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A New Garden of Eden? Stimuli to Enforcement and Compliance in Environmental Law

ANDREW WAITE*

I. INTRODUCTION

The thesis of this article is that the enforcement of and compliance with environmental law is the result of many different stimuli affecting both the enforcers and those who must comply with the law.

I have argued elsewhere¹ that environmental law can be compared to the rings of a sliced onion. Starting at the centre and moving outwards, the rings represent:

A – environmental imperatives, arising from the laws of nature which must be obeyed if adverse environmental impacts are to be avoided;

B – environmental principles arising from the environmental imperatives, such as the polluter pays principle;

C – the substantive rules of law;

D – the rules on access to justice and the duties and powers of the enforcement authorities;

E – the actual behaviour of the environmental “actors”, including legislators, judges, enforcement authorities, economic producers and those in their supply chain as well as those citizens who are affected by the environmental depredations of others or who have the interest and commitment to participate in the enforcement process.

The optimum state of environmental law is the achievement of equilibrium represented by the equation:

$$A = B \times C \times D \times E.$$

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1. Andrew Waite, *The Quest for Environmental Law Equilibrium*, 7 ENVTL. L. REV. 34, 36 (2005).

If one of the multipliers B to E is too high or too low, it must be balanced by a corresponding decrease or increase in one or more of the other multipliers. Otherwise the impact of environmental law is either excessive or deficient.² This approach underlies the discussion that follows.

II. INTERACTION OF THE ONION RINGS

The 'onion rings' interact in complex ways which critically affect the way in which the law operates in practice including compliance by industrial operators and individuals and the extent of enforcement by the enforcement authorities.

Starting at the core of the onion, the environmental imperatives (A) affect all the other layers, influencing the development of environmental principles (B), the substantive environmental law (C), enforcement duties and powers and access to justice (D), as well as the behaviour of the environmental actors (E). It is obvious that the nature and scope of the environmental imperatives, as well as the quality of the underlying science, is critical to the development of the whole apparatus of environmental law (layers B-E).³

The environmental imperatives are becoming increasingly well known through education and the media, a tendency reinforced by an appreciation of the existence of the growing corpus of substantive environmental law. The unique feature of environmental law is that it is based on our understanding of the workings of the law of nature at any point in time.⁴ In recent years we have achieved a more holistic appreciation of the environment.⁵ This has resulted in international agreements designed to protect the global rather than solely the local environment on the one hand⁶ and a focus on integrated pollution controls on the other, based on the premise that it is pointless to reduce emissions into one environmental medium if that leads to an unacceptable in-

2. *Id.* at 37-39.

3. *Id.* at 56-57.

4. Nicholas A. Robinson, Paper Delivered at the Global Judges' Symposium on Sustainable Development and the Role of Law: Environmental Law: The Bedrock for Sustainability, (Aug. 20, 2002).

5. Waite, *supra* note 1, at 35-36.

6. See, e.g., The United Nations Framework Convention on Climate Change, 1992, GE.05-6220 (E) 200705; The Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997.

crease in emissions to another.⁷ The growing sophistication of environmental law based on an improved and increasing understanding of the environmental imperatives is likely to produce in many people a feeling of moral obligation to comply with the law or in some cases to encourage its enforcement. This may be regarded as the educative function of environmental law. That process may be assisted by the environmental principles, which although sometimes misunderstood and often confused with the substantive rules of environmental law, provide some rallying calls which give an impetus to compliance.

Environmental principles (B) directly affect the development of substantive environmental law⁸ and the rules on enforcement and access to justice (D), as well as the behaviour of the environmental actors (E). Many people who are ignorant of the precise rules of environmental law are guided by the polluter pays principle, the precautionary principle and the sustainable development principle, even in the form of banner headlines, rather than principles with detailed content.⁹

The substantive environmental law in turn affects the procedural enforcement rules (D)¹⁰ as well as the way they are used, enforced and litigated in practice (E). Finally, the procedural rules themselves, which include rights of access to environmental

7. See generally ROYAL COMMISSION ON ENVIRONMENTAL POLLUTION, FIFTH REPORT, AIR POLLUTION CONTROL: AN INTEGRATED APPROACH, 1976, Cm. 6371; ROYAL COMMISSION ON ENVIRONMENTAL POLLUTION, TWELFTH REPORT, BEST PRACTICABLE ENVIRONMENTAL OPTION, 1988, Cm. 310; Environmental Protection Act, 1990, c. 43, pt. 1 (U.K.); Michael Purdue, *Integrated Pollution Control in the Environmental Protection Act 1990: A Coming of Age of Environmental Law?*, (1991) 54 Mod. L. Rev. 534; Andrew Waite, *The Legal Aspects of Integrated Pollution Control*, 4 LAND MGMT. & ENVTL. L. REP. 2 (1992); Council Directive 96/61, Concerning Integrated Pollution Prevention and Control, 1996 O.J. (L 257) 26 (EC); Pollution Prevention and Control (England and Wales) Regulations, 2000, (as amended), S.I. 2000/1973.

8. Waite, *supra* note 1, at 35-36.

9. See generally DAVID HUGHES, ET AL., ENVIRONMENTAL LAW, 17-32 (4th ed. 2002); MICHEL PRIEUR, DROIT DE L'ENVIRONNEMENT, Titre 2, (5e ed. 2004); NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES (Susan Leubusher trans., 2002).

10. For example, if a high pollution threshold constitutes the trigger for action under an environmental regulatory regime, a duty to enforce may appropriately be placed on the authorities. On the other hand, if any amount of pollution suffices to trigger action, it is better to allow the authorities discretion as to when to act. The contaminated land and statutory nuisance regimes provide high thresholds coupled with a duty to enforce, whereas the works notice procedure for water pollution is actionable at the discretion of the authorities in the event of any pollution. Compare Environmental Protection Act, 1990, c. 43, §§ 78A(2), 79(1) (Eng.) (as amended) with the Water Resources Act, 1991, c. 57, § 161A (U.K.).

information and access to justice, are bound to affect the behaviour of those who operate within the framework of environmental law.

At the outer layer (E), there is also a degree of "rippling in" as the behaviour of the environmental actors and the administrative and judicial infrastructure which underpins it can be shown to affect the inner layers of substantive environmental law (C) and the procedural enforcement rules (D). In particular, an effective administrative and judicial system should enable the substantive and procedural rules to operate in practice, so that weaknesses can be observed and corrected. In particular, defects are exposed and the law refined in the crucible of litigation as judges seek to interpret and develop the law to achieve justice and satisfy the environmental imperatives.

The interaction of the onion layers is shown in the following diagram (Figure 1).

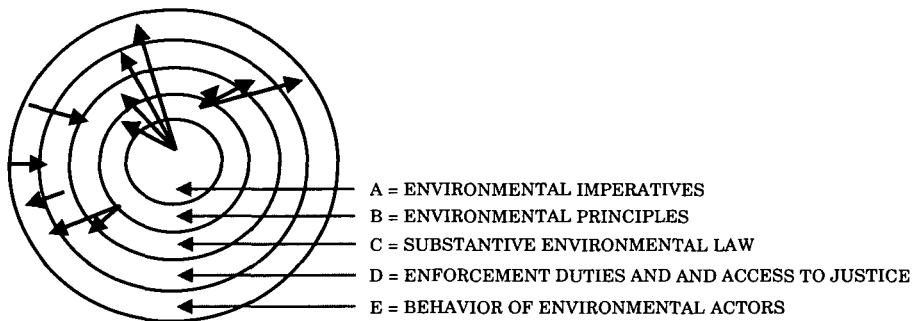


FIGURE 1

III. THE IMPACT OF SUBSTANTIVE ENVIRONMENTAL LAW AND POLICY

The content of the substantive environmental law itself may also affect the behaviour of the environmental actors, including compliance and enforcement. If the law is vague or there are too many difficult hurdles to surmount to be sure of success before the courts, the authorities may be unwilling to enforce it.

A. The *Van de Walle* Case

In some rare cases compliance and enforcement may lapse because the law is perceived to be too stringent. A notable example is the decision of the European Court of Justice ("ECJ") in *Van de*

Walle,¹¹ in which the court decided that petrol, which had leaked from a petrol filling station, and the soil which it had contaminated should both be treated as waste.¹²

That decision has been widely (although, in the author's view, wrongly) interpreted to mean that all contaminated soil is waste and that remedial action must therefore be taken to dispose of or recover it.¹³ The impact of that interpretation on the older indus-

11. Case C-1/03, *Van de Walle v. Texaco Belgium SA* 2004 E.C.R. I-7613.

12. The *Van de Walle* case concerned a leakage of hydrocarbons from defective petrol storage facilities at a Texaco service station in Brussels. *Id.* The hydrocarbons migrated to the cellar of the building on the adjoining property, which required remediation. *Id.* The service station was owned by Texaco but operated by a manager who had full responsibility for maintaining the property in perfect condition. *Id.* The manager operated the service station on his own behalf. *Id.* In the course of criminal proceedings against Texaco and its chief officers, the question of whether the contaminated soil was waste was referred to the ECJ. *Id.* The ECJ held that the contaminated soil was waste within the meaning of the Waste Framework Directive ("WFD"). *Id.* ¶ 62. The reasoning of the ECJ was essentially as follows: (1) the accidentally spilled hydrocarbons are not a product which can be re-used without processing, and are therefore residues which are discarded, albeit involuntarily; (2) under Articles 4 and 8 of the WFD, Member States have a duty to ensure that waste is recovered or disposed of by its holder; (3) it follows that the contaminated soil (which cannot be separated from the hydrocarbons) is required to be discarded and therefore disposed of and recovered in order that the obligation not to abandon and to recover or dispose of the waste hydrocarbons is complied with; (4) it follows further that the fact that soil is not excavated has no bearing on its classification as waste. *Id.*

13. The *Van de Walle* decision should not apply in the following cases:

a. *Pre-1977 spillages* - the European Council Directive on Waste Management ("WFD"), is not retroactive, and so should not apply to waste discarded before the implementation date in 1977, Council Directive 2006/21/EC, art. 24, 2006 O.J. (L 102) 15-34 (EC).

b. *No remediation is required* - until remediation is required under the contaminated land legislation, Environmental Protection Act, 1990, c. 43, §§ 78A-78YC (Gr. Brit), or as a condition of planning permission if the site is to be developed, there should be no obligation to discard and then dispose of or recover it under the WFD. No time limits are placed on the duty of member states to ensure that waste holders have their waste recovered or disposed of. Council Directive 2006/21/EC, 2006 O.J. (L 102) 15-34 (EC). Additionally, the WFD's aim of achieving a high level of environmental protection would be negated if people are required to discard material unnecessarily. In *Van de Walle*, remediation was required and had already been carried out before the ECJ hearing. *Van de Walle*, 2004 E.C.R. I-7613 ¶ 14.

c. *Recovery by degradation or dispersal* - in some cases, spilled substances that are waste may be recovered most effectively by leaving them in the ground and allowing them to degrade or disperse naturally and form part of the ground. This solution would not involve the need to discard (and then dispose of or recover) the contaminated soil.

d. *Made ground* - if waste has been deposited on land to create made ground, that material has been recovered by the act of depositing it and is no longer waste provided that it is suitable for the purpose.

e. *Recovery by becoming part of the ground* - waste deposited in the ground by way of disposal may have been recovered subsequently, for example, by becoming part of the

trialised countries such as the United Kingdom would be unimaginable!

The result has been what can only be described as a massive conspiracy to ignore the *Van de Walle* decision. In the UK despite a ministerial statement to the effect that *Van de Walle* represents the law and that its implications are being considered, the government and the regulatory authorities have for the moment chosen to ignore it in practice. In the meantime, the proposed new Waste Framework Directive to exclude contaminated soil from the scope of the Directive provided that it is covered by other European Community legislation.¹⁴

B. The Contaminated Land Regime and the *Circular Facilities* Case

The contaminated land legislation came into force in England in April 2000.¹⁵ This legislation imposes duties on the enforcing authorities to investigate their areas for any land that meets the statutory criteria for contaminated land, to designate any such land as contaminated land,¹⁶ and, finally, to ensure that the responsible party (the “appropriate person”) carries out the appropriate remediation.¹⁷ However, due to the complexity of the legislation, far fewer sites have been designated and remediated than had been expected.

The *Circular Facilities* case¹⁸ illustrates the difficulties that can arise in ascertaining which party is responsible for carrying out remediation.

The “appropriate persons” primarily liable are those who “caused” or “knowingly permitted” the contaminating substances

ground, whether as surface or sub-surface material, irrespective of the date of the deposit. An obvious example is a prehistoric waste tip which, when discovered, is considered not as waste but as part of the cultural environment.

14. *Commission Proposal for a Directive of the European Parliament and of the Council on Waste*, at 2, COM (2005) 667 final (Dec. 21, 2005).

15. Environmental Protection Act, 1990, c. 43, §§ 78A-78YC (Gr. Brit.), introduced by the Environment Act, 1995, c. 25, § 57 (Gr. Brit.). See also Contaminated Land (England) Regulations, 2000, S.I. 2000/227. The legislation is also supported by statutory guidance. DEP'T FOR ENV'T FOOD & RURAL AFFAIRS, ENVIRONMENTAL PROTECTION ACT 1990: PART 2A CONTAMINATED LAND, DEFRA CIRCULAR 01/2006, Annex 3.

16. Environmental Protection Act, 1990, c. 43, § 78B (Gr. Brit.).

17. *Id.*

18. *Circular Facilities (London) Ltd. v. Sevenoaks District Council*, [2005] EWHC (Admin) 865, [35] (Eng.).

to be present (Class A persons).¹⁹ If no Class A persons can be found, liability passes to “innocent” owners and occupiers (Class B persons).²⁰ Detailed statutory guidance issued under the legislation provides for parties within a Class to agree on the allocation of liability between them.²¹ Failing agreement, some parties may be excluded from liability under a series of exclusion tests.²² After that, if more than one party remains in the Class, liability has to be apportioned in accordance with the statutory guidance.²³

Particular difficulties arise in interpreting the term “knowingly permitted,”²⁴ and in particular when an “innocent purchaser” who subsequently discovers contamination on the site may become a “knowing permitter.”²⁵

The *Circular Facilities* case concerned a housing development built in 1980 over infilled clay pits.²⁶ Circular Facilities (London) Ltd. (“CF”) acquired the site from a Mr. Scott in 1979, but Mr. Scott retained responsibility for the development.²⁷ At that time a soil investigation report, which identified gases bubbling through organic material in the former clay pits, was handed to the local authority, put on the planning register, and made available for inspection by members of the public.²⁸

In 2002, the Sevenoaks District Council decided that this problem created a significant risk of explosion and asphyxiation, and consequently that the site was “contaminated land” for the purposes of Part IIA.²⁹ It notified CF that it was a Class A appropriate person because it had knowingly permitted the presence of the contamination on the land.³⁰

Eventually the Council served a remediation notice on CF who appealed to the Magistrates Court³¹ on the ground that the

19. Environmental Protection Act, 1990, c. 43, § 78F(2), (3) (Gr. Brit.).

20. *Id.* § 78F(4), (5) (Gr. Brit.).

21. DEP'T FOR ENV'T FOOD & RURAL AFFAIRS, *supra* note 15, Annex 3, ¶¶ D.38, 39.

22. *Id.* at ¶¶ D.40-72 (for Class A exclusions), ¶¶ D.87-90 (for Class B exclusions).

23. *Id.* at ¶¶ D.75-86 (Class A), ¶¶ D.91-97 (Class B).

24. STEPHEN TROMANS & ROBERT TURRALL-CLARKE, *CONTAMINATED LAND: THE NEW REGIME, PART IIA OF THE ENVIRONMENTAL PROTECTION ACT 1990*, ¶ 13.18 (2000).

25. Daniel Lawrence and Robert Lee, *Permitting Uncertainty: Owners, Occupiers and Responsibility for Remediation*, 66 MOD. L. REV. 261 (2003).

26. *Circular Facilities*, [2005] EWHC at ¶ 8.

27. *Id.* ¶¶ 13, 24, 27-28.

28. *Id.* ¶ 9.

29. *See id.* ¶ 2.

30. *Id.*

31. Since August 4, 2006 appeals against remediation notices are dealt with by DEFRA rather than magistrates courts, so expertise is likely to be more concentrated than under the previous procedure.

company was not an “appropriate person.” CF’s appeal challenged the district judge’s decision that CF was an “appropriate person” because it had knowingly permitted the presence of the organic material on the site.³²

The High Court granted CF’s appeal and ordered a retrial. Justice Newman considered that there was probably sufficient evidence pointing to Mr. Scott being the agent of CF so that his knowledge could be imputed to CF.³³ However, Justice Newman found that the district judge’s reasoning was unclear as to what basis he had considered CF to have the necessary knowledge.³⁴ That was a fatal flaw.

The district judge found that the Managing Director (MD) of CF was the company’s “controlling mind” and that he had either entered into an informal partnership with Mr. Scott or used him as agent of CF.³⁵ Because the MD had stated in evidence that he was unaware of the contamination at the relevant time, it is unclear whether the District Judge considered that Mr. Scott’s knowledge was to be imputed to CF’s MD and therefore to CF or whether he found that the MD did have personal knowledge but was mistaken in his recollection.³⁶

The parties subsequently settled the case on undisclosed terms.³⁷ Apparently, the cost of litigation was becoming too high

32. *Circular Facilities*, [2005] EWHC at ¶ 29.

33. *Id.* ¶ 35.

34. *Id.* ¶¶ 34-35.

35. *Id.* ¶ 27.

36. *Id.* ¶ 35. Two points of general application were also dealt with in the judgment. First, the fact that the soil investigation report was on the planning register and therefore available to CF was insufficient to impute knowledge of the contents of the report to CF. *Id.* ¶ 38. This represents a narrowing of the concept of “knowingly permitting” which case law indicates includes constructive knowledge (what a person ought to know) as well as actual knowledge. However, this does not mean that the courts are excluding constructive knowledge entirely in this context. It is probable that the High Court judge merely considered that in 1980 (when contaminated land was not such an important issue as it is today) an owner/developer would not be expected to check the planning register for information on contamination. It is possible that the courts would reach a different conclusion in respect of a developer in 2006 who might be expected to be much more attuned to contamination issues and the importance of undertaking environmental due diligence. Secondly, the High Court also confirmed that “knowingly permitting” does not require knowledge of the potential harm to which the presence of the substance in the soil could give rise. *Id.* ¶¶ 41-43. A person only needs to have knowledge of the presence of the substance. *Id.*

37. Ashfords, *National Grid Gas*, RECENT CASE LAW DEVELOPMENTS IN CONTAMINATED LAND, June 2006, available at http://www.ashfords.co.uk/publications_template.asp?Pubid=369.

for the council to pursue further.³⁸ It appears that the difficulties of establishing who the “appropriate persons” are in historic contamination cases have also slowed the implementation of the contaminated land legislation by local authorities generally.³⁹

The *Circular Facilities* case illustrates the importance for local authorities of working carefully through the evidence to establish which parties are knowing permitters. This may require using knowledge of the rules of agency to decide whether the knowledge of a particular individual can be attributed to a company. Even in the *Circular Facilities* case, the High Court judge considered that there was probably enough evidence to conclude that CF was a knowing permitter.⁴⁰ The problem arose because the District Judge had not shown clearly his reasons for coming to that conclusion.

Although not all cases are as complex as *Circular Facilities*, it does illustrate the dangers of incorporating complex legal concepts in regulatory legislation, which has to be interpreted and applied in the first instance by officials and adjudicated in the event of dispute by courts with little experience of such matters. Nonetheless, it has been said that:

[d]espite the many problems and complexities, it is undeniable that Part IIA has kick-started the clean-up of many of the nation's most polluted sites. Many would also argue that a true measure of its success would be to look at the number of sites cleaned up as an indirect result of the regime, not just those remediated through regulatory intervention.⁴¹

IV. TOOLS OF ENFORCEMENT⁴²

No system of environmental control can operate effectively if the regulatory authorities lack adequate enforcement tools. Some

38. *Id.*

39. *Tensions Mount as Land Remediation Regime Stalls*, ENDS REP., April 2006, at 35.

40. *Circular Facilities*, [2005] EWHC (Admin) 865, ¶ 35.

41. *Tensions Mount as Land Remediation Regime Stalls*, *supra* note 39, at 38. Many sites are remediated in the context of development permitted under planning legislation. In other cases, remediation may be carried out in order to mitigate the risk of liability under the contaminated land legislation.

42. For an earlier review, see Andrew J. Waite, *Criminal and Administrative Sanctions in English Environmental Law* 1 LAND MGMT. AND ENVTL. L. REP. 38 (1989).

of the main tools available to the authorities in England and Wales are explored below.

A. Criminal Offences

In England and Wales, most environmental legislation relies primarily on criminal sanctions as an enforcement tool. For example, it is an offence to "cause[] or knowingly permit[] any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters."⁴³ Other statutes provide for offences relating to the disposal or recovery of waste except in accordance with a waste management licence.⁴⁴ A number of offences exist for harming wildlife⁴⁵ and damaging a site of special scientific interest without reasonable excuse.⁴⁶ It is an offence to operate an "installation" without a permit⁴⁷ and to be the occupier of any building or industrial or trade premises if such premises contain a chimney from which emits dark smoke.⁴⁸

Whilst environmental offences are generally strict liability crimes, they are sometimes subject to defences, which may mitigate or overcome that liability. The waste offences referred to are subject to a due diligence defence.⁴⁹ The same applies to the offence of releasing or allowing to escape into the wild any non-native species.⁵⁰ The duty of care requirements in relation to the management of waste are qualified in that "the duty of any person who imports, produces, carries, keeps, treats or disposes of controlled waste or, as a broker, has control of such waste" is limited to taking "all such measures applicable to him in that capacity as are *reasonable in the circumstances*" to (inter alia) prevent contraventions of waste legislation by other persons, to prevent the waste escaping from his or any other person's control, and to secure that the waste is transferred with an adequate written

43. Water Resources Act, 1991, c. 57, § 85(1) (U.K.).

44. Environmental Protection Act, 1990, c. 43, § 33 (Eng.).

45. Wildlife and Countryside Act, 1981, c. 69, §§ 1, 5, 9, 13 (Gr. Brit.).

46. Wildlife and Countryside Act, 1981, c. 69, § 28P (Eng.).

47. Pollution Prevention and Control (England and Wales) Regulations, 2000, S.I. 2000/1973, reg. 9 (Eng.).

48. Clean Air Act, 1993, c. 11, §§ 1, 2 (Gr. Brit.).

49. Environmental Protection Act, 1990, c. 43, § 33(7)(a) (Gr. Brit.). The Government proposes to remove this defence. See DEP'T FOR ENV'T FOOD & RURAL AFFAIRS, ENVIRONMENTAL PERMITTING PROGRAMME: SECOND CONSULTATION ON PROPOSALS FOR CREATING A STREAMLINED ENVIRONMENTAL PERMITTING AND COMPLIANCE SYSTEM, ¶¶ 2.85-2.88 (2006).

50. Wildlife and Countryside Act, 1981, c. 69, § 14(3) (Gr. Brit.).

description.⁵¹ Most environmental offences provide for a defence if the defendant has a permit or licence from the competent authority that permits the act in question.⁵² Despite the predominance of strict liability in this area, some offences do incorporate the traditional *mens rea* requirement, such as in the Wildlife and Countryside Act which references *intentionally or recklessly* killing, injuring or taking any wild bird.⁵³

Two questions arise with regard to criminal offences in relation to regulatory matters. Are criminal sanctions an effective tool? If so, should they be offences of strict liability? As to the first question, Professor Richard Macrory's official study⁵⁴ indicates concerns that although criminal prosecutions are a necessary tool in enforcing regulatory compliance, when used or available in isolation, they have a number of significant disadvantages.⁵⁵ First, criminal prosecutions may be a disproportionate response where there is regulatory failure.⁵⁶ Second, the prosecutions are resource-intensive for regulatory authorities to prepare, and consequently the authorities may be deterred from initiating proceedings, resulting in a so-called compliance deficit.⁵⁷ Third, fines imposed on the liable party(ies) upon a successful prosecution are not frequently sufficient deterrents, probably because regulatory offences are not considered truly criminal.⁵⁸ Fourth, criminal sanctions have lost their stigma, which may be associated with the strict liability nature of most of these offences.⁵⁹ Nevertheless, anecdotal evidence demonstrates that many responsible companies try hard to avoid criminal convictions for environmental offences and the potential subsequent national and local publicity of such conviction.⁶⁰ That is particularly true of companies for whom a good environmental record is seen as a business

51. Environmental Protection Act, 1990, c. 43, § 34(1) (Gr. Brit.) (emphasis added).

52. *E.g.*, Water Resources Act, 1991, c. 57, § 88 (U.K.). Note that in the case of section 33 of the Environmental Protection Act 1990 (waste management offences), the absence of a waste management licence is part of the offence and must be proved by the prosecution. Environmental Protection Act, 1990, c. 43, § 33 (Gr. Brit.).

53. Section 1 of the Wildlife and Countryside Act, 1981, c. 69, § 1 (U.K.) (emphasis added).

54. RICHARD MACRORY, *REGULATORY JUSTICE: SANCTIONING IN A POST-HAMPTON WORLD* 12-16 (2006).

55. *Id.*

56. *Id.* at 15.

57. *Id.*

58. *Id.* at 14.

59. *Id.* at 15.

60. The author has heard this from many company representatives.

goal. Fifth, criminal prosecutions may not address the needs of victims (and, in the present context, environmental degradation) adequately.⁶¹

On the issue of strict liability, it can be suggested that although convictions may be easier to secure in the case of strict liability offences, they do not carry the same level of social opprobrium as those that have the requirement of *mens rea*. However, since prosecutions are generally brought in cases where there is demonstrable fault on the part of the defendant, the additional burden on prosecutors to prove *mens rea* would probably not be too great.⁶²

To summarise so far, criminal prosecutions remain a necessary part of the enforcement tool-kit. However, they should be reserved for the most serious matters, the offences should be subject to a *mens rea* requirement, and the heavy instrument of the criminal law should be supported by a number of other tools to provide a flexible and proportionate enforcement regime.

B. Administrative Penalties

Although some environmental law regimes are underpinned only by the criminal law,⁶³ it is more common to find, at least in recent years, that they are supported by other enforcement mechanisms. A relative newcomer in the environmental field is the fixed penalty notice, which generally applies to “low-level” environmental crimes. The enforcing authority has the power to serve such a notice on a person (who appears to it to have committed an offence), giving that person an opportunity to pay a fixed—and generally small—penalty as an alternative to facing criminal prosecution. Examples are a fixed penalty of £300 for failure to furnish to the Environment Agency copies of written waste de-

61. *Id.*

62. Waite, *supra* note 1, at 58-59. The approach advocated here has been followed by the *Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment Through Criminal Law*, COM (2007) 51 final (Feb. 9, 2007), which would involve criminalising nine forms of environmentally adverse conduct “when committed intentionally or with at least serious negligence.” *Id.* art. 3. Recital 3 states that “compliance can and should be strengthened by the application of criminal sanctions, which demonstrate a social disapproval of a qualitatively different nature compared to administrative sanctions or a compensation mechanism under civil law.” *Id.* recital 3.

63. *E.g.*, Wildlife and Countryside Act, 1981, c. 69, §§ 1-27 (U.K.) (wildlife protection); Clean Air Act, 1993, c. 11, §§ 1-3 (Gr. Brit.) (prohibition of dark smoke from chimneys and from industrial or trade premises).

scriptions and transfer notes when required to do so by notice,⁶⁴ and a fixed penalty of £75 for littering.⁶⁵

Administrative penalties can offer an alternative to criminal penalties that is more proportionate to the particular non-compliance, whilst being less resource intensive for regulators. However, this result can only be achieved if penalties are variable, allowing regulators to impose a penalty that reflects the gravity of the offence and the attitude of the offender, as well as providing a sufficient deterrent effect. If the recipient of a notice does not agree to accept the penalty, then an appeals process to a special tribunal should be allowable. In the alternative, the recipient could elect for a trial in the criminal courts, or even an appeal to the courts.⁶⁶ A regime that allows for the recovery of a proportionate penalty under a variable penalty scheme, whilst reserving criminal prosecution for the most serious cases, is likely to prove far more effective than one that relies solely on criminal sanctions.

C. Statutory Notices

Statutory notices have two very different functions in environmental law regimes. The first is to enable the regulatory authority which has identified infractions or potential infractions of the criminal law to require the regulated party to take corrective action. This is generally an alternative to criminal prosecution and is designed to encourage a change in behaviour such that there will be no infringements in the future.⁶⁷ Failure to comply with a notice is a criminal offence.⁶⁸ The second function is quite separate from criminal environmental law although sometimes the two operate in parallel. This is to pursue an administrative process requiring the recipient of the notice to undertake work to

64. Environmental Protection Act, 1990, c. 43, §§ 34-34A (Eng.); Environmental Protection (Duty of Care) Regulations, 1991, S.I. 1991/2839, § 4 (Gr. Brit.).

65. Environmental Protection Act, 1990, c. 43, § 88 (Eng.). *See also* Noise Act, 1996, c. 37, § 8 (U.K.) (providing an option for a person accused of playing excessively loud music during the hours of darkness to pay a fixed penalty, without necessarily admitting guilt).

66. MICHAEL WOODS & RICHARD MACRORY, ENVIRONMENTAL CIVIL PENALTIES: A MORE PROPORTIONATE RESPONSE TO REGULATORY BREACH (2003); MACRORY, *supra* note 54, at 44-61.

67. *E.g.*, Water Resources Act, 1991, c. 57, § 90B(1) (U.K.); Pollution Prevention and Control (England and Wales) Regulations, 2000, S.I. 2000/1973, reg. 24.

68. *E.g.*, Water Resources Act, 1991, c. 57, § 90B(3) (U.K.); Pollution Prevention and Control (England and Wales) Regulations, 2000, S.I. 2000/1973, reg. 32(1)(d).

protect or restore the environment.⁶⁹ It is not a precondition of this type of notice that the regulatory authority identify a breach of the criminal law, but rather actual or potential environmental degradation which needs to be remedied. Usually, the notice is addressed to the person who caused or knowingly permitted the state of affairs to exist,⁷⁰ although in certain circumstances, for example where no such person is found, the notice may be served on another person, usually the owner or occupier of the premises on which the unacceptable state of affairs exists.⁷¹ Again, failure to comply with the notice is an offence⁷² and the authorities have powers to carry out the necessary work in default and charge the cost to the responsible party.⁷³

D. Injunctions

An injunction from the court is a powerful tool to enforce the criminal law where a criminal conviction is an inadequate deterrent. In some cases, environmental legislation provides specific powers for the regulatory authority to seek an injunction.⁷⁴ This generally applies in cases where the authority considers that criminal prosecution would afford an inadequate remedy for the purpose of securing compliance with the law.

69. *E.g.*, Environmental Protection Act, 1990, c. 43, §§ 78A-78YC, 79-85 (Gr. Brit.) (contaminated land and statutory nuisances respectively); Water Resources Act, 1991, c. 57, §§ 161A-D (U.K.).

70. *E.g.*, Environmental Protection Act, 1990, c. 43, §§ 78F, 80(2) (Gr. Brit.) (contaminated land and statutory nuisance respectively). The notice under section 80(2) must be served on the "person responsible," as defined in Environmental Protection Act, 1990, c. 43, § 79(7). *See also, e.g.*, Water Resources Act, 1991, c. 57, § 161A (U.K.) (water pollution).

71. This applies in relation to contaminated land, statutory nuisance and water pollution legislation. *E.g.*, Environmental Protection Act, 1990, c. 43, § 80(2)(c) (Gr. Brit.).

72. Environmental Protection Act, 1990, c. 43, §§ 78M, 80(4) (Gr. Brit.) (contaminated land and statutory nuisance respectively); Water Resources Act, 1991, c. 57, § 161D (U.K.).

73. Environmental Protection Act, 1991, c. 43, §§ 78N-78P, 81 (Gr. Brit.); Water Resources Act, 1991, c. 57, § 161D (U.K.).

74. *E.g.*, Environmental Protection Act, 1990, c. 43, § 24, (authorizing enforcing authority to initiate proceeding to secure compliance against a person who has failed to comply with the requirements of an enforcement or prohibition notice), *repealed by* Pollution Prevention and Control Act, 1999, c. 24, §§ 6(2) (Gr. Brit.), sched. 3 (U.K.); Environmental Protection Act, 1990, c. 43, § 81(5) (authorizing proceeding to secure abatement, prohibition or restriction for failure to comply with an abatement notice under the statutory nuisance regime); Pollution Prevention and Control (England and Wales) Regulations 2000, S.I. 2000/1973, reg. 33 (authorizing proceeding to secure compliance for failure to comply with the requirements of an enforcement notice or suspension notice).

In the absence of such specific legislation, local authority regulators can use their powers under section 222 of the Local Government Act 1972⁷⁵ to bring proceedings for an injunction, where they consider it expedient for the promotion of the interests of the inhabitants of their area.⁷⁶ The courts have held that an injunction should only be granted under this procedure if it appears that criminal proceedings would be insufficient to ensure compliance.⁷⁷

The Environment Agency has standing to institute proceedings for an injunction to enforce the criminal law under the general power that it "may do anything which, in its opinion, is calculated to facilitate, or is conducive or incidental to, the carrying out of its functions."⁷⁸ Natural England has a power in similar terms.⁷⁹

Otherwise, in the absence of statutory authority, any person who wishes to initiate proceedings for an injunction must seek the consent of the Attorney-General to bring a relator action.⁸⁰ This type of action overcomes the difficulty that the person bringing the action otherwise has no standing. The Attorney-General is nominally the claimant and may exercise control over the case if he wishes.⁸¹ However, usually he allows the relator to retain control.⁸²

E. Restoration Obligations

Modern environmental legislation often prescribes a mechanism for ensuring that a person responsible for environmental degradation is obliged to take appropriate remedial steps. These obligations arise in different regulatory contexts under criminal and administrative environmental legislation. For example, a court convicting a person of certain offences in relation to sites of special scientific interest may order the convicted person to carry out works specified in the order for the purposes of restoring the

75. Local Government Act, 1972, c. 70, § 222 (Eng.).

76. *Id.*

77. *City of London Corp. v. Bovis Constr. Ltd.*, (1988) 3 All E.R. 697 (Court of Appeal) (Eng.).

78. Environment Act, 1995, c. 25, § 37(1)(a) (Gr. Brit.). It is understood that the Environment Agency uses this power to seek an injunction only in exceptional circumstances.

79. Natural Environment and Rural Communities Act, 2006, c. 16, § 13(1) (Eng.).

80. SIR WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 579 (9th ed. 2004).

81. *Id.*

82. *Id.* at 579-80.

site of special scientific interest to its former condition.⁸³ A similar order to carry out remedial work can be made by a court convicting a person of offences relating to prescribed activities under the Pollution Prevention and Control (England and Wales) Regulations 2000.⁸⁴

Other restoration obligations may be imposed by an administrative order of the regulatory authority, irrespective of criminal proceedings and sometimes even though no criminal offence has been committed. The contaminated land legislation has been discussed above.⁸⁵ Part IIA of the Environmental Protection Act (EPA) imposes duties on local authorities to identify contaminated land (as defined in the EPA) and then ensure that it is remediated by the "appropriate person."⁸⁶ Generally, if the appropriate person does not agree to carry out the remediation voluntarily, the local authority must serve a remediation notice requiring that person to carry out the necessary work.⁸⁷

Other examples are to be found in the statutory nuisance and water pollution legislation. Under the former, if a local authority is satisfied that a statutory nuisance⁸⁸ exists, or is likely to occur or recur in its area, it must serve an abatement notice on the person responsible⁸⁹ "requiring the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence" and/or requiring the execution of works for any of those purposes.⁹⁰

Under the latter, if "poisonous, noxious or polluting matter or any solid waste matter" enters or is at a place from which it is likely to enter controlled waters, the Environment Agency may, but is not obliged to, serve a works notice on the person who caused or knowingly permitted the presence of that matter to undertake appropriate remedial or preventive works.⁹¹

The European Union (EU) Directive on Environmental Liability with regard to the Prevention and Remedying of Environmen-

83. Wildlife and Countryside Act, 1981, c. 69, § 31 (Gr. Brit.).

84. Pollution Prevention and Control (England and Wales) Regulations, 2000, S.I. 2000/1973, reg. 35.

85. See *Circular Facilities*, [2005] EWHC (Admin) 865; *supra* text accompanying notes 15-41.

86. Environmental Protection Act, 1990, c. 43, § 78E (Gr. Brit.); *Circular Facilities*, [2005] EWHC (Admin) 865, ¶ 3.

87. See Environmental Protection Act, 1990, c. 43, § 78E (Gr. Brit.).

88. *Id.* § 79(1) (defining statutory nuisance).

89. *Id.* § 79(7) (defining person responsible), as amended by Noise and Statutory Nuisance Act, 1993, c. 40, § 2(4).

90. *Id.* § 80(1).

91. Water Resources Act, 1991, c. 57, § 161A (U.K.).

tal Damage⁹² takes a different approach. In the event of “environmental damage”⁹³ (or an imminent threat of such damage) caused by any Annex III activity,⁹⁴ the operator is required to take necessary remedial or preventive measures.⁹⁵ The point to emphasise is that the obligations on the operator are self-executing.⁹⁶ In other words, the operator is obliged to take action without waiting for an administrative order from the regulatory authority. That duty is reinforced by a duty on the regulator to require the operator to do the work.⁹⁷

F. Anti-Social Behaviour Orders (ASBOs)

Under the Crime and Disorder Act 1998,⁹⁸ any natural person over the age of 10 can be made the subject of an ASBO by the courts for anti-social behaviour which is defined as acting in a manner that “causes or is likely to cause harassment, harm or distress to one or more persons not of the same household as the per-

92. Council Directive 2004/35, 2004 O.J. (L 143) 56 (EU).

93. Environmental Damage is defined as:

(a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status [defined in article 2, paragraph 4] of such habitats or species . . . ;

(b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned . . . ;

(c) land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms

Id., art. 2, at 59 (citing Council Directive 2000/60, 2000 O.J. (L 327) 1 (EU)). Protected species and habitats include species and natural habitats listed in annexes to Council Directive 79/409, On the Conservation of Wild Birds, 1979 O.J. (L 103) 1 (EC), or Council Directive 92/43, On the Conservation of Natural Habitats of Wild Fauna and Flora, 1992 O.J. (L 206) 7 (EC), and any other habitat or species which member states choose to designate for equivalent purposes as those specified in these two Directives. Council Directive 2004/35, *supra* note 92, art. 2, at 59.

94. Annex III of Council Directive 2004/35, *supra* note 92, at 70, contains a list of activities governed by various EU Environmental Directives.

95. *Id.*, arts. 5, 6, at 61-62. Article 7 and Annex II deal with the determination of remedial measures, which include “complementary remediation” where the damaged resources do not return to their baseline condition and “compensatory remediation” to compensate for the interim loss of resources pending recovery. *Id.* at 62, 67.

96. Valerie Fogelman, *Enforcing the Environmental Liability Directive: Duties, Powers and Self-Executing Provisions*, 4 ENVTL. LIABILITY 127 (2006).

97. Council Directive 2004/35, *supra* note 92, art. 5, ¶ 4, art. 6, ¶ 3, at 61-62.

98. Crime and Disorder Act, 1998, c. 37 (Eng.).

son who is the subject of the complaint.”⁹⁹ Although mainly used against anti-social youths, ASBOs are used to control low-level environmental degradation such as graffiti, fly-posting, burning rubbish, litter, noise, vehicles which are a nuisance, misuse of fireworks and light pollution.¹⁰⁰

V. ENFORCEMENT DUTIES AND POWERS

A duty to enforce the laws, rather than a mere power, is likely to increase enforcement in practice. However, the effect may not always be as marked as desired.

The majority of environmental regulatory regimes are founded on a power to enforce, which is vested in the regulatory authority. That involves discretion as to whether and how to enforce in particular cases. Examples are the Works Notice procedure in the water pollution legislation¹⁰¹ and waste management¹⁰² legislation. In addition to the Environment Agency’s power to serve a works notice, if the offending matter in question has entered controlled waters, the Agency has discretion as to whether to prosecute.¹⁰³ On the other hand, the contaminated land and statutory nuisance regimes are mandatory in that when prescribed circumstances exist, the regulatory authorities are obliged to serve a notice requiring the recipient to take certain steps.¹⁰⁴ Nevertheless, it is apparent that mandatory enforcement duties do not result in efficient enforcement in practice if the necessary conditions for liability are difficult to establish.

It has been explained above that difficulties in identifying the appropriate person for the purpose of the contaminated land legislation has slowed the implementation of that legislation to a considerable extent. That effect has arisen despite the layers of duties imposed on the enforcement authorities to ensure that contaminated sites are remediated. Those duties are successively to inspect their areas from time to time to identify potentially contaminated land, to determine whether that particular land is in fact contaminated,¹⁰⁵ to notify specified persons (including appro-

99. *Id.*

100. Michael Watson, *Anti-Social Behaviour Orders and Environmental Protection* 18 ENVTL. L. & MGMT. 47 (2006).

101. Water Resources Act, 1991, c. 57, §§ 161A-161D (U.K.).

102. Environmental Protection Act, 1990, c. 43, §§ 29-78 (U.K.).

103. *See* Water Resources Act, 1991, c. 57, § 85 (U.K.).

104. Environmental Protection Act, 1990, c. 43, §§ 78E, 80(1) (Gr. Brit.).

105. *See* Environmental Protection Act, 1990, c. 43, § 78B(1) (Eng.); DEPARTMENT OF THE ENVIRONMENT, TRANSPORT, AND THE REGIONS, CIRCULAR 2/2000: CONTAMI-

priate agencies owners and occupiers) of any determination made,¹⁰⁶ and (subject to certain conditions) to serve a remediation notice requiring the appropriate remedial work to be carried out¹⁰⁷. However, there is a mandatory three month delay period between identification of the contaminated land and the service of a remediation notice (except in the case of an imminent danger of serious harm or serious pollution of controlled waters) to encourage the appropriate person to carry out the necessary work voluntarily.¹⁰⁸

In the case of statutory nuisance legislation,¹⁰⁹ effective enforcement has been impeded by evidentiary difficulties in establishing the existence of a statutory nuisance as well as lack of resources. Local authorities have a duty to inspect their areas from time to time to detect any statutory nuisances and to take reasonably practicable steps to investigate complaints of statutory nuisances by persons living within their area.¹¹⁰ As stated earlier, where a local authority is satisfied of the existence of a statutory nuisance, it has a duty to serve an abatement notice.¹¹¹ However, traditionally, environmental health officers have often preferred to act by persuasion rather than by formal legal steps, largely for the reasons suggested above. This approach has been sanctioned to a limited extent by a recent change in the law. The environmental health officer can delay serving an abatement by up to seven days to persuade the appropriate person to abate the nuisance or prohibit or restrict its occurrence or recurrence. However, if persuasion does not achieve the desired objective within that period, an abatement notice must then be served.¹¹²

NATED LAND: IMPLEMENTATION OF PART IIA OF THE ENVIRONMENTAL PROTECTION ACT 1990 (2000).

106. Environmental Protection Act, 1990, c. 43, § 78B(3) (Eng.).

107. *See id.* § 78E.

108. *See id.* § 78H(3)(a)(ii), (4).

109. *See id.* §§ 79-84.

110. *See id.* § 79(1).

111. *See id.* § 80(1); *see also supra* text accompanying notes 64-66; *R v. Carrick Dist. Council*, [1996] 160 J.P. 912 (Q.B.) (U.K.).

112. *See id.* § 80(2A)-(2E) (inserted by section 86 of the Clean Neighbourhoods and Environment Act 2005, which came into force on 6 April 2006 in England (Clean Neighbourhoods and Environment Act, 2005, c. 16, § 87, schedule 2 (Eng.))).

VI. ENFORCEMENT BY PRIVATE INDIVIDUALS AND NON-GOVERNMENTAL ORGANISATIONS

Any enforcement function on the part of the regulatory authorities will be reinforced to the extent that enforcement action may be taken by private persons in the absence of action by the authorities. Under English law there are considerable possibilities for private persons to take action against those who infringe environmental law and against the authorities themselves if they fail to observe their duties.

Under English law any person may prosecute a criminal offence without having to establish an interest, unless there is a restriction in the relevant legislation¹¹³. Under the older environmental legislation, it was common to find provisions that prosecutions could only be brought by the regulatory authority or with the consent of the Attorney General¹¹⁴ or the Director of Public Prosecutions.¹¹⁵ Modern environmental legislation generally contains no such restrictions,¹¹⁶ so any person can prosecute offences.

Exceptionally, there are procedures enabling aggrieved individuals to bring proceedings in the courts for an administrative order, such as an abatement order to deal with statutory nuisance.¹¹⁷

As explained earlier, any person can seek an injunction in appropriate cases to prevent infringements of the law by means of a relator action, provided that the Attorney General gives his consent.¹¹⁸

Where a person complains that the regulatory authority is not enforcing the law properly, a distinction must be drawn between cases where the authority has the discretion to act and those where it has a duty to act. In the former case, the courts will not

113. See Prosecution of Offences Act, 1985, c. 23, § 6 (Eng.). The Attorney-General and the Director of Public Prosecutions can take over any private prosecution and either continue or discontinue it. See *id.*

114. *E.g.* Rivers (Prevention of Pollution) Act, 1961, c. 50, § 11 (Eng.).

115. *E.g.* Health and Safety at Work Act etc., 1974, c. 37, § 38 (Eng.). This Act governed proceedings for air pollution offences under the Alkali, etc. Works Regulation Act 1906. See generally Alkali, etc. Works Regulation Act, 1906, c. 14, § 1-31 (Eng.).

116. *E.g.* Environmental Protection Act, 1990, c. 43, § 33 (Eng.) (waste); Water Resources Act, 1991, c. 57, § 85 (Eng.) (water pollution).

117. See Environmental Protection Act, 1990, c. 43, § 82 (Eng.). The procedure exists in parallel with the duty on local authorities to serve an abatement notice under section 80. *Id.* § 80.

118. See *supra* text accompanying note 59.

interfere with the exercise of discretion by the authority, provided that it is reasonable.¹¹⁹ For example, if the authority made a decision not to enforce the law, that would be an abuse of their discretion. On the other hand, the authorities are bound to comply with a duty to enforce the law.

The remedy available to individuals and NGO's to challenge enforcement failures by the regulatory authorities is judicial review.¹²⁰ An applicant for judicial review who has "a sufficient interest in the subject matter to which the application relates"¹²¹ may challenge any illegality, irrationality or procedural impropriety in any act, omission or decision of a public body in relation to it.¹²²

Particularly following the *Inland Revenue Commissioners* case¹²³, the rules on standing have become very relaxed. In that case, the House of Lords held that the question of sufficient interest could not be considered in isolation, but rather, "the test is whether the applicant can show a strong enough case on the merits, judged in relation to his own concern with it."¹²⁴ It follows that the House of Lords has practically abolished any requirement of standing distinct from the merits of the case. According to Wade & Forsyth, "[T]he real question [of standing] is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved. In effect, therefore, a citizen's action, or *actio popularis*, is in principle allowable in suitable cases."¹²⁵ This goes beyond the requirements of the Aarhus Convention, which is discussed later.

The relaxed approach to standing has benefited a number of environmental organisations who have thereby been enabled to bring proceedings for judicial review. For example, Greenpeace had standing to challenge the grant of an authorisation for a nu-

119. *R v. Comm'r of Police of the Metropolis*, [1968] 2 Q.B. 118, 125, 139. *See also* WADE & FORSYTH, *supra* note 80, at 359-61.

120. *See generally* WADE & FORSYTH, *supra* note 80, at 559-740.

121. *See* Supreme Court Act, 1981, c. 54, § 31(3) (Eng.); CIVIL PROCEDURE RULES, 1998, No. 3132 L. 17, sched. 1 (Eng.).

122. *Council of Civil Serv. Unions v. Minister for Civil Serv.*, [1985] A.C. 374, 408 (H.L.) (U.K.) (Lord Diplock's statement on judicial review).

123. *See generally* *R v. Inland Revenue Comm'rs*, [1981] A.C. 617 (H.L.) (U.K.).

124. WADE & FORSYTH, *supra* note 80, at 692 (discussing the liberalizing effect of the *Inland Revenue Commissioners* case on standing).

125. *Id.* at 694.

clear generator,¹²⁶ and Friends of the Earth was entitled to proceed against a government department, claiming that water standards should be properly enforced.¹²⁷

The most notable departure from the modern trend on standing is the *Rose Theatre* case,¹²⁸ in which the judge refused to allow standing to a company established to preserve the archaeological remains of the historic Rose Theatre in Southwark.¹²⁹ The company sought to challenge the refusal of the Secretary of State to list the remains as an ancient monument.¹³⁰ The judge's initial analysis dealt not with whether the company had standing, but whether the case had any merit.¹³¹ It was only after deciding the case against the company that the judge held that the company lacked standing.¹³² This approach has not been followed in later cases and may be regarded as an aberration. Wade and Forsyth suggest that it is best regarded as a case in which an arguable issue was not shown.¹³³

Unsurprisingly these changes to the rules of standing for prosecutions and judicial review have been accompanied by a massive increase in the number of environmental cases brought before the courts.

VII. USE OF HUMAN RIGHTS TO ENFORCE ENVIRONMENTAL LEGISLATION

The European Convention on Human Rights,¹³⁴ which was mainly drafted by UK lawyers, contains a number of different rights. Some of these rights are absolute and permit no derogation. However, those which are most relevant to the environment are qualified and allow derogations where necessary for the legitimate benefit of others and the community as a whole. Those provisions are Article 8 (right to respect for private and family life and home) and Article 1 of the First Protocol (protection of prop-

126. *R v. Inspectorate of Pollution*, (1993) 4 All E.R. 329 (Q.B.D.) (Greenpeace was involved *ex parte*, and sought judicial review of the decision to vary the existing authorizations.).

127. *R v. Sec'y of State for the Env't*, (1994) 4-04-1994 *The Times* 1060, 510 (Q.B.D.) (Friends of the Earth was again involved *ex parte*.).

128. *R v. Sec'y of State for the Env't*, (1989) 1 Q.B. 504 (*Rose Theatre Trust Co.* was involved *ex parte*.).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. WADE & FORSYTH, *supra* note 80, at 699.

134. Implemented in UK law by the Human Rights Act, 1998, c. 42 (U.K.).

erty).¹³⁵ After holding earlier that the European Convention provided no right to environmental protection or quality, the European Court of Human Rights (ECHR) has nonetheless demonstrated that (particularly in serious cases) it can have a powerful effect on human rights.

Lopez Ostra v. Spain concerned a plant for the treatment of tannery wastes that had been constructed close to the applicant's home.¹³⁶ Fumes, odours and contaminants released from the plant led to nuisances and health problems in the locality.¹³⁷ Despite a temporary evacuation of the area and closure of some plant, environmental problems continued.¹³⁸

The ECHR found in favour of the applicant.¹³⁹ The court held that "severe environmental pollution might affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."¹⁴⁰ Even though there was no absolute obligation on the state to prevent such pollution, it had to strike a balance between the economic benefits of operating the plant and the environmental problems faced by the applicant.¹⁴¹ In failing to take adequate steps to prevent those problems, the correct balance had not been struck.¹⁴²

Another case, *Guerra v Italy*, concerned a factory that released considerable quantities of inflammable and toxic substances, which had endangered local residents on numerous occasions.¹⁴³ One of the most serious occurrences was in 1976 when a factory malfunction led to the hospitalisation of 150 people sick with arsenic poisoning.¹⁴⁴ The ECHR followed *Lopez Ostra* in holding that the failure to reduce pollution risks and avoid major accidents was a breach of Article 8.¹⁴⁵ Article 8 was breached in

135. A substantial quantity of literature on this subject exists. . See, e.g., Justine Thornton & Stephen Tromans, *Human Rights and Environmental Wrongs – Incorporating the European Convention on Human Rights: Some Thoughts on the Consequences for UK Environmental Law*, 11 J. ENVTL. L. 35 (1999); Mark Stallworthy, *Whither Environmental Human Rights?*, 7 ENV. L. REV. 12 (2005).

136. *Lopez Ostra v. Spain*, 20 Eur. H.R. Rep. 277 (1994).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Guerra v. Italy*, 26 Eur. H.R. Rep. 357 (1998).

144. *Id.*

145. *Id.*

this case, like in *Lopez Ostra*, because pollution had adversely affected private and family life.¹⁴⁶

The recent case of *Fadeyeva v. Russia* concerned the privately owned Severstal steel plant that had caused pollution over a long period, leading to Ms. Fadeyeva's complaints of diminished health.¹⁴⁷ The court found in Ms. Fadeyeva's favour, holding that the state should have protected her by rehousing her away from the plant or ensuring that its pollution levels were appropriately reduced.¹⁴⁸

The key features of these rulings are that in each case: (a) The levels of pollution caused were high; and (b) The state failed to enforce its own national legislation. That being so, Article 8 can be viewed as an indirect enforcement mechanism in serious pollution cases, whereby the state is required to pay compensation to the claimant for failing to enforce its own laws, even though under those laws themselves there may be no duty of enforcement.

Despite these undoubted successes, however, environmental human rights have fared less well in cases where the substantive domestic environmental law has not proved responsive to the needs of claimants. That tendency is particularly evident in the decision of the Grand Chamber of the ECHR in the *Hatton* case.¹⁴⁹

VIII. PROCEDURAL RIGHTS: PRINCIPLE 10 AND THE AARHUS CONVENTION

Of greater importance in encouraging enforcement of the law and ensuring that the regulatory authorities carry out their duties properly are procedural rights. Rights to information, participation, and access to justice are likely to improve the governmental functions of protecting the environment and the interests of future generations whilst satisfying present human needs.¹⁵⁰ Comprehensive rights of this type are mandated by Principle 10 of the Rio Declaration of 1992 which states:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to informa-

146. *Id.*

147. *Fadeyeva v. Russia*, [2005] Eur. Ct. H.R. 376.

148. *Id.* at ¶ 133.

149. *Hatton v. United Kingdom*, 37 Eur. H.R. Rep. 28 (2003) (holding that domestic law gave plaintiff no remedy for airport noise pollution).

150. BIRNIE & BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* (2nd ed 2002), pp 261 ff.

tion concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”¹⁵¹

Rights of these types have been incorporated in a number of international and regional measures, such as the Biological Diversity Convention of 1992¹⁵² and the original EC Directive on the Freedom of Access to Information on the Environment.¹⁵³ However, the most noteworthy instrument for implementing Principle 10 is the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998.¹⁵⁴ Being a regional convention of the UN Economic Commission for Europe, its geographical scope covers most of the northern hemisphere. Significantly, the preamble of this far-reaching treaty proclaims that, “every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.”¹⁵⁵ The importance of this statement lies in linking the procedural rights of humans to the duty to protect the environment.

The preamble of the Convention considers further that in order to “assert this right and observe this duty”, in relation to environmental matters citizens must have (1) access to information; (2) an entitlement to participate in decision-making; and (3) access to justice.¹⁵⁶ Each Party to the Convention is obliged to take the necessary legislative, regulatory, and other measures, including enforcement measures, to achieve a clear, transparent, and

151. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, Principle 10, U.N. Doc A/CONF.151/26 (Aug. 12, 1992).

152. Convention on Biological Diversity art. 14, June 5, 1992, 31 I.L.M. 818 (the rights are given “where appropriate”).

153. Council Directive 90/313/EEC, On the Freedom of Access to Information on the Environment, 1990 O.J. (L 158) 56-58 (repealed).

154. Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, June 25, 1998, 38 I.L.M. 517 [hereinafter Aarhus Convention].

155. *Id.* preamble.

156. *Id.*

consistent framework to implement the Convention.¹⁵⁷ Significantly, “appropriate recognition of and support to associations, organisations or groups promoting environmental protection” must be provided and national legal systems must be consistent with this obligation.¹⁵⁸

A. Access to Environmental Information

Article 4 provides a broad right for the public,¹⁵⁹ without having to state an interest, to require public authorities to provide environmental information¹⁶⁰ held by them.¹⁶¹ The definitions of “public,” “environmental information,” and “public authority” are wide.¹⁶² In particular the definition of “public authority” in the Convention is wider than that under the earlier EC Directive on Freedom of Access to Information on the Environment.¹⁶³ Unlike that in the Directive, the definition in the Convention specifically includes natural or legal persons providing public services in rela-

157. *Id.* art. 3.1.

158. *Id.* art. 3.4.

159. “The Public” refers to “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.” *Id.* art. 2.4.

160. “Environmental Information” means any information in written, visual, aural, electronic or any other material form on: (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making; (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above. *Id.* art. 2.3.

161. According to Article 2.1, “public authority” means:

(a) Government at national, regional and other level; (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above; (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention. This definition does not include bodies or institutions acting in a judicial or legislative capacity.

162. See *supra* notes 159-161.

163. Compare note 161 with Council Directive 90/313/EEC, art. 2(b), 1990 O.J. (L 158) 56, 57.

tion to the environment if they are controlled by a governmental or administrative authority.¹⁶⁴ To illustrate the breadth of the Convention's definition, this would include privatised sewerage undertakers, even though their status under the earlier EC directive was questionable.

The Convention provides that a request for environmental information may be refused if the public authority does not hold it, if the request is manifestly unreasonable or formulated too generally, or if it relates to material in the course of completion or to the internal communications of public authorities.¹⁶⁵ There are also a number of other exceptions.¹⁶⁶

Environmental information must be provided or a refusal given in writing "as soon as possible and at the latest within one month" unless the complexity of the information justifies an extension up to two months after the request.¹⁶⁷

In addition to the duty to provide environmental on request, Convention Parties must ensure that public authorities collect and disseminate environmental information.¹⁶⁸

B. Public Participation

Article 6 provides a right for the public to participate in decisions on whether to permit proposed activities listed in Annex I,

164. *Id.*

165. Aarhus Convention, *supra* note 154, art. 4.3. In the case of incomplete material and the internal communications of public authorities, the public interest served by disclosure must be taken into account. *Id.*

166. Under Article 4.4, requests for environmental information may also be refused if disclosure would adversely affect any of the following interests: (a) "the confidentiality of the proceedings of public authorities . . ."; (b) "international relations, national defence or public security;" (c) the course of justice, a person's ability to receive a fair trial, or a public authority's ability to conduct a criminal or disciplinary enquiry; (d) the confidentiality of commercial and industrial information, where protected by law "to protect a legitimate economic interest;" (e) intellectual property rights; (f) the confidentiality of personal data or files relating to a natural person who has not consented to disclosure; (g) the interests of a third party who has supplied the information without being "under or capable of being put under a legal obligation to do so," and who has not consented to its release; (h) the environment, such as "the breeding sites of rare species." However, it is provided that these grounds of refusal should be interpreted restrictively taking into account both the public interest served by disclosure, and whether the information relates to emissions to the environment. *Id.*

167. *Id.* arts. 4.2, 4.7.

168. *Id.* art. 5.

which are broadly those covered by the Environmental Impact Assessment Directive¹⁶⁹ and the IPPC Directive.¹⁷⁰

The public must be informed by public notice or individually, as appropriate, early in the decision-making procedure of: (1) the proposed activity and the application made; (2) full details of the proposed procedure, including opportunities for the public to participate; (3) the public authority making the decision; (4) the nature of possible decisions or the draft decision; (5) an indication of the relevant environmental information available; and (6) if the activity is subject to an environmental impact assessment procedure.¹⁷¹

Convention Parties are required to provide for early public participation, when all options are open and effective participation can take place,¹⁷² access to relevant information,¹⁷³ and an opportunity for "the public to submit in writing or, as appropriate, at a public hearing or inquiry," any comments, information, analyses or opinions that it considers relevant to the proposed activity.¹⁷⁴ The decision by the public authority must take due account of the outcome of the public participation.¹⁷⁵

Public participation procedures must also be in place when permits are reconsidered or their conditions updated,¹⁷⁶ as well as in relation to the preparation of plans, programmes, and policies relating to the environment¹⁷⁷ and "executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment."¹⁷⁸

C. Access to Justice

Those whose requests for environmental information have not been dealt with satisfactorily should be given "access to a review procedure before a court of law or other independent and impartial body established by law."¹⁷⁹ Where review by a court of law is

169. Council Directive 85/337/EEC, art. 6, 1985 O.J. (L 175) 140, 142, *amended by* Council Directive 97/11/EC, art. 1.8, 1997 O.J. (L 73) 5, 7.

170. Council Directive 96/61/EC, art. 15, 1996 O.J. (L 257) 26, 32.

171. Aarhus Convention, *supra* note 154, art. 6.2.

172. *Id.* art. 6.4.

173. *Id.* art. 6.6. This is without prejudice to Article 4. *Id.* art. 4.

174. *Id.* art. 6.7.

175. *Id.* art. 6.8.

176. *Id.* art. 6.10.

177. *Id.* art. 7.

178. *Id.* art. 7.

179. *Id.* art. 9.1

provided, there should also be access to “an expeditious procedure . . . that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.”¹⁸⁰ Final decisions by any such body are to bind the public authority holding the information.¹⁸¹ Reasons for a decision must be given in writing at least in cases of refusal of access to information.¹⁸²

Members of the public should also be given “access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission” which is covered by the public participation requirements under Article 6.¹⁸³ That applies where parties can demonstrate a sufficient interest or impairment of a right (where required by national administrative law).¹⁸⁴ In addition, subject to meeting any criteria laid down by national law, members of the public must be given access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene national environmental law.¹⁸⁵

The access to justice procedures referred to must provide adequate and effective remedies, including injunctive relief as appropriate, and must be “fair, equitable, timely, and not prohibitively expensive.”¹⁸⁶ Convention Parties must also consider establishing “appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”¹⁸⁷

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* art. 9.2. These requirements shall not exclude the possibility of a preliminary review procedure before an administrative authority or affect the requirement of exhaustion of administrative review procedures prior to judicial review where there is such a requirement under national law. *Id.*

184. The requirements of “sufficient interest” and “impairment of right” are to be determined “in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of th[e] Convention.” Any NGO which promotes environmental protection and meets any requirements under national law is to be deemed to have such an interest and to have rights capable of being impaired. *Id.*

185. *Id.* art. 9.3.

186. *Id.* art. 9.4 Also, decisions must be in writing, and decisions of courts, “and wherever possible of other bodies,” must be accessible to the public. *Id.*

187. *Id.* art. 9.5.

D. Implementing the Aarhus Convention

The Aarhus Convention promises to be effective, at least in the European Union. Its three pillars of access to environmental information, public participation, and access to justice, are being implemented via directives.¹⁸⁸ It has been ratified, approved or accepted by the European Union and most of the Member States, including the United Kingdom.¹⁸⁹

Apart from the specific requirements of the Convention, there has been a long tradition of public participation in environmental matters in England and Wales. For example, applications for consents to discharge effluent to controlled waters, authorisations for “prescribed processes” and permits for installations subject to integrated pollution permitting and control have to be advertised in the press and are subject to comments by members of the public

188. See Council Directive 2003/4/EC, On the Freedom of Access to Information on the Environment, 2004 O.J. (L 143) 56-58 (repealing Council Directive 90/313/EEC, 1990 O.J. (L 158); Council Directive 2003/35/EC, Providing for Public Participation in Respect of the Drawing up of Certain Plans and Programmes Relating to the Environment, 2003 O.J. (L 156) 17-24; *Commission Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters*, COM (2003) 624 final (Oct. 10, 2003). The Directive on Freedom of Access to Information on the Environment, *supra*, has been implemented in England, Wales, and Northern Ireland by the Environmental Information Regulations, 2004 S.I. 2004/3391. The Directive Providing for Public Participation, *supra*, has been transposed in the UK by a number of regulations including the Pollution Prevention and Control (Public Participation) Regulations, 2005, S.I. 2005/1448 (Eng. & Wales). There is a draft Regulation on Application of Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies, 2006, 2003/0204 (COD), C6-0156/2006, PE-CONS 3614/06, which is awaiting adoption following approval by the European Union Council and Parliament. There is also a notable procedure for public participation and access to justice in Council Directive 2004/35/CE, On Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage, 2004, art. 12, 2004 O.J. (L 143) 56-65.

189. The EU signed and approved the Convention on February 17, 2005. See The EU and the Aarhus Convention, <http://ec.europa.eu/environment/aarhus/index.htm> (last visited Apr. 29, 2007). The following Member States, e.g., have ratified the Convention: Austria (17/01/2005); Belgium (21/01/2003); Cyprus (19/09/2003); Czech Republic (06/07/2004); Hungary (03/07/2001); Italy (13/06/2001); Latvia (14/06/2002); Lithuania (28/01/2002); Malta (23/04/2002); Poland (15/02/2002); Portugal (09/06/2003); Slovenia (29/07/2004); Spain (29/12/2004); UK (23/02/2005). The following Member States, e.g., have approved the Convention: Denmark (29/09/2000); France (08/07/2002). The following Member States, e.g., have accepted the Convention: Finland (01/09/2004); Netherlands (29/12/2004). United Nations Treaty Collection, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Participants, <http://www.unece.org/env/pp/ctreaty.htm> (last visited Apr. 29, 2007).

which must be considered by the regulatory authority before it makes its decision.¹⁹⁰

The Public Participation Directive amends the Environmental Assessment and IPPC Directives to require the public to be given early and effective opportunities to participate in environmental decision-making and permitting procedures.¹⁹¹

The proposed Directive on Access to Justice in Environmental Matters goes further than the Convention in at least one important respect in that it provides for legal standing of “qualified entities.”¹⁹² Qualified entities are to have “access to environmental proceedings, including interim relief, without having a sufficient interest or maintaining the impairment of a right,” if the matter of review falls within the ambit of their “statutory activities” and their geographical area of activity.¹⁹³ Specific criteria as well as a requirement for a procedure for recognition of qualified entities are prescribed by the proposed Directive.¹⁹⁴

However, the proposed directive has now been sidelined by the Council of Ministers. In response to a Parliamentary Question, the Council stated in October 2005:

On 24 June 2005 the Council (Environment) was informed about the state of play of discussions on the above-mentioned Commission proposal. At this stage, a majority of delegations is questioning the usefulness of this directive. They consider that the Aarhus Convention, which has been ratified by most Member States, implies sufficient legal requirements in terms of access to justice and do not believe that the proposed harmonisation would lead to a better application and enforcement of environmental legislation. As long as these doubts persist, it is difficult to imagine an adoption in the immediate future.¹⁹⁵

The liberal rules on standing for judicial review in England and Wales which have been discussed above should be sufficient

190. See Water Resources Act, 1991, c. 57, sched. 10, ¶¶ 1(1)(b), 2(5) (U.K.); Environmental Protection Act, 1990, sched. 1, ¶¶ 1(2) and 2(5) (U.K.); Pollution Prevention and Control Regulations, 2000, S.I. 2000/1973, sched. 4, ¶¶ 5, 6, 12 (Eng. & Wales).

191. See Council Directive 2003/35/EC, *supra* note 188, arts. 3.4, 4.3.

192. *Commission Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters*, *supra* note 188, art. 5.

193. *Id.*

194. See *id.* arts. 8, 9.

195. See Interinstitutional File 2003/0246 (COD) 9967/05 (reported that “[s]everal delegations and the Commission have stated that the directive would still have an added value since: not all Member States have ratified the Aarhus Convention yet; [and] the directive would allow for a better enforcement of Community environmental legislation in a manner that is not already ensured by the Aarhus Convention”).

to satisfy the requirements of the Aarhus Convention. However, it will be recalled that the Convention also requires that court procedures must not be "prohibitively expensive."¹⁹⁶ There has been considerable doubt as to whether that requirement would be met, particularly in view of the long tradition that the losing party pays the winner's costs in litigation, even though as a general rule the issue of costs lies within the discretion of the court.

A recent decision of the Court of Appeal goes some way towards meeting that objection, although the case did not relate to an environmental issue and covers judicial applications generally. The court held that a protective costs order (PCO), which extinguishes or limits the liability of the losing party to pay the winner's costs, may be made at any time in the proceedings, although normally an application would be made at the time of the initial claim.¹⁹⁷ Nonetheless, it is questionable whether this decision fully meets the requirements of the Convention, particularly in those cases which are not purely of public interest.

IX. THE ROLE OF THE ENVIRONMENTAL ACTORS

The crucial role of the environmental actors (legislators, judges, regulatory authorities, regulated industry, lawyers and litigants) in the functioning of environmental law and particularly compliance and enforcement has been noted elsewhere.¹⁹⁸ There may be internal stimuli to act, such as commitment, training, experience and resources (judges, lawyers and regulatory authorities), corporate social responsibility policies/environmental management systems (regulated industry) and knowledge, concern, determination,¹⁹⁹ and access to resources (litigants).

196. Aarhus Convention, *supra* note 154, art. 9.4.

197. *R (on the application of Corner House Research) v. Sec'y of State for Trade & Indus.*, [2005] EWCA (Civ) 192, [2005] 1 W.L.R. 2600 (Court of Appeal) (A PCO would be made on the basis of five principles: (1) the case raises issues of general public importance; (2) those issues should be resolved in the public interest; (3) the applicant has no private interest in the matter; (4) it is fair and just to make the order considering the financial resources of the parties and the amount of costs likely to be at stake; (5) in the absence of a PCO, the applicant is likely to discontinue proceedings).

198. Waite, *supra* note 1, at 36-37, 61-62.

199. In the area of common law, I have discussed elsewhere the determination of a dying litigant seeking redress for the negligence of his various former employers as a result of which he contracted mesothelioma through working with asbestos. *Id.* at 44-48. His efforts led to a change in the rules on causation as a result of which people in his position who had previously been unable to claim compensation will be able to do so in the future. *Id.*

On the other hand there are many external stimuli such as pressure from the public and NGOs on industry, commercial pressure on companies from their customers, both corporate and individual, and orders by regulatory authorities or the courts (or the threat of such action). In the latter case, legal action or the threat of action will only be a real stimulus if it is likely to be enforced.

As argued above, the actual practice of environmental law by the “actors” may also lead to a refinement of the rules of substantive environmental law and the procedural enforcement rules.²⁰⁰

However, the policies and principles of environmental law as well as the quality of the substantive and procedural law also affect the behaviour of the environmental actors and hence the levels of compliance with and enforcement of the law. Taking the onion analogy a little further, rottenness in any of the inner rings of the onion affects the whole onion. Conversely, if all the onion rings are sound, it is a wholesome and nutritious vegetable.

200. *See id.* at 44-48, 54-55.