for the most serious acts of non-compliance where such sanctioning is desirable from a public policy perspective. Regulators should be equipped with the discretion to apply administrative fines and allow recipient firms to appeal the matter to an independent administrative tribunal.

Such an approach is in contrast to the EPA's preferred option of allowing the accused company the option of paying the fine or facing criminal proceedings thus making redundant the concept of an independent administrative tribunal, and negating any additional costs that the establishment of such might incur.

Macrory's review considered a similar system but concluded it would be punitive and might give offenders the option of buying their way out of prosecution. The review similarly considered the option of appealing to the

courts but felt the consideration of regulatory sanctions under criminal law to have a diluting effect leading to a disproportionate, inflexible and slow process. An independent tribunal would award more favourable outcomes for industry. While business's responded favourably towards a greater flexibility of sanctioning powers, they expressed concern that administrative penalties would lead to more frequent use of penalties. The combined effect of a tribunal and a transparent enforcement policy might alleviate the business's concern.

**Statutory Notices: Enforcement and improvement notices with mechanisms to follow them up. Voluntary but legally binding once decided upon between regulators and firms.**

Restorative Justice: Ensuring victim's needs are addressed. Those most affected by the wrongdoing can come together to determine the actions needed to repair the harm done and prevent re-occurrence. Can occur prior to court proceeding on recommendation of the regulator or alternatively on the recommendation of the courts. Effectiveness of criminal courts: Develop sentencing guidelines in a focused manner in order to build magistrates' experience. A review of maximum fines and fines set to eliminate financial gain from non-compliance. Proposed extension of courts power beyond the sphere of financial penalties or imprisonment, to include matters such as conditional cautions or publicity orders. The six penalty principles applicable to sanctioning should consider;

1. Behavioural change of the offender
2. Prevention of financial benefit from non-compliance
3. Responsive to offender profile resulting in appropriate sanctioning
4. Proportionate response to offence and harm caused
5. Restoration of harm caused
6. Deter future non-compliance

The article concludes by reiterating Macrory's calls for the publishing of regulators enforcement policies. These policies should unambiguously justify and detail the administrative penalties imposed. Furthermore, the outcome of such penalties should be measured in order to improve their efficiently.

**"Review seeks alternative to criminal prosecutions"**

**CITATION: ENDS 2006, 372, 44**

A report, by Philip Hampton commonly referred to as the Hampton review, called on the Better Regulation Executive to undertake a new system of administrative penalties to be available to regulators. Such regulators can impose fines on non-compliant businesses without the need for court proceedings. The motivation for the report was to offer alternatives that might alleviate the over-reliance on criminal prosecution.

The paper looks at administrative penalties used in other countries and draws on the examples of Germany and Australia. Germany's system allows regulatory bodies to mete out fines directly for regulatory breaches. Criminal prosecution is only used in the most serious of offences and for appeals of the administrative system.

The option of just threatening companies with administrative sanctions has been used in Germany also. The paper finds the system in use in Germany to offer a more proportionate response and doesn't blur the lines between criminality and regulatory breaches.

The German system also uses options similar to administrative penalties such as improvement notices. The issuing of improvement notices may often provide businesses more of an incentive to comply over criminal prosecution.

At present 15 UK regulators actually use administrative penalties to good effect; these include the Financial Services Authority, Ofwat and Ofgem. Businesses have the option to either accept the penalty or to appeal and have the case heard by a specialist tribunal. The review considers whether the criminal courts are an appropriate forum to hear some of the regulatory offences that might be presented granted that, at present, the specialist knowledge needed to understand some of the cases is not easily accessed.

**"Review of environment enforcement unveiled"**

**CITATION: ENDS 2005, 382, 40-41**

Environment Minister Elliot Morley has launched a review of environmental legislation. The work is likely to pave the way for greater use of civil rather than criminal penalties. Reassurance of the government's commitment to this area of reform came in the form of a speech made

by Mr. Morley addressing a conference on environmental justice. However the evidence necessary to mount the case for reform has not yet entered circulation.

DEFRA explained that the aims of the review established to produce this research were 'to improve the efficiency, proportionality and effectiveness of enforcer action and court sanctions' and focuses on the community at large especially; provision for their access to relevant information, the views of the community towards court sanctions and the sanctions handed down in court that endeavour to secure compliance or remedy environmental damage.

Relevant stakeholders and the government officials will maintain a continued dialogue throughout the review. The body producing the review will be responsible for providing evidence to identify and define the nature and scale of the enforcement obstacles. Concurrent to this research, practical trials as to the workability of administrative penalties and methods of reading the community impact of such will be conducted; as will methods of making existing measures more useful.

The article predicts that the review will recommend wider use of civil penalties in order to avoid the struggle that the criminal law procedure can entail. The gradual wave of support in favour of reform has been mounting for sometime with proposals for civil penalties for environmental offences set out in 2003 and a subsequent study investigating regulatory appeals and other tasks.

**"Defra rapped for 'lacklustre' approach to environmental crime"**

**CITATION: ENDS 2004, 352, 38-39**

This article deals with the first of a series of reports, put forward by the House of Commons Environmental Audit Committee, which proposes modest reforms for the improvement of environmental crimes sentencing. It highlights the passage of the report concerning the response of the Environmental Department to the inquiry. This is due in part to the department's delayed submission of evidence coupled with the poor quality of evidence once submitted. The memorandum did conclude however by DEFRA stating their commitment to improving environmental justice; although the report provides evidence to the contrary.

As neither the Home Office nor the Department for Constitutional Affairs show a dedication towards improving the current situation, DEFRA's lack of enthusiasm is all the more apparent. The report urges DEFRA to 'seize initiative and push forward a bold and radical agenda'. It calls upon the Home Office and Environment Agency to reignite talks towards tackling corporate environmental crime in a speedy manner so that Parliament can come to some decision.

The committee concludes that fines regarding environmental offences are too low and alternative sentences such as community sentences remain under utilized. Inflexible sentencing practices coupled with poor training in the area for magistrates and judges are also cited as fundamental problems. The article concludes by dealing briefly with the six suggestions put forward by the committee:

**Sentences:** The maximum statutory fine at present is £20,000 and is rarely imposed. The committee calls for an increase of the sum and supports DEFRA's recent proposal of raising this figure to as much as £50,000 for repeat fly tipping offences.

**Achieving Higher Sentences:**

Average fines handed out by the courts barely exceed one-eighth of the statutory maximum. Lack of awareness is a huge contributory factor in the courts reluctance to impose their full sentencing powers, as result the government should offer training for judges in environmental matters.

**Community Services:**

Under the Criminal Justice Act 2003 it is possible for community sentences to be imposed instead of fines. The committee finds that compulsory remediation work on the sort of blight for which the offender was himself responsible, would be a more appropriate sentence than a fine.

**Civil Penalties:**

Already in use in the US and Australia this sanction would allow the Agency to impose a financial penalty on an offender instead of initiating a prosecution. The report however failed to recommend how the matter should be taken forward.

**Prohibition Notices:**

This prosecution alternative already practicable by the Health and Safety Executive would afford regulators the

power to issue prohibition notices stopping a business from operating where it had committed repeated breaches of regulations and consequently eliminating the need to go to court.

At present the Agency can serve such notices on regulated industrial processes posing an 'imminent risk of serious pollution' and it also has the authority to suspend waste management licenses in the face of continued pollution, harm to human health or detriment to local amenity. A sufficient case for the implementation of this suggestion however was not put forward.

**Environmental Court of Tribunal:**

Though some witnesses advocated the establishment of this, the DCA held it in little regard and the Magistrates Association opposed it. Equally the committee dismissed it as it would be of considerable cost and mightn't necessarily deal with matters approaching it in a more practical manner than other proposed alternatives.

**Specialist Magistrates:**

The committee meet this suggestion with much fervour stating that 'without such concentrated experience and expertise, the courts will continue to be a lottery often unfavourable to deterrence and proper punishment.'













