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- the effectiveness of the law implementing
the Water Framework Directive in England
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Summary

The Water Framework Directive adopted in December 2000 was to be implemented by the Member States within three years. It requires a holistic approach to be taken towards water resource management and obligates Member States to implement measures that will achieve a general water quality of “good status” by 2015. The legal mechanisms required to implement the measures were therefore to be in place in national legislation by December 2003.

This thesis aims to assess the effectiveness of the law in England and Wales in achieving the good status water quality. The theoretical framework upon which the paper is based is Staffan Westerlund’s legal research material. The effectiveness of a law is comprised of two parts: the first deals with how effectively the legal obligations have been incorporated into national law or if there is an “implementation deficit”. The second part deals with how effective the legal enforcement tools are, or if there is an “enforcement deficit”.

The thesis is descriptive and analytical. It examines relevant legislation in England and Wales, in the light of the requirements of the WFD, in order to assess the effectiveness of the national law.

It is found that both an implementation deficit and an enforcement deficit are evident in the legislation of England and Wales. As regards the implementation deficit, it is diffuse pollution mainly from agriculture that is the main area of concern, but also non-implementation of the combined approach will have consequences for the achievement of the good status water quality. Another issue is how the Environment Agency is bound to implement measures; it must hold itself within the boundaries of the law, and is not empowered to itself regulate activities in order to answer to the needs of a changing and unpredictable environment. For that it must wait for the legislator.

An enforcement deficit is found. Despite the relative power endowed the Environment Agency, it shows great reticence in bringing prosecutions and this, together with low penalties being handed out by the courts, does not act as strong enough deterrents to prevent recommitments or to others. Administrative enforcement tools are used, although information as to what extent and in which situations is not readily available. The provision of administrative fines could go some way to remedying the situation, although at the expense of the ingrained common law perception of the right of the innocent against wrongful conviction.

Summarising, it cannot be held that the transposition of the WFD into the national legislation of England and Wales has resulted in an effective law, able to achieve good status water quality by 2015. The European Commission has announced it intends to take a greater involvement as regards non-compliance of the WFD. It remains to be seen what will be done. At present, the future does not look promising.

Abbreviations

BAT	Best Available Technique
CAMS	Catchment Abstraction Management Strategy
CIS	Common Implementation Strategy
DEFRA	Department for Environment, Food and Rural Affairs
EA	Environment Agency
EC	European Community
ECJ	European Court of Justice
GBR	General binding rules
the Government	the Secretary of State for the Government of the United Kingdom and the National Assembly for Wales. With the devolution of Wales in 1998, the National Assembly for Wales assumed many of the responsibilities for the implementation of secondary legislation, such as Regulations. . Where legislation refers to either the Secretary of State and or the National Assembly, the term the Government is used. (A Secretary of State is a senior cabinet minister in charge of a Government Department. Where legislation refers to the Secretary of State, it refers to a notional position split between all the Secretaries of State depending upon their functions)
LEAP	Local Environment Action Plan
MAFF	Ministry of Agriculture, Fisheries and Food (the functions of MAFF have been taken over by DEFRA)
PPC Regulations 2000	Pollution Prevention and Control (England and Wales) Regulations 2000
S(s)	Section(s)
SI	Statutory Instrument
UK	United Kingdom
Water Framework Regulations	Water Environment (Water Framework Directive) (England and Wales) Regulations 2003

Water Framework Directive (WFD)

Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p.1) as amended by Decision No 2455/2001/EC of the European Parliament and of the Council of 20 November 2001 establishing the list of priority substances in the field of water policy and amending Directive 2000/60/EC (OJ L 331, 15.12.2001, p.1)

WRA 1991

Water Resources Act 1991

1 Introduction

1.1 Background

The Water Framework Directive (WFD), adopted in 2000, is the latest development in European Community water policy legislation that first saw light nearly 30 years ago. The initial wave of legislation introduced controls on emissions of dangerous chemicals and focused on pollution problems in specific types of water, for example drinking water and bathing water. The second wave focused on certain activities that had detrimental effects on water, namely the use of nitrates and the treatment of waste water. The WFD represents the third wave and sees the embracing of a holistic approach to water management. The Directive provides for the implementation, by the Member States, of water management policies based on naturally occurring river basin districts with the needs of the aquatic environment as the reference point, with which to regulate pollution-causing activities.

Europe's waters have improved, over recent years. River quality is improving, pollution by chemicals and the eutrophication of waters is decreasing, water use is more efficiently controlled, and the establishment of monitoring networks have led to improvements in information about water quality. There are, however, serious problems remaining. Nitrate and pesticide pollution, particularly from agriculture, occur in all waters at concerning levels. Nitrate in drinking water is a particular problem with limit values being exceeded in around one third of groundwater bodies for which information is available. And despite the fact that nutrients in rivers and discharges of nutrients to the sea have decreased, comparative reductions in marine concentrations of nutrients have not been achieved.¹ The general aim of the WFD is for all Europe's waters to achieve the environmental quality objective of "good status" by 2015.

1.2 Orientation

Environmental legal and enforcement issues have been the subjects of theory development in recent years. Staffan Westerlund, professor in Environmental Law at the University of Uppsala, has led the development of environmental legal theory in Sweden. When setting legally binding environmental quality objectives, as the WFD does, a process must be carried through whereby the objectives are transformed into rights and liabilities for individuals. This process is what Westerlund refers to as the "operationalisation" of an environmental quality objective.² Therefore the achievement of the objective is dependent upon how well it is

¹ European Environment Agency Briefing No. 1/2003, 2003/11/27, available at http://reports.eea.eu.int/briefing_2003_1/en, 2005-05-06.

² Generally, see Westerlund, S., *Miljörättsliga grundfrågor 2.0*, Åmyra Förlag AB, Åmyra 2003.

operationalised and includes how efficiently it is legislated for. Ideally, special kinds of legal mechanisms, named navigation instruments should be provided for, whereby a cyclical process of monitoring, assessing, adjusting and implementing is repeated and an enforcement authority is empowered to affect the rights and liabilities of individuals, depending on the results.³ Westerlund has coined the term “implementation deficit” for any gap between the achievement of an environment quality objective and the results that the adopted law are expected to reach.

There is a further dimension. For a law to be effective, there must be sufficient inducement to ensure that it is complied with. A judiciary system that can administer suitable penalties is required as is an enforcement authority, which can act quickly in response to the needs of a changing environment and is armed with powerful enforcement tools. Any ineffectiveness in how the legal system ensures compliance with the law is what Westerlund calls the “enforcement deficit”.⁴

1.3 Aim

The Water Framework Directive is a framework directive which sets a number of environmental quality objectives and requires that a programme of measures is established in order to achieve those objectives. A directive is binding upon the Member States. Article 249 (3) of the EC Treaty states that a directive is binding as to the result to be achieved, but that the choice of form and methods are discretionary. There are therefore two discernable obligations: the provisions of the WFD are to be incorporated into national law and they are to be, in fact, complied with. There are therefore two aspects to this thesis. Firstly the transposition of the Directive into national legislation in England and Wales will be examined in order to determine any, in Westerlund’s terminology, “implementation deficit”, and secondly the enforcement provisions available at national level will be considered in order to assess the practical implementation of the Directive. This will determine the existence of any “enforcement deficit”. The overlying aim of this thesis is to analyse the effectiveness of the legislation in England and Wales in reaching the objectives of the Water Framework Directive.

1.4 Scope

The Water Framework Directive deals with a number of water quality issues. Not only does it provide for the setting of environmental quality objectives for water, it also contains provisions regarding the administrative organisation and obligations on Member States to manage water use on a

³ Lena Gipperth’s study in environmental law methodology on operationalisation of environmental goals provides an enlightening work on the operationalisation procedure, describing how environmental quality objectives are broken down into subgoals and further subgoals and implemented with the use of navigation rules. (Gipperth, L., *Miljö kvalitetsnormer. En rättsvetenskaplig studie i regelteknik för operationaliseringen av miljömål*, Uppsala universitet, 1999).

⁴ Westerlund, S., op cit., chapter 4.

cost recovery principle. This paper concentrates on the legal provisions in relation to the achievement of the environment quality objectives, only briefly touching the other areas where relevant. The paper is further limited to the domain of public law, in consideration of the fact that it is public bodies, and in particular the Environment Agency, who carry the main responsibility of ensuring compliance with national water legislation. Issues concerning co-ordination between public bodies are not addressed.

1.5 Method, material and disposition

The traditional method for legal research has been used. Relevant literature, case law and Government consultation papers have provided most of the information for this paper. Prior to the transposition of the Water Framework Directive into national legislation, the Government published three consultation documents, and these have provided an invaluable insight into water protection legislation in England and Wales.⁵ Legal theory literature, as well as literature on the practical application of environmental law in England and Wales has been used and websites have provided valuable information. Also informal contacts with the Environment Agency have been useful in gaining an understanding of the implications that the implementation of the WFD has on a public body.

The paper is both descriptive and analytical. There are three main sections. The first describes the Water Framework Directive, its environmental quality objectives and the measures that are required to be put in place by the Member States in order to reach the objectives. A section then follows that examines the applicable national legislation of England and Wales. Here it is aimed to identify any legal gaps remaining after the transposition of the Directive, or in legal theory jargon the existence of an implementation deficit, which will have implications on the achievement of the objectives. The third section deals with regulatory enforcement provisions, and discusses the existence of any possible enforcement deficit which will jeopardise the achievement of the objectives. My findings, as to the effectiveness of the law in England and Wales in complying with the WFD, although discussed in the body of the thesis, are summarised in the conclusion.

⁵ The first consultation paper was published in March 2001, the second in October 2002 and the third in August 2003.

2 The Water Framework Directive

2.1 The Directive

The Water Framework Directive establishes a framework for the protection of water in Europe. The Directive relates to water quality and requires that human activity shall be regulated with regard to preventing further deterioration and protecting and enhancing the status of aquatic ecosystems. The general objective is of good water status by 2015, and this is defined further in the Directive dependent on the water type or category.⁶ Once the objectives have been defined, programmes of measures are to be implemented in order to achieve them.⁷ If existing legislation is judged to be insufficient to achieve the objectives, additional measures are to be taken. Although it is largely up to the Member States how the objectives will be achieved, the Directive calls for the application of the “combined approach”, which tackles pollution using both emission limits and water quality standards.⁸ There are also requirements regarding the administrative arrangements, marking the holistic approach that the Directive takes: administrative arrangements for water resource management are to be based on naturally occurring river basin districts, and not any previously existing administrative or political boundaries.⁹ Also an “appropriate competent authority” to administer the rules of the Directive is to be identified.¹⁰ And finally, the Directive emphasizes transparency and greater public participation in water management issues.¹¹

This section is descriptive. First, it describes the environmental quality objectives for water that are to be achieved, and second, it sets out the requirements to be included in the programmes of measures. The section will therefore set the parameters in judging whether the legislation in England and Wales provides for an effective implementation of the WFD. Finally a brief look at the obligation on Member States to transpose the WFD is taken.

⁶ Article 4.

⁷ Article 11.

⁸ Article 10.

⁹ Articles 2 (13) and (15), and 3 (1). A river basin district is defined as an area of land and sea made up of one or more river basins, with their associated groundwaters and coastal waters, and shall be of a size that is practical in relation to the achievement of the Directive’s objectives.

¹⁰ Article 3 (2).

¹¹ Article 14.

2.2 The Environmental Quality Objectives

2.2.1 Introduction

The WFD requires that measures are taken with the aim that all waters in Europe are to achieve the level of good status by 2015. This objective is clarified further in the WFD and is defined differently for surface water, groundwater and protected areas. First a comment on the wording of the requirement to *aim* to achieve the level of good status. On the face of it, it appears that the objective has been downgraded compared to earlier directives, which set out categorical requirements that water quality requirements were actually to be met.¹² However the WFD shall achieve a level of achievement which is at least equivalent to that provided under the earlier directives, and any softening of this requirement would undermine the aim of the WFD. No further regard is therefore given to this aspect, although it should be noted that it may present difficulties in determining when a Member State is in breach of the WFD.

2.2.2 Good status

First, the requirements regarding surface water: Surface water is to be identified as individual bodies of water and assigned to one of the categories rivers, lakes, transitional waters, coastal waters or artificial and heavily modified surface water bodies. For a surface water body to achieve good status it must achieve good ecological status and good chemical status. Ecological status is assessed according to technical specifications set out in annex V to the WFD and is classified as high, good, moderate, poor or bad. High status (or type-specific conditions) is defined as the ecology that is normally associated with that surface water body type in undisturbed conditions unaffected by human influences. Some departure from these conditions is therefore allowed as the WFD aims for good status.¹³ Artificial and heavily modified bodies of water are subject to the less stringent requirement of achieving good ecological potential.¹⁴ It is left to the discretion of the Member States to designate the bodies of water and to determine the type-specific conditions although the co-ordination work carried out under the auspices of the Common Implementation Strategy (CIS) should ensure that the individual countries' classification and reference systems are comparable. All bodies of surface water must achieve good chemical status. Good chemical status is achieved when levels of pollutants in a body of water do not exceed emission limit values or environmental quality standards established under the WFD or by other EC-directives.¹⁵

¹² Howarth, H. and McGillivray, D., *Water Pollution and Water Quality Law*, Shaw & Sons Limited, 2001, p. 355.

¹³ Article 4 (1) (ii) and annex V, 1.2.

¹⁴ Article 4 (1) (a) (iii).

¹⁵ Article 4 (1) (a) (iv). Under the WFD, the Community is to adopt specific measures against pollution aimed at progressive reduction and, for priority hazardous substances,

Second, the requirements regarding groundwater: Good groundwater status is achieved according to the WFD when a body of groundwater has a good chemical status and a good quantitative status.¹⁶ Good chemical status is met when a groundwater body does not show any sign of saltwater intrusion, any environmental quality standards established under other Community legislation or under the WFD are not breached and that the achievement of the objective of good status is not jeopardised for an associated body of surface water.¹⁷ Good quantitative status is achieved when a balanced abstraction of groundwater is ensured.¹⁸

Third, waters in protected areas: As regards protected areas, Member States are to achieve compliance with all the objectives and standards mentioned above by 2015, unless exception has been granted under the Community legislation under which a particular protected area has been established.¹⁹

Finally, waters used for the abstraction of drinking water are to be protected so that they reach the standards required under the Drinking Water Quality Directive.²⁰ Safeguard zones may be established in order to avoid deterioration in the quality of such waters.²¹

2.2.3 Exceptions

I have already referred to the less stringent requirement of good ecological potential for artificial and heavily modified bodies of water. There are a number of additional circumstances where the WFD allows for exceptions to the achievement of the environmental objectives. Briefly these provide for extension of the time limits set for the achievement of the objectives,²² the setting of less stringent environmental objectives,²³ temporary deterioration in the status of bodies of water which is the result of natural causes or *force majeure*²⁴ and finally where failure to achieve the

cessation or phasing out (article 16 (1)). For more on Community Strategies against water pollution, see below at 2.4.3. A list of existing directives setting emission limit values and environmental quality standards is found in annex IX to the WFD (article 16 (10)).

¹⁶ Article 4 (1) (b) (ii).

¹⁷ Article 2 (25) which refers to table 2.3.2 of annex V. Under the WFD, the Community is to adopt specific measures to prevent and control groundwater pollution. (article 17). For more on Community Strategies against water pollution, see below at 2.4.3.

¹⁸ Article 2 (28) which refers to table 2.1.2 of annex V.

¹⁹ Article 4 (1) (c).

²⁰ Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ L 229, 30.8.1980, p. 11) as amended by Directive 98/83/EC (OJ L 330, 5.12.1998, p. 32).

²¹ Article 7.

²² Article 4 (4). Certain conditions must be met. The deadline may be extended for technical reasons, for economic reasons or if the natural conditions do not allow improvement within the time limit. The deadline can be extended until 2027.

²³ Article 4 (5). These can be set for specific bodies of water that are so affected by human activity, or their natural condition makes the achievement of the environmental objectives infeasible or disproportionately expensive and the environmental and socioeconomic needs cannot be achieved by other means.

²⁴ Article 4 (6). The cause must be exceptional or could not reasonably have been foreseen.

environmental objectives is the result of new modifications of physical characteristics and sustainable development activities.²⁵

2.2.4 Categorisation and setting of the objectives

As can be seen a substantial amount of the categorisation of water bodies and the definition of the objectives is left to the discretion of the Member States. In order to set the objectives, the WFD requires an analysis of the characteristics of each river basin district, a review of the impact of human activity on the status of water bodies within it, and an economic analysis of water use.²⁶ The characterisation analysis will inform the setting of environmental quality objectives by categorising the types of water bodies, defining the type-specific conditions and assessing the present status of the water.²⁷ The human activity impact review is required in order to collect information and assess the anthropogenic pressures on the bodies of water in each river basin district. Information is required in respect of point source and diffuse sources of pollution, water abstraction and water flow regulation. Once this has been done an assessment of the measures that need to be taken in order to achieve the WFD's objectives can be prepared. A measure that is required by the WFD, and is not discretionary is the application of the combined approach. It is therefore suitable to describe this concept before proceeding with the substance of the programmes of measures.

2.3 The combined approach

There are two regulatory methods of controlling or reducing water pollution. One method focuses on point source regulation with the setting of emission limit values at source for emissions of polluting substances. This does not however take into account the number of point sources in any one area and there may be such a conglomeration of them that they together pollute the water to such an extent that it cannot sustain any aquatic life form. The other method is to set quality objectives where the ambient quality of the water is in focus. However critics mean that the latter method undermines the need to prevent pollution at source.²⁸

²⁵ Article 4 (7). The reasons for the modifications are to be of overriding public interest and/or the benefits to the environment and to society of achieving the objectives are outweighed by the benefits.

²⁶ Article 5. Technical specifications setting out what the analyses are to include are found in annexes II and III to the WFD.

²⁷ The characterisation analysis was to have been completed by 22 December 2004 and this was in fact accomplished. The analysis was forwarded to the European Commission on 22 March 2005 (http://www.environment-agency.gov.uk/business/444217/444663/955573/958199/525252/837888/838578/?lang=e&theme=®ion=&subject=&searchfor=characterisation+analysis&any_all=&choose_order=&exactphrase=&withoutwords=, 2005-05-30).

²⁸ Howarth, H. and McGillivray, D., op cit., p. 362.

Previous EC directives have allowed for Member States to apply either emission limit values or quality objectives in order to control water pollution,²⁹ but the WFD requires that Member States adopt a combination of these two methods, hence the term “the combined approach”.³⁰ Member States are to ensure the establishment or implementation of emission controls based on best available techniques, the relevant emission limit values or controls based on best environmental practices set out in:

- the Integrated Pollution Prevention and Control Directive;³¹
- the Urban Waste Water Treatment Directive;³²
- the Nitrates Directive;³³
- directives adopted pursuant to article 16;
- directives listed in Annex IX;³⁴
- any other relevant Community legislation.

Further, it is provided that where quality objectives or quality standards, established under the WFD or in one of the directives listed in Annex IX, or in any other Community legislation, require stricter conditions than those that would result from the application of the combined approach, more stringent emission controls shall be set accordingly.³⁵

2.4 Programmes of measures

2.4.1 Generally

In order to achieve the environmental quality objectives that have been set for the individual water bodies, the WFD requires that a programme of measures is established for each river basin district.³⁶ The programmes of measures are to be established by 2009, made operational by 2012 and reviewed on a six yearly basis. A summary of the programme of measures is to be included in the information contained in river basin management plans which are to be produced for each river basin district and published by 2009.³⁷

²⁹ See discussion regarding the UK application below at 3.2.3.

³⁰ Article 10.

³¹ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ L 257, 10.10.1996, p. 26).

³² Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment (OJ L 135 30.5.1991, p. 40) as amended by Directive 98/15/EC (OJ L 67, 7.3.1998, p. 29).

³³ Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ L 375, 31.12.1991, p. 1).

³⁴ These are daughter directives established under the framework of the Dangerous Substances in Water Directive 76/464/EEC (Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ L 129, 18.5.1976, p. 23) as amended by Directive 91/692/EEC (OJ L 377, 31.12.1991, p. 48)).

³⁵ Article 10 (3).

³⁶ Article 11.

³⁷ Article 13 and Annex VII. River basin management plans are to be informative documents setting out water policies and are to act as a catalyst for citizen involvement. They are also to form the main reporting forum from the Member States to the Commission.

2.4.2 Different types of measures

A programme of measures is to include basic measures, which are the minimum requirements to be complied with, and supplementary measures. Legislation already adopted at national level may be referred to in the programmes of measures and measures that apply to all river basin districts may be adopted. The basic measures, listed in the WFD, consist of the following:

- a) those measures required to implement Community legislation for the protection of water, including legislation listed in article 10 which requires that the combined approach is applied, and other relevant Community water and environmental legislation listed in part A of annex VI to the WFD;³⁸
- b) measures deemed appropriate to implement charges on a polluter pays principle;³⁹
- c) measures that promote efficient and sustainable water use;
- d) measures required to meet the environmental quality standards for water intended for the abstraction of drinking water. Measures are also required to meet Community legislation in respect of drinking water quality and steps are to be taken aimed at reducing the level of purification treatment required in the production of drinking water, including the establishment of safeguard zones;⁴⁰
- e) controls on the abstraction of water and prior authorisation for abstraction and impoundment;
- f) controls, including prior authorisation of artificial recharge or augmentation of groundwater bodies;
- g) prior regulation of point source pollution such as the prohibition on the entry of pollutants into water, or prior authorisation, or registration based on general binding rules, laying down emission

³⁸ The Bathing Water Directive (Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ L 31, 5.2.1976) as amended by the 1994 Act of Accession), the Birds Directive (Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 25.4.1979, p. 1)), the Drinking Water Directive (Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ L 229, 30.8.1980, p. 11) as amended by Directive 98/83/EC (OJ L 330, 5.12.1998, p. 32)), the Major Accidents (Seveso) Directive (Council Directive 96/82/EC of 9 December 1996 on the control of major accident hazards involving dangerous substances (OJ L 10 14.1.1997, p.13)), the Environmental Impact Assessment Directive (Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L 175 5.7. 1985, p. 40) as amended by Directive 97/11/EC (OJ L 73, 14.3.1997, p. 5)), the Sewage Sludge Directive (Council Directive 86/278/EEC of 12 June 1986 on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture (OJ L 181, 8.7.1986, p. 6)), the Urban Waste Water Treatment Directive (91/271/EEC), the Plant Protection Products Directive (Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ L 230, 19.8.1991, p. 1) as amended by Directive 98/47/EC (OJ L 191, 7.7.1998, p. 50)), the Nitrates Directive (91/676/EEC), the Habitats Directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7)) and the Integrated Pollution Prevention Control Directive (96/61/EC).

³⁹ Article 9.

⁴⁰ Article 7.

controls for the pollutants concerned including controls that incorporate the combined approach and Community strategies adopted under article 16;

- h) measures that prevent or control the input of pollutants from diffuse sources. Controls may be in the form of prior regulation, prior authorisation or registration based on general binding rules;
- i) for significant adverse impacts, measures that ensure the hydromorphological conditions of the bodies of water are consistent with the achievement of the required objectives;
- j) a prohibition of direct discharges of pollutants into groundwater;
- k) measures that eliminate pollution of surface waters in accordance with the strategies as provided for under article 16;
- l) measures that reduce losses of pollutants from technical installations and measures that prevent and/or reduce the impact of accidental pollution incidents for example as the result of floods.

Supplementary measures may be taken when the basic measures are inadequate to achieve the environmental objectives.⁴¹ An indicative list of the supplementary measures that are envisaged is included as an annex to the WFD but this is not exhaustive.⁴² They can for example comprise of regulatory provisions, economic or fiscal instruments, voluntary environmental agreements, environmental grants for the creation of wetlands, management initiatives, information and advice, education and “other relevant measures”. According to some views, Member States are only under a duty to take measures beyond the basic measures when monitoring data shows that the environmental objectives for a particular body of water are unlikely to be met.⁴³ In those circumstances, the WFD requires that “additional measures as may be necessary” in order to achieve the objectives, are to be established.⁴⁴

2.4.3 Community Strategies against water pollution

The WFD obligates the Community to adopt strategies against the pollution of water. According to Article 16 action is to be taken in order to eliminate pollution of water by priority substances, and measures are to be adopted to prevent and control groundwater pollution pursuant to Article 17.

Article 16 sets out “Strategies against pollution of water” and outlines the specific measures that are to be taken. First a list of priority substances selected amongst those which present a significant risk to or via the aquatic environment is to be established and incorporated in the WFD as Annex X.⁴⁵ The WFD has now been amended to incorporate this list.⁴⁶ The list

⁴¹ Article 11 (4).

⁴² Annex VI, part B.

⁴³ Howarth, H. and McGillivray, D., *op cit.*, p. 301 f.

⁴⁴ Article 11 (5).

⁴⁵ Article 16 (2) and (11).

identifies 33 substances or groups that pose a major risk to European waters. 11 of the 33 substances have been identified as priority hazardous substances and are of particular concern. The discharge of priority hazardous substances is to be ceased or phased out while the discharge of the other priority substances is to be progressively reduced. The list of 33 priority substances replaces the list I and list II substances of the Dangerous Substances Directive.

The second step is for the Community to adopt specific measures in order to progressively reduce or cease or phase out, as appropriate, the discharge of priority substances. The Commission is in the process of preparing proposals for environmental quality standards and emission controls and it may be noted that a substantial amount of consultation with the Member States, candidate countries and stakeholders is required.⁴⁷ If agreement cannot be reached at Community level by 2006, Member States are to establish their own environmental quality standards or emission limit values.⁴⁸

The WFD will, over a transitional period replace the Dangerous Substances in Water Directive. Article 6 of the Dangerous Substances Directive in Water relating to the setting of emission limit values and environmental quality standards was repealed at adoption of the WFD, and the remaining provisions will be repealed in 2013.

Article 17 sets out “Strategies to prevent and control pollution of groundwater”. Specific measures must be taken aimed at achieving the objective of good groundwater chemical status.⁴⁹ The Commission has published a proposal for a new Groundwater Directive, which includes setting the criteria for assessing good chemical status of groundwater. It also addresses pollution by indirect discharge of pollutants into groundwater so as to achieve the same level of protection as under the existing Groundwater Directive.⁵⁰ It is proposed that environmental quality standards may be adopted later, on the basis of information received from the Member States of nationally established threshold levels of pollutants if it is required to ensure harmonisation.⁵¹

2.5 Obligations on Member States to transpose

The EC Treaty provides that directives are binding, as to the result to be achieved, but that the choice of form and methods is at the discretion of the

⁴⁶ Decision No 2455/2001/EC of the European Parliament and of the Council of 20 November 2001 establishing the list of priority substances in the field of water policy and amending Directive 2000/60/EC (OJ L 331, 15.12.2001, p.1).

⁴⁷ Article 16 (5) WFD.

⁴⁸ Article 16 (8) WFD.

⁴⁹ Article 17 (1).

⁵⁰ The WFD only addresses direct discharges into groundwater.

⁵¹ Commission proposal COM (2003) 550 : Groundwater Directive, available at <http://europa.eu.int/comm/environment/water/water-framework/groundwater.html>, 2005-04-20.

Member States.⁵² Therefore a directive's provisions must be transposed into national legislation and Member States are to ensure that they are, in fact, complied with.

The Commission has applied to the European Court of Justice on numerous occasions for rulings on the national transposition of environmental directives including several cases against the United Kingdom.⁵³ Attempts by Member States to transpose the requirements by means of, for example, administrative circulars have been rejected by the Court with the main argument being that where a directive creates rights for individuals, the directive's provisions must be transposed in a "sufficiently clear and precise manner" so that the "persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts".⁵⁴ The WFD requires that environmental quality objectives are established and that a number of quality standards established under previous directives are implemented. Also programmes of measures are to be established. Directives that fix quality objectives or standards give individuals certain legal rights, and therefore must be transposed by binding legal provisions. This applies even to the requirement of the establishment of programmes of measures, as they can also contain issues which affect the rights and duties of individuals.⁵⁵ The question that is raised is exactly which rights an EC directive creates and who enjoys them. There are two possible approaches to this. First, there is a restrictive approach, whereby only those directly affected by an EC law have rights. This includes private individuals where environmental directives are intended to protect human health. Second, there is a wider view whereby citizens are granted rights generally even if an environmental directive does not expressly protect human health. At present an examination of ECJ case law shows that the first approach is adopted,⁵⁶ and this effectively blocks court action by the "concerned citizen" by denying "standing". Therefore it falls solely to the European Commission to ensure that directives that aim to protect the environment are complied with.

The second aspect, that Member States are to ensure the practical application of environmental provisions is, however, probably the most serious problem today.⁵⁷ The Commission has announced a more dynamic attitude towards transposition requirements in regards to the WFD. Member States are under a duty to provide the Commission with texts of the main provisions of national law adopted in order to transpose the Directive,⁵⁸ and

⁵² Article 249 (3) EC.

⁵³ See, for example, Case C-337/89 *Commission v United Kingdom* [1992] ECR I-6103 and Case C-340/96 *Commission v United Kingdom* [1999] ECR I-2023 (the Drinking Water Cases), Case C-56/90 *Commission v United Kingdom* [1993] ECR I-4109 (the Blackpool Bathing Water Case) and Case C-69/99 *Commission v United Kingdom* [2000] ECR I-10979 (non-compliance with the Nitrates Directive).

⁵⁴ See, for example, Case C-131/88 *Commission v Germany* [1991] E.C.R. I-825. A more detailed account of cases involving non-transposition of directives is found in Gipperth, L., p. 145 ff).

⁵⁵ Krämer, L., *EC Environmental Law*, Sweet and Maxwell, 2003, p. 374.

⁵⁶ Holder, J., *The Impact of EC Environmental Law in the United Kingdom*, John Wiley & Sons, 1997, p. 54.

⁵⁷ Krämer, L., *op cit.*, p. 377.

⁵⁸ Article 24 (2).

further implementation will be followed rigorously. Non-communication, non-conformity or bad application of the WFD can lead to infraction proceedings and ultimately the imposition of penalty payments by the ECJ.⁵⁹

⁵⁹ Articles 226 – 228 EC-Treaty.

3 Implementation in England and Wales

3.1 Introduction

The WFD requires that the level of protection of water quality provided shall be, at a minimum, the same level of protection provided under existing Community legislation. Much of the WFD refers to existing Community directives, especially as regards the means of achieving the objectives, which have already been (or should have been) implemented at national level. In order to understand the legal mechanisms that exist today, and to explain the Environment Agency's relative strong position, it is helpful to the reader to briefly consider the evolutionary steps that water pollution legislation has undergone in England and Wales. Therefore in the following, a short section on the history of water pollution legislation is included, before returning to the transposition of the WFD, and in particular the different measures that are to be included in the programmes of measures. This section aims to expose any gaps in the national legislation of England and Wales in transposing the requirements of the WFD, or in other terms if there is an implementation deficit.

3.2 Water pollution legislation

3.2.1 History

Early legislation protecting against water pollution, the first dating from 1388, concentrated on the need to protect water supplies and the prevention of water-borne diseases. This became particularly pressing during the beginning of the nineteenth century due to the growth of industrialisation and the influx of human labour to towns and cities. Regulation developed in the same vein throughout the nineteenth and twentieth centuries, but legislation developed independently in three distinct areas; water supply, sewerage and land drainage. This separation of water issues lead to a legal framework that was sector based and an administrative system that was extremely fragmented as can be noted by the fact that in the early 1970's, in England and Wales, responsibility for water supply rested with 198 different bodies, sewerage responsibility rested with 1,300 authorities and water conservation and pollution control was the responsibility of 29 river authorities.⁶⁰

Water pollution legislation underwent a thorough overhaul with the adoption of the Water Act in 1973. The Act simplified the administrative arrangements and for the first time the idea of controlling water on an integrated river basin management basis was introduced. This meant that a

⁶⁰ Howarth, H. and McGillivray, D., op cit., p. 92.

single “comprehensively-empowered” authority was made responsible for all water-related matters in naturally occurring water catchment areas.⁶¹

Another significant event in the management of water resources and control of pollution was the privatisation of the water industry in the 1980’s. This raised concerns at national level about the appropriateness of controls for the protection of the aquatic environment being in the hands of the private sector. Membership of the European Community was however already being felt and the requirement that a “competent authority” be appointed to implement EC water quality directives influenced the shaping of the national administrative arrangements.⁶² Under the Water Act 1989, which enabled privatisation, the National Rivers Authority was established as an independent environmental regulatory body.⁶³ That the Authority took advantage of its independent status can be noted by the significant increase of prosecution proceedings in relation to water pollution offences, even if the number of convictions remained small in relation to the number of reported incidents.⁶⁴ The Environment Agency subsequently replaced the National Rivers Authority, together with a number of other pollution control authorities, in 1996.⁶⁵

Traditionally, the approach taken to regulation and discharge consent conditions is largely an informal process, often agreed upon after negotiations between regulators and the regulated, taking into account local conditions and the use of the best practical means of reducing pollution. The Water Act 1989 however also gave effect to a number of EC water quality directives setting statutory water quality objectives.⁶⁶ The establishment of water quality objectives as legally binding standards was achieved using three legal mechanisms 1) provision for a statutory scheme for water quality classification; 2) provision of a power to specify the quality objectives to be achieved and 3) the imposition of a legal obligation that the specified quality objectives were in fact to be met.⁶⁷ The effect that this had on the regulatory bodies was that the traditional informal approach had to give way to the requirement to apply formal statutory regulated environmental quality standards when EC directives required them.⁶⁸

In 1991, there was a “consolidation process” of all the water enactments, in order to rationalise the legislation, even if the substance remained largely the same. The resulting Acts are known as the “consolidation Acts” and comprise the Water Resources Act 1991, the Water Industry Act 1991, the Land Drainage Act 1991, the Statutory Water Companies Act 1991 and the Water Consolidation (Consequential Provisions) Act 1991.⁶⁹ The first

⁶¹ Howarth, H. and McGillivray, D., *op cit.*, p. 95.

⁶² Howarth, H. and McGillivray, D., *op cit.*, p. 98 f.

⁶³ Howarth, H. and McGillivray, D., *op cit.*, p. 103.

⁶⁴ Howarth, H. and McGillivray, D., *op cit.*, p. 105.

⁶⁵ Ss. 1 and 2 Environment Act 1995. The Environment Agency is discussed further below at 4.2.

⁶⁶ See discussion on the application of quality objectives instead of emission limit values below at 3.2.3.

⁶⁷ Howarth, H. and McGillivray, D., *op cit.*, p. 800.

⁶⁸ Howarth, H. and McGillivray, D., *op cit.*, p. 108 ff.

⁶⁹ Howarth, H. and McGillivray, D., *op cit.*, p. 106.

named being of primary importance to this work as it is here that the general regime for water pollution regulation is found.

3.2.2 The regimes for water pollution control

The general regime for the control of pollution of water resources is found in Part III of the Water Resources Act 1991. The main water pollution offences are concerned with, briefly:

- The entry of polluting matter into controlled waters⁷⁰
- The contravention of a prohibition of any matter to enter controlled waters, other than trade effluent or sewage effluent⁷¹
- The discharge of any trade effluent or sewage effluent into any controlled waters or into the sea outside the limits of controlled waters through a pipe⁷²
- The contravention of a prohibition of any trade effluent or sewage effluent to be discharged⁷³
- The entry of any matter into inland freshwater so as to tend to impede the flow of the waters and leading to pollution⁷⁴
- The contravention of a consent.⁷⁵

Here, it is appropriate to consider the definition of certain legal concepts in so much as they are relevant to this paper. Controlled waters include relevant territorial and coastal waters, inland freshwaters including waters of any pond or lake or river or watercourse and groundwater contained in underground strata.⁷⁶ To be noted is that enclosed stillwaters, so called discrete waters, which do not discharge into other waters, for example reservoirs, are excluded from the definition of controlled waters.⁷⁷

Also worthy of mention is the definition of polluting matter. Recent legal judgments and commentary seem to point to this is matter which has a likelihood or capability of causing harm to animal or plant life or those who use it. That is to say it does not need to have already harmed the environment; but it has a capacity to do so.⁷⁸

A person shall not be found guilty of a water pollution offence under s. 85 Water Resources Act, if he or she is acting under and in accordance with a discharge consent.⁷⁹ In other words, the holding of a discharge consent provides a defence to the offences.⁸⁰ Applications for a discharge consent are made to the Environment Agency in accordance with some formal and

⁷⁰ S. 85 (1) WRA 1991.

⁷¹ S. 85 (2) WRA 1991.

⁷² S. 85 (3) WRA 1991.

⁷³ S. 85 (4) WRA 1991.

⁷⁴ S. 85 (5) WRA 1991.

⁷⁵ S. 85 (6) WRA 1991.

⁷⁶ S. 104 (1) WRA 1991.

⁷⁷ S. 221 (1) WRA 1991.

⁷⁸ Howarth, H. and McGillivray, D., *op cit.*, p. 549.

⁷⁹ S. 88 (1) (a) WRA 1991.

⁸⁰ A discharge consent does not give a direct defence to civil proceedings, as nothing in Part III of WRA 1991 derogates from any right of action or other remedy in proceedings started otherwise than in accordance with Part III (s. 100 WRA 1991).

procedural requirements.⁸¹ This includes advertising in a local newspaper (“local” both to the place of discharge and the place of impact), and the *London Gazette*. In practice, the application for a discharge consent is preceded by numerous rounds of discussions and negotiations.⁸²

Formally the Agency has a great deal of freedom in determining consents; for example there is no legal duty to apply BAT⁸³. However, self-imposed targets for water quality have been traditionally used by the regulating bodies, in determining consent conditions which have been set according to the needs of the receiving waters. The Environment Agency is under an obligation to comply with specific water quality standards set by Community legislation, when setting consent conditions.⁸⁴ Discharge consent conditions can include:

- the place at which the discharge takes place
- parameters for the discharge
- requirements for treatment in order to minimise the polluting effects of the discharge
- stipulations as regards samples and the provisions of monitoring apparatus
- the keeping of records and the provision of information to the Environment Agency.⁸⁵

The Environment Agency is provided with a power, not a duty, to review discharge consents and may revoke a consent or modify the conditions of a consent by the serving of a notice on the consent holder.⁸⁶ The period during which a consent may not be revoked or varied, without the consent of the consent holder, is not less than four years from the date on which the consent takes effect. Each review notice is also subject to this four year respite.⁸⁷ The Government can however direct the Environment Agency to review consents, even within the four year period, and can also direct the Agency to revoke or modify the conditions of a consent if it is considered appropriate to do so in order to meet any Community obligation, protect the public health or fauna or by reason of any representations or objections made or otherwise.⁸⁸

Alongside the general regime is the new or PPC regime provided by the Pollution Prevention and Control (England and Wales) Regulations 2000,⁸⁹

⁸¹ S. 88 (2) and Schedule 10 WRA 1991 amended by para. 183 Schedule 22 Environment Act 1995 and reg. 7 and Schedule 2 Control of Pollution (Applications, Appeals and Registers) Regulations 1996 (SI 1996 No. 2971).

⁸² Howarth, H. and McGillivray, D., op cit., p. 597.

⁸³ Howarth, H. and McGillivray, D., op cit., p. 593.

⁸⁴ Chapter I of Part III, WRA 1991.

⁸⁵ S. 88 and Schedule 10 WRA 1991.

⁸⁶ Para. 7 (2) Schedule 10 WRA 1991, amended by para. 183 Schedule 22 Environment Act 1995.

⁸⁷ Para. 8 (3) Schedule 10 WRA 1991, amended by para. 183 Schedule 22 Environment Act 1995.

⁸⁸ Paras. 9 and 7 (4) Schedule 10 WRA 1991, amended by para. 183 Schedule 22 Environment Act 1995.

⁸⁹ SI 2000 No. 1973. These Regulations were adopted under the Pollution Prevention and Control Act 1999 in order to implement the IPPC Directive. It is referred to as the new regime as it will, after a transitional period, replace an existing body of legislation relating

which have been adopted in order to implement the IPPC Directive. The PPC Regulations 2000 regulate specific types of polluting activities and discharge consents are granted by the Environment Agency or in certain circumstances the Local Authority.⁹⁰ Where the determination of a discharge consent is made by the Local Authority, the Authority is bound by any emission limit values or conditions imposed upon it by the Environment Agency.⁹¹ In contrast to the regulation of consent conditions under the Water Resources Act, consents for discharges issued under the PPC Regulations 2000 are to include emission limit values which are based on BAT.⁹² Further, stricter emission limit values are to be applied where an environmental quality standard requires it and therefore stricter conditions beyond those required by BAT can be set.⁹³ However there is no duty placed upon the regulator under the PPC Regulations 2000 to apply the combined approach required by the WFD. There is however an obligation to take necessary action to secure compliance with the conditions of a permit.⁹⁴

Right of appeal to the Government exists for a number of decisions taken by the Environment Agency concerning discharge consents, but does not extend to third parties that might be affected.⁹⁵ Therefore a neighbour, or any other who considers that he or she is affected by the granting of a consent, has no right of appeal. Appeals are not allowed where the Agency has acted pursuant to directions from the Government.⁹⁶ Appeals may be taken when a consent application has been refused, or made subject to conditions, revoked, modified or an unconditional consent has been made subject to conditions. Procedural requirements in relation to appeals are set out in the Control of Pollution (Applications, Appeals and Registers) Regulations 1996.⁹⁷ Appeals are normally conducted by a written process, but a hearing may be held if the Government insists upon it. The person hearing the appeal decides on the extent to which the hearing is to take place in private. Under the PPC regime, a hearing is compulsory if the regulator or the appellant ask for one.

to integrated pollution control found in Part I of the Environmental Protection Act 1990. It is, on the whole concerned with the same types of polluting activities and discharges, but will encompass a broader spectrum. The new regime is to be fully implemented by 2007 and therefore will form part of the legal framework for the achievement of the WFD's objectives. It is envisaged that Part I of the Environmental Protection Act will eventually be repealed so for the purposes of this paper the "old" regime regulated under the 1990 Act is not considered here. For the interested reader, further information on the phased introduction of the new regime can be found in Farthing, J., Marshall, B. and Kellett P., *Pollution Prevention and Control – The New Regime*, Butterworths LexisNexis, 2003 and *Integrated Pollution Prevention and Control. A Practical Guide. Edition 3*, available at http://www.defra.gov.uk/environment/ppc/ippcguide/ippc_ed3.htm, 2005-04-14.

⁹⁰ Regs. 8 (2) and (3) PPC Regulations 2000.

⁹¹ Reg. 13 PPC Regulations 2000. Local Authorities are not normally bound by directions from the Environment Agency concerning matters of public health.

⁹² Regs. 12 (2) and (6) PPC Regulations 2000. These are not to be confused with emission limit values set under EC directives.

⁹³ Reg. 12 (7) PPC Regulations 2000.

⁹⁴ Reg. 23 PPC Regulations 2000.

⁹⁵ Generally, see s. 91 WRA 1991, amended by para. 143 Schedule 22 Environment Act 1995.

⁹⁶ Howarth, H. and McGillivray, D., op cit., p. 630.

⁹⁷ SI 1996 No. 2971.

Strategic Planning

Worthy of comment is that it is in marked contrast to other areas of environmental law that there is no statutory provision made in relation to the strategic planning of water quality. For example, for air quality, the Government is under a specific duty to formulate policy statements for the assessment or management of the quality of air.⁹⁸ Action plans are to be prepared when air quality standards or objectives are not being achieved in designated areas, and binding directions can be given by the Government to the relevant authorities, to implement the plans. The Environment Agency, in an attempt to address this lack of legislation as regards water quality strategic planning, has established Local Environment Agency Plans (LEAPS), which are intended to be used as a vehicle for informing the public on what local objectives the Agency seeks to achieve and how it intends to use its legal powers to achieve them. They are, however, informal, non-mandatory mechanisms and carry with them no direct legal consequences.⁹⁹

As regards strategic planning for land use, the Environment Agency is a statutory consultee, but the Local Authority is under no duty to abide by or take regard to the Agency's views.¹⁰⁰

3.2.3 Relationship with the combined approach

Before progressing it is appropriate to discuss here the relationship the legislators of England and Wales have to the combined approach. It is therefore necessary to consider the method of application used to implement other EC-directives, namely the Dangerous Substances Directive and its daughter directives.

The Dangerous Substances Directive is largely concerned with the restriction of the emission of dangerous substances at source. It requires prior authorisation of discharges of certain dangerous substances and authorisations are to set emission limits, including the maximum concentrations and the maximum quantities of dangerous substances, over a period of time.¹⁰¹ The Council sets these emission limit values under daughter directives.¹⁰² However, during negotiations prior to the adoption of the Directive, the UK argued against the use of emission limit values as it favoured the quality objective approach. This was partly due to the advantages that the UK enjoys with its fast flowing rivers and its long coastline which can disperse pollutants more effectively, and partly due to a reluctance to waiver from the traditional and largely discretionary decision-making approach that was based on local environmental quality.¹⁰³ The Dangerous Substances Directive therefore incorporated the "parallel approach" which provides for the Council not only to set emission limit

⁹⁸ Part IV of Chapter III Environment Act 1995.

⁹⁹ Howarth, H. and McGillivray, D., *op cit.*, p. 807 ff.

¹⁰⁰ Farthing, J., Marshall, B. and Kellett P., *Pollution Prevention and Control – The New Regime*, Butterworths LexisNexis, 2003, p 32.

¹⁰¹ Articles 2 and 5 Dangerous Substances in Water Directive.

¹⁰² Article 6 (1) Dangerous Substances in Water Directive.

¹⁰³ Howarth, H., and McGillivray, D., *op cit.*, p. 301 f.

values for the dangerous substances included in the daughter directives but also to establish quality objectives. The quality objectives can be applied by a Member State if it can prove to the Commission that the quality objectives are being met.¹⁰⁴

The United Kingdom adopted this parallel approach, applying water quality objectives instead of emission limit values, which necessitated the first legal mechanisms for the implementation of quality objectives.¹⁰⁵

3.3 Transposition

The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003¹⁰⁶ came into effect on 2 January 2004, just over a week later than the time limit set by the WFD.¹⁰⁷ The Regulations establish the administrative arrangements for the management of water resources and provide for the establishment of the legally binding environmental quality objectives required by the WFD.

The WFD's requirement that water management is to be based on river basin districts had few implications for the administrative arrangements of the Environment Agency, as this has in fact been the case since 1973. In total there are nine river basin districts within England and Wales, with two more that overlie the border between England and Scotland.¹⁰⁸ As for who carries responsibility, it will be seen that a great deal of the technical work and responsibility for administering the requirements of the WFD rests with the Environment Agency, but it is essentially the Government who bears ultimate responsibility.¹⁰⁹ The Government declined from identifying the Environment Agency as the "competent authority" as it was "unnecessary": the Environment Agency was, "in fact, the competent authority in England and Wales" for the purposes of the WFD.¹¹⁰

¹⁰⁴ Articles 6 (1) and (3) Dangerous Substances in Water Directive (76/464/EEC).

¹⁰⁵ Surface Waters (Dangerous Substances) (Classification) Regulations 1989 (SI 1989 No. 2286) made under the Water Act 1989.

¹⁰⁶ SI 2003 No. 3242.

¹⁰⁷ Compare article 24 WFD which required transposition by 22 December 2003. The Regulations were enacted by using existing regulation-making powers under Section 2(2) of the Communities Act, which empowers the Government to make provision by regulations of any legislation arising out of a Community obligation. There were some doubts raised during the consultation period as to the appropriateness of this method of transposition. Some responses called for Parliamentary scrutiny, implying a need for primary legislation to be adopted (DEFRA and Welsh Assembly Government, *Second Consultation Paper on the Implementation of the EC Water Framework Directive (2000/60/EC)*, October 2002, p. 16, available at <http://www.defra.gov.uk/environment/consult/waterframe2/index.htm>, 2005-04-08).

¹⁰⁸ Reg. 4 Water Framework Regulations.

¹⁰⁹ The reasons for giving the Government ultimate responsibility goes back to a constitutional convention of the UK and the doctrine of "individual ministerial responsibility", whereby individual ministers are accountable to Parliament for policy issues, their own conduct or the actions of their officials (Leyland, P., Woods, T. and Harden, J., *Textbook on Administrative Law*, Blackstone Press Limited, 1994 p. 27 ff).

¹¹⁰ DEFRA and Welsh Assembly Government, *Transposition Note on the Transposition of the Water Framework Directive (2000/60/EC)*, p. 3, available at <http://www.defra.gov.uk/environment/water/wfd/transposition.htm>, 2005-04-08.

The Regulations 2003 provide for the legal mechanisms establishing statutory environmental quality objectives. Provision is made for a statutory scheme of water classification, empowerment to define the environmental quality objectives to be achieved and a duty on the Environment Agency to exercise its functions so as to secure compliance with the WFD.¹¹¹ The environmental quality objectives, according to the Regulations, are those required to comply with Article 4 of the WFD and any objectives to comply with Article 7 (2) and (3) of the WFD (drinking water).¹¹² The Environment Agency is under a duty to prepare and submit to the Government proposals for the environmental quality objectives, based on the characteristics analysis carried out in accordance with Article 5.¹¹³ The Government can approve the proposals or reject them in whole or in part. Directions on the definitions of the objectives and allowance for any derogation are to be given to the Agency issued under statutory guidance.¹¹⁴ At consultation stage it was stated that the setting of the objectives and allowance for derogations would be considered in the context of the work being carried out under the CIS which was aiming to assist in developing uniform definitions of water bodies, type-specific reference conditions, heavily modified bodies of water etc. across the Community.¹¹⁵

3.4 Programmes of measures

3.4.1 Generally

During consultation stage it was recognised that the Environment Agency already enjoyed a wide range of powers and duties under existing legislation, in part adopted to comply with existing EC directives. It would therefore, practically, fall to the Environment Agency the task of identifying suitable action that would need to be taken and of implementing the programmes of measures required, in order to ensure that the WFD's objectives were achieved.¹¹⁶

The Regulations require that the Environment Agency proposes and submits to the Government a programme of measures, for each river basin district, to achieve the environmental objectives.¹¹⁷ Account must be taken by the Environment Agency of the Article 5 characterisation analysis and the economic analysis of water use.¹¹⁸ The Government can approve the proposal or reject them in whole or in part.¹¹⁹ It is the Government's

¹¹¹ Reg. 3 and Schedule 2 Water Framework Regulations.

¹¹² Reg. 2 (1) Water Framework Regulations.

¹¹³ Reg 10 Water Framework Regulations.

¹¹⁴ Reg. 20 Water Framework Regulations and DEFRA and Welsh Assembly Government, *Third Consultation Paper on the Implementation of the EC Water Framework Directive (2000/60/EC)*, August 2003, p. 17, available at <http://www.defra.gov.uk/corporate/consult/waterframe3/index.htm>, 2005-04-08. Statutory guidance is binding, see below at 4.2.

¹¹⁵ DEFRA and Welsh National Assembly, *Second Consultation Paper*, op cit., p. 21.

¹¹⁶ DEFRA and Welsh National Assembly, *Second Consultation Paper*, op cit., p. 34.

¹¹⁷ Reg. 10 (1) Water Framework Regulations.

¹¹⁸ Reg. 10 (2) Water Framework Regulations.

¹¹⁹ Reg. 10 (3) Water Framework Regulations.

responsibility to ensure that the programmes of measures are established by 22 December 2009, made operational by 22 December 2012 and periodically reviewed on a six yearly basis thereafter.¹²⁰

3.4.2 Basic measures

3.4.2.1 Introduction

The programmes of measures will, by necessity, be comprehensive legal documents containing detailed packages of measures. The adoption of the Water Framework Regulations, together with existing legislation is to provide for the full range of legal mechanisms required to implement the programmes of measures in order to achieve the environmental quality objectives of the WFD.

The following section therefore deals with the question of how the basic measures, to be included in the programmes of measures, are provided for in the national legislation of England and Wales. Attention is given to those measures directly aimed at controlling water pollution and for which the Environment Agency is the main body responsible.

The WFD requires that as a minimum the programmes of measures are to include the “basic” measures as listed under Article 11 (3). Many of the basic measures include, as a minimum requirement, the implementation of existing EC legislation that has already been transposed into national legislation. Therefore much of the content of the programmes of measures will contain references to measures that are provided for in national legislation which predate the transposition of the WFD. The measures are accounted for below, in the same order as they appear in the WFD. Measures regarding cost recovery (Article 11 (3) (b) WFD) and the efficient and sustainable use of water (Article 11(3) (c) WFD) are not included in this paper as they are mainly the responsibility of another public body, the newly created Water Services Regulation Authority.¹²¹

3.4.2.2 Article 11 (3) (a) Existing Community legislation

This article requires that Community legislation, which establishes water quality standards or emission limit values is to be implemented, including adherence to the combined approach required by certain EC directives controlling pollution from point and diffuse sources.¹²² The various EC directives which are relevant to this paper are taken up elsewhere,¹²³ but it is convenient to take up the issue of the combined approach here.

As has already been discussed, in order to implement the Dangerous Substances Directive (and its daughter directives), the Surface Waters (Dangerous Substances) (Classification) Regulations 1989, were adopted

¹²⁰ Reg. 10 (5) Water Framework Regulations.

¹²¹ The Water Services Regulation Authority replaced the Director General of the Office of Water Services (Ofwat) under the Water Act 2003.

¹²² For list of Community legislation that is to be implemented see note 38 above. For the combined approach and list of relevant Directives see above at section 2.3.

¹²³ The basic measures listed in Article 11 (3) WFD are concerned with different aspects of the relevant EC directives. Therefore the requirements of these EC directives are covered under the most relevant basic measure in sections 3.4.2.3 to 3.4.2.11 below.

which established water quality objectives for different categories of water, in accordance with the parallel approach.¹²⁴ The WFD however envisages a two-stage process whereby firstly, full effect is given to emission limit values (as established under the Dangerous Substances Directive), and if this fails to achieve the specified water quality objectives or standards then the second stage is to impose stricter emission limits which ensure that the water quality objectives or standards are actually met.¹²⁵ Hence no option remains for a Member State to apply either emission limit values or quality objectives. However there is no regulatory provision made to put the Environment Agency under a duty to apply the combined approach. It can also be reiterated that it is only under the PPC regime that the Agency has been empowered to apply stricter emission limits if it is unlikely that environmental quality objectives or standards will not be met.¹²⁶

3.4.2.3 Article 11 (3) (d) Drinking water

Member States are to ensure that drinking water, after treatment, meets the requirements of the Drinking Water Quality Directive, and requires that measures are taken in order to reduce the level of water treatment required for the production of drinking water. Regulations enacted in order to transpose the Drinking Water Directive legislate that the quality of drinking water is the responsibility of the private water undertakers to ensure, and this is enforceable by the Government.¹²⁷ The Environment Agency has no regulatory capacity in these regards. However there are requirements that both groundwater and surface waters intended for abstraction for drinking water are to be safeguarded, where the Environment Agency does have duties to perform. Where the Environment Agency has functions in relation to protecting groundwater, this is more appropriately discussed elsewhere.¹²⁸

As regards protection of surface waters, this is provided for by the Surface Waters (Abstraction for Drinking Water) (Classification) Regulations 1996.¹²⁹ The Environment Agency is required to classify the quality of inland freshwaters according to their suitability for supply as drinking water and conduct monitoring and sampling functions. Directions have been given to the Environment Agency to ensure that there is no deterioration of quality in such waters when it is carrying out its pollution control functions.¹³⁰

Additional protection of all surface waters, not just those intended for the abstraction of drinking water, is provided when the general regime proves to be inadequate. Water Protection Zones can be designated for particular areas in which activities need to be more strictly regulated in order to protect

¹²⁴ See above at section 3.2.3.

¹²⁵ Howarth, H. and McGillivray, D., *op cit.*, p. 360.

¹²⁶ Compare article 10 (3) WFD.

¹²⁷ Water Supply (Water Quality) Regulations 1989 (SI 1989 No. 1147), as amended by Water Supply (Water Quality) Regulations 2000 (SI 2000 No. 3184) and ss. 18 and 52 Water Industry Act 1991.

¹²⁸ See below at 3.4.2.9.

¹²⁹ SI 1996 No. 3001.

¹³⁰ Surface Water (Abstraction for Drinking Water) Directions 1996, 26 November 1996. For discussion on the legal status of Directions see below at 4.2.

vulnerable waters.¹³¹ The Government, on application from the Environment Agency, is empowered to make an order designating a Water Protection Zone where it is considered appropriate in order to prevent or control the entry of poisonous, noxious or polluting matter into controlled waters and prohibiting or restricting activities which are considered likely to result in the pollution of such waters.¹³² The order may contain various provisions conferring power on the Environment Agency including power to determine the circumstances in which activities are prohibited or restricted and power to apply such prohibitions and restrictions.¹³³ However this legislation has been used only once in establishing a water protection zone for the River Dee catchment area,¹³⁴ mainly motivated by a number of serious pollution incidents in the river which greatly affected its use as a source of water supply.¹³⁵ Protection zone consent must be obtained from the Environment Agency for the carrying out of certain defined controlled activities, including the keeping or use of a controlled substance, within the zone and appeals are made to the Government.¹³⁶

Designation of Nitrate Vulnerable Zones, discussed elsewhere,¹³⁷ can also be useful tools in safeguarding the quality of waters intended for the abstraction of drinking water, although controls for diffuse pollution by other agricultural activities, for example pesticide use, remain absent. Even diffuse pollution from urban activities need to be addressed. Despite this, the Government saw no need to establish “safeguard zones”, as allowed for under the WFD, to implement this part of the Directive.¹³⁸

3.4.2.4 Article 11 (3) (e) Abstraction controls

Controls over abstraction of fresh surface water and groundwater are required, a register of abstractions, abstraction must have prior authorisation and controls must be periodically reviewed and updated. Legislation on water resource management and abstraction controls is found in Part II Water Resources Act 1991. Abstraction is prohibited from any source of supply except in pursuance of a licence granted by the Environment Agency or if expressly exempted.¹³⁹ The Water Act 2003, which amended the WRA 1991, extended the licence requirement to include irrigation activities and dewatering of, for example construction works and mining (previously excluded), and providing for a new abstraction licensing threshold of 20 cubic meters per day (compared with the previous threshold of 5 cubic meters per day).¹⁴⁰ The abstraction of water for land drainage remains

¹³¹ S. 93 WRA 1991.

¹³² S. 93 (1), (2) and (5) WRA 1991. For definition of controlled waters see above at 3.2.2.

¹³³ S. 93 (4) WRA 1991.

¹³⁴ Water Protection Zone (River Dee Catchment) Designation Order 1999 (SI 1999 No. 915).

¹³⁵ Howarth, H. and McGillivray, D., *op cit.*, p. 729 ff.

¹³⁶ Water Protection Zone (River Dee Catchment) (Procedural and Other Provisions) Regulations 1999 (SI 1999 No 916), made under s. 96 (1) WRA 1991.

¹³⁷ See below at 3.4.2.7.

¹³⁸ DEFRA and Welsh Assembly Government, *Third Consultation Paper*, *op cit.*, p. 32.

¹³⁹ S. 24 WRA 1991.

¹⁴⁰ Explanatory notes to Water Act 2003. Available at http://www.legislation.hmso.gov.uk/cgi-bin/htm_hl.pl?DB=hms

exempted from the license requirement, as does abstraction for the purposes of flood defences.¹⁴¹

As regards the requirement that abstraction controls are periodically reviewed, the Environment Agency has the power to review and revoke or vary an abstraction licence at any time if necessary. However it is not under a statutory obligation to review licences on a periodical basis. A voluntary programme referred to as the Catchment Abstraction Management Strategy (CAMS) has been developed by the Environment Agency in order to secure the proper use of water resources and ensure a balance between the needs of abstractors and those of the aquatic environment. One of the programme's requirements is to review existing licences in a catchment area when a water resource is identified as being over-committed. CAMS are to be produced on a six yearly cycle for each catchment area.¹⁴²

3.4.2.5 Article 11 (3) (f) Artificial recharge of groundwater bodies

Prior authorisation for artificial recharge or augmentation of groundwater bodies is covered by the Groundwater Regulations 1998.¹⁴³ Artificial recharges may be authorised by the Environment Agency if there is no risk of polluting groundwater.¹⁴⁴

3.4.2.6 Article 11 (3) (g) Controls on point source discharges

The WFD requires prior regulation, or prior authorisation of regulation, of point source discharges liable to cause pollution.

The general regime concerning point source pollution in England and Wales has already been covered. The main administrative tool for regulating water quality is the granting of discharge consents by the Environment Agency under the Water Resources Act 1991 or the PPC regime. However there is another aspect worth considering and this is in relation to waste water originating from domestic and industrial premises which is discharged into sewers, normally to be treated at sewage treatment works by sewerage undertakers before being discharged into watercourses and coastal waters.

Sewerage undertakers are bound to accept the discharge of domestic waste water under certain conditions.¹⁴⁵ As regards discharges from trade or industrial premises, it is a matter for the sewerage undertakers to decide whether trade effluent discharges require a consent and to impose conditions.¹⁴⁶ However they are under a duty to comply with Community

[new&STEMMER=en&WORDS=water+bill+&COLOUR=Red&STYLE=s&URL=http://www.hmso.gov.uk/acts/en2003/2003en37.htm#muscat_highlighter_first_match](http://www.hmso.gov.uk/acts/en2003/2003en37.htm#muscat_highlighter_first_match), 2005-04-15.

¹⁴¹ DEFRA and Welsh Assembly Government, *Third Consultation Paper*, op cit., p. 343 f.

¹⁴² Environment Agency, *Managing Water Abstraction. The Catchment Abstraction Management Strategy process*, updated July 2002, available at <http://www.environment-agency.gov.uk/subjects/waterres/564321/309477/321271/?version=1&lang=e>, 2005-04-15.

¹⁴³ SI 1998 No. 2746.

¹⁴⁴ Regs. 3 and 6 Groundwater Regulations 1998.

¹⁴⁵ S. 106 (1) and (2) Water Industry Act 1991.

¹⁴⁶ Chapter III of Part IV of the Water Industry Act 1991. Trade effluent is defined as any liquid which is produced in the course of any trade or industry carried on at trade premises

legislation and conditions must be imposed on trade effluent consents to meet the requirements of the Urban Waste Water Treatment Directive. The sewerage undertaker can also enter into agreements with traders. Where discharges are the result of certain prescribed processes or contain certain prescribed substances, they are subject to a referral requirement. A sewerage undertaker must refer to the Environment Agency any application for approval to discharge “special category effluent”, unless it decides to refuse it outright.¹⁴⁷ Special category effluent contains substances included in the list I substances regulated under the daughter directives to the Dangerous Substances Directive.¹⁴⁸ The Environment Agency decides whether the special trade effluent can be discharged into the sewer and sets conditions, as to which there are no specified restrictions. The sewerage undertaker cannot issue a consent, or enter into an agreement before the Environment Agency has notified its decision. The provisions relating to special category effluent do not apply where the regulated substances are only present at background levels.¹⁴⁹ There is effectively no right of appeal against any direction the Agency may give, other than through the legal mechanism of judicial review.¹⁵⁰

The main obstacles to full compliance with the WFD in respect of discharge consents is the non-application of the combined approach, and for activities not falling under the PPC regime, the absence of a provision to allow the setting of stricter emission limit values if an environmental quality standard or objective requires it.

3.4.2.7 Article 11 (3) (h) Controls on diffuse sources of pollution

Diffuse pollution arising from agricultural activities and urban land use is increasingly being recognised as a serious threat to water quality and this article requires that measures are to be taken in order to prevent or control the input of pollutants. Legislative controls are difficult to implement as it is a co-operative of polluters that need to be regulated, and in order to target those actors and activities that have more of an impact on the environment than others considerable consideration is required so that the burden of duties and responsibilities is distributed fairly. At the same time monitoring duties required of the regulating authority need to be economically defensible. Codes of Good Agricultural Practice have been established by the Government and it is pertinent here to consider their legal implications.

Codes of Good Agricultural Practice

Historically, a defence to the criminal offence of causing or knowingly permitting pollution, has been allowed if the entry of the pollutant to water

(including land or premises used for agricultural purposes), not including domestic sewage (s. 141 Water Industry Act 1991).

¹⁴⁷ S. 120 Water Industry Act 1991, as amended by para. 105 Schedule 22 Environment Act 1995.

¹⁴⁸ Other substances are also included in the definition of special category effluent, as a result of international agreements on the North Sea.

¹⁴⁹ Howarth, H. and McGillivray, D., op cit., p. 670.

¹⁵⁰ Howarth, H. and McGillivray, D., op cit., p. 671. For more on judicial review see below at 4.4.

as been “attributable to an act or omission which is in accordance with good agricultural practice”.¹⁵¹ However there was a provision for exception to this rule. The defence could not be relied upon for acts or omissions in accordance with good agricultural practice within an area where the water authority judged that water had been or was likely to be polluted by those acts or omissions and a notice had been served by the Government.¹⁵² This legal mechanism was subject to a deal of criticism mainly due to the widespread failure to follow the Code, and the increasing number of pollution incidents caused by agricultural activities. There were suggestions that the Code should be given statutory force, whereby it would be an offence not to adhere to the Code, regardless of whether or not an act or omission of a farmer resulted in a water pollution incident.¹⁵³ The regime regarding codes of practice was substantially changed in 1989 and later embodied in the WRA 1991. Codes of Good Agricultural Practice may now be approved by the Government, after consultation with the Environment Agency.¹⁵⁴ The Code of Good Agricultural Practice for the Protection of Water¹⁵⁵ was approved in accordance with this procedure but a contravention of the Code is not by itself an offence. Instead the Environment Agency is to consider any contravention, or likelihood of contravention, of the Code when exercising certain powers, for example in imposing a prohibition notice.¹⁵⁶

Regulated activities

An agricultural practice that has received attention at Community level is the use of nitrates. The Protection of Water against Agricultural Nitrate Pollution (England and Wales) Regulations 1996¹⁵⁷ were adopted in order to transpose the Nitrates Directive. This Directive imposes an obligation on Member States to first identify areas (or zones) that are vulnerable to pollution from nitrate compounds and once these areas have been identified to take specified action against further contamination. Under the Regulations the Government is put under a duty to identify nitrate vulnerable zones and is responsible for the formulation, implementation and review of mandatory action programmes within these areas.¹⁵⁸

Requirements in relation to the action programmes are found in Schedule 4 of the 1996 Regulations and in Action Programmes for Nitrate Vulnerable Zones (England and Wales) Regulations 1998.¹⁵⁹ Schedule 4 of the 1996 Regulations contains detailed requirements such as time periods when certain types of fertiliser can be applied and capacity of storage vessels for

¹⁵¹ S. 31 (1) Control of Pollution Act 1974.

¹⁵² S. 32 (2) (c) Control of Pollution Act 1974.

¹⁵³ Howarth, H. and McGillivray, D., op cit., p. 750.

¹⁵⁴ S. 97 (1) and (3) WRA 1991.

¹⁵⁵ Approved by the Water (Prevention of Pollution) (Code of Practice) Order 1998 (SI 1998 No. 3084).

¹⁵⁶ S. 86 (1) WRA 1991. For further discussion on prohibition notices, see below at 4.3.2.3.

¹⁵⁷ SI 1996 No. 888.

¹⁵⁸ Regs. 3 and 6 Protection of Water against Agricultural Nitrate Pollution (England and Wales) Regulations 1996 (SI 1996 No. 888).

¹⁵⁹ SI 1998 No. 1202.

livestock manure.¹⁶⁰ Codes of practice, which are to operate on a voluntary basis are to be established as a means for protecting all waters against nitrate pollution.¹⁶¹ Aspects covering nitrate pollution are therefore incorporated in the “Code of Good Agricultural Practice for the Protection of Water (1998)”.¹⁶² In designated nitrate vulnerable zones farmers are to comply with mandatory measures which are based on the Code but in some respects are more detailed and demanding.¹⁶³ The occupier of any farm or part of a farm, which is within a nitrate vulnerable zone is required to ensure that the action programme is implemented in relation to any land comprised in the farm and within the zone. Where there is a breach of the action programmes requirements, the Environment Agency may serve a notice requiring the contravention to be remedied. A notice may contain directions to carry out works or take precautions or other steps and stipulate the time period when this shall be complied with. Appeals against such notices are made to the Government.¹⁶⁴

The Environment Agency is given the duty to monitor the quantity of nitrate in the areas waters.¹⁶⁵ A farmer is bound to permit access to Agency personnel for this purpose, and also in order to monitor the implementation of an action programme and assess its effectiveness. The farmer is required to provide all reasonable assistance and produce documents for inspection. Failure to implement an action programme requirement, failure to comply with a notice or with the access provisions can lead to criminal conviction. Also directors, managers, secretaries or other officers of a company that have committed an offence under the Regulations, together with the company, can face prosecution.¹⁶⁶

Financial incentives are also provided for under national legislation in order to alleviate the problems of nitrate contamination of water. Following the designation of an area as a nitrate vulnerable zone, improvement grants are available under the Farm Waste Grant (Nitrate Vulnerable Zones) (England and Wales) Scheme 1996.¹⁶⁷ Where agricultural businesses have invested in order to improve, for example handling, storage and disposal facilities of certain farm wastes, or for the separation of clean and dirty water grants can be obtained from the Government for up to 25 % of the expenditure incurred, up to a maximum of £85 000. Some environmental

¹⁶⁰ Schedule 4 Protection of Water against Agricultural Nitrate Pollution (England and Wales) Regulations 1996.

¹⁶¹ Articles 4 and 5 (4) Nitrates Directive.

¹⁶² MAFF; Code of Good Agricultural Practice for the Protection of Water (1998). The duties of MAFF have now been taken over by DEFRA and the Code is available at <http://www.defra.gov.uk/enviro/cogap/cogap.htm>, 2005-04-19.

¹⁶³ Reg. 3 and the Schedule Action Programmes for Nitrate Vulnerable Zones (England and Wales) Regulations 1998.

¹⁶⁴ Regs. 3, 4 and 5 Action Programmes for Nitrate Vulnerable Zones (England and Wales) Regulations 1998.

¹⁶⁵ Reg. 4 Protection of Water against Agricultural Nitrate Pollution (England and Wales) Regulations 1996.

¹⁶⁶ Regs. 6, 7 and 8 Action Programmes for Nitrate Vulnerable Zones (England and Wales) Regulations 1998.

¹⁶⁷ SI 1996 No. 908.

benefit for the nitrate sensitive zone must be shown in order to receive the grant.¹⁶⁸

Diffuse pollution in England and Wales is partially regulated and does not meet the requirements of the WFD. Polluting activities in relation to, for example, pesticide and phosphate remain to be addressed. At consultation stage, the Government proposed to create a new power that would enable action to be taken to prevent or reduce diffuse pollution. It was envisaged that the new power would enable the issuing of notice to owners of land, occupiers of land, or others undertaking activities that have the potential to contribute to diffuse pollution of actions they should take, or precautions that they should observe, for the purposes of preventing or controlling diffuse pollution sufficiently to achieve or maintain the status requirements for water bodies. Also those undertaking potentially polluting activities could be required to obtain a licence.¹⁶⁹ The majority of those who responded at consultation stage approved the proposal. However concerns were raised in relation to the adequate provision of resources for monitoring and enforcement. There was also a need for provision of an appeal mechanism. Other suggestions were broached including a power to prosecute bad practice irrespective of a proven impact, the use of management notices and of general binding rules applied to the use of particular substances.¹⁷⁰

The Government conceded that there were matters which needed to be resolved before full implementation of measures to comply with this part of the WFD could be achieved. Further consultation was therefore to be carried out.¹⁷¹

3.4.2.8 Article 11 (3) (i) Other significant adverse impacts

This article requires that measures are taken to ensure that other significant adverse impacts are controlled and that hydromorphological conditions of water are consistent with meeting the WFD's objectives.

The Environment Agency has powers to control the hydrological status of waters through the abstraction and impounding licensing regime already discussed. The Agency also issues licences for structures being erected in main rivers and works being carried out or structures altered that affect the flow of water in main rivers. Other public bodies under the Land Drainage Act 1991 control such works in smaller non-main rivers.

A major obstacle for achieving the WFD's objectives is presented by the fact that there is no offence provided of causing disturbance to the bed of an inland water, and therefore works which cause dredgings to flow downstream are uncontrollable.¹⁷² The Environment Agency, together with British Waterways and other navigation bodies, is under a duty to keep waters free to maintain navigability and if this offence was created, as the

¹⁶⁸ Howarth, H. and McGillivray, D., op cit., p. 741.

¹⁶⁹ DEFRA and Welsh Assembly Government, *Third Consultation Paper*, op cit., p. 91.

¹⁷⁰ DEFRA and Welsh Assembly Government, *Third Consultation Paper*, op cit., p. 40.

¹⁷¹ DEFRA and Welsh Assembly Government, *Third Consultation Paper*, op cit., p. 41.

¹⁷² DEFRA and Welsh Assembly Government, *Second Consultation Paper*, op cit., p. 48 f.

Environment Agency has requested, a situation would be created where the Environment Agency would have to resolve a conflict of interests between the duty to achieve the WFD's objectives and its duties to keep waterways navigable.

As regards controls on activities in transitional and coastal waters, these are embodied mainly in the Food and Protection Act 1985 and the Coast Protection Act 1949. It is mainly the responsibility of the Government to issue licences for the deposit of articles and substances including dredgings into the sea and consents for the removal (or deposit) of any object or material from or on the seashore, or the construction, alteration or improvement of any works on or under any part of the seashore.¹⁷³

Clearly the controls regarding inland waters do not meet the requirements of the WFD. Activities such as dredging, bank side quarrying, land drainage systems and construction were cited by respondents as requiring regulatory control.¹⁷⁴ The Government was to consider this further.¹⁷⁵

3.4.2.9 Article 11 (3) (j) Prohibition of direct discharges into groundwater

The direct discharge of pollutants into groundwater is prohibited under this article, but sets out a number of exceptions.

Groundwater pollution has serious consequences due to the limited capacity of such water for assimilation or dispersion of contaminants. Therefore the Environment Agency has been conducting surveys for some time identifying groundwater that is vulnerable to contamination and this is used, voluntarily, in order to give guidance in discharge consenting conditions.¹⁷⁶ The Groundwater Regulations 1998, adopted in order to transpose the Groundwater Directive,¹⁷⁷ however put the protection of groundwater on a statutory footing. Prior investigation of the potential effect of discharges is now required, and the discharge into groundwater of certain dangerous substances, identified in list I or list II of the Schedule to the Regulations, is to be prevented or reduced. Where the disposal, or tipping of the relevant substances, may result in a discharge to groundwater, directly or indirectly, an authorisation is required.¹⁷⁸ The Environment Agency is empowered to serve notices on persons engaged in activities on or in the ground which may lead to the discharge of the relevant substances, including a notice prohibiting the activity.¹⁷⁹

During consultation it was acknowledged that the new Groundwater Directive adopted under the provisions of Article 17 WFD may require

¹⁷³ DEFRA and Welsh Assembly Government, *Second Consultation Paper*, op cit., p. 49 f.

¹⁷⁴ DEFRA and Welsh Assembly Government, *Third Consultation Paper*, op cit., p. 42.

¹⁷⁵ Ibid.

¹⁷⁶ Howarth, H. and McGillivray, D., op cit., p. 751 f, and see the Environment Agency's information on Groundwater source protection zones, available at <http://www.environment-agency.gov.uk/maps/info/groundwater/?version=1&lang=e>, 2005-04-15.

¹⁷⁷ Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (OJ L 20, 26.1.1980, p. 43) as amended by Directive 91/692/EEC (OJ L 377, 31.12.1991, p. 48).

¹⁷⁸ Regs. 14 and 18 Groundwater Regulations and s. 85 WRA 1991.

¹⁷⁹ Reg. 19 Groundwater Regulations. For further discussion on notices issued under the Groundwater Regulations, see below at 4.3.2.3.

modifications to the Groundwater Regulations. It may be necessary to amend the lists of dangerous substances under the Groundwater Regulations 1998,¹⁸⁰ and the definition of “pollutant” may have to include additional substances than those included in the Regulations. In addition the Regulations provided for only one of the seven exceptions to the prohibition of discharging pollutants into groundwater allowed for by the WFD.¹⁸¹ Respondent’s views were that it was premature to transpose this part of the WFD, as before any exceptions to the prohibition of direct discharges of pollutants could be applied, the environmental objectives for each particular body of water needed to be established. The Government agreed and foreseeing other transposition requirements of the new Groundwater Directive opted to wait until the full implications were known.

The Government however did express its intention to implement this measure by amending the present Groundwater Regulations and made it clear that exclusions allowed for in the WFD would be made applicable, but that authorisations for discharge of pollutants into groundwater would be determined on a “case-by-case basis in the light of the environmental objectives and the risks posed by the particular activity”.¹⁸²

3.4.2.10 Article 11 (3) (k) Priority substances elimination

This article requires that measures to eliminate pollution of surface waters by priority substances are to be implemented. The present legislation protecting the aquatic environment from chemical pollution is the Surface Waters (Dangerous Substances) (Classification) Regulations 1989 (which transposed the Dangerous Substances Directive and its daughter directives), amended 1992,¹⁸³ and complemented 1997 and 1998.¹⁸⁴ Under the Regulations a system of classifying inland, coastal and territorial water according to the presence of concentrations of certain dangerous substances is prescribed, environmental quality standards are set for the substances regulated in the daughter directives and a responsibility is placed upon the Environment Agency to ensure that these standards are met when carrying out its obligations by way of issuing consents and authorisations.¹⁸⁵

Measures that are required in order to comply with this article are to be the subject of a separate consultation and no information as to the guise of such provisions is yet available. The timing was dependent upon the outcome of current negotiations and action the Commission chose to take.¹⁸⁶

¹⁸⁰ During the consultation stage, comments were made, to which the Government agreed, that any amendments to the lists of dangerous substances should be “scientifically justifiable on the basis of the potential risk posed to the environment” and that amendment should be preceded by consultation with stakeholders (Third Consultation Paper, p. 38).

¹⁸¹ Reg 4 (5) (b) Groundwater Regulations.

¹⁸² DEFRA and Welsh Assembly Government, *Third Consultation Paper*, op cit., p. 44.

¹⁸³ Surface Waters (Dangerous Substances) (Classification) Regulations 1992 (SI 1992 No. 337).

¹⁸⁴ Surface Waters (Dangerous Substances) (Classification) Regulations 1997 (SI 1997 No. 2560) and Surface Waters (Dangerous Substances) (Classification) Regulations 1998 (SI 1998 No. 389).

¹⁸⁵ Ss. 82 - 84 WRA 1991, previously ss. 104 - 106 Water Act 1989.

¹⁸⁶ DEFRA and Welsh Assembly Government, *Second Consultation Paper*, op cit., p. 59.

However it is already apparent that legislation is lacking important provisions in respect of adherence to the combined approach and there will, probably be a need to modify the lists of dangerous substances in order to correspond with the list contained in Annex X to the WFD.

3.4.2.11 Article 11 (3) (I) Pollution prevention at technical installations and accidental loss

Measures are to be taken to prevent significant losses of pollutants from technical installations and to prevent and /or reduce the impact of accidental pollution incidents.

The existing legislative framework for accident prevention and monitoring and reporting of pollution incidents are covered by legislation implemented to transpose the Seveso Directive and the IPPC Directive. These apply to large installations. About 80 % of pollution incidents, however, arise from smaller unregulated sites and these are addressed by guidance on good practice by the Environment Agency.¹⁸⁷

During consultation the Government pointed out that water protection zones could be designated which have the effect of prohibiting certain activities if the Government is satisfied that it is appropriate to do so.¹⁸⁸ The Control of Pollution (Oil Storage) (England) Regulations 2001¹⁸⁹ should also reduce the number of oil-related water pollution incidents from industrial, commercial and institutional premises. The Regulations set design standards for all above ground oil stores and require there to be secondary containment such as a surrounding wall or drip tray to be in place to prevent oil escaping to controlled waters.¹⁹⁰ The Environment Agency has the power to issue works notices in order to ensure improvements in water quality.¹⁹¹

The Government considered that the existing framework would meet “robustly” the provisions of the WFD under this article. Many respondents were of another opinion and the Government was to consider further with the Environment Agency if additional legal controls were necessary.¹⁹²

3.4.3 Supplementary measures

The Government’s opinion was that the supplementary measures carried no transpositional duty, as they were selective and voluntary.¹⁹³ There are a number of codes of good practice already in operation, and the use of economic instruments has also become increasingly acknowledged as an effective tool in limiting the polluting effects of certain activities. The Government is appraising various policy instruments for controlling water pollution from agriculture. Policy instruments under review are

¹⁸⁷ DEFRA and Welsh Assembly Government, *Second Consultation Paper*, op cit., p. 51.

¹⁸⁸ Water protection zones were discussed above at section 3.4.2.3.

¹⁸⁹ SI 2001 No. 2954.

¹⁹⁰ DEFRA and Welsh Assembly Government, *Second Consultation Paper*, op cit., p. 51.

¹⁹¹ For further discussion on works notices see below at 4.3.2.5.

¹⁹² DEFRA and Welsh Assembly Government, *Third Consultation Paper*, op cit., p. 45.

¹⁹³ DEFRA and Welsh Assembly Government, *Second Consultation Paper*, op cit., p. 34.

- further regulatory instruments, maybe on a uniform, national basis or more targeted for smaller areas including individual farms
- management planning which would probably require additional measures to bring about the required changes
- appointment of “Catchment officers” whose functions would include identifying problem areas and instigating measures in order to lower the levels of water pollution
- co-operation initiatives where farmers enter into voluntary agreements in order to implement solutions to pollution problems
- co-operative agreements between water undertakers who are to provide drinking water and farmers who have an impact on the water quality to promote and implement catchment sensitive farming
- grant aid for improvements to infrastructure or farming practices
- trading schemes which set up a market in environmental goods or “bads”
- environmental levies or taxes on each unit of pollution emitted, or polluting input used.¹⁹⁴

3.5 Discussion

The legal mechanisms for the establishment and setting of the environmental quality objectives required by the WFD were provided by the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003. The definitions of the objectives, and derogations, are the subject of ongoing work at both national and Community level, the outcome of which will have consequences for the status of water quality generally. However the effectiveness of a law implementing binding environmental quality objectives, however defined, is dependent upon the operationalisation of those objectives i.e. how the objectives are transformed into rules that regulate human activity.

The WFD requires that programmes of measures are established in order to meet the objectives and the legislation relating to the basic measures, required as a minimum, has been examined. No new national legislation other than the Water Framework Regulations, or amendments to existing legislation have been adopted in order to meet the requirements of the WFD. Instead measures included in legislation pre-dating the transposition of the WFD are being relied upon in order to achieve the objectives.

The present consenting system under the PPC regime allows for the setting of stricter emission limit values if a water quality objective requires it. But these emission limit values are based on BAT, and not limits set under the Dangerous Substances in Water Directive. Under the general regime, the regulator is under no duty to set stricter emission limit values where an environmental quality or standard requires it. The obligation to adhere to the combined approach is not legislated for at all. However the public bodies are obligated to apply Community law under the doctrine of

¹⁹⁴ DEFRA, *Strategic review of diffuse water pollution from agriculture. Initial appraisal of policy instruments to control water pollution from agriculture*, June 2004, available at <http://www.defra.gov.uk/environment/water/quality/diffuse/agri/index.htm>, 2005-04-20.

direct effect, although the lack of compliance with an EC directive needs to be “discovered”, in order to initiate court proceedings.

There are several areas where the Government is consulting further. The main issue probably relates to controls on diffuse pollution caused by agriculture. Codes of Good Agricultural Practice already established could form the basis for regulation, encompassing matters such as pesticide and phosphate use as necessary. But as Westerlund would see it, for the Codes to be effective mechanisms in achieving environmental quality objectives, there would need to be a mechanism which allowed the regulating authority to apply stricter rules than those included in the Codes where required. As a preliminary measure though, it would seem expedient to make it an offence not to comply with a Code of Good Agricultural Practice, rather than non-compliance to be considered by the Environment Agency when deciding whether to initiate prosecution proceedings.

Other pressing matters are the statutory mechanisms for enabling the adoption of requirements of the new Groundwater Directive presently under consideration, and any measures required by the Community Strategy adopted under Article 16. Further, Article 16 requires that Member States are to establish their own environmental quality standards and emission controls in the absence of agreement at Community level. The legal mechanisms to adopt these measures are not in place at the present.

There is no equivalent strategic planning for the management of water as there is for air quality. The Environment Agency has a very limited influence on the planning of land use by Local Authorities and these two items have serious consequences for the overall quality of water. Positive items on the water quality agenda are however the workings of the Environment Agency. The Agency has worked with water quality objectives, based on river basin districts for a number of years, and has well-established monitoring networks to support it. Programmes such as CAMS, information dissemination on environmental issues and other voluntary initiatives will have some impact on the achievement of the objectives according to the WFD. Also, it would appear that the Government is committed to improving water quality by the number of consultations it is pursuing.

The mechanisms, by which the objectives are to be reached, were required to be put in place by the transposition deadline. The Governments of England and Wales have obviously failed to do this and therefore they face possible infraction proceedings before the European Court of Justice and the imposition of fines. The Commission has indeed started the process by sending a final written warning to the United Kingdom for non-transposition of the Water Framework Directive.¹⁹⁵ The contents are unpublished.

¹⁹⁵ Press Release IP/04/870 of 8 July 2004, available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/870&format=HTML&aged=0&language=EN&guiLanguage=en>, 2005-05-07.

4 Enforcement in England and Wales

4.1 Generally

This paper so far has focused on the provision made in the national legislation of England and Wales, for the measures that are to be included in the programmes of measures, which are obligatory under the WFD. An implementation deficit was established in the previous chapter. How effective then is the law as it stands in contributing to the achievement of the environmental quality objectives of the WFD. In order for laws to be effective, adequate incentives need to be provided in order to ensure that the laws are complied with. Penalties such as the issuing of fines or custodial sentences, with the aim of deterring non-compliance of laws are the traditional methods of enforcing the law. There are other legal mechanisms such as the issuing of prohibition notices or works notices, which also aim to enforce the law. But there are other incentives such as economic instruments in the form of taxes or grants aimed at directing or alleviating the impact of polluting activities.

This paper has concentrated on measures that the Environment Agency, as the principal body for the protection of the environment, has responsibility. Therefore this section is aimed at giving the reader an understanding of the workings of the Environment Agency including its role in law enforcement and the enforcement tools it has at its disposal. In order to provide balance, the legal mechanism, judicial review, which ensures that the Environment Agency performs its duties is also considered. This section will identify the existence of any enforcement deficit inherent in the national legislation in relation to the achievement of the WFD's environmental quality objectives.

4.2 The Environment Agency

The Environment Agency was established by the Environment Act 1995, in recognition of the need for a unified regulatory authority to achieve greater integration of pollution control and also a simpler procedure for regulated bodies, its predecessor being the National Rivers Authority.

The principal aim of the Agency is to “make the contribution towards attaining the objective of achieving sustainable development”. The Government is to issue statutory guidance to the Agency with respect to this aim, marking the politically sensitive issue of what sustainable development comprises. Statutory guidance in relation to other objectives which the Government consider appropriate for the Agency to pursue in the discharge of its functions is also to be provided. The Agency is bound to have regard

to statutory guidance.¹⁹⁶ The Government is empowered to give so called “ministerial directions or guidance” to the Agency. These can be used for implementing any obligation arising out of a Community legislation or an international agreement and can be of a specific or general character with respect to the carrying out of the Agency’s functions. They are binding upon the Agency.¹⁹⁷ Therefore even though the Agency is a non-departmental body, and as such enjoys relatively broad freedom in the exercise of its responsibilities, it is essentially the Government that sets the parameters within which the Agency must work.

The Environment Agency is to exercise its powers in relation to pollution control with the express purpose of “preventing or minimising or remedying or mitigating the effects of pollution of the environment”.¹⁹⁸ For this purpose the Agency is given the responsibility of compiling information relating to pollution so that an opinion on the state of the environment can be formed, and also to provide advice to the Government when requested. There is also a duty to follow technical developments and techniques for pollution control. In exercising its functions the Agency is to have regard to the costs incurred and benefits attained by the power in question.¹⁹⁹ In relation to water-related functions, the Agency has additional general obligations such as promoting the conservation and enhancement of the natural beauty and amenity of waters and the conservation of aquatic flora and fauna,²⁰⁰ although their general nature probably means that they are of little practical importance for use for grounds for litigation.²⁰¹

4.3 Enforcement

4.3.1 Generally

The Environment Agency is allowed to do anything which is conducive to carrying out its functions, including instigating criminal proceedings.²⁰² The Agency’s *Enforcement and Prosecution Policy* sets out the general principles in relation to enforcement and prosecution issues,²⁰³ and the Agency’s *Guidance for the Enforcement and Prosecution Policy* gives guidance to the Agency’s staff in deciding the most appropriate action to be

¹⁹⁶ S. 4 Environment Act 1995. The original guidance given to the Environment Agency at its establishment in 1996, has been replaced by *The Environment Agency’s Objectives and Contribution to Sustainable Development: Statutory Guidance*, which came into force 16 December 2002, available at <http://www.defra.gov.uk/environment/ea/sustain/index.htm>, 2005-05-03.

¹⁹⁷ S. 40 Environment Act 1995.

¹⁹⁸ S. 5 Environment Act 1995.

¹⁹⁹ S. 39 Environment Act 1995.

²⁰⁰ S. 6 Environment Act 1995.

²⁰¹ Howarth, H. and McGillivray, D., op cit., p. 401.

²⁰² S. 37 (1) Environment Act 1995.

²⁰³ Environment Agency (1998), available at <http://www.environment-agency.gov.uk/business/444217/444661/?version=1&lang=e>, 2005-04-22.

taken in response to environmental offences.²⁰⁴ The Agency, although preferring to protect the environment through the provision of good advice and information to regulated industries, recognises that enforcement powers and prosecution are necessary in order to ensure regulatory compliance.²⁰⁵ The Environment Agency has a range of enforcement mechanisms at its disposal, which will be discussed in further detail below before returning to matters relating to prosecution.

4.3.2 Administrative legal instruments

4.3.2.1 General powers of entry

An invaluable power, although subject to certain restrictions, that the Environment Agency has in order to carry out its functions is that in relation to gaining access to properties and information gathering in order to, for example, determine whether regulations and consent conditions are being complied with, or to make assessments or reports, after notification by the Government, in relation to a pollution incident or a potential pollution incident.²⁰⁶ Powers which staff of the Environment Agency are able to exercise, after authorisation, include entering premises, if need be by force, making examinations or investigations, taking photographs and samples, taking possession of and detaining any article or substance found on the premises which appears to have caused pollution, carrying out experimental borings and installing, keeping, maintaining equipment for monitoring purposes. Normally, unless there is an emergency and in any case where it is proposed to enter residential premises or take heavy equipment on to premises, permission is required by the occupier of the premises, otherwise a warrant must be obtained.²⁰⁷ At least seven days' notice of the proposed entry is required to be given to the person who appears to be in occupation of the premises in question. None of the powers may compel a person to produce a document which he or she would be able to withhold on an order for discovery in an action in the High Court, for reasons of legal professional privilege (trade secrets).²⁰⁸ The obstruction of an authorised person carrying out his or her duties under the various powers of entry can lead to criminal prosecution and the imposition of a fine or a custodial sentence.²⁰⁹

²⁰⁴ Environment Agency, version 8 (17 December 2004), available at <http://www.environment-agency.gov.uk/business/444217/444661/?version=1&lang=e>, 2005-04-22.

²⁰⁵ Environment Agency, *Enforcement and Prosecution Policy*, 1998, para. 6, available at <http://www.environment-agency.gov.uk/business/444217/444661/?version=1&lang=e>, 2005-04-22.

²⁰⁶ See generally s. 108 Environment Act 1995.

²⁰⁷ S. 108 (6) Environment Act 1995. A warrant is a written order by an official of a court giving authorisation to an enforcing authority to exercise its powers of entry in relation to a specific premises, if need be by force (Schedule 18 Environment Act 1995).

²⁰⁸ S. 108 (13) Environment Act 1995.

²⁰⁹ S. 110 Environment Act 1995.

4.3.2.2 Consents without applications

Where discharges are occurring, and no authorisation or consent has been applied for, the Environment Agency has the power to impose conditions on the discharge by serving a written instrument giving its consent.²¹⁰ A consent can be imposed when it appears to the Agency that a person has caused or permitted effluent or other matter to be discharged, in contravention of the obligation not to discharge such matter into controlled water or into the sea, and a similar contravention is likely. A consent can also be imposed when a prohibition notice is contravened and it is likely to occur again. The consent does not provide a defence to any discharges which occurred before the consent was given,²¹¹ and therefore prosecution proceedings can be instigated in respect of those earlier discharges.²¹² Any contraventions of the imposed consent can lead to prosecution proceedings under a separate water pollution offence.²¹³

The requirements in relation to publicity and consultation procedures for consents without applications are similar to the provisions provided for under the normal application procedure.²¹⁴

4.3.2.3 Prohibition notices

The Environment Agency has been given powers to deal with continuing activities which may give rise to a water quality problem. Under the general regime, prohibition notices issued by the Environment Agency contain provisions which prohibit the making or continuing of a discharge, or the making or continuing of a discharge unless specified conditions are observed.²¹⁵ Prohibition notices are issued in relation to discharges not comprising trade or sewage effluent into controlled waters,²¹⁶ and discharges of trade or sewage effluent onto or into land or into lakes or ponds which are not inland freshwaters.²¹⁷ A prohibition notice shall not normally be given effect before the end of a three month period starting from the day on which it was given, or as may be specified in the notice. If a discharge consent is applied for in respect of the prohibited discharge, the prohibition notice shall remain in place until the consent application has been finally determined, including during the time for the determination of any appeal.²¹⁸ A discharge in contravention of a prohibition notice is an offence.²¹⁹

²¹⁰ Para. 6 (1) Schedule 10 WRA 1991, inserted by para. 183 Schedule 22 Environment Act 1995 which refers to ss. 85 (3) and 86 WRA 1991.

²¹¹ Para. 6 (2) Schedule 10 WRA 1991, inserted by para. 183 Schedule 22 Environment Act 1995.

²¹² Ss. 85 (3) and 85 (6) WRA 1991.

²¹³ Ss. 86 (1) and 85 (6) WRA 1991.

²¹⁴ See above at 3.2.2.

²¹⁵ S. 86 (1) WRA 1991. See also suspension notices under the PPC regime below at 4.3.2.6.

²¹⁶ S. 85 (2) WRA 1991.

²¹⁷ S. 85 (4) WRA 1991. "Inland freshwaters are the waters of any relevant lake or pond or of so much of any relevant river or watercourse as is above the freshwater limit (s. 104 (1) (c) WRA 1991).

²¹⁸ Ss. 86 (4) - (6) WRA 1991.

²¹⁹ Ss. 86 (1) and 85 (6) WRA 1991.

A breach of a notice issued under the Groundwater Regulations 1998 prohibiting an activity on land that may lead to the indirect discharge of the relevant polluting substances into groundwater is treated as an offence.²²⁰ Appeal is to the Government within 21 days of the notification of the notice.²²¹ The Government can quash, confirm or modify the notice.

Even persons carrying out otherwise lawful activities may be served prohibition notices, for example in relation to highway drains.²²² Where the Agency has served a prohibition notice and a discharge is made or continued in contravention of that prohibition notice and it is likely to occur again, the Agency can then impose a discharge consent on the discharge on the discharge.²²³ The consequence being that a contravention of the conditions of a discharge consent is an offence and thereby opens the way up to instigate criminal proceedings.²²⁴

4.3.2.4 Enforcement notices

Under the general regime the Agency has a power to serve an enforcement notice on a consent holder in order to avert potential breaches of consent or consent conditions.²²⁵ They can be issued where the holder is currently contravening a consent condition or is likely to do so, and, when issued, must state the action that must be taken. Appeals are made to the Government who can quash, modify or confirm the enforcement notice.²²⁶ Failure to comply with an enforcement notice can lead to prosecution.²²⁷

Under the PPC regime, the Environment Agency has a power to serve an enforcement notice where it is of the opinion that an operator has contravened or is likely to contravene any permit conditions.²²⁸ It must state that the regulator is of that opinion, the matters constituting the contravention or the likely contravention and it must specify the steps that are required to be taken. The steps that must be taken may include not only steps to make the operation of an installation comply with the conditions of a permit, but also steps that must be taken to remedy the effects of any pollution caused by the contravention.²²⁹ An enforcement notice may be withdrawn at any time. Appeals are to the Government whereby the notice can be quashed, confirmed or modified.²³⁰ An appeal does not have the effect of suspending the enforcement notice.²³¹ It is an offence to fail to comply with the requirements of an enforcement notice.²³²

²²⁰ Reg. 14 (1) Groundwater Regulations 1998.

²²¹ Reg. 20 Groundwater Regulations 1998.

²²² Where an authority or a person is entitled to keep open a drain (s. 100 Highways Act 1980), they will not be guilty of an offence under s. 85 WRA 1991 by causing or permitting any discharge to be made from the drain unless the discharge is made in contravention of a prohibition imposed under s. 86 of that Act (s. 89 (5) WRA 1991).

²²³ For discussion on discharge consents without applications see above at 4.3.2.2.

²²⁴ S. 85 (6) WRA 1991.

²²⁵ S. 90B WRA 1991, inserted by para. 142 Environment Act 1995.

²²⁶ Ss. 91 (1) (g) and (h) WRA 1991, amended by para. 143 Environment Act 1995.

²²⁷ S. 90B (3) WRA 1991, inserted by para. 142 Environment Act 1995.

²²⁸ Reg. 24 PPC Regulations 2000.

²²⁹ Reg. 24 (3) PPC Regulations 2000.

²³⁰ Reg. 27 (6) PPC Regulations 2000.

²³¹ Reg. 27 (8) PPC Regulations 2000.

²³² Reg. 32 (1) (d) PPC Regulations 2000.

Where the Agency is of the opinion that criminal proceedings would not provide an effective remedy against a person who has failed to observe the requirements of an enforcement notice, proceedings in the High Court may be instigated for the purpose of securing compliance with the notice.²³³

Information relating to the issuing of enforcement notices is not readily available but two such notices have been published on the Environment Agency's website, both issued under the PPC regime. One related to a failure to comply with a permit to operate a paper mill and required the company to take action to ensure that its waste water treatment equipment was maintained in good condition and that technical processes were overseen by competent staff.²³⁴ The other concerned the breaching of nickel discharge conditions to the sewer system. Although it was not proved that the company was responsible for damage to a sewage treatment works, which had prompted the investigation, examination of the company records revealed that permit discharge levels had been exceeded and that a number of other permit conditions had been contravened. The enforcement notice required employee involvement in understanding the permit conditions, and that written procedures were to be introduced to cover sampling and monitoring.²³⁵

4.3.2.5 Works notices

Works notices serve a primarily remedial purpose and can be used in any situation where polluting matter may enter or is present in controlled water. Under the general regime, where it appears to the Agency that any poisonous, noxious or polluting matter or any solid waste matter is likely to enter, or to be or to have been present in any controlled water, the Agency can issue a "works notice" against the appropriate person who should undertake works in relation to the situation.²³⁶ A works notice requires the person on whom it is served to carry out works specified in the notice, such as works or operations to prevent the polluting matter from entering the waters, or to remove or dispose of the matter when it has already entered the waters and to restore the waters to the state immediately before the matter became present in the waters as far as is practicable.²³⁷ The time period within which the specified works or operations are to be carried out are to be stated in the works notice.²³⁸ There are no restrictions on the service of a works notice where a permit has been granted, but the Agency is not entitled to require works or operations which would impede or prevent the making

²³³ S. 90B (4) WRA 1991, inserted by para. 142 Environment Act 1995 and reg. 33 PPC Regulations 2000. On injunctions see below at 4.3.2.10.

²³⁴ Environment Agency, *Enforcement notice issued to Maidenhead paper mill*, doc. reference 48/05, published 3 March 2005. Available at <http://www.environment-agency.gov.uk/news/998380?lang=e®ion=&projectstatus=&theme=&subject=&searchfor=&topic=&area=&month=>, 2005-05-06.

²³⁵ Environment Agency, *Enforcement notice issued to Hampshire plating company*, doc. reference 80/05, published 7 April 2005. Available at <http://www.environment-agency.gov.uk/news/1020963?lang=e®ion=&projectstatus=&theme=&subject=&searchfor=&topic=&area=&month=>, 2005-05-06.

²³⁶ S. 161A WRA 1991, inserted by para. 162 Schedule 22 Environment Act 1995. See also suspension notices under the PPC regime below at 4.3.2.6.

²³⁷ S.161A (2) WRA 1991, inserted by para. 162 Schedule 22 Environment Act 1995.

²³⁸ S.161A (3) WRA 1991, inserted by para. 162 Schedule 22 Environment Act 1995.

of any discharge in pursuant of a discharge consent.²³⁹ The Agency's powers to vary or revoke the consent, or enforce the conditions of the consent are to be used instead.

Further requirements are set out in the Anti-Pollution Works Regulations 1999,²⁴⁰ including the contents of works notices and the procedure to be followed in relation to appeals against such notices. Appeals against works notices are made to the Government who can quash a notice or confirm it with or without modification.²⁴¹ Criminal proceedings may follow a breach of a works notice,²⁴² but where the Agency is of the opinion that criminal proceedings would not provide an effective remedy against a person who has failed to observe the requirements of a works notice, proceedings in the High Court may be instigated for the purpose of securing compliance with the notice.²⁴³

Appeals against a works notice are to the Government, within 21 days, who can quash, confirm or modify it.²⁴⁴

4.3.2.6 Suspension notices

Under the PPC regime a hybrid form of prohibition notices and works notices has been introduced. Where it is the opinion of the Environment Agency, the operation of an installation involves "an imminent risk of serious pollution" the Agency is placed under a duty to act by serving a suspension notice. A suspension notice shall state what the imminent risk of serious pollution comprises, what steps are to be taken to avoid it and the period of time in which they must be taken, that the authorisation permit ceases to have effect or, if it continues to authorise the carrying out of certain activities, state what steps, in addition to those required by the authorisation, that are to be taken in carrying out those activities.²⁴⁵ The suspension notice can be withdrawn at any time, and shall be withdrawn when the regulator is satisfied that the steps required to remove the imminent risk have been taken. It is uncertain if this power can be used in relation to less significant pollution incidents over a longer period of time.²⁴⁶

Appeals are made to the Government, within two months of the date of the notice.²⁴⁷ The notice can be quashed, confirmed or modified.²⁴⁸ An appeal does not have the effect of suspending the suspension notice.²⁴⁹ It is an offence to fail to comply with the requirements of a suspension notice.²⁵⁰ Where the Agency is of the opinion that criminal proceedings would not

²³⁹ S.161A (7) WRA 1991, inserted by para. 162 Schedule 22 Environment Act 1995.

²⁴⁰ SI 1999 No. 1006.

²⁴¹ S.161C WRA 1991, inserted by para. 162 Schedule 22 Environment Act 1995.

²⁴² S.161D WRA 1991, inserted by para. 162 Schedule 22 Environment Act 1995.

²⁴³ S. 161D (4) WRA 1991, inserted by para. 162 Schedule 22 Environment Act 1995. On injunctions see below at 4.3.2.10.

²⁴⁴ S. 161C WRA 1991, inserted by para. 162 Schedule 22 Environment Act 1995.

²⁴⁵ Reg. 25 PPC Regulations 2000.

²⁴⁶ Farthing, J., Marshall, B. and Kellett P., p.141.

²⁴⁷ Reg. 27 PPC Regulations 2000.

²⁴⁸ Reg. 27 (6) PPC Regulations 2000.

²⁴⁹ Reg. 27 (8) PPC Regulations 2000.

²⁵⁰ Reg. 32 (1) (d) PPC Regulations 2000.

provide an effective remedy against a person who has failed to observe the requirements of a works notice, proceedings in the High Court may be instigated for the purpose of securing compliance with the notice.²⁵¹

4.3.2.7 Anti-pollution works (self help)

Where the Agency considers that it is a matter of urgency that action is taken to prevent or mitigate a pollution incident, or after reasonable inquiry no person can be found on whom to serve a works notice, the Agency is entitled to carry out the works or operations specified in a works notice. Any expenses reasonably incurred by the Agency are recoverable from the person who caused or knowingly permitted the matter in question to be present in the controlled waters, or caused or knowingly permitted the matter to be at the place from which it was likely, in the opinion of the Agency, to enter the controlled waters.²⁵² Cost recovery is not dependent upon the criminal prosecution of any pollution offence. The terms works and operations are not statutorily defined but are judged to encompass a wide range of activities. Under the PPC regime, the Environment Agency has powers to remove risks that pose an imminent risk for pollution, instead of serving a suspension notice.²⁵³ This power can also be used where the commission of an offence for operating an installation without a permit, in breach of a permit, or failing to comply with an enforcement or suspension notice has caused pollution which requires remediation. Costs incurred by the Agency may be recovered. However, seven days notice must be given to the operator before the steps are taken and it is uncertain if a conviction for the offence is required before this power can be exercised.²⁵⁴

The use of anti-pollution works and the power to recover costs is used frequently by the Environment Agency. During 1999, there were a total of 2,041 recoveries of clean-up costs, totalling an amount of £1,132,469, with a range of demands from £19 up to £137,716.²⁵⁵ However only one case has come before the courts for consideration. In *Bruton and the National Rivers Authority v Clarke*,²⁵⁶ anti-pollution works were carried out in order to restore a watercourse to its former state, after a bank supporting a slurry lagoon had collapsed allowing effluent to escape. The National Rivers Authority (predecessor to the Environment Agency) claimed for costs in respect of a fish survey, scientific and technical costs and costs for restocking the fish. The court awarded only those costs which were shown to be conclusively necessary, reducing the amount claimed from £81,000 to £38,000.

²⁵¹ Reg. 33 PPC Regulations 2000. On injunctions see below at 4.3.2.10.

²⁵² S.161 WRA 1991, amended by para. 161 Schedule 22 Environment Act 1995.

²⁵³ Reg. 26 PPC Regulations 2000.

²⁵⁴ Farthing, J., Marshall, B. and Kellett P., *op cit.*, p. 143.

²⁵⁵ Environment Agency, *Water Pollution Incidents in England and Wales 1999*, p. 38, available at http://www.environment-agency.gov.uk/yourenv/eff/pollution/296030/298038/?version=1&lang=_e, 2005-04-23.

²⁵⁶ An unreported case from 1993, Cambridge County Court, 23 July 1993, cited by Howarth, H. and McGillivray, D., *op cit.*, p. 722.

4.3.2.8 General binding rules

Provision is made under the PPC regime for the Government to make “general binding rules” to set permit conditions.²⁵⁷ When made, a GBR must be published and brought to the attention of all affected operators and a copy is to be served on all regulators. A “general binding rules condition” would be inserted in a permit together with other site specific conditions, as required. The GBR condition would be treated as one condition, which could only be replaced in whole for other site specific conditions. Appeals can only be made about the inclusion of a GBR condition as a whole, and not for any individual requirement of the GBR. For the purposes of ensuring compliance with a permit, each requirement of a GBR is to be treated as an individual permit condition, including for the purposes of serving enforcement notices and prosecution for breach of permit conditions. Where a GBR exists, it is at the discretion of the operator if he or she requests the application of a GBR, and it is at the discretion of a regulator if he or she accepts the operator’s request.

No GBRs have been made, as yet.

4.3.2.9 Name and shame

Finally, the naming and shaming initiative instigated by the Environment Agency in 1999 must be mentioned. A league table of the worst offenders convicted of environmental pollution offences was compiled and published by the Environment Agency. This strategy was brought about by the Environment Agency’s opinion that fines handed out by the courts were excessively low, and that environment convictions did not receive sufficient media coverage to act as a deterrent. Therefore, to name and shame would impact on the commercial reputation of offenders and act as a deterrent.²⁵⁸ However, this strategy was not universally acclaimed with the main criticism directed at the unfair and inconsistent approach taken in compiling the lists. The lists were subsequently removed from the Agency’s website, despite recognition of the fact that shaming and naming can have the desired effect of encouraging companies to lessen their impact on the environment.²⁵⁹ The Environment Agency now adopts a softer approach. In its yearly publication, *Spotlight on business*,²⁶⁰ articles are included on not only environmental offence convictions but also on companies who have good track records regarding environmental issues. Successful prosecution cases are also published in the Agency’s website.

4.3.2.10 Injunctions

As has already been mentioned, where the Agency is of the opinion that criminal proceedings would not provide an effective remedy against a

²⁵⁷ Reg. 14 PPC Regulations 2000. Generally see Farthing, J., Marshall, B. and Kellett P., 2003, p. 112 ff.

²⁵⁸ Howarth, H. and McGillivray, D., op cit., p. 427 ff.

²⁵⁹ Committee on the Environment, Transport and the Regions, HC Session 1999-2000, 34 I-II, paras. 88-94, available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmenvtra/34/3402.htm>, 2005-04-27.

²⁶⁰ Spotlight 2004 will be published in July 2005 (<http://www.environment-agency.gov.uk/business/444255/833726/?version=1&lang=e>, 2005-05-03).

person who has failed to observe the requirements of an enforcement notice or a works notice under the general regime,²⁶¹ or the requirements of an enforcement notice or a suspension notice under the PPC regime,²⁶² proceedings in the High Court may be instigated for the purpose of securing compliance with the notice. This would secure an injunction requiring the operator to comply, failing which he could be in contempt of court and be liable to fines and/or imprisonment. In order for the courts to grant injunctions, the regulator must show that all powers available have been exhausted and that criminal proceedings are insufficient to prevent a water pollution offence. If this cannot be shown the general principle of the balance of convenience is applied, whereby economic and social issues are balanced against the environmental aspect of preventing water pollution.²⁶³

4.3.3 Criminal justice proceedings

Where a criminal offence has been committed, in addition to the enforcement actions discussed above, the Environment Agency will consider prosecution proceedings, administering a caution or issuing a warning. A caution is the written acceptance of an offender that he or she has committed an offence and may only be used where a prosecution may properly have been brought. If prosecution proceedings are subsequently brought, the caution will be brought to the attention of the court. A warning is a written notification that, in the Agency's opinion, an offence has been committed. This may also be referred to in subsequent proceedings before a court.²⁶⁴

The aims of prosecution are to punish wrongdoing, to avoid a recurrence and to act as a deterrent to others.²⁶⁵ A number of factors are taken into account before a decision to prosecute is taken. There must be sufficiency of evidence which points to a realistic prospect of conviction.²⁶⁶ Also the effect of the offence on the environment and the attitude of the offender is considered and the deterrent effect of prosecution on others is also taken into consideration.²⁶⁷ Where companies are involved it is normal to prosecute the company, but officers of the company, for example the Managing Director or the Company Secretary, may face criminal liability if it can be shown that the offence was committed with their consent, was due to their neglect or they turned a "blind eye" to the offence.²⁶⁸

²⁶¹ S. 90B (4) WRA 1991, inserted by para. 142 Environment Act 1995 and s. 161D (4) WRA 1991, inserted by para. 162 Schedule 22 Environment Act 1995.

²⁶² Reg. 33 PPC Regulations 2000.

²⁶³ See *Tameside Metropolitan Borough Council v Smith Bros (Hyde) Ltd* [1996] Env LR D4 (QBD) where an injunction was refused. The case is commented upon by Farthing, J., Marshall, B. and Kellett P., op cit., p. 161.

²⁶⁴ Environment Agency, *Enforcement and Prosecution policy*, 1998, paras. 8, and 29 – 32, available at <http://www.environment-agency.gov.uk/business/444217/444661/112913/?version=1&lang=e>, 2005-05-03.

²⁶⁵ Environment Agency, *Enforcement and Prosecution policy*, 1998, op cit., para. 19.

²⁶⁶ Environment Agency, *Enforcement and Prosecution policy*, 1998, op cit., para. 21.

²⁶⁷ Environment Agency, *Enforcement and Prosecution policy*, 1998, op cit., para. 22.

²⁶⁸ Environment Agency, *Enforcement and Prosecution policy*, 1998, op cit., para. 24.

Criminal proceedings are instigated in a Magistrate's Court, or in cases where serious environmental damage has been caused, a request can be made to the magistrates for referral to the Crown Court. Offences committed under the Water Resources Act can result in a penalty of up to three months imprisonment and/or £20,000 fine when tried in a Magistrates Court,²⁶⁹ and up to two years imprisonment and/or an unlimited fine in the Crown Court.²⁷⁰ Under the PPC Regulations 2000, the corresponding penalties are six months imprisonment and/or a £20,000 fine in a Magistrates Court and up to five years imprisonment and/or an unlimited fine in a Crown Court.²⁷¹ An environmental crime offence is the subject of strict liability negating the need for a regulatory authority to prove intention or even negligence. Even acts of vandalism do not provide a defence to an environmental crime, as they can be foreseen and therefore avoidable.²⁷² In 2003, out of a total of 24,587 pollution incidents, only 266 companies were prosecuted, of whom 61 received fines over £10,000.²⁷³ The Environment Agency perceived the overall level of fines as disappointingly low, and reiterated the need for fines that reflect the seriousness of the crime and act as a strong deterrent.²⁷⁴

Under the PPC Regulations 2000, the court is empowered to, in addition to imposing any punishment, or instead of imposing the punishment, order the cause of the offence to be remedied.²⁷⁵ A person convicted of an offence can be given an order to take such steps as may be required to remedy any matters that it appears to the court are within his or her powers of remedying. Failure to comply with the order could amount to contempt of court and ultimately lead to imprisonment. This power, it appears must be exhausted before an injunction can be sought.²⁷⁶ In order to be applied, it requires on the one hand detailed information to be provided by the Environment Agency to the court, and on the other hand a thorough understanding of the problem that has arisen and the steps that need to be taken by the offender in order to remedy the pollution incident.

The number of prosecution proceedings can be compared with the number of times a licence or permit has been revoked or suspended. It appears to be that revocation is used only when the Agency is satisfied that the operator is unable to carry on in compliance with permit conditions, and suspension notices are issued only when there is an imminent risk of serious pollution. Information is not readily available but there is evidence that these powers are used with great reluctance by the Environment Agency, and is maybe considered only after criminal justice proceedings have had no

²⁶⁹ S. 85 (6) (a) WRA 1991.

²⁷⁰ S. 85 (6) (b) WRA 1991.

²⁷¹ Reg. 32 (2) PPC Regulations 2000.

²⁷² Howarth, H. and McGillivray, D., *op cit.*, p. 527 ff.

²⁷³ Pollution incidents – an overview, <http://www.environment-agency.gov.uk/yourenv/eff/pollution/296030/296054/?version=1&lang=e>, 2005-05-06.

²⁷⁴ Environment Agency, *Spotlight on business – environmental performance in 2003*, available at <http://www.environment-agency.gov.uk/business/444255/833726/?version=1&lang=e>, 2005-05-03.

²⁷⁵ Reg. 35 PPC Regulations 2000.

²⁷⁶ See *Tameside Metropolitan Borough Council v Smith Bros (Hyde) Ltd* [1996] Env LR D4 (QBD) commented upon by Farthing, J., Marshall, B. and Kellett P., *op cit.*, p. 161 (injunctions under Reg. 33 PPC Regulations 2000) and p. 162 (powers under Reg. 35 PPC Regulations 2000).

effect. The loss of an environmental permit has great economic implications for an operator, and therefore a potentially powerful deterrent mechanism. However, although less formal than prosecution proceedings, it seems that revocation or suspension powers are used with extreme caution.²⁷⁷

The issue of the establishment of separate environmental courts has been debated for a number of years. A report published in 2000 supported their establishment, and proffered arguments such as the lack of integration of environmental and land use decision making, an unsympathetic (and unqualified) judiciary, weak enforcement mechanisms and the lack of public engagement, due partly, to limited access to the courts.²⁷⁸ However, a debate in the House of Lords in October 2000, resolved that the need for environmental courts had not been established.²⁷⁹

4.3.4 The case for administrative fines

A tool found in many civil law legal systems, the administrative fine has found its way into the common law legal system of certain countries, and is the subject of debate.²⁸⁰ The advantage with the administrative fine is that it avoids all the procedures of criminal proceedings without inflicting the potentially financially devastating penalty of revoking or suspending a consent. It can also serve as an effective deterrent.

However there are concerns about the protection of the innocent and wrongful conviction. These are counteracted by arguments pointing out the cost of unchecked harm to the environment that the administrative fine may prevent. It is argued that by avoiding the complexities of the criminal justice system, the Environment Agency could redirect its resources to more economically effective tasks such as checking and controlling offenders, instead of gathering evidence that reaches the requisite of “beyond all doubt”. This would have a ripple effect in deterring others from committing an environmental offence, and justifies more potential wrongful convictions.

4.4 Judicial Review

There are two streams of law in which there are mechanisms that can be used to check water pollution. One is private law which covers relationships between two parties and the other is public law which covers the administrative and regulative activities taken in the interests of society. This paper has been concerned with the regulatory powers that the Environment Agency has in order to achieve the WFD’s objectives. But there is no provision made to allow for the public to appeal against the consenting of a

²⁷⁷ Ogus, A. and Abbott, C., *Sanctions for pollution: Do we have the right regime?* Journal of Environmental Law, Vol. 14 No. 3, p. 288.

²⁷⁸ Department of Environment, Transport and Regions, *Environmental Court Project: Final Report*, 2000, available at http://www.odpm.gov.uk/stellent/groups/odpm_planning/documents/page/odpm_plan_606_036.hcsp, 2005-05-04.

²⁷⁹ Hughes, D. and others, *Environmental Law*, 4th edition, Butterworths LexisNexis, 2002, p.51.

²⁸⁰ Generally see article by Ogus, A. and Abbott, C., *op cit.*, p. 283 – 298.

discharge consent, or to challenge a decision of the Agency not to act in a certain situation. The courts have developed a common law mechanism which gives them jurisdiction to ensure that public bodies act within the legal authority given to them and to provide a remedy where they do not. Therefore in the following, this regulatory mechanism, Judicial Review, that is available to challenge the activity or inactivity of public bodies, will be examined.

The basic doctrine applied by the courts is where a public body acts outside its powers (*ultra vires*). Other grounds of review are unreasonableness and procedural impropriety. Briefly unreasonableness refers to the situation where a decision is “so unreasonable that no reasonable authority could ever have come to it”.²⁸¹ Procedural impropriety is committed when the statutory procedural rules have not been complied with, and even embodies principles such as the right to a fair hearing or the right to know the opposing case.²⁸² It can be noted that the requirements of EC law and human rights legislation have also made inroads into how the courts approach the right to judicial review,²⁸³ and will presumably be of central importance in the implementation of the requirements of the Aarhus Convention whereby members of the public concerned “shall have access to a review procedure before a court of law”.²⁸⁴

Remedies available include quashing of the original decision, in which case the matter may go back to the Environment Agency for reconsideration (quashing orders, previously known as *certiorari*), preventing the carrying out of an illegal action (prohibiting, previously known as prohibition) and commanding that the Agency performs a public duty (mandatory, previously known as *mandamus*).²⁸⁵ Application is made to the High Court of Justice, which is a civil law court.

To obtain access to the courts, an applicant must show that he or she has “sufficient interest” in the matter.²⁸⁶ In determining this, the courts consider: a) the merits of the application, b) the nature of the applicant’s interest and c) the circumstances of the case.²⁸⁷ To some extent this involves pre-judging cases on their merits prior to a proper hearing taking place.

In recent years standing has been interpreted on a rather liberal basis. Standing has been granted to individuals who have had no greater interest than the general public interest or the concerned citizen.²⁸⁸ Further, standing is often extended to public interest groups, recognising them as “guardians of the environment”. However the requisites required or how much the

²⁸¹ Leyland, P., Woods, T. and Harden, J., *op cit.*, p. 171.

²⁸² Leyland, P., Woods, T. and Harden, J., *op cit.*, p. 183 ff.

²⁸³ Environmental Law Foundation, World Wide Fund for Nature and Leigh, Day and & Co Solicitors, *A Report by the Environmental Justice project*, 2004, para. 40, available at <http://www.defra.gov.uk/environment/justice/index.htm>, 2005-04-25.

²⁸⁴ Article 9 (2) Aarhus Convention.

²⁸⁵ Leyland, P., Woods, T. and Harden, J., *op cit.*, p. 308 ff and the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004 (SI 2004 No. 1033) amending the terms.

²⁸⁶ Hughes, D. and others, *op cit.* p. 167.

²⁸⁷ Environmental Law Foundation, World Wide Fund for Nature and Leigh, Day and & Co Solicitors, *A Report by the Environmental Justice project*, 2004, para. 45, available at <http://www.defra.gov.uk/environment/justice/index.htm>, 2005-04-25.

²⁸⁸ *R v Somerset District Council, ex p Dixon* ([1998] Env LR III).

existence of members in the affected area is taken into consideration, for allowing such “third party” or “surrogate” applicants is uncertain.²⁸⁹

4.5 Discussion

The Environment Agency operates under a mandate providing it with a great deal of discretion in the way it carries out its duties. This bodes well for the state of the environment. The possible use of works notices, the carrying out of anti-pollution works and general powers of entry provide potential effective contributions to achieving compliance with environmental laws. The fact that environmental offences carry with them strict liability, and that both companies and their directors can be prosecuted for the same offence also have the potential for providing for a sound protection of the environment.

Enforcement tools must act as a powerful enough deterrent in order to be effective. Figures on how often works notices or enforcement notices are issued are not easily found, but there is evidence to suggest that their use is not common. The Environment Agency, it seems, avails itself of its powers to carry out anti pollution works more often but it must, practically, take account of how certain it can be that its costs will be recovered. But maybe the most serious obstacles to the enforcement of an effective environmental law are the Agency’s reticence of not prosecuting and its resistance to revoking or suspending licences. Prosecution proceedings will not be initiated until the matter has passed the “sufficiency test” and fulfils the other requirements of, for example having had a serious enough effect on the environment and the deterrent effects of conviction. The revoking or suspending of permits, it seems is regarded as a harsher penalty than those penalties handed out by the courts, on conviction of an environmental crime. It is a paradox that the more formal and costly procedure is preferred over the more flexible approach. The use of administrative fines could go some way to rectifying this anomaly, but before any adoption of these can be anticipated, the common law perception of an innocent defendant’s right to protection against wrongful conviction in the interests of the environment must be overcome. Neither does it appear that the establishment of environmental courts will win inroads into the opinions of the legislators.

The recourse to judicial proceedings, to ensure that the Environment Agency carries out its functions and duties, provides for some remedy. Here the generous interpretation of standing which allows interest organisations access to the courts is of importance. However the achievement of environmental quality standards requires careful monitoring and it will probably be difficult for the concerned citizen to identify when these have been contravened in order to question the activities of the Environment Agency. The effect of a successful judicial review action, as far as it relates to quashing orders, is to refer the case back to the Agency for reconsideration, and therefore may not even have any effect on the original decision.

²⁸⁹ R v HM Inspectorate of Pollution, ex p Greenpeace (no 2) ([1994] 4 All ER 329, QBD).

The enforcement tools provided for in the legislation of England and Wales are potentially effective. However, their application and maybe the non-provision of administrative fines, lead to the conclusion that there is an enforcement deficit, which will have consequences for the achievement of the environmental quality objectives required by the WFD.

5 Conclusion

Europe's waters have benefited during the 30 years of EC-legislation. Serious problems remain however, especially with regard to pollution from diffuse sources. The Water Framework Directive attempts to address water pollution from a holistic approach with the needs of the water as the reference point.

The Government is well aware of the significance of EC legislation, due to several times judicial proceedings have been taken against the UK in respect of non-compliance with Directives and in relation to procedural implementation of Directives. The requirements of EC directives are now viewed as being of direct and pressing practical concern and therefore the present state of national legislation after the transposition of the Water Framework Directive is somewhat perplexing.

In chapter 3 it was established that an implementation deficit of the WFD exists. The main issue is probably the lack of regulatory controls regarding diffuse pollution, particularly from agriculture, although there are several matters in which the Government is consulting further. No regulatory provisions have been made as yet, for example, in relation to the new Groundwater Directive or for the additional requirements adopted under article 16 WFD (dangerous substances). Environmental quality objectives require innovative, flexible mechanisms in order to be achieved (compare Westerlund's navigation rules), therefore the dominant use of legislation pre-dating the transposition of the WFD is questionable. No duty has been provided as regards adherence to the combined approach in setting discharge consents, and the general regime does not provide for the setting of stricter emission limit values if a quality objective or standard requires it, in accordance with the WFD. This latter point is provided for under the PPC regime but, with very few statutory controls in place for diffuse pollution, the question as to the distribution of burdens is raised. Will the burden of reducing pollution mainly be put on point source polluting activities in order to achieve water quality objectives? The Environment Agency is obliged to apply Community legislation under the doctrine of direct effect. This is not possible as regards imposing conditions on agricultural practices and as to the non-compliance of an environmental quality objective, this requires the action of a concerned citizen, or interest group to bring the breach to the attention of the courts.

And finally, regarding the implementation deficit, to be effective water resource planning requires a strategic and coordinated approach so it is therefore of concern that no strategic planning duties are provided for (as there are for air quality). The Environment Agency has been given some coordinating powers under the PPC regime (Local Authorities are under an obligation to apply emission limit values or conditions set by the Agency, in permits for which they are the regulators), but otherwise it has little influence over land use decisions made by Local Authorities.

Chapter 4 dealt with the enforcement mechanisms provided for in the legislation of England and Wales, in order to establish any enforcement

deficit, which unfortunately proved to be the case. Unlike other areas of policy such as agriculture or transport, the environment has no “vested interest defender”, with financial backing, to ensure compliance with the law. The well being of the environment therefore depends on public bodies, environmentally inclined individuals or environmental organisations. We have concluded that it is difficult for individuals to ensure compliance with an environmental law due to lack of knowledge and the financial means, and environmental organisations are often structurally and economically too weak to defend environmental interests effectively. Effective enforcement is therefore necessarily dependent upon a public body.

Figures on the use of administrative enforcement tools by the Environment Agency are not readily available. However evidence suggests that they are used rarely, mainly when there are imminent risks of serious pollution. It appears that the Environment Agency more commonly avails itself of its powers to carry out anti-pollution works and this is a valuable tool in the Agency’s armoury, but its use is not without problems. Any costs incurred by the Agency in carrying out the works must be shown to be necessary in order for the courts to grant full recovery. The administrative fine would be a powerful addition to the Agency’s toolkit, when considering the low number of prosecutions brought. But the question still remains how often these would be applied. In reality their provision is probably not on the horizon.

In many ways the Environment Agency is an effective and powerful body, considering its independent status and the relative freedom in which it operates. The question must therefore be asked as to why there is so little use of administrative enforcement tools and so few prosecutions of environmental pollution offences compared with the number of confirmed pollution incidents. Is it due to the Environment Agency’s adherence to its traditional informal pollution regulating approach whereby agreement and consensus is preferred over formal regulatory procedures? Or is it due to resource efficiency in that the Environment Agency will only take action if it is economically expedient for it to do so?

Whatever the answer, the WFD puts an obligation on the Member States to achieve the environmental quality objectives. The law as it stands, with both an implementation deficit and an enforcement deficit, is not effective. The Environment Agency needs to be empowered with more far-ranging powers, and not hampered by policies set by the executive who are prone to setting economic and social issues above the interests of the environment. The European Commission has an important and demanding task ahead of it in ensuring not only that the WFD is complied with in legal terms, but also in practice.

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